

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA

and

STATE OF NEBRASKA,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY

and

UNION PACIFIC CORPORATION,

Defendants.

CIVIL ACTION NO. 8:11CV195

CONSENT DECREE

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Nebraska (“State”), on behalf of the Director of the Nebraska Department of Environmental Quality (“NDEQ”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of certain costs incurred by EPA for response actions at the Omaha Lead Superfund Site in Omaha, Nebraska (the “Site”), and (2) performance of response actions by the Defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State on February 6, 2009, of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a Party to this Consent Decree.

D. The State is seeking reimbursement of certain costs incurred by the Nebraska Department of Environmental Quality for response actions at the Site pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior on February 6, 2009, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree. The Director of the Nebraska Department of Environmental Quality is the State official designated as the State Natural Resources Trustee under Section 107(f)(2)(B) of CERCLA, 42 U.S.C. §9607(f)(2)(B).

F. The Defendants have entered into this Consent Decree (collectively referred to as “Settling Defendant”) without adjudication of any issue of fact or law. The Settling Defendant does not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on April 30, 2003, 68 Fed. Reg. 23077.

H. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, EPA commenced on September 30, 2002, an initial Remedial Investigation and Feasibility Study (“RI/FS”) for the Site pursuant to 40 C.F.R. § 300.430.

I. The EPA completed a final Remedial Investigation (“RI”) Report on October 24, 2008, and EPA completed a final Feasibility Study (“FS”) Report on October 28, 2008, in support of a final Record of Decision.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on October 30, 2008, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the EPA based the selection of the response action.

K. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision (“ROD”), executed on May 13, 2009, on which the State has given its concurrence. The ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

L. Based on the information presently available to EPA and the State, EPA and the State believe that a portion of the Work will be properly and promptly conducted by the Settling Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

M. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), the Remedial Action set forth in the ROD and the Work to be performed by the Settling Defendant shall constitute a response action taken or ordered by the President for which judicial review shall be limited to the administrative record.

N. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is procedurally and substantively fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and the State and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work required by this Consent Decree and to each person representing Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work in accordance with the terms of this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

4. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that 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 Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply solely for purposes of this Consent Decree:

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

“Consent Decree” or “Decree” shall mean this Consent Decree and all appendices attached hereto (listed in Section XXVI). In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

The term “day” shall mean a calendar day unless expressly stated to be a working day. The term “working day” shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, 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.

“Effective Date” shall be the effective date of upon which this Consent Decree is entered by the Court as recorded on the Court docket, or, if the Court instead issues an order approving the Consent Decree, the date such order is recorded on the Court docket.

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

“NDEQ” shall mean the Nebraska Department of Environmental Quality and any successor departments or agencies of the State.

“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 deliverables submitted pursuant to this Consent Decree, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Section XII (Emergency Response), Paragraph 31 (Funding for Work Takeover), and

Section XXVI (Community Relations). Future Response Costs shall also include Interest beginning on the Effective Date.

“Institutional Controls” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, and/or resource use to minimize the potential for human exposure to Waste Materials at the Site; (b) limit land, water, and/or resource use to implement, ensure non-interference with, or ensure the protectiveness of the Remedial Action at the Site; and/or (c) provide information intended to modify or guide human behavior at the Site.

“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.

“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.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States, the State of Nebraska and the Settling Defendant.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States or the State paid at or in connection with the Site up to the Effective Date, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

“Performance Standards” shall mean the measures of achievement of the goals of the Work, consistent with the ROD and the SOW.

“Plaintiffs” shall mean the United States and the State of Nebraska.

“Proprietary Controls” shall mean easements or covenants running with the land that (a) limit land, water or resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded by the owner in the appropriate land records office.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Final Record of Decision relating to the Omaha Lead Site signed on May 13, 2009, by the Superfund Division Director, EPA Region 7, and all attachments thereto. The ROD is attached as Appendix A.

“Remedial Action” shall mean those actions taken to perform the Selected Remedy chosen by EPA in the Final ROD.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” shall mean Union Pacific Corporation, Union Pacific Railroad Company, and their respective predecessors and successors.

“Site” shall mean the Omaha Lead Superfund Site, which encompasses approximately 27 square miles and lies generally within a four-mile radius centered around the former ASARCO and Gould Facilities, which were located at 500 Douglas Street and 555 Farnam Street, respectively, in Omaha, Douglas County, Nebraska, and depicted generally on the map attached as Appendix C.

“State” shall mean the State of Nebraska.

“Statement of Work” or “SOW” shall mean the statement of work for implementation of the Work at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

“Supervising Contractor” shall mean the principal contractor retained by the Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“United States” shall mean the United States of America and each department, agency and instrumentality of the United States, including EPA and any federal natural resource trustees.

“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); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27) and (4) any wastes, solid waste, hazardous waste, contaminants or hazardous substances as defined under the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 et seq. and the rules and regulations promulgated pursuant to such Act.

“Work” is required for protection of human health and the environment and shall mean all activities Settling Defendant is required to perform under the Consent Decree to implement the ROD, in accordance with the SOW, as set forth in the Work Plan attached as Appendix D to this Consent Decree and any modifications of the Work Plan approved by EPA, until the Performance Standards set forth in the Work Plan are met, and excluding the activities required under Section XXII (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment by the design and implementation and/or funding of certain response actions at the Site by the Settling Defendant, to pay a portion of the response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendant as provided in this Consent Decree.

6. Commitments by Settling Defendant. Settling Defendant shall finance and perform \$3.15 million in Work in accordance with this Consent Decree, the ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth in this Consent Decree or developed by Settling Defendant and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also pay the United States and the State for a portion of the Past Response Costs and Future Response Costs as provided in this Consent Decree.

7. The Administrative Order issued by EPA to Union Pacific Railroad Company on March 31, 2005, with an effective date of December 16, 2005 (Docket No. CERCLA-07-2005-0207), will be withdrawn by EPA. The withdrawal shall become effective on the Effective Date of the Consent Decree.

8. Compliance With Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be deemed to be consistent with the NCP.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

9. Supervising Contractor.

Settling Defendant has chosen the Omaha Healthy Kids Alliance (“OHKA”) as its Supervising Contractor.

10. Work Plan and Performance.

a. Settling Defendant has developed a work plan describing 5 years of health education and community involvement programs (the “Work Plan”). The Work Plan is incorporated and enforceable under this Consent Decree as Appendix D. The Settling Defendant shall perform \$3.15 million of Work focused on health education and community involvement about the health risks of lead exposures through its implementation of the Work Plan.

b. Upon EPA’s issuance of an authorization to proceed, Settling Defendant shall implement the Work Plan, subject to Paragraph 12 below. The Settling Defendant shall submit to EPA an annual report and other deliverables required under the SOW and the Work Plan in accordance with the approved schedule for review and approval pursuant to Section VIII (EPA Approval of Plans and Other Submissions).

11. The Settling Defendant shall continue to implement the Work for a period of five (5) years, and until OHKA has expended the \$3.15 million in funding provided by Settling Defendant for health education and community involvement programs. The \$3.15 million in costs shall include all costs for performing the Work required by this Consent Decree. All other costs incurred by Settling Defendant in completing the requirements of this Consent Decree shall not be included as part of the \$3.15 million to perform the Work required by the Consent Decree, including but not limited to, any costs incurred by Settling Defendant or billed by the Plaintiffs under Paragraph 35 of Section XII (Emergency Response), any costs incurred by the Settling Defendant or billed by the Plaintiffs under Paragraph 31 (Funding for Work Takeover), any costs incurred by Settling Defendant complying with requirements of Section X (Performance Guarantee) or Section XIV (Indemnification and Insurance), and any payments for Stipulated Penalties or Interest.

12. Modification of the SOW or Related Work Plans.

a. If EPA determines that it is necessary to modify the Work specified in the SOW, the Work Plan and/or in work plans developed pursuant to the SOW to achieve and

maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, and such modification is consistent with the scope of the remedy set forth in the ROD, then EPA may issue such modification in writing and shall notify Settling Defendant of such modification. For the purposes of this Paragraph and Paragraph 33 only, the “scope of the Work required by this Consent Decree” is the performance of health education and community involvement programs at a cost to Settling Defendant of \$3.15 million. If Settling Defendant objects to any modification it may, within 30 days after EPA’s notification, seek dispute resolution under Paragraph 50 (Record Review).

b. The SOW, the Work Plan, and/or related work plans shall be modified: (i) in accordance with the modification issued by EPA; or (ii) if Settling Defendant invokes dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this Consent Decree, and Settling Defendant shall implement all work required by such modification. Settling Defendant shall incorporate the modification into the related Work Plan(s) as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

13. Nothing in this Consent Decree, the SOW, or the Work Plan constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

VII. REPORTING REQUIREMENTS

14. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit 3 copies to EPA and 2 copies to the State of written annual progress reports according to the Work Plan that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous year; (b) identify all work plans, reports and other deliverables required by this Consent Decree completed and submitted during the previous year; (c) describe all actions, including, but not limited to, implementation of work plans, which are scheduled for the next year; (d) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (e) include any modifications to the work plans or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; (f) include a summary of all costs incurred performing Work during the previous year and in total; (g) describe all activities undertaken in performance of the Work which supports the Community Relations Plan during the previous year and those expected to be undertaken in the next year; and (h) identify any changes in project managerial personnel that occurred during the previous year. Settling Defendant shall submit progress reports to EPA and the State, consistent with the Work Plan, until EPA notifies the Settling Defendant pursuant to Paragraph 33.b of Section XI (Certification of Completion). If requested by EPA, Settling Defendant shall also provide briefings for EPA to discuss the progress of the Work.

15. The Settling Defendant shall notify EPA of any change in the schedule described in the annual progress report for the performance of any activity, including, but not limited to, implementation of work plans, no later than seven days prior to the performance of the activity.

16. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-know Act (“EPCRA”), 42 U.S.C. § 11004, Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response and Removal Branch, Superfund Division, EPA, Region 7, (913) 281-0991. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

17. Within 20 days of the onset of such an event, Settling Defendant shall furnish to Plaintiffs a written report, signed by the Settling Defendant’s Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto.

18. Settling Defendant shall submit 3 copies of all plans, reports, and data required by the SOW, the Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendant shall simultaneously submit 2 copies of all such plans, reports and data to the State. Upon request by EPA or the State, Settling Defendant shall submit in electronic form all portions of any report or other deliverable Settling Defendant is required to submit pursuant to the provisions of this Consent Decree.

19. All reports, plans or other deliverables submitted by Settling Defendant to EPA which purport to document compliance by Settling Defendant, with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant.

VIII. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

20. Initial Submissions.

a. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (i) approve, in whole or in part, the submission; (ii) approve the submission upon specified conditions; (iii) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (iv) any combination of the foregoing.

b. EPA also may modify the initial submission to cure deficiencies in the submission if: (i) EPA determines that disapproving the submission and awaiting a resubmission would cause substantial disruption to the Work; (ii) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable plan, report, or deliverable.

21. Resubmissions. Upon receipt of a notice of disapproval under Paragraph 20.a.(iii) or (iv) or if required by a notice of approval upon specified conditions under Paragraph 20.a.(ii), Settling Defendant shall, within 60 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. After review of the resubmitted plan, report, or other deliverable, EPA may: (a) approve, in whole or in

part, the resubmission; (b) approve the resubmission upon specified conditions; (c) modify the resubmission; (d) disapprove, in whole or in part, the resubmission, requiring Settling Defendant to correct the deficiencies; or (e) any combination of the foregoing.

22. Material Defects. If an initially submitted or resubmitted plan, report, or other deliverable, contains a material defect, and the plan, report, or other deliverable is disapproved or modified by EPA under Paragraph 20.b.(ii) or 33 due to such material defect, then the material defect shall constitute a lack of compliance for purposes of Paragraph 53. The provisions of Section XVI (Dispute Resolution) and Section XVII (Stipulated Penalties) shall govern the accrual and payment of any stipulated penalties regarding Settling Defendant's submissions under this Section.

23. Implementation. Upon approval, approval upon conditions, or modification by EPA, under Paragraph 20 or 21, of any plan, report or other deliverable, or any portion thereof: (a) such plan, report, or other deliverable, or portion thereof, shall be incorporated into and enforceable under this Consent Decree; and (b) Settling Defendant shall take any action required by such plan, report, or other deliverable, or portion thereof, subject only to Settling Defendant's right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. The implementation of any non-deficient portion of a plan, report, or other deliverable submitted or resubmitted under Paragraph 20 or 21 shall not relieve Settling Defendant of any liability for stipulated penalties under Section XVII (Stipulated Penalties).

IX. PROJECT COORDINATORS

24. Jeff McDermott, Manager Environmental Site Remediation, Union Pacific Railroad Company, 1400 Douglas Street, Stop 1030, Omaha, NE 68179, telephone (402) 544-3675, is Settling Defendant's Project Coordinator. Kara H. Eastman MSW, the Executive Director of OHKA, 5006 Underwood Ave., Omaha, NE 68132, telephone (402) 934-9700, is Settling Defendant's Alternate Project Coordinator. Within 20 days of lodging this Consent Decree, the State and EPA will notify Settling Defendant, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during Work activities.

25. Plaintiffs may designate other representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the NCP, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the NCP, to halt any Work required by this Consent Decree and to take

any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

26. EPA's Project Coordinator and the Settling Defendant's Project Coordinator will meet, at a minimum, on a quarterly basis. If both Parties agree, the meeting can take place by telephone.

X. PERFORMANCE GUARANTEE

27. In order to ensure the full and final completion of the Work, Settling Defendant shall establish and maintain a performance guarantee for the benefit of EPA in the amount of \$2 million (hereinafter "Cost of the Work"). The performance guarantee, which must be satisfactory in form and substance to EPA, shall be in the form of one or more of the following mechanisms:

- a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
- b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. federal or state agency;
- c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. federal or state agency;
- d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a U.S. federal or state agency;
- e. A demonstration by the Settling Defendant that meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are met to EPA's satisfaction; or
- f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of the Settling Defendant, or (ii) a company that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with the Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Cost of the Work that it proposes to guarantee hereunder.

28. Settling Defendant has selected, and EPA has approved, as an initial performance guarantee a written guarantee to fund or perform the Work by Union Pacific Corporation, pursuant to Paragraph 27(f). Within ninety days after lodging of this Consent Decree, Settling Defendant shall execute or otherwise finalize all instruments or other documents required in order to make the selected performance guarantee(s) legally binding, and such performance guarantee shall thereupon be fully effective. Within thirty days of entry of this Consent Decree, Settling Defendant shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee

legally binding to the EPA Regional Financial Management Officer in accordance with Section XXIII (Notices and Submissions) of this Consent Decree, with a copy to the United States, EPA and the State as specified in Section XXIII.

29. If at any time after the Effective Date and before issuance of the Certification of Completion of the Work pursuant to Paragraph 33.b, the Settling Defendant provides a performance guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 27.e or Paragraph 27.f above, the Settling Defendant shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these mechanisms unless otherwise provided in this Consent Decree, including but not limited to (i) the initial submission of required financial reports and statements from the relevant entity's chief financial officer ("CFO") and independent certified public accountant ("CPA"), in the form prescribed by EPA in its financial test sample CFO letter and CPA reports available at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fa-test-samples.pdf>; (ii) the annual re-submission of such reports and statements within 90 days after the close of each such entity's fiscal year; and (iii) the prompt notification of EPA after each such entity determines that it no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1) and in any event within 90 days after the close of any fiscal year in which such entity no longer satisfies such financial test requirements. For purposes of the performance guarantee mechanisms specified in this Section X, references in 40 C.F.R. Part 264, Subpart H, to "closure," "post-closure," and "plugging and abandonment" shall be deemed to refer to the Work required under this Consent Decree, and the terms "current closure cost estimate" "current post-closure cost estimate," and "current plugging and abandonment cost estimate" shall be deemed to refer to the Cost of the Work; the terms "owner" and "operator" shall be deemed to refer to the Settling Defendant; and the terms "facility" and "hazardous waste facility" shall be deemed to include the Site.

30. In the event that EPA determines at any time that a performance guarantee provided by the Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section for any reason, or in the event that the Settling Defendant becomes aware of information indicating that a performance guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section for any reason, Settling Defendant, within 30 days of receipt of notice of EPA's determination or, as the case may be, within 30 days of the Settling Defendant becoming aware of such information, shall obtain and present to EPA for approval a proposal for a revised or alternative form of performance guarantee listed in Paragraph 27 of this Consent Decree that satisfies all requirements set forth in this Section X. In seeking approval for a revised or alternative form of performance guarantee, Settling Defendant shall follow the procedures set forth in Paragraph 32.b.(ii) of this Consent Decree. Settling Defendant's inability to post a performance guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Decree, including, without limitation, the obligation of Settling Defendant to complete the Work in strict accordance with the terms of this Consent Decree.

31. Funding for Work Takeover. The commencement of any Work Takeover pursuant to Paragraph 71 of this Consent Decree shall trigger EPA's right to receive the benefit of any performance guarantee provided pursuant to Paragraph 27.a, 27.b, 27.c, 27.d, or 27.f, and

at such time EPA shall have immediate access to resources guaranteed under any such performance guarantee, whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. Upon the commencement of any Work Takeover, if (a) for any reason EPA is unable to promptly secure the resources guaranteed under any such performance guarantee, whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or (b) in the event that the performance guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 27.e or Paragraph 27.f.(ii), Settling Defendant (or in the case of Paragraph 27.f.(ii), the guarantor) shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA. In addition, if at any time EPA is notified by the issuer of a performance guarantee that such issuer intends to cancel the performance guarantee mechanism it has issued, then, unless Settling Defendant provides a substitute performance guarantee mechanism in accordance with this Section X no later than 30 days prior to the impending cancellation date, EPA shall be entitled (as of and after the date that is 30 days prior to the impending cancellation) to draw fully on the funds guaranteed under the then-existing performance guarantee. All EPA Work Takeover costs not reimbursed under this Paragraph shall be reimbursed under Section XIII (Payments for Response Costs).

32. Modification of Amount and/or Form of Performance Guarantee.

a. Reduction of Amount of Performance Guarantee. If Settling Defendant believes that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 27 above, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in writing to request a reduction in the amount of the performance guarantee provided pursuant to this Section so that the amount of the performance guarantee is equal to the estimated cost of the remaining Work to be performed. Settling Defendant shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a reduction in the amount of the performance guarantee, Settling Defendant shall follow the procedures set forth in Paragraph 32.b.(ii) of this Consent Decree for requesting a revised or alternate form of performance guarantee, except as specifically provided in this Paragraph 32.a. If EPA decides to accept Settling Defendant's proposal for a reduction in the amount of the performance guarantee, either to the amount set forth in Settling Defendant's written proposal or to some other amount as selected by EPA, EPA shall notify the Settling Defendant of such decision in writing. Upon EPA's acceptance of a reduction in the amount of the performance guarantee, the Cost of the Work shall be deemed to be the estimated cost of completing the Work set forth in EPA's written decision. After receiving EPA's written decision, Settling Defendant may reduce the amount of the performance guarantee in accordance with and to the extent permitted by such written acceptance and shall submit copies of all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee legally binding in accordance with Paragraph 32.b.(ii). In the event of a dispute, Settling Defendant may reduce the amount of the performance guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute pursuant to Section XVI (Dispute Resolution). No change to the form or terms of any performance

guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 30 or 32.b of this Consent Decree.

b. Change of Form of Performance Guarantee.

(i) If, after entry of this Consent Decree, Settling Defendant desires to change the form or terms of any performance guarantee provided pursuant to this Section, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in writing to request a change in the form or terms of the performance guarantee provided hereunder. The submission of such proposed revised or alternative performance guarantee shall be as provided in Paragraph 32.b.(ii) of this Consent Decree. Any decision made by EPA on a petition submitted under this subparagraph b(i) shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

(ii) Settling Defendant shall submit a written proposal for a revised or alternative form of performance guarantee to EPA which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of performance guarantee, including all proposed instruments or other documents required in order to make the proposed performance guarantee legally binding. The proposed revised or alternative performance guarantee must satisfy all requirements set forth or incorporated by reference in this Section. Settling Defendant shall submit such proposed revised or alternative performance guarantee to the EPA Regional Financial Management Officer in accordance with Section XXIII (Notices and Submissions) of this Consent Decree. EPA will notify Settling Defendant in writing of its decision to accept or reject a revised or alternative performance guarantee submitted pursuant to this subparagraph. Within ninety days after receiving a written decision approving the proposed revised or alternative performance guarantee, Settling Defendant shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected performance guarantee legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such performance guarantee shall thereupon be fully effective. Settling Defendant shall submit copies of all executed and/or otherwise finalized instruments or other documents required in order to make the selected performance guarantee legally binding to the EPA Regional Financial Management Officer within 30 days of receiving a written decision approving the proposed revised or alternative performance guarantee in accordance with Section XXIII (Notices and Submissions) of this Consent Decree, with a copy to the United States, EPA and the State as specified in Section XXIII.

c. Release of Performance Guarantee. Settling Defendant shall not release, cancel, or discontinue any performance guarantee provided pursuant to this Section except as provided in this subparagraph. If Settling Defendant receives written notice from EPA in accordance with Paragraph 33 hereof that the Work has been fully and finally completed in accordance with the terms of this Consent Decree, or if EPA otherwise so notifies Settling Defendant in writing, Settling Defendant may thereafter release, cancel, or discontinue the performance guarantee provided pursuant to this Section. In the event of a dispute, Settling Defendant may release, cancel, or discontinue the performance guarantee required hereunder

only in accordance with a final administrative or judicial decision resolving such dispute pursuant to Section XVI (Dispute Resolution).

XI. CERTIFICATION OF COMPLETION

33. Completion of the Work.

a. Within 60 days after the end of the five years funded by Settling Defendant, the Settling Defendant shall submit a Final Report to the EPA and the State, consistent with Paragraph 6 of the SOW. Within 30 days after receipt of the Final Report, if the Settling Defendant still believes that the Work has been fully performed and the Performance Standards have been achieved, it shall submit a written request for certification to EPA for approval, with a copy to the State, pursuant to Section VIII (EPA Approval of Plans and Other Submissions). In the request, the Settling Defendant's Project Coordinator shall state that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of the Settling Defendant or the Settling Defendant's Project Coordinator:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.

If, after receipt and review of the Final Report, EPA, after reasonable opportunity for review and comment by the State, determines that the Work or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Work and achieve the Performance Standards, provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the Work required by this Consent Decree," as that term is defined in Paragraph 12.a. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section VIII (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendant. This certification shall constitute the Certification of Completion of the

Work for purposes of this Consent Decree, including, but not limited to, Section XVIII (Covenants by Plaintiffs). Certification of Completion of the Work shall not affect Settling Defendant's remaining obligations under this Consent Decree.

34. Completion of the Remedial Action. When EPA has issued Settling Defendant a Certificate of Completion of the Work and also performed all other activities selected as a part of the Remedial Action in the final ROD, EPA will issue a Remedial Action Report, certifying that the Remedial Action is completed. This Remedial Action Report shall constitute the Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XVIII (Covenants by Plaintiffs).

XII. EMERGENCY RESPONSE

35. In the event of any action or occurrence during the 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, Settling Defendant shall, subject to Paragraph 36, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the Emergency Response and Removal Branch, Superfund Division, EPA, Region 7, (913) 281-0991. Settling Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendant shall reimburse EPA all costs of the response action under Section XIII (Payments for Response Costs).

36. Subject to Section XVIII (Covenants by Plaintiffs), nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State, (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XIII. PAYMENTS FOR RESPONSE COSTS

37. Payments by Settling Defendant for Past Response Costs.

a. Within 30 days of the Effective Date, Settling Defendant shall pay to EPA \$9,500,000 in payment for Past Response Costs. Payment shall be made in accordance with Paragraphs 39.a and 39.c (Payment Instructions).

b. The total amount to be paid by Settling Defendant pursuant to Paragraph 37.a shall be deposited in the Omaha Lead Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

c. Within 30 days of the Effective Date, Settling Defendant shall pay to the State \$400,000 by official bank check made payable to Nebraska Department of Environmental Quality, in payment of State Past Response Costs. Settling Defendant shall send the bank check to Michael J. Linder, Director Nebraska Department of Environmental Quality, Suite 400, The Atrium, 1200 N Street, P.O. Box 98922, Lincoln, Nebraska 68509-8922.

38. Payments by Settling Defendant for Future Response Costs and NRD. Within 30 days of the Effective Date, Settling Defendant shall pay to EPA as Future Response Costs, a single payment in the amount of \$11,850,000 for distribution to existing programs. EPA plans to fund the following programs:

a. EPA's existing contracts for exterior lead-based paint stabilization with Professional Environmental Engineers, Inc. (Contract: EP-R7-06), and Prudent Technologies, Inc. (DBA: Prudent Environmental Services) (EP-R7-08-07);

b. The City of Omaha's Exterior Paint Stabilization Program (Cooperative Agreement V-98767501);

c. The City of Omaha's Lead Hazard Registry to include properties which have received soil remediation and/or exterior paint stabilization (Cooperative Agreement V-98767501);

d. The child blood-lead screening components of the Douglas County Health Department's Lead Poisoning Prevention Program (Cooperative Agreement V-98771701-6); and

e. Response to interior lead-contaminated dust.

f. The total amount to be paid by Settling Defendant pursuant to Paragraph 38 shall be deposited in the Omaha Lead Special Account within the EPA Hazardous Substance Superfund to be retained and used to finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. The total amount to be paid by Settling Defendant pursuant to Paragraph 38 shall be deposited in the Omaha Lead Special Account within the EPA Hazardous Substance Superfund. The EPA plans to use the total amount to be paid by Settling Defendant pursuant to Paragraph 38 to finance response actions under programs listed in Paragraph 38.a through 38.e, or other response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund.

g. Within 30 days of the Effective Date, Defendant will pay to the U.S. Department of Interior \$100,000 in natural resource damages. Payment shall be made in accordance with Paragraph 39.d (Payment Instructions).

39. Payment Instructions for Settling Defendant.

a. Instructions for Past Response Cost Payments. Settling Defendant shall make all payments required by this Paragraph by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, and in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office after the Effective Date.

b. Instructions for Future Response Cost Payments and Stipulated Penalties. All payments required elsewhere in this Consent Decree, to be made in accordance with Paragraph 39.b shall be made by online payment made at <https://www.pay.gov> to the U.S. EPA

account in accordance with instructions provided to Settling Defendant by EPA following lodging of the Consent Decree.

c. Instructions for All EPA Payments. All payments made under Paragraph 39.a or 39.b shall reference the Consolidated Debt Collection System (“CDCS”) number, EPA Site/Spill ID Number 07ZY, DOJ Case Number 90-11-3-07834, and USAO file number 2011v00076. At the time of payment required to be made in accordance with Paragraph 39.a or 39.b, Settling Defendant shall send notice that payment has been made to the United States, and to EPA in accordance with Section XXIII (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at acctsreceivable.cinwd@epa.gov, or by mail to 26 Martin Luther King Drive, Cincinnati, Ohio 45268. Such notice shall also reference the CDCS Number Site/Spill ID Number and DOJ Case Number.

d. Instructions for NRD Payments: Settling Defendant shall make all payments required by this Paragraph by FedWire EFT to the U.S. Department of Interior Natural Resource Damage Assessment and Restoration Fund (Account No. 14X5198) in accordance with current EFT procedures, and in accordance with instructions provided to Settling Defendant by the U.S. Department of Justice after the Effective Date. A separate, site-specific numbered account has been or will be established within DOI’s Natural Resource Damage Assessment and Restoration Fund (“Omaha Lead Account”). The Fish and Wildlife Service shall use the funds in the Omaha Lead Account, including all interest earned on such funds, for appropriate natural resource damage assessment and restoration activities.

40. Interest. In the event that any payment for Past Response Costs or for Future Response Costs required under this Section is not made by the date required, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past and Future Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest shall accrue through the date of Settling Defendant’s payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant’s failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 53.

XIV. INDEMNIFICATION AND INSURANCE

41. Settling Defendant’s Indemnification of the United States and the State

a. The United States and the State do not assume any liability by entering into this Consent Decree or by virtue of any designation of Settling Defendant as EPA’s authorized representatives under Section 104(e) of CERCLA, 42 U.S.C § 9604(e). Settling Defendant shall indemnify, save and hold harmless the United States, the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA’s authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the United States and the State all costs they incur 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 or the State

based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Settling Defendant notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 41, and shall consult with Settling Defendant prior to settling such claim.

42. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between the Settling Defendant 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, Settling Defendant shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between the Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

No later than 15 days before commencing any on-Site Work, Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Work pursuant to Paragraph 33.b of Section XI (Certification of Completion) commercial general liability insurance with limits of 1 million dollars, for any one occurrence, and automobile liability insurance with limits of 1 million dollars, combined single limit, naming the United States and the State as additional insureds with respect to all liability arising out of the activities performed by or on behalf of the Settling Defendant pursuant to this Consent Decree. In addition, for the duration of this Consent Decree, the Settling Defendant 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 the Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, the Settling Defendant shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

XV. FORCE MAJEURE

43. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of any entity controlled by Settling Defendant, or Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the

obligation. The requirement that the Settling Defendant exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force Majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, for which Settling Defendant intends or may intend to assert a claim of force majeure, the Settling Defendant shall notify orally EPA’s Project Coordinator or, in his or her absence, EPA’s Alternate Project Coordinator or, in the event both of EPA’s designated representatives are unavailable, the Director of the Superfund Division, EPA Region 7, within 48 hours of when Settling Defendant first knew that the event might cause a delay. Within 7 days thereafter, Settling Defendant shall provide in writing to EPA and the State 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; the Settling Defendant’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 the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant 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. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant’s contractors knew or should have known.

45. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, 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, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendant in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

46. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XVI (Dispute Resolution), it shall do so no later than 30 days after receipt of EPA’s notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and

mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 43 and 44, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XVI. DISPUTE RESOLUTION

47. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

48. Any dispute regarding this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties to the dispute. The period for informal negotiations shall not exceed 30 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute. The dispute shall be considered to have arisen when one Party sends the other Parties a written Notice of Dispute.

49. Statements of Position.

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 15 days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 50 or 51.

b. Within 14 days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 50 or 51. Within 10 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 50 or 51, the Parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 50 and 51.

50. Record Review. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or

appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the final ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the Parties to the dispute.

b. The Director of the Superfund Division, EPA Region 7, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 50.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 50.c and d.

c. Any administrative decision made by EPA pursuant to Paragraph 50.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant with the Court and served on all Parties within 15 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 50.a.

51. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendant's Statement of Position submitted pursuant to Paragraph 49, the Director of the Superfund Division, EPA Region 7, will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be binding on the Settling Defendant unless, within 15 days of receipt of the decision, the Settling Defendant files with the Court and serves on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's motion.

b. Notwithstanding Paragraph M of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

52. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 60. Notwithstanding the stay of

payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVII (Stipulated Penalties).

XVII. STIPULATED PENALTIES

53. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 54 and 55 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XV (Force Majeure).

“Compliance” by Settling Defendant shall include completion of all payments and activities required under this Consent Decree, or any plan, report or other deliverable approved under this Consent Decree in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans, reports or other deliverables approved under this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

54. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 54.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day and beyond

b. Compliance Milestones.

(1) Failure to make payments required by this Consent Decree.

55. Stipulated Penalty Amounts – Plans, Reports, and other Deliverables.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other plans or deliverables pursuant to Paragraph 10 of Section VI (Performance of the Work by Settling Defendant) and Paragraph 14 of Section VII (Reporting Requirements) and the attached Statement of Work:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th day
\$ 1,000	15th through 30th day
\$ 2,500	31st day and beyond

56. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 71 of Section XVIII (Covenants by Plaintiffs), Settling Defendant shall be liable for a stipulated penalty in the amount of three hundred thousand dollars (\$300,000).

57. 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: (a) with respect to a deficient submission under Section VIII (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendant of any deficiency;

(b) with respect to a decision by the Director of the Superfund Division, EPA Region 7, under Paragraph 50.b or 51.a of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Section XVI (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

58. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendant written notification of the same and describe the noncompliance. EPA may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendant of a violation.

59. All penalties accruing under this Section shall be due and payable to the United States within 30 days of the Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XVI (Dispute Resolution) within the 30-day period. All payments to the United States under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with Paragraphs 39.b and 39.c (Payment Instructions).

60. Penalties shall continue to accrue as provided in Paragraph 59 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph 60.c below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owed to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendant to the extent that they prevail.

61. If Settling Defendant fails to pay stipulated penalties when due, the Settling Defendant shall pay Interest on the unpaid stipulated penalties as follows: (a) if Settling Defendant has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 60 until the date of payment; and (b) if Settling Defendant fails to timely invoke dispute resolution, Interest shall accrue from the

date of demand under Paragraph 59 until the date of payment. If Settling Defendant fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

62. The payment of penalties and Interest, if any, shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

63. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided in this Consent Decree, except in the case of a willful violation of the Consent Decree.

64. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XVIII. COVENANTS BY PLAINTIFFS

65. Covenants for Settling Defendant by United States. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 67, 68 and 70 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 37.a (Payments for Past Response Costs) and Paragraph 38 (Payments for Future Response Costs and NRD) and any Interest or stipulated penalties due thereon under Paragraph 40 (Interest) or Section XVII (Stipulated Penalties). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action pursuant to Paragraph 34 of Section XI (Certification of Completion). These covenants are conditioned upon the satisfactory performance by Settling Defendant of their obligations under this Consent Decree. These covenants extend only to the Settling Defendant and do not extend to any other person.

66. Covenant for Settling Defendant By State of Nebraska. In consideration of and upon receipt of the payment the Settling Defendant is making pursuant to Paragraph 37.c., and except as otherwise provided in Paragraph 70 below, the State of Nebraska covenants not to further sue or to take administrative action against the Settling Defendant under any state or federal law or regulation for reimbursement of costs the State has incurred for the Site and further releases and covenants not to sue the Settling Defendant for natural resources damages related to the Site.

67. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant to perform further response actions

relating to the Site, and/or to pay the United States for additional costs of response if, (a) prior to Certification of Completion of the Work, (i) conditions at the Site, previously unknown to EPA, are discovered, or (ii) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Work is not protective of human health or the environment.

68. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant to perform further response actions relating to the Site, and/or to pay the United States for additional costs of response if, (a) subsequent to Certification of Completion of the Work, (i) conditions at the Site, previously unknown to EPA, are discovered, or (ii) information, previously unknown to EPA, is received, in whole or in part, and (b) EPA determines that these previously unknown conditions or information together with other relevant information indicate that the Work is not protective of human health or the environment.

69. For purposes of Paragraph 67, the information and the conditions known to EPA will include only that information and those conditions known to EPA as of the date the final ROD was signed and set forth in the final Record of Decision for the Site and the administrative record supporting the final Record of Decision and all Site data compiled by EPA from the date the final ROD was signed to the lodging date of this Consent Decree. For purposes of Paragraph 68, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Work and set forth in the final Record of Decision, the administrative record supporting the final Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Work.

70. General Reservations of Rights. The United States and State of Nebraska reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within Plaintiffs' covenants not to sue. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based on the ownership or operation of the Site by Settling Defendant when such ownership commences after signature of this Consent Decree;
- d. liability based upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the final ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree;

- e. criminal liability; and
- f. liability for violations of federal or state law which occur during or after implementation of the Work.

71. Work Takeover

a. In the event EPA determines that Settling Defendant has (i) ceased implementation of any portion of the Work, or (ii) is seriously or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to the Settling Defendant. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendant a period of 25 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

b. If, after expiration of the 25-day notice period specified in Paragraph 71.a, Settling Defendant has not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary (“Work Takeover”). EPA will notify Settling Defendant in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 71.b. Funding of Work Takeover costs is addressed under Paragraph 31.

c. Settling Defendant may invoke the procedures set forth in Section XVI (Dispute Resolution), Paragraph 50 (Record Review), to dispute EPA’s implementation of a Work Takeover under Paragraph 71.b. However, notwithstanding Settling Defendant’s invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 71.b until the earlier of (i) the date that Settling Defendant remedies, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice or (ii) the date that a final decision is rendered in accordance with Section XVI (Dispute Resolution), Paragraph 50 (Record Review), requiring EPA to terminate such Work Takeover.

72. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

XIX. COVENANTS BY SETTLING DEFENDANT

73. Covenant Not to Sue by Settling Defendant. Subject to the reservations in Paragraph 75, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State, including any department, agencies, officers, employees, contractors, or agents, with respect to the Site and this Consent Decree, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding the Site and this Consent Decree; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Nebraska 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.

74. Except as provided in Paragraph 77 (Claims Against *De Micromis* Parties), Paragraph 79 (Claims Against *De Minimis*/Ability to Pay Parties), and Paragraph 84 (Res Judicata and Other Defenses), the covenants in this Section shall not apply if the United States or the State brings a cause of action or issues an order pursuant to any of the reservations in Section XVIII (Covenants by Plaintiffs), other than in Paragraphs 70(a) (claims for failure to meet a requirement of the Consent Decree), 70(e) (criminal liability), and 70(f) (violations of federal/state law during or after implementation of the Work), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

75. The Settling Defendant reserves, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendant's plans, reports, or other deliverables or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

76. Nothing in this Consent Decree shall be deemed to constitute 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).

77. Claims Against De Micromis Parties. Settling Defendant 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 Settling Defendant 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.

78. The waiver in Paragraph 77 shall not apply with respect to any defense, claim, or cause of action that the Settling Defendant may have against any person meeting the criteria in Paragraph 77 if such person asserts a claim or cause of action relating to the Site against the Settling Defendant. This waiver also shall not apply to any claim or cause of action against any person meeting the criteria in Paragraph 77 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 RCRA, 42 U.S.C. § 6927, 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; or

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.

79. Claims Against De Minimis/Ability to Pay Parties. Settling Defendant agrees not to assert any claims or causes of action 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 that has entered or in the future enters into a final CERCLA Section 122(g) *de minimis* settlement, or a final settlement based on limited ability to pay, with EPA with respect to the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that the Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against the Settling Defendant.

XX. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

80. Except as provided in Paragraph 77 (Claims Against De Micromis Parties) and Paragraph 79 (Claims Against *De Minimis*/Ability to Pay Parties), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Except as provided in Paragraph 77 (Claims Against De Micromis Parties) and Paragraph 79 (Claims Against *De Minimis*/Ability to Pay 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 relating in any way to the Site against any person not a party hereto. Nothing in this Consent Decree 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).

81. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that the Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for “matters addressed” in this Consent

Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred and natural resource damages, at or in connection with the Site, by the United States or any other person; provided, however, that if the United States exercises rights against the Settling Defendant under the reservations in Section XVIII (Covenants by Plaintiffs), other than in Paragraphs 70(a) (claims for failure to meet a requirement of the Consent Decree), 70(e) (criminal liability), or 70(f) (violations of federal/state law during or after implementation of the Work), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

82. The Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

83. The Settling Defendant shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify in writing the United States and the State within ten days of service of the complaint on the Settling Defendant. In addition, the Settling Defendant shall notify the United States and the State within ten days of service or receipt of any Motion for Summary Judgment and within ten days of receipt of any order from a court setting a case for trial.

84. Res Judicata and Other Defenses. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVIII (Covenants by Plaintiffs).

XXI. ACCESS TO INFORMATION

85. Settling Defendant shall provide to EPA and the State, upon request, copies of all records, reports, documents and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within its possession or control or that of its contractors or agents relating to Settling Defendant’s Work activities at the Site or to Settling Defendant’s implementation of this Consent Decree, including, but not limited to, receipts, reports, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

86. Business Confidential and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the Records submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), 40 C.F.R. § 2.203(b), and other federal or state law. Records determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B and by the State in accordance with Neb. Rev. Stat. § 84-712 et seq. If no claim of confidentiality accompanies

Records when they are submitted to EPA and the State, or if EPA has notified Settling Defendant that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, and Neb. Rev. Stat. § 84-712 et seq. for the State, the public may be given access to such Records without further notice to Settling Defendant.

b. The Settling Defendant may assert that certain Records are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If the Settling Defendant asserts such a privilege in lieu of providing Records, it shall provide Plaintiffs with the following: (1) the title of the Record; (2) the date of the Record; (3) the name, title, affiliation (e.g., company or firm) and address of the author of the Record; (4) the name and title of each addressee and recipient; (5) a description of the contents of the Record; and (6) the privilege asserted by Settling Defendant. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States and the State in redacted form to mask the privileged portion only. Settling Defendant shall retain all Records that it claims to be privileged until the United States or the State has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor.

c. No Records created or generated pursuant to the specific requirements of this Consent Decree for performance of Work shall be withheld from the United States or the State on the grounds that they are privileged or confidential.

87. No claim of 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.

XXII. RETENTION OF RECORDS

88. Until 10 years after the Settling Defendant's receipt of EPA's notification pursuant to Paragraph 33.b of Section XI (Certification of Completion), the Settling Defendant shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that the Settling Defendant must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. The Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records (including Records 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, provided, however, that the Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

89. At the conclusion of this record retention period, Settling Defendant shall notify the United States and the State at least 90 days prior to the destruction of any such Records, and, upon request by the United States or the State, Settling Defendant shall deliver any such Records to EPA or the State. The Settling Defendant may assert that certain Records are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If the

Settling Defendant asserts such a privilege, it shall provide the Plaintiff with the following: (a) the title of the Record; (b) the date of the Record; (c) the name, title, affiliation (e.g., company or firm) and address of the author of the Record; (d) the name and title of each addressee and recipient; (e) a description of the contents of the Record; and (f) the privilege asserted by Settling Defendant. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States and the State in redacted form to mask the privileged portion only. Settling Defendant shall retain all Records that it claims to be privileged until the United States or the State has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no Records created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged or confidential.

90. The Settling Defendant 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 (other than identical copies) relating to its potential liability regarding the Site since the earlier of notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 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.

XXIII. NOTICES AND SUBMISSIONS

91. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, and the Settling Defendant, respectively. Notices required to be sent to EPA, and not to the United States, under the terms of this Consent Decree should not be sent to the U.S. Department of Justice.

As to the United States:

Chief, Environmental Enforcement Section
 Environment and Natural Resources Division
 United States Department of Justice
 Ben Franklin Station
 P.O. Box 7611
 Washington, D.C. 20044-7611
 Re: DJ # 90-11-3-07834

As to EPA:

Steven L. Sanders
 Senior Counsel
 United States Environmental Protection Agency
 Region 7
 901 North 5th Street
 Kansas City, Kansas 66101

And

Pauletta France-Isetts
EPA Project Coordinator
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

As to the Regional Financial
Management Officer:

John Phillips
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

As to the State:

David B. Haldeman
Waste Division Administrator
Nebraska Department of Environmental Quality
Suite 400, The Atrium
1200 N Street
P.O. Box 98922
Lincoln, Nebraska 68509-8922

As to the Settling Defendant:

Jeff McDermott
Settling Defendants' Project Coordinator
Manager Environmental Site Remediation
Union Pacific Railroad Company
1400 Douglas Street
STOP 1030
Omaha, Nebraska 68179

and

David P. Young
General Solicitor and
National Environmental Counsel
Union Pacific Railroad Company
1001 McKinney Street
Suite 900
Houston, Texas 77002

XXIV. RETENTION OF JURISDICTION

92. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the

construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XVI (Dispute Resolution) hereof.

XXV. APPENDICES

93. The following appendices are attached to and incorporated into this Consent Decree:

- “Appendix A” is the ROD.
- “Appendix B” is the SOW.
- “Appendix C” is the map of the Site.
- “Appendix D” is the Work Plan.

XXVI. COMMUNITY RELATIONS

94. If requested by EPA or the State, the Settling Defendant shall participate in community relations activities pursuant to the community relations plan developed by EPA. EPA will determine the appropriate role for the Settling Defendant under the community relations plan. Settling Defendant shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA or the State, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at or relating to the Site.

XXVII. MODIFICATION

95. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendant. All such modifications shall be made in writing.

96. Except as provided in Paragraph 12 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendant, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2), may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendant.

97. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

98. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or

considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

99. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXIX. SIGNATORIES/SERVICE

100. The undersigned representative of the Settling Defendant to this Consent Decree and the Associate Attorney General for the Environment and Natural Resources Division of the Department of Justice and the Attorney General for the State, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

101. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

102. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. The Parties agree that Settling Defendant need not file an answer to the complaint in this action unless or until the court expressly declines to enter this Consent Decree.

XXX. FINAL JUDGMENT

103. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

104. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States the State, and the Settling Defendant. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

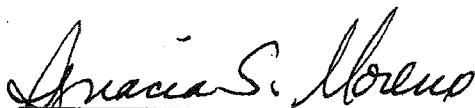
SO ORDERED THIS ____ DAY OF _____, 2011.

United States District Judge

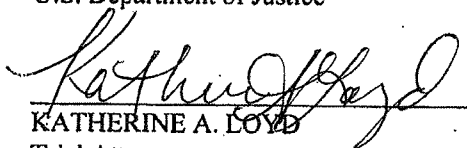
Signature Page for Consent Decree regarding the Omaha Lead Superfund Site.

FOR THE UNITED STATES OF AMERICA

3/27/11
Date

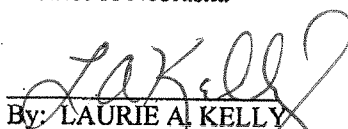


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Signature Page for a Consent Decree regarding the Omaha Lead Superfund Site.

FOR THE STATE OF NEBRASKA

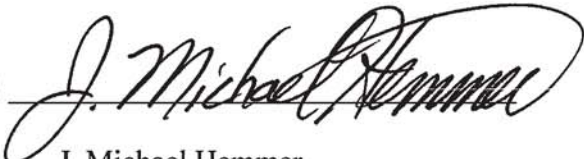

JON BRUNING
Nebraska Attorney General

May 20, 2011
Date


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FOR UNION PACIFIC RAILROAD COMPANY AND UNION PACIFIC CORPORATION

Signature:  Date: 

Name: J. Michael Hemmer
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Omaha, Nebraska 68179

Agent Authorized to Accept Service on Behalf of Above-signed Party:

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