

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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REGION 8  
1595 WYNKOOP ST  
DENVER, COLORADO 80202

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF: )

Farmers Union Oil Co. of Devil's Lake )  
OWNER/OPERATOR )  
Warwick Oil Gas Station )  
Warwick, North Dakota )

Respondent. )

Proceeding under Section 9003(h) of the )  
Resource Conservation and Recovery Act, )  
as amended, 42 U.S.C. § 6901, *et seq.* )

Docket No. RCRA-08-2018-0003

**INITIAL ADMINISTRATIVE  
ORDER AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**I. JURISDICTION**

1. This Initial Administrative Order (Order) is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by section 9003(h) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. § 6901, *et seq.*, and the Rules Governing Issuance of and Administrative Hearings on Corrective Action Orders, codified at 40 C.F.R. § 24. The authority vested in the Administrator by section 9003(h) of RCRA has been delegated to the Regional Administrators by EPA Delegation Nos. 8-25 and 8-37, dated February 26, 2010, and re-delegated to supervisors in the Legal and Technical Enforcement Programs.

2. This Order is based upon an administrative record, compiled by EPA and incorporated herein by reference. The administrative record is being transmitted to Respondent with this Order, and is available for the public to review by appointment at EPA's office at 1595 Wynkoop St., Denver, CO 80202.

## II. DEFINITIONS

3. Unless otherwise expressly provided in this Order, terms used in this Order that are defined in RCRA or in regulations promulgated under RCRA shall have the meaning assigned to them in RCRA or in such regulations. Whenever terms listed below are used in this Order or in the appendices to or incorporated by reference into this Order, the following definitions shall apply:

a. “Corrective Action Plan” (CAP) has the meaning accorded by 40 C.F.R. § 280.66.

b. “Day” or “day” means a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.

c. “Effective Date” means the effective date of this Order as provided in Section XXI.

d. “Order” means this Initial Administrative Order and Notice of Opportunity for Hearing, all appendices attached hereto, and all documents incorporated by reference into this document including, but not limited to, EPA-approved submissions. In the event of conflict between this Order and any appendix or other incorporated document, this Order shall control.

e. “Petroleum” means “petroleum, including crude oil or any fraction thereof which is liquid at standard conditions or temperature or pressure...” and includes its constituent parts including, but not limited to, Benzene, Toluene, Ethyl Benzene and total Xylenes (collectively, BTEX) pursuant to section 9001(6) of RCRA.

f. “Regulated substance” shall mean petroleum and “any substance defined in section 9601(14) of this title (but not including any substance regulated as a hazardous waste under subchapter III of this chapter)” pursuant to section 9001(7)(B) of RCRA.

g. “Respondent” shall mean Farmers Union Oil Co. of Devils Lake, a corporation doing business in the State of North Dakota.

h. “Site” shall mean the parcel(s) of property on which the underground storage tanks (USTs) are located, and the parcel(s) of property on which the associated leak is located, and depicted generally on the maps included in the 2012 Phase II Environmental Assessment, which is included in the Administrative Record, and located generally at the Warwick Oil Gas Station 115 Main St., Warwick, North Dakota, 55381.

i. “Site Assessment” shall mean an investigation of the Site as described in 40 C.F.R. § 280.65 (Investigations for soil and ground-water cleanup).

### **III. PARTIES BOUND**

4. This Order applies to and is binding upon Respondent and its officers, directors, employees, agents, successors, assigns, trustees, and receivers, and upon all persons, including but not limited to independent contractors and consultants acting under or on behalf of Respondent.

5. No change in owner, operator, corporate, or partnership status relating to the USTs alters Respondent’s responsibilities under this Order. Any conveyance of title, easement, or other interest in the USTs, or a portion of the USTs, shall not affect Respondent’s obligations under this Order.

6. Respondent shall give written notice of this Order to any successor in interest prior to transfer of ownership or operation of the USTs or portion thereof, and shall notify EPA at least 30 days prior to such transfer.

7. Respondent shall ensure that its contractors, subcontractors, and representatives comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

8. Respondent shall provide a copy of this Order to all contractors, subcontractors, laboratories, and consultants retained to conduct or monitor any portion of the work performed pursuant to this Order within one week of the Effective Date of this Order or date of hire, and shall condition all such contracts on compliance with the terms of this Order.

#### **IV. FINDINGS OF FACT**

9. Respondent is a corporation doing business in the State of North Dakota.

10. Respondent owns and operates the Warwick Oil Gas Station, 115 Main St., Warwick, North Dakota, 55381 (Site).

11. The Site is located on privately-owned property within the Spirit Lake Indian Reservation.

12. The Site contains two USTs.

13. Each of the two USTs consists of one 560 gallon single-walled STIP3 tank containing unleaded gasoline.

14. The Spirit Lake Tribe has not established groundwater standards or Maximum Concentration Limits (MCLs) for BBTEX.

15. Documentation of Release. In 2012, a Phase II Environmental Site Assessment Report was conducted on the Site. The ground water samples collected for the monitoring wells were analyzed for BTEX.

16. Monitoring well TW5 was directly adjacent to the UST area. Samples from monitoring well TW5 contained benzene at 14.6 parts per million (ppm), toluene at 28.8 ppm, ethyl benzene at 1.76 ppm, and total xylenes at 12.8 ppm.

17. The MCL for groundwater in the North Dakota Department of Health Standard of Water Quality for Waters of the State are .005 ppm for benzene, 1 ppm for toluene, .7 ppm for ethyl

benzene, and 10 ppm for total xylenes. NDCC § 33-17-01-06.

18. Monitoring well TW4 was located downgradient of the UST area. Samples from monitoring well TW4 contained benzene at 1.13 ppm, which is above the MCL of .005 ppm for benzene.

19. Benzene, toluene, ethyl benzene, and total xylenes are all substances found in unleaded gasoline and diesel fuel, and are constituents of petroleum. If left unaddressed, these petroleum constituents could migrate into drinking water sources.

20. The State of North Dakota notified EPA of the sample results in September 2017.

21. Upon notification, EPA sent Respondent a letter requesting that Respondent determine the extent of release and develop and submit a proposed corrective action plan within 60 days.

22. While Respondent indicated to EPA that it was working with the State of North Dakota to file a claim with the Tank Fund, Respondent failed to submit the requested corrective action plan.

23. Thereafter, EPA sent Respondent numerous emails. Respondent indicated via email that it anticipated pulling the tanks. But Respondent has not provided a proposal to determine the extent of release, nor has Respondent submitted a proposed corrective action plan.

## V. CONCLUSIONS OF LAW AND DETERMINATIONS

24. Based on the above Findings of Fact, and in consideration of the administrative record, EPA has made the following conclusions of law and determinations:

- a. Respondent is a “person” as defined in section 9001(5) of RCRA.
- b. Respondent meets the definition of “owner” or “operator”, as defined in section 9001(3) and (4) of RCRA, of the USTs at the Site.
- c. There has been a release of petroleum into the environment from regulated

USTs at the Site as defined by section 9001(8) of RCRA.

- d. The actions required by this Order are necessary to protect human health and the environment.

## **VI. CORRECTIVE ACTION ORDER**

Pursuant to section 9003(h) of RCRA Respondent is ordered to:

25. Site Assessment. Within 45 days of the Effective Date of this Order, conduct and submit to EPA a Site Assessment in accordance with 40 C.F.R. § 280.65 (Investigations for soil and groundwater cleanup). The Site Assessment is subject to approval by EPA in accordance with Section VIII (Approvals), below.

26. Corrective Action Plan. Within 30 days after EPA approval of the Site Assessment, Respondent shall submit to EPA a CAP for the Site. The CAP shall:

- a. Develop one or more corrective action alternatives that will respond to the contamination and will permanently mitigate and abate the release(s) of petroleum at the Site;
- b. Achieve the applicable MCL levels for ground water at the Site; and
- c. Provide a schedule for the performance of the corrective action at the Site.
- d. The CAP shall meet the requirements of 40 C.F.R. §280.66 (Corrective Action Plan) and shall comply with subchapter IX of RCRA, 42 U.S.C. § 6991, *et seq.*, its implementing regulations at 40 C.F.R. § 280, *et seq.*, and with relevant EPA or tribal regulations and guidance documents.<sup>1</sup> The CAP is subject to approval by EPA in accordance with Section VII (Approvals), below.

- e. Within 30 days after receiving EPA's approval of the CAP, Respondent shall implement the approved CAP in accordance with its requirements, specifications and schedule.

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<sup>1</sup> Available at <http://www.epa.gov/oust/cat/sitechar.htm>

27. Release Greater than Initially Identified. If at any point prior to termination of this Order Respondent identifies a release of petroleum of greater extent than that indicated by the Site Assessment, Respondent shall immediately notify the EPA Project Coordinator orally or electronically, and shall provide written notification within 15 days of such identification, summarizing the magnitude of the release and the potential threat to human health and/or the environment.

28. Additional Work. Consistent with the objectives of this Order, new circumstances, including but not limited to those identified in Paragraph 27 (Release Greater than Initially Identified) may cause EPA to determine that certain tasks, including investigatory work, evaluation, or corrective action are necessary in addition to the tasks included in the CAP. EPA shall request in writing that Respondent perform the additional work and EPA shall specify the basis and reasons for its determination that the additional work is necessary, and if required, a due date for an amended CAP or other required submittal. Within 15 days after receipt of such request, Respondent shall have the opportunity to meet with EPA to discuss such additional work. EPA review of any additional submittals required of Respondent under this Paragraph shall be conducted in accordance with the procedures set forth in Section VII (Approvals) below. All additional work performed by Respondent under this Paragraph shall be performed in a manner consistent with this Order.

29. Reports. Respondent shall provide quarterly reports that include information regarding any sampling conducted; Respondent's ability to attain the MCL at the point of compliance; Respondent's progress towards controlling the source of the release; and estimates and analysis of quantity, volume, and/or toxicity of the waste generated, including contaminated soil, sludge, and groundwater.

30. Professionals. All work performed pursuant to this Order shall be under the direction and supervision of a professional engineer, geologist or equivalent professional with expertise in remediation of subsurface environmental contamination. Within 30 days of the Effective Date of this Order, Respondent shall notify EPA in writing of the name, title, and qualifications of the engineer or geologist, and of any contractors or subcontractors and their personnel to be used in carrying out the terms of this Order. After such notice, Respondent shall provide EPA with 15 days notice of any intended change of the engineer, geologist, or equivalent professional and contractors or subcontractors and their personnel. Respondent shall verify that no contractor is on the “List of Parties Excluded from Federal Procurement or Non-Procurement Programs”.<sup>2</sup> EPA reserves the right to request that Respondent propose an alternative at any time during the pendency of this Order.

## **VII. APPROVALS**

31. EPA will provide Respondent with its written approval, approval with conditions, or disapproval for any submittal pursuant to or required by this Order. EPA will provide a written statement of reasons for any approval with conditions or disapproval, and if required, a due date for the revised submittal.

32. Respondent shall revise any submittal in accordance with EPA’s written comments and submit them by the due date. Revised submittals are subject to EPA approval, approval with conditions, or disapproval.

33. While awaiting EPA approval, approval with conditions, or disapproval of any submittal, Respondent shall proceed with all other tasks that may be conducted independently of such submittal.

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<sup>2</sup> <https://www.epls.gov/>



34. CAP Approval. EPA's approval, approval with conditions, or disapproval of the CAP may be conditioned upon the public participation requirements of 40 C.F.R. § 280.67 (Public Participation).

### **VIII. PROJECT COORDINATOR**

35. Within 15 days of the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for overseeing the implementation of this Order. Respondent shall notify EPA in writing of the Project Coordinator it has selected.

36. Respondent shall provide EPA with at least 15 days written notice prior to changing Project Coordinators.

37. EPA reserves the right to request that Respondent propose an alternative project coordinator at any time during the pendency of the Order.

38. The designated EPA Project Coordinator is Fran Chambus. She may be reached by mail at 1595 Wynkoop St., Mail Code 8P-R, Denver, CO 80202, by phone at (303) 312-6782, and by email at [chambus.francisca@epa.gov](mailto:chambus.francisca@epa.gov). All communications between Respondent and EPA, and all documents, reports, approvals and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the Project Coordinators. Unless otherwise specified, two copies of all documents to be submitted to the EPA pursuant to this Order shall be sent to the Project Coordinator at the email address above.

### **IX. QUALITY ASSURANCE**

39. Throughout all sample collection and analysis activities, Respondent shall use EPA approved quality assurance, quality controls, and chain-of-custody procedures. In addition, Respondent shall:

- a. Follow all EPA Region 8 guidance for sampling and analysis;<sup>3</sup>
- b. Consult with EPA in planning for, and prior to, field sampling and laboratory analysis;
- c. Notify EPA at least 10 business days in advance of field sampling and laboratory analysis;
- d. Inform the EPA Project Coordinator at least 10 business days in advance as to which laboratories will be used by Respondent and ensure that EPA personnel and EPA authorized representatives have reasonable access to the laboratories and personnel used for analyses; and
- e. Ensure that all laboratories used by Respondent for analyses are accredited by a quality assurance/quality control program equivalent to the National Environmental Laboratory Approval Program, and provide the name, address and telephone numbers of the laboratories Respondent plans to use to implement the CAP.

40. Respondent shall submit to EPA the results of all sampling and/or tests or other data generated by, or on behalf of Respondent to EPA within 10 business days, in accordance with this Order.

41. Respondent shall notify EPA at least 10 days before engaging in any field activities, such as well drilling, installation of equipment, or sampling. At the request of EPA, Respondent shall provide, or allow EPA or its authorized representatives to take, split, duplicate, or replicate samples of all samples collected by Respondent pursuant to this Order.

#### **X. SITE ACCESS**

42. EPA, its contractors, employees, and/or any duly designated EPA representatives are

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<sup>3</sup> Data requirements can be found at <https://www.epa.gov/quality/managing-quality-environmental-data-epa-region-8>

authorized to enter and freely move about the Site pursuant to this Order for the purposes of, *inter alia*: reviewing the progress of Respondent in carrying out the terms of this Order; conducting such tests, sampling, or monitoring as EPA deems necessary; using documentary type equipment; and verifying the reports and data submitted to EPA by Respondent. Respondent agrees to provide EPA and its representatives access at all reasonable times to the Site and subject to the following Paragraph, to any other property to which access is required for implementation of this Order.

43. To the extent that work required by this Order or by any approved CAP prepared pursuant hereto must be done on property not owned or controlled by Respondent, Respondent shall enter into Site access agreements with the present owner(s) of such property within 30 days after the need for access becomes known to Respondent. Best efforts as used in this Paragraph shall include, at a minimum, a certified letter from Respondent to the present owners of the property requesting access agreements granting Respondent and EPA representatives access to the property. Any such access agreement shall be incorporated by reference into this Order and a copy shall be provided to EPA. If agreements for access are not obtained within 30 days after the need for access becomes known to Respondent, Respondent shall notify EPA in writing within 15 days thereafter regarding both its efforts to obtain access and its failure to obtain the agreements. If EPA subsequently obtains access to the property, Respondent shall undertake EPA approved work on such property in accordance with this Order.

44. Nothing in this Section shall be construed to limit or otherwise affect Respondent's liability for and obligation to perform corrective action, notwithstanding the lack of access.

45. Nothing in this Section limits or otherwise affects EPA's right of access and entry pursuant to all applicable law.

## **XI. ACCESS TO INFORMATION AND RECORD RETENTION**

46. During the pendency of this Order and for a period of 10 years after its termination as provided by Section XXII (Termination and Satisfaction), Respondent shall preserve and retain all data, records, and documents in its possession or in the possession of its officers, directors, employees, agents, contractors, successors, and assigns which relate in any way to this Order. Respondent shall make such records available to EPA for inspection or shall provide copies of any such records to EPA during this retention period.

47. At the conclusion of the retention period, Respondent shall notify EPA 90 days prior to the destruction of any such records, and if the records are requested by EPA, shall deliver such records to EPA. Such notification shall reference the Effective Date, caption, and docket number of this Order.

## **XII. STOP WORK ORDER**

48. If EPA determines that activities performed by Respondent in compliance or non-compliance with this Order have caused or may cause a release or other threat to human health or the environment, or that Respondent is not capable of undertaking the studies or corrective measures ordered, EPA may order Respondent to stop further implementation of this Order for such period of time as EPA determines may be needed to abate any such release or threat.

## **XIII. BUSINESS CONFIDENTIALITY**

49. Respondent may assert a business confidentiality claim covering all or part of any information submitted to EPA pursuant to this Order. Any assertion of confidentiality shall be adequately substantiated by Respondent pursuant to 40 C.F.R. § 2, subpart B. Information determined to be confidential by EPA shall be disclosed only to the extent permitted by 40

C.F.R. § 2, subpart B. If no such confidentiality claim accompanies this information when it is submitted to EPA, it may be made available to the public by EPA without further notice to Respondent. Physical or analytical data shall not be deemed confidential.

**XIV. PENALTIES FOR NONCOMPLIANCE**

50. If Respondent fails to comply with the terms and provisions of this Order, EPA may commence a subsequent action to require compliance and to assess a civil penalty not to exceed fifty-eight thousand, five hundred and sixty-two dollars (\$58,562) for each day of violation in accordance with section 9006(a) of RCRA and 40 C.F.R. § 19 (Adjustment of Civil Monetary Penalties for Inflation).

**XV. RESERVATION OF RIGHTS BY EPA**

51. Nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to RCRA or any other applicable law. EPA reserves the right to bring an action against Respondent under section 9003(h) of RCRA for recovery of any response costs incurred by the United States related to this Order or the Site and not paid by Respondent.

**XVI. OTHER APPLICABLE LAWS**

52. All action required to be taken by Respondent pursuant to this Order shall be undertaken in accordance with all applicable local, state, and Federal laws and regulations. Respondent shall

obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

**XVII. EPA NOT LIABLE**

53. By issuance of this Order, EPA assumes no liability for any injuries or damages to persons or property resulting from acts or omissions of Respondent or Respondent's directors, officers, employees, agents, representatives, successors, assigns, contractors, subcontractors, or consultants in carrying out any action or activity required by this Order or necessary to complete the work required by this Order.

54. EPA is not to be construed as a party to, and does not assume any liability for any contract entered into by Respondent to carry out any work pursuant to this Order. The proper completion of work under this Order is solely the responsibility of Respondent.

**XVIII. SUBSEQUENT MODIFICATION AND INCORPORATION**

55. This Order may be amended by EPA to ensure protection of human health and the environment. Such amendments shall be in writing, shall have as their Effective Date the date on which they are signed by EPA, and shall be incorporated into this Order.

56. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writing submitted by Respondent will be construed as relieving Respondent of its obligation to obtain written approval, if and when required by this Order.

57. If Respondent seeks permission to deviate from any approved CAP, Respondent's Project Coordinator shall timely submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving approval from the EPA Project Coordinator pursuant to Section VII (Approvals),

above.

58. Any reports, plans, specifications, schedules, and attachments required by this Order are, upon written approval by EPA, incorporated into this Order. Any noncompliance with such EPA-approved reports, plans, specifications, schedules, and attachments shall be considered a violation of this Order and shall subject Respondent to the statutory penalty provisions referenced in Section XIV (Penalties for Noncompliance), above.

#### **XIX. SEVERABILITY**

59. If any provision or authority of this Order or the application of this Order to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of such provisions to other parties or circumstances and the remainder of the Order shall remain in force and shall not be affected thereby.

#### **XX. EFFECTIVE DATE AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

60. In accordance with 40 C.F.R. § 24.05 this Order shall become effective 30 days after service of the Order, unless Respondent files a response and requests a public hearing in writing no later than 30 days after service of the Order.

61. If Respondent fails to file a response and request for hearing within 30 days after service of the Order, Respondent will be deemed to have waived its right to a hearing, and the Order will become effective.

62. The response and request for hearing shall be filed with:

Regional Hearing Clerk  
United States Environmental Protection Agency  
1595 Wynkoop St.  
Denver, CO 80202

63. A copy of the response and request for hearing and copies of all subsequent documents filed in this action shall also be sent to:

Amelia Piggott  
Attorney  
U.S. EPA Region 8, ENF-L  
1595 Wynkoop St.  
Denver, CO 80202

64. The response shall specify each factual or legal determination or relief provision in the Order that Respondent disputes and shall specify the basis upon which it disputes such determination or provision. The response should also include any proposals for modification of the Order. Any hearings on the Order will be conducted in accordance with the hearing procedures under 40 C.F.R. § 24.

**XXI. SETTLEMENT CONFERENCE**

65. Whether or not Respondent requests a hearing, the Respondent may request an informal conference at any time in accordance with 40 C.F.R. § 24.07 to discuss the facts of this case and to discuss a potential settlement. To request an informal conference, contact:

Amelia Piggott, Attorney  
U.S. EPA Region 8  
(303) 312-6410  
Piggott.amelia@epa.gov

66. A request for an informal conference does not extend the 30 day period during which a written response and request for a hearing must be submitted. The informal conference procedure may be pursued simultaneously with the public hearing procedure.

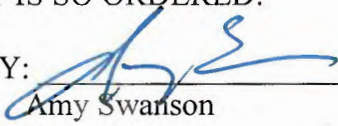
**XXII. TERMINATION AND SATISFACTION**

67. The provisions of this Order shall be deemed satisfied upon Respondent's receipt of written notice from EPA that Respondent has demonstrated, to the satisfaction of EPA, that the terms of this Order, including any additional tasks determined by EPA to be required pursuant to this Order, or any continuing obligation or requirements, except record preservation, have been satisfactorily completed.



IT IS SO ORDERED:

BY:



\_\_\_\_\_  
Amy Swanson  
Supervisory Attorney, Legal Enforcement Program  
Office of Enforcement, Compliance and Environmental Justice  
U.S. EPA Region 8

DATE:

9/4/2018

BY:



\_\_\_\_\_  
Aaron Urdiales  
Director, RCRA & CERCLA Technical Enforcement Program  
Office of Enforcement, Compliance and Environmental Justice  
U.S. EPA Region 8

DATE:

9/4/2018

### Attachment A: Submittal Summary

Deadline to Request a Hearing	Date of Service + 30 days
Effective Date	See Order Section XXI
Identify initial Project Coordinator*	Effective Date + 15 days
Notify EPA of change in Project Coordinator*	15 days prior to change
Obtain Site Access	Effective Date + 30 days
Notify EPA of Professionals*	Effective Date + 30 days
Notify EPA of change in Professionals*	15 days prior to change
Notify EPA of failure to obtain Site Access	Effective Date + 45 days
Site Assessment due to EPA	Effective Date + 45 days
CAP due to EPA	Site Assessment Approval + 30 days
Begin work in CAP	CAP Approval + 30 days
Notify EPA prior to field activities and laboratory analysis	10 days prior to activities/analysis
Record Retention	10 years after Order termination
After Record Retention period, notify EPA prior to destroying records	90 days prior to destruction

\* Note – The Order does not require that EPA approve Respondent’s project coordinator or professionals.