

UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6

In the Matter of:)	CERCLA Docket No.
)	
Agrifos Phosphoric Acid Release Site)	Settlement Agreement and
Pasadena, Harris County, Texas)	Administrative Order on Consent for
)	Recovery of Past Response Costs
Agrifos Fertilizer L.L.C.,)	
RESPONDENT)	Proceeding under Section 122(h)(1)
)	of CERCLA 42 U.S.C. § 9622(h)(1)

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I. JURISDICTION

1. This Settlement Agreement and Administrative Order on Consent for Past Response Costs is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Agrifos Fertilizer L.L.C. ("Agrifos" or "Respondent") pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1). This authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D.

2. This Agreement is made and entered into by EPA and Agrifos. Agrifos consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Agrifos Phosphoric Acid Release Site located at 2001 Jackson Road, Pasadena, Harris County, Texas ("Site," as defined in Section IV). EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

a. Agrifos is the current owner and operator of the Site. In 2007, Agrifos operated a monoammonium phosphate ("MAP") and diammonium phosphate ("DAP") fertilizer manufacturing facility at the Site. Byproducts from the manufacture of MAP and DAP were stored in gypsum stacks, including a 240 acre gypsum stack identified as the South Gypsum Stack, or South Stack. Process water stored in the gypsum stack was reused in the manufacturing process and has a pH of 2.0 (or less) and/or other constituents considered a hazardous substance if released into the environment without treatment.

b. On August 16, 2007, the Site received an estimated eight inches of rainfall that added to a higher than normal seasonal rainfall average. The rainfall contributed to an excess of process water and storm water stored within the South Stack, which caused an unforeseen failure of the retaining wall surrounding the South Stack and subsequent release of process water between August 16 and September 7, 2007 to Cotton Patch Bayou and the Houston Ship Channel.

d. On September 7, 2007, EPA's Emergency Response Team mobilized to the Site. EPA assessed the impact of the discharge, determined potential mitigating actions, coordinated with the United States Coast Guard ("USCG"), the Texas Commission

Environmental Quality ("TCEQ"), and the Harris County Pollution Control Services Department, and ensured Agrifos' response actions mitigated the threat to the public and the environment. Assisting the Emergency Response Team were the START-3 contractors, the EPA Region Six Enforcement Division, the EPA Office of Enforcement and Compliance Assurance ("OECA"), and an OECA contractor. EPA oversaw operations as Agrifos made temporary repairs to the retaining walls of the South Stack.

e. On September 12, 2007, the National Hurricane Center issued a tropical storm warning indicating that tropical storm Humberto was bearing down on the Site. Agrifos had made temporary repairs to the retaining walls, but the moat was near capacity and the anticipated eleven inches of rain threatened to overtop the retaining walls. On September 13, 2007, EPA issued a Unilateral Administrative Order ("UAO") directing Agrifos to conduct an emergency controlled release from the Site to control the free-board and prevent a catastrophic failure of the containment areas. EPA oversaw these activities.

f. On September 24, 2007, the emergency operations were completed and the Site fully transitioned from CERCLA authority to Resource Conservation and Recovery Act ("RCRA") authority under the modified UAO.

5. In performing the above-described response action, EPA has incurred response costs at or in connection with the Site.

6. The Regional Administrator of EPA Region 6, or her delegatee, has determined that the total past response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.

7. EPA alleges that Agrifos is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for response costs incurred or to be incurred at or in connection with the Site.

8. EPA and Agrifos recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

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

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Settlement Agreement and any attached appendices. In the event of conflict between this Settlement Agreement and any appendix, the Settlement Agreement shall control.

b. "Agrifos" shall mean Agrifos Fertilizer L.L.C.

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

d. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

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

f. "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.

g. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

h. "Parties" shall mean EPA and Agrifos.

i. "Past Response Costs" shall mean all costs, fees, and expenditures, including but not limited to direct and indirect costs, oversight costs, payroll costs, travel costs, overhead costs, labor costs, attorney's fees, and any other expenditure, that EPA or the U.S. Department of Justice ("DOJ") on behalf of EPA, or any contractor or agent acting on behalf of EPA or DOJ has paid or incurred at or in connection with the Removal Action described in the September 13, 2007 Unilateral Administrative Order for Removal Response Activities Re: Agrifos Superfund Site, EPA Region 6 Docket No. 06-15-07, as amended by the September 17, 2007 First Amended Unilateral Administrative Order for Removal Response Activities and 7003 Unilateral Administrative Order Re: Agrifos Superfund Site, EPA Region 6 Docket No. 06-16-07 through

the Effective Date of this Agreement, plus accrued Interest on all such costs through such date.

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

k. "Site" shall mean the Agrifos Phosphoric Acid Release Superfund site.

l. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

11. Within 30 days of the effective date of this Agreement, Agrifos shall pay to EPA \$385,000.00, plus an additional sum for Interest on that amount calculated from February 29th, 2012 through the date of payment.

12. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") and shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number 06LD, and the EPA docket number for this action. Transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
 ABA = 021030004
 Account = 68010727
 SWIFT address = FRNYUS33
 33 Liberty Street
 New York NY 10045
 Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

13. At the time of payment, Agrifos shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 06LD and the EPA docket number for this action.

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

VI. FAILURE TO COMPLY WITH AGREEMENT

15. Interest on Late Payments. If Agrifos fails to make any payment required by Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

16. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 11 are not paid by the required date, Agrifos shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 15, \$1500 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number 06LD and the EPA Docket Number for this action. Agrifos shall send the check (and any accompanying letter) to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Agrifos of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

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

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to

this Agreement. Payment of stipulated penalties shall not excuse Agrifos from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

19. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Agrifos pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Agrifos of its obligations under this Agreement. This covenant not to sue extends only to Agrifos and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

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

- a. liability for failure of Agrifos to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

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

IX. COVENANT NOT TO SUE BY AGRIFOS

22. Agrifos covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Texas, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

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

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Claims Against De Micromis Parties. Agrifos agrees not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Agrifos 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.

25. The waiver in Paragraph 24 shall not apply with respect to any defense, claim, or cause of action that Agrifos may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against Agrifos. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

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

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

26. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. The Party expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

27. EPA and Agrifos agree that the actions undertaken by Agrifos in accordance with this Agreement do not constitute an admission of any liability by Agrifos. Agrifos does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Agreement.

28. The Parties agree that this Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) and Section 122(h)(4) of CERCLA, 42 U.S.C. §§9613(f)(2) and 122(h)(4), and that Agrifos is entitled, as of the Effective Date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(b) of CERCLA, 42 U.S.C. §9613(f)(3)(B), pursuant to which Settling Parties have, as of the Effective Date, resolved their liability to the United States for Past Response Costs.

29. Agrifos agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Agrifos also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Agrifos shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

30. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Agrifos shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding

were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

31. Until 10 years after the effective date of this Agreement, Agrifos shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

32. After the conclusion of the 10-year document retention period in the preceding paragraph, Agrifos shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Agrifos shall deliver any such records to EPA. Agrifos may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Agrifos asserts such a privilege, it shall provide EPA 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 subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Agrifos shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Agrifos' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

33. Agrifos hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since 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 Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

34. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change

to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Agrifos.

As to EPA:

Elizabeth Pletan, 6RC-S
Site Attorney
1445 Ross Avenue
Dallas, Texas 75202

Robert Werner
Enforcement Officer
1445 Ross Avenue
Dallas, Texas 75202

As to Respondent:

Craig J. Pritzlaff
Curran Tomko Tarski L.L.P.
2001 Bryan Street, Suite 2000
Dallas, Texas 75201

XIII. INTEGRATION

35. This Agreement and its appendices constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. "Appendix A" is the map of the Site.

XIV. PUBLIC COMMENT

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

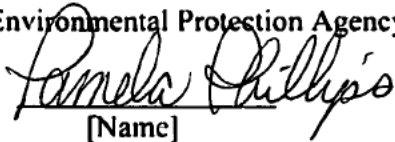
XV. EFFECTIVE DATE

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

IT IS SO AGREED:

U.S. Environmental Protection Agency

By:


[Name]

January 2, 2013

[Date]

Pamela Phillips
Acting Director
Superfund Division

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of [insert U.S. EPA docket number], relating to the Agrifos Phosphoric Acid Release Site:

FOR SETTLING PARTY: Agrifos Fertilizer L.L.C.

2001 Jackson Road
Pasadena, TX 77506

By: M. R. Sout
[Name]

September 27, 2012
[Date]