UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

**IN THE MATTER OF**

| | | |
|---|---|---|
| Former W&J Lanyon Zinc Works<br>Superfund Site<br>Pittsburg, Crawford County, Kansas | )<br>)<br>)<br>)<br>)<br>) | ADMINISTRATIVE<br>SETTLEMENT AGREEMENT<br>AND ORDER ON CONSENT<br>FOR REMOVAL ACTION |
| MCP Industries, Inc.<br>Respondent | )<br>)<br>)<br>)<br>) | U.S. EPA, Region 7<br>CERCLA 07-2012-0012 |
| Proceeding Pursuant to<br>Sections 104, 106(a), 107, and 122<br>of the Comprehensive Environmental<br>Response, Compensation, and Liability Act,<br>as amended, 42 U.S.C. §§ 9604, 9606(a),<br>9607 and 9622 | )<br>)<br>)<br>)<br>)<br>) | |

# ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMOVAL ACTION

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## I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and MCP Industries, Inc. ("Respondent"). This Settlement Agreement provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Former W&J Lanyon Zinc Works Site, Pittsburg, Crawford County, Kansas, (the "Site") generally located at approximately 1,000 feet west of 900 East 2d Street in Pittsburg, Crawford County, Kansas, as shown on attached map, Attachment A.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Kansas (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondent 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 findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. EPA and Respondent agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms.

## II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of the Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter the Respondent's responsibilities under this Settlement Agreement.

6. Respondent is liable for carrying out the activities required by this Settlement Agreement in the attached RAWP or Work Plan, Attachment B.

7. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement.

## III. DEFINITIONS

8. Unless otherwise expressly provided in this Settlement Agreement, 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 the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Enforcement Action Memorandum relating to the Site that will be signed by the regional delegate, the Superfund Division Director. The draft Action Memorandum is attached as Attachment C.

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

c. "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.

d. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXXII.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9607.

g. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 36 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation). Paragraph 46 (emergency response), and Paragraph 71 (work takeover). Future Response Costs shall also include any Interest owed as a result of late payment pursuant to Paragraph 53.

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

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

k. "Parties" shall mean EPA and Respondent.

l. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through the

effective date of this Settlement Agreement, plus Interest on all such costs through such date.

m. "Respondent" shall mean MCP Industries, Inc.

n. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

o. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

p. "Site" shall mean the Former W&J Lanyon Zinc Works Superfund Site, Pittsburg, Crawford County, Kansas Superfund Site, encompassing approximately 3 acres, located at approximately 1,000 feet west of 900 East 2nd Street in Pittsburg, Crawford County, Kansas and depicted generally on the map attached as Attachment A.

q. "Statement of Work" or "SOW" shall mean the statement of work for implementation of the removal action, as set forth in the Removal Action Work Plan ("RAWP") or ("Work Plan") in Attachment B to this Settlement Agreement, and any modifications made thereto in accordance with this Settlement Agreement.

r. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and 3) any "solid waste" or "hazardous waste" under Section 1004(27) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(27).

s. "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement and Work Plan, Attachment B.

## IV. FINDINGS OF FACT

9. Respondent is a corporation organized under the laws of California and is authorized to conduct business in the State of Kansas.

10. Respondent purchased the property located at 800, 824 and 826 East 4th Street, Crawford County, Pittsburg Kansas. The legal description is the northeast ¼ of Section 29, Township 30 South, Range 25 East.

11. The Site is a portion of the Former W. & J. Lanyon Zinc Works smelter that performed zinc smelting activities. Respondent uses the Site for storage of broken and finished clay products, including piping and tile. The Site consists of approximately 3 acres located on the western portion of the property owned by Respondent.

12. Respondent's manufacturing building and storage areas are located east and south of the Site. The property to the north is owned by A. Messenger Lumber and Millwork Construction Company. Burlington Northern Santa Fe Railroad is located southwest of the Site. A tributary of

Taylor Creek is located approximately 400 feet south of the Site. Surface water flows south and southeast from the Site to this tributary. The Site is within the 100 to 500 year floodplain of the Cow Creek drainage basin. No drinking water intakes are within 15 miles downstream from the Site.

13. In June 2008, Kansas Department of Health and Environment ("KDHE") completed an Expanded Site Investigation ("ESI") that included collection of soil samples from 27 residences and parks approximately 500 feet from the Site. Concentrations of lead were found as high as 610 milligrams per kilograms ("mg/kg") with a risk-based standard for Kansas ("RSK") level of 400 mg/kg, and 20.7 mg/kg for arsenic with a RSK level of 5.85 mg/kg.

14. In 2009, EPA conducted a Removal Site Evaluation for the Pittsburg Zinc Site. The Summary Report for this activity is dated January 7, 2011. Nearly two hundred properties throughout Pittsburg, Kansas, were screened for the presence of lead and surficial excavations have occurred on about eighty residential properties having lead concentrations exceeding 550 mg/kg. Five grid sections of the Former W&J Lanyon Zinc Works Site exceeded lead levels of 1,200 mg/kg.

15. From November 29 through December, 2010, EPA conducted sampling activities for the Integrated Site Assessment dated May 16, 2011, at the MCP Industries, Inc. property. Lead concentrations exceeding 1,200 mg/kg were found at five of 180 cells measuring 100 feet by 100 feet. Levels of lead were found as high as 6,319 mg/kg at a depth of two feet and as high as 3,978 mg/kg at a depth of two to four feet. Soil sample results for arsenic exceeded the Regional Screening Level ("RSL") of 1.6 mg/kg ranging from 3.7 to 18.7mg/kg.

16. On July 1, 2011, EPA established a Preliminary Remediation Goal ("PRG") of 2,921 mg/kg for lead for the outdoor industrial worker and the range from 1,176 mg/kg to 5,118 mg/kg for recreational users.

17. On June 28, 2011, the Regional Decision Team selected a PRG of 1,200 mg/kg for lead with Environmental Use Controls unless soils are excavated to below 550 mg/kg.

18. Adult employees and trespassers may be exposed to health risks through possible ingestion and inhalation of surface lead, arsenic, cadmium, mercury, and zinc concentrations.

19. Exposure to lead is the primary risk posed by this Site. Children are more susceptible to the health risks posed by lead than adults. Exposure to low levels of lead can affect a child's mental and physical growth. Children who swallow large amounts of lead may develop anemia, kidney damage, colic, muscle weakness, and brain damage. Lead exposure to adults may cause weaknesses in fingers, wrists, and ankles. Lead exposure may also cause anemia, and brain and kidney damage in adults.

20. The Regional Administrator of EPA Region 7, or his/her delegate, has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed $500,000, excluding interest.

## V. CONCLUSIONS OF LAW AND DETERMINATIONS

21. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Former W&J Lanyon Zinc Works Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

b. Substances found at the Site, as identified in the Findings of Fact above, includes "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for performance of the response action and response costs incurred and to be incurred at the Site. Respondent, MCP Industries, Inc. is the "owner" and/or "operator" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(l) of CERCLA, 42 U.S.C. § 9607(a)(l).

e. The conditions described above in the Findings of Fact constitute an actual or threatened of "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).

f. The removal action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## VI. SETTLEMENT AGREEMENT AND ORDER

22. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that EPA and Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

## VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

23. Respondent shall retain one or more contractors or use services of employee(s) to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) and employees within 10 days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) or employees retained/hired to perform the Work at least 10 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors, subcontractors, and/or employees retained by Respondent. If EPA disapproves of a selected contractor, subcontractor and/or employee, Respondent shall retain a different contractor, subcontractor and/or employee and shall notify EPA of that contractor, subcontractor and/or employee's name and qualifications within 10 days of EPA's disapproval. If environmental media sampling is conducted, the proposed contractor, subcontractor and/or employee's must demonstrate compliance with ANSI/ASQC E- 4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995) by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP

should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/BO-1/002), or equivalent documentation as required by EPA.

24. Within 10 days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 10 days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

25. EPA has designated Todd Campbell of the Emergency Response North Branch, Region 7 as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the OSC at U.S. EPA, Region 7, 901 North 5th Street, Kansas City, Kansas 66101.

26. EPA and Respondent shall have the right, subject to Paragraph 25, to change their respective designated OSC or Project Coordinator. Respondent shall notify EPA five days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

## VIII. WORK TO BE PERFORMED

27. Respondent shall perform, at a minimum, all actions necessary to implement the Removal Action Work Plan ("RAWP") or ("Work Plan") attached as Attachment B.

28. Work Plan and Implementation.

a. Respondent shall implement the Work Plan in accordance with the schedule stated in the RAWP or Work Plan. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement Agreement.

b. Respondent shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondent shall not commence implementation of the Work Plan developed hereunder until receiving written EPA approval pursuant to Paragraph 28(a).

29. Health and Safety Plan ("HASP"). Within 30 days after the Effective Date, Respondent shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

30. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001; Reissued May 2006)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than 10 days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work.

31. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondent shall implement post-removal site control consistent with Section 300.415(*l*) of the NCP and OSWER Directive No. 9360.2-02. Respondent shall provide EPA with documentation of all post-removal site control arrangements.

32. Reporting.

a. Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement every 45th day after the date of receipt of EPA's approval of the Work Plan until termination of this Settlement Agreement, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall submit one copy of all plans, reports, or other submissions required by this Settlement Agreement, the Statement of Work, or any approved work plan. Upon request by EPA, Respondent may submit such documents in electronic form.

c. Respondent shall, at least 30 days prior to the conveyance of any Interest in real property at the Site, give written notice to the transferee that the property is subject to this Settlement Agreement

and written notice of the proposed conveyance, including the name and address of the transferee. Respondent who owns or controls the Site also agrees to require that its successors comply with the immediately preceding sentence and Sections IX (Site Access) and X (Access to Information).

33. Final Report. Within 45 days after completion of all Work required by this Settlement Agreement, including receipt of any disposal manifests, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, to the requirements set forth in Section 300.165 of the National Contingency Plan ("NCP") entitled "OSC Reports" and similar to Reports prepared regarding previous EPA response actions at the Pittsburg Zinc Site. The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action *(e.g.,* manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

> Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

34. Off-Site Shipments.

a. Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

b. Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

c. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by Paragraph 34(a) and 34(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

d. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants

from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

## IX. SITE ACCESS

35. If the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA, and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement. Such existing current and effective Access Agreements shall be included in the RAWP or Work Plan, Attachment B.

36. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within 14 days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA, if after using its best efforts, it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing their efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described in this Settlement Agreement, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

37. 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.

## X. ACCESS TO INFORMATION

38. Respondent shall provide to EPA upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

39. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

40. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, they shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged or confidential.

41. No claim of privilege or confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## XI. RECORD RETENTION

42. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature, or description relating to performance of the Work.

43. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged or confidential.

44. Respondent 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, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State of Kansas or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## XII. COMPLIANCE WITH OTHER LAWS

45. Respondent shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable state and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R.§§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws and presented in Section VIII (Work to be Performed). Respondent may identify additional ARARs in the Work Plan subject to EPA approval.

## XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

46. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer, EPA Region 7 at (913) 281-0991, which is the EPA Regional Emergency, 24-hour telephone number, of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this paragraph and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

47. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC at (913) 281-0991and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, et seq.

## XIV. AUTHORITY OF ON-SCENE COORDINATOR

48. The OSC shall be responsible for overseeing Respondent's implementation of this Settlement Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

## XV. PAYMENT OF RESPONSE COSTS

49. Payments for Future Response Costs.

a. Respondent shall pay EPA all Future Response Costs not inconsistent with the National Contingency Plan ("NCP"). On a periodic basis, EPA will send Respondent a bill requiring payment

that includes a SCORPIOS cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 51 of this Settlement Agreement.

b. Respondent shall make all payments required by this Paragraph to EPA by Fedwire Electronic Funds Transfer ("EFT") to:

Federal Reserve Bank of New York
ABA = 02103 0004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read "D 6810727 Environmental Protection Agency"

c. At the time of payment, Respondent shall send notice that such payment has been made to Todd Campbell, OSC, EPA Region 7 at 901 N. 5th Street, Kansas City, Kansas 66101 and to the EPA Cincinnati Finance Office by email to acct5receivable.cinwd@epa.gov, or by mail to:

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

Such notice shall reference Site/Spill ID Number A7X6, and the EPA docket number for this action.

d. The total amount to be paid by Respondent pursuant to Paragraph 49a shall be deposited by EPA in the Hazardous Substance Superfund.

50. Interest. In the event that the payments for Future Response Costs are not made within 30 days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including, but not limited to, payment of stipulated penalties pursuant to Section XVIII.

51. Respondent may contest payment of any Future Response Costs billed under Paragraph 49 if it determines that EPA has made a mathematical error, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the OSC. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondent shall, within the 30-day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 49. Simultaneously, Respondent shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation ("FDIC") and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondent shall send to the EPA OSC a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information

containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondent shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondent shall pay the sums due (with accrued Interest) to EPA in the manner described in Paragraphs 49 and 50. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued Interest) for which it did not prevail to EPA in the manner described in Paragraphs 49 and 50. Respondent shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for its Future Response Costs.

## XVI. DISPUTE RESOLUTION

52. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

53. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within 10 days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have 21 days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

54. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, the EPA, Region 7 Superfund Division Director or her/his delegate will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondent's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

## XVII. FORCE MAJEURE

55. Respondent agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a force majeure. For purposes of this Settlement Agreement, a force majeure is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the Work or increased cost of performance or a failure to attain the action levels set forth in the draft Action Memorandum and/or SOW.

56. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a force majeure event, Respondent shall

notify EPA orally within 5 days of when Respondent first knew that the event might cause a delay. Within 2 days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of force majeure for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

57. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Settlement Agreement that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

## XVIII. STIPULATED PENALTIES

58. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 59 and 60 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (Force Majeure). "Compliance" by Respondent shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, the SOW, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

59. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Section VIII and listed in the RAWP schedule:

| Penalty Per Violation Per Day | Period of Noncompliance |
|---|---|
| $1,000.00 | 1st through 14th day |
| $2,000.00 | 15th through 30th day |
| $3,000.00 | 31st day and beyond |

60. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports pursuant to Paragraph 32 and 33:

| Penalty Per Violation Per Day | Period of Noncompliance |
|---|---|
| $700.00 | 1st through 14th day |
| $1,000.00 | 15th through 30th day |
| $1,500.00 | 31st day and beyond |

61. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 71 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of $1,000,000.

62. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA Superfund Division Director or her/his delegatee, under Paragraph 54 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing in this Settlement Agreement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

63. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

64. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). Respondent shall make all payments required by this Paragraph to EPA by Fedwire Electronic Funds Transfer ("EFT") to:

Federal Reserve Bank of New York
ABA = 02103 0004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read "D 6810727 Environmental Protection Agency"

and shall reference stipulated penalties. Site/Spill ID Number A7X6, and the EPA docket number for this action.

At the time of payment, Respondent shall send notice that payment has been made as provided in Paragraph 49 above.

65. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement Agreement.

66. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

67. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 64. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(1) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(1), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(1) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided in this Section, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 71. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

## XIX. COVENANT NOT TO SUE BY EPA

68. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon completion of the Work, including establishing post-removal site control under Paragraph 31 and receipt by EPA of all Future Response Costs and any Interest or Stipulated Penalties due under Paragraph 50 (Interest) or Section XVIII (Stipulated Penalties). This covenant not to sue is conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Settlement Agreement, including, but not limited to, the Work and payment of Future Response Costs pursuant to Paragraph 49 (Payment for Future Response Costs). This covenant not to sue extends only to Respondent and does not extend to any other person.

## XX. RESERVATIONS OF RIGHTS BY EPA

69. Except as specifically provided in this Settlement Agreement, nothing in this Settlement Agreement 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 or solid waste on, at, or from the Site. Further, nothing in this Settlement Agreement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, 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 CERCLA or any other applicable law.

70. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

71. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in its performance of the Work, or implementation of the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## XXI. COVENANT NOT TO SUE BY RESPONDENT

72. Respondent 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 Work, Past Response Costs, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the 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 Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act. 28 U.S.C. § 2412, as amended, or at common law;

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work, Past Response Costs, or Future Response Costs.

Except as provided in Paragraph 74, Claims Against De Micromis Parties, 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 the reservations set forth in Section XX (Reservation of Rights), other than in Paragraph 70a (liability for

failure to meet a requirement of the Settlement Agreement) or 70d (criminal liability), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

73. Nothing in this 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).

74. Claims Against De Micromis Parties. Respondent 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) and 113 of CERCLA) that it may have for all matters relating to the Site against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

75. The waiver in Paragraph 74 shall not apply with respect to any defense, claim, or cause of action that Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise;

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

## XXII. OTHER CLAIMS

76. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

77. Except as expressly provided in Paragraph 74 (Claims against De Micromis Parties), and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including, but not limited to, any claims of the United States for costs, damages and Interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

78. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. §9613(h).

## XXIII. EFFECT OF SETTLEMENT/CONTRIBUTION

79. Except as provided in Paragraph 74 (Claims Against De Micromis 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 74 (Claims Against De Micromis Parties), each of the Parties expressly reserves any and all rights including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613, defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence in any way to the Site against any person not a Party hereto.

80. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Respondent 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 the Work, Past Response Costs, and Future Response Costs.

81. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the Work, Past Response Costs, and Future Response Costs.

82. Nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any persons not parties to this Settlement Agreement. 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).

83. Respondent 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 sixty (60) days prior to the initiation of such suit or claim. Respondent also shall, with respect to any suit of claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within then (10) days of service of the complaint of claim upon it. In addition, Respondent shall notify EPA within then (10) days of service or receipt of any Motion for Summary Judgment and within then (10) days of receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.

84. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by EPA set forth in Section XXI.

85. Effective upon signature of this Settlement Agreement by Respondent, such Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from Respondent the Payments required by Section XV(Payment of Response Costs) and, if any Section XVIII (Stipulated Penalties) 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 80 and that, in any action brought by the United States related to the "matters addressed", Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitation, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Respondent that it will not make this Settlement Agreement effective, the statute of limitation shall begin to run again commencing ninety (90) days after the date such notice is sent by EPA.

## XXIV. INDEMNIFICATION

86. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including, but not limited to, attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

87. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

88. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

## XXV. INSURANCE

89. At least 10 days prior to commencing any on-Site work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of $1,200,000.00, combined single limit, naming EPA as an additional insured. At least 10 days prior to commencing any on-Site work under this Settlement Agreement, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondent shall submit such certificates and copies of

policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## XXVI. FINANCIAL ASSURANCE

90. Within 30 days of the Effective Date, Respondent shall establish, maintain and provide to the OSC, financial security for the benefit of EPA in the amount of $100,000 in one or more of the following forms, in order to secure the full and final completion of Work by Respondent:

a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;

b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA;

c. a trust fund administered by a trustee acceptable in all respects to EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

e. a written guarantee to pay for or perform the Work provided by one or more parent companies of Respondent, or by one or more unrelated companies that have a substantial business relationship with at least one of Respondent; including a demonstration that any such guarantor company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a demonstration of sufficient financial resources to pay for the Work made by Respondent, which shall consist of a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

91. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondent shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 90 above. In addition, if at any time EPA notifies Respondent that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondent shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondent's inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

92. If Respondent seeks to ensure completion of the Work through a guarantee pursuant to Subparagraph 90(e) or 90(f) of this Settlement Agreement, Respondent shall (i) demonstrate to EPA's

satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date or such other date as agreed by EPA, to EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the dollar amount to be used in the relevant financial test calculations shall be the current cost estimate of $100,000 for the Work at the Site plus any other RCRA, CERCLA, TSCA, or other federal environmental obligations financially assured by the relevant Respondent or guarantor to EPA by means of passing a financial test.

93. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 90 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondent may seek dispute resolution pursuant to Section XVI (Dispute Resolution). Respondent may reduce the amount of security in accordance with EPA's written decision resolving the dispute.

94. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

## XXVII. MODIFICATIONS

95. The OSC may make modifications to any plan or schedule or Statement of Work in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the parties.

96. If Respondent seeks permission to deviate from any approved work plan or schedule or Statement of Work, Respondent's Project Coordinator shall 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 oral or written approval from the OSC pursuant to Paragraph 95.

97. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

## XXVIII. ADDITIONAL REMOVAL ACTION

98. If EPA determines that additional removal actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a Work Plan for the additional removal actions. The plan

shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Settlement Agreement. Upon EPA's approval of the plan pursuant to Section VIII, Respondent shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications).

## XXIX. NOTICE OF COMPLETION OF WORK

99. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including, payment of Future Response Costs and establishing post-removal site control, or record retention, EPA will provide written notice to Respondent. If EPA determines that such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

## XXX. INTEGRATION/APPENDICES

100. This Settlement Agreement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following attachments are incorporated into this Settlement Agreement: the Map is attached as Attachment A; the Removal Action Work Plan is attached as Attachment B; and the draft Action Memorandum is attached as Attachment C.

## XXXI. PUBLIC COMMENT

101. Final acceptance by EPA of Paragraph 49 of Section XV (Payment of Response Costs) shall be subject to Section 122 (i) of CERCLA, 42 U.S.C. § 9622 (i), which requires EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all or part of Section XV of this Settlement Agreement if comments received disclose facts or considerations that indicate that Section XV of this Settlement Agreement is inappropriate, improper, or inadequate. Otherwise Section XV shall become effective when EPA issues notice to Respondent that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Settlement Agreement.

## XXXII. EFFECTIVE DATE

102. This Settlement Agreement shall be effective 5 days after the Settlement Agreement is signed by the Regional Administrator or his/her delegate, with the exception of Paragraph 49 of Section XV (Payment of Response Costs) of this Settlement Agreement, which shall be effective when EPA issues notice to Respondent that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Settlement Agreement.

The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind the party it represents to this document.

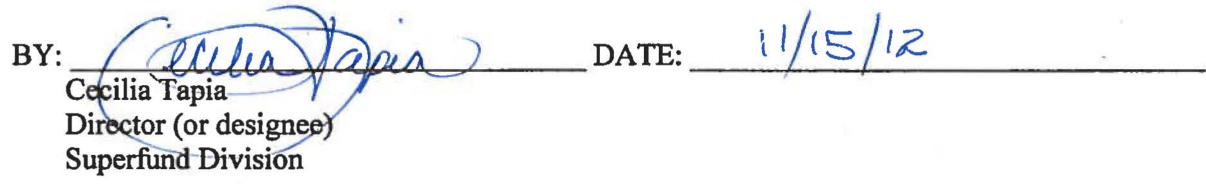
Agreed this 28TH day of SEPTEMBER, 2012.

For Respondent, MCP Industries, Inc.:

BY: Tom Harter DATE: 9/28/2012

Name: Tom Harter
Title: Plant Manager

It is so ORDERED and Agreed this 15 day of November, 2012



BY: ______________________ DATE: 11/15/12

Cecilia Tapia
Director (or designee)
Superfund Division

EFFECTIVE DATE: 11/15/12

KENT JOHNSON
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 7/23/15

# ATTACHMENT A

Legend

Former smelter site boundary

Grid cell

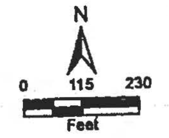
Parcel

Surface soil lead greater than 1200 mg/kg

Surface soil lead greater than 550 mg/kg

Lead at 0-2 feet greater than 550 mg/kg

mg/kg Milligrams per kilogram




Source: Crawford County GIS Department, 2006.

**Mission Clay Products**
**Pittsburg, Kansas**

**Lead Greater Than 1200 mg/kg**
**And Lead Greater Than 550 mg/kg**
**At Surface And 0-2 Feet**

TETRA TECH EM INC.

# REMOVAL ACTION WORK PLAN

FORMER W&J LANYON ZINC WORKS SITE
PITTSBURG,
CRAWFORD COUNTY, KANSAS

August 2012

Attachment B

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# 1. Introduction

## 1.1 Preface

The W&J Lanyon Zinc Works Site (Site) is located approximately 1,000 feet west of 900 East 2nd Street in Pittsburg, Crawford County, Kansas, as shown on the map (Attachment A). The Site property is now owned by MCP Industries, Inc. (MCP). The original W&J Lanyon facility consisted of about 20 acres, approximately three acres of which are the subject of the current Potentially Responsible Party (PRP) lead removal action and this work plan. There have been ten grid cells identified which contain elevated levels of lead-contaminated media that exceed the site specific residential action level of 550 milligrams/kilogram (mg/kg) (see Attachment A), and which require an institutional control such as an Environmental Use Control (EUC) issued by the Kansas Department of Health and Environment (KDHE) or a common law restrictive covenant (CLRC) for any soils containing lead above 550 parts per million (ppm). The remainder of the approximately 120-acre MCP property is not subject to the actions outlined in this removal action work plan (RAWP) and is not currently considered part of the Site designated with SSID A7X6 and CERCLIS ID KSN000706199.

MCP is the owner and operator of the current Mission Clay Products facility used for the manufacture and storage of finished clay products, including storage areas for raw clay materials and recyclable broken clay products. The address of the facility is 900 East 2nd Street, Pittsburg, Kansas.

## 1.2 Site Sampling Events

The Kansas Department of Health and Environment (KDHE) conducted investigatory actions at the Pittsburg Zinc Smelter Site, which included the former W&J Lanyon Zinc Works Site, former S&H Lanyon Zinc Works, and the former Robert Lanyon Smelter, as follows:

- In September 2004, KDHE issued a Focused Former Smelter Assessment summarizing a soil survey and ground water sampling at the Site.
- In July 2005, KDHE issued a Phase II Focused Former Smelter Assessment summarizing a survey and ground water sampling at the Site.
- In June 2008, KDHE issued an Expanded Site Investigation (ESI) for the Pittsburg Zinc Site.

The EPA also conducted investigations at the Pittsburg Zinc Site in 2009, and in 2010 at MCP, which included the former W&J Lanyon Zinc Works, under site-specific Access Agreements executed in 2009 and 2010, as follows :

- On March 3-4, 2009, the EPA conducted a field screening assessment for the presence of lead at the Pittsburg Zinc Site, the results of which are documented in the June 29, 2010, Removal Site Evaluation and Removal Action Summary Report for the Pittsburg Zinc Site, Pittsburg, Kansas, dated January 7, 2011
- During the week of November 29, 2010, the EPA conducted an integrated site assessment that provided soil lead level results for the entire MCP property, which consists of approximately 120 acres. In addition, samples were collected for at-depth analysis, sediment analysis, and rubber waste characterization. Also, a geophysical survey was conducted at the location reported to

have been used historically as a drum storage area. The results of the site assessment are documented in the Integrated Site Assessment Final Report dated May 16, 2011.

### 1.3 Site Surface Sampling Results: Toxicity Evaluation

The Former W&J Lanyon Zinc Works Site is currently used as an isolated portion of an industrial clay pipe lay-down yard, which is not subject to site-specific residential clean-up levels. However without the implementation of an EUC or a CLRC, it is impossible to guarantee that areas of defined contamination left on site can be adequately restricted from residential uses in the future.

On July 1, 2011, the EPA prepared the memorandum "Preliminary Remediation Goals (PRGs) for Soil-borne Lead for the Former W&J Lanyon Zinc Works Site". On June 28, 2011, an EPA Regional Decision Team (RDT) selected a PRG of 1,200 ppm which would require an EUC or a CLRC on an isolated portion of MCP's industrial clay pipe lay-down yard.

## 2. Scope of Work

This Removal Action Plan (RAWP or Removal Action Work Plan) begins with the initiation of a land survey by a licensed land surveyor of the ten grid cells subject to environmental use controls (EUCs). The five grid cells subject to the removal actions in this plan (G5, F6, G6, H7, G8) will then be marked and targeted for installation of the two-part protective barrier outlined below. The surface area of the five grid cells requiring the aforementioned cap and cover will be cleared of vegetation and other surface encumbrances so the cap material and the placement of a protective cover can be applied appropriately. An institutional control of either an EUC or CLRC to be placed on the deed for this 3-acre Site is required for the reason stated in Section 1.1.

In order to minimize or eliminate exposure of workers and others to contaminants contained in the shallow subsoils, the surface of the Site will undergo minimal disturbance.

As defined by the EPA and the Settlement Agreement, samples at the Site consisted of soil, sediment, off-specification rubber gasket material, and insulation. Clean soils needed for the capping of the ground surface are stockpiled quarried raw materials (naturally-occurring clay) mostly available at the MCP facility, that meet residential soil screening levels. Analytical data will be provided to show that this material does not contain concentrations of total Resource Conservation and Recovery Act (RCRA) heavy metals in the soil at levels exceeding the standards spelled out in the Settlement Agreement. Remnant clay products utilized during the Removal Action are comprised of the same clay material but will also be sampled to ensure that they consist of clean material, which contains no more than 240 ppm for lead. No movement of soil material off site is being proposed or anticipated.

The scope of the EUCs proposed for the site will include restrictions approved by KDHE. If a CLRC is used instead, it shall contain those restrictions stated in Section 3.5 of this Work Plan. These controls are proposed for the five grid cells subject to the cap and cover elements described above and also for the remaining five cells that contain known levels of contaminants that exceed the site specific residential action level of 550 mg/kg lead in soil (F5, E6, F7, G7, H13). (See Site Map, Attachment A.) In all, the area proposed for EUCs encompasses approximately three acres around the approximate location of the former W&J Lanyon Zinc Works. The land survey will be attached to the RAWP prior to EPA approval of the RAWP, or in the alternative, prior to mobilization for field work. The schematic of the cap design is attached.

## 3. Removal Action Plan

### 3.1 Site Survey

Grid cells, identified by the EPA in the 2011 Integrated Site Assessment Report and as appear on the Site Map (Attachment A), which exceed the calculated industrial site specific removal action level (RAL) will be staked by a licensed land surveyor. Besides locating the precise area of the Site to be addressed, the survey information will be used to provide a legal description of the land parcel to be presented in an Environmental Use Control Agreement (EUCA) or a CLRC.

### 3.2 Site Clearing

The selected grid cells will be cleared of stored products and equipment, vegetation, debris, garbage, and waste. Materials meeting the definition of solid waste will be removed off-site to proper disposal facilities. Other materials determined not to be solid or hazardous waste may be staged elsewhere on facility property. Material known to contain soil lead levels in excess of the commercial/industrial screening level of 1,200 mg/kg or 1,200 ppm will be left in place and covered as described herein.

### 3.3 Site Grading

The Site is essentially level and the existing ground surface will not be disturbed beyond that incidental to clearing activity.

### 3.4 Site Cap

The protection will be ensured with the placement of a soil cap and a durable vitrified clay material cover over areas that the EPA has identified as exceeding its industrial removal action level (RAL) of 1,200 mg/kg.

#### 3.4.1 Soil Cap (First portion of Protective Barrier)

The affected grid cells will be capped with a minimum of one foot of clean soil (containing no more than 240 ppm of lead) that is normally used as a raw material for clay products. Clay raw materials that are "off-specification" due to miscellaneous mineral content (not due to metal content) may also be used as cap material. Analytical data showing the "off specification" on-site material does not exceed the Regional Screening Levels for RCRA metals as listed in the Settlement Agreement will be provided prior to utilization of such materials. If any of the sampled materials exceed the "clean" specifications listed in the Settlement Agreement - i.e., soils containing no more than 240 ppm for lead – the materials will be excluded from utilization as part of the on-site removal action. The soil cap will be vehicle compacted and leveled to drain.

#### 3.4.2 Protective Cover (Second portion of Protective Barrier)

To protect the surface of the cap from disturbance and degradation from natural events such as runoff and erosion as well as anthropogenic activities such as inadvertent digging and moving via on-site heavy equipment, the 12-inch clay cap will be covered with the placement of approximately one foot of crushed vitrified clay that consists of crushed clay pipe available at the

facility. This material will provide a durable cap over the underlying soil layer and will provide a marker from the surrounding soil and vegetated ground surface, which does not contain similar reddish crushed vitrified clay. In addition, to avoid confusion by future users of the area, signage indicating the presence of elevated lead levels in the soils will be placed at 100-foot intervals around the perimeter of the clay and crushed pipe cap. The signage will also be clearly marked with the appropriate point of contact and contact mechanism so that future owners/users of the property will know who to contact in the event disturbance occurs or is required in the future.

The protective clay soil and crushed vitrified clay pipe material will be placed so that there will be no ponding of precipitation on the Site.

#### 3.4.3 Access Restriction

The Site is entirely contained within the MCP facility property, restricted as an industrial site. Additional Site access to those areas protected by the cap and cover specified and those grid cells protected by an EUC or CLRC will be restricted by placing signage that will function to effectively limit access to the Site by anyone not authorized to enter the Site. These site restrictions are in addition to those proposed in the EUC or CLRC to ensure adequate maintenance of the remedy described within this document. The remainder of the property is not subject to any agreement between the EPA and MCP and will therefore be restricted at the discretion of those given the responsibility for the Site.

### 3.5 Environmental Use Control (EUC) or Common Law Restrictive Covenant (CLRC)

The Site is located within the City of Pittsburg, Kansas. The City will be contacted and advised of the use restriction needed for ten grid cells with soil lead levels that exceed the 550 mg/kg residential action level which comprise approximately three acres of the Site within MCP's industrial facility. Arrangements will be made with local authorities such that any use restriction will not overly impede possible redevelopment of the Site for the benefit of the Community.

An Environmental Use Control Agreement will be negotiated with KDHE, or in the alternative, a common law restrictive covenant enforceable under Kansas law shall be placed on the Site deed with the restrictions that follow:

(1) the Site shall not be used for residential use; (2) the Site shall not be used for any recreational, daycare or rehabilitative use; (3) drinking water wells shall not be installed on site; (4) the cap on the Site (cap) shall not be punctured, trees, brush and weeds shall not be allowed to grow on the cap, and the cap shall be kept in good repair; (5) signage warning of the presence of hazardous substances shall be placed around the perimeter of the Site and the Site shall be maintained in good condition and repair, which will include replacement if cracks appear that, from a technical opinion, would cause erosion or seepage into the cap; (6) the landowner/purchaser shall give at least 30 days prior notice to the EPA and grantee(s) of any sale of the Site; (7) the landowner/purchaser shall provide and maintain in any deed, title, notice or other instrument of conveyance of the Site a notice stating the Site is subject to these restrictions stated in (1) through (10); (8) the landowner/purchaser and grantee(s) shall have the right to sue for and obtain an injunction, prohibitive or mandatory, to prevent the breach of these stated restrictions set forth in these stated conditions/provisions; (9) the landowner/purchaser and grantee(s) shall have the right to sue to enforce the observance of these restrictions stated in (1) through (10) in addition to any legal action for damages, including costs, whether injunctive or legal,

and when incurred shall be a charge and lien on the Site; (10) upon request by the EPA, the landowner/purchaser shall grant access to the EPA of the Site; and (11) the failure of the landowner/ purchaser, grantee(s) or the EPA to enforce any of the stated restrictions in this (1) through (10) at the time of its violation shall in no event be deemed a waiver of the right to do so at a later time.

## 4. Health and Safety

The Health and Safety Plan (HASP) for this project will be approved outside of the scope of this RAWP. The EPA will review and approve the site HASP according to standard regional health and safety protocols and within approved OSHA guidelines. At a minimum, Level D safety precautions will be implemented during surface activities. No intrusive activities are planned for the Site. Site related health and safety activities will be performed in general accordance with the health and safety procedures of MCP Industries.

## 5. Project Schedule

Table 1 provides for completion of the land parcel survey and other tasks outlined in this work plan. The following assumptions have been made in developing the anticipated schedule:

- The site will be cleared of existing vegetation, etc., as necessary to conduct activities. Effort will be made such that the ground surface is minimally disturbed during the site clearing activities.
- Site labor will be performed by current employees of MCP Industries and all proposed actions listed within this RAWP will be incorporated into facility workers' normal activities.
- The duration of field activities may be extended as needed due to poor weather or unforeseen field conditions in the area of the Site with the approval of the EPA.
- Ongoing site activities will be coordinated through the EPA's On-Scene Coordinator, Todd Campbell (913.551.7115). Deviations from the proposed work schedule must be agreed upon by both parties with the understanding that the EPA oversight costs can and will be affected by sudden and/or unannounced changes in the work schedule that result in delays or work stoppages regardless of causation or fault.
- Field activities shall commence within 30 days of the Effective Date of the Settlement Agreement and conclude within 60 days of the Settlement Agreement.

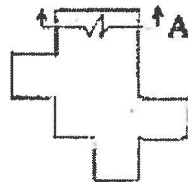
TABLE 1

PROPOSED SCHEDULE
MCP SITE
PITTSBURG,
CRAWFORD COUNTY, KANSAS

Excluding holiday delays

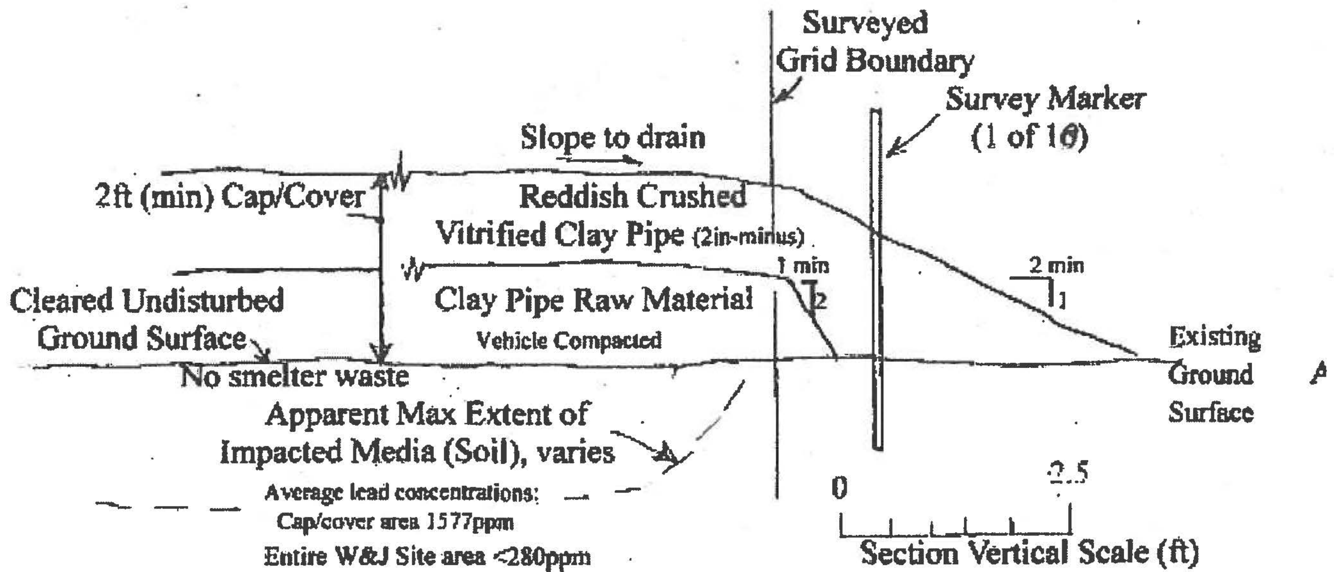
| Item | Activity | Schedule |
|---|---|---|
| 1 | EPA Approval of RAWP or Work Plan | September 15, 2012 |
| 5 | Submit HASP and QAPP defined in paragraphs 31 and 32 of the Settlement Agreement | October 1, 2012 |
| 6 | Mobilization for Fieldwork | October 8, 2012 |
| 7 | Site Clearing / Capping Activities | November 8, 2012 |
| 8 | Complete Field Activities and De-mobilization | December 8, 2012 |
| 9 | Final Removal Action Report | January 22, 2013 |

Attachment B



Plan Horizontal Scale (ft)

*Plan View, see*
Site Map: Removal Action Work Plan
Exhibit A: EUC Agreement




**Cap and Cover**
**Schematic Cross Section**
**FORMER W&J ZINC WORKS SITE**