

**UNITED STATES' DISTRICT COURT**  
**DISTRICT OF KANSAS**

UNITED STATES OF AMERICA and the	)	
STATE OF KANSAS ex rel.	)	
KANSAS DEPARTMENT OF HEALTH AND	)	
ENVIRONMENT, AND ROBERT MOSER, M.D.,	)	
AS SECRETARY OF THE KANSAS	)	
DEPARTMENT OF HEALTH	)	
AND ENVIRONMENT,	)	NO: 12-CV-1146-EFM-KMH
	)	
Plaintiffs,	)	<u>JOINT COMPLAINT</u>
	)	
v.	)	
	)	
E. I. du Pont de Nemours and Company	)	
	)	
Defendant.	)	
_____	)	

The United States of America, by authority of the Attorney General through his undersigned attorneys, and at the request and on behalf of the United States Department of the Interior (DOI), and the State of Kansas by and through the Kansas Department of Health and Environment ("KDHE") and Robert Moser, M.D., as, Secretary of KDHE ("Kansas") (collectively, the "Plaintiffs"), in their capacities as trustees for Natural Resources in Cherokee County, Kansas allege as follows:

**NATURE OF ACTION**

1. This is a civil claim for natural resource damages brought pursuant to Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321, and Kansas state law for damages for injury to, destruction of, or loss of natural resources at the Waco Subsite of the Cherokee County Superfund Site resulting from the discharge of hazardous substances at and from certain properties owned and/or operated by E.I. du Pont Nemours and Company ("Defendant") or its predecessors in interest.

### JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §§ 1331, 1345, 1362 and 2201 and 33 U.S.C. §§ 1321(e)(2) and (n).

3. Venue is proper in this district pursuant to 33 U.S.C. § 2717(b); and 28 U.S.C. § 1391(b).

### PARTIES

4. Defendant E.I. du Pont Nemours and Company is a corporation organized under the laws of Delaware.

5. Plaintiff the United States of America ("United States") is a trustee for natural resources damaged or destroyed at the Waco Subsite of the Cherokee County Superfund Site as a result of the discharges of hazardous substances from properties owned and operated by the Defendant and/or its predecessors in interest pursuant to federal statutes which include, but are not limited to, Section 311(f)(5) of the Clean Water Act, 33 U.S.C. § 1321(f)(5). *See* Exec. Order No. 12,580, as amended by Exec. Order No. 12,077, 61 Fed. Reg. 45871 (Aug. 28, 1996); 40 C.F.R. § 300.600(b)(2).

6. Plaintiffs KDHE and the Secretary of KDHE (the "State") are state trustees for natural resources injured, destroyed or lost at the Waco Subsite of the Cherokee County Superfund Site as a result of discharges of hazardous substances from properties owned and operated by the Defendant and/or its predecessors in interest, pursuant to statutes, which include, but are not limited to, Section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), 40 C.F.R. § 300.605, and K.S.A. 65-164, 65 - 171u, and 65-3452a.

### GENERAL ALLEGATIONS

7. The Cherokee County Superfund Site ("Site") was added by the United States

Environmental Protection Agency (“EPA”) to the National Priorities List on September 8, 1983, 48 Fed. Reg. 40658. The Site consists of 115 square miles in the southeast corner of the State of Kansas, bordering the States of Missouri and Oklahoma. It has been divided into various subsites including the Waco Subsite.

8. The Waco Subsite of the Cherokee County, Kansas Superfund Site, encompasses approximately 560 acres, located approximately six miles north of Riverton, Kansas, 11 miles south of Pittsburgh, Kansas and four miles west of Carl Junction, Missouri in Cherokee County, Kansas. The Waco Kansas Site includes an unnamed tributary (SW-W4) to Cow Creek and Cow Creek but does not include any areas downstream of its confluence with the Spring River.

9. Defendant and/or its predecessors in interest own and/or operate, or owned and/or operated, certain mining claims, mines and real property located in the Waco Subsite (Hereinafter collectively referred to as “Defendant’s Properties”).

10. There have been and continue to be discharges of hazardous substances from Defendant’s Properties into the environment at the Waco Subsite. These hazardous substances include but are not limited to lead, cadmium, and zinc.

11. These discharges of hazardous substances from the Defendant’s Properties have resulted in elevated levels of lead, cadmium and zinc in the soils, sediments and surface water at the Waco Subsite.

12. Natural resources at the Waco Subsite have been injured or destroyed or lost as a result of the discharges of hazardous substances from the Defendant’s Properties. These natural resources included but are not limited to surface water, sediments, terrestrial resources, resident and migratory birds, fish, macroinvertebrates, biota and such other resources belonging to,

managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State.

13. Cow Creek has flow a substantial part of the year and is a tributary to the Spring River.

#### RELEVANT LEGAL AUTHORITIES

14. Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), provides that the owner or operator of any facility from which oil or a hazardous substances has been discharged is liable for any costs or expenses incurred by the United States or State "in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge."

15. Under Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), the Plaintiffs are entitled to recover damages for injuries to natural resources, including the costs of restoring or replacing natural resources damaged or destroyed.

16. KSA 65 - 164 states in pertinent part, subsection (a) "No person, company, corporation . . . shall place or permit to be placed or discharge or permit to flow into any of the waters of the state any sewage . . . (b) For the purposes of this act "sewage" means the waste products ... or other discharges . . . or other waste from manufacturing or other forms of industry."

17. KSA 65 171u provides that any person who violates the provisions of KSA 65-161 to 65- 171 and causes the death of, or injury to, fish, animals, vegetation or other resources of the state whether natural or structural . . . shall be liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish or replace such resources

and to otherwise restore the stream, lake or other water resource to its condition prior to the injury.

**FIRST CLAIM FOR RELIEF**  
**Natural Resource Damages Under the Clean Water Act**

18. The allegations set forth in paragraphs 1 through 17 are re-alleged and incorporated herein by reference.

19. Each of the Defendant's Properties is an "onshore facility" within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(2).

20. The Defendant and/or its predecessors is or was an "owner" and/or "operator" of an onshore facility within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1).

21. There have been discharges of hazardous substances in harmful quantities from the Defendant's Properties into the waters of the United States and/or adjoining shorelines including Cow Creek that have affected, damaged or destroyed natural resources belonging to, appertaining to, or under the exclusive management authority of the Plaintiffs within the meaning of Sections 311(b) and (f)(4) of the CWA, 33 U.S.C. §§ 1321(b) and (f)(4).

22. The Defendant has assumed or succeeded to the liabilities of its predecessors in interest that owned and/or operated Defendant's Properties from which hazardous substances were discharged.

23. The Defendant is liable to Plaintiffs for the costs or expenses incurred by Plaintiffs in the restoration or replacement of natural resources at the Waco Subsite damaged destroyed as a result of the discharges of hazardous substances from the Defendant's Properties under Section 311(f)(4) of the CWA, 33 U.S.C. § 1321(f)(4).

**SECOND CLAIM FOR RELIEF:**  
**Natural Resource Damages under KSA 65-171u**

24. The allegations set forth in paragraphs 1 through 17 are re-alleged and incorporated herein by reference.

25. Defendant and/or its predecessors in interest placed or permitted to be placed or discharged or permitted to flow sewage into the waters of the State in violation of KSA 65-164.

26. The Defendant has assumed or succeeded to the liabilities of its predecessors in interest that owned and/or operated Defendant's Properties at which the sewage was placed, and from which it was discharged or permitted to be placed or flowed into the waters of the State.

27. The discharges described above have caused the death of, or injury to, fish, animals, vegetation or other resources of the state at the Waco Subsite.

28. Pursuant to KSA 65-171u the Defendant is liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish or replace such resources and to otherwise restore the stream, lake or other water resource to its condition prior to the injury.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Enter a judgment in favor of Plaintiffs against Defendant, pursuant to Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), for all costs of restoring, replacing, and/or acquiring the equivalent of natural resources damaged or destroyed as a result of the release of hazardous substances from the Defendant's Properties and including the costs of

assessing such damages and the diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial.

(2) Enter a judgment in favor of Plaintiffs against Defendant, pursuant to KSA 65-171u for damages in an amount equal to the sum of money necessary to restock such waters, replenish or replace such resources and to otherwise restore the stream, lake or other water resource to its condition prior to the injury.

(3) Enter a judgment in favor of Plaintiffs against Defendant for all costs of this action, including attorney's fees; and

(4) Award Plaintiffs such other and further relief as this Court may deem appropriate.

Plaintiff requests that the trial be held in Wichita.

Respectfully submitted,

FOR THE UNITED STATES:

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