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Dated: November 27, 1995.

William H. Sanders III,  
Director, Office of Pollution Prevention and Toxics.

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[FRL-5340-6]

**Superfund Program; Revised Model De Minimis Contributor Consent Decree and Administrative Order on Consent**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** The Agency is publishing today the revised "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree" and the revised "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent." These models, developed by the Agency and the U.S. Department of Justice, supersede the "Interim Model CERCLA Section 122(g)(4) *De Minimis* Waste Contributor Consent Decree and Administrative Order on Consent" issued on October 19, 1987, and published at 52 FR 43,393 (November 12, 1987). They are designed as

guidance for Agency and Department staff when negotiating CERCLA Section 122(g)(1)(A) *de minimis* contributor settlements. The Agency is publishing the models in their entirety, along with the September 29, 1995 joint memorandum of the EPA and the U.S. Department of Justice announcing their issuance, to inform affected members of the public of their existence and content.

**FOR FURTHER INFORMATION CONTACT:**

Janice C. Linett, Mail Code 2272, Office of Enforcement and Compliance Assurance, Regional Enforcement Division, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 260-7116.

Dated: October 26, 1995.

Susan Brown,  
Acting Director, Office of Site Remediation Enforcement.

September 29, 1995.

**MEMORANDUM**

**SUBJECT:** Issuance of Revised "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent"  
**FROM:** Jerry Clifford, Director, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency, Bruce S. Gelber, Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice  
**TO:** Regional Counsel, Regions I-X, Regional Waste Management Division Directors, Regions I-X, Financial Management Officers, Regions I-X, Assistant Chiefs, Environmental Enforcement Section

We are pleased to issue the revised "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Consent Decree" and the revised "Model CERCLA Section 122(g)(4) *De Minimis* Contributor Administrative Order on Consent." These models supersede the "Interim Model CERCLA Section 122(g)(4) *De Minimis* Waste Contributor Consent Decree and Administrative Order on Consent" issued on October 19, 1987, and published at 52 Fed. Reg. 43,393 (1987). They represent the latest thinking on CERCLA Section 122(g)(1)(A) *de minimis* contributor settlements and are the product of years of experience gained in administering the *de minimis* settlement provisions of CERCLA. These revised models are needed to implement the early *de minimis* expedited settlement pilots that are part of the Superfund Administrative Reforms initiative and will provide valuable tools in fostering *de minimis* settlements in general.

These models are to be used as guidance by EPA and DOJ staff when negotiating *de minimis* contributor settlements. We encourage our staffs to adhere to them as closely as possible so as to conform with current settlement practices and procedures. We believe use of the models will help expedite negotiation of *de minimis* settlements, increase fairness and national consistency, and streamline review and approval of *de minimis* consent decrees and consent orders. When seeking approval of any settlement based upon one of these models, staff should identify any significant deviation from the relevant model and the basis for the departure. For DOJ staff, these models are available electronically on the Section's work product directory, EESINDEX, as N: \NET\SS52\UDD\EESINDEX\CERMODEL\122G4.CD or 122G4.AOC.

We would like to thank all EPA and DOJ staff who assisted in the development of these models. If you have any questions about the models, please contact Janice Linett of the Regional Support Division (RSD) at (703) 978-3057 or Tom Mariani of the Environmental Enforcement Section (EES) at (202) 514-4620. The EPA Regions may address questions about case-specific matters to the RSD attorney assigned to the case. DOJ staff should direct questions about case-specific matters to their senior attorneys or Assistant Chief or to Tom Mariani, Joe Hurley, or Mike Goodstein, EES' *de minimis* settlement coordinators.

**Attachments**

cc: Lawrence E. Starfield, Acting Associate General Counsel, Solid Waste and Emergency Response Division  
Stephen D. Luftig, Director, Office of Emergency and Remedial Response  
Jack L. Shipley, Director, Financial Management Division  
Letitia Grishaw, Chief, Environmental Defense Section

United States Environmental Protection Agency and United States Department of Justice Model Cercla Section 122(g)(4) *De Minimis* Contributor Consent Decree and Administrative Order on Consent

These models and any internal procedures adopted for their implementation and use are intended as guidance for employees of the U.S. Department of Justice and U.S. Environmental Protection Agency. They do not constitute rulemaking by the Department or Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The

Department or Agency may take action at variance with these models or their internal implementing procedures.

Model Cercla Section 122(g)(4) De Minimis Contributor Consent Decree

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Model Cercla Section 122(G)(4) De Minimis Contributor Consent Decree

In the United States District Court for the District of [\_\_\_\_\_] [\_\_\_\_\_] Division<sup>1</sup>

United States of America, Plaintiff, v. [Defendants] Defendants.

[Civil Action No. \_\_\_\_\_]

Judge \_\_\_\_\_

Consent Decree

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

I. Background

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to [[insert causes of action and relief sought, e.g., "Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, seeking injunctive relief regarding the cleanup of the [insert site name] in [insert City, County, State] ("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"]].

B. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. 9604, and will

undertake response actions in the future. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site.

[Note: Insert brief description of response actions undertaken at the site to date by EPA or private parties, noting whether a removal, RI/FS or ROD(s) have been completed. Describe briefly any previous settlements for performance of work or recovery of costs. Note whether further response action is planned.]

C. The Regional Administrator of EPA, Region \_\_\_\_\_, or his/her delegatee, has determined the following:

1. prompt settlement with each Settling Defendant is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1);

2. the payment to be made by each Settling Defendant under this Consent Decree involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1), based upon EPA's estimate that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by private parties is [insert either "\$ \_\_\_\_\_" or "between \$ \_\_\_\_\_ and \$ \_\_\_\_\_"]; and

3. the amount of hazardous substances contributed to the Site by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. 9622(g)(1)(A). This is because [[insert volume and toxicity criteria used to qualify as a *de minimis* party under this consent decree, e.g.: "the amount of hazardous substances contributed to the Site by each Settling Defendant does not exceed [insert either "\_\_\_\_\_% of the hazardous substances at the Site," or "\_\_\_\_\_ pounds/gallons of materials containing hazardous substances,"] and the hazardous substances contributed by each Settling Defendant to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site."]]

[Note: Where practicable, an attachment listing the volume and general nature of the hazardous substances contributed to the site by each settling defendant, to the extent available, may be included as an appendix. The total estimated volume of hazardous substances at the site should be noted on the attachment, if one is used.]

D. The Settling Defendants do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

E. The United States and Settling Defendants agree that settlement 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 with respect to Settling Defendants.

Therefore, with the consent of the Parties to this Consent Decree, it is ordered, adjudged, and decreed:

II. Jurisdiction

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331 and 1345 and 42 U.S.C. 9613(b), and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. Parties Bound

2. This Consent Decree is binding upon the United States and upon Settling Defendants and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of a Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

IV. Statement of Purpose

[Note: As drafted, this Statement of Purpose assumes that all settling defendants are making a cash payment, which includes a premium amount, in exchange for a full and final settlement with the United States for all civil liability under CERCLA Sections 106 and 107 with respect to the site as a whole. This Statement of Purpose will need to be amended if the settlement is of narrower scope with respect to some or all settling defendants because, e.g., it relates to only one operable unit, or it includes a reservation of rights for cost overruns. When using this or any other Statement of Purpose, be sure that it is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of "matters addressed" in the Contribution Protection provision.]

3. By entering into this Consent Decree, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. 9622(g), that allows Settling Defendants to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606

<sup>1</sup> Follow local rules for caption format.

and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; and

c. to obtain settlement with Settling Defendants for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by private parties, to provide for full and complete contribution protection for Settling Defendants with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5).

#### V. Definitions

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601, *et seq.*

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. 9507.

f. "Interest" shall mean interest at the current rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. 9507, compounded annually on

October 1 of each year, in accordance with 42 U.S.C. 9607(a).<sup>2</sup>

g. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

h. "Parties" shall mean the United States and the Settling Defendants.

i. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. 9601(25).

j. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

k. "Settling Defendants" shall mean those persons, corporations or other entities listed in Appendix A.

l. "Site" shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_\_ acres, located at [insert address or description of location] in [insert City, County, State] and [insert either "depicted more clearly on the map attached as Appendix B" or "designated by the following property description: \_\_\_\_\_."]

m. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### VI. Payment

5. Within 30 days of entry of this Consent Decree, each Settling Defendant shall pay to the EPA Hazardous Substance Superfund [insert either "the amount set forth below" or "the amount set forth in Appendix C to this Consent Decree"].

6. Each Settling Defendant's payment includes an amount for: (a) Past response costs incurred at or in connection with the Site; (b) projected future response costs to be incurred at or in connection with the Site; and [insert, if a premium is included in the settlement, "(c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any private party, will exceed the estimated total response costs upon which Settling Defendants' payments are based."]

[Note: If some settling defendants are paying a premium and some are not, Paragraph 6 will need to be redrafted to indicate that

<sup>2</sup>The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

there are both premium and non-premium settling defendants.]

7. Each payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number \_\_\_\_\_ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and DOJ Case Number \_\_\_\_\_ and shall be sent to: EPA Superfund.

[Insert Regional Superfund lockbox number and address]

8. At the time of payment, each Settling Defendant shall send notice that such payment has been made to: Chief, Environmental Enforcement Section, United States Department of Justice, DJ No. \_\_\_\_\_, P.O. Box 7611, Washington, D.C. 20044-7611.

[Insert name and address of Regional Financial Management Officer and any other receiving officials at EPA or DOJ]

[Note on Requiring one Collective Payment: If the settlement involves a large number of settling defendants, it may be appropriate to include alternative instructions under which the settling defendants are to establish a short-term trust or escrow account to receive their individual payments and to make one collective payment to the Superfund at the address noted in Paragraph 7. In such event, the cost of the trust or escrow account may be funded from interest earned by the account or through other appropriate means.]

[Note on use of Special Account payments: Payments made under Paragraph 7 may be placed in the Hazardous Substance Superfund to offset the United States' past response costs at the site, or may be placed in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a "reimbursable account") to be retained and used for future response action at the site. If the negotiating team believes that a site-specific special account is appropriate, the consent decree should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund to defray the United States' past costs and which portion of the payment is to be retained in a special account for future response action at the site. The instructions must include that any funds remaining in the special account after completion of the response action will be transferred to the Hazardous Substance Superfund. Sample instructions to be included at the end of Paragraph 7 are as follows (the address for payment stated in Paragraph 7 is correct for both Trust Fund and special account payments and should not be amended):

"Of the total amount to be paid pursuant to this Consent Decree, [\$ \_\_\_\_\_, or '\_\_\_\_\_%'] shall be deposited in the EPA Hazardous Substance Superfund as

reimbursement for response costs incurred at or in connection with the Site as of [insert date] by the EPA Hazardous Substance Superfund, and ['\$\_\_\_\_\_ or '\_\_\_\_\_%' or 'the remainder'] shall be deposited in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance the response action at or in connection with the Site. Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund." ]]

#### VII. Failure To Make Payment

9. If any Settling Defendant fails to make full payment within the time required by Paragraph 5, that Settling Defendant shall pay interest on the unpaid balance. In addition, if any Settling Defendant fails to make full payment as required by Paragraph 5, the United States may, in addition to any other available remedies or sanctions, bring an action against that Settling Defendant seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

#### VIII. Certification of Settling Defendant

10. By signing this Consent Decree, each Settling Defendant certifies, individually, that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e) [insert, if applicable, "and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. 6927" ].

#### IX. Covenant Not To Sue by United States

11. In consideration of the payments that will be made by Settling Defendants

under the terms of this Consent Decree, and except as specifically provided in Section X (Reservations of Rights by United States), the United States<sup>3</sup> covenants not to sue or take administrative action against any of the Settling Defendants pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973,]<sup>4</sup> relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each Settling Defendant upon receipt of that Settling Defendant's payment as required by Section VI of this Consent Decree. With respect to each Settling Defendant, individually, this covenant not to sue is conditioned upon: (a) The satisfactory performance by Settling Defendant of all obligations under this Consent Decree; and (b) the veracity of the information provided to EPA by Settling Defendant relating to Settling Defendant's involvement with the Site. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

#### X. Reservations of Rights by United States

12. The covenant not to sue by the United States set forth in Paragraph 11 does not pertain to any matters other than those expressly specified in Paragraph 11. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters including, but not limited to, the following:

- a. Liability for failure to meet a requirement of this Consent Decree;
- b. Criminal liability;
- c. Liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;<sup>5</sup> or

<sup>3</sup> If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue.

<sup>4</sup> Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

<sup>5</sup> The natural resource damages reservation in Paragraph 12(c) must be included unless the Federal Natural Resource Trustee[s] has/have 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 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[s] of the negotiations and

d. liability arising from the future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the date of lodging of this Consent Decree.

13. Notwithstanding any other provision in this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings against any individual Settling Defendant in this action or in a new action or to issue an administrative order to any individual Settling Defendant seeking to compel that Settling Defendant to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if:

a. information is discovered which indicates that such Settling Defendant contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Settling Defendant no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Section I, Paragraph C(3), e.g., "Settling Defendant contributed greater than \_\_\_\_\_% of the hazardous substances at the Site, or contributed hazardous substances which are significantly more toxic or are of significantly greater hazardous effect than other hazardous substances at the Site"]; or

[Note: The cost overrun reopener in Paragraph 13(b) below should only be included with respect to any settling defendant who is not paying a premium in lieu of this reopener.]

[[b. total response costs at or in connection with the Site exceed \$\_\_\_\_\_ [insert dollar amount of cost ceiling]].

[[Note: If some settling defendants are paying a premium in lieu of the cost overrun reopener and some are not, insert: "This Paragraph 13(b) shall not apply to those Settling Defendants identified [insert "in Paragraph \_\_\_\_\_" or "in Appendix \_\_\_\_\_"] who have elected to pay a premium amount pursuant to Paragraphs 5 and 6.]]

#### XI. Covenant not to Sue by Settling Defendants

14. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Decree including, but not limited to:

a. Any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of

\_\_\_\_\_ encourage the Trustee[s] to participate in the negotiations.

CERCLA, 42 U.S.C. 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. Any claim arising out of response activities at the Site;<sup>6</sup> and

c. Any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, relating to the Site.<sup>7</sup>

15. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. 9611, or 40 CFR 300.700(d).

16. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against each other with regard to the Site<sup>8</sup> pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. 9607 and 9613.

#### XII. Effect of Settlement/Contribution Protection

17. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The United States and Settling Defendants each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

18. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling

<sup>6</sup>If the consent decree does not resolve settling defendants' liability for the site as a whole, the scope of Paragraph 14(b) and (c) may be narrowed to conform to the scope of the United States' covenant not to sue. For example, if the consent decree resolves settling defendants' liability for defined "Past Response Costs" and for a defined "Operable Unit I," Paragraph 14(b) and (c) could be limited to "any claim arising out of response actions at the Site for which the Past Response Costs were incurred and any claim arising out of Operable Unit I."

<sup>7</sup>The settlement should, wherever possible, release or resolve any claims by settling defendants against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

<sup>8</sup>If the consent decree does not resolve settling defendants' liability for the site as a whole, the scope of settling defendants' covenant not to sue each other may be narrowed so as to conform to the scope of the United States' covenant.

Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 11.

19. The Parties agree, and by entering this Consent Decree this Court finds, that each Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are [all response actions taken and to be taken by the United States and by private parties, and all response costs incurred and to be incurred by the United States and by private parties, at or in connection with the Site.]<sup>9</sup>

#### XIII. Retention of Jurisdiction

20. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### XIV. Integration/Appendices

21. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached and incorporated into this Consent Decree:

"Appendix A" is [the list of Settling Defendants].

"Appendix B" is [the map of the Site].

"Appendix C" is [the payment schedule].

[Note: List any additional appendices.]

#### XV. Public Comment

22. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States shall file with the Court any written comments

<sup>9</sup> This definition of "matters addressed" assumes that this consent decree is designed to resolve fully settling defendants' liability at the site. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

received and the United States' response thereto. The United States reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendants consent to entry of this Consent Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

#### XVI. Effective Date

23. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 22.

#### XVII. Signatories/Service

24. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or [his/her] delegatee, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such party to this document.

25. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

26. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court.

27. Contemporaneous with the filing of the complaint in this action, the United States shall file a stipulation or motion for an extension of time to answer the complaint in favor of each Settling Defendant, which extension shall run until 30 days after the United States withdraws or withholds its consent pursuant to Section XV (Public Comment) or the Court declines to enter this Consent Decree.

So order this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

United States District Judge

The Undersigned Parties enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the [insert site name and location]:

For the United States of America
Date: \_\_\_\_\_

[Name]
Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530

[Name]
United States Attorney, [Address]

[Name]
Attorney, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044-7611

[Name]
Regional Administrator, Region [ ], U.S. Environmental Protection Agency.
[Address]

[Name]
Assistant Regional Counsel, U.S. Environmental Protection Agency.
[Address]

The Undersigned Party enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR DEFENDANT [ ]
Date: \_\_\_\_\_

[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:
Name: \_\_\_\_\_
Title: \_\_\_\_\_
Address: \_\_\_\_\_

Model CERCLA Section 122(g)(4) De Minimis Contributor, Administrative Order on Consent

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Model CERCLA Section 122(g)(4) De Minimis Contributor, Administrative Order on Consent

[U.S. EPA Docket No. \_\_\_\_\_]

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).

I. Jurisdiction

1. This Administrative Order on Consent ("Consent Order" or "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 ("CERCLA"), 42 U.S.C. 9622(g)(4), to reach settlements in actions under Section 106 or 107 of CERCLA, 42 U.S.C. 9606 or 9607. 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 FR 2923 (Jan. 29, 1987), and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E [insert reference to Regional redelegation, if any].

2. This Administrative Order on Consent is issued to the persons, corporations, or other entities identified in Appendix A ("Respondents"). Each Respondent agrees to undertake all actions required by this Consent Order. Each Respondent further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

3. EPA and Respondents agree that the actions undertaken by Respondents in accordance with this Consent Order do not constitute an admission of any liability by any Respondent. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Order, the validity of the Statement of Facts or Determinations contained in Sections IV and V, respectively, of this Consent Order.

II. Statement of Purpose

[Note: As drafted, this Statement of Purpose assumes that all respondents are making a cash payment, which includes a premium amount, in exchange for a full and final settlement with EPA for all civil liability under CERCLA Sections 106 and 107 with respect to the site as a whole. This Statement of Purpose will need to be amended if the

settlement is of narrower scope with respect to some or all respondents because, e.g., it relates to only one operable unit, or it includes a reservation of rights for cost overruns. When using this or any other Statement of Purpose, be sure that the provision is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of "matters addressed" in the Contribution Protection provision.]

4. By entering into this Consent Order, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. 9622(g), that allows Respondents to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a [substantial] number of potentially responsible parties from further involvement at the Site; and

c. to obtain settlement with Respondents for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by private parties, to provide for full and complete contribution protection for Respondents with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5).

III. Definitions

5. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Order, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601, et seq.

b. "Consent Order" or "Order" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, the Order shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day

would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. 9507.

f. "Interest" shall mean interest at the current rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).<sup>1</sup>

g. "Paragraph" shall mean a portion of this Consent Order identified by an arabic numeral.

h. "Parties" shall mean EPA and the Respondents.

i. "Respondents" shall mean those persons, corporations, or other entities listed in Appendix A.

j. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. 9601(25).

k. "Section" shall mean a portion of this Consent Order identified by a roman numeral.

l. "Site" shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_\_ acres, located [insert address or description of location] in [insert City, County, State] and [insert either "depicted more clearly on the map attached as Appendix B" or "designated by the following property description: \_\_\_\_\_."]

m. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### IV. Statement of Facts

6. [In one or more paragraphs, insert site name, location, description, NPL status and brief statement of historical hazardous substance activity at the site.]

7. Hazardous substances have been or are threatened to be released at or from the Site.

[Note: Additional information about specific hazardous substances present on- or off-site may be included.]

8. As a result of the release or threatened release of hazardous

substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. 9604, and will undertake response actions in the future.

[Note: Insert brief description of response actions undertaken at the site to date by EPA or private parties, noting whether a removal, RI/FS or ROD(s) have been completed. Describe briefly any prior settlements for performance of work at the site. Note whether further response action is planned.]

9. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site.

[Note: The dollar amount of costs incurred as of a specific date should be included. Describe briefly any previous cost recovery settlements under which any of these costs have been reimbursed to EPA by site PRPs.]

10. [Identify each respondent and its relationship to the site. If respondents are numerous, state generally that "Each Respondent listed on Appendix A arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by such Respondent, by any other person or entity, at the Site, or accepted a hazardous substance for transport to the Site which was selected by such Respondent."]

11. [[In one or more paragraphs, present in summary fashion the factual basis for EPA's determination in Section V below that the amount of hazardous substances contributed to the site by each respondent and the toxic or other hazardous effects of the substances contributed to the site by each respondent are minimal in comparison to other hazardous substances at the site. The language will vary depending upon the criteria established for the particular settlement. An example follows:

"The amount of hazardous substances contributed to the Site by each Respondent does not exceed [insert either "\_\_\_\_\_% of the hazardous substances at the Site," or "\_\_\_\_\_ pounds/gallons of materials containing hazardous substances,"] and the hazardous substances contributed by each Respondent to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site."]

[Note: Where practicable, an attachment listing the volume and general nature of the hazardous substances contributed to the site by each respondent, to the extent available, may be included as an appendix. The total estimated volume of hazardous substances at

the site should be noted on the attachment, if one is used.]

12. EPA estimates that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by private parties is [insert either "\$\_\_\_\_\_" or "between \$\_\_\_\_\_ and \$\_\_\_\_\_"]. The payment required to be made by each Respondent pursuant to this Consent Order is a minor portion of this total amount.

[Note: The dollar figure inserted should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the site. The response cost estimate should include United States and private party costs.]

#### V. Determinations

13. Based upon the Statement of Facts set forth above and on the administrative record for this Site, EPA has determined that:

a. The [insert site name] site is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. 9601(9).

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

c. Each Respondent is a "potentially responsible party" within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

d. There has been an actual or threatened "release" of a "hazardous substance" from the Site as those terms are defined in Section 101(22) and (14) of CERCLA, 42 U.S.C. 9601(22) and (14).

e. The actual or threatened "release" caused the incurrence of response costs.

f. Prompt settlement with each 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).

g. As to each Respondent, this Consent Order involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. 9622(g)(1).

h. The amount of hazardous substances contributed to the Site by each Respondent and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Respondent are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. 9622(g)(1)(A).

[Note: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the site are not expected to exceed \$500,000, insert the following Paragraph 13(i).]

<sup>1</sup> The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Superfund Accounting Branch, at (202) 260-6465.

[i. The total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.]

#### VI. Order

14. Based upon the administrative record for the Site and the Statement of Facts and Determinations set forth above, and in consideration of the promises and covenants set forth herein, the following is hereby agreed to and ordered:

#### VII. Payment

15. Within 30 days of the effective date of this Consent Order, each Respondent shall pay to the EPA Hazardous Substance Superfund [insert either: "the amount set forth below" or "the amount set forth in Appendix C to this Consent Order"].

16. Each Respondent's payment includes an amount for: (a) past response costs incurred at or in connection with the Site; (b) projected future response costs to be incurred at or in connection with the Site; and [insert, if a premium is included in the settlement, "(c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any private party, will exceed the estimated total response costs upon which Respondents' payments are based."]

[Note: If some respondents are paying a premium and some are not, Paragraph 16 will need to be redrafted to indicate that there are both premium and non-premium settling respondents.]

17. Each payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number \_\_\_\_\_ [insert 4-digit number, first 2 numbers represent the Region (01-10), second 2 numbers represent the Region's Site/Spill Identification number], and the EPA docket number for this action, and shall be sent to:

EPA Superfund  
[Insert Regional Superfund lockbox number and address]

18. At the time of payment, each Respondent shall send notice that such payment has been made to:

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

[Note on Requiring One Collective Payment: If the settlement involves a large number of respondents, it may be appropriate to include alternative instructions under which the respondents are to establish a short-term trust or escrow account to receive their individual payments and to make one collective payment to the Superfund at the address noted in Paragraph 17. In such event, the cost or the trust or escrow account may be funded from interest earned by the account or through other appropriate means.]

[Note on Use of Special Account Payments: Payments made under Paragraph 17 may be placed in the Hazardous Substance Superfund to offset the United States' past response costs at the site, or may be placed in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a "reimbursable account") to be retained and used for future response action at the site. If the negotiating team believes that a site-specific special account is appropriate, the consent order should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund to defray the United States' past costs and which portion of the payment is to be retained in a special account for future response action at the site. The instructions must include that any funds remaining in the special account after completion of the response action will be transferred to the Hazardous Substance Superfund. Sample instructions to be included at the end of Paragraph 17 are as follows (the address for payment stated in Paragraph 17 is correct for both Hazardous Substance Superfund and special account payments and should not be amended):

"Of the total amount to be paid pursuant to this Consent Order, ['\$ \_\_\_\_\_' or '\_\_\_\_\_ %'] shall be deposited in the EPA Hazardous Substance Superfund as reimbursement for response costs incurred at or in connection with the Site as of [insert date] by the EPA Hazardous Substance Superfund, and ['\$ \_\_\_\_\_' or '\_\_\_\_\_ %' or 'the remainder'] shall be deposited in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance the response action at or in connection with the Site. Any balance remaining in the [Insert Site Name] Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund."

#### VIII. Failure to Make Payment

19. If any Respondent fails to make full payment within the time required by Paragraph 15, that Respondent shall pay Interest on the unpaid balance. In addition, if any Respondent fails to make full payment as required by Paragraph 15, the United States may, in addition to any other available remedies or sanctions, bring an action against that Respondent seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. 9622(l), for failure to make timely payment.

#### IX. Certification of Respondent

20. By signing this Consent Order, each Respondent certifies, individually, that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e) [insert, if applicable "", and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. 6927"].

#### X. Covenant Not to Sue by United States

21. In consideration of the payments that will be made by Respondents under the terms of this Consent Order, and except as specifically provided in Section XI (Reservations of Rights by United States), the United States<sup>2</sup> covenants not to sue or take administrative action against any of the Respondents pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973,]<sup>3</sup> relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each Respondent upon receipt of that Respondent's payment as required by Section VII. With respect to each Respondent, individually, this covenant not to sue is conditioned upon: (a) the satisfactory performance by Respondent of all obligations under this Consent

<sup>2</sup>If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue.

<sup>3</sup>Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

Order; and (b) the veracity of the information provided to EPA by Respondent relating to Respondent's involvement with the Site. This covenant not to sue extends only to Respondents and does not extend to any other person.

#### XI. Reservations of Rights by United States

22. The covenant not to sue by the United States set forth in Paragraph 21 does not pertain to any matters other than those expressly specified in Paragraph 21. The United States reserves, and this Consent Order is without prejudice to, all rights against Respondents with respect to all other matters including, but not limited to:

a. liability for failure to meet a requirement of this Consent Order;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;<sup>4</sup> or

d. liability arising from any future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the effective date of this Consent Order.

23. Notwithstanding any other provision in this Consent Order, the United States reserves, and this Consent Order is without prejudice to, the right to institute judicial or administrative proceedings against any individual Respondent seeking to compel that Respondent to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if:

a. information is discovered which indicates that such Respondent contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Respondent no longer qualifies as a *de minimis* party at the Site because [insert volume and toxicity criteria from Paragraph 11 of the Statement of Facts, e.g., "such Respondent contributed greater than \_\_\_\_\_% of the hazardous substances at the Site, or contributed hazardous substances which are significantly more toxic or are of significantly greater

hazardous effect than other hazardous substances at the Site"]; or

[Note: The cost overrun reopener in Paragraph 23(b) below should only be included with respect to any respondent who is not paying a premium in lieu of this reopener.]

[b. total response costs at or in connection with the Site exceed \$ \_\_\_\_\_ [insert dollar amount of cost ceiling].

[Note: If some respondents are paying a premium in lieu of the cost overrun reopener and some are not, insert: "This Paragraph 23(b) shall not apply to those Respondents identified [insert "in Paragraph \_\_\_\_\_" or "in Appendix \_\_\_\_\_"] who have elected to pay a premium pursuant to Paragraphs 15 and 16."]

#### XII. Covenant not to Sue by Respondents

24. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Order including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response activities at the Site;<sup>5</sup> and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, relating to the Site.<sup>6</sup>

25. Nothing in this Consent Order shall be deemed to constitute preauthorization or approval of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. 9611, or 40 CFR 300.700(d).

<sup>5</sup> If the consent order does not resolve respondents' liability for the site as a whole, the scope of Paragraph 24 (b) and (c) may be narrowed to conform to the scope of EPA's covenant not to sue. For example, if the consent order resolves respondents' liability for defined "Past Response Costs" and for a defined "Operable Unit I," Paragraph 24 (b) and (c) could be limited to "any claim arising out of response actions at the Site for which the Past Response Costs were incurred and any claim arising out of Operable Unit I."

<sup>6</sup> The settlement should, wherever possible, release or resolve any claims by respondents against the United States related to the site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Settlement of any federal liability will require additional revisions to this document, and model language will be provided separately. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

26. Respondents covenant not to sue and agree not to assert any claims or causes of action against each other with regard to the Site<sup>7</sup> pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613.

#### XIII. Effect of Settlement/Contribution Protection

27. Nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. The United States and Respondents each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

28. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 21.

29. The Parties agree that each Respondent is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are [all response actions taken by the United States and by private parties, and all response costs incurred and to be incurred by the United States and by private parties, at or in connection with the Site].<sup>8</sup>

#### XIV. Parties Bound

30. This Consent Order shall apply to and be binding upon EPA and upon Respondents and their [heirs,]

<sup>7</sup> If the consent order does not resolve respondents' liability for the site as a whole, the scope of respondents' covenant not to sue each other may be narrowed so as to conform to the scope of the United States' covenant.

<sup>8</sup> This definition of "matters addressed" assumes that this consent order is designed to resolve fully respondents' liability at the site. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

<sup>4</sup> This natural resource damage reservation must be included unless the Federal Natural Resource Trustee[s] has/have 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[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.

successors and assigns. Any change in ownership or corporate or other legal status of a Respondent, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Respondent's responsibilities under this Consent Order. Each signatory to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to execute and bind legally the party represented by him or her.

XV. Integration/Appendices

31. This Consent Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Order. The following appendices are attached to and incorporated into this Consent Order:

- "Appendix A" is [the list of Respondents].
- "Appendix B" is [the map of the Site].
- "Appendix C" is [the payment schedule].

[Note: List any additional appendices.]

XVI. Public Comment

32. This Consent Order shall be subject to a public comment period of not less than 30 days 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 withhold its consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper, or inadequate.

XVII. Attorney General Approval

[Note: This Section should be used if Attorney General approval is required for this settlement because total past and projected response costs at the site will exceed \$500,000, excluding interest. The Region should consult with DOJ during the negotiations process and should obtain written DOJ approval of the settlement before publishing notice of the proposed consent order in the Federal Register pursuant to Section 122(i) of CERCLA. The Region should discuss with DOJ any significant comments received during the public comment period. If the Region believes that the consent order should be modified based upon public comment, the Region should discuss with the DOJ attorney assigned to the case whether the proposed change will require formal re-approval by DOJ.]

33. The Attorney General or [his/her] designee has approved the settlement embodied in this Consent Order in

accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. 9622(g)(4).

XVIII. Effective Date

34. The effective date of this Consent Order shall be the date upon which EPA issues written notice to Respondents that the public comment period pursuant to Paragraph 32 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:*

U.S. Environmental Protection Agency  
 By: \_\_\_\_\_  
 [Name] \_\_\_\_\_  
 [Date] \_\_\_\_\_  
 Regional Administrator, Region \_\_\_\_\_  
 [Note: If the Regional Administrator has re delegated authority to enter into *de minimis* settlements, insert name and title of delegated official.]

THE UNDERSIGNED RESPONDENT enters into this Consent Order in the matter of [insert U.S. EPA docket number], relating to the [insert site name and location]:

For Respondent:  
 [Name] \_\_\_\_\_  
 [Address] \_\_\_\_\_  
 By: \_\_\_\_\_  
 [Name] \_\_\_\_\_  
 [Date] \_\_\_\_\_

[FR Doc. 95-29746 Filed 12-6-95; 8:45 am] BILLING CODE 6560-50-P

FEDERAL RESERVE SYSTEM

**The Mitsubishi Bank, Limited; Formation of, Acquisition by, or Merger of Bank Holding Companies; and Acquisition of Nonbanking Company**

The company listed in this notice has applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed company also has given notice under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these

activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal to acquire the non-banking subsidiaries can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 4, 1996.

A. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. *The Mitsubishi Bank, Limited*, Tokyo, Japan; to merge with The Bank of Tokyo, Ltd., Tokyo, Japan, and thereby indirectly acquire The Bank of Tokyo Trust Company, New York, New York, The Chicago-Tokyo Bank, Chicago, Illinois, and Union Bank, San Francisco, California.

In connection with this application, Applicant also has applied to acquire BOT Securities, Inc., New York, New York, and thereby engage in making, acquiring or servicing loans, pursuant to § 225.25(b)(1), providing investment or financial advice, pursuant to § 225.25(b)(4), providing brokerage services separately and in combination with investment advisory services, pursuant to § 225.25(b)(15), underwriting and dealing in bank-eligible securities, pursuant to § 225.25(b)(16), providing general information and statistical forecasting with respect to foreign exchange markets, pursuant to § 225.25(b)(17), acting as a futures commission merchant, pursuant to § 225.25(b)(18), and trading for its own account in