

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER QUALITY DIVISION

IN THE MATTER OF:
FMRI, INC.,

RESPONDENT,

FACILITY NO. I-51000040
PERMIT NO. OK0001643
PROBLEM(S): Permit Compliance Schedule
Violation

CASE NO. 12-208

OKLAHOMA
DEPT. OF ENVIRONMENTAL QUALITY

MAR 26 2013

FILED BY: *D. Kay*
HEARING CLERK

CONSENT ORDER

The parties to this case, the Oklahoma Department of Environmental Quality ("DEQ") and FMRI, Inc. ("Respondent"), agree to this Consent Order in order to resolve certain environmental compliance issues.

This Consent Order supersedes and closes Notice of Violation ("NOV") No. I-51000040-10-1.

FINDINGS OF FACT

1. Respondent owns and operates a metal recovery facility located at 10 Tantalum Place, in the City of Muskogee, in Muskogee County, Oklahoma.
2. DEQ issued Oklahoma Pollution Discharge Elimination System (OPDES) Permit No. OK0001643, which was effective December 12, 2003 through December 11, 2008, to Respondent authorizing Respondent to discharge treated wastewater to the Arkansas River in stream segment 120400 from Outfalls 001, 002, 003 and 005. In the compliance schedule portion of the permit, Respondent was required to install liners compatible with Class I wastewater in

impoundments F01 (Pond 6) and F02 (Pond 7) no later than two (2) years after the effective date of the permit, which was December 15, 2006.

3. On June 1, 2008, DEQ received Respondent's application to renew its OPDES permit. However, DEQ could not renew Respondent's OPDES permit because Respondent had not installed liners for F01 or F02 contrary to the compliance schedule in the existing permit.

4. On November 23, 2009, Paul Johnson and Steven Gunnels of the Water Quality Division ("WQD") inspected Respondent's facility and observed that Respondent had still not installed the liners for F01 and F02.

5. On March 8 and 9, 2010, the following DEQ personnel inspected Respondent's facility: John Flynn, Land Protection Division ("LPD"), Mr. Johnson and Mr. Gunnels. Present during this inspection were United States Nuclear Regulatory Commission ("NRC") representatives Robert Evans, P.E., Nuclear Materials Safety Branch B, and Gerald A. Shlapper, Ph.D., P.E., Nuclear Materials Safety Branch. Representatives present for Respondent included E. Jonathan Jackson, FMRI's former President, James Burgess, FMRI's Plant Manager, and Robert Miller, Radiation Safety Office. During the inspection, DEQ personnel again observed that Respondent had neither lined nor closed F01 and F02.

6. On March 10, 2010, DEQ issued NOV No. I-51000040-10-1 to Respondent for failing to install the liners for F01 and F02 as required in the compliance schedule contained in the existing permit.

7. On March 22, 2010, DEQ received a response to the NOV from Respondent. In the response, Respondent refused to line F01 and F02 unless directed to do so by the Bankruptcy Court and the NRC.

8. From April 2010 through February 2012, the parties discussed Respondent's non-

compliance with the terms of the old permit but did not reach an agreement about what should be done.

9. On March 7, 2012, Brian Clagg, WQD, performed a Compliance Evaluation Inspection at Respondent's facility and observed that F01 and F02 not been lined or closed.

10. On May 16, 2012, the NRC held a public meeting, which was facilitated by James Shepherd, Project Engineer, NRC. The issues discussed at the public meeting included Respondent's existing decommissioning plan, the groundwater quality, Respondent's non-compliance with its OPDES Permit, and the status of Respondent's permit renewal application.

11. On July 16, 2012, DEQ sent a letter (a) informing Respondent that its March 22, 2010 NOV response was inadequate, and (b) requesting that Respondent submit a new schedule for either lining or closing F01 and F02.

12. On July 27, 2012, DEQ received a written response from Respondent requesting additional time to develop a plan for lining or closing F01 or F02. DEQ granted the request and gave Respondent until September 1, 2012, to submit the plan.

13. On August 28, 2012, Mr. Gunnels spoke with Mr. Burgess regarding the action Respondent wished to take regarding the compliance schedule. Mr. Burgess told Mr. Gunnels that Respondent wanted to enter into a Consent Order to address the violations at the facility.

14. On September 5, 2012, DEQ received the letter from Respondent containing a proposed plan to attain compliance. In the plan, Respondent proposed to sample for a period of at least eight weeks or until 24 samples are collected, whichever is longer. The parameters to be analyzed will be those identified in the existing permit. The resulting analyses were to be used to determine whether Respondent could meet the effluent limits in the existing permit without using F01 and F02.

15. On January 18, 2013, a settlement conference was held between representatives of the DEQ and Respondent's representatives. DEQ was represented by: Mista Burgess, Supervising Attorney for WQD, Wayne T. Craney, P.E., Engineering Manager, Carl Parrott, P.E., Chief Engineer, Patrick Rosch, P.E., Engineering Manager, and Mr. Gunnels. Respondent was represented by Mr. Burgess and Robert Compennolle, President. During the meeting, the parties agreed the terms contained in this Consent Order.

16. On January 30, 2013, DEQ personnel performed a Compliance Evaluation Inspection. The report will be mailed within 45 days of the inspection date.

17. Using unlined impoundments (F01 & F02) for Class I wastewater in violation of state statutes and regulations creates the potential for contaminating groundwater which may result in harm to the environment or health and well-being of the affected public.

18. Respondent and DEQ agree that it is beneficial to resolve this matter promptly and by agreement.

19. Respondent and DEQ waive the filing of a petition or other pleading, and Respondent waives the right to a hearing.

CONCLUSIONS OF LAW

20. DEQ has regulatory jurisdiction and authority in this matter, and Respondent is subject to the jurisdiction and authority of DEQ under 27A O.S. § 1-3-101(B), 27A O.S. §§ 2-6-201 through 2-6-206.

21. Respondent and DEQ are authorized by 75 O.S. § 309(E) and 27A O.S. § 2-3-506(B) to resolve this matter by agreement.

22. By not completing the tasks required by the compliance schedule in the OPDES Permit, Respondent is in violation its permit. Page 12, Part 1, Section B.2 Surface Impoundment

Requirements of Respondent's permit states, "The facility will have two years from the effective date of the permit to install a liner compatible with Class I wastewater for impoundments F01 and F02." This requirement is established under Oklahoma Administrative Code ("OAC") 252:616-7-1, which states that Class I waste water requires one of three liner systems: 1.) Flexible Membrane; 2.) Composite Liner; or 3.) Concrete. The OPDES Permit, classifies the wastewater destined for F01 and F02 as Class I wastewater, therefore requiring either of the aforementioned liner systems for both impoundments. Using unlined impoundments creates the potential for contaminated groundwater.

23. Pursuant to OAC 252:4-7-15(b), DEQ may not renew Respondent's permit since Respondent "is not in substantial compliance with...the terms of [its] existing DEQ permit...."

ORDER

24. Based on the above paragraphs, Respondent and DEQ agree, and it is ordered by the Executive Director:

| <u>TASK</u> | <u>DUE DATE</u> |
|---|------------------------|
| a. Respondent agrees to submit a sampling plan to be used to determine whether Respondent can maintain compliance with the effluent limits in its OPDES permit if it closes F01 and F02. All samples shall be tested using U.S. EPA approved methods and shall be performed by a DEQ certified laboratory. | April 1, 2013 |
| b. Respondent agrees to complete the sampling plan and submit an affidavit to DEQ certifying the completion of the sampling plan. | July 1, 2013 |
| c. Respondent agrees to submit to DEQ an engineering report and schedule that includes either a plan to close F01 and F02 or line F01 and F02 in compliance with OAC 252:616. The engineering report shall be prepared and sealed by an engineer licensed in the State of Oklahoma and not employed by FMRI. The schedule in the engineering report will be used as the basis for the | October 1, 2013 |

compliance/construction task schedule to be incorporated in an Amendment to this Consent Order.

- d. Respondent agrees to begin construction for either closing or lining F01 and F02. For purposes of this paragraph, "beginning construction" means breaking ground--not beginning a search for a contractor. TBD and included in an Amendment to this Consent Order
- e. Respondent agrees to complete the closing or lining of F01 and F02. For purposes of this paragraph, "completing construction" means the day DEQ inspects F01 and F02 and verifies completion of either the closing or lining of F01 and F02 in compliance with OAC 252:616. TBD and included in an Amendment to this Consent Order

25. The Oklahoma Pollutant Discharge Elimination System Act, 27A O.S. §§ 2-6-201 through 2-6-206, authorizes DEQ to seek penalties of up to "Ten Thousand Dollars (\$10,000.00) per day of violation, for each day during which a violation of the Act, permit, associated rules or order continues." Based on the facts and circumstances of this case, DEQ assesses a total penalty of Fifty Thousand Dollars (\$50,000.00).

- a. For each task that Respondent completes by the due date listed in Paragraph ²⁴25, DEQ agrees to defer payment of the portion of the \$50,000 penalty allocated to that task (as set forth below in subparagraph "c") to the closure date of this Consent Order and any Amendments.

i. If Respondent lines or closes F01 and F02 by the date agreed to in the Amendment to the Consent Order, DEQ agrees to waive all portions of the \$50,000 for which payment was deferred to the closure date.

ii. If Respondent fails to line or close F01 and F02 by the date agreed to in the Amendment to the Consent Order, all deferred portions of the \$50,000 shall become immediately due and payable.

b. For each task that Respondent fails to complete by the due date listed in Paragraph 23, the portion of the \$50,000 penalty allocated to that task (as set forth below in subparagraph "c") shall become immediately due and payable.

- c. TASK a - \$2,500
- TASK b - \$2,500
- TASK c - \$10,000
- TASK d - \$15,000
- TASK e - \$20,000

26. All penalty payments shall be by check or money order payable to the Oklahoma Department of Environmental Quality (or ODEQ), showing the Case Number, 12-208, of this Consent Order, and delivered to:

Accounts Receivable
Financial & Human Resources Management
Department of Environmental Quality
P.O. Box 2036
Oklahoma City, OK 73101-2036

27. Respondent agrees that if Respondent fails to complete any of the task(s) by the specified due dates set forth in Paragraph ~~21~~^{24(b)} in this Consent Order, DEQ may assess additional stipulated penalties as follows:

| <u>TASK</u> | <u>PENALTY PER DAY</u> |
|-------------|------------------------|
| a. | \$ 280.00 |
| b. | \$ 280.00 |
| c. | \$ 280.00 |
| d. | \$ 280.00 |
| e. | \$ 280.00 |
| f. | \$ 280.00 |

Stipulated penalties begin to accrue on the day performance is due, with the total amount of stipulated penalties not to exceed Seventy Thousand Dollars (\$70,000.00). If DEQ notifies Respondent that Respondent is not in compliance with this Consent Order and that stipulated penalties are being assessed, Respondent may request a hearing to contest the finding of noncompliance. The notification from DEQ will specify how to request a hearing.

28. If Respondent fails to pay any penalty, DEQ may bring a separate action for collection of the penalty in District Court. An action by DEQ for the collection of a penalty does not affect Respondent's duty to complete the tasks required by this Consent Order.

GENERAL PROVISIONS

29. DEQ has received delegation from the United States Environmental Protection Agency, to implement and enforce the Federal NPDES program. A portion of the implementation and enforcement program is to issue timely enforcement actions and impose appropriate penalties. The federal program calls for a significant increase in monetary penalties should this Consent Order be violated or future violations occur.

30. As used in this Consent Order, an "approvable" submission to DEQ is to be considered a final submission. That is, all preliminary discussions between DEQ and Respondent regarding the requirements of a submission must be concluded prior to the date the submission is due so that the submission will be approvable as submitted. If the submission is not submitted in an approvable form by its due date, the submission will be considered late and Respondent will be subject to the stipulated penalties described in this Consent Order.

31. Respondent agrees to perform the requirements of this Consent Order within the time frames specified unless performance is prevented or delayed by events which are a "force majeure." For purposes of this Consent Order, a force majeure event is defined as any event arising

from causes beyond the reasonable control of Respondent or Respondent's contractors, subcontractors or laboratories which delays or prevents the performance of any obligation under this Consent Order. Examples are vandalism; fire; flood; labor disputes or strikes; weather conditions that prevent or seriously impair construction activities; civil disorder or unrest; and "acts of God." Force majeure events do *not* include increased costs of performance of the tasks agreed to in this Consent Order, or changed economic circumstances. Respondent must notify DEQ in writing within fifteen (15) days after Respondent knows or should have known of a force majeure event that is expected to cause a delay in achieving compliance with any requirement of this Consent Order. Failure to submit notification within fifteen (15) days waives the right to claim a force majeure.

32. Respondent and DEQ may amend this Consent Order by mutual consent. Such amendments must be in writing and the effective date of the amendments will be the date on which they are filed by DEQ. Any amendment to this Consent Order may require the payment of an administrative penalty.

33. Upon their approval by DEQ, any final reports, plans, specifications, schedules and attachments required under this Consent Order are incorporated into it and enforceable under it. Failure to respond within a reasonable time to any errors, deficiencies or other regulatory requirements identified by DEQ is a violation of this Consent Order.

34. No informal advice, guidance, suggestions or comments by employees of DEQ regarding reports, plans, specifications, schedules, and other writings affect Respondent's obligation to obtain written approval by DEQ, when required by this Consent Order.

35. Respondent agrees to allow agents of DEQ entry onto Respondent's property, at reasonable times and without advance notice, for the purposes of inspecting, sampling, testing, records review and other authorized activities to assess compliance with Oklahoma statutes and

rules and this Consent Order. If Respondent is required to sample or test, Respondent agrees to give DEQ reasonable notice of the sampling or testing date and time and allow DEQ to observe and/or split-sample.

36. Unless otherwise specified, any report, notice or other communication required under this Consent Order must be in writing and must be sent to:

For the Department of Environmental Quality:

Steven Gunnels, District Representative
Industrial Wastewater Enforcement Section
Water Quality Division
Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

For Respondent:

Robert Compennolle, President
FMRI, Inc.
10 Tantalum Place
Muskogee, OK 74403

37. This Consent Order is enforceable as a final order of the Executive Director of DEQ. DEQ retains jurisdiction of this matter for the purposes of interpreting, implementing and enforcing the terms and conditions of this Consent Order and for the purpose of resolving disputes.

38. Nothing in this Consent Order limits DEQ's right to take enforcement action for violations discovered or occurring after the effective date of this Consent Order.

39. Nothing in this Consent Order excuses Respondent from its obligation to comply with all applicable federal, state and local statutes, rules and ordinances. Respondent and DEQ agree that the provisions of this Consent Order are considered severable, and if a court of competent jurisdiction finds any provisions to be unenforceable because they are inconsistent with state or federal law, the remaining provisions will remain in full effect.

40. Respondent agrees to disclose the facts concerning any contamination of the property and to provide a copy of this Consent Order to all potential purchasers of the property. Respondent agrees to notify all potential purchasers of the property that the obligations under this Consent Order are binding on the purchaser. Within ten (10) days of the sale of the property, Respondent will notify DEQ of the sale and provide the name and address of the purchaser to DEQ.

41. The provisions of this Consent Order apply to and bind Respondent and DEQ and their officers, officials, directors, employees, agents, successors and assigns. No change in the ownership or corporate status of Respondent will affect Respondent's responsibilities under this Consent Order.

42. Compliance with the terms and conditions of this Consent Order fully satisfies Respondent's liability to DEQ for all items of noncompliance in this Consent Order. If Respondent satisfies the requirements of this Consent Order, DEQ will not pursue any other remedy, sanction or relief that might otherwise be available to address the issues of noncompliance in this Consent Order. Nothing in this Consent Order shall be deemed to satisfy Respondent's liability, if any, for actions or remedies not within the scope of authority of DEQ.

43. Respondent and DEQ agree that the venue of any action in district court for the purposes of interpreting, implementing and enforcing this Consent Order will be Oklahoma County, Oklahoma.

44. The requirements of this Consent Order will be considered satisfied and this Consent Order terminated when Respondent receives written notice from DEQ that Respondent has demonstrated that all the terms of the Consent Order have been completed to the satisfaction of DEQ, and that any assessed penalty has been paid.

45. The individuals signing this Consent Order certify that they are authorized to sign it

and to legally bind the parties they represent.

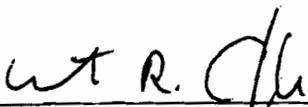
46. This Consent Order becomes effective on the date of the later of the two signatures below.

Dated: 3-13-13

Dated: 3-26-13

FOR RESPONDENT:

**FOR OKLAHOMA DEPARTMENT
OF ENVIRONMENTAL QUALITY:**



ROBERT COMPEROLLE
FMRI, PRESIDENT

for 

STEVEN A. THOMPSON
EXECUTIVE DIRECTOR