

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Development
and Implementation of a Former
Manufactured Gas Plant (MGP) Site
Investigation and Remediation
Program by Brooklyn Union for the
former Richmond County Gas Light site
located at 25 and 40 Willow Avenue,
Staten Island, New York

ORDER ON CONSENT
Index #D2-0001-98-04

WHEREAS:

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law, which, inter alia, requires the Department to carry out the environmental policy of the State set forth in ECL 1-0101. ECL 3-0301.1.

2. Brooklyn Union ("Respondent") is a business corporation organized under the laws of the State of New York.

3. A. The former Clifton Manufactured Gas Plant (MGP) Site is located on Willow Avenue and Bay Street in Staten Island, NY and covers a three acre area (see attached map) (the "Site"). The Site was operated by Richmond County Gas Light from 1856 to 1901 and by New York and Richmond Gas from 1901 to 1957. The MGP facility ceased operation in 1957. Brooklyn Union acquired New York and Richmond Gas in 1957 and never operated the MGP facility. Brooklyn Union is the current owner of the property and is currently leasing a portion of the property to a Saturn Dealership. However, the Clifton Gate Station is currently maintained and utilized by Brooklyn Union on portions of the property.

B. Portions of the Site were used by Brooklyn Union until 1994 as a Service Center on the north side of Willow Avenue and as a gate station, still in operation, on the south side of Willow Avenue. The property on the north side of Willow Avenue (former Service Center) contains a building on the corner of Willow Avenue and Bay Street. However, the majority of the Site is covered by a paved parking lot. A wooded undeveloped area adjacent to a raised railroad line traverses the northwestern portion of the Site. Commercial buildings are located across Bay Street, to the north and south of the Site. Among other things, coal tar and associated hazardous substances ("MGP wastes") and petroleum (as defined in Navigation Law §172) are thought to have come to be located at the Site at various times in the past.

C. In 1993, Brooklyn Union, under the supervision of the New York State Department of Environmental Conservation (the "Department")'s then Division of Spill Prevention and Response, removed several gasoline underground storage tanks (USTs). Further, Brooklyn Union installed four monitoring wells (OW1-OW4) in the vicinity of the former USTs, in accordance with Department regulations. Since 1993, Brooklyn Union has performed quarterly groundwater sampling to determine if any contamination was present and has submitted yearly reports summarizing these results to the Department. Based on the continued presence of contaminants that exhibit MGP-like characteristics, the Department requested, in November 1997, that Brooklyn Union install an additional three wells (OW5-OW7) to determine if these contaminants are migrating off-site. As a result, Brooklyn Union installed these additional wells in January 1998 (see attached map for monitoring well locations). The preliminary analytical results indicate that MGP-like contamination is present in the groundwater at all three monitoring well locations.

4. The Department's general authority to require abatement and remediation of releases of, inter alia, hazardous substances as that term is defined in 42 U.S.C. 9601(14), including MGP wastes, that are in violation of law or that exceed State environmental quality standards (as those set forth in 6 NYCRR Part 703) ("hazardous substances") and of petroleum, is varied, including, but not limited to, ECL 1-0101, 3-0301, 71-1929, 71-2703, and 71-2705 and Navigation Law Article 12. In addition, the Department has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution caused by, inter alia, the release of hazardous substances and petroleum into the environment. ECL 3-0301.1.i. Furthermore, the Department has authority to require abatement and remediation of significant threats to the public health or the environment caused by threatened releases of hazardous substances that are hazardous wastes as that term is defined in ECL 27-1301. Finally, the Department's adoption of the Toxicity Characteristics Leaching Procedure, effective January 15, 1995, triggers the Department's authority under ECL Article 27, Title 13.

5. The Department and Respondent agree that the goals of this Order are for Respondent to (i) develop and implement a Remedial Investigation ("RI") and prepare a Feasibility Study ("FS"); (ii) remediate the Site, and to remediate off-Site areas to the extent Respondent is responsible, if the Department determines there is a need for remediation, on a schedule and to an extent acceptable to the Department, including authorizing Respondent to develop and implement Interim Remedial Measures ("IRMs") that the Department determines to be appropriate; and (iii) pay for the State's reasonable administrative and oversight costs associated with implementation of this Order.

6. Respondent, without admitting or denying the Department's authority to require investigation and remediation of hazardous substances at, or associated with, the Site and having waived its right to a hearing herein as provided by law, and having

consented to the issuance and entry of this Order, 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. However, should the Department request that this Order be revised, Respondent reserves all of its rights provided by law and the New York Environmental Conservation Law.

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

I. Initial Submittals

No later than 30 days after the effective date of this Order, Respondent shall submit to the Department any other data and information it has in its possession respecting the Site. The other data and information shall include, to the extent known and in Respondent's possession:

A. A brief history and description of the Site, including operations, facilities, and equipment and the types, quantities, physical state, location, and, if applicable, dates of disposal of hazardous substances, including methods of disposal and spillage of such substances;

B. A comprehensive list and copies of all existing relevant reports and memoranda with titles, authors, and subject matter, as well as a description of the results of all previous investigations of the Site and areas in the vicinity of the Site, including copies of all available plans, drawings, topographic and property surveys, engineering studies and surface and aerial photographs; and

C. An 8.5 inch by 11 inch portion of a United States Geological Survey topographic map of the Site which contains the name of the quadrangle and an arrow indicating the orientation of a northern compass point.

If any of the data or information is contained in documents concerning which a claim of privilege may be asserted, Respondent shall provide such data and information but need not disclose the privileged mental impressions, conclusions, opinions, or legal theories of counsel or Respondent's staff's request for same, as provided under applicable New York State law.

II. RI/FS Work Plan Contents and Submittals

A. Within 90 days after the effective date of this Order, Respondent shall submit to the Department a detailed work plan describing the methods and procedures to be implemented in performing an RI/FS for the Site ("RI/FS Work Plan").

B. 1. The RI/FS Work Plan shall include, but not be limited to, the following:

a. A chronological description of the anticipated RI/FS activities together with a schedule for the performance of these activities.

b. A Sampling and Analysis Plan that shall include:

(i) A quality assurance project plan that describes the quality assurance and quality control protocols necessary to achieve the initial data quality objectives. This plan shall designate a data validation expert and must describe such individual's qualifications and experience.

(ii) A field sampling plan that defines sampling and data gathering methods in a manner consistent with the "Field Methods Compendium," OSWER Directive 9285.2-11 (draft June 1993), as supplemented by the Department.

c. A health and safety plan to protect persons at and in the vicinity of the Site during the performance of the RI/FS which shall be prepared in accordance with 29 CFR 1910 and all other applicable standards by a certified health and safety professional. Respondent shall add supplemental items to this plan necessary to ensure the health and safety of all persons at or in the vicinity of the Site during the performance of any work pursuant to this Order.

d. A citizen participation plan that is, at a minimum, consistent with the Department's publication, "New York State Inactive Hazardous Waste Site Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto, and 6 NYCRR Part 375.

2. The RI/FS Work Plan shall incorporate all elements of a RI/FS as set forth in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") [42 USC 9601 et seq.], as amended, the National Contingency Plan ("NCP") of March 8, 1990 [40 CFR Part 300], the USEPA guidance document entitled "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," dated October 1988, and any subsequent revisions to that guidance document in effect at the time the RI/FS Work Plan is submitted, and appropriate USEPA and Department technical and administrative guidance documents. Respondent may request that certain requirements contained in the items listed in the preceding sentence not be followed because they are unnecessarily and needlessly burdensome for obtaining additional data at the Site and other areas of investigation. The Department shall not unreasonably deny such requests when reviewing Respondent's RI/FS Work Plan.

C. Respondent shall perform the Remedial Investigation in accordance with the Site's Department-approved RI/FS Work Plan.

D. During the performance of the Site's Remedial Investigation, Respondent shall have at the Site and at other areas covered by the Remedial Investigation a full-time representative who is qualified to supervise the work done. Respondent's designated representative may be a qualified employee of a consultant or contractor.

E. In accordance with the schedule contained in the Site's Department-approved RI/FS Work Plan, Respondent shall prepare a Remedial Investigation Report that shall:

1. Include all data generated and all other information obtained during the remedial investigation of the site and other areas covered by the Remedial Investigation;
2. Identify any additional data that must be collected; and
3. Provide all appropriate assessments and evaluations set forth in CERCLA, the NCP, and the guidance documents identified in Subparagraph II.B.2 of this Order; and
4. Include a certification by the individual or firm with primary responsibility for the day to day performance of the Remedial Investigation at the Site and other areas of investigation that all activities that comprised the Remedial Investigation were performed in full accordance with the Department-approved RI/FS Work Plan.

III. Feasibility Study

A. 1. Upon review and approval of the Remedial Investigation Report, the Department shall determine whether hazardous substances found at the Site and other areas of investigation that have migrated from or otherwise originated from the Site (the "hazardous substances at issue") constitute a significant threat to the environment. Such determination shall be in writing and provided to Respondent.

2. Within 150 days after receipt of the Department's approval of the Remedial Investigation Report, Respondent shall submit to the Department a Feasibility Study evaluating on-Site and off-Site remedial actions to eliminate, to the maximum extent practicable, all health and environmental hazards and potential hazards attributable to disposal or release of hazardous substances at issue. Such evaluation may include remediation cleanup levels based upon a site-specific risk assessment that shall consider a range of exposure scenarios and assumptions that take into account the

form, nature, biodegradation, fate, and transport of the contaminants present, available toxicological data that are based upon generally accepted and peer-reviewed scientific evidence or methodologies, and current and expected future uses of the Site and other areas covered by the Remedial Investigation, which may include appropriate institutional controls. The site-specific risk assessment shall be consistent with guidance and regulations for exposure assessment developed by the United States Environmental Protection Agency pursuant to CERCLA and other statutory authorities as applicable; and any proposed remediation cleanup level based upon a site-specific risk assessment shall be protective of the public health and safety and of the environment. In the event that Respondent intends to undertake such evaluation using a Site-specific risk assessment, Respondent shall submit such risk assessment to the Department for review no later than 90 days before Respondent shall be required to submit the Feasibility Study. Unless the Department determines that such risk assessment is not consistent with the expected future uses of the Site or other covered areas and or not consistent with peer-reviewed scientific evidence or methodologies, or appropriate guidance and regulations--in which case, the Department shall provide Respondent with a written explanation of the basis for such a determination--the Site-specific risk-based remediation cleanup level determined by application of the risk assessment shall be approved by the Department and shall be used for purposes of selecting the remedial alternative for the Site and other areas covered by the Remedial Investigation. Such evaluation also shall take into account any and all Department-approved IRMs that were implemented at the Site and other areas covered by the Remedial Investigation. The Feasibility Study shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Feasibility Study was prepared in accordance with this Order.

B. Respondent shall perform and prepare the Feasibility Study in accordance with the Department-approved RI/FS Work Plan in a manner consistent with appropriate sections of CERCLA, the NCP, and the guidance documents identified in Subparagraph II.B.2 of this Order.

C. 1. Within 30 days after the Department's approval of the Feasibility Study, Respondent shall cooperate and assist the Department in soliciting public comment on the RI/FS and the proposed remedial action plan identified therein, in accordance with appropriate provisions of CERCLA, the NCP, the guidance documents identified in Subparagraph II.B.2 of this Order, and with any Department policy and guidance documents in effect at the time the public comment period is initiated.

2. The Department shall afford Respondent an opportunity to review and comment upon the proposed remedial action plan before its release to the public using the following procedure: the Department shall prepare a proposed remedial action plan and shall mail a copy of same to Respondent at least fifteen business days before the scheduled date of publication of the notice of availability of the

document. Respondent shall have ten business days to meet with the Department to discuss it. In the event that Respondent disputes the proposed remedial action plan within that ten day period, it may request in writing a resolution of its dispute using the procedures contained in Subparagraph XVI.A of this Order. Any resolution of this dispute through the use of those procedures shall concern only the contents of the proposed remedial action plan to be released to the public and shall not preclude the Department from selecting a final remedial alternative for the Site or other area covered by the Remedial Investigation that shall have been released to the public.

3. After the close of the public comment period, the Department shall select a final remedial alternative for the Site and other areas covered by the Remedial Investigation in a Record of Decision ("ROD"). The ROD shall be incorporated into and become an enforceable part of this Order.

IV. IRMs

A. 1. Respondent may propose one or more IRMs for the Site or other area of investigation.

2. In proposing each IRM, Respondent shall submit to the Department a work plan that includes a chronological description of the anticipated IRM activities together with a schedule for performance of those activities (an "IRM Work Plan" for the Site or other area of investigation).

3. Upon the Department's determination that the proposal is an appropriate IRM and upon the Department's approval of such work plan, the IRM Work Plan shall be incorporated into and become an enforceable part of this Order; and Respondent shall submit to the Department for review and (as appropriate) Department approval, in accordance with the schedule contained in the Department-approved IRM Work Plan, detailed documents and specifications prepared, signed, and sealed by a professional engineer to implement the Department-approved IRM. Such documents shall include a health and safety plan, contingency plan, and (if the Department requires such) a citizen participation plan that incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto. Respondent shall then carry out such IRM in accordance with the requirements of the approved IRM Work Plan, detailed documents and specifications, and this Order. Respondent shall notify the Department of any significant difficulties that may be encountered in implementing the Department-approved work plan, detailed documents, or specifications and shall not modify any obligation unless first approved by the Department.

4. During implementation of all construction activities identified in

the Department-approved IRM Work Plan, Respondent shall have at the location where the IRM is being undertaken a full-time representative who is qualified to supervise the work done.

5. Within the schedule contained in the Department-approved IRM Work Plan, Respondent shall submit to the Department a final engineering report prepared by a professional engineer that includes a certification by that individual that all activities that comprised the IRM were performed in full accordance with the Department-approved IRM Work Plan, detailed documents and specifications, and this Order.

i. If the performance of the Department-approved IRM encompassed construction activities, the final engineering report shall include a detailed post-remedial operation and maintenance plan ("O&M Plan"); "as-built" drawings and a final engineering report (each including all changes made to the Remedial Design during construction); and a certification by a professional engineer that the IRM was implemented and all construction activities were completed in accordance with the Department-approved detailed documents and specifications for the IRM. The O&M Plan, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

ii. Upon the Department's approval of the O&M Plan, Respondent shall implement the O&M Plan in accordance with the requirements of the Department-approved O&M Plan.

6. After receipt of the final engineering report and certification, the Department shall notify Respondent in writing whether the Department is satisfied that the IRM was completed in compliance with the Department-approved IRM Work Plan and design.

B. 1. In implementing any IRM approved by the Department under this Order, Respondent shall be exempt from the requirement to obtain any permit issuable by the Department for an activity satisfying the criteria set out in Subparagraph IV.B.2 of this Order.

2. The following criteria must be met:

i. The activity is conducted on the Site. For purposes of this Order, an activity is on the Site:

(a) if it is conducted on the same premises as the Site,

or

(b) if it is conducted on different premises that are under common control or are contiguous to or physically connected with the Site and the activity manages exclusively hazardous substances for which Respondent is liable (except in situations where the Remedial Investigation Report discloses the existence of off-Site hazardous substance deposits derived from, or otherwise related to materials deposited on-Site, in which case such deposits shall be deemed "on-Site" and subject to this Order to the extent Respondent is able to obtain access for purposes of investigation and/or removal); and

(c) the activity is conducted in a manner which satisfies all substantive technical requirements applicable if the activity were conducted pursuant to a permit issued by the Department.

V. Remedial Design

A. Unless the ROD selects the "no action" alternative, within 180 days after the ROD is signed, or as otherwise specified in the ROD, Respondent shall submit to the Department a remedial design to implement the remedial alternative for the Site and areas covered by the Remedial Investigation selected by the Department in the ROD (the "Remedial Design"). The Remedial Design shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Remedial Design was prepared in accordance with this Order.

B. The Remedial Design shall include the following:

1. A detailed description of the remedial objectives and the means by which each essential element of the selected remedial alternative will be implemented to achieve those objectives, including, but not limited to:

- i. the construction and operation of any structures;
- ii. the collection, destruction, treatment, and/or disposal of hazardous substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;
- iii. the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;
- iv. physical security and posting of the Site and other areas covered by the Remedial Investigation;
- v. health and safety of persons living and/or working at or in the vicinity of the Site and areas covered by the Remedial Investigation;

vi. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Design; and

vii. monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-selected remedial alternative.

2. "Biddable quality" documents for the Remedial Design including, but not limited to, documents and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

3. A time schedule to implement the Remedial Design;

4. The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including, if the Remedial Design encompasses groundwater monitoring, a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;

5. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction of the Remedial Design, including the number of years during which such activities will be performed;

6. A contingency plan to be implemented if any element of the Remedial Design fails to achieve any of its objectives or otherwise fails to protect human health or the environment;

7. A health and safety plan for the protection of persons at and in the vicinity of the Site and other areas covered by the Remedial Investigation during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional;

8. A citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto; and

9. A plan for coordination with affected property owners on whose properties remediation activities will occur.

VI. Remedial Construction

A. Within such time as identified in the Department's approval of the Remedial Design, Respondent shall commence construction of the Remedial Design. The Department will extend this period if reasonably necessary to accommodate weather-related limitations or other restrictions upon the construction season, or problems with accessing property not owned or controlled by Respondent.

B. Respondent shall implement the Remedial Design in accordance with the Department-approved Remedial Design.

C. During implementation of all construction activities identified in the Remedial Design, Respondent shall have at the location of construction activities a full-time representative who is qualified to supervise the work done.

D. 1. Respondent shall submit to the Department a detailed post-remedial operations and maintenance plan ("O&M Plan"), to the extent necessary, by the completion of the construction activities identified in the Remedial Design.

2. Within 90 days after completion of the construction activities identified in the Department-approved Remedial Design, Respondent shall submit to the Department a final engineering report. The final engineering report shall include "as built" drawings showing all changes made to the Remedial Design during construction, to the extent necessary; and a certification by a professional engineer that the Remedial Design was implemented and all construction activities were completed in accordance with the Department-approved Remedial Design and were personally witnessed by him or her or by a person under his or her direct supervision. The O&M Plan, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Upon the Department's approval of the O&M Plan, Respondent shall implement the O&M Plan in accordance with the requirements of the Department-approved O&M Plan.

F. Respondent shall notify the Department of any significant difficulties that may be encountered in implementing investigative or remedial activities under this Order and shall not modify any obligation unless first approved by the Department, which approval shall not be unreasonably withheld.

G. After receipt of the "as-built" drawings, final engineering report, and certification, the Department shall notify Respondent in writing whether the Department is satisfied that all construction activities have been completed in compliance with the approved Remedial Design.

H. If the Department concludes that any element of the Remedial Program fails to achieve its objectives or otherwise fails to protect human health or the environment, Respondent shall take whatever action the Department determines necessary to achieve those objectives or to ensure that the Remedial Program otherwise protects human health and the environment.

VII. Progress Reports and Meetings

A. Respondent shall submit to each of the parties set forth in Paragraph XV of this Order in the numbers stated therein copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Order during the previous month;
2. identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month;
3. describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information relating to the progress at the Site and other areas of investigation;
4. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays; and
5. include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved. Respondent shall submit these progress reports to the Department by the 10th day after the end of the month to which the report pertains.

B. Respondent shall allow the Department to attend, and shall provide the Department at least seven days advance notice of the occurrence of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting; provided, however, that if circumstances are such as to prevent Respondent from providing the Department with such seven day notice period, Respondent shall provide as much advance notice as possible, under the circumstances.

VIII. Review of Submittals

- A. 1. The Department shall review each of the submittals Respondent is

required to make pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. Respondent shall include all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent, in the submittal to which such sampling, tests, and other data pertain. The Department shall notify Respondent in writing of its approval or disapproval of the submittal, except for the health and safety plans identified in Subparagraphs IV.A.3 and V.B.7 of this Order. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

2. i. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within 30 days after receiving written notice that Respondent's submittal has been disapproved, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

ii. Within a reasonable time after receipt of the revised submittal so as to not cause Respondent to be unable to comply with subsequent obligations and schedule deadlines as presented in Department-approved work plans, the Department shall notify Respondent in writing of its approval or disapproval. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law, unless Respondent exercises the dispute resolution procedure described in Subparagraph XVI.A of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. The Department may require Respondent to modify and/or amplify and expand a submittal if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary.

IX. Penalties

A. Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL. Nothing in this Order precludes Respondent from contesting in a Department hearing any possible future Department allegations that Respondent failed to comply with this Order or from contesting any penalty for an alleged failure to comply.

B. With respect to the period during which the condition shall exist, Respondent shall not suffer any penalty under this Order or be subject to any proceeding or action for enforcement of this Order if it cannot comply with any requirement hereof because of war, riot, or an unforeseeable disaster which the exercise of ordinary human prudence could not have prevented. Respondent shall, within five days of when it obtains knowledge of any such condition, notify the Department in writing. Respondent shall include in such notice the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to compliance with this Order.

X. Entry upon Site

Subject to conditions as may be described in the Site's health and safety plan, Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order.

XI. Payment of State Costs

Paragraph XI of Department Order Index No. D3-0001-95-06 is hereby revised to allow the Department to draw from the interest-bearing account described in that paragraph to pay for environmental monitors and all other State expenses incurred for work related to the Site to the effective date of this Order, as well as for reviewing and revising submittals made pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order.

XII. Department Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights, including, but not limited to nor exemplified by, the right to recover natural resource damages.

B. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

XIII. 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 Respondent's directors, officers, employees, servants, agents, successors, and assigns; provided, however, that Respondent shall not indemnify the Department, the State of New York, and their representatives and employees in the event that such claim, suit, action, damages, or cost relate to or arise from any unlawful, willful, grossly negligent, or malicious acts or omissions on the part of the Department, the State of New York, or their representatives and employees.

XIV. Public Notice

A. Within 30 days after the effective date of this Order with respect to the Site; or within 30 days after Respondent acquires ownership in any property affected by this Order, Respondent shall file, with respect to the Site or such property, a Declaration of Covenants and Restrictions with the Clerk of the County within which the Site or such property is located to give all parties who may acquire any interest in the Site or such property notice of this Order.

B. If Respondent proposes to convey the whole or any part of Respondent's ownership interest in any property affected by this Order, including the Site, Respondent shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance of the property in question and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order and shall accompany such notification with a copy of this Order.

XV. Communications

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

1. Communication from Respondent shall be sent to:

James G. Van Hoesen, P.E.
Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

with copies to:

Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203

Regional Director
New York State Department of Environmental Conservation
1 Hunters Point Plaza
Long Island City, New York 11101-5407

Charles E. Sullivan, Jr., Esq.
New York State Department of Environmental Conservation
50 Wolf Road, Room 410A
Albany, New York 12233-5550

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

Mr. Lawrence H. Liebs
Director, Environmental Risk Management
Brooklyn Union
One MetroTech Center
Brooklyn, New York 11201-3850

Dennis P. Harkawik, Esq.
Jaekle, Fleischmann & Mugel
Fleet Bank Building
Twelve Fountain Plaza
Buffalo, New York 14202-2292

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

B. Copies of work plans and reports shall be submitted as follows:

1. Four copies (one unbound) to Van Hoesen.
2. Two copies to Director, Bureau of Environmental Exposure Investigation.
3. One copy to the Regional Director, Region 2.

C. 1. Within 30 days of the Department's approval of any report submitted pursuant to this Order, Respondent shall submit, if requested, to Mr. Van Hoesen a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format.

2. Within 30 days after the Department's approval of the RI/FS, Respondent shall submit to Mr. Van Hoesen one microfilm copy (16 millimeter roll film M type cartridge) of the Department-approved RI/FS. Within 30 days after its approval of the drawings and submittals described in Subparagraph VII.A of this Order, Respondent shall submit one microfilm copy (16 millimeter roll film M type cartridge) of such Department-approved drawings and submittals, as well as all other Department-approved submittals other than the Department-approved RI/FS.

XVI. Miscellaneous

A. 1. If after conferring in good faith, there remains a dispute between Respondent and the Department concerning a provision of this Order identified as subject to this Subparagraph's procedures, within the time period provided in that provision Respondent shall serve on the Department a request for an appointment of an Administrative Law Judge ("ALJ"), and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis, or opinion supporting its position, and all supporting documentation on which Respondent relies (hereinafter called the "Statement of Position"). The Department shall serve upon Respondent its Statement of Position, including supporting documentation no later than ten (10) business days after receipt of Respondent's Statement of Position. Respondent each shall have five (5) business days after receipt of the Department's Statement of Position within which to serve upon the Department a reply to the Department's Statement of Position, and in the event Respondent serves such a reply, the Department shall have five (5) business days after receipt of Respondent's reply to the Department's Statement of Position within which to serve upon Respondent the Department's reply to Respondent's 's reply to the Department's Statement of Position. In the event that the periods for exchange of Statements of Position and replies may cause a delay in the work being performed under this Order, the time periods may be shortened upon and in accordance with notice by the Department as agreed to by Respondent.

2. The Department shall maintain an administrative record of any dispute being addressed under this Subparagraph. The record shall include the Statement of Position of each party served pursuant to Subparagraph XVI.A.1 and any relevant information. The record shall be available for review of all parties and the public.

3. Upon review of the administrative record as developed pursuant

to this Subparagraph, the ALJ shall issue a final decision and order resolving the dispute. If the matter in dispute concerns a submittal,

i. Respondent shall revise the submittal in accordance with the Department's specific comments, as may be modified by the ALJ and except for those which have been withdrawn by the ALJ, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the ALJ revises the time frame in the ALJ's final decision and order resolving the dispute.

ii. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval of the revised submittal.

iii. If the revised submittal fails to address the Department's specific comments, as may be modified by the ALJ, and the Department disapproves the revised submittal for this reason, Respondent shall be in violation of this Order and the ECL.

4. In a review by the ALJ of any dispute pursued under this Subparagraph, Respondent shall have the burden of proving by a preponderance of the evidence that the Department's position should not prevail.

5. A deadline involving any matter that is the subject of the dispute resolution process described in this Subparagraph shall be held in abeyance while it is the subject of the dispute resolution process unless the Department and Respondent otherwise agree in writing. The invocation of the procedures stated in this Subparagraph shall constitute an election of administrative remedies by Respondent, and such election of this remedy shall constitute a waiver of any and all other administrative remedies which may otherwise be available to Respondent regarding the issue in dispute.

B. Subject to the provisions of Subparagraph II.C, all activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous substances and petroleum at the Site. The Department recognizes that the Department -approved remediation program may allow some level of hazardous substances or petroleum to remain on-Site after completion of the Department-approved remediation program's implementation. Because of this, Respondent hereby acknowledges that the Department may impose reasonable institutional controls upon the Site's use--including a restriction Respondent hereby considers to be reasonable running with the land that requires written Department preapproval of a use of the Site that is different than that specified in Respondent's FS. The Department's approval in such circumstances may be based upon the need to

perform additional remediation. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous substances for which Respondent or its predecessors or affiliates is responsible; subject, however, to the limitation that Respondent is not hereby required to remediate hazardous substances that are not hazardous substances at issue and that are not intermingled with hazardous substances at issue.

C. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. Within 30 days after completion of Respondent's retainer process resulting in the selection of a particular firm or individual to perform any of such obligations, Respondent shall submit to the Department a summary of the experience, capabilities, and qualifications of the firm or individual retained. Respondent must obtain the Department's approval of these firms or individuals before the initiation of any activities for which Respondent and such firms or individuals will be responsible.

D. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent, and the Department also shall have the right to take its own samples. Respondent shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the Department, and Respondent also shall have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data generated by Respondent with respect to implementation of this Order, including a tabular summary of any such results in any report submitted pursuant to this Order requiring such results.

E. Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order. The Department's project manager is hereby authorized to approve any modification to an activity to be conducted under a Department-approved work plan in order to adapt the activities to be undertaken under such work plan to the conditions actually encountered in the field, provided that such modification does not impair the effectiveness of the remediation of the Site or other area covered by the Remedial Investigation.

F. Respondent shall use reasonable efforts to obtain whatever permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations are necessary to perform Respondent's obligations under this Order. If Respondent is unable, after exhaustion of such reasonable efforts, to obtain any such permissions, the Department will exercise whatever authority is available to it, in its discretion, to obtain same. In no event will Respondent be determined to be in violation of this Order if it fails to obtain any such permissions after exhausting reasonable efforts to obtain same. This is

in recognition of the facts that Respondent is the current owner of only part of the potential area of disposal of hazardous substances at issue. Significant impediments may, therefore, be encountered as to Respondent's ability to obtain access for purposes of carrying out the requirements of this Order.

G. If Respondent determines, in connection with its obligations under this Order, that a valid claim exists in favor of Respondent as against any other potentially responsible party, for contribution toward response costs deemed necessary by the Department (or for recovery of an appropriate portion of such costs previously incurred by Respondent), the Department shall provide, in a timely manner, information responsive to any reasonable request (otherwise in conformity with Freedom of Information Law requirements) by such party and any other relevant information that may be helpful in substantiating Respondent's claim. Similarly, if Respondent requests access to non-privileged and otherwise disclosable information in the Department's possession and relevant to the potential liability of any person or entity who may be subject to such claim by Respondent for contribution or cost recovery, the Department will take reasonable steps to expedite Respondent's 's access to such information.

H. Respondent and its 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. Respondent's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondent.

I. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondent with respect to the Site and shall condition all contracts entered into hereunder upon performance in conformity with the terms of this Order. Respondent or Respondent's contractors 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 to be done under this Order in accordance with this Order.

J. All references to "professional engineer" in this Order are to an individual licensed and registered to practice professional engineering in accordance with Article 145 of the New York State Education Law. If that individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York under that Article.

K. All references to "days" in this Order are to calendar days unless otherwise specified.

L. 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.

M. This Order shall not be construed as barring, diminishing, or restricting Respondent's ability to seek cost recovery, contribution, or indemnification from third parties, other than the State of New York.

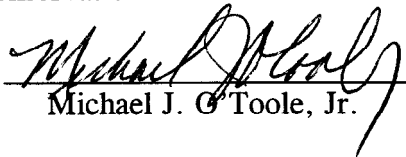
N. 1. The terms of this Order shall constitute the complete and entire Order issued to Respondent concerning the Site and areas covered by the Remedial Investigation pertaining to the matters identified in this Order. No term, condition, understanding, or agreement purporting to modify or vary any term 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 regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

2. If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by the Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Messrs. Van Hoesen and Sullivan.

O. The effective date of this Order shall be the date it is signed by the Commissioner or his designee.

DATED: 4/17/98

JOHN P. CAHILL, Commissioner
New York State Department of Environmental
Conservation

by: 
Michael J. Toole, Jr.

