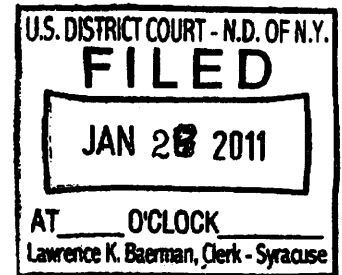


UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK



THE STATE OF NEW YORK and THE NEW  
YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 7:10-CV-1495

District Court Judge Norman A. Mordue

Magistrate Judge George H. Lowe

RECEIVED

ENVIRONMENTAL QUALITY  
REGION 6

**CONSENT DECREE**

**WHEREAS:**

A. Contemporaneously with the lodging of this Consent Decree, the State of New York and the New York State Department of Environmental Conservation (collectively, "the State") filed a Complaint in the above-referenced matter, alleging the following:

- (i) The United States Army ("the Army") owns and operates a petroleum storage and distribution facility (commonly called the "Oasis fuel system"), located at the Wheeler-Sack Airfield on the Fort Drum Military Installation (commonly called "Fort Drum") town of LeRay, Jefferson County, New York. The Oasis fuel system includes two 110,000 gallon above-ground storage tanks and a hydrant fuel system that includes pumps and underground pipes for distribution of aviation fuel at Fort Drum.
- (ii) In April 2006, the Army reported a discharge of JP-8 jet fuel from Service Pit No. 6 at the northern end of the Oasis fuel system (hereinafter referred to as "the Site"). The discharge has been attributed to a failed pressure relief valve located within Service Pit No. 6. This spill occurred continuously from at least 2003 until April 2006.
- (iii) Sampling of groundwater underlying Fort Drum shows it to be contaminated with petroleum in concentrations exceeding New York State drinking water standards

and otherwise constituting an imminent and substantial endangerment to health and the environment, in violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C § 6972(a)(1)(B), and the New York State Environmental Conservation Law ("ECL") Article 17 ("Water Pollution Control Act").

- (iv) The discharge resulted in the Site being contaminated in three distinct ways: (1) by creating a layer of petroleum, known as light non-aqueous phase liquids ("LNAPL") that floats within or on top of the groundwater; (2) by creating a dissolved phase plume within the groundwater; and (3) by contaminating soils.

B. Since January 2007, the Army has undertaken interim remedial measures ("IRMs") to recover LNAPL from the Site, including utilization of vacuum enhanced product recovery which will continue to operate until full scale LNAPL recovery is initiated.

C. In or around June 2008, the New York State Department of Environmental Conservation ("DEC") and the Army agreed to proceed with a Treatability Study to determine the appropriateness of using surfactants to enhance the LNAPL removal. Since surfactant enhancement is an innovative technology, the Army agreed to proceed first with a Treatability Study and, if favorable results were obtained, a subsequent Pilot Study to demonstrate the effectiveness of the technology in removing LNAPL from the Site.

D. On November 26, 2008, the Army submitted to DEC a Treatability Study Work Plan - a proposed laboratory analysis to determine the effectiveness of surfactants in removing LNAPL from the Site and implemented the Work Plan.

E. On March 12, 2009, the Army submitted to DEC a Final Treatability Study Report. On July 29, 2009, the Army submitted to DEC a Final Surfactant-Enhanced Aquifer Remediation Pilot Study Work Plan. DEC approved that Work Plan on August 3, 2009. The Surfactant Enhanced Aquifer Remediation Pilot Study has been completed at the Site and a draft Surfactant-Enhanced Aquifer Remediation Pilot Study Summary Report was submitted electronically by the Army to DEC on January 21, 2010.

F. The primary purpose of this Consent Order is to specify the requirements with which the Army must comply concerning the completion of LNAPL removal from the groundwater at the Site, whether as part of an IRM or final remedial action, and implementation of any necessary remedial actions to address the dissolved phase plume within groundwater and the contaminated soil at the Site.

G. On May 5, 2010, the State notified the United States by certified letter, pursuant to 42 U.S.C. § 6972(b)(2)(A), of its intent to commence a citizen suit action to compel the Army to take all remedial measures to abate the discharge of jet fuel into the environment.

H. The State asserts that Section 6001(a) of RCRA waives sovereign immunity for the United States and requires “[e]ach department, agency, and instrumentality of the executive . . . engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all . . . State . . . requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal.” 42 U.S.C. § 6961(a).

I. The United States has not answered or otherwise responded to the Complaint, and states that it is agreeing to the obligations imposed by this Consent Decree to avoid the costs and uncertainties of litigation and to improve the environment.

J. The Parties recognize, and the Court by entering this Consent Decree, finds that this Consent Decree has been negotiated in good faith and at arm’s length and that this Consent Decree is fair, reasonable, consistent with the goals of RCRA, and in the public interest.

K. The State and the United States have consented to entry of this Consent Decree without trial of any issue.

L. The Parties have agreed to settlement of this action because it is in the best interest of the Parties and in the public interest, and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter.

**NOW, THEREFORE**, without any admission of fact or law, without any adjudication on the merits of the allegations set forth in the Complaint and without any admission of the violations alleged in the Complaint, it is hereby **ORDERED AND ADJUDGED** as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction of this matter pursuant to 42 U.S.C. § 6972(a)(1)(B), which authorizes “any person [to] commence a civil action on his own behalf . . . against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”<sup>1</sup> Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b) and 1395 because the Army owns and operates Fort Drum located in this judicial district.

2. Solely for the purposes of this Consent Decree and the underlying Complaint, the United States waives all objections and defenses that it may have to the Court’s jurisdiction over this action, to the Court’s jurisdiction over the Army, and to venue in this District. For purposes of the Complaint filed by the State in this matter and resolved by the Consent Decree, and for purposes of entry and enforcement of this Consent Decree, the United States waives any defense or objection based on standing as to the State.

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<sup>1</sup> The term “person” is defined to include a “State” and “any political subdivision of a State.” *Id.* at §6903(15).

3. This Consent Decree shall not create any rights in any party other than the Parties to this Consent Decree. The Parties consent to entry of this Consent Decree without further notice.

## **II. APPLICABILITY**

4. Upon entry, the provisions of this Consent Decree shall apply to and be binding upon the State and upon the United States of America, including its departments, agencies and instrumentalities, and its employees and agents solely in their official capacities.

5. The Army shall provide notice of and access to a copy of this Consent Decree to all vendors, suppliers, consultants, contractors, agents, and any other company or other organization retained to perform any of the work required by this Consent Decree. Notwithstanding any retention of contractors, subcontractors, or agents to perform any work required under this Consent Decree, the Army shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Decree.

## **III. DEFINITIONS**

6. Terms used in this Consent Decree, that are defined in the ECL or in regulations promulgated by the DEC pursuant to the ECL, shall have the meanings assigned to them in the ECL or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Effective Date" shall mean the date upon which this Consent Decree is entered by the Court.
- b. "Site" refers to the area within the vicinity of the Wheeler-Sack airfield of Fort Drum, Jefferson County, New York, that has been contaminated or affected by the discharge of petroleum from the Oasis fuel system as approximated in Exhibit A.

- c. "Treatability Study" refers to laboratory analyses the Army completed, in accordance with the Treatability Study Work Plan that was submitted to the DEC on 26 November 2008, to evaluate the potential for remediation of the vadose zone soils and LNAPL at the water table interface with surfactant-enhanced removal.
- d. "Pilot Study" refers to the field study the Army conducted to evaluate the potential for remediation of the vadose zone soils and LNAPL at the water table interface with surfactant enhanced remediation. The Pilot Study was conducted in accordance with the Final Surfactant-Enhanced Aquifer Remediation Pilot Study Work Plan approved by DEC on 3 August 2009.
- e. "Remedial Action Selection Report" refers to the report the Army shall prepare in accordance with DEC's Division of Environmental Remediation, DER-10 Technical Guidance for Site Investigation and Remediation, issued May 3, 2010 (hereinafter "DER-10"), to evaluate and select technologies for remediation of the contamination not addressed by the Interim Remedial Measures or IRMs approved by DEC.
- f. "Addendum to the Remedial Action Selection Report" refers to the report the Army will prepare in accordance with DER-10 to address remediation of groundwater at the Site.
- g. "Work Plan" refers to a plan or plans of activities approved by DEC that the Army will undertake to remediate the Site, as described in DER-10.
- h. "Day" refers to calendar day. In computing any period of time for compliance with this agreement, if the last day falls on a Saturday, Sunday, or federal or state holiday, the period of compliance shall run until the close of business on the next working day.

#### **IV. COMPLIANCE OBLIGATIONS**

##### ***A. Remediation of Site***

7. Unless otherwise approved by DEC, the Army shall restore the Site to pre-discharge conditions, to the extent technically feasible. Additionally, the Army's restoration to pre-discharge conditions shall be in accordance with Work Plans either to be submitted or previously submitted and approved by the DEC, as specifically discussed in paragraphs 9 and 10 below. The schedule for such remediation is as follows:

- a. The Army shall implement appropriate IRMs designed to remove, to the extent practicable, the LNAPL present at the water table interface and vadose zone at the Site in accordance with DEC-approved Work Plans.
  - b. Within eighteen (18) months of the Effective Date, the Army shall conclude implementing all approved IRMs and submit to DEC an approvable IRM Summary Report. Any further action needed to define the full nature and extent of the petroleum impact at the Site must conform to the procedures outlined in DER-10. The term "approvable" in this context shall mean that the IRM Summary Report (i) is accurate and prepared in accordance with applicable professional standards, and (ii) reflects substantial compliance with the ECL and the regulations and standards promulgated pursuant thereto.
  - c. Within three (3) years of the Effective Date or a different timeframe agreed to by the parties, the Army shall implement a Remedial Action acceptable to DEC to achieve compliance with water quality standards promulgated in 6 New York Code of Rules and Regulations ("NYCRR") Part 703 for Class GA waters, with the goal of achieving these standards within five (5) years of the completion of the IRMs. The Army shall also comply with any such Remedial Action approved by DEC.
8. Any of the deadlines set forth in Paragraphs 9 and 10 below may be extended by the written agreement of the parties and notice to the Court.

*i. Implementation of Interim Remedial Measures*

9. The Army shall achieve the following benchmarks subject to provisions in Sections VIII, IX, and X of this Consent Decree:

- a. The Army shall submit a draft Surfactant-Enhanced Aquifer Remediation Pilot Study Summary Report to DEC within thirty (30) days after completion of the Pilot Study field activities.
- b. The Army shall submit a Final Surfactant-Enhanced Aquifer Remediation Pilot Study Summary Report within fifteen (15) days of receipt of DEC's comments to the draft report. The Final Surfactant-Enhanced Aquifer Remediation Pilot Study Summary Report shall either recommend full-scale implementation of surfactant enhanced removal as an IRM or, in the event that the pilot study results indicate that this approach is not suitable for the Site, a proposed schedule to evaluate and implement an alternative technology to remove LNAPL from groundwater at the Site.
- c. The Army shall submit a draft Data Gap Study Summary Report to DEC within thirty (30) days after completion of the Data Gap Study field activities.

- d. The Army shall submit a Final Data Gap Study Summary Report within fifteen (15) days of receipt of DEC's comments to the draft report.
- e. The Army shall submit a Draft IRM Work Plan within forty-five (45) days after submission of the Final Surfactant Enhanced Aquifer Remediation Pilot Study Summary Report to DEC.
- f. The Army shall submit a Final IRM Work Plan within thirty (30) days of receipt of DEC's comments to the draft work plan.
- g. The Army shall complete full scale implementation of the IRM within sixteen (16) months of DEC's approval of the Final IRM Work Plan.
- h. The Army shall submit a Draft IRM Summary Report to DEC within thirty (30) days after completion of the Final IRM Work Plan field activities.
- i. The Army shall submit a Final IRM Summary Report to DEC within fifteen (15) days of receipt of DEC's comments to the draft report.

*ii. Implementation of the Remedial Action*

- 10. The Army shall achieve the following benchmarks subject to the provisions in

Sections VIII, IX, and X of this Consent Decree:

- a. The Army shall submit a Draft Remedial Investigation Work Plan within forty-five (45) days after submission of the Final IRM Summary Report.
- b. The Army shall submit a Final Remedial Investigation Work Plan within thirty (30) days of receipt of DEC's comments to the draft work plan.
- c. The Army shall complete implementation of the Remedial Investigation within six (6) months of DEC's approval of the Final Remedial Investigation Work Plan.
- d. The Army shall submit a Draft Remedial Investigation Report within forty-five (45) days after completion of the Final Remedial Investigation Work Plan field activities.
- e. The Army shall submit a Final Remedial Investigation Report within fifteen (15) days of receipt of DEC's comments to the draft report.
- f. The Army shall submit a Revised Draft Remedial Action Selection Report that addresses all residual petroleum impacts that are not addressed by the Final IRM within forty-five (45) days after submission of the Final Remedial Investigation Report.
- g. The Army shall submit a Final Remedial Action Selection Report within thirty (30) days of receipt of DEC's comments to the revised draft report.



- h. The Army shall submit a Draft Remedial Action Design Report within forty-five (45) days of DEC's approval of the Final Remedial Action Selection Report.
- i. The Army shall submit a Final Remedial Action Design Report within fifteen (15) days of receipt of DEC's comments to the draft design report.
- j. The Army shall submit a Draft Remedial Action Work Plan within forty-five (45) days of DEC's Approval of the Final Remedial Design Report.
- k. The Army shall submit a Final Remedial Action Work Plan within fifteen (15) days of receipt of DEC's comments to the draft work plan.
- l. The Army shall initiate implementation of the Final Remedial Action Work Plan within thirty (30) days of DEC's approval of said plan. The Army shall submit to DEC all supporting documentation and a Final Engineering Report in accordance with the schedule contained therein. The Final Engineering Report shall be prepared in accordance with DER-10 and certify that the Compliance Obligations detailed in Paragraph 8 of this Section have been met.
- m. The Army shall submit a Draft Operation, Maintenance, and Monitoring ("OM&M") Plan within forty-five (45) days after completion of the Final Remedial Action Work Plan field activities, which shall included, but not be limited to, undertaking an annual review to ensure that the Remedial Action is, or will be, protective of human health and the environment
- n. The Army shall submit a Final OM&M Plan within thirty (30) days of receipt of DEC's comments to the draft plan.
- o. Upon DEC's approval of the Final OM&M Plan the Army shall initiate implementation of such plan, and submit documents and final reports in accordance with the schedule contained therein.

*iii. Responsibilities With Respect to All Work Plans*

11. All activities undertaken to remediate the petroleum discharge at the Site shall be conducted pursuant to Work Plans that are:

- a. Developed and implemented in accordance with DER-10.
- b. Entitled with the applicable Work Plan title as given in paragraphs 9 and 10, or otherwise expressed in DER-10;
- c. Prepared, signed, and sealed by a Professional Engineer; and
- d. Approved by the DEC in writing.

12. Submission and Implementation of Work Plans: In accordance with DER-10, any proposed Work Plan shall include, at a minimum, a chronological description of all activities anticipated to remediate the Site (in sufficient detail to allow DEC to evaluate such Work Plan) and a schedule for performance of such activities, including the date by which the Army shall submit a Final Report. After submission of any such Work Plan to DEC, the Army shall thereafter take all actions necessary to obtain approval of such Work Plan from DEC, including, but not limited to, responding to reasonable requests for additional information by DEC in a timely fashion. In the event DEC disapproves a Work Plan, the Army shall modify or expand such Work Plan within thirty (30) days after receiving written notice of such disapproval. Upon DEC's written approval of a Work Plan, the Army shall implement such Work Plan in accordance with its terms, including the schedule contained therein.

13. Revisions to Work Plans: DEC may require the Army to revise a Work Plan after its initial approval if good cause is shown to do so. Any revised Work Plan shall supersede a previously approved Work Plan.

14. Supervision of Field Activities: During all field activities undertaken to remediate the Site, the Army shall have at least one on-site representative that is "qualified" (i.e., experienced in the installation and operation of the petroleum remediation techniques and systems to be used at the Site) to supervise the activities undertaken. Such representative may be an employee of the Army or a consultant retained by the Army to perform such supervision.

15. Submission of Progress Reports: The Army shall submit written progress reports to DEC by the 10<sup>th</sup> day of each quarter (January 10, April 10, July 10, and October 10) commencing with the quarter subsequent to the approval of the first Work Plan and ending with the DEC approval of the Final OM&M plan, unless a different frequency is set forth in a Work

Plan approved by DEC. Such progress reports shall, at a minimum, include (a) a discussion of all actions taken pursuant to Consent Decree during the reporting period and those anticipated for the next reporting period, (b) all activity revisions (changes of work scope and/or schedule) approved by DEC during the reporting period, (c) all results of sampling and tests, and all other data received or generated during the reporting period by or on behalf of the Army (including quality assurance/quality control information) in connection with remediation of the Site, (d) an assessment of Work Plan progress to date relative to Work Plan objectives, and (e) information regarding percentage of completion of Work Plan activities, unresolved delays encountered or anticipated that may affect the future schedule, and efforts made to mitigate such delays.

16. Submission of Final Reports: In accordance with the approved schedule contained in each Work Plan approved by DEC and consistent with the benchmarks set forth in Paragraphs 8-11 above, the Army shall submit to DEC for approval a Final Report – prepared, signed, and sealed by a Professional Engineer – that includes, but is not be limited to, all data generated or obtained in the process of implementing such Work Plan, a statement of any additional data that is to be collected to implement such Work Plan, “as-built” drawings showing all buildings, structures, and equipment added to the Site to implement the Work Plan, and certification that Site activities were performed in full accordance with the approved Work Plan. After submission of any such Final Report to DEC, the Army shall thereafter take all actions necessary to obtain approval of such Final Report from DEC, including, but not limited to, responding to reasonable requests for additional information by DEC in a timely fashion. In the event DEC disapproves a Final Report, the Army shall modify or expand such Final Report within thirty (30) days after receiving written notice of such disapproval. All Final Reports shall be submitted

to DEC in an electronic format acceptable to DEC within thirty (30) days of approval of such Final Report.

17. Notification to DEC Prior to Field Activities: The Army shall notify DEC at least seven (7) days in advance of any excavating, drilling, sampling, or other first time or non-recurring field activities to be conducted pursuant to the terms of this Decree.

18. Enforceability of Work Plan: The Army shall implement and timely comply with all Work Plans, Reports and Schedules submitted to and approved by DEC pursuant to this Consent Decree. The terms and schedules included in any approved Work Plan or revision thereto shall be enforceable in this Court. DEC shall review submitted Work Plans, Reports and Schedules as expeditiously as practicable and shall promptly inform the Army of its approval decisions.

#### **V. COST RECOVERY**

19. Prior to entry into this Consent Decree, the Department of Defense and the State had previously entered into a Department of Defense and State Memorandum of Agreement ("DSMOA")<sup>2</sup>, which was subsequently implemented by Cooperative Agreement<sup>3</sup> specifying, among other things, procedures to be followed by the State in seeking reimbursement for costs associated with its supervision of the cleanup of the Site.

20. DEC reserves the right to seek reimbursement under the DSMOA for all direct and indirect costs associated with the Department's remedial management and oversight of Site activities. The United States reserves any defenses it may have to such a claim by DEC.

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<sup>2</sup> Effective June 6, 1991.

<sup>3</sup> The most recent Cooperative Agreement was effective July 1, 2010.

21. In addition to the costs that are reimbursable pursuant to the DSMOA, the United States shall reimburse DEC for the cost of any sampling and/or analysis of samples taken at the Site by DEC (or by a consultant or contractor acting on its behalf). The State retains sole discretion to determine whether any such sampling is necessary. DEC agrees that its determination as to sampling will be reasonable and that such sampling will not be overly extensive as to cause an unnecessary financial burden on the United States.

22. DEC's non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports.

23. In the event that DEC incurs costs that are subject to cost recovery under this Section, DEC shall submit a payment request to the Army using the procedures set out in the DSMOA and Cooperative Agreement. If the Army determines that the requested costs are reimbursable under the DSMOA and the Cooperative Agreement, the procedures set out therein shall apply.

## **VI. RIGHT OF ENTRY**

24. Any authorized representative of the DEC who has the appropriate security clearances, including independent contractors, upon presentation of credentials, shall have a right of entry upon the Facility at any reasonable time for the purpose of monitoring compliance with the provisions of this Consent Decree, including inspecting all equipment and inspecting and copying all records maintained by the Army required by this Consent Decree. The Army shall retain such records for a period of twelve (12) years from the date of entry of this Consent Decree.

## **VII. STIPULATED PENALTIES**

25. For purposes of this Consent Decree, within thirty (30) days after written demand from the State, and subject to the provisions of Sections VIII (Force Majeure) and IX (Dispute Resolution), the State may assess the following stipulated penalties to the State for each failure by the United States to comply with the terms specified in Section IV of this Consent Decree:

### **Period of Noncompliance Penalty**

1st day through 10<sup>th</sup> day . . . . \$ 500 per day

11<sup>th</sup> day through 30<sup>th</sup> day . . . \$1,000 per day

each day thereafter . . . . . \$2,000 per day.

26. Should the United States dispute its obligation to pay part or all of a demanded stipulated penalty, the United States may avoid the imposition of additional stipulated penalties in regard to alleged compliance violations it disputes by invoking the Dispute Resolution provisions of this Consent Decree within the time provided in Section IX of this Consent Decree for payment of the disputed penalty.

27. If the State is awarded contempt penalties after having collected stipulated penalties for the same violation, any contempt penalty awarded shall be reduced by the amount of the stipulated penalty timely paid by the United States. The United States shall not be required to remit any stipulated penalty that is disputed in compliance with Section IX of this Consent Decree until the dispute is resolved in favor of the State. The accrual of the stipulated penalties will cease until the dispute is resolved.

## **VIII. FORCE MAJEURE**

28. The United States shall not suffer any penalty under this Consent Decree if it complies with the requirements of this Consent Decree within the time frames set forth herein or

when such compliance is prevented or delayed by events which constitute a force majeure. A force majeure shall mean any event arising from causes not reasonably foreseeable and beyond the control of the United States Army which could not be overcome by due diligence, and includes any act of God; fire; war; insurrection; explosion; unanticipated breakage or accident to machinery, equipment or lines of pipe despite reasonably diligent maintenance; restraint by court order or order of public authority; inability to obtain, at reasonable cost and after exercise of reasonable diligence, any necessary authorizations, approvals, permits or licenses due to action or inactions of any governmental agency or authority other than the Army; delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of reasonable diligence. A force majeure shall also include any strike or other labor dispute, whether or not within the control of a party affected thereby.

29. Within twenty-four (24) hours (or on the first business day following an event in the case where the event occurs on a weekend or holiday) of the time the United States knows or has reason to know of the occurrence of any event which the United States has reason to believe may prevent timely compliance with any requirement under this Consent Decree, the Army shall provide oral notification (by telephone or in person) to Lincoln Fancher at the phone number identified in paragraph 46 below or, in the case where Mr. Fancher is not available, via e-mail at the address identified in paragraph 46 below. Within five business days of the discovery of the event, the Army shall submit to the DEC a written description of the event causing the delay, the reasons for the delay, the expected duration of the delay, actions which will be taken to mitigate the duration of the delay and a revised time frame for completion of the affected requirement for approval by the DEC official. The burden of proving any delay was caused by a force majeure

and that the required notices were given shall rest with the United States. Delay in the achievement of one requirement shall not necessarily justify or excuse delay in the achievement of subsequent requirements. In the event any performance under this Consent Decree is found to have been delayed by a force majeure, the United States shall perform the requirements of this Consent Decree that were delayed by the force majeure within the revised time frame for compliance as approved by the DEC Official.

30. Unanticipated or increased costs or expenses associated with the performance of the United States' obligations under this Consent Decree shall not constitute circumstances beyond the control of the United States or serve as a basis for an extension of time under this Section.

#### **IX. DISPUTE RESOLUTION**

31. The dispute resolution procedure provided by this Section shall be available to resolve all disputes arising under this Consent Decree, except as provided in either this Section or Section VIII (Force Majeure), provided that the party making such application has first made a good faith attempt to resolve the matter with the other party.

32. The dispute resolution procedure required in this Section of the Consent Decree shall be invoked by one party to this Consent Decree giving written notice to the other advising of a dispute pursuant to this Section. The notice shall describe the nature of the dispute and shall state the noticing party's position with regard to such dispute. The party receiving such a notice shall acknowledge receipt of the notice, and the parties shall expeditiously schedule a meeting to discuss the dispute informally not later than fourteen (14) days following receipt of such notice.

33. Disputes submitted to dispute resolution under this Section shall in the first instance, be the subject of informal negotiations between the parties. Such period of informal



negotiations shall not extend beyond thirty (30) calendar days unless the parties agree in writing to either shorten or extend such time period. If the Parties are unable to reach an agreement during the informal negotiation period, the dispute shall be elevated to the Bureau Director of Remedial Bureau C of the Division of Environmental Remediation for DEC and the Fort Drum Garrison Commander for the United States.

34. If discussions between the officials for the respective parties described in paragraph 35 do not result in the resolution of the dispute, then either Party may file with the Court a petition that identifies the nature of the dispute and seeks resolution of the dispute. The Court may, on its own motion or at the request of the parties, refer the parties to non-binding mediation with a neutral mediator prior to deciding the issue itself.

35. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Section may be shortened upon motion of one of the parties to the dispute.

36. As part of the resolution of any dispute under this Section, the parties may agree to an extension or modification of the schedule for completion of work under this Consent Decree to account for any delay that occurred as a result of events such as, but not limited to, dispute resolution, the results of the pilot study, Federal funding and procurement, and climatologic seasons.

37. To the extent that that the dispute resolution provisions of the DSMOA apply to any dispute concerning cost recovery pursuant to Section V, those provisions shall be applied in lieu of the Dispute Resolution procedure described in this Section..

**X. ANTI-DEFICIENCY ACT**

38. Any requirement for the payment or obligation of funds by United States established by the terms of this Consent Decree shall be subject to the availability of funds, and no provision herein shall be interpreted to require obligation of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

**XI. GENERAL PROVISIONS**

39. Effect of Settlement: This Consent Decree shall constitute final judgment with respect to all claims alleged or that could be alleged against the United States in the State's complaint, except those claims arising from injuries to the natural resources of the State. Notwithstanding this provision, the State reserves the right to commence a new civil action in the following circumstances:

- a. if releases of petroleum are discovered upon the Site that were not known or detected before the entry of this Decree, and that demonstrate that the activities that the United States is obligated to undertake pursuant to this Decree are not protective of human health and the environment or do not meet an applicable State standard or requirements; or
- b. if after the State's approval of the Final Engineering Report specified in paragraph 10(l) of this Decree, the State receives information that was not available on or before the State's approval of the Final Engineering Report, and the additional information demonstrates that either the releases of petroleum or the health or environmental threats posed by its presence are different than those reported in the Final Engineering Report, and if those conditions demonstrate that the activities that the United States is obligated to undertake pursuant to this Decree are not protective of human health and the environment or do not meet State standards and requirements.

40. Termination: If the United States believes it has achieved compliance with the requirements of this Consent Decree, then the United States shall so certify to the State. Unless

the State objects in writing with specific reasons within sixty (60) days of receipt of the United States' certification, the Court shall order that this Consent Decree be terminated on the United States' motion. If the State objects to the Army's certification, then the matter shall be submitted to the Court for resolution pursuant to Section IX of this Consent Decree. In such case, the United States shall bear the burden of proving that this Consent Decree should be terminated. This Consent Decree may also be terminated at any time upon the parties' joint motion. Any termination under this Paragraph is without prejudice to the State's right to commence a new civil action under the circumstances specified in Paragraph 41 above.

41. Other Laws: Except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve the United States of its obligation to comply with all applicable federal, State and local laws and regulations. This Consent Decree is not a permit; compliance with its terms does not guarantee compliance with all applicable federal, State or local laws or regulations.

42. Third Parties: This Consent Decree does not limit, enlarge or affect the rights of any party to this Consent Decree as against any third parties.

43. Summary Abatement: The terms of this Consent Decree shall not be construed to prohibit the Commissioner of DEC or his duly authorized representative from exercising any summary abatement powers pursuant to ECL § 71-0301.

44. Reservation of Rights: Nothing contained in this Consent Decree shall be construed as barring, diminishing, adjudicating or in any way affecting:

- a. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than the United States or its successors and assigns;

- b. The State's right, to the extent provided for by law, to apply to the Court for the enforcement of this Consent Decree against the United States, in the event that the United States fails to fulfill any of the terms or provisions hereof; or
- c. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against the United States for any alleged violations of the ECL, rules or regulations promulgated there under or permits issued there under, and that were not and could not have been alleged in the State's Complaint.
- d. Any claim that the United States may have regarding the Site on behalf of the United States Environmental Protection Agency or a resource trustee, or any claim that the United States may have to enforce federal laws or regulations, in connection with the Site.

45. Costs: Each party to this action shall bear its own costs and attorneys' fees except as otherwise provided for in this Consent Decree.

46. Communications: Unless otherwise indicated, all communications required by this Consent Decree to be made between the State and the Army shall be made in writing, with one copy provided in the manner set forth below,

- a. Communication to be made from the Army to the State pursuant to this Consent Decree shall be made as follows:

1. By United States Postal Service, hand-delivery, Federal Express, Airborne Express, or a comparable courier service to:

Regional Attorney, Region 6 Headquarters  
New York State Department of Environmental Conservation  
Dulles Office Bldg., 317 Washington Street  
Watertown, New York 13601-3787; and

Robert Rosenthal, Senior Counsel  
Environmental Protection Bureau  
New York State Attorney General's Office  
The Capitol, Albany, NY 12224.

2. By United States Postal Service, hand-delivery, Federal Express, Airborne Express, or a comparable courier service to:

Lincoln Fancher, Region 6 Headquarters

New State Department of Environmental Conservation  
Dulles Office Bldg., 317 Washington Street  
Watertown, New York 13601-3787  
lbfanche@gw.dec.state.ny.us  
(315) 785-2513.

- b. Communication to be made from the State to the Army pursuant to this Consent Decree shall be made by United States Postal Service, hand-delivery, Federal Express, Airborne Express, or a comparable courier service to:

Mark A. Holycross, Trial Attorney  
USALSA, Environmental Law Division,  
901 N. Stuart St., Suite 402  
Arlington, VA 22203;

Chief, Environmental Defense Section  
U.S. Department of Justice  
L'Enfant Plaza Station, P.O. Box 23986  
Washington, DC 20026-3986;

Mr. James Miller, Chief  
Environmental Division, Directorate of Public Works  
85 First Street West  
Fort Drum, NY 13602-5097, and

Mr. James King, Esq.  
Office of the Staff Judge Advocate  
141 Lewis Avenue  
Fort Drum, NY 13602-5097.

- c. The State and the Army respectively reserve the right to designate other or different persons and addressees on written notice to the other.

47. Modification. Except as otherwise allowed by law or otherwise specifically permitted by the Consent Decree, there shall be no modification of this Consent Decree without written approval by the parties and notice of such modification to the Court.

48. Continuing Jurisdiction: The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction,

execution, or modification. During the term of this Consent Decree, either party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree.

49. Complete Agreement. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the parties with respect to the settlement embodied in this Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

SO ORDERED and Entered this 28 day of Jan., 2010.

  
Honorable U.S. District Court Judge

Consented and agreed to:

ANDREW M. CUOMO  
Attorney General of the State of New York  
Attorney for the State

IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Div.

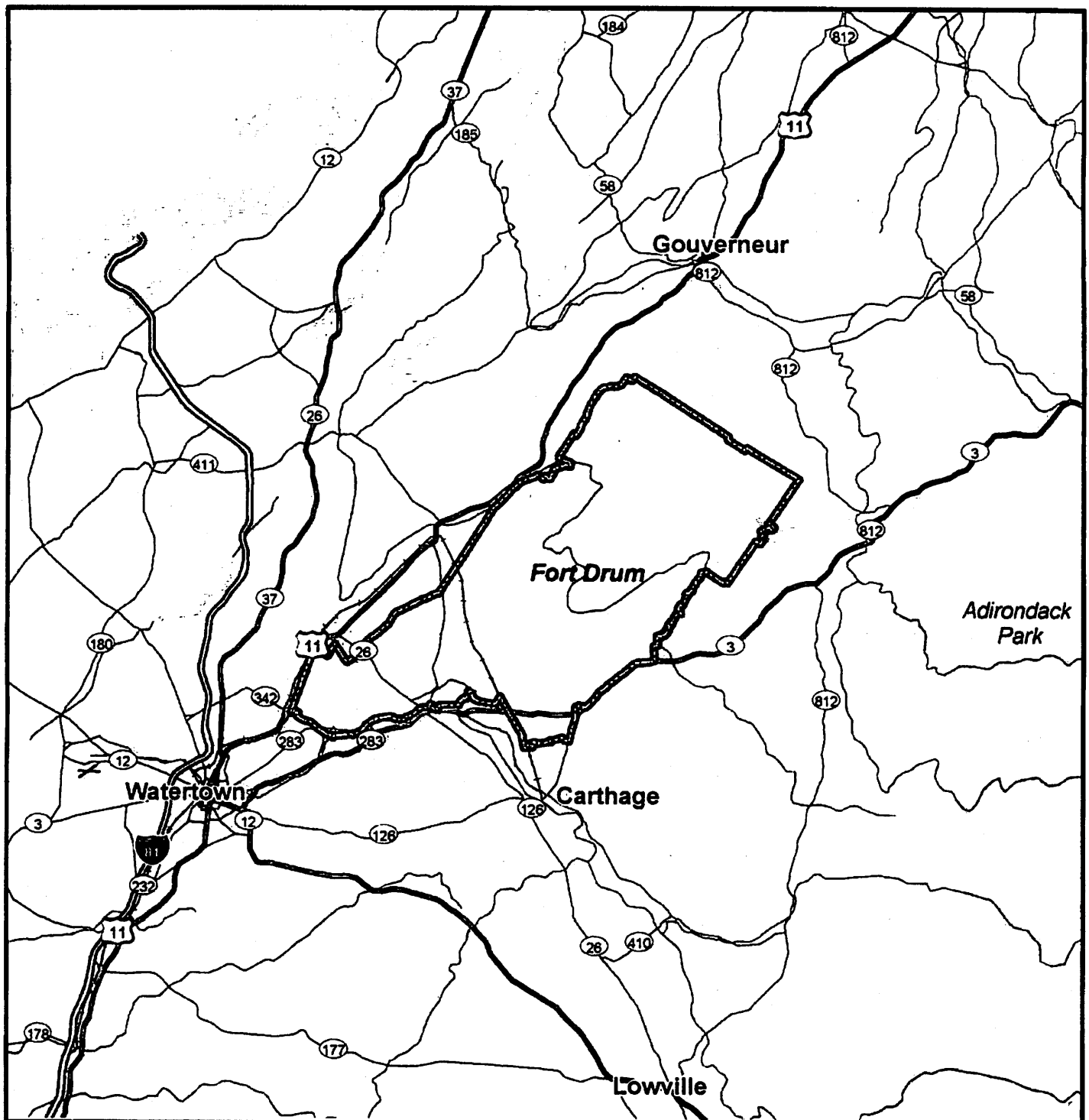
By: 


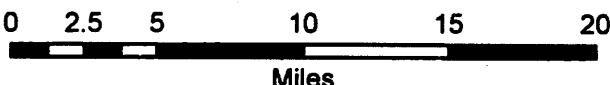




ROBERT ROSENTHAL  
Senior Counsel  
The Capitol  
Albany, New York 12224  
(518) 402-2260

By: 

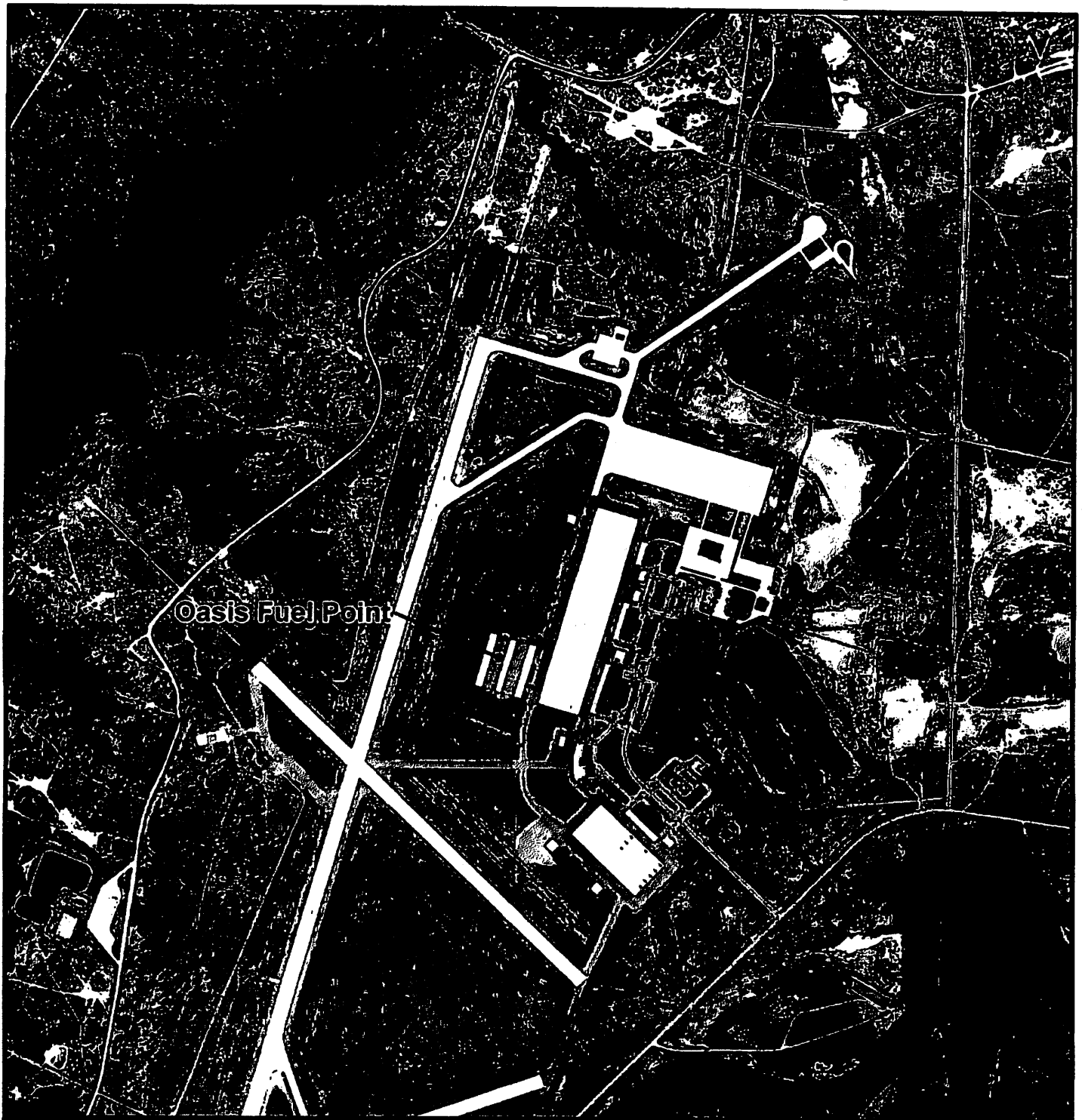
DAVID GUNTER  
Environmental Defense Section  
U.S. Department of Justice  
L'Enfant Plaza Station, P.O. Box 23986  
Washington, DC 20026-3986  
(202) 514-3785

**EXHIBIT "A"**  
**Map of Site**



							
  		<p align="center"><b>Oasis Fuel Point Wheeler-Sack Army Airfield Fort Drum, New York</b></p>			<p align="center"><b>FIGURE 1 Site Location Map</b></p>		
PROJECT MGR TWP	DESIGNED BY FDJR	CREATED BY FDJR	CHECKED BY: JAM	SCALE: AS SHOWN	DATE: NOVEMBER 2008	PROJECT NO 62175DA02	FILE NO G:\Projects\Federal\DOA Fort Drum Projects\ 62175DA02 (Oasis)





Oasis Fuel Point



0 0.25 0.5 0.75 1  
Miles



**PW**  
FORT DRUM NEW YORK

Oasis Fuel Point  
Wheeler-Sack Army Airfield  
Fort Drum, New York

FIGURE 2  
Site Map

PROJECT MGR.  
TWP

DESIGNED BY  
FDJR

CREATED BY  
FDJR

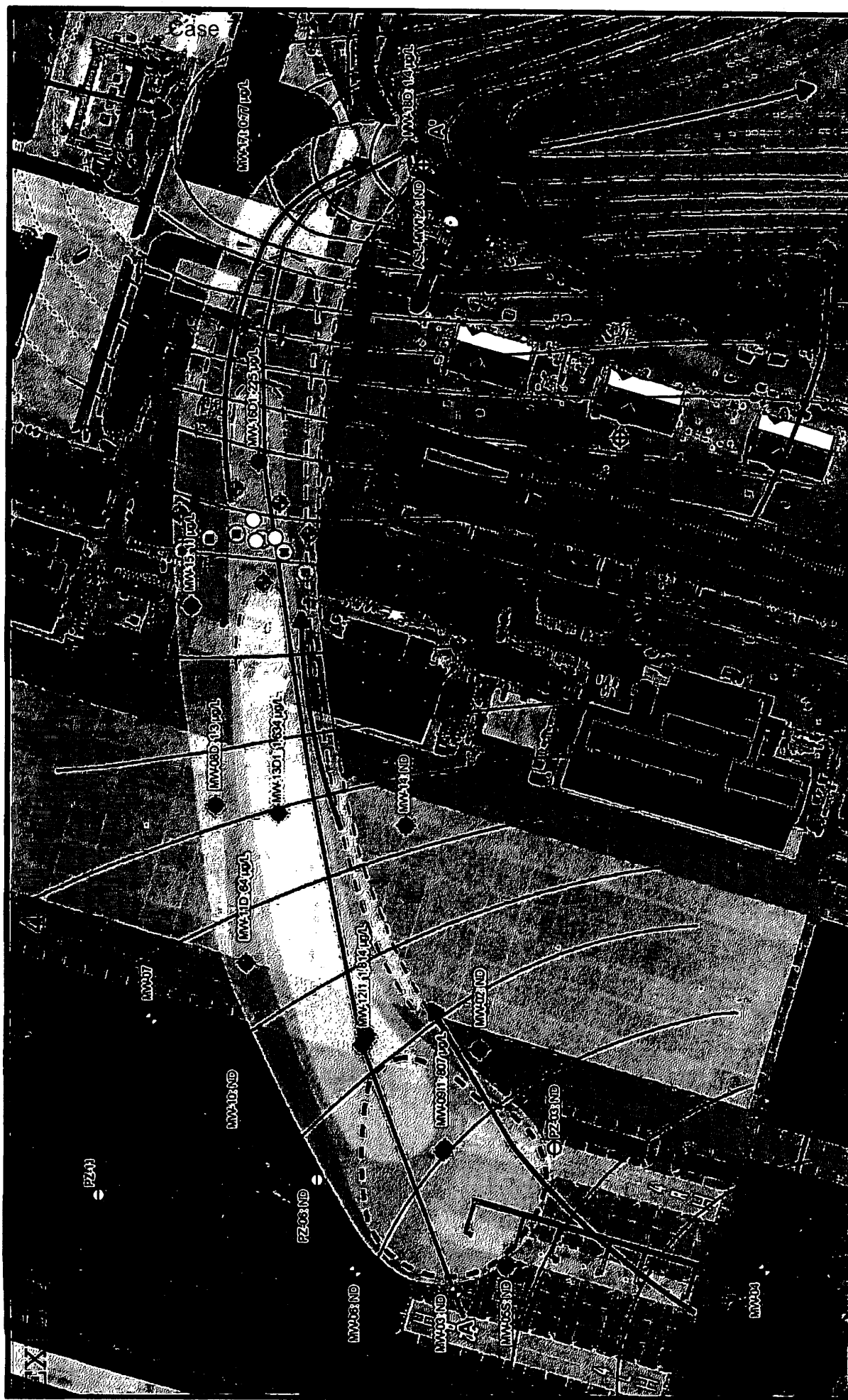
CHECKED BY  
JAM

SCALE  
AS SHOWN

DATE  
NOVEMBER 2008

PROJECT NO  
62175DA02

FILE NO  
G:\Projects\Federal\DOA  
Fort Drum Projects\  
62175DA02 (Case)



26 of 27

0 125 250 500

Feet

Note: ND = Non-detected (below laboratory detection limit)  
Total VOC Concentrations shown are the highest concentrations at each location

Total VOC Concentration (µg/L)

10-100  
1-10

1,000-10,000  
100-1,000

— VOC Contour (No Data)

Legend:

- ASL Well
- Monitoring Well Clusters
- Monitoring Wells
- Piezometers
- Fuel Lines
- Approximate LNAPL Plume Boundary
- Groundwater Contour
- Groundwater Flow Direction

Figure 2a

June 2010 Groundwater Sampling Event Results:  
Total VOC Concentrations

Oasis Fuel Point  
Wheeler-Sack Army Airfield  
Fort Drum, New York

DESIGNED BY  
MJS

CREATED BY  
ALB

CHECKED BY  
TWP

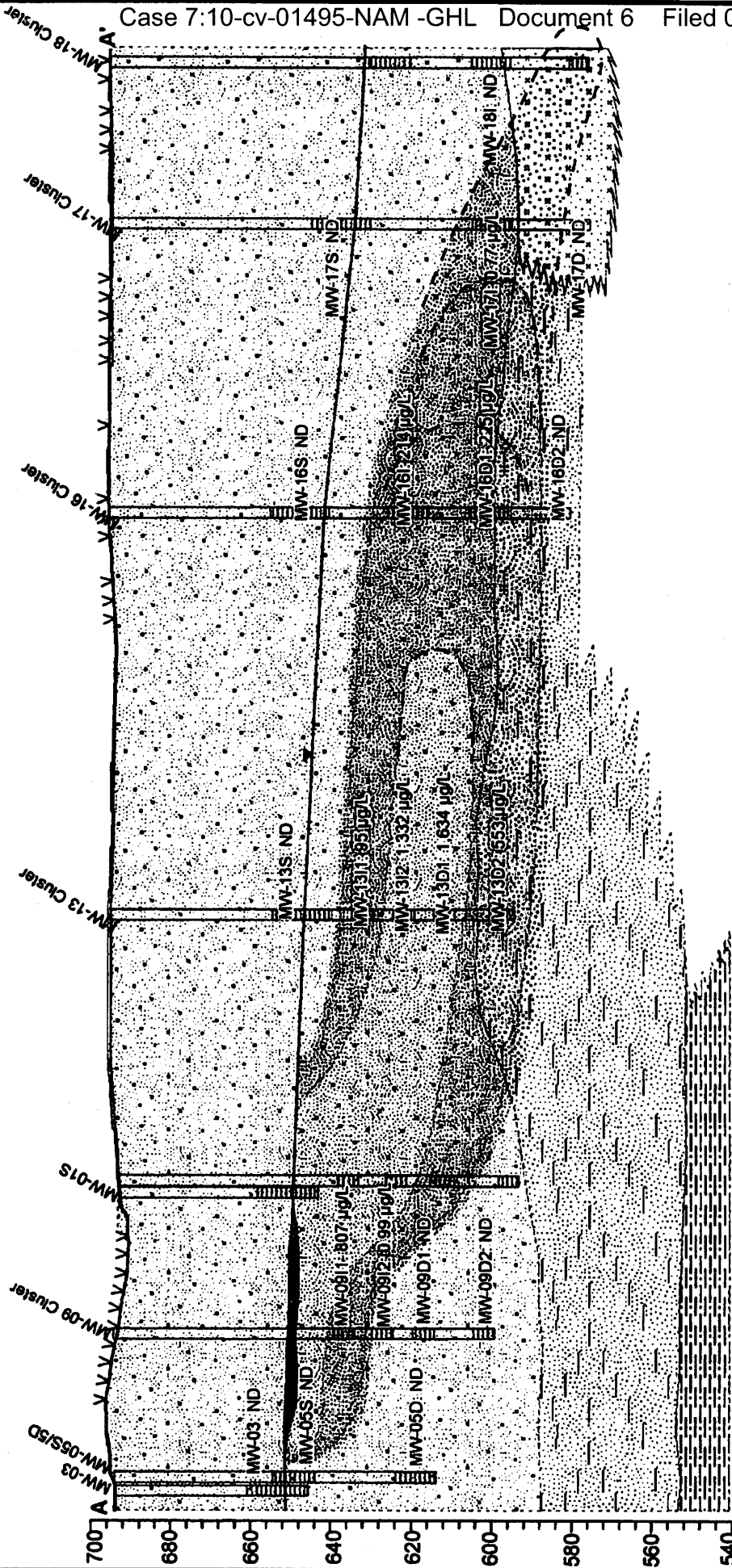
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AUGUST 2010

PROJECT NO  
62175DA02

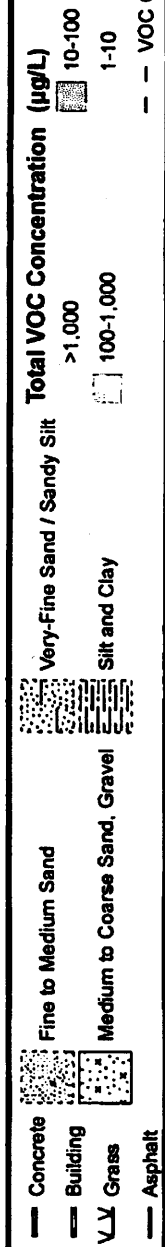
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PROJECT MGR  
TWP

# EXHIBIT A - P. 4 OF 4



Feet



		PROJECT MGR TWP		DESIGNED BY MJS		CREATED BY ALB		CHECKED BY TWP		SCALE AS SHOWN		DATE AUGUST 2010		PROJECT NO 62175DA02		FILE NO G:\Projects\Federal\DOO Fort Drum Project\62175DA02 (Case)	
Oasis Fuel Point Wheeler-Sack Army Airfield Fort Drum, New York																	
FIGURE 2b June 2010 Groundwater Sampling Results: Total VOC Cross Section																	