STATEMENT OF DEFENSES
TO EPA GENERAL NOTICE LETTER
CHEMETCO SUPERFUND SITE

ATLAS METAL & IRON CORP.
May 31, 2013

By letter of November 30, 2011, EPA notified Atlas that it was potentially a responsible party regarding the Chemetco Superfund Site. As required by the EPA letter, Atlas has submitted a thorough 104(e) response, dated April 27, 2012, and a supplemental response, dated May 31, 2013.

Atlas' only relationship with Chemetco was that Chemetco was an arms-length purchaser of Atlas' commercial products, none of which contained any "hazardous substances" or "hazardous wastes" as defined by CERCLA and RCRA. Atlas' sole business is to acquire used metal materials, process the materials, and sell useful commercial metal products to numerous end consumers. Atlas has processed metal materials in compliance with environmental laws and according to ISRI industry standards and commercial specifications. Atlas' sole purpose and intention regarding these product sales to Chemetco was a sale of useful products for use in Chemetco manufacturing without further processing, and Atlas was always contracted with Chemetco to be paid competitive commercial rates for its products. Atlas sold products to many consumers and would seek the best market for its specific products. Atlas never had any intention to dispose or have treated at Chemetco the products it sold.

Atlas' 104(e) response demonstrates that all the materials Atlas sold to Chemetco are not subject to CERCLA liability because:

- Atlas' products were not regulated hazardous wastes or hazardous substance and did not contain hazardous substances;
- All of Atlas' materials sold to Chemetco were commercial metal products useful in Chemetco's manufacturing operations; and
- As applicable, all materials Atlas sold were exempt as "recyclable materials" pursuant to CERCLA § 127.

<u>Standards for EPA Review</u>

It is the respondent's burden to present its defenses to EPA asserted liability pursuant to CERCLA §§ 107(a) and 127. If the respondent so demonstrates, the burden then shifts to EPA to prove one of the exclusions of § 127(f). EPA is required to review the asserted defenses and to prove the exclusions based on a preponderance of the evidence standard. A thorough review of the factual circumstances is required. As to whether a transaction constitutes a disposal or a sale of a useful product, courts use a balancing test. *RSR Corp. v. Avanti Dev., Inc.*, 68 F. Supp. 2d 1037, 1045 (S.D. Ind. 1999).

Description of Atlas' Business

Atlas has been a family business for over 50 years. Its sole business is to collect used metal materials from many sources, to sort by grade to meet industry specifications, process by cutting, bailing and packaging those metal materials, and then sell specified materials to many end consumers, always according to an industry specification code and for valuable consideration. Atlas' metal materials are collected from many other sources; none of Atlas' materials are a by-product of Atlas' manufacturing. Atlas' business and practices have been uniform during the entire period relevant to Chemetco.

Atlas is a profit-making company. Thus it seeks to sell its metal products in appropriate metal markets to the highest reliable bidder. The sale process was as follows: Atlas would contact known consumer markets and describe the products available by specification code and volume; the consumer would reply with a quoted price and terms for the material; if Atlas agreed with the price and terms, the consumer would send a standard contract; Atlas would then ship the products to the consumer using standard paperwork; after the consumer received the product, it would weigh the materials and send payment based on specification, weight and agreed price rate. A robust metals commodity market exists for the products Atlas sold, and Atlas always received valuable compensation for its products.

Atlas only sold RCRA-excluded materials to Chemetco, pursuant to regulations §§ 261.6(a)(10), 261.1(b)(1) and (c)(9) and 261.4(a)(13) and (14). Atlas' whole business operations are covered by the RCRA definition of "processed scrap metal," § 261,6(a)(10). Atlas operations did not result in materials used in a manner constituting disposal, or used to produce products that were applied to the land, or burned as fuel for energy recovery; Atlas' materials were not speculatively accumulated.

Atlas Interactions with Chemetco

Atlas is located in Denver, Colorado, and thus did not have site-specific knowledge about Chemetco operations. A representative of Atlas did make a short visit to the Chemetco Hartford plant in mid-1980s and Atlas recalls receiving some printed marketing materials from Chemetco. Atlas has been an active member of the industry trade group, Institute of Scrap Recycling Industries ("ISRI"), and was aware of the reputation of Chemetco through its activities in ISRI. Atlas always knew Chemetco to have a good reputation in the industry; Atlas was never aware, at the time it shipped materials to Chemetco, of any current environmental problems at Chemetco.

Atlas understood Chemetco to be a large secondary smelter which purchased a variety of metal products for use in its manufacturing operations. Atlas had little specific knowledge about Chemetco manufacturing. It was Atlas understanding and intent that the products Atlas sold to Chemetco would go directly into Chemetco smelters without further processing. Atlas was frequently assured by Chemetco sales staff that the products Atlas sold to Chemetco went directly into the Chemetco manufacturing processes as a valuable manufacturing material. Atlas sent the products to Chemetco in a form which did not require further processing. Atlas never

understood or intended that the valuable products it sent to Chemetco would be "treated" or "disposed," as those terms are defined by CERCLA and RCRA.

Atlas used a variety of shipping containers for its products sent to Chemetco, depending on the nature of the product. Typically, chopped copper wire was shipped in new nylon fabric bags. Other materials were shipped in cardboard boxes or were bailed. It was Atlas' policy to use only clean and dry drums when shipping product in drums. Atlas never included any liquids, hazardous substances or PCBs in its shipping containers.

Atlas Products were not a Hazardous Substance

The following discussion applies to each shipment of product by Atlas to Chemetco.

The commercial sale of useful metal products does not create CERCLA liability. Case law, even after the enactment of the SREA amendment, holds that sale of a useful product is not an "arrangement" for "treatment" or "disposal" of "hazardous substances" pursuant to CERCLA. The cases indicate that the key criterion of "arranging" is intent of the selling party. *Burlington Northern and Santa Fe Ry., Co. v. U.S.*, 556 U.S. 599, 610. There is no evidence to suggest that Atlas, in any of its transactions with Chemetco, had any other intent than to sell and be compensated for a valuable commercial product in the commodity market. Atlas did not intend, and there is no evidence known to Atlas, that any of the useful products Atlas sold to Chemetco required "treatment" or "disposal" at Chemetco. The Atlas products were not waste-like and did not contain waste materials when delivered to Chemetco. Thus, Atlas' useful commercial products were not a "hazardous substance."

Nor does Atlas fit under any of the liability categories of § 107(a) of CERCLA. Atlas had no ownership or operational role in the Chemetco facility. Atlas did not direct and had no control over how Chemetco managed the Atlas products once they arrived at Chemetco Hartford, and Atlas made no decisions about Chemetco processing and manufacturing operations. Atlas was not an "arranger" because it sold only useful products which were not and did not contain "hazardous substances" and because Atlas had no intent for its product to be "treated" or "disposed" by Chemetco.

At no time in the Atlas-Chemetco transactions did the Atlas useful products have the characteristic of or were managed as a "waste" material. To the contrary, both Atlas and Chemetco managed the products as a valuable commercial commodity. None of the Atlas products were ever handled as a RCRA-regulated material; all the products sold to Chemetco were "processed scrap metal," as defined by RCRA regulations, § 261.6(a)(10).

CERCLA § 127

§ 127 of CERCLA does not rule out "useful product" defenses. § 127 does not override the seminal requirement of CERCLA that a party has "arranged for treatment or disposal of hazardous substances." If a party demonstrates that it had no such intent and that the transaction was the sale of a useful product, that transaction does not create CERCLA § 107 liability, and § 127 does not come into play.

Since the enactment of § 127, courts have continued to recognize the applicability of the useful product defense for recycled materials. *California Dept. of Toxic Substances Control v. Alco Pacific*, 508 F.3d 930, 938 (2007); *Team Enterprise v. Western*, 647 F.3d 901, 908 (2011); *Carolina Power & Light Co. v. Alcan Aluminum Corp.*, 2013 WL 419300 (E.D.N.C. 2013).

EPA has improperly applied the provisions of § 127 to Atlas regarding the products it sold to Chemetco. The intent of § 127 is clear, as stated by the Act's sponsor, Senator Lott:

> *"Recycling is not disposal and shipping for recycling is not arranging for disposal—it is a relatively simple clarification, but one that is necessary to maintain a successful recycling effort nationwide. … [This Act] addresses only one Superfund issue—the unintended consequence of law that holds recyclers responsible for the actions of those who purchase their goods."* Congressional Record—Senate, October 25, 1999, at S13086.

All of Atlas' intents and actions in its sales of product to Chemetco were consistent with this congressional intent. Congress did not intend suppliers of recyclable materials to be liable for environmental problems created by the consumer's operations. Atlas sales to Chemetco were the type of well-managed, pure recycling operations Congress intended to promote and not to burden with CERCLA liability for remote-consumer-caused problems, over which Atlas had no knowledge or control.

However, even considering the provisions of § 127, Atlas should not have not have CERCLA liability as an "arranger" with respect to products Atlas sold to Chemetco after the effective date of § 127. During the effective period of § 127, Atlas only sold "scrap metal" products to Chemetco, as that term is defined by § 127(d)(3).

Criteria of § 127:

(c)(1): Atlas has over 50 years of successful business acumen about metal specifications and metal markets. Every sale of Atlas product to Chemetco was according to a commercial specification grade. Atlas sorted all its scrap metal by commercial specifications and discussed the specification grade in arriving at a contract with a consumer. Atlas was an active member of ISRI and typically used the ISRI specification grade narrative (ISRI Scrap Specification Circular, 1998) or the American Metal Mark National publication in describing its products. Also, Chemetco had their own list of specification codes which was used in their contracting. The fact that Chemetco accepted the material and paid Atlas for it confirms that the product met the agreed-to specification.

(c)(2): A very robust metals commodities market existed for the products Atlas sold. The fact that Chemetco paid its suppliers good value for their metal products is conclusive in itself of a good market. **Exhibit A**.

(c)(3): It was Atlas intent, and as far as Atlas knows, that all of its product went directly into Chemetco's manufacturing and was used as a feedstock for manufacture of Chemetco

products. There is ample evidence of Chemetco sales of its metal products to customers, such as Asarco.

(c)(4): Some smelters specialize in using virgin ores to manufacture their products. Others purchase secondary materials for the same purposes. Chemetco was the latter type of smelter, using reclaimed metal materials instead of virgin ores.

(c)(5) and (6): Atlas is located in Denver and Chemetco is located in rural Illinois; thus Atlas had little ability to monitor the Chemetco operations. During the first § 127 period, there was considerable uncertainty about how to implement this provision of § 127. EPA guidance on § 127 was not published until after Chemetco ceased operations. Atlas understood that Chemetco had a good reputation in the industry and paid prices for Atlas metal products that were competitive with other consumers. Atlas did send written inquiry to Chemetco dated February 7, 2000 and received a reply from the Chemetco Environmental Manager, Heather Young, dated March 10, 2000, stating that Chemetco "believes that it is currently in compliance with substantive provisions of any Federal, state or local environmental law associated with the materials that Atlas sold Chemetco." The letter also stated that any violations were "historical issues" "not related to current operations." **Exhibit B**. Atlas sent a similar letter dated March 1, 2001, and was again assured by the Chemetco response that there were "historical" environmental issues, but "in regards to CURRENT INCOMING SCRAP, Chemetco believes that it is in compliance with applicable laws and regulations." **Exhibit C**. In fact, the "historical" issues noted related to Chemetco manufacturing operations, and not to Chemetco's handling of Atlas' incoming metal products. Atlas also assumed that if there were serious regulatory issues at Chemetco, EPA or Illinois EPA would have suspended Chemetco's permits or forced the closure of Chemetco. Taking all the evidence in its totality, Atlas complied in good faith with the new § 127 requirements.

(d)(1)(B): Atlas participated in regulatory evaluation as a member of ISRI and it was important to Atlas to know and comply with all environmental regulations. Atlas never received a compliance advisory or notice of violation from a state or federal agency for non-compliance with environmental regulations at its Denver plant. Atlas sold to Chemetco only RCRA-excluded scrap metal products.

(d)(1)(C): Atlas has not had any equipment capable of melting scrap metal at its Denver plant, and as such, Atlas never melted any scrap metals prior to sale to Chemetco. Atlas did acquire already agglomerated drosses from customers, and sold some agglomerated drosses to Chemetco. However, Atlas sold those agglomerated drosses as received from customers without further melting.

(f)(1)(A): (i) Atlas had an "objectively reasonable basis" for its belief that all its materials were being directly and properly used in the Chemetco manufacturing processes. In negotiating contracts with Chemetco, Atlas frequently asked Chemetco sales persons to assure that all the Atlas products were being properly recycled for use as a feedstock in Chemetco manufacturing, and would not be used for any other purpose, and was so assured.

(ii) There is no evidence that any of the Atlas products were burned as fuel or were used for energy recovery or incineration. All Atlas products were combined by Chemetco with other reclaimed materials in a proper mix to manufacture valuable metal products.

(iii) See *(c)(5) and (6)* above. Being located in Denver, Atlas was not able to observe the operations of Chemetco, and reasonably relied on the assurances of Chemetco regarding its environmental compliance. Atlas was active in ISRI and carefully followed industry environmental practices at that time; Atlas understood that Chemetco, also an ISRI member, maintained a good reputation and paid competitive commodity prices. All these factors support an "objectively reasonable basis" of Atlas.

(f)(1)(B): There is no evidence that any hazardous substances were added to Atlas products by the Chemetco manufacturing processes. The definition of "recyclable material" allows for "minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap". Atlas never added such materials to the scrap it acquired from customers. As relevant to Atlas sales to Chemetco, Atlas always had wire chopping equipment which removed wire insulation from the wires. Atlas also had equipment to drain free oils from metal turnings, so that these type metal scrap were shipped in a condition that there was no visible sign of free-flowing oil.

(f)(1)(C): Atlas was very careful to properly manage its recyclable materials according to prevailing industry standards. *See (d)(1)(B)* above.

<u>EPA General Notice Letter Database</u>

The database used for the EPA General Notice Letters ("GNL Database") is seriously flawed for numerous reasons, including: (a) the EPA database apparently was based on a potential contracts list of Chemetco (PCON data), and not on actual consummated transactions with Chemetco; and (b) EPA relied on assumptions of an IEPA contractor, CDM, which were arbitrary, incorrect and inconsistent with § 127 and EPA guidance.

A Chemetco database which is based on actual Chemetco transactions (LOFTI data) does not yet exist. Atlas has reviewed all of the available Chemetco databases, but is not yet able to link the Atlas shipment records to available Chemetco data until a "lot number" database is created. Atlas reviewed the CDM Phase I Report, dated October 17, 2005 to evaluate how CDM interpreted the Chemetco PCON and MATNA data. CDM arbitrarily and improperly made assumptions to categorize some Atlas products as "Excluded from Definition of Scrap Metal" (Table 3) or "Not Suitable for Metal Recycling" (Table 4). Equally arbitrary and capricious, EPA relied on the assumptions of CDM in preparing its GNL Database.

CDM Table 3. CDM listed on Table 3 several categories of specified dross and Hi-Speed Babbitt materials which Atlas sold to Chemetco. Atlas sold to Chemetco only agglomerated drosses which Atlas acquired from other parties. There is nothing in § 127 or RCRA rules which suggests that all drosses are excluded from the definition of scrap metal. The EPA Guidance on § 127 (August 2002) specifically notes that agglomerated drosses are considered as "scrap metal" (pages 7 and 20). The inclusion of Hi-speed Babbitt on Table 3 is inexplicable to Atlas and is not further explained by CDM on page 6 of the Phase I Report. The material sold by Atlas

was not powdery and is clearly a "recyclable material." Therefore, it was arbitrary and inaccurate for EPA to list 9,056 pounds in Category A for Atlas.

CDM Table 4. Atlas sold to Chemetco several materials which Chemetco apparently coded as "combustable" and which CDM asserts are not suitable for metal recycling. CDM provides no explanation on page 6 of the Phase I Report why industry specifications of recyclable materials would be excluded just because Chemetco assigned an internal classification of "combustable" to the material. There is no basis in § 127, EPA guidance or standard industry practice for the arbitrary CDM determination. In fact, these Atlas products were used in the Chemetco manufacturing process, and thus could hardly be considered "unsuitable." Therefore, it was arbitrary and inaccurate for EPA to list 93,157 pounds in Category B for Atlas.