



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE



May 17, 2004

**MEMORANDUM**

**SUBJECT:** Interim Guidance on the Ability to Pay and *De Minimis* Revisions to CERCLA § 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act

**FROM:** Susan E. Bromm, Director /s/  
Office of Site Remediation Enforcement

**TO:** Director, Office of Site Remediation and Restoration, EPA Region I  
Director, Emergency and Remedial Response Division, EPA Region II  
Director, Hazardous Site Cleanup Division, EPA Region III  
Director, Waste Management Division, EPA Region IV  
Directors, Superfund Division, EPA Regions V, VI, VII and IX  
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, EPA Region VIII  
Director, Office of Environmental Cleanup, EPA Region X  
Director, Office of Environmental Stewardship, EPA Region I  
Director, Environmental Accountability Division, EPA Region IV  
Regional Counsel, EPA Regions II, III, V, VI, VII, IX, and X  
Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice, EPA Region VIII

**I. Introduction**

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (SBLRBRA), Pub. L. No. 107-118 (referred to herein as “the Act”). Section 102(b) of the Act amended section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(g), entitled “*De Minimis* Settlements.” The amendments fall into two categories: (1) those that apply to

potentially responsible parties (PRPs) that are *de minimis* and demonstrate a limited ability, or inability, to pay their entire liability at a site (referred to herein as the “ATP amendments”); and (2) those that apply to all *de minimis* parties regardless of their financial status (referred to herein as the “*de minimis* amendments”).<sup>1</sup>

The ATP amendments to section 122(g): (1) specifically authorize EPA to negotiate settlements based on a PRP establishing an inability or limited ability to pay (ATP) rather than on its full liability at the site; (2) require ATP applicants to promptly provide EPA with information the Agency needs to assess the PRP’s inability, or limited ability, to pay; and (3) direct EPA to consider alternative payment methods as may be appropriate when ATP PRPs are unable to pay the “total settlement amount at the time of settlement.” The amendments were added to CERCLA § 122(g), the existing “*De Minimis* Settlements” section. Existing CERCLA § 122(g)(6), however, states that “nothing in this subsection will be construed to affect the authority of the President to enter into settlements with other potentially responsible parties.” Accordingly, EPA will continue its existing policy of entering into ATP settlements with both *de minimis* and non-*de minimis* PRPs where appropriate. See detailed discussion at III.A.3 & 4.

Under the *de minimis* amendments to section 122(g), EPA generally will: (1) determine whether a PRP is eligible or ineligible for a CERCLA § 122(g) settlement; (2) notify a PRP of a *de minimis* eligibility determination; (3) consider a PRP’s degree of cooperation when making a settlement eligibility determination; (4) impose a waiver of claims requirement on CERCLA § 122(g) settlers; (5) impose on settlers a continuing obligation of cooperation at the site; and (6) notify non-settlers about a final CERCLA § 122(g) settlement.

This interim guidance<sup>2</sup> first discusses existing policy regarding ATP and *de minimis* parties. The guidance then discusses each of the section 122(g) amendments and its relationship to and impact on EPA’s existing policy regarding ATP and *de minimis* parties. Finally, this

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<sup>1</sup> The Act confers the authority to implement the amendments to CERCLA § 122(g) on “the President.” Under Executive Order 12580, as amended, the authority to make determinations under section 122(g) is delegated to the Administrator of EPA (and to the heads of Executive departments and agencies for facilities under their jurisdiction, custody or control that are not on the National Priorities List). 52 Fed. Reg. 2923 (Jan. 23, 1987). Under Delegation 14-14-E (July 28, 2003), the Administrator redelegated the authorities in section 122(g) to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance with the authority to further delegate to the Branch Chief level. Accordingly, for ease of reference, this interim guidance refers to “EPA” in lieu of “the President.”

<sup>2</sup> This document is an interim guidance because as EPA gains more experience implementing the ATP and *de minimis* amendments, it may be necessary to revise this guidance.

interim guidance includes four model notice letters for use by Regional staff at their discretion:<sup>3</sup> (1) “Model Notice of Eligibility to Receive a *De Minimis* Party Settlement” (Appendix A); (2) “Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay” (Appendix B); (3) “Model Notice of Ineligibility to Receive a *De Minimis* Party Settlement” (Appendix C); and (4) “Model Notice Denying Reduction in Settlement Amount Based on Inability to Pay” (Appendix D).<sup>4</sup>

## II. **Background**

Consistent with EPA’s discretionary authority under CERCLA § 122(g), it has been EPA’s longstanding policy to enter into settlements with *de minimis* parties as early as possible in the Superfund response process. EPA has issued several policies and guidance documents that discuss the considerations, requirements and framework for settlements with *de minimis* parties. See “Communications Strategy for Settlements with Small Volume Waste Contributors” (Sept. 30, 1993); “Streamlined Approach for Settlements with *De Minimis* Waste Contributors under CERCLA § 122 (g) (1)(A)” (July 30, 1993, OSWER Dir. 9834.7-1D); “Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA § 122(g)(1)(A)” (June 2, 1992, OSWER Dir. 9834.7-1C).<sup>5</sup>

Similarly, EPA has pursued early settlements with ATP PRPs that demonstrate the need for relief, regardless of the size of the business or the type or volume of hazardous substances it contributed to the site. EPA’s CERCLA ATP policy has developed over time, and EPA has issued a number of documents and settlement tools to facilitate implementation of the Agency’s approach to ATP parties.<sup>6</sup> Most notably, in 1997, EPA issued its “General Policy on Superfund

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<sup>3</sup> These models are intended to address the most frequent situations that arise. Regions have the discretion to revise these models to address site-specific concerns, where appropriate.

<sup>4</sup> In addition, on August 12, 2003, EPA and the Department of Justice issued the “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree,” “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent,” new “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties Only,” and new “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties and Non-Ability to Pay Parties.” These documents are available on EPA’s webpage at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-demin-122g4-cvr-4att.pdf>. These documents were issued, in part, to address the ATP and *de minimis* amendments to section 122(g). See further discussion at section III.B.

<sup>5</sup> EPA’s guidance documents are available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/>.

<sup>6</sup> In 1991, EPA first issued a computer model entitled ABEL designed to help regional staff estimate the ability to pay of business PRPs. Similarly, EPA has issued computer models

Ability to Pay Determinations” (Sept. 30, 1997) (referred to herein as the “1997 ATP Policy”), which provides a general policy framework for settlements in which a party’s financial ATP is a significant consideration.<sup>7</sup> The general purpose of EPA’s ATP tools and documents has been to provide EPA with the means to settle the liabilities of PRPs with ATP issues in a way that will avoid imposing undue financial hardships on either businesses or individuals.

### **III. Discussion**

For the most part, the *de minimis* and ATP amendments to section 122(g) do not change EPA’s existing guidances and, accordingly, these documents remain in effect. This guidance will address only the new requirements imposed under the amendments and, where appropriate, reference EPA’s existing guidance.

#### **A. ATP Amendments to CERCLA § 122(g)**

The Act amended CERCLA § 122(g) to add new paragraph (7), entitled “Reduction in Settlement Amount Based on Limited Ability to Pay.” Section 122(g)(7) largely codifies existing EPA policy.

##### **1. Determining Eligibility for Statutory ATP**

New CERCLA § 122(g)(7)(A) generally provides that a *de minimis* PRP must demonstrate an inability or a limited ability to pay response costs to be eligible for a settlement under paragraph (7). New CERCLA § 122(g)(7)(B) places the burden on the PRP to demonstrate its financial hardship, which is consistent with EPA’s existing policy and practice. Accordingly, although EPA may inform PRPs that they may request an ATP eligibility determination pursuant to CERCLA § 122(g), EPA will generally make such determinations only at the request of a PRP that provides the necessary information. *De minimis* PRPs that request an ATP settlement generally have done so as part of their response to an EPA settlement offer which they believe they cannot pay.

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for individuals (INDIPAY) and municipalities (MUNIPAY). More recently, EPA issued model language for judicial ATP settlements in 2001 and revised model language for administrative ATP settlements in 2004. See “Revised Model CERCLA Section 122(h)(1) Cashout Agreement for Ability to Pay Peripheral Parties” (Jan. 8, 2004); “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree” (Jan. 11, 2001). As indicated in footnote 4, *supra*, model language for *de minimis* ATP settlements was issued in 2003.

<sup>7</sup> A copy of this document may be found on EPA’s webpage at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

Section 122(g)(7)(B) further provides that EPA “shall take into consideration the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.” The process set forth in EPA’s 1997 ATP Policy for making eligibility determinations for business and individual PRPs is consistent with the new statutory language and serves as a guide to EPA and Department of Justice (DOJ) staff involved in potential ATP settlements.

New CERCLA § 122(g)(7)(C) states that a PRP seeking an ATP settlement must “promptly provide . . . all relevant information needed to determine” the PRP’s ability to pay. The 1997 ATP Policy describes the materials EPA generally will need to determine the ability of a PRP to pay response costs, although Regions may request additional information as appropriate based upon site-specific considerations.

## **2. ATP Payment Methods**

Under new CERCLA § 122(g)(7)(D), if EPA determines that a PRP is unable to pay its total settlement amount at the time of settlement, then EPA is authorized to consider an “alternative payment method as may be necessary or appropriate.” When appropriate, EPA has agreed to a variety of alternative payment methods, including reduced one-time payments, installment payments and contingent payments.

The 1997 ATP Policy generally provides for payment periods not greater than five years. The policy also advises the case team to be mindful of the advantages and disadvantages of installment payments when considering its options, such as the potential for achieving a larger settlement amount, the risk of default, and the administrative burden on the Agency.<sup>8</sup> With any alternative payment option, the timing and structure of the payment(s) should be designed to maximize the actual net amount returned to the Hazardous Substance Trustfund (Superfund).

## **3. Early ATP Consideration**

As discussed above, EPA anticipates that most *de minimis* ATP settlements will result from PRP requests and most of those requests will occur in response to an EPA *de minimis* settlement offer. In certain instances, a PRP may make an “early” ATP request in response to an information request or notice letter. Early ATP consideration may be reasonable when a PRP’s financial condition makes it unable to contribute significantly to the site, such as when the PRP is already on the verge of bankruptcy or when the PRP’s financial capacity is negligible compared to its estimated share of liability.

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<sup>8</sup> Model language for an installment payment schedule in a *de minimis* settlement is included in EPA’s “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties Only” and “Model CERCLA Ability to Pay Provisions for Use in *De Minimis* Settlements with Ability to Pay Parties and Non-Ability to Pay Parties” (Aug. 12, 2003).

If EPA agrees to consider an early ATP request, the Agency should pay particular attention to how the settlement could affect other enforcement efforts at the site, enforcement efforts at other sites, other Agency priorities, and the public interest. For example, if there are ongoing or upcoming negotiations with other PRPs at the site, it may be advisable to postpone an ATP settlement, for a reasonable time, after the ATP eligibility request. In addition, when numerous parties are eligible for an ATP settlement, the Agency may seek to consolidate those settlements into a single document, even if the ATP requests were received at different times.

#### **4. ATP for Non-De Minimis PRPs**

Although the statutory ATP amendments are contained in CERCLA § 122(g), the *de minimis* settlements subsection, they do not prohibit EPA from entering into ATP settlements with non-*de minimis* PRPs. Existing CERCLA § 122(g)(6) specifically preserves the President's authority to enter into settlements with other PRPs.<sup>9</sup> Accordingly, EPA will continue its existing policy of considering ATP requests, including early ATP consideration, from any PRP, regardless of its size or its involvement at a site. EPA guidance on cashouts with peripheral parties may also be useful in arriving at settlements with non-*de minimis* parties that qualify for an ATP settlement.<sup>10</sup>

To the extent practicable and consistent with the public interest, EPA will apply the same guidelines to all ATP parties, *de minimis* as well as non-*de minimis*. Thus, the decision as to whether and when to consider a non-*de minimis* party's request for an ATP settlement will depend upon a careful evaluation of the potential impact of the settlement on other settlement efforts at the site and other Agency priorities. As a result, as warranted by the facts of a particular site, EPA may decide to defer a non-*de minimis* ATP eligibility determination or final settlement for a reasonable time, or to consolidate ATP settlements with multiple parties into a single document.

#### **B. New Requirements for all CERCLA § 122(g) Settlements**

The preceding section addressed the new provisions that apply only to ATP PRPs. This section addresses the new provisions that apply to all CERCLA § 122(g) settlements, including

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<sup>9</sup> Section 122(g)(6) explicitly provides that “[n]othing in this subsection shall be construed to affect the authority of the President to reach settlement with other potentially responsible parties under this chapter.”

<sup>10</sup> See “Revised Model CERCLA Section 122(h)(1) Cashout Agreement for Ability to Pay Peripheral Parties” (Jan. 8, 2004); “Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree” (Jan. 11, 2001); “Guidance on Administrative Response Cost Settlements Under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority” (Sept. 30, 1998).

ATP settlements. These amendments are discussed below in the order in which they typically arise during the settlement process.

## **1. Notification of Eligibility**

New CERCLA § 122(g)(10) requires EPA to notify a person of its *de minimis* eligibility under section 122(g)(1) “[a]s soon as practicable after receipt of sufficient information to make a determination. . . .” Accordingly, EPA must make a *de minimis* determination on a PRP at a site only once it has sufficient information and then must notify the PRP of that determination.

Since the amendment requires this notification to be “as soon as practicable,” the notice should be in a form reasonably expected to reach the intended PRP(s) in a timely manner and to adequately convey the Agency’s determination that the party is eligible for settlement under CERCLA § 122(g)(1). If the initial notification is oral, it should be followed by a written document within a reasonable time. Written notification can be accomplished separately by issuing an eligibility determination or in conjunction with another purpose (e.g., as part of a settlement offer). A “Model Notice of Eligibility to Receive a *De Minimis* Party Settlement” is included as Appendix A.

Although CERCLA § 122(g)(10) refers only to *de minimis* determinations under CERCLA § 122(g)(1), as a matter of policy, EPA will generally apply the same notification guidelines to ATP eligibility determinations, including non-*de minimis* ATP determinations, where it is practicable and consistent with the public interest. As discussed above, this policy applies only to ATP PRPs that have requested an ATP settlement and have provided the necessary information. It does not require EPA to make ATP determinations on all PRPs at a site. A “Model Notice Approving Reduction in Settlement Amount Based on Inability to Pay” is included as Appendix B.

## **2. Notification of Ineligibility**

Under CERCLA § 122(g)(9), once EPA determines that a PRP is ineligible for settlement under 122(g), EPA must communicate that determination, and the reasons for the determination, in writing to the PRP requesting settlement. Again, as a matter of policy, EPA will apply this notice requirement to non-*de minimis* ATP parties, where practicable and consistent with the public interest.

This notice requirement applies only to PRPs that have requested settlement. Because the notice must be written and must state the reason(s) for the determination, it often will be necessary to send correspondence to each PRP. Although section 122(g)(9) does not specify a time period, the notice should be sent within a reasonable time after the determination has been reached. A “Model Notice of Ineligibility to Receive a *De Minimis* Party Settlement” and a “Model Notice Denying Reduction in Settlement Amount Based on Inability to Pay” are included as Appendices C and D.

### **3. Compliance and Cooperation**

Under new CERCLA § 122(g)(8)(B), EPA may consider a PRP's compliance and cooperation at the site when deciding whether to enter into a *de minimis* settlement with the PRP. EPA may decline to offer a settlement under CERCLA § 122(g) to any PRP that has failed to comply with any request for access or information or a CERCLA administrative subpoena, or that has impeded or is impeding, through action or inaction, the performance of a response action at the site.

Accordingly, where a PRP has been noncompliant or uncooperative, a Region should evaluate the degree of non-compliance or non-cooperation prior to entering into a settlement with the party. Relatively inconsequential noncompliance, e.g., submission of a response to an information request a few days late, would not generally result in EPA declining to offer a settlement under section 122(g). However, where the non-compliance is significant, e.g., failure to respond to an information request or to provide access to the site, the Region should decline to enter into a settlement.

### **4. Waiver of Claims**

New CERCLA § 122(g)(8)(A) provides that CERCLA § 122(g) settlements “shall require, as a condition for settlement under this subsection, that a potentially responsible party waive all of the claims (including a claim for contribution under this Act) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.” The “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent” and “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” (Aug. 12, 2003) contain a standard waiver for purposes of this new provision.

The waiver contained in these new models covers site-related claims against all PRPs at the site,<sup>11</sup> and includes an exception allowing a settling *de minimis* PRP to assert claims or defenses against any PRP at the site that brings claims against that settling *de minimis* party. New section 122(g)(8)(A) also allows *de minimis* settlers to avoid the waiver requirement where the waiver would be unjust, such as where the settling *de minimis* PRP previously incurred response costs in excess of the share assigned to it under the *de minimis* settlement. EPA will consider on a case-by-case basis whether the waiver should be excluded or limited.

### **5. Continued Information and Access**

New CERCLA § 122(g)(8)(C) explicitly imposes upon settling *de minimis* parties the continuing obligation to provide any information or access requested by EPA under section

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<sup>11</sup> The waiver of claims in the 1995 models only required settling *de minimis* parties to waive section 107 and 113 claims against each other.



122(e)(3)(B) or section 104(e).<sup>12</sup> EPA historically has generally required *de minimis* landowners to provide continuing access to their property as a condition for settlement. See models attached to the “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” (June 6, 1989) (or successor models). Further, in August 2003, EPA revised its model *de minimis* contributor settlement documents to state expressly that the settlor has and will comply fully with any EPA information requests. See “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent” (Aug. 12, 2003); “Revised Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree” (Aug. 12, 2003).<sup>13</sup>

## 6. Notification of Non-Settlers

New CERCLA § 122(g)(12) requires EPA to promptly notify non-settlers at the facility once a settlement under section 122(g) becomes final. This new notice requirement neither replaces, nor is satisfied by, existing section 122(i) requirements to publish notice of proposed settlements in the Federal Register. Rather, section 122(g)(12) applies to final settlements and does not create a second comment period for the settlement itself.

This new notice should be given “promptly” after the settlement is finalized and should be reasonably designed to: (1) reach all of the known non-settling PRPs at the facility; (2) provide adequate notice that the settlement has been finalized; and (3) describe the major terms of the settlement. Although section 122(g)(12) does not specify the form of notice required, appropriate forms typically include: (1) written correspondence to each non-settler or its designated representatives; or (2) inclusion of notice of the settlement in a newsletter that is sent to each non-settler. In some circumstances, a description of the settlement on an EPA site-specific web page may be sufficient. Oral notice, although potentially adequate as notice, is unlikely to provide adequate documentation that this requirement has been met. Publication in general media such as the Federal Register and local newspapers may be an appropriate form of notice when there are large numbers of non-settlers involved. When the non-settling PRPs are diverse or are located in different geographical areas, it may be necessary to use several general publications to be reasonably certain of reaching the entire audience.

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<sup>12</sup> See “Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas” (Aug. 25, 1988); “Transmittal of Sample Documents for More Effective Communication in CERCLA § 104(e)(2) Information Requests” (June 30, 1995).

<sup>13</sup> This revision recognizes the continuing obligation to provide information that EPA believes existed already under the September 25, 1995 predecessor models.

#### **IV. Contacts**

Questions should be directed to Susan Boushell (202-564-2173 or boushell.susan@epa.gov) or Gregory Madden (202-564-4229 or madden.gregory@epa.gov).

#### **V. Disclaimer**

This guidance and any internal procedures adopted for its implementation are intended exclusively as guidance for employees of the U.S. Environmental Protection Agency. This guidance is not a rule and does not create any legal obligations. Whether and how EPA applies the guidance to any particular site will depend on the facts at the site.

#### **Attachments**

**cc:** Paul Connor (OECA)  
Sandra Connors (OECA)  
Mike Cook (OSTRI)  
Linda Garczynski (OBCR)  
Bruce Gelber (DOJ)  
Patricia McKenna (DOJ)  
Scott Sherman (OGC)  
Earl Salo (OGC)  
Alan Carpien (OGC)  
EPA Small Business Liability Exemption Subgroup



## Appendix A

### **MODEL NOTICE OF ELIGIBILITY TO RECEIVE A *DE MINIMIS* PARTY SETTLEMENT**

[insert date]

#### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]  
[Address]  
[City, State, Zip Code]

Re: Offer of *De Minimis* Settlement at the [Site Name] in [Site Location]

Dear [PRP Name]:

The United States Environmental Protection Agency (“EPA” or “the Agency”) is currently working to clean up the [site name] Site (“the Site”) located in [city, state] under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal “Superfund” law. Superfund is a program administered by EPA that is designed to clean up hazardous substances that may pose a threat to human health or the environment.

The purpose of this letter is to: (1) provide [you or company name] with information related to the recent federal cleanup efforts at the [site name]; and (2) inform [you or company name] that [you or it] qualify for a special *de minimis* party settlement [if offering specific *de minimis* amount in this letter insert dollar amount here] at this Site to resolve potential liability that [you or company name] may have to EPA under CERCLA. [If offering a *de minimis* settlement in this letter, include the following language: “Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**”]. [If a specific *de minimis* offer is not included in this letter, add either of the following: “EPA intends to provide [you or company name] with a *de minimis* settlement offer at a later time.” or “If you would like to enter into a *de minimis* settlement with EPA, please contact [insert name and number of regional contact person] before **[insert date in bold]**.”]

#### Background

[If there has not been any prior communication with the PRP, include the following paragraph: “Under sections 106(a) and 107(a) of CERCLA, potentially responsible parties (“PRPs”) can be required to perform cleanup actions to protect the public health, welfare, or the

environment. PRPs may also be responsible for costs incurred by EPA in performing such cleanups. PRPs include current and former owners and operators of the Site and persons who arranged for treatment and/or disposal of any hazardous substances at the Site.”]

EPA has undertaken several response actions to investigate and clean up the [site name] under the authority of the Superfund program. A brief description of the response actions taken to date follows: *[insert a brief description of site activities, such as:*

- A preliminary assessment (PA) and site investigation (SI) in order to gain a basic understanding of any risks posed by releases or threatened releases from the site to human health and the environment.
- A removal action, conducted to reduce any immediate threat to the environment or human health.
- A Remedial Investigation (RI) to identify the Site characteristics and to define the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site.
- Remedial Design and Remedial Action (RD/RA) to design and implement the EPA approved cleanup action for the Site.
- Activities to monitor, operate and maintain the cleanup action after the cleanup is completed.]

### **Eligibility for a *De Minimis* Settlement**

Based on the information EPA has collected, the Agency believes that, although [you or company name] may have liability under CERCLA as [a/an] *[insert language identifying PRP class that letter recipient falls into: owner/operator, generator, or transporter (e.g., “arranging for the disposal of the hazardous substance TCE”)]* at [site name], [you or company name] are eligible for a special *de minimis* settlement with EPA.<sup>1</sup> Under CERCLA § 122(g), whenever practicable and in the public interest, EPA may offer special settlements to parties whose waste contribution to a site is minimal in volume and toxicity, that is, *de minimis* parties. *[For de minimis waste contributors, Regions may want to add language about why the PRP is potentially liable and why they are a de minimis party (e.g., “Shipping receipts for the Site show that you arranged for the shipment of only 2 barrels of TCE to the Site among the hundreds of barrels of TCE that were disposed of at the Site. Over the years, these barrels have deteriorated and leaked TCE into the ground, and eventually into the groundwater.”)]* *[For de minimis landowners, the letter should include the following language: “In addition, an owner of the real*

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<sup>1</sup> EPA’s decision is based on information currently available and will be voided if [you or company name] have failed to disclose all information fully and accurately.

property on which the facility is located may qualify for a *de minimis* settlement if: (1) such owner did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the facility; and (2) the owner did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”]

An individual or business who resolves their Superfund liability as a *de minimis* party is not typically required to perform site cleanup. [For *de minimis* contributors, add the following: “Instead, EPA typically requires *de minimis* settlers to pay their fair share of cleanup costs incurred, plus a “premium” that accounts for, among other things, uncertainties associated with the costs of work to be performed in the future. In return, *de minimis* settlers receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against the settling party for the specific matters addressed in the settlement; and (2) contribution protection, which provides a settling party with protection from being sued by other responsible parties for the specific matters addressed in the settlement. Participation in a *de minimis* settlement means that you are settling directly with EPA.”] [For *de minimis* landowners, add the following: “Instead, EPA typically requires *de minimis* landowners to provide [insert language regarding provisions likely to be included in the settlement agreement, such as access, institutional controls, due care, cooperation and, if any, cash payment].”]

[For *de minimis* waste contributors, add the following paragraph: “EPA has designated parties contributing less than [insert pounds/gallons] of waste to the [site name] as *de minimis* waste contributors. EPA considers [you or company name] a *de minimis* party because EPA’s analysis indicates that the volume and nature of hazardous substances that you disposed of, or had disposed of, at the Site are below [insert pounds/gallons] and are, therefore, minimal compared to the other hazardous substances at the Site. Accordingly, based on currently available information, EPA believes that [you or company name] are eligible for a *de minimis* settlement.”]

[For *de minimis* landowners, add the following paragraph: “EPA has determined that [you have or company name has] demonstrated that [you or company name] satisfy all of the requirements for settlement as a *de minimis* landowner under CERCLA § 122(g). Accordingly, you are eligible to receive a *de minimis* landowner settlement.”]

### **Opportunity to Settle**

[Add the next four paragraphs if a specific settlement amount is offered in this letter: “By this letter, EPA is offering [you or company name] a *de minimis* settlement at the [site name] for the amount of [\$\_\_\_\_\_]. If [you or company name] would like to participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. In addition, please be prepared to remit payment of [\$\_\_\_\_\_] to EPA as directed in the enclosed settlement agreement. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by **[insert deadline date in bold]**, we will assume that [you or company name]

are not interested in settling at this time.”

*Unless it has already been determined that the recipients of the letter have the ability to pay the settlement amount, add the following language:* “EPA is aware that the financial ability of some PRPs to contribute toward the payment of response costs at a site may be substantially limited. If you believe and can document that [you or company name] fall within this category, please contact [insert name] at [insert phone number] for information on "Ability to Pay Settlements." You will receive a package of information about such settlements and a form to fill out with information about your finances and will be asked to submit financial records including business [and personal] federal tax returns. If EPA concludes that [you have or company name has] a legitimate inability to pay the full amount, EPA may offer a schedule for payment over time or a reduction in the principal payment.”

“Please note that some or all of the costs associated with this offer may be covered by current or past insurance policies issued to [you or company name]. Most insurance policies will require that you timely notify your carrier(s) of a claim against you. To evaluate whether [you or company name] should notify your insurance carrier(s) of this demand, you may wish to review current and past policies, beginning with the date of your or your company’s first contact with the [insert Superfund site name], up to the present. Coverage depends on many factors, such as the language of the particular policy and state law.”

“Final approval of the settlement is subject to the review of authorized EPA [*unless site costs are less than \$500,000, include the following:* and United States Department of Justice (DOJ)] officials.<sup>2</sup> If you have any questions about the [site name], EPA’s *de minimis* determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].”]

[*Add one of the following if a specific settlement amount is not offered in this letter:* “EPA intends to provide [you or company name] with a *de minimis* settlement offer at a later time. If you have any questions about the [site name], EPA’s *de minimis* determination, or anything else in this letter, please contact [insert name and number of regional contact].” or “If you would like to enter into a *de minimis* settlement with EPA, please contact [insert name and number of regional contact] before **[insert date in bold]**.”]

[*If recipient is likely a small business, insert:* “Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which

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<sup>2</sup> After final EPA [and DOJ] approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

includes information that may be helpful to small businesses.”] Thank you for your prompt attention to this matter.

Sincerely,

Enclosure(s)

Appendix B



**MODEL NOTICE APPROVING REDUCTION IN SETTLEMENT  
AMOUNT BASED ON INABILITY TO PAY**

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]  
[Address]  
[City, State, Zip Code]

Re: Results of EPA Analysis of Ability-To-Pay Claim and Offer of  
[if applicable, insert “De Minimis”] Settlement Regarding the  
[site name] in [site location]

Dear [PRP Name]:

Thank you for [your or company name] recent correspondence dated [insert date] and the information you provided regarding [your or company’s name] inability, or limited ability, to pay response costs at the [site location] (“the Site”). [If applicable, insert: “In a [insert date] letter, EPA offered to resolve [your or company’s name] potential liability at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal Superfund law. In response to that letter, [you or company name] informed EPA that you were unable to pay the settlement or “cashout” amount of [\$\_\_\_\_\_] without suffering undue financial hardship and provided EPA with written information to support [your or company’s name] financial hardship claim.”]

Based upon this financial information, EPA has determined that [you or company name] qualify for a reduction in settlement amount [if applicable, insert “and alternative payment method”]. This letter describes the results of EPA’s analysis of [your or company’s name] inability or limited ability to pay (“ATP”) claim and extends a [if applicable, insert “revised”] [if applicable, insert “de minimis party”] settlement offer to you of [\$\_\_\_\_\_]. Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold]**.

**EPA’s Analysis of ATP Claim**

EPA recognizes that some potentially responsible parties (“PRPs”) may be unable to pay the entire [if applicable, insert “de minimis”] cashout settlement amount proposed by EPA. Therefore, the Agency is willing to resolve a PRP’s liability for a reduced settlement amount



where a PRP demonstrates an inability, or limited ability, to pay. To ensure fairness among all PRPs, EPA carefully and critically considers the information provided regarding a claimant's financial situation in accordance with CERCLA § 122(g)(7) and guided by the Agency's September 30, 1997 policy on Superfund ATP determinations.<sup>1</sup>

To obtain a settlement based on an ATP claim, a PRP must show that the payment amount requested is likely to cause undue financial hardship. Such undue financial hardship may be shown when the original payment amount would deprive a party of ordinary and necessary assets or render the party unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses. When making this determination, EPA considers a party's overall financial condition and demonstrable limitations on the ability to raise revenues. EPA makes its determination based on the information provided by the party and, as necessary and appropriate, other publicly available information sources.

Based on this information, EPA has determined that [you or company name] qualify for a reduction in settlement amount [*if applicable, insert "and alternative payment method"*].<sup>2</sup> EPA has determined that you do not have sufficient cash flow, income, assets, and/or borrowing capacity to pay the full cashout amount of [\$\_\_\_\_\_] without significantly affecting [your or company's name] ability to [*for businesses, insert "continue basic business operations."*] [*for individuals, insert "meet ordinary and necessary living expenses."*] A description of the basis of our determination on [your or company's name] ATP claim is enclosed in Attachment 1.

### **Opportunity to Settle**

Because we have found [your or company's name] ATP claim valid, EPA is offering you a [*if applicable, insert "revised"*] [*if applicable, insert "de minimis"*] settlement for the [site name] for the amount of [\_\_\_\_\_]. This reduced settlement offer is [\_\_%] of EPA's original [insert date] offer.

As explained in our [insert date] letter, if [you or company name] choose to accept EPA's revised settlement offer of [\$\_\_\_\_\_], [you or company name] will receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against [you or company name] at the Site for the specific matters addressed in the settlement; and (2) contribution protection, which provides [you or company name] with protection from being sued by other

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<sup>1</sup> See EPA's "General Policy on Superfund Ability to Pay Determinations" (Sept. 30, 1997) which is available on EPA's website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

<sup>2</sup> EPA's decision is based on information currently available and will be voided if [you or company name] have failed to disclose all information fully and accurately.

responsible parties at the Site for the specific matters addressed in the settlement. Participation in this settlement means that you are settling directly with EPA.

If [you or company name] would like to accept EPA's offer of [\$\_\_\_\_\_] and participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. In addition, please be prepared to remit payment of [\$\_\_\_\_\_] to EPA as directed in the enclosed settlement agreement. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by **[insert deadline date in bold]**, we will assume that [you or company name] are not interested in pursuing a [*if applicable, insert "de minimis"*] settlement with EPA for this Site.

If [you or company name] believe that the revised settlement offer amount is still too high, [you or company name] may submit additional financial information to EPA. EPA will only consider such new information if it shows a significant change in circumstances since [your or company's name] last submission, or if it includes a potentially significant piece of information that [you or company name] did not include in your first submission.

Final approval of the settlement is subject to the review of authorized EPA [unless site costs are less than \$500,000 include the following: "and United States Department of Justice (DOJ)"] officials.<sup>3</sup> If [you or company name] have any questions about the [site name], EPA's ATP determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].

[*If recipient is likely a small business, insert: "Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), which includes information that may be helpful to small businesses."*] Thank you for your prompt attention to this matter.

Sincerely,

Enclosure(s)

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<sup>3</sup> After final EPA [and DOJ] approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

## Attachment 1

### **BASIS OF INABILITY TO PAY DETERMINATION**

[*The attachment should list:*]

**Site Name and Location**

**Name of the Party Subject to the Ability to Pay (“ATP”) Analysis**

**Party Identification Number**

**Proposed Settlement Amount**

**Documents Submitted by the ATP Candidate that Formed the Basis of the ATP Determination.** Such documents include [*list the documents provided by party*] –

- A. The Initial Inability to Pay Request
- B. Five Most Recent Years of Individual Federal Income Tax Returns or Corporate Federal Income Tax Returns
- C. Five Most Recent Years of Business Financial Statements
- D. Individual Financial Data Form or Municipal Financial Data Form or Financial Questionnaire Developed by Region
- E. Other Financial Information, including (*list all that apply*):
  - Loan Applications
  - Financial Information Relating to Businesses owned by the ATP Candidate
  - Individual or Corporate State Income Tax Returns
  - Fair Market Value of Assets Owned by the ATP Candidate
  - Insurance Policies
  - Other Sources of Funds Available to the ATP Candidate, including (list all that apply): (a) for individuals, income and assets not in the name of the ATP Candidate, but that are available to the ATP Candidate, such as income from, and assets in, trusts and other related entities as well as the

financial holdings of the ATP Candidate's spouse; (b) for businesses, financial information relating to other entities owned by the business and/or shareholders or directors of the business, financial information for a period of time greater than five years, and information that might assist in estimating the fair market value of assets, liabilities, income, and expenses of the ATP Candidate; and (c) for municipalities, annual audited financial statements; general obligation bond prospectuses, and annual budgets for [insert number] years.

**Analysis.** This section should discuss the documents submitted by the ATP Candidate and state a decision based upon the documents. For example:

“In support of [his/hers/its] inability or limited ability to pay claim, [the PRP] submitted the documents identified above. Our analysis of the submitted documentation indicates that, as of [date of latest documentation, such as latest federal tax return], [the PRP] lacks sufficient [specify any or all of the following: cash flow, income, assets, and/or borrowing capacity] to pay the entire proposed settlement amount of [ \$\_\_\_\_\_ ] without suffering undue financial hardship.]

**Conclusion.** This should be one sentence that restates the decision set forth in the analysis, such as:

“Based upon the documentation enumerated in paragraph 5 above, EPA has determined that [the PRP] is not able to pay the proposed settlement amount of [ \$\_\_\_\_\_ ] without [*for businesses*: “jeopardizing the maintenance of basic business operations.”][*for individuals*: “significantly affecting their ability to meet ordinary and necessary living expenses.”] [*Insert if PRP is able to pay a portion of the proposed settlement amount*: “However, [the PRP] is able to pay a revised settlement amount of [ \$\_\_\_\_\_ ] without having this effect.”]

## Appendix C

### **MODEL NOTICE OF INELIGIBILITY TO RECEIVE A *DE MINIMIS* PARTY SETTLEMENT**

[insert date]

#### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]

[Address]

[City, State, Zip Code]

Re: *De Minimis* Settlement at [Site Name] in [Site Location]

Dear [PRP Name]:

Thank you for your recent [insert date] correspondence requesting a settlement as a *de minimis* party at the [site name.] The United States Environmental Protection Agency (“EPA” or “the Agency”) is currently working to clean up the [site name] Site (“the Site”) located in [city, state] under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal “Superfund” law. Superfund is a program administered by EPA that is designed to clean up hazardous substances that may pose a threat to human health or the environment.

The purpose of this letter is to: (1) provide [you or company name] with information related to recent federal cleanup efforts at the [site name]; and (2) inform [you or company name] that [you do not or company name does not] qualify for a special *de minimis* party settlement at the Site to resolve potential liability that [you or company name] may have to EPA under CERCLA.

#### **Background**

[If this is EPA’s first communication to the PRP with respect to the site, include the following paragraph: “Under sections 106(a) and 107(a) of CERCLA, potentially responsible parties (“PRPs”) can be required to perform cleanup actions to protect the public health, welfare, or the environment and may also be responsible for costs incurred by EPA in performing such cleanups. PRPs include current and former owners and operators of the Site and persons who arranged for treatment and/or disposal of any hazardous substances at the Site.”]

EPA has undertaken several response actions to investigate and clean up the [site name] under the authority of the Superfund program. A brief description of the response actions taken to date follows: *[insert a brief description of site activities, such as:*

- A preliminary assessment (PA) and site investigation (SI) in order to gain a basic understanding of any risks posed by releases or threatened releases from the site to human health and the environment.
- A removal action, conducted to reduce any immediate threat to the environment or human health.
- A Remedial Investigation (RI) to identify the Site characteristics and to define the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site.
- Remedial Design and Remedial Action (RD/RA) to design and implement the EPA approved cleanup action for the Site.
- Activities to monitor, operate and maintain the cleanup action after the cleanup is completed.]

### **Eligibility for a *De Minimis* Settlement**

Based on the information EPA has collected, the Agency believes that [you or company name] are potentially liable under CERCLA as [a/an] *[insert language identifying the PRP class that the letter recipient falls into: owner/operator, generator, or transporter (e.g., “arranging for the disposal of the hazardous substance TCE”)]* at the [site name]. Under CERCLA § 122(g), whenever practicable and in the public interest, EPA may offer special settlements to parties whose waste contribution to a site is minimal in volume and toxicity, that is, *de minimis* parties. *[For de minimis landowners, the letter should include the following language: “In addition, an owner of the real property on which the facility is located may qualify for a de minimis settlement if: (1) such owner did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substances at the facility; and (2) the owner did not have actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”]*

*[For waste contributors, add the following paragraph: “EPA believes that [you or company name] are ineligible for a de minimis settlement. EPA has designated parties contributing less than [insert volume] pounds of waste to the [site name] as de minimis waste contributors. EPA does not consider [you or company name] a de minimis party because EPA’s analysis indicates that the volume and nature of hazardous substances that you disposed of, or had disposed of, at the Site are above [insert volume] pounds and are not minimal compared to the other hazardous substances at the Site.” Regions should add language about why the PRP is potentially liable and it is not a de minimis party (e.g., “Shipping receipts for the Site show that*

*you arranged for the shipment of over 20 barrels of TCE to the Site. Over the years, these barrels have deteriorated and leaked TCE into the ground, and eventually into the groundwater.”)]*

*[For landowners, add the following paragraph: “EPA believes that [you or company name] are ineligible for a *de minimis* landowner settlement because [you have or company name has] not demonstrated that [you or company name] satisfy all of the requirements for settlement as a *de minimis* landowner under CERCLA § 122(g). Accordingly, you are not eligible to receive a *de minimis* landowner settlement.” [Regions should add language about why the PRP is potentially liable and why they are not a *de minimis* party (e.g., “A review of the site history reveals that you knew of the site contamination prior to your purchase.”)]*

EPA may reconsider its determination based on the receipt of new information, such as *[for waste contributors, insert “a revised waste-in list or previously unavailable information that indicates [you or company name] sent less waste to the Site than previously identified.”] [for landowners, insert “additional evidence regarding the inquiry [you or company name] conducted prior to purchasing the property.”]* In such a case, EPA may determine that [you or company name], in fact, qualify for a *de minimis* settlement, which the Agency may offer at that time.

*[If recipient is likely a small business, insert: “Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), which includes information that may be helpful to small businesses.”]* If you have any questions about the [site name], EPA’s determination, or anything else in this letter, please contact [name, address, and phone number of regional contact]. We encourage your prompt attention and response to this matter.

Sincerely,

Enclosure(s)



Appendix D

**MODEL NOTICE DENYING REDUCTION IN SETTLEMENT  
AMOUNT BASED ON INABILITY TO PAY**

[insert date]

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[PRP Name]  
[Address]  
[City, State, Zip Code]

Re: Results of EPA Analysis of Ability-To-Pay Claim and Offer of  
[if applicable, insert “De Minimis”] Settlement Regarding the  
[site name] in [site location]

Dear [PRP Name]:

Thank you for [your or company name] recent correspondence dated [insert date] and the information you provided regarding [your or company’s name] inability, or limited ability, to pay response costs at the [site location] (“the Site”). [if applicable, insert “In a [insert date] letter, the United States Environmental Protection Agency’s (“EPA” or “the Agency”) offered to resolve [your or company’s name] potential liability at the Site under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the federal Superfund law. In response to that letter, [you or company name] informed EPA that you were unable to pay the settlement or “cashout” amount of [\$\_\_\_\_\_] without suffering undue financial hardship and provided EPA with written information to support [your or company’s name] financial hardship claim.”]

Based upon this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [if applicable, insert “or alternative payment method”]. This letter describes the results of EPA’s analysis of [your or company’s name] inability or limited ability to pay (“ATP”) claim [if applicable, insert “and renews EPA’s [if applicable, insert “de minimis”] party settlement cashout offer of [\$\_\_\_\_\_]. Details on the terms of this offer and how to accept it are provided below. Please note that the deadline for accepting the offer is **[insert deadline date in bold].”]**



## **EPA's Analysis of ATP Claim**

EPA recognizes that some potentially responsible parties (“PRPs”) may be unable to pay the entire [*if applicable, insert “de minimis”*] cashout settlement amount proposed by EPA. Therefore, the Agency is willing to resolve a PRP’s liability for a reduced settlement amount where a PRP demonstrates an inability, or limited ability, to pay. To ensure fairness among all PRPs, EPA carefully and critically considers the information provided regarding a claimant’s financial situation in accordance with CERCLA § 122(g)(7) and guided by the Agency’s September 30, 1997 policy on Superfund ATP determinations.<sup>1</sup>

To obtain a settlement based on an ATP claim, a PRP must show that the payment amount requested is likely to cause undue financial hardship. Such undue financial hardship may be shown when the original payment amount would deprive a party of ordinary and necessary assets or render the party unable to pay for ordinary and necessary business expenses and/or ordinary and necessary living expenses. When making this determination, EPA considers a party’s overall financial condition (including any applicable insurance policies) and demonstrable limitations on the ability to raise revenues. EPA makes its determination based on the information provided by the party and, as necessary and appropriate, other publicly available information sources.

Based on this information, EPA has determined that [you or company name] do not qualify for a reduction in settlement amount [*if applicable, insert “or alternative payment method”*]. EPA has determined that you have sufficient cash flow, income, assets, and/or borrowing capacity to pay [*if applicable, insert “the full cashout amount of [\$\_\_\_\_\_]”*] without significantly affecting [your or company’s name] ability to [*for businesses, insert “continue basic business operations.”*] [*for individuals, insert “meet ordinary and necessary living expenses.”*] [*If the ATP determination is based, in part, upon of the availability of insurance, insert the following: “This determination is based, in part, on the conclusion that you likely have current or past insurance policies that cover all or a portion of the cashout amount proposed by EPA. Please note that most insurance policies will require that you timely notify your carrier(s) of a claim against you.”*] A description of the basis of our determination on [your or company’s name] ATP claim is enclosed in Attachment 1.

[*If EPA is renewing an earlier settlement offer, insert the following section:*

### **Opportunity to Settle**

EPA is renewing its earlier [insert date] [*if applicable, insert “de minimis”*] settlement offer for the [site name] for the amount of [\_\_\_\_\_]. As explained in our [insert date] letter, if [you or company name] choose to accept EPA’s [*if applicable, insert “de minimis”*] settlement

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<sup>1</sup> See EPA’s “General Policy on Superfund Ability to Pay Determinations” (Sept. 30, 1997) which is available on EPA’s website at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>.

offer of [ \$\_\_\_\_\_ ], [you or company name] will receive: (1) a covenant not to sue, which is a promise that EPA will not bring any future legal action against [you or company name] at the Site for the specific matters addressed in the settlement; and (2) contribution protection, which provides [you or company name] with protection from being sued by other responsible parties at the Site for the specific matters addressed in the settlement. Participation in this settlement means that you are settling directly with EPA.

If [you or company name] would like to accept EPA's offer of [ \$\_\_\_\_\_ ] and participate in the settlement, please complete the signature page of the enclosed settlement and return the signed settlement agreement to [name and address of regional contact]. Please be prepared to remit payment of [ \$\_\_\_\_\_ ] to EPA as directed in the settlement instructions included with this settlement offer. We suggest that [you or company name] keep a copy of the entire settlement for your files. If we do not receive your signed copy by [insert deadline date in bold], we will assume that [you or company name] are not interested in pursuing a [if applicable, insert "de minimis"] settlement with EPA for this Site.

If [you or company name] continue to believe that the settlement offer amount is too high, [you or company name] may submit additional financial information to EPA. EPA will only consider such new information if it shows a significant change in circumstances since [your or company's name] last submission, or if it includes a potentially significant piece of information that [you or company name] did not include in your first submission.

Final approval of the settlement is subject to the review of authorized EPA [unless site costs are less than \$500,000 include the following: "and United States Department of Justice (DOJ)"] officials.<sup>2</sup> If [you or company name] have any questions about the [site name], EPA's ATP determination, the terms of the settlement, or how to respond to this settlement offer, please contact [name and phone number of regional contact].]

[If recipient is likely a small business, insert: "Finally, enclosed with this letter is a fact sheet about the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), which includes information that may be helpful to small businesses."] We encourage your prompt attention and response to this matter.

Sincerely,

Enclosure(s)

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<sup>2</sup> After final EPA [and DOJ] approval, EPA will publish the settlement for public comment and, barring any unforeseen circumstances, will notify you of the effective date of the settlement shortly thereafter.

**Attachment 1**

**BASIS OF INABILITY TO PAY DETERMINATION**

[*The attachment should list:*]

**Site Name and Location**

**Name of the Party Subject to the Ability to Pay (“ATP”) Analysis**

**Party Identification Number**

**Proposed Settlement Amount**

**Documents Submitted by the ATP Candidate that Formed the Basis of the ATP Determination:** Such documents include [*list the documents provided by party*] –

- A. The Initial Inability to Pay Request
- B. Five Most Recent Years of Individual Federal Income Tax Returns or Corporate Federal Income Tax Returns
- C. Five Most Recent Years of Business Financial Statements
- D. Individual Financial Data Form or Municipal Financial Data Form or Financial Questionnaire Developed by Region
- E. Other Financial Information, including (*list all that apply*):
  - Loan Applications
  - Financial Information Relating to Businesses owned by the ATP Candidate
  - Individual or Corporate State Income Tax Returns
  - Fair Market Value of Assets Owned by the ATP Candidate
  - Insurance Policies
  - Other Sources of Funds Available to the ATP Candidate, including (*list all that apply*): (a) for individuals, income and assets not in the name of the ATP Candidate, but that are available to the ATP Candidate, such as income from, and assets in, trusts and other related entities as well as the financial holdings of the ATP Candidate’s spouse; (b) for businesses,

financial information relating to other entities owned by the business and/or shareholders or directors of the business, financial information for a period of time greater than five years, and information that might assist in estimating the fair market value of assets, liabilities, income, and expenses of the ATP Candidate; and (c) for municipalities, annual audited financial statements; general obligation bond prospectuses, and annual budgets for [insert number] years.

**Analysis.** This section should discuss the documents submitted by the ATP Candidate and state a decision based upon the documents. For example:

“In support of [his/hers/its] inability or limited ability to pay claim, [the PRP] submitted the documents identified above. Our analysis of the submitted documentation indicates that, as of [date of latest documentation, such as latest federal tax return], [the PRP] has sufficient [specify any or all of the following: cash flow, income, assets, and/or borrowing capacity] to pay the entire proposed settlement amount of [\$\_\_\_\_\_] without suffering undue financial hardship.”

**Conclusion.** This should be one sentence that restates the decision set forth in the analysis, such as:

“Based upon the documentation enumerated in paragraph 5 above, EPA has determined that [the PRP] is able to pay the entire proposed settlement amount of [\$\_\_\_\_\_] without depriving you of ordinary and necessary assets or significantly affecting your ability to meet ordinary and necessary living expenses and/or pay for ordinary and necessary business expenses. EPA has determined that [the PRP] is able to pay the revised settlement amount of [\$\_\_\_\_\_] without [*for business*: “jeopardizing the maintenance of basic business operations.”][*for individuals*: “significantly affecting your ability to meet ordinary and necessary living expenses.”]