

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101**

IN THE MATTER OF:)	SETTLEMENT AGREEMENT
)	
Radiation- Former Air Capitol Dial Site)	
Wichita, Sedgwick County, Kansas)	U.S. EPA Region 7
)	CERCLA-07-2011-0005
)	
)	
Air Capitol Dial, Inc.)	
SETTLING PARTY)	PROCEEDING UNDER SECTION
)	122(h)(1) OF CERCLA
_____)	42 U.S.C. § 9622(h)(1)

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I. JURISDICTION

1. This Settlement Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D. This authority has been further delegated to the Director, Superfund Division, EPA Region 7, with concurrence of the Regional Counsel or his/her designee by EPA Delegation No. R7-14-014-C. This Settlement Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States..

2. This Settlement Agreement is made and entered into by the EPA and Air Capitol Dial, Inc. ("Settling Party"). The Settling Party consents to and will not contest the authority of the United States to enter into this Settlement Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Settlement Agreement concerns the Radiation - Former Air Capitol Dial Site ("Site") located at 1115 West 2nd Street, Sedgwick County, Wichita, Kansas. The EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, the Administrator of the EPA Region 7 signed an Action Memorandum for the Site on 4/18/11, pursuant to which EPA plans to conduct a removal action to sample, excavate, remove and replace soils contaminated with radium-226, a hazardous substance under Section 104 of CERCLA, 42 U.S.C. § 9604.

5. EPA currently anticipates that performance of this removal action will cost approximately \$500,000.

6. The EPA alleges that the Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for response costs incurred and to be incurred at the Site.

7. The EPA and Settling Party recognize that this Settlement Agreement has been negotiated in good faith and that this Settlement Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by the Settling Party in accordance with this Settlement Agreement do not constitute an admission of any liability. The Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the facts or allegations contained in this Section.

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III. PARTIES BOUND

8. This Settlement Agreement shall be binding upon the EPA and upon the Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of the Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter the Settling Party's responsibilities under this Settlement Agreement. Each signatory to this Settlement Agreement certifies that he or she is authorized to enter into the terms and conditions of this Settlement Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

9. By entering into this Settlement Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing the Settling Party to make a cash payment to address its alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, and under Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site as provided in the Covenant Not to Sue by the EPA in Section VIII, subject to the Reservations of Rights by the EPA in Section IX.

V. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in any appendix attached hereto, 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. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, 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.
- c. "Effective Date" shall mean the effective date of this Settlement Agreement as provided by Section XVII.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

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- e. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- f. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or a lower case letter.
- g. "Parties" shall mean the EPA and the Settling Party.
- h. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).
- i. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- j. "Settlement Agreement" shall mean this Settlement Agreement and any attached appendices. In the event of conflict between this Settlement Agreement and any appendix, the Settlement Agreement shall control.
- k. "Settling Party" shall mean Air Capitol Dial, Inc.
- l. "Site" shall mean the Radiation- Former Air Capitol Dial Site Superfund site, encompassing approximately .05 acres and located at 1115 West 2nd Street, Wichita, Kansas in Wichita, Sedgwick County, Kansas and shown on the map included in Appendix A.
- m. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

11. Settling Party shall pay to EPA the principal amount of \$225,000 plus Interest. Payment of the principal amount shall be made in three installments. The first installment payment of \$75,000 is due within 30 days after the Effective Date. The subsequent installment payments of \$75,000 each are due on each anniversary of the Effective Date. The second and third installment payments shall include an additional amount for Interest after the effective date through the date of Payment. EPA shall send a calculation of the Interest due for each payment to Settling Party after the Effective Date. Settling Party may pay any installment payment prior to the due date, but must contact individuals identified in Paragraph 34 in advance for a determination regarding the amount of Interest to be included with the payment. In the event any

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installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.

12. Payment shall be made by Electronic Funds Transfer (“EFT”) in accordance with instructions to be provided to the Settling Party by the EPA Region 7 and shall be accompanied by a statement identifying the name and address of the Settling Party, the Site name, the EPA Region and Site/Spill ID # A7V6 and the EPA docket number for this action.

13. At the time of each payment, the Settling Party shall also send notice that such payment has been made to the EPA in accordance with Section XIV (Notices and Submissions) and to the EPA Cincinnati Finance Center Office by email at acctreceivable.cinwd@epa.gov, or by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268.

Such notice shall reference the EPA Region and Site/Spill ID # A7V6 and the EPA docket number for this action.

14. The total amount to be paid by the Settling Party pursuant to Paragraph 11 shall be deposited by the EPA in the EPA Hazardous Substance Superfund.

VII. FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

15. If the Settling Party fails to make any payment required by Paragraph 11 (Payment of Response Costs) by the required due date or fails to grant access within 5 days of demand by EPA, all remaining installment payments and all accrued Interest shall become due immediately upon such failure and Interest shall continue to accrue on any unpaid amounts until the total amount due has been received.

16. Stipulated Penalty

- a. If any amounts due under Paragraph 11 are not paid by the required date, the Settling Party shall be in violation of this Settlement Agreement and shall pay to the EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 11, \$500 per violation per day that such payment is late.
- b. Stipulated penalties are due and payable within thirty (30) days of the date of demand for payment of the penalties by the EPA. All payments to the EPA under this paragraph shall be identified as “stipulated penalties” and shall be made by

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certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the Settling Party, the Site name, the EPA Region and Site/Spill ID # A7V6, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
US Environmental Protection Agency
Cincinnati Finance Center
PO Box 979076
St. Louis, Missouri 63197-9000.

- c. At the time of each payment, the Settling Party shall send notice that such payment has been made to the EPA in accordance with Section XIV (Notices and Submissions). Such notice shall identify the Region and Site-Spill ID # A7V6 and the EPA Docket Number for this action.
- d. Penalties shall accrue as provided above regardless of whether the EPA has notified the Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of the Settling Party's failure to comply with the requirements of this Settlement Agreement, if the Settling Party fails or refuses to comply with any term or condition of this Settlement Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Settlement Agreement, the Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

18. Notwithstanding any other provision of this Section, the EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Settlement Agreement. Payment of stipulated penalties shall not excuse the Settling Party from payment as required by Paragraph 11 or from performance of any other requirements of this Settlement Agreement.

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VIII. COVENANT NOT TO SUE BY THE EPA

19. Except as specifically provided in Section IX (Reservations of Rights by the EPA), the EPA covenants not to sue or to take administrative action against the Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), or Section 7003 of RCRA with regard to the Site. This covenant shall take effect upon receipt by the EPA of all amounts required by Section VI, Paragraph 11 (Payment of Response Costs), and any Interest or Stipulated Penalties due thereon pursuant to Section VII (Failure to Comply with Settlement Agreement). This covenant not to sue is conditioned upon the satisfactory performance by the Settling Party of its obligations under this Settlement Agreement. This covenant not to sue extends only to the Settling Party and does not extend to any other person, corporation, or entity.

IX. RESERVATIONS OF RIGHTS BY THE EPA

20. The EPA reserves, and this Settlement Agreement is without prejudice to, all rights against the Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by the EPA in Paragraph 19. Notwithstanding any other provision of this Settlement Agreement, the EPA reserves all rights against the Settling Party with respect to:

- a. liability for failure of the Settling Party to meet a requirement of this Settlement Agreement;
- 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;
- d. liability, based on the ownership or operation of the Site by Settling Party when such ownership or operation commences after signature of this Settlement Agreement by Settling Party;
- e. liability, based upon Settling Party's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Settlement Agreement by the Settling Party; and
- f. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

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21. Nothing in this Settlement Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the EPA may have against any person, firm, corporation or other entity not a signatory to this Settlement Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTY

22. The Settling Party covenants not to sue and agrees 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 Settlement Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, 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 claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Kansas Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Site.

Except as provided in Paragraph 23 (Waiver of Claims), and Paragraph 25 (Waiver of Claim Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section IX (Reservations of Rights by EPA), other than in Paragraph 20.a (liability for failure to meet a requirement of the Settlement Agreement) or 20.b (criminal liability), but only to the extent that the Settling Party's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

23. Nothing in this Settlement Agreement 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 C.F.R. § 300.700(d).

24. Settling Party agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) or 113 of CERCLA) that it may have for response costs relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with

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respect to any defense, claim, or cause of action that Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Party.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION

25. Except as provided in Paragraph 24 (claims against other potentially responsible parties), nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. Except as provided in Paragraph 24 (claims against other potentially responsible parties), Settling Party reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

26. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Settling Party is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or by any other person, provided, however, that if EPA exercises rights under the reservations in Section IX (Reservations of Rights by EPA), other than in Paragraphs 20.a (liability for failure to meet a requirement of the Settlement Agreement) or 20.b (criminal liability), the “matters addressed” in this Settlement Agreement will no longer include those response costs or response actions that are within the scope of the exercised reservation. In the event that Settling Party’s waiver of claims becomes inapplicable in accordance with Paragraph 28, the Parties further agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Settling Parties have resolved their liability to the United States, as of the Effective Date, for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), for “matters addressed” as defined above.

27. Settling Party shall, with respect to any suit or claim brought by it for matters related to this Settlement Agreement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also shall, with respect to any suit or claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within 10 days after service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days after service or receipt of any Motion for Summary Judgment

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and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.

28. In any subsequent administrative or judicial proceeding initiated by EPA, or the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party 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 by EPA, or the United States on behalf of EPA, in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by EPA set forth in Section VIII.

29. Effective upon signature of this Settlement Agreement by Settling Party, Settling Party agrees that the time period commencing on the date of its signature and ending on the date EPA receives from such Settling Party the payment(s) required by Section VI (Payment of Response Costs) and, if any, Section VII (Failure to Comply with Settlement Agreement) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the "matters addressed" as defined in Paragraph 27, and that, in any action brought by the United States related to the "matters addressed," Settling Party will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Settling Party that it will not make this Settlement Agreement effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by EPA.

XII. SITE ACCESS

30. Commencing upon the effective date of this Settlement Agreement, Settling Party agrees to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Party to which access is determined by EPA to be required for the implementation of this Settlement Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples; and

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e. Assessing the need for, planning, or implementing response actions at or near the Site; and

31. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XIII. CERTIFICATION

32. Settling Party hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information (other than identical copies) relating to its potential liability regarding the Site since the earlier of notification of potential liability by the United States or the state or the filing of a suit against it regarding the Site and that it has fully complied with any and all the EPA requests for documents or information regarding the Site and the Settling Party's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927.

XIV. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Settlement Agreement with respect to the EPA and Settling Party.

As to the EPA:

Denise L. Roberts
Senior Assistant Regional Counsel
901 North 5th Street
Kansas City, Kansas 66101
(913) 551-7559

Todd Campbell
On Scene Coordinator
901 North 5th Street
Kansas City, Kansas 66101
(913) 551-7115

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As to the Settling Party:

Steve McKinney
President
Air Capitol Dial, Inc.
220 North Vine Street
Wichita, Kansas 67203-5841
(316) 264-2483

XV. INTEGRATION/APPENDICES

34. This Settlement Agreement and Appendix A, map, attached to and in corporate herein, of the Site constitutes the final, complete and exclusive Settlement Agreement and understanding between the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, settlement agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement.

XVI. PUBLIC COMMENT

35. This Settlement Agreement shall be subject to a public comment period of not less than thirty (30) days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper, or inadequate.

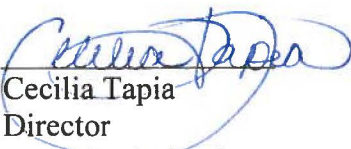
XVII. EFFECTIVE DATE

36. The effective date of this Settlement Agreement shall be the date upon which the EPA issues written notice that the public comment period pursuant to Paragraph 35 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Settlement Agreement.


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IT IS SO AGREED:

U.S. Environmental Protection Agency

By: 
Cecilia Tapia
Director
Superfund Division

2/20/13
Date

By: 
Denise L. Roberts
Senior Assistant Regional Counsel
Office of Regional Counsel

Date

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Air Capitol Dial, Inc.

By: Steve McKinney
Steve McKinney
President
Air Capitol Dial, Inc.


01/17/2012
Date

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U.S. Department of Justice

By: 
Ellen M. Mahan
Deputy Section Chief
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

11-15-12
Date


By: _____
David L. Dain
Senior Attorney
U.S. Department of Justice
Environmental Enforcement Section
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

11-15-12
Date



1115 W 2nd St N, Wichita, KS 67203

Image U.S. Geological Survey
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Settlement Agreement was sent this day in the following manner to the addressees:

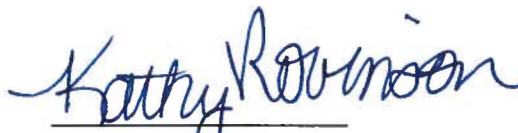
Copy hand delivered to
Attorney for Complainant:

Denise L. Roberts
Senior Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
11201 Renner Blvd.
Lenexa, Kansas 66219

Copy by First Class Mail to:

Mr. Michael D. Herd
Hinkle Elkouri Law Firm, L.L.C.
8621 East 21st Street North, Suite #200
Wichita, Kansas 67202

Dated: 2/25/13



Kathy Robinson
Hearing Clerk, Region 7