

Competition Tribunal Tribunal de la concurrence	
FILED / PRODUIT November 4, 2009 CT-2009-016	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 001

**PUBLIC VERSION**

**CT-**

**COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290;

**AND IN THE MATTER OF** the proposed acquisition by Agrium Inc. of C.F. Industries Holdings, Inc.;

**AND IN THE MATTER OF** the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

**B E T W E E N :**

**THE COMMISSIONER OF COMPETITION**

Applicant

– and –

**AGRIUM INC.**

Respondent

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**CONSENT AGREEMENT IN RELATION TO THE ACQUISITION BY  
AGRIUM INC. OF C.F. INDUSTRIES HOLDINGS, INC.**

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**WHEREAS** Agrium Inc. (“**Agrium**”) proposes to acquire up to all of the issued and outstanding securities of C.F. Industries Holdings, Inc. (“**CF**”) (the “**Transaction**”);

**AND WHEREAS** the Commissioner of Competition (the “**Commissioner**”) has concluded that the Transaction is likely to result in a substantial lessening and/or prevention of competition in the wholesale supply of Urea in the provinces of Alberta and Saskatchewan, or parts thereof, and Ammonia in the province of Alberta, or parts thereof;

**AND WHEREAS** the Commissioner has concluded that the implementation of this Consent Agreement (the “**Agreement**”) is necessary to ensure that any substantial lessening and/or prevention of competition would not result from the Transaction;

**AND WHEREAS** Agrium does not admit but will not for the purposes of the enforcement of any provision of this Agreement, or in any subsequent proceeding, including in any proceedings under section 106 of the *Competition Act*, in relation to this Agreement contest: (i) the Commissioner’s conclusion that the Transaction is likely to result in a substantial lessening and/or prevention of competition in the wholesale supply of Urea in the provinces of Alberta and Saskatchewan, or parts thereof, and Ammonia in the province of Alberta, or parts thereof; and (ii) the Commissioner’s conclusion that the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition would not result from the Transaction;

**AND WHEREAS** in order to address the Commissioner’s concerns, Agrium has agreed to divest a 50% interest in Agrium’s fertilizer manufacturing facility and interests in the Ammonia and Urea storage facilities located in Carseland, Alberta, and to supply an additional annual volume of 60,000 Tonnes of Urea to a Purchaser (as defined herein);

**AND WHEREAS** the Commissioner is satisfied that the implementation of this Agreement will be sufficient to ensure that any likely substantial lessening and/or prevention of competition would not result from the completion of the Transaction;

**AND WHEREAS** Agrium attorns to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement;

**AND WHEREAS** the Commissioner and Agrium agree to the immediate registration of this Agreement with the Competition Tribunal;

**NOW THEREFORE** Agrium and the Commissioner agree as follows:

**I. DEFINITIONS**

[1] For the purposes of this Agreement, unless something in the subject matter or context is inconsistent therewith, the following capitalized terms have the following meanings:

- (a) “**Act**” means the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

- (b) “**Affiliate**” means an affiliated corporation, partnership or sole proprietorship within the meaning of section 2(2) of the Act;
- (c) “**Agreement**” means this Consent Agreement entered into between Agrium and the Commissioner pursuant to section 105 of the Act, including the appendices hereto;
- (d) “**Agrium**” means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and Affiliates, and the respective directors, officers, employees, agents, representatives, predecessors, successors and assigns of each;
- (e) “**Agrium/Terra Transaction**” means the purchase by Terra of the Divestiture Assets from Agrium pursuant to the terms of the Purchase Agreement, and the execution of a legally binding Supply Agreement between Terra and Agrium in respect of which the conditions precedent shall have been satisfied or waived and such agreement shall be in effect;
- (f) “**Alternate Purchaser Initial Sale Period**” means the period set out in Confidential Appendix “C”, or such longer period as directed by the Commissioner;
- (g) “**Ammonia**” means anhydrous ammonia or NH<sub>3</sub>;
- (h) “**Business Day**” means a day other than a Saturday, Sunday or statutory holiday in the Provinces of Alberta or Ontario;
- (i) “**Carseland Facility**” means the fertilizer production facility operated by Agrium, located in Carseland, Alberta;
- (j) “**CF**” means C.F. Industries Holdings, Inc. and its Affiliates, successors and assigns;
- (k) “**CF Sales Force**” means those employees of CF engaged in the sale and marketing of Ammonia and Urea in Western Canada immediately prior to the Closing Date;
- (l) “**Closing Date**” means the date upon which Agrium acquires more than 15% of the issued and outstanding shares of CF;
- (m) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on her behalf;
- (n) “**Confidential Information**” means competitively sensitive or proprietary information not independently known to a Person from sources other than the entity to which the information pertains or a Person who is under confidentiality

obligations to that other Person, including, without limiting the generality of the foregoing, manufacturing, operations and financial information, operating costs and revenues, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets;

- (o) **“Controlled Release Facilities”** means all Miscellaneous Interests, Tangibles, Intangibles and Lands relating exclusively to Agrium’s controlled release product facilities as more fully described in the Purchase Agreement attached at Confidential Appendix “A” hereto;
- (p) **“Divest”** or **“Divested”** means to implement the Divestiture;
- (q) **“Divestiture”** means the sale, transfer, assignment, or other disposal of the Divestiture Assets, such that Agrium will have no direct or indirect interest in the Divestiture Assets, except as permitted herein or upon the consent of the Commissioner;
- (r) **“Divestiture Assets”** means an undivided 50% interest in the Carseland Facility, which shall consist of the Lands and all Miscellaneous Interests, Tangibles and Intangibles relating to, located in or on, or used in the operation of the Carseland Facility (specifically excluding the Excluded Assets), including, but not limited to:
  - (i) the Ammonia production and storage functions of the Carseland Facility, including a MW Kellogg designed production plant currently capable of Ammonia production capacity of approximately 1,500 Tonnes per day and a 36,000 Tonne capacity cold storage facility;
  - (ii) the Urea production functions of the Carseland Facility, including a Stamicarbon designed plant currently capable of granulated Urea production of approximately 2,000 Tonnes per day;
  - (iii) the dry storage functions of the Carseland Facility, including a 400 metre long dry storage facility equipped with a high-capacity reclaim system currently capable of storing approximately 60,000 Tonnes of granulated Urea; and
  - (iv) the rail and truck loading functions of the Carseland Facility,all as more particularly described in the Purchase Agreement attached at Confidential Appendix “A” attached hereto;
- (s) **“Divestiture Trustee”** means the Person appointed pursuant to Part IX of this Agreement and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;

- (t) **“Divestiture Trustee Sale”** means the Divestiture to be conducted by the Divestiture Trustee pursuant to Part IX of this Agreement;
- (u) **“Divestiture Trustee Sale Period”** means the period set out in Confidential Appendix “C”, within which the Divestiture Trustee is empowered to sell the Divestiture Assets, or such longer period as directed by the Commissioner;
- (v) **“Excluded Assets”** means the assets described as Excluded Assets in the Purchase Agreement attached at Confidential Appendix “A” hereto, including (as more particularly described in the Purchase Agreement):
  - (i) Agrium's Controlled Release Facilities;
  - (ii) all rights and obligations respecting the supply of Ammonia to Orica Canada Inc.'s Carseland, Alberta facility from the Carseland Facility and from Agrium's Joffre, Alberta facility or elsewhere, including ownership of the Ammonia pipeline located at the Carseland Facility supplying Orica Canada Inc.'s operations;
  - (iii) all excess supply of electricity generated at the TCPL facility located at the Carseland Facility; and
  - (iv) all finished product inventory located at the Carseland Facility as of the closing of the Agrium/Terra Transaction;
- (w) **“Hold Separate Assets”** means the Carseland Facility;
- (x) **“Hold Separate Manager”** means the Person appointed pursuant to Part IV of this Agreement to manage the operation of the Hold Separate Assets;
- (y) **“Hold Separate Period”** means the period between the expiry of the Initial Sale Period and latest of the following dates: the date of completion of the Divestiture; the date of execution of a legally binding Operating Agreement; and the date of execution of a legally binding Supply Agreement, all in accordance with the terms of this Agreement. For greater certainty, the Hold Separate Period may include the Alternative Purchaser Initial Sale Period and the Divestiture Trustee Sale Period;
- (z) **“Initial Sale Period”** means the period set out in Confidential Appendix “C”, or such longer period as directed by the Commissioner;
- (aa) **“Intangibles”** means all know-how, inventions, and trade secrets, including business methodologies and processes, utilized in the operation of the Carseland Facility;
- (bb) **“Lands”** means all real property described in the Purchase Agreement attached at Confidential Appendix “A”, including:

- (i) all freehold or fee simple right, title and interest of Agrium;
  - (ii) all right, title and interest of Agrium in and to any leases;
  - (iii) all rights (whether fee simple or pursuant to orders, licences, leases, easements, rights of way or otherwise) to enter upon, use and occupy the surface of any lands and all other interests appurtenant to the Lands; and
  - (iv) all rights to acquire any of the rights described in (i), (ii) or (iii) above,  
subject to any Permitted Encumbrances thereon;
- (cc) “**Medicine Hat Facility**” means the fertilizer production facility owned by Canadian Fertilizer Ltd., located at Medicine Hat, Alberta;
- (dd) “**Miscellaneous Interests**” means all:
- (i) contracts for the provision or receipt of goods or services, rights under leases of personal property, or any other contracts, agreements and documents or any rights in relation thereto;
  - (ii) licences, permits, approvals, consents and authorizations;
  - (iii) all computer hardware and software, including all rights under licences and other agreements or instruments relating thereto;
  - (iv) books, maps, records, documents, including manufacturing data, production records, geological, engineering, geophysical, data processing, plant, environmental and other reports, files, data, interpretations, information, tapes, disks, computer programs, papers or other records; and
  - (v) all extensions, renewals, replacements or amendments of the foregoing items described in items (i) to (iv) above;
- (ee) “**Monitor**” means the Person appointed pursuant to Part V of this Agreement, and any employees, agents or other Persons acting for or on behalf of the Monitor;
- (ff) “**Operating Agreement**” means an agreement between Agrium (or a Divestiture Trustee on behalf of Agrium, as the case may be) and a Purchaser governing the operation of the Carseland Facility, and for greater certainty, may take the form of the agreement attached as Schedule “B” to Confidential Appendix “A”;
- (gg) “**Permitted Encumbrances**” means easements, rights of way, liens or other encumbrances and rights defined as Permitted Encumbrances in the Purchase Agreement attached at Confidential Appendix “A”;

- (hh) **“Person”** means any individual, partnership, limited partnership, firm, corporation, association, trust, unincorporated organization or other entity, whether acting alone or in concert with another Person;
- (ii) **“Purchase Agreement”** means the agreement between Agrium and Terra for the sale to Terra of the Divestiture Assets, in the form attached at Confidential Appendix “A”, including the Operating Agreement attached thereto as Schedule “B”;
- (jj) **“Purchaser”** means the Person that acquires the Divestiture Assets from Agrium pursuant to this Agreement, and enters into a legally binding Operating Agreement and Supply Agreement with Agrium (or a Divestiture Trustee on behalf of Agrium, as the case may be);
- (kk) **“Remedial Agreement”** means any agreement between Agrium and a Purchaser, or between a Divestiture Trustee (on behalf of Agrium) and a Purchaser or a Third Party (to effect the assignment of assets or rights of Agrium related to the Divestiture Assets to the benefit of a Purchaser), that has been approved by the Commissioner and that is specifically referenced in this Agreement as constituting a Remedial Agreement;
- (ll) **“Supply Agreement”** means an agreement, for a five (5) year term, between Agrium (or a Divestiture Trustee on behalf of Agrium, as the case may be) and a Purchaser for the supply by Agrium of an annual volume of 60,000 Tonnes of Urea from the Carseland Facility or, upon the agreement of the Purchaser and Agrium, a different Agrium production facility or facilities located in Alberta or Saskatchewan, where such annual volume is in addition to the supply of Urea received pursuant to any acquisition by such Purchaser of the Divestiture Assets;
- (mm) **“Tangibles”** means all tangible property, including apparatus, plant, buildings, improvements, machinery, equipment, facilities, supplies, raw materials, fixtures, furniture, furnishings, parts, vehicles and other items of tangible personal property owned or leased by Agrium in connection with the development, operation or maintenance of the Carseland Facility, or the treatment, storage, transportation, marketing or production therefrom, including all extensions, additions and accretions to the foregoing;
- (nn) **“Terra”** means Terra Industries Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and Affiliates, and the respective directors, officers, employees, agents, representatives, predecessors, successors and assigns of each;
- (oo) **“Third Party”** means any non-governmental Person other than Agrium or the Purchaser;
- (pp) **“Tonnes”** means metric tonnes;

- (qq) “**Transaction**” means the transaction as defined in the recitals;
- (rr) “**Tribunal**” means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2<sup>nd</sup> Supp.), as amended; and
- (ss) “**Urea**” means (NH<sub>2</sub>)<sub>2</sub>CO in granular form.

All other terms defined in this Agreement have the meanings established elsewhere in this Agreement.

## **II. APPLICATION**

[2] The provisions of this Agreement shall apply to:

- (a) Agrium, and Agrium shall cause each of its Affiliates to carry out their respective obligations under this Agreement;
- (b) each officer, director, employee, agent or other Person acting for or on behalf of Agrium with respect to any of the matters referred to in this Agreement;
- (c) all other Persons acting in concert or participating with one or more of those listed in (a) or (b) above, with respect to the matters referred to in this Agreement, who shall have received actual notice of this Agreement;
- (d) the Commissioner;
- (e) the Hold Separate Manager;
- (f) the Monitor;
- (g) the Divestiture Trustee; and
- (h) the Purchaser and the Purchaser’s heirs, successors, legal representatives and assigns.

## **III. GENERAL OBLIGATIONS OF AGRIMUM**

[3] During the Initial Sale Period, Agrium shall:

- (a) complete the Divestiture to Terra pursuant to the Purchase Agreement in the form attached at Confidential Appendix “A”; and
- (b) enter into a legally binding Supply Agreement with Terra in the form attached at Confidential Appendix “B”,

all in accordance with Part VII of this Agreement.



- [4] In the event that Agrium fails to effect either of paragraphs 3(a) or 3(b) above, Agrium shall, during the Alternate Purchaser Initial Sale Period:
- (a) complete the Divestiture to a Purchaser;
  - (b) enter into a legally binding Operating Agreement with such Purchaser; and
  - (c) enter into a legally binding Supply Agreement with such Purchaser,
- all in accordance with Part VIII of this Agreement.

- [5] In the event that, prior to the expiry of the Alternate Purchaser Initial Sale Period, Agrium fails to complete the Divestiture to a Purchaser, enter into a legally binding Operating Agreement with such Purchaser, or enter into a legally binding Supply Agreement with such Purchaser, the Commissioner may appoint a Divestiture Trustee to: complete the Divestiture, enter into a legally binding Operating Agreement and enter into a legally binding Supply Agreement with a Purchaser in accordance with Part IX of this Agreement.

#### **IV. HOLD SEPARATE**

- [6] In the event that Agrium fails to complete the Divestiture to Terra pursuant to the Purchase Agreement or enter into a legally binding Supply Agreement with Terra during the Initial Sale Period in accordance with paragraph 3 above, the Commissioner shall appoint, immediately upon the expiry of the Initial Sale Period, a Hold Separate Manager who shall manage and operate the Hold Separate Assets independently of Agrium, as specified herein, during the Hold Separate Period. Agrium shall transfer to the Hold Separate Manager all rights, powers and authority necessary to perform his duties and responsibilities under this Agreement.

- [7] Agrium shall be responsible for all fees and expenses properly charged or incurred by the Hold Separate Manager in the course of carrying out his duties and responsibilities under this Agreement, provided that the Hold Separate Manager shall not be authorized to make capital expenditures that are outside of the ordinary course of business except for those capital expenditures which, in the opinion of the Hold Separate Manager, acting reasonably, are necessary to maintain the viability, competitiveness and saleability of the Hold Separate Assets.

- [8] Agrium shall:
- (a) take all reasonable steps to ensure that, from and after the expiry of the Initial Sale Period, the Hold Separate Assets are independent of Agrium, including transferring to the Hold Separate Manager all rights, powers and authority necessary for him to perform his duties and responsibilities under this Agreement; and

- (b) not exercise any direction or control, direct or indirect, over the management or operations of the Hold Separate Assets, except to the extent that Agrium must exercise such direction and control to assure compliance with this Agreement and except as otherwise provided in this Agreement.
- [9] The Hold Separate Manager shall be responsible for the management of the Hold Separate Assets and shall report directly to the Monitor. The Hold Separate Manager shall not have access to any Confidential Information of Agrium other than that relating to the Hold Separate Assets. During the term of this Agreement, the Hold Separate Manager shall not be involved in any way in the operations of the other businesses of Agrium.
- [10] The Hold Separate Manager shall have no financial interests affected by Agrium's revenues, profits or profit margins, except that the Hold Separate Manager's compensation for managing the Hold Separate Assets may include economic incentives for him to operate the Hold Separate Assets at no less than current rates of operation, to achieve the objectives of this Agreement and to improve the financial performance of the Hold Separate Assets.
- [11] Notwithstanding any other provision of this Agreement, Agrium shall permit the Hold Separate Manager to use the external auditors of Agrium to maintain, in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Hold Separate Assets, provided that such external auditors shall sign a standard confidentiality agreement in a form determined by the Commissioner, and pursuant to which Agrium shall be named as a third party beneficiary.
- [12] Agrium shall provide to the Hold Separate Manager such managerial, administrative and operational (including maintenance) resources of Agrium as are reasonably necessary for the following purposes:
- (a) human resources and payroll;
  - (b) accounts payable systems;
  - (c) occupational health and safety;
  - (d) environmental permitting and liability issues;
  - (e) insurance, including notification of claims for which coverage is sought; and
  - (f) financial services, including banking,

except that, in using such resources, the Hold Separate Manager shall not disclose any Confidential Information, other than as permitted herein.

- [13] In addition to those Persons employed in connection with the Hold Separate Assets at the expiry of the Initial Sale Period, the Hold Separate Manager may employ such Persons as are reasonably necessary to assist him in managing and operating the Hold Separate Assets, including, without limitation, those providing administrative services, such as finance, information technology, employee relations, regulatory and legal, public relations, and customer relations services; provided that the Hold Separate Manager may not employ additional Persons if such services are reasonably capable of being provided by Persons employed solely in connection with the Hold Separate Assets, and not employed in connection with the operation of other businesses of Agrium following the expiry of the Initial Sale Period, or through the use of the managerial, administrative and operational (including maintenance) resources of Agrium in accordance with paragraph 12 above and the other terms and conditions of this Agreement. All costs associated therewith shall be borne by Agrium.
- [14] The Hold Separate Manager shall have the responsibility and be given by Agrium any resources reasonably necessary to continue production levels and output required to satisfy current and future sales of finished product from the Hold Separate Assets and with the approval of the Monitor to implement previously approved goals, capital expenditure budgets and objectives. The Hold Separate Manager may consult with Agrium solely with respect to matters necessary to ensure that the business of Agrium continues to operate in the ordinary course. The Hold Separate Manager shall not, however, have access to any other of Agrium's confidential marketing materials unrelated to the Hold Separate Assets.
- [15] The Hold Separate Manager shall deliver to the Monitor a copy of any communications between the Hold Separate Manager and Agrium.
- [16] If the Hold Separate Manager ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Hold Separate Manager, the Commissioner, or the Monitor with the approval of the Commissioner, shall be permitted to remove the Hold Separate Manager. In the event the Hold Separate Manager ceases to act in his role, the Commissioner shall select a substitute Hold Separate Manager after consultation with Agrium and the Monitor, and transfer to the substitute Hold Separate Manager all rights, powers and authority necessary to permit such substitute Hold Separate Manager to perform the duties and responsibilities of the Hold Separate Manager pursuant to this Agreement.
- [17] During the Hold Separate Period, the Hold Separate Manager shall take all necessary steps to preserve the independence and competitive viability of the Hold Separate Assets, including, but not limited to, giving all necessary instructions to cause Persons employed in connection with the Hold Separate Assets to:
- (a) operate the Hold Separate Assets independently of Agrium;
  - (b) operate the Hold Separate Assets in compliance with all applicable laws;

- (c) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations necessary for the operation of the Hold Separate Assets;
- (d) use commercially reasonable efforts to maintain the competitiveness of the Hold Separate Assets;
- (e) maintain and hold the Hold Separate Assets in good condition and repair, normal wear and tear excepted, and to standards at least equal to those that existed at the date of this Agreement;
- (f) take all commercially reasonable steps in relation to production to honour all customer contracts and to maintain quality and service standards for customers of products produced by the Hold Separate Assets at the level that existed at the date of this Agreement;
- (g) ensure that the Hold Separate Assets are not engaged in any type of business other than the type of business conducted as of the date of this Agreement, except with the prior approval of the Monitor and the Commissioner;
- (h) not communicate any Confidential Information related to the Hold Separate Assets to anyone other than the Monitor, the Commissioner, or as otherwise permitted herein;
- (i) not knowingly take or allow to be taken any action that materially and adversely affects the competitiveness, operations or financial status of the Hold Separate Assets;
- (j) not alter to any material extent, or cause to be altered, the management of the Hold Separate Assets as it existed immediately prior to the date of this Agreement, except: (i) as may be necessary to comply with the terms of this Agreement; (ii) to replace employees that may resign; or (iii) with the prior approval of the Monitor;
- (k) not terminate or alter any current employment, salary or benefit agreements for Persons employed in connection with the Hold Separate Assets, without the prior approval of the Monitor;
- (l) maintain, in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Hold Separate Assets; and
- (m) maintain inventory levels and payment terms materially consistent with the practices of Agrium that existed, with respect to the Hold Separate Assets, prior to the date of this Agreement.

**[18]** Agrium shall provide sufficient financial resources, as appropriate in the judgment of the Hold Separate Manager, with the concurrence of the Monitor:

- (a) to operate the Hold Separate Assets at least at the current rate of operation and to carry on, at least at their scheduled pace, all capital projects and business plans found in the Hold Separate Assets' most recent budgets, provided that failure to achieve production or sales goals shall not be a breach of this Agreement;
- (b) to continue, at least at their scheduled pace, any additional expenditures for the Hold Separate Assets authorized prior to the date of this Agreement;
- (c) to perform all maintenance to, and replacements of, the Hold Separate Assets; and
- (d) to maintain the viability, competitiveness and saleability of the Hold Separate Assets.

Such financial resources to be provided shall include, but shall not be limited to: (i) general funds; (ii) capital funds; (iii) working capital; and (iv) reimbursement for any operating losses, capital losses, or other losses.

**[19]** Agrium shall not attempt to influence, direct or control the Hold Separate Manager.

**[20]** Agrium shall indemnify the Hold Separate Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the Hold Separate Manager, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence or bad faith by the Hold Separate Manager.

**[21]** The Hold Separate Manager shall not (and shall cause any Persons employed in connection with the Hold Separate Assets to not) communicate any Confidential Information acquired in the performance of their duties to any Person, except to the extent required or permitted by this Agreement. The Hold Separate Manager and any officers of Agrium employed in connection with the Hold Separate Assets will each execute a confidentiality agreement in a form determined by the Commissioner.

**[22]** The Hold Separate Manager may, to the extent applicable, provide Confidential Information to Persons only for the purposes of preparing standard financial and regulatory reports, tax returns and benefits administration, and to comply with applicable laws and requirements of governmental authorities in Canada or the United States, provided that:

- (a) prior to disclosure of any Confidential Information, each Person shall execute a confidentiality agreement in a form determined by the Commissioner; and
- (b) the Persons shall use the Confidential Information only for the purposes permitted by this Agreement and shall not disclose such information to any other Person, whether or not an employee of Agrium.

- [23] Agrium shall not directly or indirectly receive or have access to or use or continue to use any Confidential Information relating to the Hold Separate Assets, except as permitted by this Agreement, and except to the extent that access to or use of such Confidential Information is necessary in the course of consummating the Transaction, defending investigations, defending or prosecuting litigation, obtaining legal advice, negotiating and meeting obligations under agreements to effect the Divestiture, and to the extent otherwise required by law.
- [24] Notwithstanding the above, Agrium may be provided with summaries in aggregate form, such as revenue summaries, cash receipt summaries and volume sales summaries, to the extent required by a public company to complete adequate financial reporting.
- [25] The Hold Separate Assets shall be staffed with sufficient employees, on a level consistent with past custom and practice, to maintain their viability and competitiveness. Persons employed in connection with the Hold Separate Assets shall include: (a) all personnel performing responsibilities primarily in connection with any of the Hold Separate Assets as of the Closing Date; and (b) any Persons subsequently hired in connection with the Hold Separate Assets. The Hold Separate Manager, with the approval of the Monitor, may replace departing or departed employees with Persons who have similar experience and expertise or determine not to replace such departing or departed employees.
- [26] Agrium shall ensure that Persons employed in connection with the Hold Separate Assets receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.

**V. MONITOR**

- [27] The Commissioner may appoint, fourteen (14) days prior to the Closing Date, a Monitor responsible for monitoring the compliance of Agrium and the Hold Separate Manager with this Agreement. Agrium shall be responsible for all reasonable fees and expenses properly charged or incurred by the Monitor in the course of carrying out his duties under this Agreement, and those of any substitute Monitor appointed pursuant to this Agreement. The Monitor shall account for all fees and expenses incurred and such account shall be subject to the approval of the Commissioner only. The Monitor's obligations and powers shall not expire under this Agreement until the Divestiture has been completed, and Agrium (or a Divestiture Trustee on Agrium's behalf, as the case may be) has entered into a legally binding Operating Agreement and Supply Agreement in accordance with this Agreement or further order of the Tribunal.
- [28] Within two (2) Business Days of the appointment of the Monitor, Agrium and the Monitor shall execute an agreement, subject to the approval of the Commissioner, reflecting the terms and conditions of this Agreement and that confers on the Monitor all of the rights and powers necessary to permit the Monitor to monitor Agrium's compliance with this Agreement.

- [29] If the Monitor ceases to act or fails to act diligently or otherwise in accordance with this Agreement, the Commissioner shall appoint a substitute Monitor in accordance with the terms of this paragraph, subject to the consent of Agrium, which shall not be unreasonably withheld. If Agrium has not opposed the selection of the substitute Monitor in writing, including the reasons for the opposition, within seven (7) days after notice by the Commissioner to Agrium of the identity of the substitute Monitor, Agrium shall be deemed to have consented to the selection of the substitute Monitor. Agrium and the substitute Monitor shall execute an agreement, subject to the approval of the Commissioner, reflecting the terms and conditions of this Agreement. In the event that Agrium objects to the Commissioner's appointment of a substitute Monitor, Agrium may apply to the Tribunal for appropriate relief on five (5) days notice to the Commissioner. The notice must set out the grounds for the objection. The provisions of this Agreement shall apply, *mutatis mutandis*, to any substitute Monitor appointed pursuant to this paragraph.
- [30] The Monitor shall have, subject to any valid claim to a legally recognized privilege, full and complete access to all personnel, books, records, documents and facilities related to the Hold Separate Assets and the Divestiture Assets or to any other relevant information, including Confidential Information, as the Monitor may reasonably request from Agrium. Agrium shall cooperate with any reasonable request of the Monitor. Agrium shall not take any action to interfere with or impede the Monitor's ability to oversee Agrium's performance of this Agreement. Agrium shall not interfere with or impede the Monitor's compliance with this Agreement.
- [31] The Monitor shall serve without bond or security, at the expense of Agrium, on such reasonable and customary terms as are agreed with the approval of the Commissioner. If the Monitor and Agrium fail to agree on terms within two (2) Business Days from the date of the Monitor's appointment, the Commissioner shall establish the terms of the Monitor's service. The Monitor shall have the authority to engage, at the cost and expense of Agrium, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities under this Agreement.
- [32] Agrium shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of his duties under this Agreement. This includes all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not such claim results in any liability, except to the extent that such liabilities, losses, damages, claims or expenses result from malfeasance, gross negligence or bad faith by the Monitor.
- [33] The Monitor shall report in writing to the Commissioner:
- (a) concerning compliance with Part VI of this Agreement by Agrium during the Initial Sale Period, every seven (7) days following the Monitor's Appointment

until the expiry of the Initial Sale Period and within two (2) days following a request by the Commissioner or her staff for supplemental information; and

- (b) concerning compliance with all Parts of this Agreement by Agrium: (i) no later than thirty (30) days after the Closing Date and every thirty (30) days thereafter until the completion of the Divestiture, and the execution of a legally binding Operating Agreement and Supply Agreement, all in accordance with the terms of this Agreement; (ii) no later than thirty (30) days from the date upon which the Monitor's obligations and powers expire, as set out in paragraph 27 of this Agreement; and (iii) within five (5) days following a request by the Commissioner or her staff for supplemental information.

[34] Neither Agrium nor the Hold Separate Manager shall exert or attempt to exert any influence, direction or control over the Monitor.

[35] The Monitor is not the agent of Agrium and this Agreement shall not be construed as providing the Monitor with ownership, management, possession, charge or control of the Hold Separate Assets or the Divestiture Assets.

[36] The Monitor shall execute a confidentiality agreement in a form determined by the Commissioner pursuant to which the Monitor will undertake to Agrium not to disclose any Confidential Information acquired in the performance of the Monitor's duties to any Person, except as permitted by such confidentiality agreement or by this Agreement.

[37] If the Monitor believes that Agrium or the Hold Separate Manager is in breach of any of the terms of this Agreement, the Monitor shall immediately notify the Commissioner, Agrium and the Hold Separate Manager of the breach, setting out particulars of such breach.

## **VI. PRESERVATION OF THE DIVESTITURE ASSETS**

[38] Pending completion of the Divestiture, execution of a legally binding Operating Agreement and execution of a legally binding Supply Agreement, all in accordance with the terms of this Agreement, and except to the extent that such powers, duties and responsibilities are vested with the Hold Separate Manager, or where Agrium is prevented from exercising such powers, duties and responsibilities because they are vested with the Hold Separate Manager, Agrium shall:

- (a) ensure that the management and operation of the Carseland Facility continue in a manner that is reasonably consistent in nature, scope and magnitude with the past practices of Agrium relating to the Carseland Facility;
- (b) use commercially reasonable efforts to provide resources for the operational support of the Carseland Facility to maintain production and operations, and to maintain sales, marketing and business plans existing at the date of this Agreement, in a manner that is reasonably consistent in nature, scope and magnitude with the past practices of Agrium;



- (c) use commercially reasonable efforts to maintain the viability, saleability, competitiveness and the customer base for the products produced at the Carseland Facility;
- (d) maintain all approvals, registrations, consents, licences, permits, waivers, and other authorizations necessary for the operation of the Carseland Facility;
- (e) maintain and hold the Carseland Facility in good condition and repair, normal wear and tear excepted, and to standards at least equal to those that existed at the date of this Agreement;
- (f) operate the Carseland Facility in the ordinary course of business and in accordance with past practices, generally accepted industry practices and in material compliance with all applicable laws;
- (g) ensure that the Carseland Facility is not engaged in any type of business other than the type of business conducted as of the date of this Agreement, except with the prior approval of the Monitor and the Commissioner;
- (h) not knowingly take or allow to be taken any action that materially and adversely affects the competitiveness, operations or financial status of the Carseland Facility;
- (i) not materially curtail marketing, sales, promotional or other activities in respect of products originating from the Carseland Facility in connection with the solicitation of existing or prospective customers, except with the prior approval of the Monitor;
- (j) not alter to any material extent, or cause to be altered, the management of the Carseland Facility as it existed immediately prior to the date of this Agreement, except: (i) as may be necessary to comply with the terms of this Agreement and the Purchase Agreement; (ii) to replace employees that may resign; or (iii) with the prior approval of the Monitor;
- (k) maintain, in accordance with Canadian generally accepted accounting principles, separate and adequate financial ledger books and records of material financial information with respect to the Carseland Facility; and
- (l) maintain inventory levels and payment terms materially consistent with the practices of Agrium that existed, with respect to the Carseland Facility, prior to the date of this Agreement.

**[39]** Pending completion of the Divestiture, execution of a legally binding Operating Agreement and execution of a legally binding Supply Agreement, all in accordance with the terms of this Agreement, Agrium shall not, without the Commissioner's prior approval:

- (a) create any new encumbrances on the Carseland Facility, other than ordinary course obligations that are not due or delinquent;
- (b) enter into, withdraw from, amend or otherwise take steps to alter any obligations in material contracts relating to the Carseland Facility, except as necessary to implement the Agrium/Terra Transaction; or
- (c) make any material changes to the operation of the Carseland Facility, except as required to comply with this Agreement.

**[40]** Following the Closing Date and pending completion of the Divestiture, execution of a legally binding Operating Agreement and execution of a legally binding Supply Agreement, all in accordance with the terms of this Agreement, Agrium shall use commercially reasonable efforts to ensure that the CF Sales Force:

- (a) continues to conduct sales and marketing activities independently of Agrium;
- (b) continues to implement sales and marketing plans, and fulfill all contracts and forecasts, of CF as existed prior to the Closing Date;
- (c) sells, markets and allocates, independently of Agrium, Agrium's share of the volumes of Ammonia and Urea produced at the Medicine Hat Facility;
- (d) maintains, to the extent available, access and existing access rights to electronic ordering systems for customers of CF;
- (e) refrains from sharing with Agrium any Confidential Information related to the sale or marketing of volumes of Ammonia and Urea produced at the Medicine Hat Facility, except for summaries in aggregate form to the extent required by a public company to complete adequate financial reporting; and
- (f) reports to the Monitor as requested by the Monitor with respect to compliance with each of (a), (b), (c), (d) and (e) above.

**[41]** Pending completion of the Divestiture, execution of a legally binding Operating Agreement and execution of a legally binding Supply Agreement, all in accordance with the terms of this Agreement, Agrium shall staff the Carseland Facility with sufficient employees to maintain its viability, competitiveness and saleability. During such period, to the extent that any personnel employed in connection with the Carseland Facility leaves or has left employment, Agrium shall replace any such departing or departed personnel with persons who have at least equivalent experience and expertise, or determine, with the prior approval of the Commissioner, not to replace any such departing or departed personnel.

## **VII. DIVESTITURE PROCESS (INITIAL SALE PERIOD)**

**[42]** During the Initial Sale Period, Agrium shall use commercially reasonable efforts to:

- (a) complete the Divestiture, absolutely and in good faith, to Terra pursuant to, and in accordance with, the Purchase Agreement in the form attached hereto as Confidential Appendix “A”, or such other form of agreement agreed upon by Agrium and Terra and approved by the Commissioner; and
- (b) enter into a legally binding Supply Agreement with Terra in the form attached hereto as Confidential Appendix “B”, or such other form of agreement agreed upon by Agrium and Terra and approved by the Commissioner.

**[43]** Where Agrium enters into agreements as contemplated by each of paragraphs 42(a) and 42(b), such agreements shall constitute Remedial Agreements and shall be incorporated by reference and form part of this Agreement.

**[44]** In the event that Agrium fails to effect either of paragraphs 42(a) or 42(b) above, Agrium shall complete the Divestiture, enter into a legally binding Operating Agreement and enter into a legally binding Supply Agreement with a Purchaser in accordance with Part VIII of this Agreement.

**[45]** Upon execution of this Agreement, Agrium shall use all commercially reasonable efforts to obtain all consents and waivers from all Third Parties that are necessary to permit Agrium to complete the Divestiture to Terra, and/or to permit Terra to operate the Carseland Facility; provided, however, that Agrium may satisfy this requirement by certifying that Terra has executed all such agreements directly with each of the relevant Third Parties.

**VIII. DIVESTITURE PROCESS (ALTERNATE PURCHASER INITIAL SALE PERIOD)**

**[46]** In the event that, during the Initial Sale Period, Agrium fails to complete the Divestiture to Terra or enter into a legally binding Supply Agreement with Terra, Agrium shall, during the Alternate Purchaser Initial Sale Period:

- (a) complete the Divestiture to a Purchaser;
- (b) enter into a legally binding Operating Agreement with that Purchaser; and
- (c) enter into a legally binding Supply Agreement with that Purchaser,

provided that, in respect of each of (a), (b) and (c) above, the Purchaser is:

- (i) a Purchaser other than Terra;
- (ii) approved in writing by the Commissioner and the terms of the applicable agreement are approved in writing by the Commissioner, in her sole discretion;
- (iii) at arm’s length from Agrium; and

- (iv) able to satisfy the Commissioner, in her sole discretion, that they:
  - a. are committed to carrying on the business of the supply of Urea and Ammonia in the relevant market;
  - b. have the managerial, operational and financial capability to compete effectively in the supply of Urea and Ammonia in the relevant market; and
  - c. will complete the Divestiture, and enter into a legally binding Operating Agreement and a Supply Agreement prior to the expiry of the Alternate Purchaser Initial Sale Period.

The determination of whether the above conditions are satisfied is at the sole discretion of the Commissioner. In exercising her discretion to approve a Divestiture to a Purchaser, the Commissioner may take into account, *inter alia*, the likely impact of the Divestiture on competition. The decision of the Commissioner as to whether to approve the Divestiture shall be in writing.

[47] Any Person making a *bona fide* inquiry of Agrium shall be notified that the Divestiture is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions hereof that are confidential.

[48] Subject to paragraph 49 below, any prospective Purchaser with a *bona fide* interest in purchasing the Divestiture Assets shall:

- (a) be furnished with all pertinent information regarding the Divestiture Assets within fourteen (14) days of a request therefor;
- (b) be permitted to make reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged documents and information, including Confidential Information, which may be relevant to the Divestiture, except for any documents which, at the time of the request for inspection of such documents the Commissioner has agreed need not be disclosed; and
- (c) be given such full and complete access as is reasonable in the circumstances to the management personnel relating to the Divestiture Assets.

If the Monitor is concerned as to the *bona fides* of any Person making an inquiry, the Monitor shall advise the Commissioner of such concern and the final determination of *bona fides* shall be made by the Commissioner alone.

[49] Access by a potential Purchaser to the information identified in paragraph 48 above shall be conditional on the execution of a standard confidentiality agreement in a form determined by the Commissioner containing, among other things, non-solicitation terms relating to customers, personnel and suppliers, and protections to the benefit of Agrium against the disclosure of Agrium's Confidential Information.

- [50] Where Agrium enters into agreements as contemplated by each of paragraphs 46(a), 46(b) and 46(c), such agreements shall constitute Remedial Agreements and shall be incorporated by reference and form part of this Agreement.

**IX. DIVESTITURE TRUSTEE PROCESS**

- [51] In the event that Agrium fails to:

- (a) complete the Divestiture to Terra pursuant to, and in accordance with, the Purchase Agreement, or enter into a legally binding Supply Agreement with Terra during the Initial Sale Period as contemplated by section 42; and
- (b) complete the Divestiture, enter into a legally binding Operating Agreement or enter into a legally binding Supply Agreement with a Purchaser as contemplated by section 46,

the Commissioner may appoint a Divestiture Trustee to, within the Divestiture Trustee Sale Period, complete the Divestiture, and enter into a legally binding Operating Agreement and Supply Agreement with a Purchaser approved by the Commissioner and on terms approved by the Commissioner (including those terms set out at Confidential Appendix “D”), in her sole discretion, by whatever procedure the Divestiture Trustee believes in its sole discretion is suitable.

- [52] The Commissioner may appoint the Divestiture Trustee five (5) days before the expiry of the Alternate Purchaser Initial Sale Period. Immediately following the appointment of the Divestiture Trustee, and prior to the expiry of the Alternate Purchaser Initial Sale Period, Agrium shall provide the Divestiture Trustee with complete access to all information relating to the Divestiture Assets, including Confidential Information, to facilitate the Divestiture by the Divestiture Trustee.

- [53] The Divestiture Trustee shall have full and exclusive authority during the Divestiture Trustee Sale Period to complete the Divestiture, enter into a legally binding Operating Agreement and enter into a legally binding Supply Agreement with a Purchaser that are binding on Agrium. Agrium shall be bound by any Operating Agreement, Supply Agreement and agreement to complete the Divestiture entered into by the Divestiture Trustee on behalf of Agrium in accordance with this Part. Agrium agrees that it will do all such acts and execute all such further documents, and will cause the doing of all such acts and the execution of all such further documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that agreements entered into by the Divestiture Trustee are binding upon and enforceable against Agrium.

- [54] Any Person making a *bona fide* inquiry of the Divestiture Trustee shall be notified that the Divestiture is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions hereof that are confidential. For greater clarity, information in Confidential Appendices “A” and “B” may be disclosed to prospective Purchasers by the Divestiture Trustee upon expiration of the

Alternate Purchaser Initial Sale Period, provided that, prior to any such disclosure by the Divestiture Trustee, the prospective Purchaser shall execute a confidentiality agreement in a form determined by the Commissioner.

[55] Agrium consents to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority and responsibilities:

- (a) Subject to oversight and approval by the Commissioner only, the Divestiture Trustee shall have the exclusive authority to control the Divestiture and the negotiation of an Operating Agreement and a Supply Agreement and, subject to this Agreement, to accomplish the Divestiture and enter into a legally binding Operating Agreement and a Supply Agreement by whatever procedure the Divestiture Trustee believes in its discretion is suitable, as soon as practicable within the Divestiture Trustee Sale Period or such longer period as directed by the Commissioner.
- (b) Agrium will not be included in the Divestiture or the Operating Agreement or Supply Agreement process, including negotiations, nor will Agrium have contact with prospective Purchasers, except with the prior approval of the Commissioner; however, the Divestiture Trustee may consult with Agrium in the presence of a representative of the Commissioner when the Divestiture Trustee considers such consultation to be appropriate and the Commissioner consents.
- (c) Notwithstanding any term of this Agreement, the Divestiture Trustee's obligations and powers under this Agreement shall not expire until the Divestiture is completed to a Purchaser, and the Divestiture Trustee, on behalf of Agrium, has entered into a legally binding Operating Agreement and Supply Agreement with that Purchaser.
- (d) The Divestiture Trustee shall execute, on behalf of Agrium, a standard confidentiality agreement in a form determined by the Commissioner, and shall refrain from communicating any Confidential Information to anyone except to the extent reasonably required to complete the Divestiture to a Purchaser, and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser, and provided that such Person shall have agreed in writing to keep the information confidential.
- (e) The Commissioner may extend the Divestiture Trustee Sale Period as the Commissioner considers necessary, in her sole discretion, to complete the Divestiture to a Purchaser and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser.
- (f) The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Divestiture Assets, the Operating Agreement and the Supply Agreement, and to any other information, including Confidential Information, deemed relevant by the Divestiture Trustee to complete

the Divestiture to a Purchaser and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser. Agrium shall take no action to interfere with or impede the Divestiture Trustee's efforts to complete the Divestiture to a Purchaser and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser.

- (g) Agrium shall fully and promptly respond to all requests from the Divestiture Trustee and shall provide all information the Divestiture Trustee may request. Agrium shall identify an individual who shall have primary responsibility for responding to such requests from the Divestiture Trustee on behalf of Agrium.
- (h) The Divestiture Trustee shall use commercially reasonable efforts to negotiate terms and conditions that are favourable to Agrium as are reasonably available at that time for the Divestiture, the Operating Agreement and the Supply Agreement, having regard to the terms attached hereto as Confidential Appendices "A" and "B"; however, the Divestiture, Operating Agreement and Supply Agreement shall be on such terms as the Divestiture Trustee considers reasonably necessary to complete the Divestiture to a Purchaser, and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser, including the terms set out at Confidential Appendix "D". The Divestiture Trustee's opinions of what constitutes favourable terms and conditions and what constitutes reasonably available terms and conditions are subject to the Commissioner's approval only.
- (i) The Divestiture Trustee shall have the sole authority to determine, and Agrium shall provide, all reasonable and ordinary commercial covenants, representations, warranties and indemnities for the purpose of completing the Divestiture to a Purchaser and entering into a legally binding Operating Agreement and Supply Agreement with that Purchaser, including representations, warranties and indemnities relating to environmental matters typically included in transactions of the size and nature contemplated in this Agreement.
- (j) The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Agrium, and on such reasonable and customary terms and conditions as the Commissioner may set.
- (k) Agrium shall pay all reasonable invoices submitted by the Divestiture Trustee on a monthly basis. Any outstanding monies owed to the Divestiture Trustee by Agrium shall be paid out of the proceeds of the Divestiture, Operating Agreement and Supply Agreement.
- (l) The Divestiture Trustee shall have the authority to employ, at the expense of Agrium, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities.

- (m) Agrium shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation or defence of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence or bad faith by the Divestiture Trustee.
- (n) If the Divestiture Trustee ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Divestiture Trustee, the Commissioner may appoint a substitute Divestiture Trustee in the same manner as provided in this Part IX for the initial Divestiture Trustee.
- (o) The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.
- (p) The Divestiture Trustee shall report in writing to the Commissioner every twenty-one (21) days following the date of the Divestiture Trustee's appointment, and upon the Commissioner's request within three (3) days, concerning the Divestiture Trustee's efforts to complete the Divestiture to a Purchaser and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser. Such reports shall contain reasonable detail on the steps being taken by the Divestiture Trustee to complete the Divestiture to a Purchaser and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser, including but not limited to: the identity of prospective Purchasers; the status of negotiations with such prospective Purchasers; and any additional information requested by the Commissioner.
- (q) The Divestiture Trustee shall notify the Commissioner of any proposed Operating Agreement, Supply Agreement or agreement to Divest the Divestiture Assets. Such notice shall include: the identity of the proposed Purchaser; the details of the proposed agreements; information concerning whether, in the view of the Divestiture Trustee, the proposed Purchaser would likely satisfy the terms of this Agreement; and any additional information requested by the Commissioner.
- (r) The Divestiture Trustee shall only complete the Divestiture, enter into a legally binding Operating Agreement and enter into a legally binding Supply Agreement with a Purchaser:
  - (i) approved in writing by the Commissioner and on terms approved in writing by the Commissioner, in her sole discretion;
  - (ii) at arm's length from Agrium; and



- (iii) who is able to satisfy the Commissioner, in her sole discretion, that they:
  - a. are committed to carrying on the business of the supply of Urea and Ammonia in the relevant market;
  - b. have the managerial, operational and financial capability to compete effectively in the supply of Urea and Ammonia in the relevant market; and
  - c. will complete the Divestiture, and enter into a legally binding Operating Agreement and a Supply Agreement prior to the expiry of the Divestiture Trustee Sale Period.

The determination of whether the above conditions are satisfied is at the sole discretion of the Commissioner. In exercising her discretion to approve a Divestiture to a Purchaser, the Commissioner may take into account, *inter alia*, the likely impact of the Divestiture on competition. The decision of the Commissioner as to whether to approve the Divestiture shall be in writing.

- (s) If the Commissioner notifies the Divestiture Trustee that she has approved a proposed Divestiture, Operating Agreement and Supply Agreement, the Divestiture Trustee shall forthwith notify Agrium, in writing. Such notice shall include the identity of the proposed Purchaser and the details of the proposed Divestiture, Operating Agreement and Supply Agreement.
- (t) Any agreements entered into by the Divestiture Trustee, on behalf of Agrium, pursuant to this Part IX shall constitute Remedial Agreements and shall be incorporated by reference and form part of this Agreement.
- (u) Agrium may not object to or challenge the performance of the Divestiture Trustee's duties under this Agreement or any Divestiture Trustee Sale on any grounds other than the Divestiture Trustee's malfeasance, gross negligence or bad faith in executing its obligations hereunder. If Agrium objects to the terms and conditions of a Divestiture, an Operating Agreement or a Supply Agreement that has been proposed by the Divestiture Trustee on grounds of malfeasance, gross negligence or bad faith by the Divestiture Trustee, Agrium or the Commissioner may apply to the Tribunal for directions, but in no event shall any such dispute serve to suspend the Divestiture Trustee Sale Period.

## **X. FAILURE OF DIVESTITURE TRUSTEE SALE**

- [56] If, by the end of the Divestiture Trustee Sale Period (including any extensions), the Divestiture has not been completed to a Purchaser, the Divestiture Trustee (on behalf of Agrium) has not entered into a legally binding Operating Agreement with the Purchaser, or the Divestiture Trustee has not entered into a legally binding Supply Agreement with the Purchaser, or if the Commissioner is of the opinion that the Divestiture will not likely be completed or that the Divestiture Trustee will not likely enter into a legally binding

Operating Agreement or Supply Agreement prior to the end of the Divestiture Trustee Sale Period, the Commissioner may apply to the Tribunal for such an order as is necessary to complete the Divestiture to a Purchaser, and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser, or for such an order as is necessary to ensure that the Transaction is not likely to prevent or lessen competition substantially.

- [57] Agrium agrees that the Tribunal has jurisdiction to grant such relief as is required to give effect to this Agreement and complete the Divestiture to a Purchaser, and enter into a legally binding Operating Agreement and Supply Agreement with that Purchaser.

## **XI. REMEDIAL AGREEMENTS**

- [58] Any Remedial Agreement shall be deemed incorporated into this Agreement.
- [59] Any failure by Agrium to comply in any material respect with any term of a Remedial Agreement, which has not been promptly remedied upon notice of non-compliance, shall constitute a failure to comply with this Agreement.
- [60] Agrium shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commissioner.
- [61] Where the Commissioner approves amendments or modifications to any Remedial Agreement, such amended and modified Remedial Agreement shall become a Remedial Agreement and shall be deemed incorporated into this Agreement.
- [62] For a period of ten (10) years from the date of this Agreement, Agrium shall not, without the prior approval of the Commissioner, enter into any agreements that vary, amend, limit, contradict or impair the effectiveness of, or that may be construed to vary, amend, limit, contradict or impair the effectiveness of, the terms of this Agreement or any Remedial Agreement.

## **XII. COMPLIANCE**

- [63] For a period of ten (10) years from the Closing Date, Agrium shall not acquire, directly or indirectly, without the prior approval of the Commissioner: (i) the Divestiture Assets; (ii) any interest of Terra or another Purchaser in the Supply Agreement; or (iii) any Urea or Ammonia products produced from the Divestiture Assets or the Urea required to be supplied under the terms of the Supply Agreement.
- [64] Agrium shall (i) six months from the Closing Date, and every six months thereafter for a period of five (5) years, provide to the Commissioner a declaration of compliance with this Agreement and (ii) provide to the Commissioner information requested by the Commissioner to confirm compliance with this Agreement no later than ten (10) Business Days after receiving a request for such information from the Commissioner.

[65] For a period of ten (10) years from the date of this Agreement, in the event of a material breach of any of the terms of this Agreement (including a breach of any term of any Remedial Agreement by Agrium or a Purchaser), Agrium shall, upon becoming aware of such breach, promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual or anticipated) of the breach.

[66] For purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, and upon written request and upon two (2) Business Days notice to Agrium, Agrium shall, without restraint or interference, permit any duly authorized representative(s) of the Commissioner:

(a) access, during regular office hours of Agrium on Business Days, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Agrium related to compliance with this Agreement, which copying services shall be provided by Agrium at its expense; and

(b) to interview officers, directors, or employees of Agrium regarding such matters,

it being understood that this section 66 shall not be construed so as to derogate from any protections afforded by section 29 of the Act.

[67] Agrium shall not be deemed to be in default under this Agreement if such default is caused by or is attributable to fire, storm, flood, war, hostilities, sabotage, blockade, explosion, accident, pandemic, strike, lockout, work stoppage or slowdown, labour disturbance, riot, rebellion, insurrection, act of God, acts of governmental bodies, expropriation of or material injury to any facilities used in or for the production, transportation, manufacture, storage, handling or delivery of nitrogen products, or any other occurrence (whether similar or dissimilar to any of the foregoing) which is beyond the reasonable control of Agrium and which by the exercise of reasonable foresight and due diligence Agrium is unable to prevent or overcome (a “**Force Majeure Event**”); provided that: (a) notice of the Force Majeure Event is promptly provided; (b) a workaround strategy is promptly developed; and (c) all commercially reasonable efforts are used to implement the work-around strategy and to otherwise resume performance of this Agreement given the circumstances.

### XIII. NOTIFICATION

[68] Agrium shall provide a copy of this Agreement to each of its own and its Affiliates' officers, employees, or agents having managerial responsibility for any obligations under this Agreement, no later than ten (10) Business Days from the date this Agreement is registered.

[69] Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement or in any proceedings arising herefrom before the Tribunal shall

be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties as follows:

(a) If to the Commissioner:

Commissioner of Competition  
Competition Bureau  
Industry Canada  
Place du Portage, 21st Floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9

Attention: Melanie L. Aitken, Commissioner of Competition  
Fax: (819) 953-5013

With a copy to:

Executive Director and Senior General Counsel  
Competition Law Division  
Department of Justice  
Place du Portage, 22nd Floor  
50 Victoria Street, Phase I  
Gatineau, Quebec K1A 0C9

(b) If to Agrium:

General Counsel  
Agrium Inc.  
13131 Lake Fraser Drive SE  
Calgary, Alberta  
T2J 7E8  
Canada

Attention: Joni R. Paulus  
Fax: (403) 225-7610

With a copy to:

Blake, Cassels & Graydon LLP  
Commerce Court West  
199 Bay Street, 28<sup>th</sup> Floor  
Toronto, Ontario, M5L 1A9

Attention: Robert E. Kwinter/Brian A. Facey  
Fax: (416) 863-2653

or to such other street address, individual or electronic communication number or address as may be designated by notice given by any party to the other parties. Any demand, notice or other communication given by personal delivery will be conclusively deemed to have been given on the day of actual delivery and, if given by registered mail, on the fifth (5<sup>th</sup>) Business Day following the deposit thereof in the mail and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day. If the party giving any demand, notice or other communication knows or ought reasonably to know of any difficulties with the postal system that might affect the delivery of mail, any such demand, notice or other communication may not be mailed but must be given by personal delivery or by electronic communication.

**XIV. GENERAL**

- [70] Agrium agrees to the immediate registration of this Agreement with the Tribunal.
- [71] Subject to paragraph 54 of this Agreement, the Commissioner agrees that Confidential Appendices “A”, “B”, “C” and “D” shall not form part of the public version of this Agreement and shall remain confidential at all times during and following the duration of this Agreement.
- [72] The Commissioner may, in her sole discretion, extend any of the time periods contemplated by this Agreement. Agrium and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to section 106(1) of the Act.
- [73] Nothing in this Agreement (including the recitals hereto) precludes Agrium from bringing an application under section 106 of the Act (or a successor or equivalent provision under the Act) to vary or rescind this Agreement on the grounds that the circumstances that led to the making of this Agreement have changed and the other requirements of section 106 are satisfied. Agrium agrees that it shall not, in any such application, contest the Commissioner’s present conclusions that: (i) the Transaction is likely to prevent or lessen competition substantially in the wholesale supply of Ammonia and Urea in Western Canada, or parts thereof; and (ii) that the implementation of this Agreement is necessary to ensure that any substantial lessening and/or prevention of competition would not result from the Transaction.
- [74] Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purpose of this Agreement, the definition of “holiday” in the *Interpretation Act* shall be deemed to include Saturday.
- [75] This Agreement constitutes the entire agreement between the Commissioner and Agrium and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.

- [76] Nothing in this Agreement abrogates the notification obligations set out in Part IX of the Act.
- [77] In the event of a dispute regarding the interpretation, application or implementation of this Agreement, including any decision by the Commissioner pursuant to this Agreement or any breach of this Agreement by Agrium, any of the Commissioner, the Monitor or Agrium may apply to the Tribunal for directions or a further order. In no event shall any dispute serve to suspend the Initial Sale Period, the Alternate Purchaser Initial Sale Period or the Divestiture Trustee Sale Period except by order of the Tribunal.
- [78] This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English language and French language versions of this Agreement, the English language version shall prevail.

The undersigned hereby agree to the registration of this Agreement.

**DATED** this 4<sup>th</sup> day of November, 2009.

[Original Signed by “Melanie L. Aitken”]

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Melanie L. Aitken  
Commissioner of Competition

**AGRIUM INC.**

By: [Original Signed by “Joni R. Paulus”]

Name: Joni R. Paulus  
Title: General Counsel

**CONFIDENTIAL APPENDIX “A”  
PURCHASE AGREEMENT**

**[CONFIDENTIAL]**

**CONFIDENTIAL APPENDIX “B”  
SUPPLY AGREEMENT**

**[CONFIDENTIAL]**



**CONFIDENTIAL APPENDIX “C”  
SALE PERIODS**

**[CONFIDENTIAL]**

**CONFIDENTIAL APPENDIX “D”  
DIVESTITURE PROCESS**

**[CONFIDENTIAL]**