Editor's Note: The discussion in this document concerning prospective purchaser agreements (PPAs) is superseded by the 5/24/1995 Guidance on Agreements with Prospective Purchasers of Contaminated Property. The model documents included in the 1989 policy are superseded by the 9/26/2014 issuance of the a model Administrative Settlement Agreement and Order on Consent (ASAOC) and the model Consent Decree for De Minimis Landowners under CERCLA Section 122(g)(4). The current versions of the models are available on the Cleanup Enforcement Model Language and Sample Documents Database at http://cfpub.epa.gov/compliance/models/.
Note added: 1/12/2015

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

9835.9

JUN 6 1989

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
Acting Assistant Administrator for
Enforcement and Compliance Monitoring

Jonathan Z. Cannon
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

9835.9

JUN 6 1989

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

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

9835.9

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

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. §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.[1] 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.

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[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 Administrative 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.[2] 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 substances at the facility.

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[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. 1988), 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. Northernaire, 670 F. Supp 742, 748 (W.D. Mich. 1987), United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

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 Corp., 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.[3] 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.

Section 107(b)(3).

Before SARA, the Agency took the position that a real estate deed represented a contractual relationship within the meaning

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[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).

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.[4]

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 the 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

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[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).

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.

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;" [5](ii) "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility;" [6]and (iii)

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[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

"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).[7]

The requirements which 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).[8] Section

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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.

[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

122(g)(1)(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

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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 the 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, or 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.

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."

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." [9] 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

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[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.

deemed to have constructive knowledge under Section 122(g)(1)(B) and, therefore, may be eligible for a de minimis settlement.[10]

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 the 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

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[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. Northernaire, 670 F. Supp. 742, 748 (W.D. Mich. 1987).

for personal use.[11] 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.[12] In sum, the determination will be made on the basis of what is reasonable under all of the circumstances.

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,

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[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 Cong., 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 judgment 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.

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.[13] 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)(ii) excepts from the definition of "contractual relationship" acquisitions by governmental entities which occur by condemnation or purchase[14] in connection with the exercise of eminent domain authority, or involuntarily through escheat or any other such involuntary transfer or acquisition. State and local governments who acquire property involuntarily are by definition not owners or operators under Section 101(20)(D), as long as they have not caused or contributed to the

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13 See United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, (D. Md. 1986); United States v. Mirabile, 15 Envtl. 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).

release.[15] 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.[16] 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.[17]

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

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[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).

> 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.[18]

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

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[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 the 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."

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.

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 documentation 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 probability 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 assurances. 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 under 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 Fed. 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.[19] The Agency shall also require that the purchaser file in the local land records a notice acceptable to EPA, stating that hazardous substances were

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[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. 2005, 99th Cong., 2d Sess., p. 187.

disposed of on the site and that EPA makes no representation as to the appropriate use of the property.[20] 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.

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 for civil claims seeking injunctive relief under Section 106 of CERCLA and Section 7003 or RCRA[21] or cost recovery under Section 107(a) of CERCLA with regard to the facility when the Agency determines that such a covenant is in the public

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

[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.

interest.[22] 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.[23]

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 form the landowner, including the filing and enforcement of a federal lien,[24] 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

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

[23] In accordance with Section 122(j)(1) 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.

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

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 by case basis.

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.[25] 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

[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)."

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 designeee ("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 Deparment of Justice with consultation by the AA-OECM and the AA-OSWER. All de minimus consent decrees will be subject to a thirty-day comment period after lodging.

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.[26] 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.[27]

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

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[26] More detailed procedures 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.

clean-up. A prospective purchaser may participate in cleanup either through the payment of a substantial sum of money[28] 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

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[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.

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.

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 persons 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 uses 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 form 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 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 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 the 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, the AA-OSWER, and the Attorney General), and, where appropriate, the current owner of the facility.[29]

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.[30] However, the consideration may take the form of a removal, or if a Record of

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[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.

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 Substance 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.[31] 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.

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

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[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(l), 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(l)(E).

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 interference 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 administrate settlements under Section 122(g)(4).[32] 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

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[32] See supra note 26.

9835.9

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

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 definitions 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, 42 U.S.C. 9601(9).

2. Respondent is a "person" as that term is defined in Section 101(21) 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 excercise 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 a 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(l) of CERCLA, 42 U.S.C. 9622(l). [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 and 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 or 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 any subsequent proceedings, other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations contained in this Consent 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 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 Reauthorizatio Act of 1986 ("CERCLA"), Pub. L. No. 99-499, 42 U.S.C. 9606 and 9607(a), and Section 7003 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 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, 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 a 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(l) of CERCLA, 42 U.S.C. 9622(l). [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 very 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, Paragraphs 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 ability 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).

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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

By: _____

[Defendant]

By: _____

SO ORDERED this ____ day of _____, 19__.

[Name]

[Date]