

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY

**IN THE MATTER OF
ABC BROWNFIELD SITE
AND XYZ COMPANY**

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (Agreement) is entered into voluntarily by **X-Ray Yankee Zulu Company (XYZ Co.)** pursuant to the authority vested in the Department of Environment and Energy (DEE) by the Remedial Action Plan Monitoring Act (RAPMA), Neb. Rev. Stat. § 81-15,181 et seq. (Reissue 2000), the Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. § 81-1501 et seq. (Reissue 1999, Cum. Supp. 2002), and all rules and regulations promulgated thereunder.

FINDINGS

1. The DEE is the agency of the State of Nebraska authorized pursuant to Neb. Rev. Stat. § 81-1504(1) to exercise exclusive general supervision, administration, and enforcement of NEPA, and all rules, regulations, and orders promulgated thereunder, including the issuance of orders requiring the adoption of remedial action to prevent, control, or abate land and water pollution, and to encourage voluntary cooperation by persons to achieve the purposes of NEPA. The DEE is further authorized pursuant to Neb. Rev. Stat. §§ 81-15,183 through 81-15,185 to administer RAPMA.
2. **XYZ Co.**, a **Nebraska** Corporation, with principal offices at **1234 Main Street, Suite 100, Omaha, Nebraska**, is the party executing this Agreement. **XYZ Co.** is a "person" within the meaning of Neb. Rev. Stat. § 81-1502(10).
3. The property that is the subject of this Agreement is located at **5678 East Oak Street, in Lincoln, Lancaster County, Nebraska**, and is part of the Southwest Quarter of the Northeast Quarter of Section 15, Township 10 North, Range 6 East, more particularly described as, **Lots 1 through 8, Block 7 (the Site)**. The Site encompasses one city block, approximately 3.2 acres.
4. **XYZ Co.** has conducted an environmental investigation of the Site and has submitted information to the DEE that evidences that "land pollution," as defined by Neb. Rev. Stat. § 81-15,182(1), and "water pollution," as defined by Neb. Rev. Stat. § 81-15,182(2), exists at the Site.
5. Pursuant to Neb. Rev. Stat. § 81-15,184, **XYZ Co.** has submitted to the DEE an application for oversight of the remedial action it plans to conduct at the Site, as well as a nonrefundable application fee of \$2,000. In addition, **XYZ Co.** has posted an initial deposit of \$3,000 to be used by the DEE to cover the DEE's direct and indirect costs related to technical review, oversight, guidance, and other activities associated with remedial action or long-term institutional controls at the Site. The DEE shall review and approve or deny the application and notify **XYZ Co.** in writing. If the application is denied, the notification will state the reason for the denial. If the DEE determines that an application does not contain adequate information, the DEE shall return the application to **XYZ Co.** **XYZ Co.** will have sixty (60) days to resubmit the required information or the application will be deemed denied.

AGREEMENT

6. The intent of this Agreement is to allow XYZ Co. to voluntarily conduct remedial action in accordance with RAPMA and to seek a determination from the DEE that no further remedial action is required at the Site pursuant to Paragraph 23 of this Agreement.
7. XYZ Co. agrees to perform all remedial action at the Site in accordance with NEPA and all rules and regulations promulgated thereunder. XYZ Co. shall be responsible for obtaining any necessary permits, licenses, access and other authorizations required under this Agreement. Nothing in this Agreement shall be deemed to impose any additional liabilities or obligations on XYZ Co., other than those specifically stated herein. Nothing shall relieve XYZ Co. from complying with all other applicable federal, state and local laws, rules and regulations.
8. XYZ Co. agrees to maintain insurance coverage, including self-insurance, sufficient to cover any potential risks to XYZ Co.'s employees, agents, and contractors, performing the actions under this Agreement.
9. Nothing in this Agreement, including any document the DEE issues as agreed to herein, shall be interpreted to constitute a release or waiver of liability for any of the conditions which existed at the Site before, during, or after execution of this Agreement nor limit the DEE's authority to respond to such conditions. DEE shall have the authority to respond to such conditions in addition to requiring further remedial action from XYZ Co. under the circumstances described in Paragraph 23 of this Agreement. XYZ Co. reserves the right to raise any and all defenses, to any action brought by DEE for conditions that existed on the Site prior to acquisition by XYZ Co.
10. XYZ Co. neither admits nor denies that it caused land or water pollution at the Site in violation of Neb. Rev. Stat. § 81-1506(1)(a), but agrees that DEE may file an action against XYZ Co. if it fails to comply with or terminates this Agreement. XYZ Co. waives any affirmative defenses regarding jurisdiction. However, nothing in this Agreement shall constitute a waiver of XYZ Co.'s right to contest the authority of the DEE to take any enforcement action against XYZ Co., other than an action to enforce this Agreement.
11. Remedial Action Plan. Within ninety days of approval of the application, XYZ Co. shall provide to DEE a complete Remedial Action Plan (RAP) for the proposed project that conforms to all federal and state environmental standards and substantive requirements and that is subject to review and approval of the DEE. DEE approval shall be void upon failure to comply with the approved RAP or willful submission of false, inaccurate, or misleading information by XYZ Co.. DEE shall not commence technical review, oversight, guidance, or other activities associated with the RAP until this Agreement is executed and XYZ Co. has submitted a complete RAP to the DEE.

The RAP shall, at a minimum, include the following:

- a. Documentation regarding the investigation of land pollution or water pollution including, when appropriate, information indicating that XYZ Co. holds or can acquire title to all lands or has the necessary easements and rights-of-way for the project and related lands;
- b. A Remedial Action Work Plan which describes the remedial action measures to be taken to address the land or water pollution; and

- c. Project monitoring reports, appropriate engineering, scientific, and financial feasibility data, and other data and information as may be required by the DEE.

New information about the presence of land pollution or water pollution at the Site may require additional action. Therefore, XYZ Co. shall submit any subsequent work plans on a schedule agreed to by XYZ Co. and the DEE.

12. If XYZ Co. believes any such data or information is protected by a privilege, it will retain the data and information and notify the DEE of the nature of the document and the privilege claimed. XYZ Co. may also request that the DEE keep data or information contained in any submission confidential, pursuant to Title 115 - Rules of Practice and Procedure.
13. Upon receipt of the RAP, the DEE shall review and approve or disapprove the RAP and notify XYZ Co. of its decision in writing. If the RAP is disapproved, the notification shall state the reason for disapproval. DEE will provide XYZ Co. an opportunity to resubmit the RAP.

If the DEE intends to approve the RAP, DEE shall issue a public notice of its intent pursuant to § 81-15,185 in a local newspaper of general circulation in the area affected and make the RAP available to the public. The public shall have thirty days from the date of publication during which any person may submit written comments to the DEE regarding the proposed remedial action. Such person may also request or petition the Director of Environment and Energy, in writing, for a hearing and state the nature of the issues to be raised. The Director shall hold a public hearing if the comments, request, or petition raise legal, policy, or discretionary questions of general application and significant public interest exists.

Within six (6) months after the RAP is approved by the DEE, XYZ Co. shall begin implementation of the RAP. The RAP shall be completed within twenty-four (24) months of approval by the DEE, excluding long-term operation, maintenance, and monitoring activity, unless the DEE grants an extension of time. An approved RAP is not enforceable unless the DEE can demonstrate that the applicant has failed to fully implement the approved RAP. The DEE may require further action if such action is authorized by other state statutes administered by the DEE.

14. The DEE and its authorized representatives and contractors shall have access at all reasonable times to the Site and any related lands, to the extent access is controlled by or granted to XYZ Co. for the purpose of conducting technical review, oversight, guidance, or other activities associated with remedial action at the Site.
15. XYZ Co. shall notify the DEE at least ten (10) days before any scheduled well drilling, installation of equipment, or sampling for the purpose of affording the DEE the opportunity to collect split samples. If either party is collecting samples, the other party or its authorized representative shall be allowed to take split samples of all samples collected.
16. In addition to any other obligation required by law, XYZ Co. shall notify the DEE immediately upon knowledge of any condition posing an immediate threat to human health and welfare or the environment. In the event that any action or occurrence under this Agreement causes or threatens an emergency situation or presents an imminent threat to human health or welfare or the environment, XYZ Co. shall promptly take all appropriate action to prevent, abate, or minimize such emergency or imminent threat in accordance with applicable law. Nothing in this paragraph shall be deemed to limit the authority of the DEE or State of Nebraska to take, direct, or order all

appropriate action to protect human health or welfare and the environment or to prevent, abate, respond to, or minimize an actual or threatened release from the Site.

17. Unless otherwise directed by the DEE, XYZ Co. shall submit two copies of all documents required by this Agreement to the person identified below, who shall be DEE's contact for the Site and for all matters concerning this Agreement:

Mike Felix
Nebraska Department of Environment and Energy
P.O. Box 98922
1200 "N" Street, Suite 400
Lincoln, NE 68509-8922
Phone: (402) 471-3388
Fax: (402) 471-2909
E-mail: Mike.Felix@nebraska.gov

18. Unless otherwise directed, the contact for XYZ Co. for all matters concerning this Agreement shall be:

John Doe
XYZ Company
1234 Main Street, Suite 100
Omaha, NE 68123-0100
Phone: (402) 123-4567
Fax: (402) 123-9876
E-mail: jdoe@xyzco.com

19. If the costs incurred by DEE exceed the initial deposit, an additional amount agreed upon by the DEE and XYZ Co. may be required prior to proceeding. The DEE shall prepare a summary of all costs and submit an invoice to XYZ Co.. Within thirty (30) days of receiving the invoice, XYZ Co. shall submit to the DEE a check payable to the "Department of Environment and Energy, State of Nebraska" for the amount of the invoice. XYZ Co. will not be released from their obligations under this Agreement until all DEE costs are paid. For sites requiring institutional controls extending beyond the termination of this agreement, XYZ Co. must fully fund, or make arrangements with DEE to fund, required long-term oversight. Any balance of funds not reserved for oversight of institutional controls remaining after the mutual termination of this Agreement shall be refunded to XYZ Co. by the DEE.

20. XYZ Co. may terminate this Agreement provided XYZ Co.:

- a. Notifies the DEE in writing of its intention to terminate this Agreement;
- b. Submits to the DEE full payment of any outstanding costs incurred by the DEE pursuant to this Agreement; and
- c. Leaves the property in no worse condition, from a human health and environment perspective, than when XYZ Co. initiated this Agreement.
- d. Provides sufficient funding, using a mechanism approved by the Department, to cover the Department's long-term oversight of any indicated institutional controls.

21. The DEE will cease review of any submittals under this Agreement on the date it receives XYZ Co.'s written notice of intent to terminate. The DEE will then prepare a summary of all costs and provide it to XYZ Co. Once the DEE determines that XYZ Co. has fully complied with all the requirements set forth in (a) through (d) above, the Agreement shall be deemed terminated. The DEE reserves the right to unilaterally terminate this Agreement if XYZ Co.:
- a. Violates any terms or conditions or fails to fulfill any obligations of the RAP, including submission of an acceptable RAP within a reasonable period of time;
 - b. Fails to address an imminent and significant harm to public health and welfare or the environment in a timely and effective manner;
 - c. Fails to initiate the RAP within six (6) months after approval by the DEE;
 - d. Fails to complete the RAP within twenty-four (24) months after approval by the DEE, excluding long-term operation, maintenance, and monitoring activity, unless the DEE grants an extension of time; and
 - e. Violates any terms or conditions of this Agreement.

The DEE shall notify XYZ Co. in writing of its intention to terminate this Agreement and include the reason for termination. The DEE will also include a summary of all outstanding costs owed to the DEE. The DEE reserves the right to suspend this Agreement for any reason. The DEE will not consider any of the unapproved work performed during any suspension to be eligible for consideration under RAPMA.

22. Within sixty (60) days after completion of the RAP, XYZ Co. shall schedule and conduct a pre-certification inspection to be attended by XYZ Co. and the DEE. If the pre-certification inspection is satisfactory, XYZ Co. shall submit to the DEE a Final Remedial Action Report within thirty (30) days, including certification by a registered professional engineer that the RAP has been completed in material satisfaction of the requirements of this Agreement. If the pre-certification inspection is unsatisfactory, the DEE shall, acting reasonably, identify any additional remedial actions necessary to satisfy this Agreement. XYZ Co. shall perform any additional remedial actions identified by DEE prior to the submission of the Final Remedial Action Report.
23. Provided that XYZ Co.: (1) completes the remedial action in accordance with the RAP; (2) is in compliance with all provisions of this Agreement; (3) is in compliance with all state and federal laws, rules and regulations; (4) agrees to impose and enforce any institutional controls the parties mutually deem appropriate and necessary at the Site; and (5) has remitted all outstanding costs and payment of anticipated long-term oversight costs to the DEE, the DEE may issue a letter to XYZ Co. a letter stating that no further action need be taken at the Site related to any land pollution or water pollution for which remedial action has been taken in accordance with the RAP. Such letter shall provide that the DEE may require XYZ Co. to conduct additional remedial action in the event that any monitoring conducted at or near the Site or other circumstance indicates that (a) contamination is reoccurring, (b) additional contamination is present which was not previously identified under RAPMA, or (c) additional contamination is present for which remedial action was not taken according to the RAP. As a condition of issuance of the no further action letter, the DEE may require payment of ongoing direct and indirect costs of oversight of any ongoing long-term operation, maintenance, and monitoring at the Site.

24. This Agreement shall not be construed as an acceptance of liability by the State of Nebraska for activities conducted pursuant to RAPMA. XYZ Co., who is proceeding under RAPMA shall indemnify and hold harmless the State of Nebraska for any further action required by the federal Environmental Protection Agency relating to land pollution or water pollution by XYZ Co. for the remedial action.
25. This Agreement shall be governed and interpreted under the laws of the State of Nebraska. The powers conferred by the RAPMA shall be independent of and in addition and supplemental to any other provisions of the laws of the State of Nebraska with reference to the matters covered hereby, and the act shall be considered as a complete and independent act and not as amendatory of or limited by any other provision of the laws of the State of Nebraska.
26. This Agreement shall be binding on each party, its successors and assignees subject to the right of termination in Paragraphs 20 and 21. No change in the ownership or corporate or business status of any party, or of the Site shall alter any signatory's responsibilities under this Agreement.
27. By entering into this Agreement, XYZ Co. certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the DEE all information known to XYZ Co. and to the best of its knowledge and belief, disclosed information in the possession or control of its officers, employees, contractors and agents which relates in any way to any existing land or water pollution or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site. This Agreement shall be null and void upon willful submission of false, inaccurate, or misleading information by XYZ Co..
28. This Agreement shall become effective upon execution by both parties and may only be modified or amended by an agreement in writing signed by both parties.
29. Signatures. The undersigned representatives of the parties certify that they are fully authorized to enter into the terms and conditions of this Agreement.

NEBRASKA DEPARTMENT OF
ENVIRONMENT AND ENERGY

Date: _____ By: _____

(PERSON)

Date: _____ By: _____

Title