

JUN 6 1989

OSWER Directive # 9835.9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM

SUBJECT: Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property

FROM: Edward E. Reich /s/
Acting Assistant Administrator for Enforcement and Compliance Monitoring
Jonathan Z. Cannon /s/
Acting Assistant Administrator for Solid Waste and Emergency Response

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Waste Management Division Directors, Regions I-X

The attached guidance sets forth EPA's policy on issues of landowner liability, and settlement with de minimis landowners under CERCLA. In addition, there is a brief discussion and policy statement concerning settlement with prospective purchasers of contaminated property. The guidance analyzes the language in CERCLA Sections 107(b)(3) and 101(35) which provide landowners certain defenses to CERCLA liability, and CERCLA Section 122(g)(1)(B) which provides the Agency's authority for settlements with de minimis landowners. The discussion concerning prospective purchasers of contaminated property is premised on the Agency's inherent settlement authority, and recognizes that any settlement with a prospective purchaser would be outside the scope of CERCLA Section 122.

Attached to the landowner guidance are two model agreements for settlements under CERCLA Section 122: a model administrative order on consent, and a model consent decree. The model agreements contain suggested provisions for cash consideration. If the specific settlement under Section 122 does not include cash consideration, those provisions should not be used. It is worth noting here that pursuant to Agency delegation 14-14-E and the Adams/Porter memorandum of June 17, 1988, waiving certain Headquarters' settlement concurrence authority, the first landowner de minimis administrative order or consent decree negotiated by each Region (as well as the first de minimis generator agreement) must receive the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring or his designee ("AA-OECM") and the Assistant Administrator for Solid Waste and Emergency Response or his designee ("AA-OSWER"). After the Region has concluded one de minimis settlement with a landowner, other such settlements may be entered into by the Regions on behalf of the Agency upon prior consultation with the AA-OECM and the AA-OSWER or their designees. In addition, this guidance confirms that any settlement involving a covenant not to sue a prospective purchaser requires the concurrence of the AA-OECM, the AA-OSWER, and the Assistant Attorney General. For further information or follow-up questions, please ask your staff to contact Helen Keplinger of OECM-Waste at (FTS) 382-3104.

Attachments

cc: Gerald H. Yamada
Donald A. Carr

----- ATTACHMENT -----

I N D E X

Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property

I.	PURPOSE	1
II	OVERVIEW	2
III.	BACKGROUND/LANDOWNER LIABILITY	3
	A. Before SARA	3
	B. SARA	5
	C. SARA's De Minimis Settlement Provisions	6
IV.	STATEMENT OF SETTLEMENT POLICY	9
	A. Threshold Questions for Landowner Eligibility	9
	1. Did the landowner acquire the property without actual or constructive knowledge of the disposal of hazardous substances?	10
	2. Did the governmental landowner acquire the property involuntarily or through eminent domain proceedings?	13
	3. Did the landowner acquire the property by inheritance or bequest without knowledge?	14
	4. Was the property contaminated by third parties outside the chain of title?	15
	B. Guidelines for De Minimis Settlements with Landowners	16
	1. Goals of settlement	16
	2. Information gathering to aid settlement	17
	3. Settlement	19
	a. Consideration	20
	b. Reopeners	22
	c. Type of agreement	23
	C. Policy on Prospective Purchasers	25
	1. Criteria for entering into covenants not to sue with prospective purchasers of contaminated property	28
	a. Enforcement action is anticipated by the Agency at the facility	28
	b. A substantial benefit, not otherwise available, will be received by the Agency for cleanup	28
	c. The Agency believes that continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the remedy	29
	d. Due consideration has been given to the effect of continued operations or new development on health risks to those persons likely to be present at the site	30
	e. The prospective purchaser is financially viable	31
	2. Content and form of settlement	31
	a. Consideration	31
	b. Reservation of rights	33
	c. Scope of response actions	34
	d. Compliance with application laws and duty to exercise due care	34

e. Disclaimer	34
3. Procedures	35
V. PURPOSE AND OF THIS GUIDANCE	35

Attachments

Attachments I: Model CERCLA Section 122(g)(4) Administrative Order on Consent for Settlement with Landowners Under Section 122(g)(1)(B)

Attachment II: Model CERCLA Section 122(g)(4) Judicial Consent Decree for Settlements with Landowners Under Section 122(g)(1)(B)

Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective

Purchasers of Contaminated Property

I. PURPOSE

The purpose of this memorandum is to provide general guidance on landowner liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), 42. U.S.C. Section 9601 et seq., and to provide specific guidance on which landowners qualify for de minimis settlements under Section 122(g)(1)(B) and on structuring such settlements. (See footnote 1 below) Because the nature of a de minimis settlement with a landowner will differ substantially from a de minimis settlement with waste contributors, it will usually be more efficient to draft such agreements separately. In addition, because the Agency has received numerous requests from prospective purchasers of contaminated property for covenants not to sue, this memorandum sets forth Agency policy on this issue.

===== Foot Note =====

1 Agency guidance regarding de minimis settlements with waste contributors has been provided by separate memorandum entitled "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA," 52 Fed. Reg. 24333 (June 30, 1987), and by publication of the Agency's "Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administration Order on Consent," 52 Fed. Reg. 43393 (November 12, 1987).

=====

II. OVERVIEW

In the event of a release or threatened release of a hazardous substance, owners of property where such substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located" are strictly liable for the costs of response. (See footnote 2 below) Under Section 107(b)(3), such liability generally extends to releases which are caused by a third party "in connection with a contractual relationship, existing directly or indirectly" with the owner. To address concerns that this strict liability could cause inequitable results with respect to landowners who had not been involved in hazardous substance disposal activities, Congress in SARA clarified the defense to liability available to certain landowners under Section 107(b)(3) by specifically defining the term "contractual relationship." Section 101(35)(A) defines "contractual relationship" to include deeds and other instruments transferring title or possession unless the landowner can demonstrate that at the time he acquired the property, he had no knowledge or reason to know of the disposal of the hazardous

substance at the facility.

=====
Foot Note
=====

- 2 See Sections 101(9), 101(32), and 107(a)(1) of CERCLA. Liability under CERCLA is also joint and several unless the harm is divisible and there is a reasonable basis for apportioning the harm. See, e.g., *United States v. MONSANTO Co.*, 858 F.2d 160, 171-73 (4th Cir. 1989), *United States v. Bliss*, No. 84-2086C-(1) (E.D. Mo. Sept. 27, 1988), *United States v. Mottolo*, Civ. No. 83-547-D (D. N.H. Aug. 29, 1988), *United States v. Tysons*, Civ. No. 84-2663 (E. D. Pa. Jan. 29, 1988), *United States v. Northernair*, 670 F. Supp 742, 748 (W.D. Mich. 1987), *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S. D. Ohio 1983).

=====
Foot Note
=====

Accordingly, a person who acquires already contaminated property and who can satisfy the remaining requirements of Section 101(35) as well as those of Section 107(b)(3) may be able to establish a defense to liability. Although this is an affirmative defense, for which the defendant bears the burden of proof, Congress has provided a settlement mechanism which the Agency may use in its discretion for settlement purposes to resolve the liability of certain landowners prior to or in the early stages of litigation through the application of the de minimis settlement provisions of Section 122(g)(1)(B) of CERCLA.

III. BACKGROUND/LANDOWNER LIABILITY

A. Before SARA

Section 107(a)(1) of CERCLA imposes liability for response costs on owners or operators of "facilities" from which there is a release or threatened release of a hazardous substance. A "facility" is defined under Section 101(9) as including, among other things, any building, structure, equipment, pit, pond, storage container, motor vehicle, etc., and any "area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Courts have consistently held that the standard of liability imposed by Section 107 is strict. See e.g., *Tanglewood East Homeowners v. Charles Thomas, Inc.*, 849 F. 2d 1568 (5th Cir. 1988), *New York v. Shore Realty Corporation*, 759 F.2d 1032, 1042 (2d Cir. 1985), *United States v. Hooker Chemicals and Plastics Corporation.*, 680 F. Supp 546 (W.D.N.Y. 1988). The government need not prove that the owner contributed to the release in any manner in order to establish a prima facie case. However, Section 107(b) provides the following four affirmative defenses which may be asserted by a person, including a landowner: (1) an act of God; (2) an act of war; (3) an act or omission of a third party; and (4) any combination of the foregoing. (See footnote 3 below) In order to prove the third party defense set forth in Section 107(b)(3), the landowner must establish by a preponderance of the evidence that:

- (1) the release or threat of release and . . . damages resulting therefrom were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . ;
- (2) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and
- (3) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably

result from such acts or omissions.

===== Foot Note =====

3 See United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987)(holding that these statutory defenses are exclusive). See also, United States v. Monsanto CO., 858 F. 2d 160, (4th Cir. 1988), United States v. Bliss, NO. 84-2086C-(1) (E.D. Mo. Sept. 27, 1988), United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546 (W.D. N.Y. 1988), United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987), United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986). Section 107(b)(3).

=====

Before SARA, the Agency took the position that a real estate deed represented a contractual relationship within the meaning of Section 107(b)(3), thus eliminating the availability of the third party defense for a landowner in the chain of title with a party who had caused or contributed to the release. However, this issue was not addressed by a court before SARA's enactment. (See footnote 4 below)

B. SARA

Section 101(35)(A) of CERCLA, as amended by SARA, confirms the Agency's position that a real estate deed represents a contractual relationship and specifically defines "contractual relationship" to include "land contracts, deeds, or other instruments transferring title or possession," (for example, leases) unless the property was acquired after the disposal or placement of the hazardous substance which is the subject of the release or threat of release and the landowner establishes by a preponderance of the evidence that:

- (i) At the time defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility;
- (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or
- (iii) The defendant acquired the facility by inheritance or bequest.

In addition to the foregoing, the landowner must satisfy the due care requirements of Section 107(b)(3) in order to establish the third party defense. Furthermore, Section 101(35)(D) provides that:

Nothing in this paragraph shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance.

===== Foot Note =====

4 The government's argument on this issue was upheld in United States v. Hooker Chemicals & Plastics Corp., 680 F. Supp. 546 (W.D. N.Y. 1988)(decided after passage of SARA, applying pre-SARA law).

=====

C. SARA's De Minimis Settlement Provisions

Under Section 122(g)(1) of CERCLA, as amended by SARA, when the Agency determines that a settlement is "practicable and in the public interest," it "shall as promptly as possible reach a final settlement" if the settlement "involves only a minor portion of the response costs at the facility concerned" and the Agency determines that the potentially responsible party satisfies either of two sets of conditions: (A) the party's contribution of waste to the site is

minimal (by amount and toxicity) in comparison to other hazardous substances at the facility; or (B) the party (i) is an "owner of the real property on or in which the facility is located;" (See footnote 5 below) (ii) "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility;" (See footnote 6 below) and (iii) "did not contribute to the release or threat of release . . . through any act or omission." Subparagraph B does not apply if the party purchased the property "with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance." Section 122(g)(1)(B). (See footnote 7 below)

===== Foot Note =====

- 5 Relinquishment of ownership or possession does not necessarily disqualify a person from consideration under the Section 122(g)(1)(B) de minimis settlement provision. This approach is consistent with the fact that prior owners of facilities are not precluded from attempting to establish a defense to liability under Section 107(b). In order to qualify for a de minimis settlement, however, the past owner must demonstrate satisfaction of Section 122(g)(1)(B) criteria through the full term of his ownership.
- 6 The Agency interprets the phrase "any hazardous substance" to mean a hazardous substance which is the subject of the release or threat of release. Interpreting "any hazardous substance" more broadly would make the de minimis landowner settlement provisions unavailable to essentially every party. It is clear that Section 122(g) is concerned with a de minimis party's connection to the activities giving rise to the release that is the subject of the response action. Under Section 122(g)(1)(A), the generator or transporter is not a de minimis party if it cannot establish that its contribution was minimal. Similarly, under Section 122(g)(1)(B), if the landowner engaged in activities, specified in the statute as "conduct[ing] or permit[ing] the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility," involving the substance which is the subject of the response action, it will not be entitled to de minimis status.
- 7 For the reasons explained above, the Agency interprets the phrase "any hazardous substance" in the context of actual or constructive knowledge to mean a hazardous substance which is the subject of the release or threat of release.

=====

The requirements must be satisfied in order for the Agency to consider a settlement with landowners under the de minimis settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3) and Section 101(35). (See footnote 8 below) Section 122(g)(B) of CERCLA authorizes the Agency to enter into settlements with de minimis landowners, enabling such landowners to avoid the transaction costs of attempting to establish the 107(b)(3) defense through litigation and enabling the Agency to exercise enforcement discretion in appropriate circumstances. However, inasmuch as Section 122(g)(1)(B) comes into play in the settlement context, as distinct from Section 107(b)(3) coming into play in the litigation context, the quality and quantum of evidence provided by a landowner in support of his eligibility for a de minimis settlement may differ from that necessary for him to establish the third party

defense at trial. Furthermore, inasmuch as the Agency's determination as to whether the landowner has satisfied the criteria for a de minimis settlement must be made in advance of trial, the terms of the settlement, particularly the question of whether cash consideration will be required, will depend in part on the extent of the litigation risks involved in the particular case. The principles which will guide the Agency in evaluating this evidence are discussed below in Section IV, Paragraph B.3., "Settlement."

===== Foot Note =====

8 Even though the language in Sections 122(g)(1)(B) and 101(35) is not identical, the scope of the two provisions is substantially the same. For example, the requirements for a de minimis settlement under Section 122(g)(1)(B) are that the landowner "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility" and "did not contribute to the release." Substantially similar requirements are imposed by Section 101(35). That Section conditions the defense in part on the landowner acquiring the facility "after the disposal or placement of the hazardous substance . . ." and not contributing to the release. Since generation, transportation, storage and treatment of substances at the site generally all take place before disposal and placement (or at the most concurrently, in the case of "placement" and "storage"), the landowner generally would not have conducted or permitted the generation, transportation, storage, treatment, disposal of the hazardous substances which are the subject of the release or threat of release if he had acquired the facility after disposal or placement of those substances, as required by Section 101(35). This is not to suggest, however, that for purposes of establishing liability under CERCLA, "disposal" will not continue to include ongoing "leaking". In this manner, the scope of Section 122(g)(1)(B) and 101(35) is generally the same. Throughout this guidance, liability will be discussed in the context of Section 107 of CERCLA, but reference will be made to Section 122(g)(1)(B) of CERCLA in the context of settlement.

=====

IV. STATEMENT OF SETTLEMENT POLICY

The Agency will make an effort in the early stages of a case to determine whether a landowner satisfies the elements necessary to establish a third party defense under Section 107(b)(3) of CERCLA. Such determination may be made from information available to and under development by the Agency to identify all potentially responsible parties for that site. Since it serves no purpose to require a landowner who satisfies the elements of Section 107(b)(3) and who wishes to obtain legal repose to incur the litigation costs of establishing the defense at trial, if the Agency determines that the landowner has a persuasive case that each of these elements has been met, the Agency will entertain an offer for a de minimis settlement under 122(g)(1)(B) of CERCLA.

A. Threshold Questions for Landowner Eligibility for Settlement

Before the Agency will approve settlements with owners of contaminated property several questions concerning landowner eligibility for settlements must be answered, bearing in mind that Section 122(g)(1)(B) does not extend to any party who contributed to the release or threat of release "through any act or omission."

1. Did the Landowner acquire the property without knowledge or reason to know of the disposal of hazardous substances?

Section 122(g)(1)(B) applies only to owners who purchased the property without "actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance." Similarly, Section 101(35) extends the third party defense to defendants who acquired the property after the disposal or placement of the hazardous substance only if, at the time of acquisition, the defendant "did not know and had no reason to know that any hazardous substance which is the subject of the release . . . was disposed of . . . at the facility." (See footnote 9 below) Section 101(35) expressly provides that in order for a defendant to prove that he had "no reason to know" of the disposal of hazardous substances, he must demonstrate by a preponderance of the evidence that, prior to acquisition, he conducted all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice. A landowner who demonstrates that he has conducted "all appropriate inquiry" will not be deemed to have constructive knowledge under Section 122(g)(1)(B) and, therefore, may be eligible for a de minimis settlement. (See footnote 10 below)

===== Foot Note =====

- 9 The Agency will construe as similar the constructive knowledge requirements of Section 122 and 101(35), taking into consideration all relevant information available on the issue of knowledge.
- 10 The government has taken the position that "owner" for the purposes of liability includes "lessee." A lessee of a facility, who is potentially liable as an "owner," may be eligible for a de minimis settlement under Section 122(g)(1)(B), if he conducted "all appropriate inquiry" prior to taking possession of the property and meets all of the other criteria of Section 122(g)(1)(B). This is also consistent with the approach taken in Section 101(35). See Section 101(35)(A) ("The term 'contractual relationship' for the purpose of Section 107(b)(3) includes, but is not limited to land contracts, deeds or other instruments"); See also *United States v. S.C.R.D.I.*, 653 F. Supp. 984, 1003 (D. S.C. 1984) (aff'd sub nom *United States v. Monsanto Co.*, 858 F.2d 160 (4th cir. 1988) (court held lessee an owner); *United States v. Northernair*, 670 F. Supp 742, 748 (W.D. Mich. 1987).

=====

Under Section 101(35)(B), the following factors must be considered when determining whether "all appropriate inquiry" has been made:
any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

These factors clearly indicate that a determination as to what constitutes "all appropriate inquiry" under all the circumstances is to be made on a case-by-case basis. Generally, when determining whether a landowner has conducted "all appropriate inquiry," the Agency will require a more comprehensive inquiry, for those involved in commercial transactions than for those involved in residential transactions for personal use. (See footnote 11 below) For example, an investigation along the lines of a survey for contamination may be recommended in some commercial transactions, whereas this type of inquiry would not typically be recommended for the purchaser of personal residential property. (See footnote 12 below) In sum, the determination will be

made on the basis of what is reasonable under all of the circumstances.

===== Foot Note =====

- 11 The Conference Committee noted that a reasonable inquiry must have been made "in light of best business and land transfer principles", and that "[t]hose engaged in commercial transactions should . . . be held to a higher standard than those who are engaged in private residential transactions." Conference Report on SARA, H.R. 2005., 99th Con., 2d Sess., p. 187. The Committee also noted that the duty to inquire will be judged as of the time of acquisition, and that as public awareness of environmental hazards increases, the burden of inquiry will increase concomitantly. *Id.* In a recent decision, the U.S. District Court for the Middle District of Pennsylvania held that the United States was not entitled to summary judgement against a group of landowners without an evidentiary showing that, as of 1969, it was customary or good commercial practice among real estate developers to conduct a visual inspection of property prior to purchase. *United States v. Serafini*, 28 Env. Rep. Cas. 1162 (M.D. Pa. Feb. 19, 1988). Although we do not agree with the decision because the criteria set forth in Section 101(35)(B) seem, at a minimum, to contemplate a visual inspection, the court in *Serafini* appears to have recognized the evolutionary nature of the "all appropriate inquiry" standard.
- 12 In the course of conducting "all appropriate inquiry" as required by Section 101(35)(B), information regarding a release or threat of release may become available. If so, the "person in charge of the facility" is required to comply with the notification requirements under Section 103.

=====

Lenders may also be eligible for de minimis settlements in some circumstances. A lender who does not participate in the management of a facility and who only holds "indicia of ownership primarily to protect his security interest" is excepted from the definition of "owner or operator" and, therefore, is not liable. Section 101(20)(A)(ii).

If, however, a lender becomes an owner by foreclosing and taking title to the property or by conducting management activities at the site, he is potentially liable. (See footnote 13 below) Under these circumstances, the lender may be eligible for a de minimis settlement, if he meets the requirements of Section 122, including that he demonstrates that he conducted "all appropriate inquiry" prior to acquisition of the facility.

2. Did Governmental landowners acquire the property involuntarily or through eminent domain proceedings?

Section 101(35)(A)(iii) excepts from the definition of "contractual relationship" acquisitions by governmental entities which occur by condemnation or purchase (See footnote 14 below) in connection with the exercise or eminent domain authority, or involuntarily through escheat or any other such involuntary transfer or acquisition. State and local government who acquire property involuntarily are by definition not owners or operators under Section 101(20)(D), as long as they have caused or contributed to the release. (See footnote 15 below) However, Section 101(35)(A)(ii) is broader than 101(20)(D) in that 101(35)(A)(ii) extends the defense under Section 107(b)(3) to the federal government, as well as to State and local governments, and also applies to eminent domain proceedings. (See footnote 16 below) Governmental entities which fall within this category and exercise due care will escape liability and, therefore, a settlement under Section 122(g)(1)(B) will not normally be necessary. (See footnote 17 below)

===== Foot Note =====

- 13 See United States v. Maryland Bank & Trust Co., 632 F. 573, (D. Md. 1986); United States v. Mirabile, 15 Env'tl. L. Rep. 20992 (E.D. Pa. September 4, 1985).
- 14 The Agency interprets "purchase" in Section 122(g)(1)(B) to include involuntary acquisitions, applied to parties acquiring by inheritance, consistent with the purposes and underlying policy of Sections 101(20) and 101(35)(A).
- 15 Section 101(20)(D) provides in part: "The term owner or operator does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."
- 16 The legislative history contains useful guidance on how federal agencies should handle acquisitions of contaminated property. See also, CERCLA Section 120(h).
- 17 If governmental entities within this category seek a Section 122 settlement for purposes of obtaining legal repose, the Agency may use Section 122(g)(1)(B).

=====

3. Did the Landowner acquire the property by inheritance or bequest without knowledge?

Section 101(35)(A)(iii) excepts acquisitions by inheritance or bequest from the definition of "contractual relationship." However, the Conference Committee report suggests that the "all appropriate inquiry" requirement is nonetheless relevant:

[T]hose who acquire property through inheritance or bequest without actual knowledge may rely on this section if they engage in a reasonable inquiry, but they need not be held to the same standard as those who acquire property as part of a commercial or private transaction, and those who acquire property by inheritance without knowing of the inheritance shall not be liable, if they satisfy the remaining requirements of Section 107(b)(3).

Conference Committee Report, pp. 187-188.

It is recommended that inquiry by the heir at the time of acquisition and thereafter be considered, not only for the purpose of determining the existence of a contractual relationship, but also for the purpose of determining whether the due care requirements of the third party defense have been satisfied. (See footnote 18 below)

4. Was the property contaminated by third parties outside the chain of title?

Even before the enactment of SARA, it was clear that the third party defense of Section 107(b)(3) was available to a landowner whose property was contaminated as the result of the act or omission of a third party who had no contractual relationship with the landowner through a deed or otherwise, as long as the landowner satisfied the other requirements of the third party defense. Examples of this situation include contamination of property by adjacent landowners and "midnight dumping". A landowner who falls within this category and demonstrates that he has exercised due care may be eligible for a de minimis settlement under Section 122(g)(1)(B).

With respect to landowners described above, the Section 107(b)(3) defense is not available to a landowner who learns of a release or threat of release after acquiring the property and then transfers the property without disclosing this information. Section 101(35)(c). Any

such transfer may contribute to the threat of release under Section 122(g)(1)(B)(iii) precluding a de minimis settlement.

===== Foot Note =====

18 The government may, in appropriate circumstances, enter into a settlement with heirs to contaminated property pursuant to the de minimis provision in Section 122(g)(1)(B). Footnote 14, infra, provides clarification of Agency's interpretation of the exclusion from eligibility for a de minimis landowner settlement pursuant to Section 122(g)(1)(B)(iii) of parties who "purchased" contaminated property "with knowledge."

=====

B. Guidelines for De Minimis Settlements with Landowners

1. Goals of settlement

The general goal of a de minimis settlement is to allow parties who meet the criteria set forth in Section 122(g)(1)(A) or (B) to resolve their potential liability as quickly as possible, thus minimizing litigation costs and allowing the government to focus its resources on negotiations or litigation with the major parties. However, there is a fundamental difference between contributors of hazardous substances who are eligible for settlements under Subparagraph A of Section 122(g)(1) and landowners who are eligible for settlements under Subparagraph B. The waste contributor under Subparagraph A will typically have no viable defense to liability, whereas a landowner who qualifies for settlement under Subparagraph B may ultimately be able to prove a third party defense. Nevertheless, the landowner who may have a third party defense may wish to enter into a de minimis settlement in order to obtain legal repose and avail himself of the contribution protection provided in Sections 113(f)(2) and 122(g)(5) of CERCLA. As discussed below, the government will entertain offers for such settlements in exchange for, at a minimum, access and due care assurances.

2. Information-gathering to aid settlement

Section 122(g)(3) of CERCLA provides that de minimis settlements shall be concluded as soon as possible after the necessary information is available. SARA contemplates that a de minimis settlement will be reached in the early stages of a case. The Agency has substantial information-gathering authority under Sections 104(e) and 122(e) of CERCLA which may be used to aid in the determination of whether a landowner is eligible for a de minimis settlement. Generally, however, the information bearing on a landowner's status as a de minimis party is most readily available to the landowner, unlike the information regarding the waste contributor's status as a de minimis party, which is most readily available to the government through its compilation of information regarding the waste contributions to a site by all parties. Therefore, the Agency will place on the landowner the burden of coming forward with information establishing his eligibility for a de minimis settlement. The Agency may then use its information gathering authority to supplement the information produced by the landowner, as appropriate, and to check its veracity.

Information which should be provided by the landowner includes all evidence relevant to the actual or constructive knowledge of the landowner at the time of acquisition including all affirmative steps taken by the landowner to determine the previous ownership and uses of the property, information regarding the condition of the property at the time of purchase, all document and evidence of representations made at the time of sale regarding prior uses of the property, the purchase price of the property and the fair market value of comparable property at the time of acquisition, and information regarding any specialized

knowledge on the part of the landowner which may be relevant.

Additionally, the landowner should provide all information relevant to the issues of whether he exercised due care and whether he contributed to the release or threat of release through any act or omission. This information should include the circumstances under which the hazardous substances were discovered, the extent of the landowner's knowledge regarding the substances, all measures taken by the landowner to abate the threats of harm to human health and the environment posed by such substances, and all measures taken by the landowner to prevent foreseeable acts of third parties which may have contributed to the release. The information is to be included in the order or decree, and any settlement agreement is to be made contingent on its accuracy.

3. Settlement

Where the potentially responsible party meets the criteria for settlement under Section 122(g)(1)(B), and in the context of litigation or potential litigation, when the Agency is evaluating its settlement options and its litigation risks, the terms of an acceptable settlement may vary with the strength of the evidence relating to the landowner's de minimis status. In some instances, a landowner may be able to make a thoroughly convincing demonstration that each of the elements of the third party defense has been satisfied. In such cases, settlements requiring only that the landowner provide access and due care assurances will be appropriate. Although such cases will rarely be free of all doubt, the government should be persuaded that there is a very high possibility that the landowner would prevail in establishing a third party defense at trial.

If a landowner does not make the thorough and convincing demonstration described above, but is nevertheless able to persuade the Agency that it is likely that he would prevail in establishing the third party defense at trial, he may be considered for a de minimis settlement for cash consideration, as well as access and due care assurance. A landowner who cannot make this showing is not eligible for a de minimis settlement, but may be eligible for a Section 122 settlement using the same criteria as any other potentially responsible party CERCLA, the generally applicable guidelines of the Interim CERCLA Settlement policy, 50 Fed. Reg. 5034 (February 5, 1985), and the interim guidance on Covenants Not To Sue Under SARA, 52. Reg. 28038 (July 27, 1987). In any event, the United States ultimately must be able to show that any de minimis landowner settlement entered into meets the criteria of Section 122(g)(1)(B) in order to withstand judicial review.

a. consideration

All landowners who enter into de minimis settlements should be required to provide access to the property and cooperation in the Agency's response activities. In specific cases, it may be appropriate to obtain cash payments for the response activities at the site. Site access and cooperation should also extend to the Agency's response action contractors and to any other parties performing response activities under the Agency's oversight pursuant to court order, administrative order, or consent agreement under Section 106 or 122 of CERCLA. The Agency should also require the landowner to provide assurances that he will continue to exercise due care with respect to the hazardous substances at the site. (See footnote 19 below) The Agency shall also require that purchaser file in the local land records a notice acceptable to EPA, stating that hazardous substances were disposed of on the site and that EPA makes no representation as to the appropriate use of the property. (See footnote 20 below) Settlements under CERCLA generally also require that the settlor agree not to assert

any claims or causes of action against the United States or the Hazardous Substance Superfund arising from work performed or expenses incurred pursuant to the agreement, or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the facility. These requirements are in addition to any cash component of the de minimis settlement, as discussed above.

===== Foot Note =====

19 The Conference committee made the following statement regarding 107(b)(3)'s due care requirement:

[T]he due care requirement embodied in section 107(b)(3) only requires such person to exercise that degree of care which is reasonable under the circumstances. The requirement would include those steps necessary to protect the public from a health or environmental threat.

Conference Report on SARA, H.R. 1005, 99th Cong., 2d Sess., P. 187

20 Where the ROD requires that institutional controls be imposed on the property, a much more extensive notice may be required.

=====

In exchange for this consideration, the landowner will receive statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA. Subject to the reopeners discussed below, the landowner may also receive a covenant not to sue civil claims seeking injunctive relief under Section 106 of CERCLA and Section 7003 or RCRA (See footnote 21 below) or cost recovery under Section 1107(a) of CERCLA with regard to the facility when the Agency determines that such a covenant is in the public interest. (See footnote 22 below) However, natural resource damage claims may not be released and should be expressly reserved unless the Federal natural resource trustee has agreed in writing to such a covenant not to sue pursuant to the terms of Section 122(j)(2) of CERCLA. (See footnote 23 below)

===== Foot Note =====

21 Section 7003 of RCRA may provide an additional basis for compelling cleanup or obtaining cost recovery in appropriate circumstances where a party "has contributed or is contributing to {the past or present} handling, storage, treatment, transportation, or disposal" of any solid or hazardous waste. Where the release or threatened release involves wastes which are not hazardous substances under CERCLA, Section 7003 of RCRA can be an important supplemental enforcement mechanism for obtaining cost recovery or injunctive relief.

22 Any covenant provided should be drafted to apply only to the individual landowner and should not run with the recovery at issue.

23 In accordance with Section 122(j)(i) of CERCLA, where the release or threatened release of any hazardous substance at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal natural resource trustee of the negotiations and encourage the trustee to participate in the negotiations.

=====

b. Reopeners

In order to protect the agency against the possibility that the information supplied by the landowner regarding his eligibility for a de minimis settlement is inaccurate or incomplete, the settlement agreement generally should include a certification by the landowner that he has fully and accurately disclosed all information in his possession regarding those qualifications. The settlement agreement should also include a reservation of rights which would allow the government to seek

further relief from the landowner, including the filing and enforcement of a federal lien, (See footnote 24 below) if information not known to the government at the time of settlement is discovered which indicates that the landowner does not meet the requirements for a de minimis settlement. The settlement agreement should expressly reserve the Agency's right to seek further relief from the landowner, where appropriate, including but not limited to: for claims arising from the introduction of any hazardous substance, pollutant, or contaminants at the facility by any person after the effective date of the settlement agreement; for failure of the landowner to exercise due care with respect to any contamination at the facility; for exacerbation by the landowner of the existing release or threat of release of hazardous substances; or for failure to cooperate and/or for interference with the Agency, its response action contractors, or other parties or their contractors conducting response activities under Agency oversight in the implementation of response actions at the facility. In addition, other reopeners may need to be incorporated on a case basis.

===== Foot Note =====

24 Guidance on federal liens has been provided by separate memorandum entitled "Guidance on Federal Superfund Liens," (issued by AA-OECM, September 22, 1987).

=====

c. Type of Agreement

Section 122(g)(4) of CERCLA requires that de minimis settlements be entered either through judicial consent decrees or administrative orders on consent. (See footnote 25 below) Generally, a de minimis settlement with a landowner should be concluded by separate agreement, rather than as part of a larger agreement with other potentially responsible parties. Pursuant to Agency delegation 14-14-E (September 13, 1987), and waivers of settlement concurrence in "Revision of CERCLA Civil Judicial Settlement Authorities under Delegation 14-13-B and 14-14-E" (Adams/Porter June 17, 1988), the first landowner de minimis consent decree negotiated by each Region must be referred to Headquarters and must receive the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring or his designee (AA-OECM) and the Assistant Administrator for Solid Waste and Emergency Response or his designee ("AA-OSWER") prior to referral to the Department of Justice for filing. After the Region has concluded one de minimis consent decree with a landowner, other consent decrees may then be referred directly to the Department of Justice with consultation by the AA-OECM and the AA-OSWER. All de minimis consent decrees will be subject to a thirty-day comment period after lodging.

===== Foot Note =====

25 Model language is provided in Attachment I, "Model CERCLA Section 122(g)(4) Administrative Order on Consent for Settlements with Landowners under Section 122(g)(1)(B)" and Attachment II, "Model CERCLA Section 122(g)(4) Consent Decree for Settlements with Landowners under Section 122(g)(1)(B)."

=====

If the de minimis settlement is entered through an administrative order on consent, it must receive the concurrence of the AA-OECM and the AA-OSWER prior to signature by the Regional Administrator if it is the first administrative settlement with a de minimis landowner. Additionally, if the total past and projected response costs for the site, excluding interest, exceed \$500,000, Section 122(g)(4) requires that the de minimis administrative order on consent receive the prior written approval of the Attorney General or his designee. Section

122(g)(4) of CERCLA gives the Attorney General thirty days from referral by EPA to approve or disapprove the settlement. If he does not act within this time period, the settlement will be deemed to have been approved unless he has reached agreement with the Agency on an extension of time. (See footnote 26 below) Section 122(i) of CERCLA requires notice of all administrative de minimis settlements to be published in the Federal Register for a thirty day comment period. The Region must consider all comments received and "may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate." section 122(i)(3).

C. Policy on Prospective Purchasers

Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property. (See footnote 27 below)

===== Foot Note =====

26 More detailed procedure for the referral of de minimis consent orders to Headquarters and the Department of Justice are being developed.

27 Since settlements with typical prospective purchasers (i.e. those who do not currently own the property, are not otherwise involved with the site, and are, therefore, not yet liable under Section 107) will not be reached under Section 122, the procedures and restrictions in that section, such as those relating to covenants not to sue, will not apply.

=====

It is the Agency's policy not to become involved in private real estate transactions. However, a covenant not to sue a prospective purchaser might appropriately be considered if an enforcement action is anticipated and if performance of or payment for cleanup would not otherwise be available except from the Superfund and if the prospective purchaser participates in a clean-up. A prospective purchaser may participate in clean up either through the payment of a substantial sum of money (See footnote 28 below) to be applied towards a clean-up of the site or through a commitment to perform substantial response actions.

There are a number of concerns, however, associated with entering into such covenants which may, in a given case, outweigh any benefit which the Agency may receive. Given the number of sites on the National Priorities List ("NPL"), most have not been the subject of a remedial investigation/feasibility study ('RI/FS'), nor have responsible party searches been conducted. Therefore, in most instances, the extent of contamination and necessary remedy will be unknown and it may be impossible to determine whether the proposed activities of the prospective purchaser at the site (for example, operating a manufacturing facility or developing the property) will interfere with any remedy ultimately selected by the Agency. Secondly, unless the universe of potentially responsible parties and their financial viability is known, it will be impossible to determine with any certainty that the Agency is receiving a benefit which otherwise could not be obtained. If there are other viable responsible parties, by entering into an agreement with a prospective purchaser for future response costs, the Agency will have merely succeeded in providing those other parties with a set-off against future cost recovery. Furthermore, in some instances, the Agency may ultimately be able to recoup its response costs, or at least an amount equivalent to the consideration offered by a prospective purchaser, through enforcement of

the federal lien established pursuant to Section 107(1) of CERCLA.

===== Foot Note =====

28 Such monies could be paid directly to the Superfund (in the event the Agency is undertaking the cleanup) or in appropriate circumstances and with proper controls could be paid to the seller of the property if the seller has agreed to perform substantial response action pursuant to an administrative order or consent decree.

=====

Moreover, the listing of any site on the NPL means that there is a release or threatened release of hazardous substances from the site. Development and commercial use of such sites may pose a danger to those present at such sites, and the activities to be carried out by the purchaser, even with the exercise of due care, may aggravate or contribute to the contamination. Where the remedy calls for other than destruction of all contaminants below health based levels, there may be a risk that unknown future users are inconsistent with the remedy or may interfere with an ongoing cleanup.

The Agency recognizes, however, that in an appropriate case, entering into a covenant not to sue with a prospective purchaser of contaminated property, given appropriate environmental safeguards, may result in an environmental benefit through a payment to be applied to clean-up of the site or a commitment to perform response action. This guidance sets forth criteria which should be met before the Agency will enter into such covenants. These criteria are minimal standards, however, and the Agency will reject any offer unless it determines that entering into a covenant with a prospective purchaser is sufficiently in the public interest to warrant expending the resources necessary to reach such an agreement in light of competing priorities for the use of limited Agency resources.

- 1 Criteria for entering into covenants not to sue with prospective purchasers of contaminated property
 - a. Enforcement action is anticipated by the Agency at the facility

It is the policy of the Agency not to become involved in purely private commercial transactions. The Agency will not entertain requests for covenants not to sue from prospective purchasers unless an enforcement action is contemplated with respect to the facility. Therefore, such covenants generally will be considered only with regard to those facilities listed or proposed for listing on the NPL, those facilities at which Fund monies have been expended, or those facilities which are the subject of a pending enforcement action.

- b. A substantial benefit, not otherwise available will be received by the Agency for cleanup

The Agency will not entertain requests for covenants not to sue unless entering into such a covenant will produce a substantial monetary benefit to be applied to response activities at the facility, or an agreement to conduct response actions, which otherwise would not be available. This criterion may be met if the Agency projects that its anticipated response costs are not recoverable from other sources. However, if the Agency determines that its anticipated response costs can be recouped through other means, such as the filing and enforcement of a federal lien, such covenants will not be entertained.

- c. The Agency believes that the continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination of

interfere with the remedy

Unless the Agency believes, based on available information, that the continued operation of the facility or new development of the site will not aggravate or contribute to the existing contamination or interfere with the remedy, such agreements will not be entertained. Information which should be considered by the Agency includes the remedial investigation/feasibility study, if completed, and all other information relevant to the condition of the facility. If the prospective purchaser is to continue the operations of an existing facility, the Agency will require the purchaser to submit information sufficient to determine whether the continued operation are likely to aggravate or contribute to the existing contamination or interfere with the remedy. If the prospective purchaser plans to undertake new operations or development of the facility, comprehensive information regarding these plans will be required. If the available information indicate that the planned activities of the prospective purchaser are likely to aggravate or contribute to the existing contamination, the agreement will not be entered into or will include restrictions which prohibit those operations or portions of those operations which are likely to aggravate or contribute to the existing contamination or interfere with the remedy.

The Agency's determination as to whether the available information is sufficient for purposes of this evaluation will be made on a case by case basis; however, one key factor which will necessarily be considered is whether the remedial investigation has been completed and the extent of information which has been generated in that process. If the available information is insufficient for purposes of evaluating the impact of the proposed activities, the agreement will not be entered into.

- d. Due consideration has been given to the effect of continued operations or new development on health risks to those persons likely to be present at the site

The Agency will not entertain requests for covenants not to sue unless due consideration has been given to the effect which continued operations at the facility or new development is likely to have on those health risks to those persons likely to be present at the site.

- e. The prospective purchaser is financially viable.

The prospective purchaser must demonstrate that he is financially viable and capable of fulfilling his obligations under the agreement. The Agency will not entertain requests for covenants not to sue if it appears that the Agency could not recoup its costs in the event that the purchaser breaches his obligations under the agreement.

2. Content and form of settlement

If the foregoing criteria are met, and the Agency determines that entering into the covenant not to sue is in the public interest, the covenant will be embodied in an agreement to be executed by the authorized representative of the prospective purchaser, the Regional Administrator (with the concurrence of the AA-OECM, and the Attorney General), and, where appropriate, the current owner of the facility. (See footnote 29 below)

- a. Consideration

Generally, the consideration required of the prospective purchaser will be a cash payment. In specific cases, it may be possible to dedicate the payments to response activities at the site through an appropriate mechanism. (See footnote 30 below) However, the consideration may take the form of a removal, or if a Record of Decision

(ROD) had been signed, remedial activities. In addition, the prospective purchaser must agree not to assert any claims or causes of action against the United States or the Hazardous Substances Superfund arising from contamination of the facility which exists as of the date of acquisition of the facility, or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the facility. (See footnote 31 below) The Agency shall also require that the purchaser file in the local land records a notice acceptable to EPA, stating that hazardous substances were disposed of on the site and that EPA makes no representation as to the appropriate use of the property.

===== Foot Note =====

- 29 In the past, this has arisen most often in the bankruptcy context.
30 Note, however, that at present, the federal Superfund accounting system does not provide for the establishment of site specific accounts to receive dedicate payments.
31 In evaluating what is appropriate consideration, the Agency should consider the value of any lien which may be or has been placed on the property pursuant to CERCLA Section 107(1), since, in entering into an agreement with a prospective purchaser, the government is relinquishing its right to recover its cleanup costs when the property is subsequently sold to the prospective purchaser. This is because an agreement with a prospective purchaser would effectively constitute a satisfaction of the prospective purchaser's liability for cleanup work at the site, thus terminating any lien under Section 107(1)(E).

=====

The agreement should contain a provision under which the purchaser grants an irrevocable right of entry to the Agency, its response action contractors, and other persons performing response actions under Agency oversight for the purpose of taking response actions at the facility and for monitoring compliance with the agreement.

In exchange for this consideration, the Agency will grant a covenant not to sue to the prospective purchaser for civil liability under Sections 106 and 107(a) of CERCLA and section 7003 of RCRA arising from contamination of the facility which exists as of the date of acquisition of the facility. The covenant should provide that, with respect to any claim or cause of action asserted by the Agency against the prospective purchase, the purchaser shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to contamination which existed prior to the date of acquisition.

b. Reservation of rights

The agreement should expressly reserve the Agency's rights to assert all claims against the prospective purchaser, except for those set forth in the covenant not to sue, including, but not limited to, those claims arising from:

- (i) the release or threat of release of any hazardous substance, pollutant or contaminant resulting from the purchaser's operation of the facility;
- (ii) the release or threat of release of any hazardous substance, pollutant, or contaminant resulting from the introduction of any hazardous substance, pollutant, or contaminant at the facility by any person after the date of acquisition by the purchaser;
- (iii) exacerbation of contamination existing prior to the date of acquisition;

- (iv) failure to cooperate and/or interfere with the Agency, its response action contractors, or other persons conducting response activities under Agency oversight in the implementation of response actions at the facility;
- (v) failure to exercise due care with respect to any contamination at the facility; or
- (vi) any and all criminal liability.

The agreement should also expressly reserve the Agency's rights to assert all claims and causes of action against all persons other than the purchaser. Unless the Federal natural resource trustee has agreed in writing to the covenant not to sue, the agreement should also expressly reserve natural resource damage claims.

c. Scope of response actions

The agreement should provide that none of its terms is to be construed as limiting or restricting the nature or scope of response actions which may be undertaken by the Agency in exercising its authority under federal law. In most circumstances, the agreement should also state that the purchaser recognizes that the implementation of response actions may interfere with its operations, including closure of the facility or a part thereof.

d. Compliance with applicable laws and duty to exercise due care

The agreement should provide that the purchaser is subject to the requirements of all federal and state laws and regulations, including the duty to exercise due care with respect to hazardous substances at the facility.

e. Disclaimer

the agreement should contain a statement that the execution of the agreement in no way constitutes an Agency finding as to risks to human health and the environmental which may be posed by contamination at the facility or an Agency representation that the property is fit of any particular use.

3. Procedures

Any agreement entered with a prospective purchaser of contaminated property must receive the concurrence of the AA-OECM and the AA-OSWER. Additionally, such agreement must be approved by the Attorney General. Procedurally, the Regions should handle requests for such covenants in accordance with forthcoming Agency guidance on the referral of administrative settlements under Section 122(g)(4). (See footnote 32 below) The settlement analysis required by that guidance should specifically address the criteria set forth in this memorandum for entering into covenants not to sue with prospective purchasers of contaminated property.

V. PURPOSE AND USE OF THIS GUIDANCE

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

Attachments

===== Foot Note =====

32 See supra note 26

=====

Attachment I
MODEL CERCLA SECTION 122(g)(4) ADMINISTRATIVE ORDER ON CONSENT
FOR SETTLEMENTS WITH LANDOWNERS UNDER SECTION 122(g)(1)(B)

_____)	
IN THE MATTER OF:)	U. S. EPA Docket
)	No. _____
[Insert Site Name and Location])	
)	
Proceeding under Section 122(g)(4))	
of the Comprehensive Environmental)	ADMINISTRATIVE ORDER
Response, Compensation, and Lia-)	ON CONSENT
bility Act of 1980, as amended,)	
42 U.S.C. 9622(g)(4))	
_____)	

I. JURISDICTION

This Administrative Order on Consent ("Consent Order") is issued pursuant to the authority vested in the President of the United States by Section 122 (g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), Pub. L. No. 99-499, 42 U.S.C. 9622(g)(4), to reach settlements in actions under Section 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a). The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987) and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E (Sept. 13, 1987).

This Administrative Order on Consent is issued to [insert name] ("Respondent"). Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order. Respondent further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

II. DEFINITIONS

"Site" shall mean that parcel of property located at [insert address and general description], more particularly described as [insert legal description of the property owned by Respondent]. [NOTE: Additional definition may be required.]

III. STATEMENT OF FACTS

1 [In one or more paragraphs, describe the NPL status of the site and briefly describe the historical hazardous substance activity at the site, including the date on which the hazardous substance activities were terminated.]

2. Hazardous substances within the definition of Section 101(14) of CERCLA, 42 U.S.C. 9601(14), have been or are threatened to be released into the environment at or from the site. [NOTE: Additional information about specific hazardous substances present on- or off-site may be included.]

3. As a result of the release or threatened release of hazardous substances into the environment, EPA has undertaken response action at the Site under Section 104 of CERCLA, 42 U.S.C. 9604, and will undertake response action in the future. [NOTE: A brief recitation of the specific response action undertaken or planned for the site, e.g. , whether an RI/FS and ROD have been completed, should be included.]

4. In performing this response action, EPA has incurred and will continue to incur response costs at or in connection with the site. [NOTE: The dollar amount and costs incurred as of a specific date should be included.]

5. [Identify the Respondent, the nature of his ownership interest in the site, the manner in which he acquired the site, e.g. , by purchase, bequest, eminent domain proceedings, etc ., and the date of acquisition. Add any other facts relevant to the requirements of Section 122(g).]

6. Respondent represents, and for the purposes of this order EPA accepts, that respondent's involvement with the site is limited to the following: [State each fact. Make sure to address the elements of Section 122(g)(1)(B). and if no cash consideration is involved, Sections 107(B), and 101(35).]

7. Payments required to be made by Respondent pursuant to this Consent Order are a minor portion of the total response costs at the Site which EPA, based upon currently available information, estimates to be between \$ and \$. [NOTE: This statement need not be included if EPA is settling only for access and due care assurances. The dollar figure inserted should include the total response costs incurred to date as well as EPA's projection of the total response costs to be incurred during completion of the remedial action at the site.]

IV. DETERMINATIONS

Based upon the Findings of fact set forth above and on the Administrative record for this Site, EPA has determined that:

1. The Site as described in Section II of this Consent Order is a "facility" as that term is defined in Section 101(9) of CERCLA, U.S.C. 9601(9).

2. Respondent is a "person" as that term is defined in section 101(2) of CERCLA, 42 U.S.C. 9601(21).

3. Respondent is an "owner" of a facility within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1), and a "potentially responsible party" within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

4. The past, present or future migration of hazardous substances from the Site constitutes an actual or threatened "release" as that term is defined in Section 101(22) of CERCLA, 42 U.S.C. 9601(22).

5. Prompt settlement with the Respondent is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

6. This Consent Order involves at most only a minor portion of the response costs at the Site pursuant to Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1). [NOTE: This statement need not be included if the Agency is settling only for access and due care assurances.]

7. Respondent is eligible for a de minimis settlement pursuant to Section 122(g)(1)(B) of CERCLA, 42 U.S.C. 9622(g)(1)(B).

V. ORDER

Based upon the administrative record for this Site and the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth herein, it is hereby AGREED TO AND ORDERED:

VI ACCESS AND NOTICE

1. Respondent hereby grants to EPA, its representatives, contractors, agents, and all other persons performing response actions under EPA's oversight, an irrevocable right of access to the site for the purposes of monitoring the terms of this Consent Order and performing response actions at the Site. Respondent shall file in the

land records of _____ County a notice, approved by EPA, to subsequent purchasers of the land, that hazardous substances were disposed of on the site and that EPA makes no representations as to the appropriate use of the property. Nothing herein shall limit EPA's right of access under applicable law.

2. Nothing in this Consent Order shall in any manner restrict or limit the nature or scope of response actions which may be taken by EPA in fulfilling its responsibilities under federal law. Respondent recognizes that the implementation of response actions at the Site may interfere with the use of his property. Respondent agrees to cooperate with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions.

VII. DUE CARE

3. Nothing in this Consent Order shall be construed to relieve Respondent of his duty to exercise due care with respect to the hazardous substances at the Site or his duty to comply with all applicable laws and regulations.

VIII. PAYMENT

4. Respondent shall pay the sum of \$_____ to the Hazardous Substance Superfund within _____ days [insert short time period ,e.g., 10, 30 or 45 days] of the effective date of this Consent Order. [NOTE: If EPA is settling only for access, notice and due care assurances, then this section may be omitted. If EPA is settling for an agreement by the owner to perform response activities [removal --since a consent decree is required for remedial activities] rather than a cash payment, then the following section should be substituted: "WORK TO BE PERFORMED: Respondent agrees to perform [insert general description of activities to be performed], as more fully described in the scope of work and schedules attached hereto as Exhibit A and incorporated herein, and in accordance with the schedules and standards set forth therein. Based on information provided by Respondent, EPA estimates the present value of this work to be approximately \$_____."]

5. The payment specified in paragraph 4 shall be made by certified or cashier's check payable to "EPA Hazardous Substance Superfund." Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action, and shall be sent to:

[Insert address for Regional lock box]

6. Respondent shall simultaneously send a copy of its check to:
[Insert name and address of Regional Attorney or Remedial Project Manager]

IX. CIVIL PENALTIES

7. In addition to any other remedies or sanctions available to EPA, the Respondent shall be subject to civil penalty of up to \$25,000 per day for each failure or refusal to comply with any term or condition of this Consent Order pursuant to Section 122(1) of CERCLA, 42 U.S.C. 9622(1). [NOTE: If the Respondent is to perform the removal action under the Consent Order, stipulated penalties should be considered.]

X. CERTIFICATION OF RESPONDENT

8. The Respondent certifies that to the best of his knowledge and belief he has fully and accurately disclosed to EPA and stated in Paragraph 6, Section III, all information currently in his [its] possession and in the possession of his agents, [or in the possession of its officers, directors, employees, contractors or agents] which relates in any way to his [its] qualifications for a de minimis settlement under Section 122(g)(1)(B) of CERCLA.

[NOTE: In very limited circumstances this language may be omitted if

EPA determines that the risk of discovering information which would disqualify the Respondent from a de minimis settlement is negligible.]

XI. COVENANT NOT TO SUE

9. Subject to the reservation of rights in Paragraphs 11 and 12, Section XII, of this Consent Order, upon payment of the amounts specified in Paragraph 4, Section VIII, of this Consent Order [NOTE: If work is to be performed instead of a cash payment, this sentence should read: "upon satisfactory completion of the work specified in the Scope of Work." If EPA is settling only for access and due care assurances, this sentence should read: "Upon the effective date of this Consent Order."], EPA covenants not to sue or take any other civil or administrative action against the Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a) or Section 7003 of the Resource Conservation Recovery Act, as amended, 42 U.S.C. 6973, with regard to the Site.

10. In consideration of EPA's covenant not to sue in Paragraph 9, Section XI, of this Consent Order, the Respondent agrees not to assert any claims or causes of action against the United States or its contractors or its employees or the Hazardous Substance Superfund arising out of expenses incurred or payments made [or work performed] pursuant to this Consent Order, or to seek any other costs, damages, or attorney's fees from the United States or its contractors or employees arising out of response activities at the Site.

XII. RESERVATION OF RIGHTS

11. Nothing in this Consent Order is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law in equity, which the United States, including EPA, may have against Respondent for:

a) any liability as a result of failure to provide access, notice, or otherwise comply with Paragraphs 1 and 2, Section VI, of this Consent Order;

b) any liability as a result of failure to exercise due care with respect to hazardous substances at the Site;

c) any liability as a result of failure to make the payments [or perform the work] required by Paragraph 4, Section VIII, of this Consent Order;

d) any liability resulting from exacerbation by Respondent of the release or threat of release of hazardous substances from the Site;

e) any and all criminal liability; or

f) any matters not expressly included in the covenant not to sue set forth in Paragraph 9, Section XI, of this Consent Order, including, without limitation, any liability for damages to natural resources.

[NOTE: This natural resource damage reservation must be included unless the Federal natural resource trustee has agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substances at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal natural resource trustee of the negotiations and encourage the trustee to participate in the negotiations.]

12. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from the Respondent, and the covenant not to sue in Paragraph 9, Section XI, of this Consent Order is null and void, if information different from that specified in Paragraph 6, Section III, is discovered which indicates

that Respondent fails to meet any of the criteria specified in Section 122(g)(1)(B) of CERCLA.

13. Nothing in this Consent Order is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States, including EPA, may have against any person, firm, corporation or other entity not a signatory to this Consent Order.

14. EPA and Respondent agree that the actions undertaken by the Respondent in accordance with this Consent Order do not constitute an admission of any liability by the Respondent. The Respondent does not admit and retains the right to controvert in and subsequent proceedings, other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations contained in this Order.

XIII. CONTRIBUTION PROTECTION

15. Subject to the reservation of rights in Paragraphs 11 and 12, Section XII, of this Consent Order, EPA agrees that by entering into and upon carrying out the terms of this Consent Order, Respondent will have resolved his liability to the United States for those matters set forth in the covenant not to sue, Paragraph 9, Section XI, as provided by Section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), and shall have satisfied his liability for those matters within the meaning of Section 107(a) of CERCLA, 42 U.S.C. 9607(a).

XIV. PARTIES BOUND

16. This Consent Order shall apply to and be binding upon the Respondent and his heirs, agents, and assigns [its officers, directors, employees, agents, successors and assigns]. The signatory represents that he is fully authorized to enter into the terms and conditions of this Consent Order and to legally bind the Respondent. [NOTE: The preceding sentence and the bracketed phrase in the first sentence should be used if the respondent is a corporation or entity other than a natural person.] In the event that the Respondent transfers title or possession of the Site, he shall notify the United States EPA (at the address included in Paragraph 6, Section VIII) prior to any such transfer and shall continue to be bound by all of the terms and conditions of this Consent Order unless EPA agrees otherwise and modifies this Consent Order accordingly.

XV. PUBLIC COMMENT

17. This Consent Order shall be subject to a thirty-day public comment period pursuant to Section 122(i) of CERCLA, 42 U.S.C. 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. 9622(i)(3), EPA may withdraw or modify consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper, or inadequate.

XVI. ATTORNEY GENERAL APPROVAL

18. The Attorney General or his designee has issued prior written approval of the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA. [NOTE: Attorney General approval usually will be required for de minimis consent orders because the total past and projected response costs at the site will exceed \$500,000, excluding interest. In the event that Attorney General approval is not required, the order should not include this Paragraph 18, but should include the following as a separate numbered paragraph in the Determinations section (Section IV) above: "The Regional Administrator of EPA, region , has determined that the total response costs incurred to date at or in connection with the site do not exceed \$500,000, excluding interest , and that , based upon information

currently known to EPA, total response costs at or in connection with the Site are not anticipated to exceed \$500,000, excluding interest, in the future." Use of this determination requires changes to the model Statement of Facts in Section III above; specifically, Paragraph 3 of the Facts should delete "and will undertake response actions in the future." Paragraph 4 of the Facts should delete "and will continue to incur response costs at or in connection with the site."]

XVII. EFFECTIVE DATE

19. The effective date of this Consent Order shall be the date upon which EPA issues written notice to the Respondent that the public comment period pursuant to Paragraph 17, Section XV, of this Consent Order 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:

[Respondent(s)]

By: _____
[Name]

[Date]

U.S. Environmental Protection Agency

By: _____
[Name]

[Date]

----- ATTACHMENT -----

Attachment II

MODEL CERCLA SECTION 122(g)(4) CONSENT DECREE
FOR SETTLEMENTS WITH LANDOWNERS UNDER SECTION 122(g)(1)(B)

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff)	Civil Action No. _____
)	
v.)	Judge _____
)	
[INSERT NAME(S) OF DEFENDANT(S),])	
)	
Defendant(s))	
_____)	

CONSENT DECREE

[NOTE: If the complaint concerns causes of action which are not resolved by this document or names defendants who are not signatories to this document, the title should be "Partial Consent Decree."]

WHEREAS, the United States of America, on behalf of the Administrator of the United States Environmental Protection Agency ("Plaintiff" or "United States") filed a complaint on [insert date] against [insert defendant's name] ("Defendant") pursuant to [insert causes of action and relief sought, e.g. ,Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), Pub. L. No. 99-499, 42 U.S.C. 9606 and 9607(a), and Section 7303 of the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. 6973, seeking injunctive relief regarding the cleanup of the [insert site name] ("Site") and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site];

WHEREAS, the United States has incurred and continues to incur

response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, the Regional Administrator of the United States Environmental Protection Agency, Region ____ ("Regional Administrator"), has determined that prompt settlement of this case is practicable and in the public interest;

WHEREAS, this settlement does not involve the payment of response costs [delete this clause if cash consideration is included pursuant to Section V];

WHEREAS, based on information currently available to the Environmental Protection Agency ("EPA"), the Regional Administrator has determined that Defendant qualifies for a de minimis settlement pursuant to Section 122(g)(1)(B) of CERCLA;

WHEREAS, the United States and the Defendant agree that settlement of this case without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action;

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter and the parties to this action. The parties agree to be bound by the terms of this Consent Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

II. PARTIES BOUND

This Consent Decree shall apply to and be binding upon the United States and the Defendant, his heirs, agents, and assigns [its officers, directors, employees, agents, successors and assigns]. The signatory represents that he is fully authorized to enter into the terms and conditions of this Consent Decree and to legally bind the Defendant. [NOTE: The preceding bracketed language should be used if the Defendant is a corporation or entity other than a natural person.]

III. DEFINITIONS

"Site" shall mean that parcel of property located at [insert address and general description], more particularly described as [insert legal description of the property owned by defendant]. [NOTE: It may be necessary to include additional definitions.]

IV. ACCESS AND NOTICE

1. Defendant hereby grants to EPA, its representatives, contractors, agents, and all other persons performing response actions under EPA's oversight, an irrevocable right of access to the Site for the purposes of monitoring the terms of this Consent Decree and performing or monitoring performance of response actions at the Site, Defendant shall file in the land records of _____ County a notice, approved by EPA, to subsequent purchasers of the land that hazardous substances were disposed of on the site and that EPA makes no representation as to the appropriate use of the property. Nothing herein shall limit EPA's right of access under applicable law. In the event that defendant transfers title or possession of the Site, he shall continue to be bound by all of the terms and conditions of this Consent Decree and shall notify the United States EPA prior to any such transfer.

2. Nothing in this Consent Decree shall in any manner restrict or limit the nature or scope of response actions which may be taken by EPA in exercising its authority under federal law. Defendant recognizes that the implementation of response actions at the Site may interfere with the use of his property. Defendant agrees to cooperate with EPA in

the implementation of response actions at the Site and further agrees not to interfere with such response actions.

V. PAYMENT

1. Respondent shall pay the sum \$_____ to the Hazardous Substance Superfund within ___ days [insert short time period, e.g., 10 or 45 days] of the effective date of this Consent Order. [NOTE: If EPA is settling only for access, notice and due care assurances, then this section may be omitted. If EPA is settling for an agreement by the owner to perform response activities, rather than a cash payment, then the following section should be substituted: "WORK TO BE PERFORMED: Respondent agrees to perform [insert general description of activities to be performed], as more fully described in the Scope of work and schedules attached hereto as Exhibit A and incorporated herein, and in accordance with the schedules and standards set forth therein. Based on information provided by Respondent, EPA estimates the present value of this work to be approximately \$ _____ "]

2. The payment specified in Paragraph 1 of this Section, shall be made by certified or cashier's check payable to "EPA Hazardous Substance Superfund." Each check shall reference the site name, the name and address of the Respondent, and the EPA docket number for this action, and shall be sent to:

[Insert address for Regional lock box]

3. Defendant shall simultaneously send a copy of its check to:

[Insert name and address of Regional Attorney or Remedial Project Manager]

VI. DUE CARE

Nothing in this Consent Decree shall be construed to relieve Defendant of his duty to exercise due care with respect to hazardous substances at the Site or his duty to comply with all applicable laws and regulations.

VII. CIVIL PENALTIES

In addition to any other remedies or sanctions available to the United States, Defendant shall be subject to civil penalty of up to \$25,000 per day for each failure or refusal to comply with any term or condition of this Consent Decree pursuant to Section 122(1) of CERCLA, 42 U.S.C. 9622(1). [NOTE: If the defendant is to perform remedial action under the Consent Decree, stipulated penalties, pursuant to Section 121(e)(2) must be included.]

VIII. CERTIFICATION OF DEFENDANT

The Defendant certifies that, to the best of his [its] knowledge and belief, he [it] has fully and accurately disclosed to EPA all information currently in his [its] possession and in the possession of his agents [and in the possession of its officers, directors, employees, contractors or agents] which relates in any way to his [its] qualifications for a de minimis settlement under Section 122(g)(1)(B) of CERCLA. [NOTE: In every limited circumstances this language may be omitted if EPA determines that the risk of discovering information which would disqualify the Defendant from a de minimis settlement is negligible. The bracketed language in this paragraph should be used if the Defendant is a corporation or entity other than a natural person.]

IX. COVENANT NOT TO SUE

1. Subject to the reservation of rights in Section X, Paragraph 1 and 2 of this Consent Decree, upon entry of this Consent Decree, the United States covenants not to sue or take any other civil or administrative action against the Defendant for any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. 9606 or 9607(a),

or Section 7003 of RCRA, 42 U.S.C. 6973, arising from conditions existing at the Site as of the date of entry of this Consent Decree.

2. In consideration of the United States' covenant not to sue in paragraph 1 of this Section, the Defendant agrees not to assert any claims or causes of action against the United States or its contractors or its employees or the Hazardous Substance Superfund arising out of expenses incurred or payments made [or work performed] pursuant to this Consent Decree, or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the Site.

X. RESERVATION OF RIGHTS

1. Nothing in this Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, which the United States, including EPA, may have against Defendant for:

- a) failure to provide access, notice or otherwise comply with Section IV, Paragraphs 1 and 2, of this Consent Decree;
- b) failure to exercise due care with respect to hazardous substances at the Site;
- c) exacerbation of the release or threat of release of hazardous substances from the Site;
- d) any liability resulting from the introduction of any hazardous substance, pollutant, or contaminant by any person at the Site after the entry of this Consent Decree;
- e) any and all criminal liability ; or
- f) any matters not expressly included in the covenant not to sue set forth in Section IX, Paragraph 1, of this Consent Decree, including, without limitation, any liability for damages to natural resources.

[NOTE: This natural resource damage reservation must be included unless the Federal natural resource trustee has agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substances at the site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal natural resource trustee of the negotiations and encourage the trustee to participate in the negotiations.]

2. In the event that the United States asserts any claim or cause of action against the Defendant pursuant to Section X, paragraph 1, of this Consent Decree, the Defendant shall bear the burden of proving that any release or threat of release which is the subject of the claim or cause of action is attributable solely to conditions existing at the Site as of the date of entry of this Consent Decree.

3. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the liability of the United States, including EPA, to seek or obtain further relief from the Defendant, and the covenant not to sue in Section IX, Paragraph 1, of this Consent Decree is null and void, if information not currently known to the United States is discovered which indicates that Defendant fails to meet any of the criteria specified in Section 122(g)(1)(B) of CERCLA.

4. Nothing in this Consent Decree is intended as a release from or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity , which the United States, including EPA, may have against any person, firm, corporation or other entity not a signatory to this Consent Decree.

5. United States and Defendant agree that the actions undertaken by the Defendant in accordance with this Consent Decree do not constitute an admission of any liability by Defendant.

XI. CONTRIBUTION PROTECTION AND LIENS

Subject to the reservation of rights in Section X, Paragraphs 1 and 3, of this Consent Decree, the United States agrees that by entering into and carrying out the terms of this Consent Decree, Defendant will have resolved his liability to the United States for those matters set forth in the covenant not to sue, Section IX, Paragraph 1, as provided in Section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), and shall have satisfied his liability for those matters within the meaning of Section 107(a) of CERCLA, 42 U.S.C. 9607(a).

XII. PUBLIC COMMENT

This Consent Decree shall be subject to a thirty-day public comment period. The United States may withdraw consent to this Consent Decree if comments received disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate.

XIII. EFFECTIVE DATE

The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Section XII of this Consent Decree.

The United States of America [Defendant]
By: _____ By: _____

SO ORDERED this ____ day of _____, 19__ .
[Name] [Date]

Guidance on Settlements with Prospective Purchasers
of Contaminated Property

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, DC 20460

Guidance on Settlements with Prospective Purchasers of Contaminated Property

I. Purpose

This document supersedes EPA's policy on agreements with prospective purchasers of contaminated property as set forth in the June 6, 1989, policy document entitled "Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property"¹ ("the 1989 guidance"). This revised guidance reflects both Agency experience in implementing the 1989 guidance and changes to that guidance that EPA believes are needed.

During the past several years, EPA has entered into a number of prospective purchaser agreements to enable purchasers to buy contaminated property for cleanup, redevelopment or reuse. The 1989 guidance required EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. While some agreements required performance of cleanup work on contaminated parcels prior to their redevelopment, others provided covenants not to sue for purchase of uncontaminated portions of larger Superfund sites. EPA's experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance. The Agency now believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties. These agreements in turn should provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.

While this new guidance restates much of the 1989 guidance, it revises two of the original criteria used to determine whether a prospective purchaser agreement is appropriate. The revised criteria allow the Agency greater flexibility to consider agreements with covenants not to sue to encourage reuse or development of contaminated property that would have substantial benefits to the community (e.g., through job creation or productive use of abandoned property), but also would be safe, consistent with site remediation, and have direct benefits to the Agency. A "model" prospective purchaser agreement, which should be used as a starting point for negotiation of agreements, is included at the end of the document.

¹OSWER Directive No. 9835.9 and 54 F.R. 34235 (Aug. 18, 1989).

II. Statement of Policy

Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property.² It is the Agency's policy not to become involved in private real estate transactions. However, an agreement with a covenant not to sue a prospective purchaser might appropriately be considered if it will have substantial benefits for the government and if the prospective purchaser satisfies other criteria³.

The Agency recognizes that entering into an agreement containing a covenant not to sue with a prospective purchaser of contaminated property, given appropriate safeguards, may result in an environmental benefit through a payment for cleanup or a commitment to perform a response action. EPA's experience has shown that prospective purchaser agreements have also benefitted the community where the site is located by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier. The Agency believes that it is necessary to provide greater flexibility in offering covenants not to sue. Through this guidance, the Agency adopts a policy which expands the circumstances under which prospective purchaser agreements may be considered.

III. Criteria for entering into covenants not to sue with prospective purchasers of contaminated property

The following criteria should be met before the Agency considers entering into agreements with prospective purchasers. These criteria are intended to reflect EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment. The Agency may also reject any offer if it determines that entering into an agreement with a prospective purchaser is not sufficiently in the public interest to warrant expending the resources

² Since settlements with typical prospective purchasers (i.e., those who do not currently own the property, are not otherwise involved with the site, and are, therefore, not yet liable under Section 107) will not be reached under Section 122, the procedures and restrictions in that section, such as those relating to covenants not to sue, will not apply.

³This guidance is also applicable to persons seeking prospectively to operate or lease contaminated property. Agreements with prospective lessees/operators will be evaluated using the criteria set forth in this guidance, and will require the current owner's signature.

necessary to reach an agreement. Regions should consider the following criteria when evaluating prospective purchaser agreements.

1. An EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the Agency.

This criterion is meant to ensure that EPA does not become unnecessarily involved in purely private real estate transactions or expend its limited resources in negotiations which are unlikely to produce a sufficient benefit to the public. EPA, however, recognizes the potential gains in terms of clean up and public benefit that may be realized with broader application of prospective purchaser agreements. Therefore, this criterion has been expanded beyond the limitation in the 1989 guidance to sites where enforcement action is anticipated, to now include sites where federal involvement has occurred or is expected to occur.

Accordingly, when requested, the Agency may consider entering into prospective purchaser agreements at sites listed or proposed for listing on the National Priorities List (NPL), or sites where EPA has undertaken, is undertaking, or plans to conduct a response action. If the Agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions should first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. This evaluation should clearly show that EPA's covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.

The Agency should consider the following factors when evaluating the appropriateness of entering into an agreement with a prospective purchaser at any site:

- a. Whether information regarding releases or potential releases of hazardous substances at the site indicates that there is a substantial likelihood of federal response or enforcement action at the site that would justify EPA's involvement in entering into the prospective purchaser agreement. EPA should consider information that is available through EPA's data systems, such as the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"), a state agency, or through submissions from the prospective purchaser, such as the results of an environmental audit or site assessment.
- b. Whether other available avenues (e.g., private indemnification agreements) may exist to sufficiently alleviate the threat of Superfund liability at the site without the need for EPA involvement. In most cases EPA will decline to

consider an agreement at a site that is currently undergoing cleanup through a state program, since future EPA activity at such a site is extremely unlikely.

Prospective purchaser agreements generally will not be appropriate at sites screened out using the above criteria. For example, sites designated by EPA as No Further Response Action Planned (NFRAP) and removed from CERCLIS will rarely be deemed appropriate for a prospective purchaser agreement. Even at such sites, however, EPA may, in extremely unusual circumstances, consider a prospective purchaser agreement if it is in the public interest and the agreement is essential to achieve a very significant public benefit.

2. The Agency should receive a substantial benefit either in the form of a direct benefit for cleanup, or as an indirect public benefit in combination with a reduced direct benefit to EPA.

A cornerstone of the Agency's evaluation process under this policy is the measurement of environmental benefit, in the form of direct funding, or cleanup, or a combination of reduced direct funding or cleanup and an indirect public benefit. The Agency believes that its past practice of limiting prospective purchaser agreements to those situations where substantial benefit was measured only in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool.

This guidance encourages a more balanced evaluation of both the direct and indirect benefits of a prospective purchaser agreement to the government and the public. EPA recognizes that indirect benefits to a community is an important consideration and may justify the commitment of the Agency's resources necessary to negotiate a prospective purchaser agreement, even where there are reduced direct benefits to the Agency in terms of cleanup and cost reimbursement.

Therefore, EPA may continue to consider entering into prospective purchaser agreements where there is a substantial direct benefit to EPA in terms of a commitment to conduct the cleanup or to reimburse EPA's cost of cleanup. Furthermore, Regions may now consider negotiating prospective purchaser agreements that will result in substantial indirect benefits to the community as long as there is still some direct benefit to the Agency. Both direct and indirect benefits should be measurable to enable EPA to evaluate them effectively and to ensure they are substantial. Examples of indirect benefits to the community include measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure.) Examples of reduced but measurable benefits to EPA include partial cleanup or compensation.

While this policy is intended to provide greater flexibility in providing prospective purchaser agreements, EPA is not reducing its commitment to

environmental protection or environmental justice. The Agency intends to carefully weigh the public interest considerations of creating jobs in the inner city, where older contaminated industrial properties are often located, against the possibility of further environmental degradation of industrial property in mixed industrial/residential areas. EPA is committed to working with purchasers of such property, to the extent possible, to ensure proper cleanup and promote responsible land use.

3. The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with EPA's response action.

Information which should be considered by the Agency to evaluate the effect of new site development or continued operation of the facility could include site assessment data and the Engineering Evaluation Cost Analysis (EE/CA) or remedial investigation/feasibility study (RI/FS), if available, and all other information relevant to the condition of the facility. If the prospective purchaser intends to continue the operations of an existing facility, the prospective purchaser should submit information sufficient to allow the Agency to determine whether the continued operations are likely to aggravate or contribute to the existing contamination or interfere with the remedy. If the prospective purchaser plans to undertake new operations or development of the property, comprehensive information regarding these plans should be provided to EPA. If the planned activities of the prospective purchaser are likely to aggravate or contribute to the existing contamination or generate new contamination, EPA generally will not enter into an agreement, or will include restrictions in the agreement which prohibit those operations or portions of those operations which are likely to aggravate or contribute to the existing contamination or interfere with the remedy.

The Agency will determine on a case-by-case basis whether the available information is sufficient for purposes of this evaluation. One key factor to be considered is whether the remedial investigation or other site evaluation has been completed and the extent of information which has been generated in that process. EPA may not enter into an agreement if the available information is insufficient for purposes of evaluating the impact of the proposed activities.

4. The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site.

EPA believes it is important to consider the environmental implications of site operations on the surrounding community and to those likely to be present or have access to the site.

5. The prospective purchaser is financially viable.

A settling party, including a prospective purchaser of contaminated property, should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement. In appropriate circumstances, EPA may structure payment or work to be performed to avoid or minimize an undue financial burden on the purchaser.

IV. Consideration

As a matter of law, it is necessary for EPA to obtain adequate consideration when entering into a prospective purchaser agreement. In determining what constitutes adequate consideration, Regions should consider a number of factors. Initially, Regions should examine the amount of past and future response costs expected to be incurred at the site, whether there are other potentially responsible parties who can perform the work or reimburse EPA's costs, and whether there is likely to be a shortfall in recovery of costs at the site. Regions should then consider the purchase price to be paid by the prospective purchaser, the market value of the property, the value of any lien on the property under Section 107(1) of CERCLA, whether the purchaser is paying a reduced price due to the condition of the property, and if so, the likely increase in the value of the property attributable to the cleanup (e.g. compare purchase price or market price with the estimated value of the property following completion of the response action). Finally, Regions should consider the size and nature of the prospective purchaser and the proposed use of the site (e.g. whether the purchaser is a large commercial or industrial venture, a small business, a non-profit or community-based activity). The analysis of any benefits received by the Agency also should contemplate any projected "windfall" profit to the purchaser when the government has unreimbursed response costs, and whether it is appropriate to include in the agreement some provision to recoup such costs. This analysis should be coupled with an examination of any indirect benefit that the Agency may receive (e.g., demolition of structures, implementation of institutional controls) in determining whether a prospective purchaser agreement provides a substantial benefit.

V. Public Participation

In light of EPA's new policy of accepting indirect public benefit as partial consideration, and the fact that the prospective purchaser agreements will provide contribution protection to the purchaser, the surrounding community and other members of the public should be afforded opportunity to comment on the settlement, wherever feasible. Because settlements with prospective purchasers are not expressly governed by CERCLA Section 122, there is no legal requirement for public notice and comment. Whenever practicable, however, Regions should publish notices in the Federal Register to ensure adequate notification of the agreement to all interested parties. Notice of a proposed settlement, in the Federal register alone, however, will rarely be sufficient to appropriately involve a community in the process concerning an agreement with a prospective purchaser. Particularly in urban communities and at facilities where environmental justice is an issue, Regions should provide sufficient

opportunities for public information dissemination and facilitate public input. Seeking cooperation with state and local government may also facilitate public awareness and involvement. Additionally, Regions should make a case-by-case determination of the need and level of additional measures to ensure meaningful community involvement with respect to the agreement. Because of business considerations some prospective purchaser agreements may be subject to relatively short deadlines. In these circumstances, Regions should allow sufficient time for appropriate approvals and public comment prior to the deadline.

VI. Process

A mandatory consultation with the Director of the Regional Support Division, Office of Site Remediation Enforcement, is required for any agreement entered with a prospective purchaser of contaminated property. Any prospective purchaser agreement can only be entered into with the express concurrence of the Assistant Attorney General. It is important that Regions involve EPA Headquarters and the Department of Justice at an early point in the process, and keep them involved throughout the negotiations. In particular, any draft settlement document should be forwarded to Headquarters and the Department of Justice prior to being sent to a prospective purchaser. When seeking approval for a settlement, it is important to explain the consideration for the covenant not to sue, whether direct or a combination of direct and indirect benefits, how it was determined, and why the Region considers it to be adequate.

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency and creates no substantive rights in any persons. Case specific inquiry should be directed to the Regional Support Division. Additional information on this policy is available from Lori Boughton ((703) 603-8959), Elisabeth Freed ((703) 603-8936) in the Policy and Program Evaluation Division, and Helen Keplinger ((202) 260-7116) in the Regional Support Division.

Attached Model Agreement

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION ____

IN THE MATTER OF: [name]
[Docket Number]

UNDER THE AUTHORITY OF THE _____) AGREEMENT AND COVENANT
COMPREHENSIVE ENVIRONMENTAL _____) NOT TO SUE [Insert
RESPONSE, COMPENSATION, AND _____) Settling Respondent's
LIABILITY ACT OF 1980, 42 U.S.C. _____) Name]
§ 9601, et seq., as amended. _____)
[state law, if appropriate] _____)

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") [state of ____] and _____ [insert name of Settling Respondent] (collectively the "Parties").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. [If the state is a party, insert "The State of _____, enters into this Agreement pursuant to [cite relevant state authority.]" and make appropriate reference to state with respect to affected provisions, including payment or work to be performed].

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name ("Settling Respondent"), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. "Parties" shall mean EPA, [State of _____], and the Settling Respondent.
4. "Property" shall mean that portion of the Site which is described in Exhibit 1 of this Agreement.
5. "Settling Respondent" shall mean _____.
6. "Site" shall mean the [Superfund] Site, encompassing approximately _____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].
7. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

8. [Include only those facts relating to the Site that are relevant to the covenant being provided the prospective purchaser. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]
9. The Settling Respondent represents, and for the purposes of this Agreement EPA [and the state] relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.].

IV. PAYMENT

10. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein [and Removal of Lien in Section XXI herein if that is part of the consideration for the agreement], Settling Respondent agrees to pay to EPA the sum of \$_____, within ___ days of the effective date of this Agreement. [A separate section should be added if the consideration is work to be performed.] The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID#_____ [insert 4-digit no.; first 2 numbers represent Region, second 2 numbers are Region's Site/Spill ID no.], [DOJ case number_____, if applicable] and name and address of Settling Respondent. [insert Regional Superfund Lockbox address where payment should be sent]. Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to EPA Region ___ Financial Management Officer [insert address].

11. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

[_____] [WORK TO BE PERFORMED]

[Include this section and other appropriate provisions relating to performance of the work, such as financial assurance, agency approvals, reporting, etc., where work to be performed is the consideration for the Agreement.]

____. Statement of Work attached as Exhibit 3.]

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

12. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA [and the state] its authorized officers, employees, representatives, and all other persons performing response actions under EPA [or state] oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal [and state] law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et. seq., and any other applicable statute or regulation, including any amendments thereto.

13. Within 30 days after the effective date of this Agreement, the Settling Respondent shall record a certified copy of this Agreement with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. Thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement. A copy of these documents should be sent to the persons listed in Section XV (Notices and Submissions).

14. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement [and where appropriate, Section __ (Work to be Performed)].

VI. DUE CARE/COOPERATION

15. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all

appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such release or threatened release.

VII. CERTIFICATION

16. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA [and the state] all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States [and the state] determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States [and the state] reserves all rights it [they] may have.

VIII. UNITED STATES' COVENANT NOT TO SUE⁴

⁴ Since the covenant not to sue is from the United States, Regions negotiating these Agreements should advise the Department of Justice of any other federal agency involved with the Site, or which may have a claim under CERCLA with respect to the Site and use best efforts to advise such federal agency of the proposed settlement.

17. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement [if consideration for Agreement is work to be performed, insert, as appropriate, "and upon completion of the work specified in Section __ (Work to Be Performed) to the satisfaction of EPA"], the United States [and the state] covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) [and state law cite] with respect to the Existing Contamination.

IX. RESERVATION OF RIGHTS

18. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States [and the State] reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs, [and, if appropriate, Section __ (Work to be Performed)]);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(g) liability for violations of local, State or federal law or regulations.

19. With respect to any claim or cause of action asserted by the United States [or the state], the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

20. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States [or the state] may have against any person, firm, corporation or other entity not a party to this Agreement.

21. Nothing in this Agreement is intended to limit the right of EPA [or the state] to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA [or the state] in exercising

its authority under federal [or state] law. Settling Respondent acknowledges that it is purchasing property where response actions may be required. X.

SETTLING RESPONDENT'S COVENANT NOT TO SUE

22. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States [or the state], its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

23. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

24. This Agreement shall apply to and be binding upon the United States, [and the state], and shall apply to and be binding on the Settling Respondent, its officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

25. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA [and the state] in its sole discretion.

26. The Settling Respondent agrees to pay the reasonable costs incurred by EPA [and the state] to review any subsequent requests for consent to assign or transfer the Property.

27. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA [the state] and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to

any assignees or transferees who fail to provide such written consent to EPA [and the state].

XII. DISCLAIMER

28. This Agreement in no way constitutes a finding by EPA [or the state] as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA [or the state] that the Property or the Site is fit for any particular purpose.

XIII. DOCUMENT RETENTION

29. The Settling Respondent agrees to retain and make available to EPA [and the state] all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA [and the state] of the location of such documents and shall provide EPA [and the state] with an opportunity to copy any documents at the expense of EPA [or the state]. [Where work is to be performed, consider providing for document retention for ten years or until completion of work to the satisfaction of EPA, whichever is longer.]

XIV. PAYMENT OF COSTS

30. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), [or Section -- (Work to be Performed)] of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States [and the state] to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

31. [Insert names, titles, and addresses of those to whom notices and submissions are due, specifying which submissions are required.]

XVI. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA [and the state] has fully executed the Agreement after review of and response to any public comments received.

XVII. ATTORNEY GENERAL APPROVAL

33. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement.

XVIII. TERMINATION

34. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

35. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. §

9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination].

36. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States [and the state] in writing no later than 60 days prior to the initiation of such suit or claim.

37. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States [and the state] within 10 days of service of the complaint on them.

XX. EXHIBITS

38. Exhibit 1 shall mean the description of the Property which is the subject of this Agreement.

39. Exhibit 2 shall mean the map depicting the Site.

[--. Exhibit 3 shall mean the Statement of Work.]

XXI. REMOVAL OF LIEN

40. [Use this provision only when appropriate.] Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment) [or upon satisfactory completion of work to be performed specified in Section __ (Work to be Performed)], EPA agrees to remove any lien it may

have on the Property under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

XXII. PUBLIC COMMENT

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

Regional Administrator, Region __ Date

IT IS SO AGREED:

BY:

Name

Date