

US EPA ARCHIVE DOCUMENT

ENCLOSURE 6

SUNFLOWER EARLY TRANSFER REMEDIATION AGREEMENT BETWEEN THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT AND UNITED STATES ARMY

A. Background

1. This Agreement sets forth the United States Army's ("Army") commitment to ensure that all remedial action necessary to protect human health and the environment will be taken with respect to particular parcels of property ("Early Transfer Parcels") located at the Sunflower Army Ammunition Plant (Sunflower), title to which is to be transferred prior to completion of all such necessary remedial action. The Early Transfer Parcels are being transferred by the Army to Sunflower Redevelopment, LLC ("Developer") pursuant to the covenant deferral provisions ("CERCLA Section 120") of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") at 42 U.S.C. Section 9620(h)(3)(C).

2. The Army and Developer have entered into the Army/Developer Contract which, among other things, provides that: (i) the Developer will perform all remedial action necessary to protect human health and the environment with respect to any hazardous substances at Sunflower and (ii) the Army will fund the Developer's services to complete all remedial action necessary to protect human health and the environment at Sunflower. In addition, the Army/Developer Contract requires the Developer to provide environmental insurance coverage ("Insurance Policy") that the Army and The Kansas Department of Health and Environment ("KDHE") agree is sufficient to ensure the completion of all remedial action at Sunflower.

3. The KDHE and the Developer have entered into a Consent Order which sets forth the manner and timing in which the Developer will fulfill the Army's environmental remedial action obligations under CERCLA Section 120. The Army and KDHE agree that the Developer's successful performance of Corrective Actions under the Consent Order will satisfy the Army's environmental remedial action obligations at Sunflower under CERCLA Section 120. In addition, it is the Army and KDHE's intention that the Developer's successful performance of Corrective Action under the Consent Order will satisfy the Army's remedial action obligations under the Sunflower RCRA Permit dated September 30, 1991 ("Sunflower RCRA Permit" or "RCRA Permit").

B. Legal Authority

1. This Agreement is entered into under authority vested in KDHE by K.S.A. 65 - 3452a *et seq.*, K.S.A. 65 - 3401 *et seq.*, K.S.A. 65 - 3430 *et seq.*, K.S.A. 65 - 3001 *et seq.*, K.S.A. 65 - 159, and K.S.A. 65 - 161 *et seq.*, and the Memorandum of Agreement between KDHE and the Environmental Protection Agency dated _____.

2. This Agreement is entered into under authority vested in the Secretary of the Army

by CERCLA, 42 U.S.C. Section 9600 *et seq.*; the Defense Environmental Restoration Program (“DERP”), 10 U.S.C. 2701 *et seq.*; and the National Contingency Plan (“NCP”), 40 C.F.R. Part 300 *et seq.*

C. General Conditions

1. The Army generally recognizes and affirms that it is ultimately responsible for causing the completion of the remediation of hazardous substance contamination at Sunflower which is necessary to provide the covenant required by 42 U.S.C. 9620(h)(3) (“CERCLA Covenant”).

2. This Agreement reiterates the Army’s commitment, in accordance with the Army/Developer Agreement, to fund the Developer’s performance of the Army’s remediation responsibilities at Sunflower. The Army will take all steps to submit the necessary budget requests to allow for timely remediation of Sunflower, to the Office of Management and Budget. Any such funds that are received for the Sunflower remediation will not be used for any other purpose without the approval of the Assistant Secretary of the Army for Installations and Environment.

3. This Agreement provides a legal mechanism for KDHE to ensure the Army’s completion of its remedial action obligations as required by CERCLA Section 120. The Army agrees not to challenge the following: the issuance of this Agreement or the Consent Order; the KDHE’s authority to bring, nor the authority of a court of competent jurisdiction, to hear any action to enforce the terms of this Agreement or the Consent Order. However nothing in this Agreement shall be construed to preclude the United States from removing a suit filed in a state district court to the appropriate federal court should the United States be named as a party or joined in the suit.

4. The Governor’s approval of the Request for Deferral of the CERCLA Covenant for the Early Transfer Parcels shall neither increase, diminish, nor affect in any manner any rights or obligations of the DOD (including any rights or obligations under Sections 106, 107 and 120 of CERCLA) existing prior to transfer with respect to the Early Transfer Parcels.

5. The Army is not released from any obligation under CERCLA Section 120 or the Sunflower RCRA Permit for remediation of hazardous substances attributable to the Army that remains on the Early Transfer Parcels, except to the extent that such obligations are satisfied by the Developer or other third party, pursuant to the Consent Order.

D. Agreement

1. If the Developer is unable to complete its obligations under the Consent Order, the Army will exercise its rights under the Army/Developer Contract or other agreements to:(i) require the Developer to fulfill its obligations under the Consent Order and/or (ii) require the insurance company to fulfill its obligations under the Insurance Policy with respect to the Consent Order.

2. If the Developer is unable to complete its obligations under the Consent Order and the Insurance Policy is exhausted or otherwise unavailable, the Army shall fulfill its remedial action obligations under CERCLA Section 120 by performing any remaining environmental remediation obligations in accordance with the Sunflower RCRA Permit. In such event, the Army agrees to contact and confer with KDHE within thirty (30) days of receipt of written notice from KDHE of such inability to establish a meeting date to discuss the transition of the remaining environmental remedial obligations to the Army.

3. If the Army is required to fulfill its remedial action obligations under CERCLA Section 120, the Army will take all steps necessary to submit, as soon as possible but in no event later than the next budget cycle, a budget request to allow for timely remediation of Sunflower, to the Office of Management and Budget. Any such funds that are received for the Sunflower remediation will not be used for any other purpose without the approval of the Assistant Secretary of the Army for Installations and Environment.

4. Nevertheless, the Army will use its best efforts at Sunflower to complete the remediation under CERCLA Section 120 and the corrective action under the RCRA Permit in a timely manner regardless of the financial viability of Developer or the availability of funds from the Insurance Policy.

5. The Army and KDHE reserve all rights to institute legal and administrative actions for any violation of law, regulation, permit or order regarding existing or potential contamination or related issues. The Army and KDHE reserve all rights to take action to achieve compliance with applicable law, to impose additional requirements necessary to protect human health and the environment. The Parties reserve all rights to fully defend and appeal any such actions. Nothing in this Agreement relieves or limits any applicable obligation to comply with any statute, regulation, permit or order.

6. The Parties agree that the Army reserves the right, in any administrative or judicial proceedings seeking to enforce the requirements of this Agreement, to raise as a defense that any failure or delay was caused by the Army's obligation to comply with the Anti-Deficiency Act. Nothing shall be construed as precluding the Army from arguing that any provision of this Agreement requires the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Sections 1301 or 1341. While the State disagrees that an Anti-Deficiency Act defense, or any other defense based upon lack of funding exists, the Parties agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.

E. Dispute Resolution

It is the intention of the parties that all disputes are resolved at the lowest possible level of authority as expeditiously as possible within the framework established under Section IV of the DSMOA. All timeframes for resolving disputes therein may be lengthened by mutual consent.

F. Termination and Release

This Agreement shall terminate and the Army shall be released therefrom upon the KDHE issuance of a “no further corrective actions are planned” document to the Developer as required under the Consent Order and issuance by the Army of the deferred CERCLA Covenant for all of the Early Transfer Parcels.

G. Signatories

The undersigned warrant that they are authorized to legally bind their respective principals to this Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Agreement.

UNITED STATES DEPARTMENT OF THE ARMY:

Raymond J. Fatz, Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health OASA (Installations and Environment))	Date
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STATE OF KANSAS :

Roderick L. Bremby, Secretary Kansas Department of Health and Environment	Date
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