UNITED STATES DISTRICT COURT

DISTRICT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_

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UNITED STATES OF AMERICA :

[and STATE OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], :

:

Plaintiff[s], :

: Civil Action No. \_\_\_\_\_\_

v. :

:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, :

:

Defendants. :

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

**September 2014**

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| See the “Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties” (Nov. 6, 2002,), available online at <https://www.epa.gov/enforcement/guidance-settlement-policy-contribution-waiver-language-regarding-de-micromis-parties>, for the factors to consider when determining whether a party should be treated as a non-exempt de micromis party. As noted in the policy, Regions should consider offering settlements to non-exempt de micromis parties only if such parties (1) have been sued by other potentially responsible parties (PRPs) at the site, or (2) face the concrete threat of litigation from other PRPs at the site. As a general rule, a judicial consent decree should only be used if the settlor has already been named as a defendant in a contribution action, or if the United States has already initiated CERCLA litigation at the site. |

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| This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. 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 model or its internal implementing procedures. |

[NOTE: Insert explanation of procedural posture of the case. To the extent applicable, the following language may be used.]

A. The United States on behalf of the Environmental Protection Agency (EPA) filed a complaint in this matter under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (CERCLA or “Superfund”), to recover costs it has spent for the cleanup of the [**insert site name**]. The defendants sued by the United States filed contribution actions against third-party defendants, some of whom are Settlors under this Consent Decree. Settlors do not admit any liability.

B. The [**insert site name**] (“the Site”) is located at [**insert address or location**] in [**city, county, state**], and is generally [**shown on/described by**] the [**map/property description**] attached to this Consent Decree as Attachment \_\_. Under Section 104 of CERCLA, 42 U.S.C. § 9604, EPA has incurred [**approximately $**\_\_\_\_\_\_ **in**] response costs at the Site and [**will/may**] incur additional costs. EPA currently estimates that total past and future response costs at the Site, including costs of EPA and CERCLA potentially responsible parties, will be [**insert either “$**\_\_\_\_\_\_**” or “between $**\_\_\_\_\_\_ **and $**\_\_\_\_\_\_**” or “in excess of $**\_\_\_\_\_\_**”**]. Each Settlor may have contributed hazardous substances to the Site that are not in excess of [**insert number of pounds or gallons**] of materials containing hazardous substances [**or, stated as a percentage,** \_\_\_**% of the hazardous substances at the Site**] and that are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

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

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

1. Jurisdiction/Parties Bound**.** This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b) and also has personal jurisdiction over Settlors. Settlors consent to this Consent Decree and this Court’s jurisdiction to enter and enforce this Consent Decree. This Consent Decree is binding upon the United States and upon the parties who are identified in Attachment \_\_ who are signatories to this Consent Decree (“Settlors”).
2. Purpose**.** The purpose of this Consent Decree is to reach a final non-exempt de micromis party settlement with Settlors, which: a) resolves Settlors’ potential civil liability to the United States under Superfund for payment of response costs and for performance of cleanup at the Site; and b) protects Settlors from any lawsuits seeking recovery of Site cleanup costs.
3. Certification**.** Each Settlor certifies that to the best of its knowledge it: a) has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, if any, that relates in any way to the generation, treatment, transportation, storage, or disposal of a hazardous substance at or in connection with the Site; b) has not altered, destroyed, or disposed of any records, reports, documents, or other information (including records, reports, documents, or other information in electronic form) (other than identical copies) relating to its potential liability at the Site since notification of potential liability by the United States or the State; and c) has and will fully comply with any and all EPA and state requests for information concerning the Site pursuant to Sections 104(e) and 122(e)(3)(B) and (g)(8) of CERCLA, 42 U.S.C. §§ 9604(e)(3)(B) and 9622(e) and (g)(8), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.
4. United States’ Covenant Not to Sue. In consideration of Settlors’ agreement to this Consent Decree, and except as specifically provided in Paragraph 5, the United States covenants not to sue or take administrative action against Settlors under Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,] [[1]](#footnote-1) relating to the Site.[[2]](#footnote-2) These covenants shall take effect on the effective date as defined by Paragraph 9.
5. United States’ Reservations of Rights**.** The United States reserves the right to seek additional relief from any Settlor: (a) if information is discovered indicating that such Settlor’s contribution of hazardous substances to the Site is of such greater amount or of such greater toxic or other hazardous effect that it no longer qualifies for settlement under the criteria stated in Paragraph B; or (b) after signing this Consent Decree, such Settlor becomes an owner or operator of the Site or undertakes any activity with regard to hazardous substances or solid wastes at the Site. The United States also reserves all rights that it may have as to any matter relating in any way to the Site against any person who is not a party to this Consent Decree.
6. Settlor’s Covenant Not to Sue. Settlors covenant not to sue and agree not to assert any claims against the United States or its contractors or employees with respect to the Site or this Consent Decree. Settlors also agree not to assert and to waive all claims with respect to the Site against each other or against any other person who is a potentially responsible party under CERCLA at the Site, provided, however, that this waiver shall not apply with respect to any defense, claim, or cause of action that a Settlor may have against any person if such person asserts a claim or cause of action relating to the Site against such Settlor. [**NOTE: If a Settlor asserts that it has a claim against a PRP within the scope of this waiver that is unrelated to the PRP’s de micromis CERCLA liability at the Site, e.g., a claim for contractual indemnification, insert exception for such claim to end of proviso, such as:** , and provided further that this waiver shall not apply to Settlor [**insert name**]’s contractual indemnification claim against [**insert name**].]
7. Contribution Protection**.** The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree is a judicially-approved settlement under which each Settlor has, as of the effective date as defined by Paragraph 9, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), and is entitled, as of the effective date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken and to be taken and all response costs incurred and to be incurred, at or in connection with the Site, by the United States or by any person (except for the state), except for those limited areas in Paragraph 5 for which the United States has reserved its rights.
8. Contribution Rights. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree is a judicially-approved settlement pursuant to which each Settlor has, as of the effective date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).
9. Public Comment/Effective Date. The United States will lodge this Consent Decree with the Court for a period of at least 30 days for public notice and comment. Provided that the United States does not withdraw the Consent Decree following such public notice and comment, this Consent Decree shall be effective on the date of entry by this Court.
10. Service. For all matters relating to this Consent Decree, each Settlor will personally receive service of process by mail sent to the name and address provided on the attached signature page, unless such Settlor provides the name and address of an agent for service of process on the attached signature page. Settlors agree to accept service in this manner and to waive the formal service requirements of Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.
11. Final Judgment. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settlors. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

United States District Judge

Signature Page for Consent Decree regarding the \_\_\_\_\_\_ Superfund Site

FOR THE UNITED STATES OF AMERICA

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

[Name]

Assistant Attorney General

Environment and Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

United States Attorney

[Address]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

Attorney

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

P.O. Box 7611

Washington, DC 20044-7611

Signature Page for Consent Decree regarding the \_\_\_\_\_\_ Superfund Site

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

Regional Administrator, Region \_\_

U.S. Environmental Protection Agency

[Address]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

Assistant Regional Counsel

U.S. Environmental Protection Agency

[Address]

Signature Page for Consent Decree regarding the \_\_\_\_\_\_ Superfund Site

**FOR** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_:

[Print name of Settlor]

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

[Name and address of Settlor or Settlor’s signatory]

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

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

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

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

[NOTE: A separate signature page must be signed by each settlor.]

1. If including a RCRA § 7003 covenant, pursuant to Section 7003(d) of RCRA, you must offer to have a public meeting regarding the settlement and hold such a meeting if requested. To do this, please include language in the Federal Register notice providing for an opportunity for a public meeting in the affected area. For guidance regarding how to comply with this requirement, see “Revised Model Notice Language for Compliance with Public Participation Requirements of Section 7003(d) of RCRA” (Oct. 30, 1996), available at <https://www.epa.gov/enforcement/guidance-model-language-compliance-public-participation-requirements-under-rcra-section>. [↑](#footnote-ref-1)
2. The federal natural resource trustees have agreed to waive the natural resource damage claim against de micromis settlors whose monetary consideration is $1.00 or less, subject to a right to withdraw that consent in a given case. The Region should notify the trustees as early in the process as possible after it has decided to develop a de micromis settlement offer and must give potentially interested federal trustees 30 days to review the proposed settlement prior to EPA’s signing it. (The 30 days may run concurrently with the period given to the de micromis parties to review and sign the proposed settlement.) Unless a trustee objects within the 30-day period (or an enlarged time period agreed to by the Region and the trustee), the trustee’s generic waiver of natural resource claims applies. This process was outlined in the “Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors” (June 3, 1996, p. 10), available to EPA employees at <http://intranet.epa.gov/oeca/docket/ec-2003-053/cercla-sett-rpt.pdf>. Although this guidance was superseded by the “Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties,” (Nov. 6, 2002)**,** available online at <https://www.epa.gov/enforcement/guidance-settlement-policy-contribution-waiver-language-regarding-de-micromis-parties>, the trustee review process is still in effect. [↑](#footnote-ref-2)