

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation
of one or more components of a Remedial Program for an
Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13,
and Article 71, Title 27 of the
Environmental Conservation Law
of the State of New York by

Consolidated Edison Company of New York, Inc.
Respondent.

ORDER ON CONSENT

Index #

Site # 2-41-034

WHEREAS,

1. A. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL") entitled "Inactive Hazardous Waste Disposal Sites." The Department asserts that any person under an order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the Inactive Hazardous Waste Disposal Site Remedial Program committed to under that order. The Department asserts that ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

B. The Department also asserts that it has the authority, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. *See, e.g.*, ECL 3-0301.1.i.

C. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13, ECL Article 71, Title 27 and ECL 3-0301.

2. Consolidated Edison Company of New York, Inc. ("Respondent") is a New York corporation with offices at 4 Irving Place, New York, New York 10003. Respondent owns the 1.1 acre Farrington Street Former Gas Holder Site located at the corner of Farrington Street and 32nd Street, Flushing, Queens County (hereinafter referred to as "the Site") and presently operates on the Site a flush truck facility used for de-watering and managing debris, sediment, and street run-off materials that accumulate within the manholes, vaults, and other underground structures of Respondent's electric and steam distribution and transmission systems and that from time to time contain, *inter alia*, sufficient concentrations of soluble lead to constitute characteristic hazardous waste under the Department's regulations in 6 NYCRR § 371.3(e). After completing to the

Department's satisfaction the IRM Work Plan required under this Order, Respondent intends to upgrade its flush truck facility by constructing for it a central collection building at the Site. In the past, Respondent and its predecessor, the New York & Queens Gas Company, owned and operated on the Site a gas storage holder which was initially associated with a manufactured gas plant (MGP) that they operated on the property located to the west of the Site. Exhibit "A" of this Order is a map of the Site showing its general location.

3. The Site is not currently listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State.

4. Respondent consents to the Department's issuance of this Order without (i) an admission or finding of liability, fault, wrongdoing, or violation of any law, regulation, permit, order or requirement or standard of care of any kind whatsoever, or (ii) an acknowledgment that there has been a release or threatened release of hazardous waste or that the release or threatened release of hazardous waste at or from the Site constitutes a significant threat to public health or the environment.

5. The parties recognize that implementation of this Order will expedite the cleanup of the Site and may avoid prolonged and complicated litigation between the parties, and that this Order is mutually acceptable, fair, reasonable and in the public interest.

6. Solely with regard to the matters set forth below, Respondent hereby waives its right to a hearing herein as provided by law, consents to the issuance and entry of this Order, and agrees to be bound by its terms. Respondent consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agrees not to contest the validity of this Order or its terms or the validity of the data generated by Respondent pursuant to this Order.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Initial Submittal

Within thirty (30) Days after the effective date of this Order, Respondent shall submit to the Department a Records Search Report in accordance with the requirements of Exhibit "F" attached hereto. The Records Search Report can be limited if the Department notifies Respondent that prior submissions satisfy specific items required for the Records Search Report. Such Records Search Report shall be submitted in a format acceptable to the Department.

II. Development, Performance and Reporting of Work Plans

A. Work Plans

All activities at the Site that comprise any element of an Inactive Hazardous Waste Disposal Site Remedial Program shall be conducted pursuant to one or more Department-approved work plans ("Work Plan" or "Work Plans") and this Order. The Work Plan(s) under this Order shall be developed and implemented in accordance with CERCLA, the NCP, and all applicable statutes, regulations and guidance documents then in effect. All Department-approved Work Plans shall be incorporated into and become an enforceable part of this Order and shall be attached as Exhibit "B." Upon the approval of a Work Plan, Respondent shall implement such Work Plan in accordance with the schedule contained in such Work Plan. Nothing in this Subparagraph shall mandate that any particular Work Plan be submitted. Further, each Work Plan submitted shall use one of the following captions on the cover page:

1. "Preliminary Site Assessment Work Plan" ("PSA Work Plan"): a Work Plan the objective of which is to identify the presence of any hazardous waste disposed of at the Site. Such Work Plan shall be developed in accordance with Exhibit "G";

2. "Remedial Investigation/Feasibility Study Work Plan" ("RI/FS Work Plan"): a Work Plan the objective of which is to perform a Remedial Investigation and a Feasibility Study. Such Work Plan shall be developed and implemented in accordance with the requirements set forth in Exhibit "H";

3. "IRM Work Plan": a Work Plan the objective of which is to provide for an Interim Remedial Measure. Such Work Plan shall be developed in accordance with Exhibit "I";

4. "Remedial Design/Remedial Action Work Plan" ("RD/RA Work Plan"): a Work Plan the objective of which is to provide for the development and implementation of the final plans and specifications for implementing the remedial alternative set forth in the ROD. Such Work Plan shall be developed in accordance with Exhibit "J"; or

5. "OM&M Work Plan": a Work Plan the objective of which is to provide for all activities required to maintain and monitor the effectiveness of the Remedial Action or an IRM. Such Work Plan shall be developed in accordance with Exhibit "K."

B. Submission/Implementation of Work Plans

1. (a) The IRM Work Plan shall be submitted to the Department within thirty (30) Days after the effective date of this Order.

(b) The Department may request that Respondent submit such other, additional or supplemental Work Plans as are appropriate to advance the Remedial Program at the Site. Within thirty (30) Days after the Department's written request, Respondent shall advise the Department in writing whether it will submit and implement the requested additional Work Plan (or Supplemental Work Plan) or whether it elects to terminate this Order pursuant to Paragraph XIII. If Respondent elects to submit and implement such Work Plan, Respondent shall submit a Work Plan providing for implementation of the activities requested within sixty (60) Days after such election. If Respondent elects to terminate this Order or fails to make a timely election, this Order shall terminate pursuant to Paragraph XIII.

(c) Respondent can propose one or more additional or supplemental Work Plans (including one or more IRM Work Plans) at any time at the option of Respondent, which Work Plan(s) shall be reviewed for appropriateness and technical sufficiency.

(d) The Department's request under Subparagraph (b) or determination under Subparagraph (c) of this Paragraph shall be subject to dispute resolution pursuant to Paragraph XII.

2. A Professional Engineer must prepare, sign, and seal all Work Plans other than a Work Plan for an RI/FS or PSA.

3. During all field activities, Respondent shall have on-Site a representative who is qualified to supervise the activities undertaken. Such representative may be an employee or a consultant retained by Respondent to perform such supervision.

C. Revisions to Work Plans

The Department shall notify Respondent in writing if the Department determines that any element of a Department-approved Work Plan needs to be modified in order to achieve the objectives of the Work Plan as set forth in Subparagraph II.A or to ensure that the Remedial Program otherwise protects human health and the environment. Upon receipt of such notification, Respondent shall, subject to Respondent's right to invoke dispute resolution pursuant to Paragraph XII, submit a Work Plan for such requested work to the Department within sixty (60) Days after the date of the Department's written notice pursuant to this Subparagraph.

D. Submission of Final Reports and Annual Reports

1. In accordance with the schedule contained in a Work Plan, Respondent shall submit a final report which includes the caption of that Work Plan on the cover page and a certification that all requirements of the Work Plan have been

complied with and all activities have been performed in full accordance with such Work Plan. Such certification shall be by the person with primary responsibility for the day to day performance of the activities under this Order and, except for RI and PSA final reports, shall be by a Professional Engineer.

2. In the event a final report sets forth construction activities performed during the implementation of a Work Plan, such final report shall include "as built" drawings showing all changes made to the remedial design or IRM.

3. In the event that the ROD, if any for the Site, or any Work Plan for the Site relies upon institutional or engineering controls, Respondent shall submit an annual report by the 15th of January each year following the initial implementation of said institutional or engineering controls. Respondent shall file such annual report until the Department determines that the remedial process is completed and so notifies Respondent in writing. Such annual report shall be signed by a Professional Engineer and shall contain a certification that the institutional and engineering controls put in place pursuant to this Order are still in place, have not been materially altered, and are still effective in achieving their objectives. Respondent can petition the Department for a determination that the institutional and/or engineering controls may be terminated. Such petition must be supported by a certification by a professional engineer stating that such controls are no longer necessary for the protection of public health and the environment. The Department shall not unreasonably withhold its approval of such petition.

E. Review of Submittals other than Progress Reports and Health and Safety Plans

1. The Department shall make a good faith effort to review and respond to each of the submittals Respondent makes pursuant to this Order within sixty (60) Days. The Department's response shall include an approval or disapproval of the submittal, in whole or in part, and the notification to Respondent of the Department's determination. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

2. If the Department disapproves a submittal, it shall specify the reasons for its disapproval. Within thirty (30) Days after the date of the Department's written notice that Respondent's submittal has been disapproved or rejected, Respondent shall elect in writing, subject to Subparagraph II.E.3, to either (i) modify the submittal to address the Department's comments, or (ii) invoke dispute resolution pursuant to Paragraph XII. If Respondent elects to modify the submittal, Respondent shall, within sixty (60) Days after it elects to modify the submittal, make a revised submittal to the Department that addresses all of the Department's stated reasons for disapproving the first submittal. In the event that Respondent's revised submittal is disapproved, Respondent shall be in violation of this Order unless it invokes dispute resolution

pursuant to Paragraph XII and its position prevails. Failure to make an election or failure to comply with the election is a violation of this Order.

3. In the event the rejected submittal is a Work Plan submitted prior to the Department's approval of the RD/RA Work Plan, Respondent shall have the additional option to terminate this Order pursuant to Paragraph XIII.

4. Within thirty (30) Days after the Department's approval of a final report, Respondent shall submit such final report, as well as all data gathered and drawings and submittals made pursuant to such Work Plan, to the Department in an electronic format acceptable to the Department. If any document cannot be converted into electronic format, Respondent shall so advise the Department and, if the Department concurs, submit such document in an alternative format acceptable to the Department.

F. Department's Issuance of a ROD

Respondent shall cooperate with and provide reasonable assistance, consistent with the Citizen Participation Plan, in soliciting public comment on the proposed remedial action plan ("PRAP"), if any. After the close of the public comment period, the Department shall select a final remedial alternative for the site in a ROD. Nothing in this Order shall be construed to abridge the rights of Respondent, as provided by law, to judicially challenge the Department's ROD.

G. Release and Covenant Not To Sue

Upon the Department's approval of either the RD/RA Work Plan final report or an IRM Work Plan final report evidencing that no further remedial action (other than OM&M activities) is required to meet the goals of the Remedial Program, then, except for the provisions of Paragraphs VI and VIII, and except for the future OM&M of the Site, and any Natural Resource Damage claims, such acceptance shall constitute a release for each and every claim, demand, remedy or action whatsoever against Respondent, its directors, officers, employees, agents, servants, and successors and assigns (except successors and assigns who were responsible under law for the development and implementation of a Remedial Program at the Site prior to the effective date of this Order), which the Department has or may have pursuant to Article 27, Title 13 of the ECL or pursuant to any other provision of statutory or common law involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes (or other contaminants addressed by Respondent pursuant to the ROD or Work Plans provided for in this Order if no ROD is issued pursuant to Paragraph II.F) at the Site; provided, however, that the Department specifically reserves all of its rights concerning, and any such release and satisfaction shall not extend to any further investigation or remediation the Department deems necessary due to environmental conditions on-Site or off-Site which are related to the disposal of hazardous wastes at the

Site and which indicate that the Remedial Program is not protective of public health and/or the environment. The Department shall notify Respondent of such environmental conditions or information and its basis for determining that the Remedial Program is not protective of public health and/or the environment.

This release shall be null and void, *ab initio*, in the event of fraud relating to the implementation of this Order or Respondent's failure to materially comply with any provision of this Order. The Department's determination that Respondent has committed fraud or materially failed to comply with this Order shall be subject to dispute resolution. This release shall inure only to the benefit of Respondent, its directors, officers, employees, agents, and servants and to the benefit of those successors and assigns of Respondent that are not otherwise responsible under law for the development and implementation of a remedial program at the Site.

Nothing herein shall be construed as barring, diminishing, adjudicating or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that (i) Respondent may have against anyone other than the Department, and (ii) the Department may have against anyone other than Respondent, its directors, officers, employees, agents, and servants and those successors and assigns of Respondent that were not responsible under law for the development and implementation of a remedial program at the Site prior to the effective date of this Order.

III. Progress Reports

Respondent shall submit written progress reports to the parties identified in Subparagraph XI.A.1 by the 10th Day of each month commencing with the month subsequent to the approval of the first Work Plan and ending with the Termination Date, unless a different frequency is set forth in a Work Plan. Such reports shall, at a minimum, include: all actions taken pursuant to this Order during the previous reporting period and those anticipated for the next reporting period; all approved activity modifications (changes of work scope and/or schedule); all results of sampling and tests and all other data received or generated by or on behalf of Respondent in connection with the Site, whether under this Order or otherwise, in the previous reporting period, including quality assurance/quality control information; and information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule, efforts made to mitigate such delays, and information regarding activities undertaken in support of the Citizen Participation Plan during the previous reporting period and those anticipated for the next reporting period.

IV. Penalties

A. 1. Respondent's failure to comply with any term of this Order constitutes a violation of this Order, the ECL and 6 NYCRR Section 375-1.2(d). Nothing

herein abridges Respondent's right to contest, defend against, dispute or disprove any such claim, assertion or allegation that it has violated this Order.

2. Respondent may elect in writing, addressed to the Department's project attorney with a copy to the Department's project manager, within thirty (30) Days of the effective date of this Order to opt-out of the application of statutory penalties and, in lieu thereof, to have the following stipulated penalties apply to any failure to comply with this Order:

<u>Period of Non-Compliance</u>	<u>Penalty Per Day</u>
First through 15th day	\$ 500.00
16th through 30th day	\$ 1,000.00
31st day and thereafter	\$ 1,500.00

3. Payment of the penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

B. 1. Respondent shall not suffer any penalty or be subject to any proceeding or action in the event it cannot comply with any requirement of this Order as a result of any event arising from causes beyond the reasonable control of Respondent, of any entity controlled by Respondent or of Respondent's contractors, that delays or prevents the performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation ("Force Majeure Event"). The requirement that Respondent exercise best efforts to fulfill the obligation includes using best efforts to anticipate the potential force majeure event and best efforts to address the effects of any such event as it is occurring and following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include Respondent's economic inability to comply with any obligation, the failure of Respondent to make complete and timely application for any required approval or permit, and non-attainment of the goals, standards and requirements of this Order.

2. Respondent shall notify the Department in writing within seven (7) Days after it obtains knowledge of any such Force Majeure Event. Respondent shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such seven (7) Day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall be deemed to know of any circumstance of which it, any entity controlled by it, or its contractors knew or should have known.

3. Respondent shall have the burden of proving by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure Event; that the duration of the delay or the extension sought was or will be

warranted under the circumstances; that best efforts were exercised to avoid and mitigate the effects of the delay; and that Respondent complied with the requirements of this Paragraph regarding timely notification to the Department of the event.

4. If the Department agrees that the delay or anticipated delay is attributable to a Force Majeure Event, the time for performance of the obligations under this Order that are affected by the Force Majeure Event will be extended by the Department for such time as is reasonably necessary to complete those obligations.

5. If Respondent asserts that an event provides a defense to non-compliance with this Order pursuant to Subparagraph IV.B and the Department rejects such assertion, Respondent shall be in violation of this Order unless it invokes dispute resolution pursuant to Paragraph XII and Respondent's position prevails.

V. Entry upon Site

A. Respondent hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site or areas in the vicinity of the Site which may be under the control of Respondent by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to matters addressed pursuant to this Order, and by any agent, consultant, contractor, or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site for (i) inspecting, sampling, and copying records related to the contamination at the Site; (ii) implementing the activities under this Order; and (iii) testing and any other activities necessary to ensure Respondent's compliance with this Order. Upon request, Respondent shall provide the Department with suitable office space at the Site, including access to a telephone, to the extent same are available. Upon request, Respondent shall permit the Department full access to all non-privileged records relating to matters addressed by this Order. Raw data is not considered privileged and that portion of any privileged document containing raw data must be provided to the Department.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Respondent shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of all sampling and scientific measurements taken under this Subparagraph available to Respondent.

VI. Payment of State Costs

A. Within forty-five (45) Days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall

represent reimbursement for State Costs for work performed at or in connection with the Site through and including the Termination Date.

B. Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports. The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.

C. Such invoice shall be sent to Respondent at the following address:

Con Edison, 31-01 20th Avenue, Bldg. 138, Long Island City, NY 11105,
Attention - Neale R. Bedrock, Director of Remediation

D. Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to: Bureau of Program Management, Division of Environmental Remediation, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7010.

E. Each party shall provide written notification to the other within ninety (90) Days of any change in the foregoing addresses.

F. Respondent may contest, in writing, invoiced costs under Subparagraph VI.B if it believes that (i) the cost documentation contains clerical, mathematical, or accounting errors; (ii) the costs are not related to the State's activities with respect to the Remedial Program for the Site; or (iii) the Department is not otherwise legally entitled to such costs. If Respondent objects to an invoiced cost, Respondent shall pay all costs not objected to within the time frame set forth in Subparagraph VI.B and shall, within thirty (30) Days after its receipt of an invoice, identify in writing all costs objected to and identify the basis of the objection. This objection shall be filed with the Division of Environmental Remediation's Director of the Bureau of Program Management. The Director or the Director's designee shall have the authority to relieve Respondent of the obligation to pay invalid costs. Within forty-five (45) Days after the date of the Department's determination of the objection, Respondent shall pay to the Department the amount which the Director or the Director's designee determines Respondent is obligated to pay or commence an action or proceeding seeking appropriate judicial relief.

G. In the event any instrument for the payment of any money due under this Order fails of collection, such failure of collection shall constitute a violation of this

Order, provided that (i) the Department gives Respondent written notice of such failure of collection, and (ii) the Department does not receive from Respondent a certified check or bank check in the amount of the uncollected funds within fourteen (14) Days after the date of the Department's written notification.

VII. Reservation of Rights

A. Except as provided in Subparagraph II.G, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights or authorities, including, but not limited to, the right to require performance of further investigations and/or response action(s), to recover natural resource damages, or to exercise any summary abatement powers with respect to any party, including Respondent.

B. Except as otherwise provided in this Order, Respondent specifically reserves all rights and defenses under applicable law respecting any Departmental assertion of remedial liability against Respondent, and further reserves all rights respecting the enforcement of this Order, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Order or Respondent's compliance with it shall not be construed as an admission of liability, fault, wrongdoing, or breach of standard of care by Respondent, and shall not give rise to any presumption of law or finding of fact, or create any rights, or grant any cause of action, which shall inure to the benefit of any third party. Further, Respondent reserves such rights as it may have to seek and obtain contribution, indemnification and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers for past or future response and/or cleanup costs or such other costs or damages arising from the contamination at the Site as may be provided by law.

VIII. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns except for liability arising from (i) vehicular accidents occurring during travel to or from the Site; or (ii) from willful, wanton or malicious acts or acts constituting gross negligence or criminal behavior by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Order. The Department shall provide Respondent with written notice no less than thirty (30) Days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

IX. Public Notice

A. Within thirty (30) Days after the effective date of this Order, Respondent shall cause to be filed a Department-approved Notice of Order, which Notice shall be substantially similar to the Notice of Order attached to this Order as Exhibit "D," with the Clerk of the County wherein the Site is located (or the City Register if the property is located in New York, Bronx, Kings or Queens County) to give all parties who may acquire any interest in the Site notice of this Order. Within thirty (30) Days of such filing (or such longer period of time as may be required to obtain a certified copy provided Respondent advises the Department of the status of its efforts to obtain same within such thirty (30) Days), Respondent shall also provide the Department with a copy of such instrument certified by such County Clerk (or the City Register) to be a true and faithful copy.

B. If Respondent proposes to convey the whole or any part of Respondent's ownership interest in the Site, or becomes aware of such conveyance, Respondent shall, not fewer than forty-five (45) Days before the date of conveyance, or within forty-five (45) Days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order. However, such obligation shall not extend to a conveyance by means of a corporate reorganization or merger or the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security agreement, lease or any other right accruing to a person not affiliated with Respondent to secure the repayment of money or the performance of a duty or obligation.

X. Declaration of Covenants and Restrictions

A. 1. If a Department-approved Work Plan or the ROD, if any for the Site, relies upon one or more institutional controls, Respondent shall, within thirty (30) Days after the Department's approval of such Work Plan or ninety (90) Days of the issuance of the ROD, whichever is earlier, submit to the Department for approval a Declaration of Covenants and Restrictions to run with the land which provides for covenants and restrictions consistent with the Work Plan or the ROD. This submittal shall be substantially similar to Exhibit "E." Respondent shall file such instrument with the Clerk of the County (or the City Register) wherein the Site is located within thirty (30) Days of the Department's approval of such instrument. Respondent shall provide the Department with a copy of such instrument certified by such County Clerk (or the City Register) to be a true and faithful copy within thirty (30) Days of such recording (or such longer period of time as may be required to obtain a certified copy provided Respondent advises the Department of the status of its efforts to obtain same within such thirty (30) Days).

2. Respondent may petition the Department to modify or terminate the Declaration of Covenants and Restrictions filed pursuant to this Paragraph at such

time as it can certify that reliance upon such covenants and restrictions is no longer required to meet the goals of the Remedial Program for the Site. Such certification shall be made by a Professional Engineer. The Department shall not unreasonably withhold its consent.

B. If the ROD provides for “no action” other than implementation of one or more institutional controls, the Department shall request Respondent to cause same to be filed under the provisions of Subparagraph X.A. If Respondent does not cause such institutional controls to be filed, Respondent cannot obtain a Qualified Release pursuant to Subparagraph II.G.

XI. Communications

A. All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

1. Communication from Respondent shall be sent to:

Robert W. Schick, P.E.,
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7017

Note: four copies (one unbound) of work plans are required to be sent.

with copies to:

Gary Litwin
Bureau of Environmental Exposure Investigation
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216

Note: two copies of work plans are required to be sent, and

Dale A. Desnoyers, Esq.
Division of Environmental Enforcement
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-5500

Note: a copy of the work plan need not be transmitted to this contact.

2. Communication to be made from the Department to Respondent shall be sent to:

Eddy Louie
Section Manager, Remediation
Consolidated Edison Company of New York, Inc
31-01 20th Avenue, Bldg. 138
Long Island City, New York 11105

Michael Wilcken, Esq.
Consolidated Edison Company of New York, Inc.
4 Irving Place, Room 1800
New York, New York 10003

B. The Department and Respondent reserve the right to designate additional or different addressees for communication upon written notice to the other.

C. Each party shall notify the other within ninety (90) Days after any change in the addresses in this Paragraph XI or Paragraph VI..

XII. Dispute Resolution

A. If Respondent disagrees with the Department's notice under (i) Subparagraph II.B; (ii) Subparagraph II.E disapproving a submittal, a proposed Work Plan or a final report; (iii) Subparagraph II.C requesting additional activities; (iv) Subparagraph II.G finding that Respondent materially failed to comply with the Order; (v) Subparagraph IV rejecting Respondent's assertion of a Force Majeure Event; or (vi) Subparagraph XIV.I.2.iii, Respondent shall, within thirty (30) Days of its receipt of such notice, request in writing informal negotiations with the Department in an effort to resolve the dispute. A copy of such request shall be sent by Respondent to the appropriate Remedial Bureau Chief in the Department's Central Office. The Department and Respondent shall consult together in good faith and exercise best efforts to resolve any differences or disputes without resort to the procedures described in Subparagraph XII.B. The period for informal negotiations shall not exceed thirty (30) Days from Respondent's request for informal negotiation. If the parties cannot resolve a dispute by informal negotiations during this period, the Department's position shall be considered binding unless Respondent notifies the Department in writing within thirty (30) Days after the conclusion of the thirty (30) Day period for informal negotiations that it invokes the dispute resolution provisions provided under Subparagraph XII.B.

B. 1. Respondent shall serve upon the Assistant Division Director for the Division of Environmental Remediation ("ADD") a request for formal

dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Respondent relies (hereinafter called the "Statement of Position"). A copy of such request and written statement shall be provided to the parties listed under Subparagraph IX.A.

2. The Department shall serve its Statement of Position no later than twenty (20) Days after receipt of Respondent's Statement of Position.

3. Respondent shall have the burden of proving by a preponderance of the evidence that the Department's position is not in accordance with law or otherwise should not prevail. The ADD can conduct meetings, in person or via telephone conferences, and request additional information from either party if such activities will facilitate a resolution of the issues.

4. The ADD will issue a final decision resolving the dispute in a timely manner. The final decision shall constitute a final agency action and Respondent shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR provided that Respondent notifies the Department within forty-five (45) Days after receipt of a copy of the decision that it intends to file an Article 78. Respondent shall be in violation of this Order if it fails to comply with the final decision resolving this dispute within forty-five (45) Days after such final decision, or such other time period as may be provided in the final decision, unless it seeks judicial review of such decision within the forty-five (45) Day period provided. In the event that Respondent seeks judicial review, Respondent shall be in violation of this Order if it fails to comply with the final court order or settlement within thirty (30) Days after the effective date of such order or settlement, unless otherwise directed by the Court. For purposes of this Paragraph, a determination shall not be final until the time to perfect an appeal of that determination has expired.

5. The invocation of dispute resolution shall not extend, postpone or modify Respondent's obligations under this Order with respect to any item not in dispute unless or until the Department agrees or a court determines otherwise.

6. Nothing contained in this Order shall be construed to authorize Respondent to invoke dispute resolution with respect to the remedy selected by the Department in the ROD or any element of such remedy, nor to impair any right of Respondent to seek judicial review of the Department's selection of any remedy.

7. The Department shall keep an administrative record which shall be available consistent with Article 6 of the Public Officers Law.

XIII. Termination of Order

A. This Order will terminate upon the earlier of the following events:

1. Respondent's election to terminate pursuant to Subparagraphs II.B.1.b or II.E.3 so long as such election is made prior to the Department's approval of Respondent's proposed RD/RA Work Plan. In the event of termination in accordance with this Subparagraph, this Order shall terminate effective the 5th Day after the Department's receipt of the written notification terminating this Order or the 5th Day after the time for Respondent to make its election has expired, whichever is earlier, provided, however, if there are one or more Work Plan(s) for which a final report has not been approved at the time of Respondent's notification of its election to terminate this Order pursuant to Subparagraphs II.B.1.b or II.E.3 or its failure to timely make such an election pursuant to Subparagraphs II.B.1.b or II.E.3, Respondent shall promptly complete the activities required by such previously approved Work Plan(s) consistent with the schedules contained therein. Thereafter, this Order shall terminate effective the 5th Day after the Department's approval of the final report for all previously approved Work Plans; or

2. the Department's written determination that Respondent has completed all phases of the Remedial Program (including OM&M), in which event the termination shall be effective on the 5th Day after the Department issues its approval of the final report relating to the final phase of the Remedial Program.

B. Notwithstanding the foregoing, the provisions contained in Paragraphs VI and VIII shall survive the termination of this Order and any violation of such surviving Paragraphs shall be a violation of this Order, the ECL and 6 NYCRR Section 375-1.2(d) subjecting Respondent to penalties as provided under Paragraph IV so long as such obligations accrued on or prior to the Termination Date.

C. If the Order is terminated pursuant to Subparagraph XIII.A.1, neither this Order nor its termination shall affect any liability of Respondent to remediate the Site and/ or for payment of the State's response costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA. Respondent shall also ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any activities under this Order were commenced. Further, the Department's efforts in obtaining this Order and requesting additional Work Plan(s) shall constitute "reasonable efforts" under law to obtain a voluntary commitment from Respondent for any further activities to be undertaken as part of an Inactive Hazardous Waste Disposal Site Remedial Program for the Site.

XIV. Miscellaneous

A. The activities and submittals under this Order shall address contamination~~ing~~ resulting from the disposal of hazardous wastes at the Site.

B. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and third party data validators ("Respondent's Contractors") acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. To the extent that the Department has not previously approved Respondent's Contractors for the work contemplated by this Order, Respondent shall submit the experience, capabilities, and qualifications of Respondent's Contractors to the Department within ten (10) Days after the effective date of this Order or at least thirty (30) Days before the start of any activities for which Respondent and such firms or individuals will be responsible. The Department's approval of these firms or individuals shall be obtained prior to the start of any activities for which such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent. Subject to the requirements of this Subparagraph, Respondent retains the right to select or change firms or individuals in its sole discretion.

C. Respondent shall allow the Department to attend and shall notify the Department at least seven (7) Days in advance of any field activities as well as any pre-bid meetings, job progress meetings, the substantial completion meeting and inspection, and the final inspection and meeting.

D. 1. Respondent shall use "best efforts" to obtain all Site access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls or authorizations necessary to perform Respondent's obligations under this Order, except that the Department may exempt Respondent from the requirement to obtain any permit issued by the Department for any activity that is conducted on the Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit. If any necessary Site access, permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations required to perform this Order are not obtained despite best efforts within forty-five (45) Days after the effective date of this Order, or within forty-five (45) Days after the date the Department notifies Respondent in writing that additional access beyond that previously secured is necessary, Respondent shall promptly notify the Department, and shall include in that notification a summary of the steps Respondent has taken to obtain access. The Department may, as it deems appropriate and within its authority, assist Respondent in obtaining access.

2. If access to the Site or other approvals set forth in Subparagraph XIV.D.1 are needed to implement an institutional control required by a Work Plan and such access or approvals are not obtained despite Respondent's best efforts and the Department's assistance, if any, then the Department may require that

Respondent modify the Work Plan pursuant to Subparagraph II.C of this Order to reflect changes necessitated by the lack of access and/or approvals.

E. Respondent and Respondent's successors and assigns shall be bound by this Order. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Respondent's responsibilities under this Order.

F. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. Respondent or its contractor(s) shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

G. The paragraph headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

H. 1. The terms of this Order shall constitute the complete and entire agreement between the Department and Respondent concerning implementation of the activities required by this Order. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order. In the event of a conflict between the terms of this Order and any Work Plan submitted pursuant to this Order, the terms of this Order shall control over the terms of the Work Plan(s) attached as Exhibit "B."

2. i. Except as set forth herein, if Respondent desires that any provision of this Order be changed, other than a provision of a Work Plan or a time frame, Respondent shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph XI.A.1. The Commissioner or the Commissioner's designee shall timely respond.

ii. Changes to the Work Plan shall be accomplished as set forth in Subparagraph II.C of this Order.

iii. Changes to a time frame set forth in this Order shall be accomplished by a written request to the Department's project attorney and project

manager, which request shall be timely responded to in writing. The Department's decision relative to the request for a time frame change shall be subject to dispute resolution pursuant to Paragraph XII.

I. 1. Respondent shall perform the work required pursuant to this Order. If there are multiple parties signing this Order collectively as "Respondent," the term "Respondent" shall be read in the plural where required to give meaning to this Order. Further, the obligations of Respondents under this Order are joint and several and the "bankruptcy" or failure by any Respondent to implement the obligations under this Order shall not affect the obligations of the remaining Respondent(s) to carry out the obligations under this Order.

2. If Respondent is a partnership, the obligations of all general partners, including limited partners who act as a general partner, to finance and perform obligations under this Order and to pay amounts owed the Department under this Order are joint and several. In the event of the insolvency or other failure of any one or more of the general partners to implement the requirements of this Order, the remaining general partners shall complete all such requirements.

3. Notwithstanding the foregoing Subparagraphs XIV.I.1 and 2, if multiple responsible parties sign this Order but not all of the signing responsible parties elect, pursuant to Subparagraph II.B, to implement a Work Plan, then all Respondents are jointly and severally liable for each and every obligation under this Order through the completion of the activities in such Work Plan that all such parties consented to; thereafter, only those responsible parties electing to perform additional work shall be jointly and severally liable under this Order for the obligations and activities under such additional Work Plan(s). The responsible parties electing not to implement the additional Work Plan(s) shall have no obligations under this Order relative to the activities set forth in such Work Plan(s). Further, only those responsible parties electing to implement such additional Work Plan(s) shall be eligible to receive the covenant not to sue as provided under Subparagraph II.G.

J. To the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law § 15-108 and any other applicable law, Respondent shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2) for "matters addressed" pursuant to and in accordance with this Order. "Matters addressed" in this Order shall mean all response actions taken to implement this Order for the Site and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Order, including reimbursement of the State's costs pursuant to this Order.

K. All activities undertaken by Respondent pursuant to this Order shall be performed in accordance with the requirements of all applicable federal and State laws and regulations.

L. Unless otherwise expressly provided herein, terms used in this Order which are defined in ECL Article 27, Title 13 or in regulations promulgated under such statute shall have the meaning assigned to them under said statute or regulations. Whenever terms listed in the Glossary attached hereto are used in this Order or in the attached Exhibits, the definitions set forth in the such Glossary shall apply. In the event of a conflict, the definition set forth in statute or regulation shall control.

M. The Respondent's obligations under this Order represent payment for or reimbursement of response costs, and shall not be deemed to constitute any type of fine or penalty.

N. This Order may be executed for the convenience of the parties hereto, individually or in combination, in one or more counterparts, each of which for all purposes shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.

O. The effective date of this Order is the 10th Day after the date the Commissioner or the Commissioner's designee signs this Order.

DATED:

12/4/01

ERIN M. CROTTY
Commissioner
New York State Department
of Environmental Conservation

By:


Michael J. O'Toole, Jr.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.


By: 
Randolph S. Price

Title Vice President, Environment, Health and Safety

Date: November 26, 2001

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

On the 26th day of November, in the year 2001, before me, the undersigned, personally appeared Randolph S. Price, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.


Signature and Office of individual
Taking Acknowledgment

AUDREY LILLOO FRASER
Notary Public, State of New York
No. 41-4993984
Qualified in Queens County
Commission Expires March 30, 2002

