

US EPA ARCHIVE DOCUMENT

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**IN THE MATTER OF:**

**Anderson Redevelopment Commission,  
owner of the  
General Motors Corporation Delphi  
Energy & Engine Management Systems  
facility  
2900 South Scatterfield Road  
Anderson, Indiana**

**EPA ID No. IND 980 503 825**

)  
) **Docket No. RCRA-05-2011-0011**

)  
) **Proceeding under Section 3008(h) of the  
Resource Conservation and Recovery Act,  
as amended, 42 U.S.C. § 6928(h).**

**RECEIVED**  
**JUL 12 2011**

**I. JURISDICTION**

**REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY**

1. The Administrator of the United States Environmental Protection Agency (U.S. EPA) is issuing this Administrative Order on Consent (Order or AOC) to the Anderson Redevelopment Commission, City of Anderson, Indiana (ARC) under Section 3008(h) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928(h). The Administrator has delegated the authority to issue orders under Section 3008(h) of RCRA to the Director of the Land and Chemicals Division in U.S. EPA Region 5.
2. ARC owns a facility at 2900 South Scatterfield Road, Anderson, Indiana (the facility). The facility is commonly known as the "General Motors Corporation/Delphi Energy & Engine Management Systems" site. For purposes of this corrective action Order, this Order applies to Area 7 of Former Plant 7 at the facility, which was identified during RCRA Facility Investigation (RFI) activities conducted pursuant to the permit modification.
3. Area 7 is the former site of a degreaser that released trichloroethylene (TCE) into the soil and groundwater.
4. ARC agrees not to contest U.S. EPA's jurisdiction to issue this Order, to enforce its terms, or to impose sanctions for violations of the Order.
5. ARC waives all rights to request a hearing on this matter pursuant to Section 3008(b) of RCRA and 40 C.F.R. Part 24, and consents to the issuance of this Order without a hearing under Section 3008(b) of RCRA as a Consent Order issued pursuant to Section 3008(h) of RCRA.

## II. DEFINITIONS

6. This Order incorporates the definitions in RCRA, 42 U.S.C. §§ 6901 - 6922k, and the regulations promulgated under RCRA, unless otherwise specified.

## III. PARTIES BOUND

7. This Order applies to and binds U.S. EPA and ARC and its agents, successors, assigns, trustees, receivers, and all persons, including but not limited to contractors and consultants, acting on behalf of ARC. ARC will be responsible for and liable for any violations of this Order, regardless of ARC's use of employees, agents, contractors, or consultants to perform work required by this Order.

8. No change in ownership or corporate or partnership status relating to the facility will alter ARC's obligations under this Order. Any conveyance of title, easement, or other interest in the facility, or a portion of the facility, will not affect ARC's obligations under this Order. ARC will give written notice of this Order to any successor in interest prior to transferring ownership or operation of the facility or a portion thereof and will notify U.S. EPA in writing within five days of the transfer. This written notice will describe how ARC has assured that, despite the transfer, all institutional controls required now or in the future for the facility will be implemented and maintained. This paragraph will not apply if U.S. EPA and ARC agree that this Order has terminated as to the facility or any relevant portion of the facility.

## IV. DETERMINATIONS

9. After consideration of the Administrative Record, the Director of the Land and Chemicals Division in U.S. EPA Region 5 has made the following conclusions of law and determinations:

- a. The prior owner and operator of the facility was General Motors Corporation (GM). GM was performing corrective action activities at the facility under a RCRA Hazardous Waste Permit, as modified and issued on November 19, 1998. After lapse of that permit, GM continued corrective action activities at the facility pursuant to the Consent Agreement and Final Order entered into between GM and U.S. EPA in Docket No. RCRA-05-2001-0011 (May 2002) (the CAFO).
- b. On July 11, 2006, U.S. EPA issued a Statement of Basis selecting a slurry wall containment system to address the TCE contamination at Area 7 of Former Plant 7 at the facility. GM constructed the containment system, but contamination continues to be found outside of the containment system boundaries and in the groundwater.



- c. The CAFO provided that GM “give notice and a copy of this CAFO to any successor in interest prior to any transfer of ownership or operational control of the facility. This CAFO is binding on [GM] and all successors in interest.” [CAFO at paragraph 8.]
- d. Effective September 20, 2006, GM transferred, via an agreement for donation of property, the ownership of the facility to the Anderson Redevelopment Commission (ARC) (the Donation Agreement). ARC is an Indiana statutory redevelopment commission formed for the purpose of identifying, creating, monitoring, and funding redevelopment activities that will enhance the esthetic qualities of the community, increase the tax base, create new jobs, and improve the economic development conditions in the City of Anderson, Indiana. ARC is a commission formed by and is a part of the City of Anderson. Under the Donation Agreement, GM agreed to exercise commercially reasonable efforts to complete the work required under the CAFO, including completion of the corrective action.
- e. ARC was notified prior to the transfer of the facility of the terms and obligations, and was provided with a copy, of the CAFO.
- f. On June 1, 2009, Motors Liquidation Corporation (f/k/a GM)(MLC) filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York under Chapter 11 of Title 11 of the United States Code, Case No. 09-50026 (REG).
- g. On October 20, 2009, MLC informed EPA, in writing, that it would default on its obligations under the CAFO and that it would not complete the required RCRA corrective work.
- h. Under the CAFO, and pursuant to RCRA, GM maintained financial assurance, in the form of a surety bond issued by Westchester Fire Insurance Company (Westchester), to guarantee its financial ability to perform the corrective action work required under the CAFO.
- i. On February 2, 2010, U.S. EPA presented a claim to Westchester for the full penal amount of the surety bond. On or about November 19, 2010, Westchester deposited into a trust account at the Bank of New York/Mellon (BNY Mellon) the amount of \$1,200,435.09 (the Insurance Trust). U.S. EPA is the beneficiary of the BNY Mellon Insurance Trust. The trust money may only be used to reimburse MLC (which has ceased, or will cease, to exist after the conclusion of the bankruptcy proceedings) or to reimburse “other persons as specified by the EPA Regional Administrator from the Fund for corrective action expenditures in

such amounts as the EPA Regional Administrator shall direct in writing.”  
[Insurance Trust Agreement at 1.]

- j. On March 7, 2011, the United States Bankruptcy Court for the Southern District of New York entered the Consent Decree and Settlement Agreement among MLC, the United States of America, and the State of Indiana in Case No. 09-50026 (REG) with respect to the Scatterfield Road facility (the Consent Decree). Under the Consent Decree, MLC is obligated to make a cash payment in the amount of \$3,599,039.00, into a trust account (of which U.S. EPA is the beneficiary) “to conduct or finance response actions approved by EPA at or in connection with the [facility] and not for any other purpose. . . .” [Consent Decree at 7.] On or about April 1, 2011, MLC deposited into a trust account at the First Merchants Trust Company (First Merchants) the amount of \$3,599,039.00 (the Bankruptcy Trust).
- k. ARC is a “person” within the meaning of Section 1004(15) of RCRA.
- l. ARC is the owner of a facility that has operated under interim status subject to Section 3005(e) of RCRA.
- m. Certain wastes and constituents found at the facility are hazardous wastes and/or hazardous constituents pursuant to Sections 1004(5) and 3001 of RCRA and 40 C.F.R. Part 261. These wastes include TCE and its degradation products, total 1,2-dichloroethene (1,2-DCE), and vinyl chloride.
- n. There is or has been a release of hazardous wastes or hazardous constituents into the environment from the facility.
- o. The actions required by this Order are necessary to protect human health or the environment.

#### V. PROJECT MANAGER

10. U.S. EPA and ARC must each designate a Project Manager and notify each other in writing of the Project Manager selected within fourteen (14) days after the effective date of this Order. Each Project Manager will be responsible for overseeing the implementation of this Project. The parties must provide prompt written notice whenever they change Project Managers.

#### VI. WORK TO BE PERFORMED

11. Within one hundred and eighty (180) days after the effective date of this Order, ARC must propose to U.S. EPA final corrective measures necessary to protect human health and the



environment from all current and future unacceptable risks due to releases of hazardous waste or hazardous constituents at or from the former Plant 7, Area 7 (the Final Corrective Measures Proposal). The proposal must describe all corrective measures implemented by ARC at the former Plant 7, Area 7, since the effective date of this Order. It must also include a description of all other final corrective measures that ARC evaluated, detailed explanation of why ARC preferred the proposed final corrective measures, and cost estimates for all final corrective measures evaluated. The proposal must also include a detailed schedule to construct and implement the final corrective measures, and to submit a Final Remedy Construction Completion Report. ARC must complete as much of the initial construction work as practicable within one year after U.S. EPA selects the final corrective measures. ARC must complete all final corrective measures within a reasonable period of time to protect human health and the environment.

12. As part of developing its proposal, ARC must propose appropriate risk screening criteria, cleanup objectives, and points of compliance under current and reasonably expected future land use scenarios and provide the basis and justification for these decisions.
13. U.S. EPA may request supplemental information from ARC if U.S. EPA determines that the proposal and supporting information do not provide an adequate basis to select final corrective measures that will protect human health and the environment from the release of hazardous waste and hazardous constituents at or from former Plant 7, Area 7. ARC must provide timely any supplemental information that EPA requests in writing.
14. U.S. EPA will provide the public with an opportunity to review and comment on its proposed final corrective measures, including a detailed description and justification for the proposal (the Statement of Basis). Following the public comment period, U.S. EPA will select the final corrective measures, and will notify the public of the decision and rationale in a Final Decision and Response to Comments (Final Decision).
15. Upon notice by U.S. EPA, ARC must implement the final corrective measures selected in U.S. EPA's Final Decision according to the schedule in the Final Decision.
16. Reporting and other requirements:
  - a. ARC must establish a publicly accessible repository for information regarding site activities and conduct public outreach and involvement activities.
  - b. ARC must provide quarterly progress reports to U.S. EPA by the fifteenth day of the month after the end of each quarter. The report must list work performed to date, data collected, problems encountered, project schedule, and percent project completed.

- c. The parties will communicate frequently and in good faith to assure successful completion of the requirements of this Order, and will meet at least on a semiannual basis to discuss the work proposed and performed under this Order.
- d. ARC must provide a Final Remedy Construction Completion Report documenting all work that it has performed pursuant to the schedule in U.S. EPA's Final Decision.
- e. If ongoing monitoring or operation and maintenance is required after construction of the final corrective measures, ARC must include an operations and maintenance plan in the Final Remedy Construction Completion Report. ARC must revise and resubmit the report in response to U.S. EPA's written comments, if any, by the dates U.S. EPA specifies. Upon U.S. EPA's written approval, ARC must implement the approved operations and maintenance plan according to the schedule and terms of the plan.
- f. Any risk assessments ARC conducts must estimate human health and ecological risk under reasonable maximum exposure for both current and reasonably expected future land use scenarios. In conducting the risk assessments, ARC will follow the Risk Assessment Guidance for Superfund (RAGS) or other appropriate U.S. EPA guidance. ARC will use appropriate, conservative screening values when screening when further investigation is required. Appropriate screening values include those derived from Federal Maximum Contaminant Levels, U.S. EPA Region 9 Preliminary Remediation Goals, and U.S. EPA Region 5 Ecological Screening Levels.
- g. All sampling and analysis conducted under this Order must be performed in accordance with the U.S. EPA Region 5 Quality Assurance Project Plan Policy (April 1998) as appropriate for the site, and be sufficient to identify and characterize the nature and extent of all releases as required by this Order. U.S. EPA may audit laboratories which ARC selects or require ARC to purchase and have analyzed performance evaluation samples selected by U.S. EPA which contain compounds of concern. ARC must notify U.S. EPA in writing at least fourteen (14) days before beginning each separate phase of field work performed under this Order. At the request of U.S. EPA, ARC will provide or allow U.S. EPA or its authorized representative to take split or duplicate samples of all samples ARC collects under this Order.

17. Project Managers can agree in writing to extend, for ninety (90) days or less, any deadline in this Section. However, extensions of greater than ninety (90) days require approval from the Chief of the Remediation and Reuse Branch; Land and Chemicals Division.



## VII. ACCESS

18. Upon reasonable notice, and at reasonable times, U.S. EPA, its contractors, employees, and any designated U.S. EPA representatives may enter and freely move about the facility to, among other things: interview facility personnel and contractors; review ARC's progress in carrying out the terms of this Order; conduct tests, sampling, or monitoring as U.S. EPA deems necessary; use a camera, sound recording, or other documentary equipment; and verify the reports and data ARC submits to U.S. EPA. ARC will permit such persons to inspect and copy all non-privileged photographs and documents, including all sampling and monitoring data, that pertain to work undertaken under this Order and that are within the possession or under the control of ARC or its contractors or consultants. ARC may request split samples, or copies of all photographs, tapes, videos or other recorded evidence created by U.S. EPA and releaseable under the Freedom of Information Act.

19. If ARC must go beyond the facility's boundary to perform work required by this Order, ARC must use its best efforts to obtain the necessary access agreements from the present owner(s) of such property within 30 days after ARC knows of the need for access. Any such access agreement must provide for access by U.S. EPA and its representatives. ARC must submit a copy of each access agreement to U.S. EPA's Project Manager. If it does not obtain agreements for access within 30 days, ARC must notify U.S. EPA in writing within 14 additional days of both the efforts undertaken to obtain access and the failure to obtain access agreements. U.S. EPA may, at its discretion, assist ARC in obtaining access.

20. Nothing in this Section limits or otherwise affects U.S. EPA's right of access and entry under applicable law, including RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675.

## VIII. COST ESTIMATES AND ASSURANCES OF FINANCIAL RESPONSIBILITY FOR COMPLETING THE WORK

### 21. Estimated Cost of the Work

- a. Within thirty (30) days after submission of the Final Corrective Measures Proposal required by Paragraph 11 above, ARC shall submit to EPA for approval detailed written estimates, in current dollars, of the cost of hiring a third party to perform all remaining Work to Be Performed under Section VI of this Order (Cost Estimate). The Cost Estimate must account for the costs of all foreseeable work, including all remaining investigations and reports, construction work, monitoring, and other long term care work, etc. All Cost Estimates shall be consistent with the requirements of 40 C.F.R. § 264.142 and § 264.144. References in these regulations to closure and post-closure shall mean the Work to be Performed under Section VI of this Order.



- b. ARC shall annually adjust the Cost Estimate for inflation and for changes in the scope of the Work to be Performed under Section VI of this Order until the Work to be Performed under Section VI of this Order is completed. Within thirty (30) days after the close of ARC's fiscal year, ARC shall submit each annual Cost Estimate to EPA for review and approval.
- c. If at any time U.S. EPA determines that a Cost Estimate provided pursuant to this Paragraph is inadequate, U.S. EPA shall notify ARC in writing, stating the basis for its determination. If at any time ARC becomes aware of information indicating that any Cost Estimate provided pursuant to this Section is inadequate, ARC shall notify U.S. EPA in writing of such information within ten (10) days. Within thirty (30) days of U.S. EPA's notification, or within thirty (30) days of becoming aware of such information, as the case may be, ARC shall submit a revised Cost Estimate to U.S. EPA for review and approval.

22. Assurances of Financial Responsibility for Completing the Work

- a. Within sixty (60) days after U.S. EPA approves the initial Cost Estimate, ARC shall establish financial assurance for the benefit of the U.S. EPA. The amount of the financial assurance established by ARC for the benefit of the U.S. EPA shall be established annually based on the costs identified in annually adjusted Cost Estimate net of the sum of the remaining annual balances in the Insurance Trust and the Bankruptcy Trust. In the event that U.S. EPA approval of ARC's initial Cost Estimate is not received within 30 days after close of ARC's fiscal year, ARC shall establish and maintain the financial assurance in the amount of the Cost Estimate submitted under Paragraph 21.a. within ninety (90) days of the end of its fiscal year. ARC shall maintain adequate financial assurance until U.S. EPA releases ARC from this requirement under Paragraph 23.c. ARC shall update the financial instrument or financial test demonstration to reflect changes to the Cost Estimate within ninety (90) days after the close of the ARC's fiscal year. ARC may use one or more of the financial assurance forms described in subparagraphs i - v below. Any and all financial assurance documents provided pursuant to this Order shall be submitted to U.S. EPA for review in draft form at least forty-five (45) days before they are due to be filed and shall be satisfactory in form and substance as determined by U.S. EPA.
  - i. A trust fund established for the benefit of U.S. EPA, administered by a trustee;
  - ii. A surety bond unconditionally guaranteeing performance of the Work in accordance with this Order, or guaranteeing payment at the direction of U.S. EPA into a standby trust fund that meets the requirements of the trust fund in subparagraph i above;

- iii. An irrevocable letter of credit, payable at the direction of the Director, Land and Chemicals Division, into a standby trust fund that meets the requirements of the trust fund in subparagraph i above;
  - iv. An insurance policy that provides U.S. EPA with rights as a beneficiary, issued for a face amount at least equal to the current Cost Estimate, except where costs not covered by the insurance policy are covered by another financial assurance instrument;
  - v. A corporate guarantee, executed in favor of the U.S. EPA by one or more of the following: (1) a direct or indirect parent company, or (2) a company that has a "substantial business relationship" with ARC (as defined in 40 C.F.R. § 264.141(h)), to perform the Work to Be Performed under Section VI of this Order or to establish a trust fund as permitted by subparagraph i above; provided, however, that any company providing such a guarantee shall demonstrate to the satisfaction of the U.S. EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the portion of the Cost Estimate that it proposes to guarantee.
  - vi. A demonstration by ARC that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Cost Estimate, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied.
- b. ARC shall submit all original executed and/or otherwise finalized instruments to U.S. EPA's Regional Comptroller (MF-10J), 77 W. Jackson Blvd., Chicago, IL 60604-3590, within thirty (30) days after date of execution or finalization as required to make the documents legally binding. Respondent shall also provide copies to the U.S. EPA Project Manager.
  - c. If at any time ARC provides financial assurance for completion of the Work by means of a corporate guarantee or financial test, ARC 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 methods, and will promptly provide any additional information requested by U.S. EPA from ARC or corporate guarantor at any time.
  - d. For purposes of the corporate guarantee or the financial test described above, references in 40 C.F.R. § 264.143(f) to "the sum of current closure and post-closure costs and the current plugging and abandonment cost estimates" shall mean "the sum of all environmental remediation obligations" (including obligations under CERCLA, RCRA, UIC, TSCA and any other state or tribal



environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the Cost Estimate.

- e. ARC may combine more than one mechanism to demonstrate financial assurance for the Work to Be Performed under Section VI of this Order.
  - f. ARC may satisfy its obligation to provide financial assurance for the Work to be Performed under Section VI of this Order by providing a third party who assumes full responsibility for the Work to be Performed under Section VI of this Order and otherwise satisfies the obligations of the financial assurance requirements of this Order; however, ARC shall remain responsible for providing financial assurance in the event such third party fails to do so and any financial assurance from a third party shall be in one of the forms provided in subparagraphs 22(a)(i) through 22(a)(iv) above.
  - g. If at any time U.S. EPA determines that a financial assurance mechanism provided pursuant to this Section is inadequate, U.S. EPA shall notify ARC in writing. If at any time ARC becomes aware of information indicating that any financial assurance mechanism(s) provided pursuant to this Section is inadequate, ARC shall notify U.S. EPA in writing of such information within ten (10) days. Within ninety (90) days of receipt of notice of U.S. EPA's determination, or within ninety (90) days of ARC's becoming aware of such information, ARC shall establish and maintain adequate financial assurance for the benefit of U.S. EPA which satisfies all requirements set forth in this Section.
  - h. Any and all financial assurance documents provided pursuant to this Order shall be submitted to U.S. EPA for review in draft form at least forty-five (45) days before they are due to be filed and shall be satisfactory in form and substance as determined by U.S. EPA.
  - i. ARC's inability or failure to establish or maintain financial assurance for completion of the Work shall in no way excuse performance of any other requirements of this Order.
23. Modification of Amount and/or Form of Performance Guarantee
- a. Reduction of Amount of Financial Assurance. If ARC believes that the Cost Estimate has diminished below the amount covered by the existing financial assurance provided under this Order, ARC may, at the same time that ARC submits its annual Cost Estimate, submit a written proposal to U.S. EPA for approval to reduce the amount of the financial assurance to equal the revised Cost Estimate.

- b. Change of Form of Financial Assurance. If ARC desires to change the form or terms of financial assurance, ARC may, at the same time that ARC submits the annual Cost Estimate, submit a written proposal to U.S. EPA for approval to change the form of financial assurance. The written proposal shall specify all proposed instruments or other documents required in order to make the proposed financial assurance legally binding and shall satisfy all requirements set forth in this Section. Within ten (10) days after receiving written approval of the proposed revised or alternative financial assurance, ARC shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding. ARC shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected financial assurance legally binding to the U.S. EPA Comptroller's Office, with a copy to U.S. EPA's Project Manager, as provided in Paragraph 22(b), above.
  - c. Release of Financial Assurance. ARC may submit a written request to the Director, Land and Chemicals Division that U.S. EPA release ARC from the requirement to maintain financial assurance under this Section once U.S. EPA and ARC have both executed an "Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Right" pursuant to Section XIX (Termination and Satisfaction) of the Order. The Director, Land and Chemicals Division shall notify both the ARC and the provider(s) of the financial assurance that ARC is released from all financial assurance obligations under this Order.
24. Performance Failure
- a. If U.S. EPA determines that ARC (i) has ceased implementing any portion of the Work to be Performed under Section VI of this Order, (ii) is significantly or repeatedly deficient or late in its performance of the Work to be Performed under Section VI of this Order, or (iii) is implementing the Work to be Performed under Section VI of this Order in a manner that may cause an endangerment to human health or the environment, U.S. EPA may issue a written notice (Performance Failure Notice) to both ARC and the financial assurance provider of ARC's failure to perform. The notice issued by U.S. EPA will specify the grounds upon which such a notice was issued and will provide ARC with a period of twenty (20) days within which to remedy the circumstances giving rise to the issuance of such notice.
  - b. Failure by ARC to remedy the relevant Performance Failure to U.S. EPA's satisfaction before the expiration of the twenty-day notice period specified in Paragraph 24(a) shall trigger U.S. EPA's right to have immediate access to and benefit of the financial assurance provided pursuant to subparagraphs 22.a.i, 22.a.ii, 22.a.iii, 22.a.iv, or 22.a.v. If U.S. EPA is unable after reasonable efforts to



secure payment of funds or performance of Work to be Performed under Section VI of this Order from the financial assurance provider, then upon written notice from U.S. EPA, ARC shall within twenty (20) days deposit into a trust fund approved by U.S. EPA, a cash amount equal to the amount of the financial assurance calculated annually under Paragraph 22.a. of this Order.

#### IX. RECORD PRESERVATION

25. ARC must retain, during the pendency of this Order and for at least six years after the Order terminates, all data and all final documents now in its possession or control or which come into its possession or control which relate to this Order. ARC must notify U.S. EPA in writing 90 days before destroying any such records, and give U.S. EPA the opportunity to take possession of any non-privileged documents. ARC's notice will refer to the effective date, caption, and docket number of this Order and will be addressed to:

Director  
Land and Chemicals Division  
U.S. EPA, Region 5  
77 W. Jackson Blvd.  
Chicago, IL 60604-3590

ARC will also promptly give U.S. EPA's Project Manager a copy of the notice.

Within 30 days of retaining or employing any agent, consultant, or contractor (agents) to carry out the terms of this Order, ARC will enter into an agreement with the agents to give ARC a copy of all data and final non-privileged documents produced under this Order.

26. ARC will not assert any privilege claim concerning any data gathered during any investigations or other actions required by this Order.

#### X. REIMBURSEMENT FOR CORRECTIVE ACTION COSTS

27. Agreement to Disburse Trust Funds to ARC. U.S. EPA agrees to first make the funds, along with accrued interest, in the BNY Mellon Insurance Trust account and then, after exhaustion of the funds in the BNY Mellon Insurance Trust account, to make the funds, along with accrued interest, in the First Merchants Bankruptcy Trust account available for disbursement to ARC as reimbursement for performance of the corrective measures detailed in Section VI. The Parties agree that, upon ARC's petition, U.S. EPA may direct the Insurance Trust account trustee to disburse funds from the BNY Mellon Insurance Trust account in accordance with the procedures and milestones for phased disbursement set forth in Paragraph 28. Once the BNY Mellon Insurance Trust account is exhausted, U.S. EPA may direct the Bankruptcy Trust account trustee to disburse funds, upon ARC's petition, from the First Merchants Bankruptcy Trust account in accordance with the procedures and milestones for

phased disbursement set forth in Paragraph 28.

**28. Timeline and procedure for disbursements from the BNY Mellon Insurance Trust Account and from the First Merchants Bankruptcy Trust Account**

- a. Three (3) months after U.S. EPA issues its Final Decision in Paragraph 14, and every month thereafter until the BNY Mellon Insurance Trust account is exhausted, ARC may submit to U.S. EPA a monthly Cost Summary and Certification covering work performed pursuant to this Order. ARC shall not include in any submission the costs included in a previous Cost Summary and Certification that were previously submitted to U.S. EPA, or any costs excluded from reimbursement under Paragraph 29.
- b. After the BNY Mellon Insurance Trust account is exhausted, and until the First Merchants Bankruptcy Trust account is exhausted, ARC may submit to U.S. EPA a Monthly Cost Summary and Certification covering work performed pursuant to this Order without reimbursement by U.S. EPA. ARC shall not include in any submission the costs included in a previous Cost Summary and Certification that were previously reimbursed by U.S. EPA, or any costs excluded from reimbursement under Paragraph 29.
- c. Each Cost Summary and Certification shall include a complete and accurate written cost summary (including a breakdown and narrative description of the activities performed and the costs billed for each activity) and certification of the necessary costs incurred and paid by ARC for the corrective measures covered by the particular submission, excluding costs not eligible for disbursement under Paragraph 28(d). Each Cost Summary and Certification shall contain the following statement signed by the responsible ARC official:

“To the best of my knowledge, after thorough investigation and review of the ARC’s documentation of costs incurred and paid for final corrective measures pursuant to this Order, I certify that the information contained in or accompanying this submittal is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.”

The responsible ARC official shall also provide U.S. EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification. ARC shall retain all of these documents for five (5) years after completing the final corrective measures. Upon request by U.S. EPA, ARC shall submit to U.S. EPA all additional information that U.S. EPA deems necessary for its review and approval of a Cost Summary and Certification.



- d. If U.S. EPA finds that a Cost Summary and Certification includes a mathematical accounting error, costs excluded under Paragraph 29, costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it will notify ARC and provide ARC an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If ARC fails to cure the deficiency within ten (10) days after being notified of, and given the opportunity to cure, the deficiency, then U.S. EPA will recalculate ARC's costs eligible for disbursement for that submission and shall direct the appropriate trustee to disburse the corrected amount to ARC. ARC may dispute U.S. EPA's recalculation under this Paragraph pursuant to Section XII – Dispute Resolution. In no event shall ARC be disbursed funds from either the BNY Mellon Insurance Trust account, or thereafter from the First Merchants Bankruptcy Trust account, in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by U.S. EPA.

29. Costs Excluded from Disbursement. The following costs are excluded from, and shall not be sought by ARC for, disbursement from both the BNY Mellon Insurance Trust account and the First Merchants Bankruptcy Trust account: (a) any other payments made by ARC to the United States pursuant to this Order, including, but not limited to, any interest or stipulated penalties paid pursuant to Section XI; (b) attorneys' fees and costs; (c) costs of any response activities ARC performs that are not required under, or approved by U.S. EPA pursuant to, this Order; (d) internal costs of ARC, including but not limited to, salaries, travel, or in-kind services, except for those costs that represent the work of employees of ARC directly performing the final corrective measures; (e) any costs incurred by ARC before U.S. EPA issues its Final Decision in Paragraph 14; or (f) any costs incurred by ARC pursuant to Section XII – Dispute Resolution.

30. Termination of Disbursements from the BNY Mellon Insurance Trust Account and from the First Merchants Bankruptcy Insurance Account. U.S. EPA's agreement to direct the trustees to disburse funds from the BNY Mellon Insurance Trust account and the First Merchants Bankruptcy Trust account under this Order shall terminate upon U.S. EPA's determination that ARC: (a) has knowingly submitted a materially false or misleading Cost Summary and Certification; (b) has submitted a materially inaccurate or incomplete Cost Summary and Certification, and has failed to correct the materially inaccurate or incomplete Cost Summary and Certification within 10 days after being notified of, and given the opportunity to cure, the deficiency; or (c) has failed to submit a Cost Summary and Certification as required by Paragraphs 27 and 28 within 10 days (or such longer period as U.S. EPA agrees) after being notified that U.S. EPA intends to terminate its obligation to make disbursements pursuant to this Section because of ARC's failure to submit the Cost Summary and Certification as required by Paragraphs 27 and 28. U.S. EPA's obligation to disburse funds from the BNY Mellon Insurance Trust Account and the First Merchants Bankruptcy Trust account shall also terminate upon U.S. EPA's assumption of performance of any portion of the final corrective actions pursuant to Section VI, when such assumption of performance is not challenged by ARC, or, if challenged,



is upheld under Section XII – Dispute Resolution. ARC may dispute U.S. EPA's termination of trust account disbursements under Section XII – Dispute Resolution.

31. Recapture of Trust Account Disbursements. Upon termination of disbursements from the BNY Mellon Insurance Trust account and the First Merchants Trust account under Paragraph 30, if U.S. EPA has previously disbursed funds from the BNY Mellon Insurance Trust account or the First Merchants Trust account for activities specifically related to the reason for termination (e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission), then U.S. EPA shall submit a bill to ARC for those amounts already disbursed from the BNY Mellon Insurance Trust account or the First Merchants Trust account specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by U.S. EPA to the date of repayment of the funds by ARC. Within 10 days of receipt of U.S. EPA's bill and as directed by EPA, ARC shall reimburse the BNY Mellon Insurance Trust account or the First Merchants Trust account, as appropriate, for the total amount billed by a certified or cashier's check or checks made payable to relevant trust referencing ARC's name and address, and the name and Docket No. of this matter, as well as the appropriate Trust account number. ARC shall send the check(s) or payment to the address provided in Paragraph 37.

At the time of payment, ARC shall send notice that payment has been made to the Regional Financial Management Officer. Upon receipt of payment, U.S. EPA may deposit all or any portion thereof in the BNY Mellon Insurance Trust account or the First Merchants Bankruptcy Trust account. The determination of where to deposit or how to use the funds shall not be subject to challenge by ARC pursuant to the dispute resolution provisions of this Order or in any other forum. ARC may dispute U.S. EPA's determination as to recapture of funds pursuant to Section XII – Dispute Resolution.

32. Balance of Trust Funds. After the trustees complete all disbursements directed by U.S. EPA to ARC in accordance with this Section, if any funds remain in the BNY Mellon Insurance Trust account or the First Merchants Bankruptcy Trust Account, then such funds shall be administered consistent with the terms of each such Trust. The Insurance Trust trust agreement and the Bankruptcy Trust trust agreement are attached to this Order as Attachment "A." Any such disposition of remaining funds from the BNY Mellon Insurance Trust account or the First Merchants Bankruptcy Trust account shall not be subject to challenge by ARC pursuant to the dispute resolution provisions of this Order or in any other forum.

#### XI. STIPULATED PENALTIES

33. ARC must pay the following stipulated penalties to the United States for violations of this Order:

- a. For failure to submit quarterly progress reports by the dates scheduled in paragraph 16(b), above: \$1,000 to \$2000 per day for the first 14 days and \$2,000



to \$4000 per day thereafter.

- b. For failure to submit the Final Corrective Measures Proposal required in paragraph 11 within 180 days after the effective date of the Order: \$500 to \$1000 per day for the first 14 days and \$1,000 to \$2000 per day thereafter.
- c. For failure to implement according to the approved schedule, the selected final corrective measures as described in paragraph 15: \$3,000 to \$6000 per day for the first 14 days and \$6,000 to \$12,000 per day thereafter.
- d. For failure to submit the Final Remedy Construction Completion Report as scheduled in paragraph 16(d): \$1,000 to \$2000 per day for the first 14 days and \$2,000 to \$4000 per day thereafter.
- e. For failure to maintain the Assurances of Financial Responsibility for Completing the Work as required under Section VIII of the Order: \$1000 to \$2000 per day for the first 14 days and \$2000 to \$4000 per day thereafter.

34. Whether or not ARC has received notice of a violation, stipulated penalties will begin to accrue on the day a violation occurs, and will continue to accrue until ARC complies. Separate stipulated penalties for separate violations of this Order will accrue simultaneously.

35. ARC must pay any stipulated penalties owed to the United States under this Section within 30 days of receiving U.S. EPA's written demand to pay the penalties, unless ARC invokes the dispute resolution procedures under Section XII: Dispute Resolution. A written demand for stipulated penalties will describe the violation and will indicate the amount of penalties due.

36. Interest will begin to accrue on any unpaid stipulated penalty balance beginning 31 days after ARC receives U.S. EPA's demand letter. Interest will accrue at the current value of funds rate established by the Secretary of the Treasury. Under 31 U.S.C. § 3717, ARC must pay an additional penalty of six percent per year on any unpaid stipulated penalty balance more than 90 days overdue.

37. ARC must pay all penalties by certified or cashier's check payable to the United States of America, or by wire transfer, and will send the check to:

U.S. Department of the Treasury  
Attention: U.S. EPA Region 5, Office of the Comptroller  
P.O. Box 70753  
Chicago, Illinois 60673.

A transmittal letter stating the name of the facility, ARC's name and address, and the U.S. EPA docket number of this action must accompany the payment. ARC will simultaneously send a

copy of the check and transmittal letters to the U.S. EPA Project Manager.

ARC must make all reimbursements of the BNY Mellon Insurance Trust account or the First Merchants Trust required under Paragraph 31 of this Order consistent with the terms of the Insurance Trust trust agreement and the Bankruptcy Trust trust agreement, which are attached to this Order as Attachment "A."

38. ARC may dispute U.S. EPA's assessment of stipulated penalties by invoking the dispute resolution procedures under Section XII, Dispute Resolution. The stipulated penalties in dispute will continue to accrue, but need not be paid, during the dispute resolution period. ARC must pay stipulated penalties and interest, if any, according to the dispute resolution decision or agreement. ARC must submit such payment to U.S. EPA within 30 days after receiving the resolution according to the payment instructions of this Section.

39. Neither invoking dispute resolution nor paying penalties will affect ARC's obligation to comply with the terms of this Order not directly in dispute.

40. The stipulated penalties set forth in this Section do not preclude U.S. EPA from pursuing any other remedies or sanctions which may be available to U.S. EPA for ARC's violation of any terms of this Order. However, U.S. EPA will not seek both a stipulated penalty under this Section and a statutory penalty for the same violation.

## **XII. DISPUTE RESOLUTION**

41. The parties will use their best efforts to informally and in good faith resolve all disputes or differences of opinion.

42. If either party disagrees, in whole or in part, with any decision made or action taken under this Order, that party will notify the other party's Project Manager of the dispute. The Project Managers will attempt to resolve the dispute informally.

43. If the Project Managers cannot resolve the dispute informally, either party may pursue the matter formally by placing its objections in writing. A written objection must state the specific points in dispute, the basis for that party's position, and any matters which it considers necessary for determination.

44. U.S. EPA and ARC will in good faith attempt to resolve the dispute through formal negotiations within 21 days, or a longer period if agreed in writing by the parties. During formal negotiations, either party may request a conference with appropriate senior management to discuss the dispute.

45. If the parties are unable to reach an agreement through formal negotiations, within 14 business days after any formal negotiations end, ARC and U.S. EPA's Project Manager may



submit additional written information to the Director of the Land and Chemicals Division, U.S. EPA Region 5. U.S. EPA will maintain a record of the dispute, which will contain all statements of position and any other documentation submitted pursuant to this Section. U.S. EPA will allow timely submission of relevant supplemental statements of position by the parties to the dispute. Based on the record, U.S. EPA will respond to ARC's arguments and evidence and provide a detailed written decision on the dispute signed by the Director of the Land and Chemicals Division, U.S. EPA Region 5 (EPA Dispute Decision).

46. If, at the conclusion of the Dispute Resolution process, ARC notifies U.S. EPA that it refuses to implement U.S. EPA's selected final corrective measures, U.S. EPA will endeavor to pursue the action(s) it deems necessary, if any, within a reasonable period of time.

### XIII. FORCE MAJEURE AND EXCUSABLE DELAY

47. Force majeure, for purposes of this Order, is any event arising from causes not foreseen and beyond ARC's control that delays or prevents the timely performance of any obligation under this Order despite ARC's best efforts.

48. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, ARC must notify U.S. EPA within two business days after learning that the event may cause a delay. If ARC wishes to claim a force majeure event, within 15 business days thereafter ARC must provide to U.S. EPA in writing all relevant information relating to the claim, including a proposed revised schedule.

49. If U.S. EPA determines that a delay or anticipated delay is attributable to a force majeure event, U.S. EPA will extend in writing the time to perform the obligation affected by the force majeure event for such time as U.S. EPA determines is necessary to complete the obligation or obligations.

### XIV. MODIFICATION

50. This Order may be modified only by mutual agreement of U.S. EPA and ARC, except as provided in Section VI – Work to be Performed. Any agreed modifications will be in writing, will be signed by both parties, will be effective on the date of signature by U.S. EPA, and will be incorporated into this Order.

### XV. RESERVATION OF RIGHTS

51. Nothing in this Order restricts U.S. EPA's authority to seek ARC's compliance with the Order and applicable laws and regulations. For violations of this Order, U.S. EPA reserves its rights to bring an action to enforce the Order, to assess penalties under Section 3008(h)(2) of RCRA, 42 U.S.C. § 6928(h)(2), and to issue an administrative order to perform corrective actions or other response measures. In any later proceeding, ARC shall not assert or maintain

any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon a contention that the claims raised by the United States in the later proceeding were or should have been raised here. This Order is not a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, or authorities of U.S. EPA.

52. U.S. EPA reserves all of its rights to perform any portion of the Work to be Performed under Section VI consented to here or any additional site characterization, feasibility study, and remedial work as it deems necessary to protect human health or the environment.

53. If U.S. EPA determines that ARC's actions related to this Order have caused or may cause a release of hazardous waste or hazardous constituent(s), or a threat to human health or the environment, or that ARC cannot perform any of the work ordered, U.S. EPA may order ARC to stop implementing this Order for the time U.S. EPA determines may be needed to abate the release or threat and to take any action that U.S. EPA determines is necessary to abate the release or threat.

54. ARC does not admit any of U.S. EPA's factual or legal determinations. Except for the specific waivers in this Order, ARC reserves all of its rights, remedies and defenses, including all rights and defenses it may have: (a) to challenge U.S. EPA's performance of Work to be Performed under Section VI of this Order; (b) to challenge U.S. EPA's stop work orders; and (c) regarding liability or responsibility for conditions at the facility, except for its right to contest U.S. EPA's jurisdiction to issue or enforce this Order. ARC has entered into this Order in good faith without trial or adjudication of any issue of fact or law. ARC reserves its right to seek judicial review of U.S. EPA actions taken under this Order, including a proceeding brought by the United States to enforce the Order or to collect penalties for violations of the Order.

#### XVI. OTHER CLAIMS

55. ARC waives any claims or demands for compensation or payment under Section 106(b), 111, and 112 of CERCLA against the United States or the Hazardous Substance Superfund established by 26 U.S.C. § 9507 for, or arising out of, any activity performed or expense incurred under this Order. Additionally, this Order is not a decision on preauthorization of funds under Section 111(a)(2) of CERCLA.

#### XVII. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

56. ARC indemnifies, saves and holds harmless the United States, its agencies, departments, agents, and employees, from all claims or causes of action arising from or on account of acts or omissions of ARC or its officers, employees, agents, independent contractors, receivers, trustees, and assigns in carrying out activities required by this Order. This indemnification will not affect or limit the rights or obligations of ARC or the United States under their various contracts. This



indemnification will not create any obligation on the part of ARC to indemnify the United States from claims arising from the acts or omissions of the United States.

#### **XVIII. SEVERABILITY**

57. If any judicial or administrative authority holds any provision of this Order to be invalid, the remaining provisions will remain in force and will not be affected.

#### **XIX. TERMINATION AND SATISFACTION**

58. ARC may request that U.S. EPA issue a determination that ARC has met the requirements of the Order for all or a portion of the facility. ARC may also request that U.S. EPA issue a "corrective action complete" or "corrective action complete with controls" determination for all or a portion of the facility as described at 67 Federal Register 9176, dated February 27, 2002

59. The provisions of the Order will be satisfied upon ARC's and U.S. EPA's execution of an "Acknowledgment of Termination and Agreement on Record Preservation and Reservation of Rights," consistent with U.S. EPA's Model Scope of Work.

60. ARC's execution of the Acknowledgment will affirm its continuing obligation to preserve all records as required by Section IX, to maintain any necessary institutional controls or other long terms measures, and to recognize U.S. EPA's reservation of rights as required in Section XV.

XX. EFFECTIVE DATE

61. This Order is effective on the date that U.S. EPA signs the Order.

IT IS SO AGREED:

DATE: June 7, 2011

BY: Carolyn W. Scott

Print Name: CAROLYN W. Scott

Print Title: President  
Anderson Redevelopment Commission

IT IS SO ORDERED:

DATE: 7/11/11

BY: Margaret Guerriero

Margaret Guerriero, Director  
Land and Chemicals Division  
U.S. Environmental Protection Agency  
Region 5

RECEIVED  
JUL 12 2011  
REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY