

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

**Charles Curtis Building
1000 SW Jackson Suite 560
Topeka, Kansas 66612-1368**

IN THE MATTER OF:

**POLLUTION AT FORMER FARMLAND
INDUSTRIES, INC. NITROGEN
MANUFACTURING PLANT
LAWRENCE, KANSAS**

)
)
)
)
)
)

**CONSENT ORDER
Case No. 10-E-_____**

I. PRELIMINARY STATEMENT

The parties hereto, the Kansas Department of Health and Environment ("KDHE"), and the City of Lawrence, Kansas ("Respondent"), agree that settlement of this matter is in the best interests of all parties and the public. This Consent Order ("CO") is therefore entered into by and between the Secretary of KDHE and Respondent.

Respondent voluntarily and knowingly waives any and all rights conferred upon it by the Kansas Administrative Procedure Act ("KAPA"), K.S.A. 77-501, *et seq.*, and voluntarily and knowingly waives the right to an appeal and review of this CO and matters leading up to the execution of this CO under the Kansas Act for Judicial Review and Civil Enforcement of Agency Action, K.S.A. 77-601 *et seq.* KAPA authorizes KDHE to enter into an informal settlement of this matter without the necessity of proceeding to a formal hearing, K.S.A. 77-505.

The Farmland Industries Kansas Remediation Trust ("Remediation Trust") has been performing the remediation at the Farmland Industries Inc. Nitrogen Manufacturing Plant ("Facility Property") using the Trust Fund established under the Remediation Trust, using both administrative funds and remediation funds within that Trust Fund. This Consent Order establishes the conditions under which the Respondent agrees to complete the Required Remediation of the Facility Property as directed under this CO.

KDHE recognizes Respondent intends to conduct demolition of existing structures on the Facility Property, and this Consent Order imposes no additional requirements for such demolition beyond those which may be otherwise contained in state and federal laws and regulations.

KDHE and the Respondent agree that the following findings of fact and conclusions of law are correct. By signing this CO, Respondent accepts the terms and conditions contained herein. Upon the Secretary's signature it will become the Final Order in this case. The parties represent and state their agreement as follows:

1. KDHE is a duly authorized agency of the State of Kansas, created by act of the legislature.
2. KDHE has general jurisdiction of matters involving hazardous substance and hazardous substance cleanups under the authority of the Kansas Environmental Response Act (K.S.A. 65-3452a *et seq.*), as well as solid and hazardous waste and its cleanup (K.S.A. 65-3401 *et seq.* and K.S.A. 65-3430 *et seq.*) and has general authority and responsibility to protect the waters and soils of the state under the authority of K.S.A. 65-161 *et seq.*
3. On May 31, 2002, Farmland Industries, Inc. filed Chapter 11 Bankruptcy. Pursuant to those proceedings, SELS Administrative Services, L.L.C. ("SAS") became the Trustee for the Remediation Trust. KDHE was designated as the primary beneficiary of the Remediation Trust, subject to the limitations of the Remediation Trust Agreement dated April 30, 2004.
4. On July 31, 2009, the Bankruptcy Court entered a Final Order closing and terminating the Farmland Industries, Inc. Bankruptcy cases.
5. The Remediation Trust and SAS collectively desire to sell the Facility Property to the Respondent. The Remediation Trust Agreement describes the conditions under which the property may be leased, sold or otherwise disposed, as follows:

"The Trustee may lease, sell or otherwise dispose of any Trust Sites at any time; provided, however, that no lease, sale or other disposition of a Trust Site shall be consummated without: (a) issuance of a No Further Action letter or equivalent acknowledgement in writing from the Department evidencing the Department's agreement that the remediation of such Trust Site is complete (a "No Further

Action Letter”), (b) the issuance of a letter from the Department evidencing the Department’s agreement that such Trust Site may be leased, sold or otherwise disposed of (a “Permission Letter”) or, in the case of a sale or other disposition, (c) the buyer unconditionally agrees to assume all of the environmental liabilities associated with such Trust Site.”

6. This CO shall apply to and be binding upon KDHE and Respondent, their agents, successors, and assigns. The signatories to this CO certify that they are authorized to execute and legally bind the parties they represent to this CO. No change in the ownership or corporate status of Respondent shall alter its responsibilities under this CO.
7. Respondent shall provide a copy of this CO to the following: any successors in interest, any future owners of the Facility Property, or any portion thereof, before ownership rights are transferred; any current or future lessee, sub lessee; any other entity with rights to use the Facility Property as of the effective date of this CO; and all contractors, subcontractors, laboratories, and consultants which are retained by Respondent to conduct any work performed under this CO, within fourteen (14) days after the effective date of this CO or the date of retaining their services. Notwithstanding the terms of any contract, Respondent is responsible for compliance with this CO and for ensuring that its agents, contractors, lessees, successors in interest, future owners of all or any portion of the property, and others with rights to use the Facility Property, comply with this CO.
8. Headings and titles contained within this document are for guidance and the purpose of facilitating review only.
9. Respondent agrees that in the event it becomes aware of any action or occurrence which causes or threatens a release of pollutants, contaminants, or hazardous substances at or from the Facility Property that constitutes an emergency situation or may present a threat to public health and/or the environment, it shall immediately notify KDHE and take all appropriate action to prevent, abate, or minimize such release or threat of release.
10. Respondent agrees to enter into this CO to perform all activities described herein and to

completely satisfy all the requirements outlined in this CO within the KDHE-approved timelines.

11. This Order does not address Part II of the Resource, Conservation and Recovery Act ("RCRA") Hazardous Waste Post-Closure Permit. Respondent must address this issue with the United States Environmental Protection Agency (EPA) RCRA Corrective Action program outside this Order.

II. FINDINGS OF FACT

1. The Facility Property is located on the eastern edge of Lawrence on Kansas Highway 10 and the Facility Property is described by the approximate geographical area illustrated on the map attached hereto as Exhibit 1. The Facility Property includes approximately 467 acres of the former operating facility and 120 acres of contiguous parcels. For purposes of this CO, the Site ("Site") includes the above described Facility Property as well as all areas, and media, where contamination from the Facility may have emanated or migrated.
2. Farmland Industries, Inc. ("Farmland"), formerly Cooperative Farm Chemical Association, constructed the Facility in 1954. Prior to ceasing operation at the Facility, Farmland produced various nitrogen-containing chemicals that included ammonia, prilled ammonium nitrate, granular urea, anhydrous ammonia, nitric acid and urea ammonium nitrate ("UAN") solution. All manufacturing operations ceased in 2001 when the plant was closed due to the economic downturn of the agricultural market.
3. 1990 RCRA Facility Assessments identified 21 Solid Waste Management Unit(s) ("SWMU"), with the Chrome Reduction System Unit ("CRS Unit") listed as the first one. The CRS Unit was certified closed with waste remaining in place on January 20, 1987. The KDHE and EPA issued a RCRA Post-Closure Permit, including a Hazardous and Solid Waste Amendment (HSWA) Corrective Action Permit (Part II) from EPA, effective February 1993 and the continuation thereof effective August 2002.

4. On January 27, 1993, Farmland entered into a Consent Agreement (Case Number 92-E-27) with KDHE to conduct an investigation of the 21 solid waste management units and other areas of concern.
5. In 1997, a Corrective Action Plan approved by KDHE identified the need for a hydraulic containment system consisting of French drains and recovery wells to prevent contaminated groundwater from migrating off the Facility Property. This remedial alternative was selected based on the assumption that the plant would be in operation and thus continue to recycle and reuse contaminated groundwater recovered through hydraulic containment. Upon plant closure, the recycle and reuse options were no longer applicable and KDHE requested additional investigation and a modified remedy.
6. Previous and current groundwater analytical data collected from on-site monitoring wells and probe locations indicate the presence of nitrate at concentrations as high as 51,640 milligrams per liter ("mg/l") above the federal Safe Drinking Water Act Maximum Contaminant Level ("MCL") of 10 mg/l, adopted by Kansas in K.A.R. 28-15a-62, implementing K.S.A. 65-171m, and set out in the Risk Based Standards for Kansas RSK Manual. Additionally, nitrate and ammonia impacted soils were detected near the UAN process, storage and loading areas, the ponds, the northwest site area known as "Sandstone Hill," the operations area, as well as other areas on the Facility Property.
7. On May 31, 2002, Farmland Industries, Inc. and its affiliates filed Petitions for relief under Chapter 11 of the United States Bankruptcy Code and were assigned Case No. 02-50557-JWV.
8. On December 29, 2003, the Bankruptcy Court approved the Debtors Joint Amended and Restated Plan of Reorganization, as modified ("The Plan"). The effective date of the Plan was May 1, 2004.
 - a. Pursuant to the Plan, the Remediation Trust was established to hold the Trust

Assets located in the State of Kansas, including the Farmland Facility Property in Lawrence, Kansas, which is the subject of this CO.

- b. KDHE was named the "Primary Beneficiary" of the Remediation Trust.
9. The Remediation Trust has conducted various investigations at the Site and has submitted a Final Remedial Action Plan ("RAP") which KDHE approved on March 3, 2010, attached hereto marked Exhibit 2 and incorporated herein. The final RAP contains the minimum remediation requirements and strategy to control, mitigate and reduce contamination from the Site.
10. On March 3, 2010, KDHE issued a Final Corrective Action Decision ("CAD"), attached hereto marked Exhibit 3 and incorporated herein, which documents the selected remedial action for the Site (the "Required Remediation").
11. Pursuant to the Remediation Trust Agreement, on April __, 2010, KDHE issued a Permission Letter to the Remediation Trust and SAS, contingent upon execution of this Consent Order, thereby allowing the acquisition of the Facility Property by Respondent.
12. On _____, Respondent, SAS, and Capitana entered into an Acquisition Agreement by which Respondent will acquire the Facility Property and \$ 8.5 Million Dollars of the Remediation Trust Funds upon satisfaction of certain conditions in the Acquisition Agreement, and in consideration for accepting the Required Remediation obligations.
13. The Facility currently has a National Pollutant Discharge Elimination System ("NPDES") Permit (Kansas Permit No. I-KS31-PO04), with an expiration date of 2/28/2015. The permitted discharges include storm water runoff from the Facility Property, domestic wastewater, and pumpage from alluvial recovery wells that are directed to the Kansas River. Additionally, contaminated storm water runoff and contaminated groundwater is being land applied north of the Kansas River pursuant to the NPDES permit.

III. CONCLUSIONS OF LAW

1. Respondent is a "person" within the meaning of K.S.A. 65-164 *et seq.*, K.S.A. 65-3401 *et seq.*, K.S.A. 65-3430 *et seq.*, and K.S.A. 65-3452a *et seq.*
2. The presence of the contaminants identified in the soils, storm water runoff, and groundwater underlying the Site, as that term is defined below in paragraph 4, constitutes "sewage" as defined by K.S.A. 65-164(b) and "pollution" as defined by K.S.A. 65-171d.
3. Some of the contaminants identified in the soils and groundwater underlying the Site are "hazardous substances" as defined by K.S.A. 65-3452a and "hazardous wastes" as defined by K.S.A. 65-3430.
4. The area defined in Section II, Paragraph 1 and identified as the Facility Property constitutes a "Site" within the meaning of K.S.A. 65-3453.
5. The facts above constitute:
 - a. the discharge, abandonment, or disposal of hazardous substances, hazardous wastes, or sewage;
 - b. the pollution of the land or waters of the State or the threat of pollution of the land or waters of the State;
 - c. a hazard to persons, property, or public health or threatens to become a hazard to persons, property, or public health.
6. The contamination of soil and groundwater beneath the Site is causing or threatens to cause pollution of the waters of the State or is or threatens to become a hazard to persons, public health, or safety.
7. Under the facts as shown above, KDHE has concluded, and the Secretary has confirmed, that there is a need for remedial action to prevent a continuing release or threat of release of hazardous substances, hazardous wastes, or sewage.
8. The clean-up of such discharges of hazardous substances, hazardous wastes, or sewage is

necessary to remove a threat to public health and safety and the environment, giving rise to the authority of KDHE to enter this CO.

9. KDHE has authority to enter the CO herein, and to make the findings of fact and conclusions of law herein stated.
10. The Secretary is authorized by K.S.A. 65-3453, K.S.A. 65-164 *et seq.*, including K.S.A. 65-171m, K.S.A. 65-3401 *et seq.*, K.S.A. 65-3430 *et seq.*, and the regulations issued pursuant thereto to enter an order confirming the agreement of the parties, and ordering the actions and obligations required by the foregoing findings of fact and conclusions of law. The parties hereto agree to the following activities and commitments.

IV. ORDER

Subject to any amendment or modification allowed under this CO, the Respondent agrees to be responsible for performance of the Required Remediation and the obligations and requirements of this CO, including the continued operation and maintenance of all active remediation systems upon execution of the CO. Active remediation systems include, but are not limited to, all recovery wells, sumps, trenches, pipelines, tanks and all other systems related to the hydraulic containment and land application of contaminated ground and/or surface water.

A. BUREAU OF WASTE MANAGEMENT

1. Respondent shall continue long-term care for the CRS Unit for the remainder of the thirty (30) year post closure period or until the contaminants in the CRS Unit no longer pose a potential threat to human health or the environment as specified in the RCRA Permit and the Final RAP, as approved by KDHE.
2. Respondent shall apply for a transfer of the existing RCRA Post Closure Permit pursuant to K.S.A. 65-3430 *et seq.*, the regulations promulgated thereunder, and 40 CFR § 270.40 to complete this task, as included in the RAP. Documents

necessary for application or transfer of the RCRA Permit are located at
http://www.kdheks.gov/waste/bwm_haz_waste.html

3. If KDHE agrees that a parcel needs no further action or that a parcel can be transferred to a different oversight authority, such as the EUC Program, such parcel may be considered for removal from the RCRA permitted area through a Class I permit modification on a case by case basis.

B. **BUREAU OF WATER**

1. If KDHE determines that future work on the Facility Property requires modification of existing permits or new permits, the Respondent shall, in a timely manner, request modification of the existing permit or submit a complete application for a new permit pursuant to K.S.A. 65-161 et seq. and the regulations promulgated. To the extent any new or modified permit is required, Respondent shall be allowed to continue operating under the existing permit during the pendency of the permit application. At a minimum, either the modification of the existing NPDES permit or issuance of a new permit, shall address the following:
 - a. Pumpage from all recovery wells and/or hydraulic containment structures operated on the Facility Property that may be directed to the existing NPDES point of compliance;
 - b. The land application practices, including but not limited to ensuring adequate land is available for agronomic application of the wastewater, annual submission of a land application report on or before February 1 of each calendar year, summarizing the land application activities during the past calendar year and provision of a plan for the upcoming calendar year, and coordination with the City of Lawrence to prevent conflict with future siting

for municipal wastewater sludge disposal;

- c. Closure of the wastewater ponds on the Facility Property in conformance with KAR 28-16-173;
 - d. Storm water runoff quality from the Site;
 - e. Storm water construction runoff related to remedial activities conducted by the Respondent at the Site, more specifically erosion and sediment control associated with soil disturbing activities;
 - f. Continuation of the current storm water monitoring program; and
 - g. The ponds used for containment of sludge and contaminated soils that are not used for wastewater treatment, storage and disposal.
2. If any proposed development or re-development activities on the Facility Property involve the disturbance of one (1) or more acres, the Respondent shall ensure that it files a complete application, in a timely manner for an NPDES storm water construction runoff permit.
 3. During remediation activities, any inactive, inoperable, or abandoned water supply or groundwater monitoring well encountered at the Facility Property shall be plugged, after consultation with KDHE and EPA, pursuant to K.S.A. 82a-1201 *et seq.* and K.A.R. 28-30-2 *et seq.*

C. **BUREAU OF ENVIRONMENTAL REMEDIATION**

Respondent agrees to conduct all activities identified herein in accordance with the Project Deliverable and Milestone Schedule ("Milestone Schedule") marked Exhibit 4 and attached hereto as well as any other dates approved by KDHE and subsequently incorporated within this CO. Respondent agrees that work performance and KDHE-approved schedules are subject to the Stipulated Penalties (Section X) provisions and Work Takeover (Section IV.C.9) provisions of this CO.

1. **Transition Plan** Within thirty (30) days of the effective date of this CO, Respondent

shall submit a Transition Plan to KDHE for approval. The Transition Plan shall include, at a minimum, the names and telephone numbers of key contact personnel, a description of the continued operation of all current on-site remediation systems including the land application systems, continued monitoring for RCRA and NPDES requirements, all other environmental requirements and the development of a Soil-Waste Management Plan ("SWMP"). Upon approval, the Transition Plan shall be attached hereto marked Exhibit 8 and incorporated herein. The Transition Plan must be approved by KDHE prior to demolition or other activities contemplated under this Consent Order. In the event that Respondent desires to conduct any demolition prior to KDHE approval of the Transition Plan, including the Soil-Waste Management Plan, the Respondent shall notify and coordinate such demolition activities with KDHE.

2. **Remedial Design/Remedial Action Work Plan and Remedial Design/Remedial Action Implementation Schedule**

a. **Submission of Draft Remedial Design/Remedial Action ("RD/RA")**

Work Plan and RD/RA Implementation Schedule: Within sixty (60) days of the approval of the Transition Plan by KDHE, Respondent shall submit a draft RD/RA Work Plan and RD/RA Implementation Schedule for KDHE approval which is consistent with the Scope of Work attached hereto, marked Exhibit 5, the Final RAP (Exhibit 2), and the Final CAD (Exhibit 3). The draft RD/RA Work Plan and RD/RA Implementation Schedule shall facilitate, to the extent possible, commencement and/or continuation of on-site remedial action within 60 days of the approval of the RD/RA Work Plan and RD/RA Implementation Schedule.

b. **Submission of Final RD/RA Work Plan and RD/RA Implementation**

Schedule: KDHE will provide comments on the draft RD/RA Work Plan and

RD/RA Implementation Schedule. Within thirty (30) days of receipt of KDHE's comments, Respondent shall submit for final approval a revised RD/RA Work Plan and RD/RA Implementation Schedule that addresses KDHE's comments. Upon KDHE approval, the RD/RA Work Plan and RD/RA Implementation Schedule shall become incorporated into this CO and be a part hereof as Exhibits 6 and 7, respectively.

c. **Implementation of RD/RA Work Plan and RD/RA Implementation**

Schedule Tasks: Within sixty (60) days from date of KDHE approval of the RD/RA Work Plan and RD/RA Implementation Schedule, Respondent shall commence the implementation of the tasks detailed in the RD/RA Work Plan.

The work shall be conducted in accordance with the standards, schedules and specifications contained in the RD/RA Work Plan, and the RD/RA Implementation Schedule.

3. **Inadequate Revisions:** In the event that Respondent submits a revised RD/RA Work Plan and RD/RA Implementation Schedule that fails to adequately address KDHE's comments, KDHE shall make the revisions necessary to incorporate the comments. Respondent shall be responsible for KDHE's costs associated with such revisions.
4. **Written Notice of Disapproval:** Respondent shall provide all draft and final documents/reports to KDHE according to the RD/RA Implementation Schedule contained in Exhibit 7 in a form responsive to KDHE's comments. After KDHE reviews the draft and final documents/reports, KDHE shall notify Respondent in writing of KDHE's approval or disapproval of these documents/reports or any part thereof. KDHE may also notify Respondent in writing of KDHE disapproval of Respondent's implementation of the approved Work Plan(s).
5. **Submittals:** Unless otherwise directed by KDHE, all documents (draft and final) submitted

to KDHE for review should be provided as one hard copy plus one electronic copy of each deliverable by Respondent to both KDHE and the EPA.

6. **Schedules and Milestones:** The RD/RA Implementation Schedule shall establish dates and timeframes for related implementation, construction and reporting activities. This Schedule shall specifically include the Respondent's proposed completion dates for start and completion of implementation and construction activities and submittal of all associated work plans and reports. Additional milestone dates may be incorporated into this CO as agreed to by KDHE based on requested information provided by the Respondent.
7. **Completion Dates Subject to Stipulated Penalties:** The Respondent shall conduct all activities identified herein in accordance with the dates outlined in the CO and RD/RA Implementation Schedule. Completion dates defined in the CO and RD/RA Implementation Schedule, as approved by KDHE, are subject to the Stipulated Penalties and Work Takeover provisions of this CO.
8. **Work Specifications:** All work shall be conducted in accordance with the standards and specifications contained in the KDHE approved RD/RA Work Plan and any subsequent work plans and completion dates shall comply with the RD/RA Implementation Schedule and any subsequent schedules as approved by KDHE. In the event of any KDHE disapproval of a submitted document/report or disapproval of Respondent's implementation of the approved Work Plan(s), KDHE shall send Respondent a written Notice of Disapproval delineating the deficiencies, requiring revisions to the document/report or modified work to cure the deficiencies in the work and setting a schedule for revision, correction or other response by Respondent. Failure to revise, correct or otherwise respond in accordance with the schedule specified by KDHE shall be deemed a violation of this CO and may result in a Work Takeover or issuance of Stipulated Penalties.
9. **Work Takeover:** In the event Respondent fails to revise, correct or otherwise respond to

KDHE's Notice of Disapproval in accordance with the schedule specified in the Notice of Disapproval or in the event that KDHE determines that Respondent has ceased implementation of any portion of the work, is seriously or repeatedly deficient or late in its performance of the work, or is implementing the work in a manner which may cause an endangerment to human health or the environment, KDHE will send Respondent a written Notice of Work Takeover specifying a date upon which KDHE may assume or arrange for a contractor or contractors to assume the performance of all or any portions of the work as KDHE determines necessary. In the event of Work Takeover, Respondent shall pay for all costs incurred by KDHE and any contractor who performs work pursuant to this paragraph.

10. **Additional Tasks may be required:** In order to satisfy the objectives of the approved RAP and CAD, KDHE may determine that additional tasks, consistent with the purpose of this CO, are necessary in addition to the approved RD/RA Work Plan tasks including, but not limited to, associated work, work plans, reports or any other documents, which have been completed pursuant to this CO. KDHE may require Respondent to implement any such additional tasks within a timeframe specified by KDHE. Failure by Respondent to implement additional tasks, as required by KDHE, shall be considered a violation of this CO and be subject to Work Takeover.
11. **Kansas Licensure Required:** All work performed pursuant to this CO shall be under the direction and supervision of a professional engineer or geologist licensed in the State of Kansas with expertise in hazardous waste site investigations and remediation. Within thirty (30) days of the effective date of this CO, Respondent shall notify KDHE in writing of the name, title, license number and qualification of the engineer or geologist, and of any contractors or subcontractors and their personnel to be used in carrying out the terms of this CO. Respondent shall notify KDHE in writing of any changes of name, title, license number and qualifications of the engineer, geologist, contractors, subcontractors and their personnel

within thirty (30) days of the occurrence of such change.

12. **Wells Required by CO:** All wells installed on Facility Property owned by the Respondent for the purposes of this CO shall be deemed the property of Respondent. Those wells installed by KDHE or any former owner of the Facility Property for investigation and/or remediation purposes prior to the effective date of this CO, shall become the property of Respondent. If any wells are installed on property not owned by Respondent, Respondent shall be responsible for such wells conditional upon obtaining access and subject to the provisions of Section VII of this CO. Prior to termination of this CO, all wells for which Respondent is responsible shall be closed in accordance with KDHE regulations and written notice shall be provided to the KDHE project coordinator as set forth in the CO unless otherwise approved in writing by KDHE.
13. **Land-Use Controls:** Within thirty (30) days from the approval of the Transition Plan or as otherwise directed by KDHE, Respondent shall make an application to the Environmental Use Control Program for the purpose of entering into an Environmental Use Control Agreement pursuant to K.S.A. 65-1,221 *et seq.* that includes all restrictions as set forth by KDHE, as described in the RAP and CAD to ensure the protectiveness of the remedial measures to be performed pursuant to this CO.
14. **Soil-Waste Management Plan** Respondent shall submit for KDHE approval a Soil-Waste Management Plan ("SWMP") as part of the Transition Plan described in paragraph 1 of this Section, for future owners, operators, developers, lessees, sub lessees and/or any other entities with rights to use Facility Property, to be followed in the handling of potentially contaminated soil, waste or any other environmental media encountered throughout the development and use of the Facility Property. The Respondent shall provide this KDHE-approved SWMP to all assignees, successors in interest, and all lessees, sub lessees and other entities with rights to use the Facility Property.

15. **Document Incorporation:** Any and all documents/reports, plans, specifications, schedules, and attachments required by this CO are, upon approval by KDHE, incorporated into this CO. Any noncompliance with such approved documents/reports, plans, specifications, schedules, and attachments shall be considered a violation of this CO.
16. **Written Approval Required:** No informal advice, guidance, suggestions, or comments by KDHE regarding documents/reports, plans, specifications, and any other writing submitted to Respondent will be construed as relieving Respondent of its obligation to obtain written approval, if and when required by this CO.
17. **Annual Budget and Expenditure Report** Respondent shall provide, within _____ of the effective date of this CO an Annual Budget for KDHE approval, and subsequent Annual Budget and Reports within thirty (30) days after end of each calendar year or as otherwise agreed by KDHE. Said Annual Budget and Expenditure Report shall document past expenditures and project future expenditures for all activities required pursuant to this CO. All future expenditures shall include a description of the activity proposed, an associated cost of the activity, and a date for completion of the activity. In the event that expenditure(s) equal to or exceeding \$ 25,000 were not included in the respective Annual Budget, Respondent shall obtain prior approval of KDHE. Such written request for approval shall include the need for the expenditure, the associated costs and a timeline for completion. KDHE shall provide written approval for such expenditure(s) prior to implementation of the activity.

V. QUALITY ASSURANCE

1. All samples analyzed pursuant to this CO shall be analyzed by a KDHE-approved laboratory using KDHE-approved laboratory methodologies.
2. All sample collection and analysis shall be performed in compliance with the approved Work Plan(s), including scheduling of analyses, documentation of sample collection, handling, and analysis.

3. Laboratory analytical report forms shall be submitted to KDHE for all analytical work performed pursuant to this CO. Any deviations from the procedures and methods set forth in these documents must be approved in writing by KDHE prior to use. Respondent shall notify KDHE in writing within five (5) working days of notice or knowledge of a potential deviation from prescribed procedures or methods. Such notice shall provide information as to the nature of the deviation, if known, and outline a proposed investigation to determine whether the sample or results are potentially representative or should not be considered valid. If the results cannot be validated by evaluation of the Quality Assurance/Quality Control procedures, historical data, or laboratory protocol, Respondent shall resample upon KDHE's direction and discretion. Respondent shall notify KDHE at least seven (7) days before conducting resampling. Failure to follow the above procedure for notification of deviations will be considered a violation of this CO and shall subject Respondent to an administrative penalty of \$1,000 per violation and the data resulting therefrom shall be invalid.
4. Respondent shall use the quality assurance, quality control, and chain of custody procedures specified in the Quality Assurance Project Plan, which is part of the Work Plan(s), for all sample collection and analysis performed pursuant to this CO, unless otherwise agreed to in writing by KDHE.
5. All contracts for field work shall provide that KDHE representatives are allowed access, for auditing and evaluation purposes, at reasonable times upon reasonable request, to all personnel utilized by Respondent for sample collection and analysis and other field work. Upon request by KDHE, the laboratories shall perform analysis of a reasonable number of samples provided by KDHE to demonstrate the quality of the analytical data.

VI. PROGRESS AND FUNDING REPORTING

Respondent shall provide KDHE with written progress reports quarterly, commencing from the

effective date of this CO and continuing until termination of this CO. At a minimum, these progress reports shall:

- a. describe the actions, progress, and status of projects which have been taken toward achieving compliance with this CO, as well as the actions which are scheduled for the next quarter;
- b. identify any requirements under this CO that were not timely completed and any problem areas and anticipated problem areas in complying with this CO;
- c. include all results of sampling, tests, data, field notes, and conclusions drawn from data generated pursuant to the Work Plan(s);
- d. provide updated schedule(s) as requested by and subject to KDHE approval;
and
- e. to the extent that Respondent is using Remediation Trust Funds as financial assurance under this CO, document all expenditures from activities approved by KDHE and income earned during the last quarter, including an updated summary of total expenditures, total funding remaining, income earned and projected quarterly expenditures and activities.

The KDHE Project Coordinator may direct the Respondent to submit monitoring reports consistent with the Project Deliverable Schedule or combined with quarterly progress reports.

VII. ACCESS

1. KDHE and any of its agents or contractors are authorized by Respondent to enter and freely move about all property at the site for the purposes of, *inter alia*, interviewing site personnel and contractors; inspecting records, operating logs, and contracts related to the activities set out in the Work Plan(s); reviewing the progress of Respondent in carrying out the terms of this CO; conducting such sampling and tests as KDHE deems necessary; using a camera, sound recording, or other documentary type equipment; and verifying the reports and data

submitted to KDHE by Respondent; and invoking Work Takeover provisions under this CO. Respondent shall permit such persons to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data that pertain to work undertaken pursuant to this CO.

2. As long as the Respondent is an owner or operator of the Facility Property, Respondent shall require that assignees, successors in interest, and any lessees, sub lessees and other entities with rights to use the Facility Property shall provide access and cooperation to KDHE, its authorized officers, employees, representatives, and all other persons performing response actions under KDHE oversight. Respondent shall require that all assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Facility Property, implement and comply with any Environmental Use Control Agreement or any other response action, and not contest KDHE's authority to enforce any such action on the Facility Property.
3. Upon sale or other conveyance of the Facility Property, any part thereof, or any other interest therein, Respondent shall require, in the document conveying title: that each grantee, transferee or other holder of an interest in or to the Facility Property or any part thereof, shall provide access and cooperation to KDHE, its authorized officers, employees, representatives, and all other persons performing response actions under KDHE oversight; that all assignees, successors in interest, and any lessees, sub lessees and other entities with rights to use the Facility Property, implement and comply with any Environmental Use Control Agreement or any other response action, and not contest KDHE's authority to enforce any such action on the Facility Property.
4. To the extent that work required by the Work Plan must be done on property not owned or controlled by Respondent, Respondent shall use its best efforts to obtain access agreements from the present owner(s) of such property within thirty (30) days of knowledge of the need

for access. Best efforts include, but are not limited to, reasonable payment of monies to the property owner. Any such access agreement shall be incorporated by reference into this CO.

In the event that agreements for site access are not obtained within thirty (30) days of the date the need for access is known, Respondent shall notify KDHE regarding both the lack of and its failure to obtain such agreements within seven (7) days thereafter. In the event that KDHE obtains access for Respondent, Respondent shall reimburse all costs incurred by KDHE. Upon KDHE's obtaining access for Respondent, Respondent shall undertake approved work on such property. KDHE shall not be responsible for any injury or damage to persons or property caused by the negligent or willful acts or omissions of Respondent, its officers, employees, agents, successors, assigns, contractors, or any other person acting on Respondent's behalf in carrying out any activities pursuant to the terms of this CO.

VIII. FIELD ACTIVITIES NOTIFICATION AND DATA/DOCUMENT AVAILABILITY

1. Respondent shall provide KDHE at least seven (7) days advance written notification before conducting any investigative and/or remedial activities at the Site pursuant to this CO. This includes, but is not limited to, other ancillary activities or activities performed for dual regulatory program purposes. Advance written notification is to be accomplished by completing the *KDHE-BER Remedial Section Field Activities Notification Form* on the KDHE website for each activity as distinguished by separate field mobilizations. If website access is not available, Respondent may provide required written notification by completing the form (attached hereto as Exhibit 9) and submitting it to the designated KDHE Project Coordinator. Failure to provide advance written notification may result in KDHE rejection of the work conducted by the Respondent.
2. At the request of KDHE, Respondent shall provide or allow KDHE or its authorized representatives to take split samples of any or all samples collected by Respondent pursuant to this CO and/or collect independent samples. Similarly, at the request of Respondent,

KDHE shall allow Respondent or its authorized representatives to take split or duplicate samples of all samples collected by KDHE under this CO. KDHE shall notify Respondent at least seven (7) days before conducting any sampling under this CO, provided, however, that if seven (7) days notice of sample collection activity is not possible, KDHE and Respondent shall give such advance notice to enable each party to have a representative present during said sample collection activity.

3. Respondent shall make available to KDHE all results of sampling, tests or other data generated by or on its behalf with respect to the implementation of this CO. Respondent shall submit these results in the progress reports described in this CO or as otherwise directed by KDHE. KDHE will make sampling results and other data available to Respondent.

IX. RECORD PRESERVATION

Respondent agrees that it shall preserve, during the pendency of this CO and for a minimum of six (6) years after its termination, all records and documents which have not previously been provided to KDHE in Respondent's possession or in the possession of divisions, employees, agents or consultants or contractors which relate in any way to this CO or to hazardous substance and hazardous waste management and disposal at the site. At the conclusion of this six (6) year period following the termination of this CO, Respondent shall then make such records available to KDHE for inspection or KDHE's retention or shall provide copies of any such records to KDHE.

X. STIPULATED PENALTIES

1. For each period of time that Respondent fails to comply with the elements of the RD/RA Work Plan, attached and incorporated herein as Exhibit 6, or the enforceable milestones established in the KDHE-approved RD/RA Implementation Schedule, attached and incorporated herein as Exhibit 7, Respondent shall pay as stipulated penalties the following: \$1,000 for the first week of delay or part thereof; \$1,500 per day for each day of delay for

the 8th through 14th day; and, \$3,000 per day of delay thereafter. All requests for schedule extension must be made in writing by Respondent and are subject to KDHE approval.

2. Any stipulated penalties assessed shall be payable within twenty-one (21) days after Respondent's receipt of demand for payment by KDHE and shall be paid by certified check with the name of the Site and the CO number noted on the check to:

Kansas Department of Health and Environment
Bureau of Environmental Remediation
Attn: Administration
1000 SW Jackson Street, Suite 410
Topeka, Kansas 66612-1367

A copy of the check and a transmittal letter shall be sent to the KDHE Project Coordinator specified herein. Respondent shall remit a check for the full amount of penalty stated in the demand made payable to the Kansas Department of Health and Environment.

3. Should Respondent fail to comply with a time requirement of any tasks required by this CO, the period of noncompliance shall terminate upon Respondent's performance of said requirement.

XI. FORCE MAJEURE

Delays that result from causes not foreseeable and beyond the Respondent's control and which cannot be overcome by due diligence shall not be a violation of the Respondent's obligations under this Consent Order. The Respondent shall notify KDHE orally as soon as possible, but no later than five (5) business days after the Respondent knows of any delay or anticipated delay in compliance with the requirements of this Consent Order, and in writing no later than five (5) business days after the oral notification of the delay. The written notice shall describe the nature of the delay, whether and why the delay was unforeseeable and beyond the control of the Respondent, the actions taken and/or that will be taken to mitigate, prevent and/or minimize further delay, and the anticipated length of the delay. The Respondent shall adopt all measures to avoid or minimize such delay. To the extent a delay is caused by circumstances beyond the control of the Respondent, or those resulting from delays caused by KDHE

or any third party not under the control or employment of any of the signatories hereto, the schedule shall be extended for a period equal to the delay resulting from such circumstances. Such an extension does not alter the schedule for performance or completion of other tasks required by this Consent Order, which are unaffected by such unexpected delay events, unless also specifically altered by amendment of this Consent Order. Failure to comply with the notice provision of this section may be grounds for KDHE to deny the Respondent an extension of time for performance. Unexpected delay events do not include unanticipated or increased costs of performance, changed economic circumstances, or normal precipitation events (having due regard for seasonal fluctuations). If KDHE determines that the delay as stated in the Respondent's written notice to KDHE was not due to unexpected delay events, a stipulated penalty may be assessed as provided in Section X.

XII. DISPUTE RESOLUTION

1. If Respondent disagrees, in whole or in part, with any decision by KDHE pursuant to this Consent Order, Respondent shall notify KDHE within thirty (30) days of receipt of the decision. The parties shall then have an additional thirty (30) working days to attempt to resolve the dispute. If an agreement is reached, the resolution shall be reduced to writing, signed by each Party and incorporated thereupon into this Consent Order. If agreement is not reached, KDHE shall issue a final written decision on the dispute.
2. Respondent reserves its right to appeal any decision of the KDHE, which is not consistent with law or which is arbitrary or capricious concerning a dispute under this Consent Order, to an administrative body with applicable jurisdiction and thereafter in compliance with the Kansas Administrative Procedures Act. The final decision or resolution of the applicable authority or court shall be incorporated as a part of this Consent Order. For purposes of this Consent Order, final order or decision shall mean an order or decision from which no appeal may be taken.
3. In the event that Respondent seeks dispute resolution concerning a date for performance of an act set out in the Work Plan, the date for performance of such act shall be extended for a period

equal to the delay resulting from the invocation of the dispute resolution provision. However, such extension does not alter the schedule for performance of completion of other tasks required by this Consent Order unless also specifically altered by the amendment of this Consent Order.

4. However, in the event that it is determined that dispute resolution was not sought in good faith, administrative penalties may be assessed at the rate of \$1,000 per day for each day of delay caused by such invocation of the dispute resolution provisions.

XIII. OTHER CLAIMS AND PARTIES

Nothing in this CO shall constitute or be construed as a release for any claim, cause of action or demand in law or equity against any person, firm, partnership, or corporation not a signatory to this CO for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Facility Property or the Site.

XIV. OTHER APPLICABLE LAWS

1. All actions required to be taken pursuant to this CO shall be undertaken in accordance with the substantive requirements of all applicable local, state, and federal laws and regulations.
2.
 - a. The Respondent shall exercise due care at the Facility Property with respect to existing contamination not actively remediated as part of this CO and shall comply with all applicable local, state, and federal laws and regulations.
 - b. The Respondent recognizes that the implementation of remedial actions at the Facility Property may interfere with the Respondent's and or its lessees' use of the Facility Property, and may require coordination of its operations, or a part thereof, with KDHE.
 - c. KDHE agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Respondent's operations by entry and remediation.

3. This CO shall be interpreted under the laws of the State of Kansas.

XV. FINANCIAL ASSURANCE OF ABILITY TO COMPLETE WORK

1. In order to ensure the full and final completion of the activities contemplated herein ("Work"), no later than thirty (30) days after the effective date of this CO, Respondent shall establish and maintain financial security in the amount of \$ 15,348,860, which amount does not include the costs of demolition, and hereinafter is termed the "Estimated Cost of the Work". Respondent will use a combination of financial security with \$ 8.5 Million Dollars placed in an escrow account under Subparagraph 1 (d) of this paragraph, and another financial assurance mechanism subject to approval by KDHE. Respondent currently intends to provide the remainder of the financial assurance provided by the ad valorem taxing authority of the Respondent and KAR 28-29-2112, as allowed under subparagraph 1(f) of this paragraph, subject to such demonstration as KDHE may require under that regulation. Such financial security shall be provided by Respondent in one or more of the following forms, which must be satisfactory in form and substance to KDHE:

- a. A surety bond, unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
- b. One or more irrevocable letters of credit, payable to or at the direction of KDHE, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal agency, or agency of the State of Kansas;
- c. A trust fund, established for the benefit of KDHE into which the Remediation Trust Funds, including funding from both Remedial and Administrative Accounts that Respondent receives through the Acquisition Agreement, shall be placed by

Respondent to be used solely for activities performed pursuant to this CO. Such trust fund shall be administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a U.S. Federal agency, or agency of the State of Kansas;

- d. An identified separate escrow account into which the Remediation Trust Funds, including funding from both Remedial and Administrative Accounts that Respondent receives through the Acquisition Agreement, shall be placed by Respondent to be used solely for activities performed pursuant to this CO and which account will be available for use by KDHE in the event of any Work Takeover under Paragraph 9 of Section IV C of this CO;
 - e. A demonstration by the Respondent satisfactory to KDHE that it meets the financial test criteria of 40 CFR § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 CFR § 264.143(f) are met;
 - f. Other financial mechanism(s) consistent with state and federal laws and currently included as financial assurance in other state environmental programs, including but not limited to KAR 28-29-2111 through 2113; or
 - g. A combination of the above.
- 2. Within thirty (30) days of the effective date of this CO, Respondent shall submit to the KDHE Project Coordinator, in accordance with Section XVII ("Notification") of this CO, all executed and/or otherwise finalized financial security instruments or other documents required in order to make the selected financial security mechanism legally binding.
 - 3. Payments from the approved financial security instruments shall be used to complete the obligations of the Respondent as set forth in Section IV of this Consent Order for the Site.
 - 4. In the event that either KDHE determines, or the Respondent becomes aware of information,

that the financial security required by this CO and provided by the Respondent pursuant to this Section becomes inadequate or otherwise no longer satisfies the requirements set forth in this Section due to an increase in the estimated cost of completing the Work, then within thirty (30) days of receipt of notice of KDHE's determination or, as the case may be, within thirty (30) days of the Respondent becoming aware of such information, the Respondent shall obtain and present to KDHE for approval a proposal for a revised or alternative form of the financial security listed in Paragraph 1 of this Section of the CO that satisfies all requirements set forth in this Section.

In seeking approval for a revised or alternative form of the financial security, Respondent shall follow the procedures set forth in Paragraph 6(b)(ii) of this Section of the CO. Respondent's inability to establish and maintain financial security for completion of the Work shall in no way excuse performance of any other requirements of this CO, including, without limitation, the obligation of Respondent to complete the Work in strict accordance with the terms hereof.

5. The commencement of any of the Work Takeover provisions pursuant to Paragraph 9 of the Order Section IV of this CO shall trigger KDHE's right to receive the benefit of any established financial security provided pursuant to Paragraphs 1a through 1g, of this Section as applicable, and at such time KDHE shall have immediate access to resources guaranteed under any such financial security mechanism(s), whether in cash or in kind, as needed to continue and complete the activities contemplated herein assumed by KDHE under the Work Takeover paragraph. If for any reason KDHE is unable to promptly secure the resources guaranteed under any such financial assurance mechanism(s), whether in cash or in kind, necessary to continue and complete the activities contemplated herein assumed by KDHE under the Work Takeover paragraph, Respondent shall immediately upon written demand from KDHE deposit into an account specified by KDHE, in immediately available funds and without

setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining activities contemplated herein to be performed as of such date, all as determined by KDHE.

6. Modification of Amount and/or Form of Financial Security.

- a. Reduction of Amount of Financial Security. If Respondent believes that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 1 of this Section, above, Respondent may, on any anniversary date of entry of this CO, or at any other time agreed to by the Parties, petition KDHE in writing to request a reduction in the amount of the financial security provided pursuant to this Section so that the amount of the financial security is equal to the estimated cost of the remaining Work to be performed. Respondent shall submit a written proposal for such reduction to KDHE that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a revised or alternative form of financial security, Respondent shall follow the procedures set forth in Paragraph 6(b)(ii) of this Section of the CO. If KDHE decides to accept such a proposal, KDHE shall notify the petitioning Respondent of such decision in writing. After receiving KDHE's written acceptance, Respondent may reduce the amount of the financial security in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, Respondent may reduce the amount of the financial security required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. No change to the form or terms of any financial security provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 4 or 6(b) of

this Section of the CO.

b. Change of Form of Financial Security.

- i. If, after the effective date of this CO, Respondent desires to change the form or terms of any financial security mechanism(s) provided pursuant to this Section, Respondent may, on any anniversary date of entry of this CO, or at any other time agreed to by the Parties, petition KDHE in writing to request a change in the form of the financial security provided hereunder. The submission of such proposed revised or alternative form of financial security shall be as provided in Paragraph 6(b) (ii) of this Section of the CO. Any decision made by KDHE on a petition submitted under this subparagraph (b)(i) shall be made in KDHE's sole and unreviewable discretion, and such decision shall not be subject to challenge by Respondent in any forum.
- ii. Respondent shall submit a written proposal for a revised or alternative form of financial security to KDHE which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of financial security, including all proposed instruments or other documents required in order to make the proposed financial security mechanism legally binding. The proposed revised or alternative form of financial security must satisfy all requirements set forth or incorporated by reference in this Section. Respondent shall submit such proposed revised or alternative form of financial security to the KDHE Project

Coordinator in accordance with Section XVII ("Notification") of this CO. KDHE shall notify Respondent in writing of its decision to accept or reject a revised or alternative financial security submitted pursuant to this subparagraph. Within ten (10) days after receiving a written decision approving the proposed revised or alternative financial security, Respondent shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected financial security mechanism(s) legally binding in a form substantially identical to the documents submitted to KDHE as part of the proposal, and such financial security mechanism (s) shall thereupon be fully effective. Respondent shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected financial security mechanism(s) legally binding to the KDHE Project Coordinator within thirty (30) days of receiving a written decision approving the proposed revised or alternative financial security in accordance with Section XVII I ("Notification") of this CO.

- c. Release of Financial Security. If Respondent receives written notice from KDHE in accordance with Section XX. hereof that the Work has been fully and finally completed in accordance with the terms of this CO, or if KDHE otherwise so notifies Respondent in writing, Respondent may thereafter release, cancel, or discontinue the financial security(s) provided pursuant to this Section. Respondent shall not release, cancel, or discontinue any financial security provided pursuant to this Section except as provided in this subparagraph.

7. Respondent's inability to establish and maintain financial security for completion of the Work shall in no way excuse performance of any other requirements of this CO, including, without limitation, the obligation of Respondent to complete the Work in strict accordance with the terms hereof.

XVI. PROJECT COORDINATORS

On or before the effective date of this CO, KDHE and Respondent shall each designate a Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of this CO. The KDHE Project Coordinator will be KDHE's designated representative. To the maximum extent possible, all communications between Respondent and KDHE and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this CO, shall be directed through the Project Coordinators. The parties agree to provide at least seven (7) days written notice prior to changing Project Coordinators. The absence of the KDHE Project Coordinator from the Site shall not be cause for the stoppage of work.

XVII. NOTIFICATION

Unless otherwise specified, reports, notice or other submissions required under this CO shall be in writing and shall be sent to:

- a) **For KDHE:**
Pamela Green
Environmental Scientist
KDHE Bureau of Environmental Remediation
Remedial Section/State Coop Unit
1000 SW Jackson, Suite 410
Topeka, Kansas 66612-1367
785-296-1935 (ph)
785-296-7030 (fax)

- b) **For Respondent:**
Dave Corliss
City Manager
City of Lawrence, Kansas
P.O. Box 708
Lawrence, KS 66044-0708

(785) 832-3403 (ph)

- c) **For EPA:**
Kurt Limesand, PG
AWMD/RCAP
EPA Region VII
901 N. 5th Street
Kansas City, Ks 66101
913-551-7184 (ph)
913-551-9184 (fax)

XVIII. REIMBURSEMENT OF COSTS

1. Three (3) months after the effective date of this CO and quarterly thereafter until termination of this CO by KDHE, the KDHE shall submit to Respondent an accounting of all oversight costs incurred by KDHE with respect to this CO from the effective date of this CO through the end of the quarter. These oversight costs will include all KDHE direct and administrative costs including payment of state contractors or agents of KDHE. These costs include providing project oversight, Site related research, negotiation of legal documents, legal involvement, management involvement, quality assurance/quality control audits, public meetings, administrative records, expendables, travel, per diem, equipment rental, equipment use, sampling analysis, sampling supplies, all contractor related activities (i.e., reviewing a model, conducting field work or risk assessment), document retrieval (i.e., aerial photographs), and all other types of data collection and associated costs.
2. KDHE shall submit to Respondent an accounting of those costs described above which have been incurred by KDHE with respect to this CO during the previous quarter. Respondent shall, within thirty (30) calendar days from receipt of a said accounting, remit a check for the full amount of those costs made payable to the Kansas Department of Health and Environment. Checks should specifically reference the identity of this site, and should be addressed to:

Kansas Department of Health and Environment
Bureau of Environmental Remediation

Attn: Administration
1000 SW Jackson Street, Suite 410
Topeka, Kansas 66612-1367

A copy of the check and transmittal letter shall be sent to the KDHE Project Coordinator specified herein.

XIX. COVENANT NOT TO SUE

Based upon the completion of: a) the Required Remediation and other obligations under this CO using funds formerly known as FIKRT Funds and financial security; and b) the Respondent placing, maintaining and fully funding any necessary Environmental Use Control Agreement (EUCA) and Long Term Care Agreement (LTCA) for this property, KDHE agrees and Covenants Not To Sue (Covenant) Respondent for environmental response, investigation, or remediation at, or emanating from, the Facility Property for the known environmental contamination, existing as of and prior to the effective date of this CO, at the Facility Property. However in the event that parcel(s) receive a "Resolved with Restrictions" designation by KDHE where the Required Remediation and/or the CO prescribes the use of an EUCA to restrict future land use due to concentrations of contaminants remaining in place that prohibit unrestricted exposure, there is an expectation of adherence to the terms of the conditions of the EUCA and LTCA for the duration of the EUCA as described in K.A.R. 28-73-6. If during the ownership of Respondent such parcel(s) does not comply with the terms of the EUCA and LTCA, the Respondent waives its right to allege that such parcel is not, or is no longer, a hazard to human health or the environment in any action pursuant to K.S.A. 65-1,229, to enforce such EUCA and LTCA. In the event that Repondent sells parcel(s) which has an EUC and LTCA placed upon it, as a condition of sale of such parcel(s), Respondent shall require the subsequent parcel(s) owner to waive its right to allege that such parcel is not, or is no longer, a hazard to human health or the environment in any action pursuant to K.S.A. 65-1,229, to enforce such EUCA and LTCA.

Provided however that this Covenant is conditional upon the satisfactory performance by

Respondent of its obligations under this CO including the Required Remediation responsibilities under the RAP and CAD pertaining to remediation of the Facility Property and maintenance of any required EUCs.

This Covenant does not relieve or waive any obligations of Respondent that it may have in the future which occur as a result of any activity on the part of Respondent.

This Covenant extends only to the Respondent and does not extend to any other person or entity.

XX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

1. This CO shall become effective on the date of the Respondent's closing on the purchase of the Facility Property assuming prior receipt by Respondent of a copy of this CO signed by Respondent and the Secretary of KDHE.
2. This CO may be amended by mutual agreement of KDHE and Respondent and such agreement shall not be unreasonably withheld. Such amendments shall be in writing, shall have as their effective date the date on which they are signed by both parties, and shall be incorporated into this CO. Nothing herein shall limit KDHE's ability to require additional tasks as described in Section IV, subsection C, paragraph 10 and/or perform a Work Takeover as set forth in paragraph 9 of the same Section and subsection.

XXI. TERMINATION

The provisions of this CO shall terminate upon Respondent's receipt of written notice from KDHE that Respondent has demonstrated that the terms of this CO, including any additional tasks which KDHE has determined to be necessary, have been satisfactorily completed.

IN WITNESS WHEREOF, the parties have affixed their signatures below:

RESPONDENT:

By: _____ Date: _____
Title:

STATE OF KANSAS:

Roderick L. Bremby, Secretary
Kansas Department of Health &
Environment Date: _____

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of _____, 2010, a true and correct copy of the above and foregoing Consent Order was deposited in the United States Mail, postage prepaid, and addressed to:

KDHE Staff Member

EXHIBITS

| | |
|---|------------------|
| FACILITY PROPERTY LOCATION MAP | Exhibit 1 |
| FINAL REMEDIAL ACTION PLAN | Exhibit 2 |
| FINAL KDHE CORRECTIVE ACTION DECISION | Exhibit 3 |
| PROJECT DELIVERABLE AND MILESTONE SCHEDULE | Exhibit 4 |
| RD/RA SCOPE OF WORK | Exhibit 5 |
| RD/RA WORK PLAN | Exhibit 6 |
| RD/RA IMPLEMENTATION SCHEDULE | Exhibit 7 |
| TRANSITION PLAN | Exhibit 8 |
| FIELD ACTIVITIES NOTIFICATION FORM | Exhibit 9 |

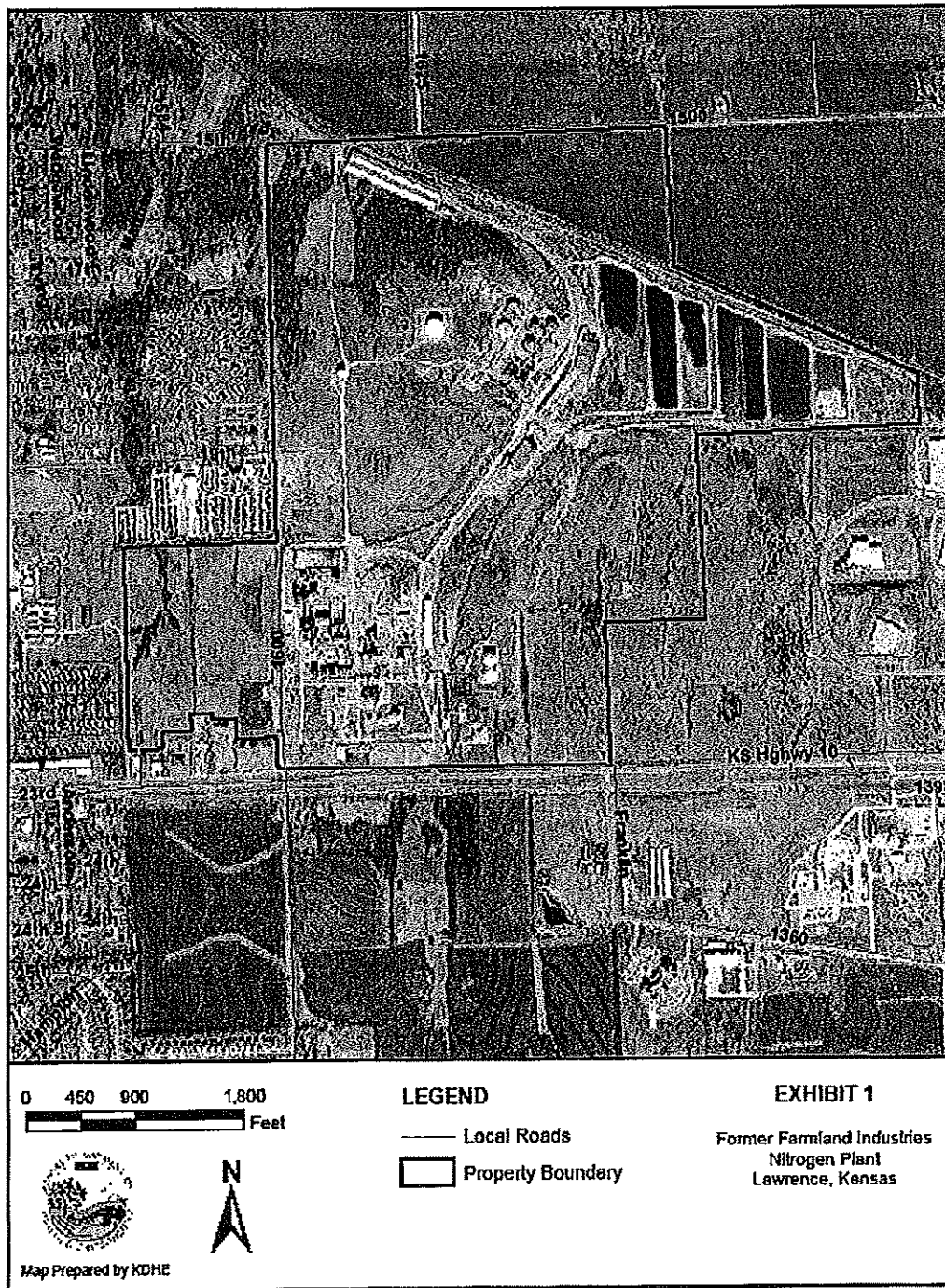


Exhibit 4
Project Deliverable and Milestone Schedule¹

| Deliverable/Milestone | Due Date |
|--|---|
| Establish financial security | Due within 30 days of the effective date of the Consent Order or as otherwise directed by KDHE |
| Submit all executed/finalized financial security instruments | Due within 30 days of the effective date of the Consent Order or as otherwise directed by KDHE |
| Submit Transition Plan | Due within 30 days of the effective date of the Consent Order or as otherwise directed by KDHE |
| Submit Environmental Use Control application | Due within 30 days of the approval of the Transition Plan. |
| Draft Remedial Design/Remedial Action (RD/RA) Work Plan ² and RD/RA Implementation Schedule | Due within 60 days of the approval of the Transition Plan. |
| Commence implementation of RA activities | Within 60 days of the KDHE approval of the RD/RA Implementation Schedule established in KDHE-approved RD/RA Work Plan |
| Complete RA implementation/construction and reporting | Per the RD/RA Schedule established in KDHE-approved RD/RA Work Plan |
| Certification of RA completion (or fully operational and functional) and reporting | Per the RA Implementation Schedule established in KDHE-approved RA Work Plan |
| Quarterly Progress Reports ³ | Due each quarter, 45 days after the end of each quarter or as otherwise agreed by KDHE |
| Monitoring Reports | Per the KDHE-approved schedule(s) or as otherwise directed by KDHE |

¹ One hard copy plus one electronic copy of each deliverable shall be provided unless otherwise directed by KDHE; revised deliverable(s) shall be provided within 30 days of receipt of KDHE comments.

² In accordance with Scope of Work #BER-RS-026, incorporated herein as Exhibit 5, and including other associated documents as described in the RD/RA Scope of Work.

³ As approved by the KDHE Project Coordinator, quarterly progress may be documented in other routine monitoring report submittals.

Exhibit 9

KDHE-BER Remedial Section Field Activities Notification Form

This field notification form is only applicable to sites managed by the Remedial Section and is not intended for use by other programs such as the Underground Storage Tank Program. If internet access is unavailable to provide the advance written notification via our website (<http://www.kdheks.gov/remedial/index.html>), please complete this form and fax to 785-296-7030. If you have any problems completing this form, please call 785-296-1673.

Note: If you are amending or canceling a previous notification, please enter the exact ID number (if known).

- ☐ I want to submit a new notification.
☐ I want to amend a previous notification. (Enter ID number if known) _____
☐ I want to cancel a previous notification. (Enter ID number if known) _____

(*denotes required fields)

*Project Name: _____
*KDHE Project Manager: _____

Location of work:

*County: _____
City (or nearest city): _____

Anticipated dates and duration of work:

*Start Date (mm/dd/yy): _____
*Duration of work (days): _____
☐ Check this box if work is expected to occur on any weekend or holiday days.

Primary Field Contact:

*Name: _____
*Affiliation/Company: _____
*Primary Phone Number: _____ Alternate Phone Number: _____
Email Address: _____

Alternate Contact:

*Name: _____
*Affiliation/Company: _____
*Primary Phone Number: _____ Alternate Phone Number: _____
Email Address: _____

***Brief Description of Work to be Performed:**

