

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

In the Matter of the  
Development and Implementation  
of a Remedial Program for an  
Inactive Hazardous Waste Disposal  
Site under Article 27, Titles 9 and 13, and,  
Article 71 of the Environmental Conservation Law

by

Dyno Nobel, Inc.  
Respondent.

**ORDER  
ON  
CONSENT  
and  
ADMINISTRATIVE  
SETTLEMENT**

Index #CO 3-20180508-  
85

Site # 356001

**WHEREAS,**

1. A. The New York State Department of Environmental Conservation (“Department”) is responsible for inactive hazardous waste disposal site remedial programs pursuant to Article 27, Title 13 of the Environmental Conservation Law (“ECL”) and Part 375 of Title 6 of the Official Compilation of Codes, Rules and Regulations (“6 NYCRR”) and may issue orders consistent with the authority granted to the Commissioner by such statute.

B. The Department is responsible for carrying out the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land and air pollution consistent with the authority granted to the Department and the Commissioner by Article 1, Title 3 of the ECL.

C. The Department is also responsible for the Resource Conservation and Recovery Act Program (“RCRA” a/k/a the “Industrial Hazardous Waste Management Program”) pursuant to Article 27, Title 9 of the ECL and 6 NYCRR Parts 370 – 374 and 376.

D. This Order on Consent and Administrative Settlement (“Order”) is issued pursuant to the Department’s authority under, *inter alia*, ECL Article 27, Titles 9 and 13, ECL Article 71-2727 and ECL 3-0301.

2. Dyno Nobel, Inc. (hereinafter "Respondent") is a business corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of New York. Respondent is the owner and operator of a RCRA-permitted facility in the Town of Esopus located at 161 Ulster Avenue, Ulster County, New York (hereinafter the "Site").
3. Respondent is currently listed as permittee for a 6 NYCRR Part 373 RCRA permit that governs corrective action, closure, and post-closure activities for the Site (RCRA Permit No. 3-5122-00042/00019). A map depicting the general boundaries of the Site and the tax parcel (63.2-2-1), which consists of approximately 280 acres, is attached hereto as Exhibit "A".
4. Respondent and prior owners/operators produced various explosives, explosive primers and igniters, and related materials at the Site dating back to 1912, when the plant was originally constructed by Brewster Explosives Company.
5. The Site is listed as a class 2 site with a site number of 356001 in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* (the "Registry"). The Department initially listed the Site in the Registry in 1991.
6. Remedial investigations have been conducted at the Site since the early 1990s under the oversight of both the Department and the U.S. Environmental Protection Agency ("USEPA"). A RCRA Facility Assessment ("RFA") that was finalized in 1994 identified several Solid Waste Management Units ("SWMUs") and Areas of Concern ("AOCs"). Respondent and the Department executed an Order on Consent in April 1996 to implement RCRA Facility Investigations ("RFIs"). Specifically, many SWMUs and AOCs were investigated and determined that either some additional work was needed or no further action was needed.
7. Upon completion of the RFIs under the 1996 Order on Consent, the Department issued RCRA Permit No. 3-5122-00042/00019 with Respondent identified as permittee. This RCRA Permit addresses: (a) the storage and management of hazardous waste in containers; (2) the destruction of hazardous waste in an RCRA Subpart X detonation unit; and (3) RCRA corrective action, which includes: corrective measures study(s) ("CMS"), interim corrective measures ("ICM") design submissions and groundwater monitoring and reporting.
8. The RFIs revealed that the Site was contaminated with metals and volatile organic compound ("VOC") contaminants from the disposal of waste products in several SWMUs, including a Shooting Pond, four land disposal units, and a wetland area. Also, air emissions of chemicals that settled on the soil from building vents, piles of construction debris, and hazardous waste disposal operations, resulted in the formation of more than 50 small SWMUs.
9. Groundwater in the vicinity of the Shell Plant at the Site contains concentrations of VOCs, including trichloroethene ("TCE") and various degradation products, exceeding groundwater and drinking water standards.

10. Soil contaminated with heavy metals is present at more than 20 SWMUs throughout the Site. Mercury, lead and arsenic are the primary contaminants in these soils. Mercury contamination is also present in sediment and soils in the wetland area.

11. Respondent prepared a CMS Report in 2000 that evaluated remediation alternatives for the Site. The CMS Report evaluated potential remedies for 39 SWMUs and 15 AOCs at the Site, including the contaminated groundwater, the waste and soil in the Shooting Pond and the waste material in the land disposal units.

12. Respondent closed its manufacturing operations at the Site and no longer stores hazardous waste in containers or destroys hazardous waste at the Site. The permitted storage and treatment units identified in Modules III and X of RCRA Permit No. 3-5122-00042/00019 have all undergone closure in accordance with Department-approved work plans. The closed permitted units include the following:

<b>Permitted Unit – Building No.</b>	<b>Unit Type</b>	<b>Department Approval of Closure Report</b>
Magazine A – Building No. 9207	Storage Area	May 23, 2012
Magazine B – Building No. 9208	Storage Area	May 23, 2012
Magazine C – Building No. 9209	Storage Area	May 23, 2012
Magazine F – Building 9219	Storage Area	May 23, 2012
LA Magazine – Building No. 3002	Storage Area	October 11, 2005
Powder Storage Building – Building No. 2037	Storage Area	Unknown
Liquid Chemical Storage – Building No. 3016	Storage Area	July 31, 2014
Lab Annex – Building No. 8111	Storage Area	October 11, 2005
Detonation Chamber Exterior Steel Magazine	Storage Area	October 11, 2005
Detonation Chamber – Building No. 2077	Treatment Unit	October 11, 2005

13. Respondent has requested that RCRA Permit No. No. 3-5122-00042/00019 be terminated since Respondent’s hazardous waste management activities at the Site no longer require a RCRA permit. However, contamination remains at the Site that requires Corrective Action, and Respondent remains responsible for the ongoing Corrective Action obligations at the Site under 6 NYCRR Part 373-2.6 and RCRA Permit No. 3-5122-00042/00019.

14. The Department and Respondent are currently negotiating the scope of the remediation required at the Site, which will be detailed in a Record of Decision (“ROD”). Both parties agree that executing this comprehensive Order integrating Respondent’s inactive hazardous waste disposal site response obligations and RCRA Corrective Action obligations is the preferred path toward implementing a remedial program at the Site.

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

8. Solely with regard to the matters set forth below, Respondent hereby waives any right to a hearing as may be 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 in accordance with its terms, and agrees not to contest the validity of this Order or its terms.

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

I. Real Property

The Site subject to this Order has been assigned number 356001, consists of approximately 280 acres, and is identified as a portion of the following property:

Subject Property Description (A Map of the Site is attached as Exhibit "A")

Tax Map/Parcel No.: Section 63.2, Block 2, Lot 1  
161 Ulster Avenue  
Ulster Park, NY 12487  
Owner: Ireco Incorporated (k/n/a Dyno Nobel, Inc.)  
Approximate Total Acreage: 280

II. Effect of Order

The Department and Respondent intend to integrate Respondent's inactive hazardous waste disposal site remedial program obligations and RCRA corrective action obligations that relate to the release(s) of hazardous substances, hazardous wastes, pollutants, or contaminants at and from the Site covered by this Order into this comprehensive Order. Based upon the foregoing, RCRA Permit No. 3-5122-00042/00019 is hereby terminated by this Order.

The Site will retain RCRA final status, and Respondent will retain responsibility for corrective action obligations under 6 NYCRR 373-2.6(l), which will be satisfied through compliance with this Order. Activities taken by Respondent at the Site will be subject to the terms and provisions of this Order and will be taken pursuant to one or more Department approved work plans to be developed under and in accordance with the

terms of this Order. The Department expressly reserves its rights to enforce the regulations at 6 NYCRR Part 373 should Respondent fail to comply with the terms and conditions of this Order.

- A. This Order shall not in any way regulate or affect the State Pollution Discharge Elimination System Permit ("SPDES") issued for this Site.
- B. All prior agreements, Orders on Consent and similar documents between Respondent and the Department concerning remedial programs at the Site are terminated, and all obligations pursuant to such agreements shall be governed by the terms and provisions of this Order.

## II. Submission of Work Plans

- A. Respondent shall, within 90 days of the issuance of ROD for the Site by the Department, submit for the Department's review and approval a Remedial Design/Remedial Action ("RD/RA") Work Plan for the implementation of the ROD. The RD/RA Work Plan shall be prepared and submitted in accordance with the standards conditions in Appendix A.
- B. The Department may, at its discretion, direct the Respondent to prepare and submit additional work plans, studies and/or designs as the Department determines necessary to ensure protection of human health and the environment. Respondent shall submit and implement any additional work plans, studies and/or designs required by the Department in accordance with the standard conditions in Appendix A.
- C. Pursuant to the standard conditions in Appendix A, Respondent may elect to submit additional work plans, including one or more Interim Remedial Measure ("IRM") work plans, at any time.
- D. Upon the Department's written approval of a work plan, such Department-approved work plan shall be deemed to be incorporated into and made a part of this Order and shall be implemented in accordance with the schedule contained therein.

## III. RCRA Integration and Requirements

This Order, *inter alia*, incorporates the requirements of 6 NYCRR 373-2.6(l) including corrective action and financial assurance and requirements, for the facility which operated on the Site.

The investigative and remedial obligations under this Order are intended to, and if implemented in accordance with this Order shall, satisfy the corrective action requirements in 6 NYCRR 373-2.6(l). The Department and Respondent intend that any remedial action selected, implemented and/or completed under this Order shall be protective of human health and the environment such that remediation of releases

covered by this Order shall obviate the need for further Corrective Action under RCRA as to those releases. Compliance with this Order, therefore, shall fulfill Respondent's RCRA corrective action obligations.

Provided the Department-approved Remedial Design achieves the remedial goals set forth in the ROD, Respondent's implementation to the Department's satisfaction of the Department-approved Remedial Design will constitute Respondent's satisfactory performance of the RCRA Corrective Action requirements which are specifically incorporated into the Department-approved Remedial Design.

IV. Payment of Costs

Respondent shall pay future state oversight costs as set forth in Appendix "A."

V. Financial Assurance

As the Site is a class "2" inactive hazardous waste disposal site and a RCRA-permitted facility subject to Corrective Action, the Department pursuant to 6 NYCRR 375-1.11(c) and 6 NYCRR 373-2.6(l)(2) requires financial assurance for the remediation of contaminated soils and sediments and implementation of long-term groundwater treatment/recovery and monitoring.

Within thirty (30) days following the issuance of a ROD, Respondent shall provide to the Department a cost estimate and shall provide financial assurance for implementation of the ROD remedy and the operation, maintenance and monitoring of remedial systems pursuant to one of the methods set forth in 6 NYCRR Part 373-2.8(f). While this Order is in effect, the cost estimate will be subject to adjustment for inflation as provided in 6 NYCRR Part 373-2.8(e).

Respondent must maintain cost estimates for the post-closure care and for corrective action remedy implementation and maintenance in accordance with 6 NYCRR 373-2.8(e) and 6 NYCRR 375-1.11(c)(3).

Respondent must provide, maintain and update its financial assurance mechanism(s), as necessary, in accordance with 6 NYCRR 373-2.8(f) and 6 NYCRR 375-1.11(c)(2), (4) – (6).

VI. Communications

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

1. Communication from Respondent shall be sent to:

Salvatore Priore  
Division of Environmental Remediation Project Manager  
NYSDEC, Division of Environmental Remediation  
Remedial Bureau C  
625 Broadway, 11<sup>th</sup> Floor,  
Albany, NY 12233  
salvatore.priore@dec.ny.gov  
(One hard copy and electronic copy)

David Crosby  
Division of Environmental Remediation Section Chief  
NYSDEC, Division of Environmental Remediation  
Remedial Bureau C  
625 Broadway, 11<sup>th</sup> Floor,  
Albany, NY 12233  
david.crosby@dec.ny.gov  
(electronic copy only)

with copies to:

Michael C. Murphy, Esq. (Correspondence Only)  
Office of General Counsel  
New York State Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, NY 12233  
michael.murphy1@dec.ny.gov

Maureen Schuck  
Bureau of Toxic Substance Assessment Regional Chief  
New York State Department of Health  
Bureau of Environmental Exposure Investigation  
Empire State Plaza  
Corning Tower Room 1787  
Albany, NY 12237  
maureen.schuck@health.ny.gov  
(electronic copy only)

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

Fred Jardinico, Environmental Manager  
Dyno Nobel Inc.  
Port Ewen Plant  
161 Ulster Avenue  
Ulster Park, NY 12487-5019  
fred.jardinico@am.dynonobel.com

with copy to:

Jeff Droubay, Vice President/Legal  
Dyno Nobel, Inc.  
2795 East Cottonwood Parkway  
Suite 500  
Salt Lake City, Utah 84121  
jeffrey.droubay@am.dynonobel.com

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 VI.

VII. Dispute Resolution

Pursuant to Paragraph XV of Appendix A, in the event disputes arise under this Order, Respondent may, within fifteen (15) Days after Respondent knew or should have known of the facts which are the basis of the dispute, initiate dispute resolution in accordance with the provisions of 6 NYCRR 375-1.5(b)(2).

All costs incurred by the Department associated with dispute resolution are State costs subject to reimbursement pursuant to this Order. Nothing contained in this Order shall be construed to authorize Respondent to invoke dispute resolution with respect to any remedy selected by the Department 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.

VIII. Termination of Order

This Order will terminate upon the Department's written determination that Respondent has completed all phases of the Remedial and Corrective Action/Post-Closure Programs (including Site Management), in which event the termination shall be effective on the Fifth Day after the date of the Department's approval of the final report relating to the final phase of the Remedial and Corrective Action/Post Closure Programs.

IX. Miscellaneous

A. Appendix A – "Standard Clauses for All New York State State-Superfund Orders" is attached to and hereby made part of this Order as if set forth fully herein.

B. In the event of a conflict between the terms of this Order (including any and all attachments thereto and amendments thereof) and the terms of Appendix A, the terms of this Order shall control.



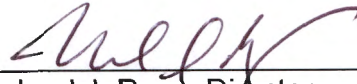
C. The effective date of this Order is the 10<sup>th</sup> Day after the date the Commissioner or the Commissioner's designee signs this Order.

DATED: Albany, New York

**JUL 24 2018**

Basil Seggos  
Commissioner  
New York State  
Department of Environmental Conservation

By:



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Michael J. Ryan, Director  
Division of Environmental Remediation

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order without further notice, waive their right to a hearing herein, and agree to be bound by the terms, conditions and provisions contained in this Order.

Dyno Nobel, Inc.

By: (Signature): *Frederic Jardine*

Print Name: FREDERIC JARDINE

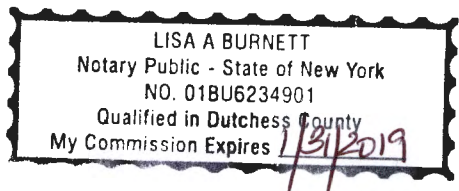
Title: SENIOR DIRECTOR - ENVIRONMENT

Date: July 12, 2018

State of New York )  
County of Dutchess ) s.s.:

On this 12 day of July, 2018, before me, the undersigned, personally appeared Frederic Jardine, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

*Lisa Burnett*  
Notary Public



**EXHIBIT A**

**SITE MAP**



**FIGURE 2-1  
SITE LAYOUT  
DYNO NOBEL SITE, PORT EWEN, NEW YORK**

<p><b>Legend</b></p> <ul style="list-style-type: none"> <li><span style="border: 1px solid red; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> APPROXIMATE SITE BOUNDARY</li> <li><span style="border: 1px solid white; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> APPROXIMATE PROPERTY BOUNDARY</li> <li><span style="background-color: #90EE90; border: 1px solid black; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> NYSDEC MAPPED CLASS 2 WETLANDS</li> <li><span style="background-color: #90EE90; border: 1px dashed yellow; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> NYSDEC MAPPED CLASS 3 WETLANDS</li> <li><span style="background-color: #ADD8E6; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> LAKE/POND</li> <li><span style="background-color: #3CB371; display: inline-block; width: 15px; height: 10px; margin-right: 5px;"></span> SWAMP/MARSH</li> <li><span style="border-bottom: 1px dashed yellow; display: inline-block; width: 15px; margin-right: 5px;"></span> SWMU 1/22 BOUNDARY</li> <li><span style="border-bottom: 1px solid black; display: inline-block; width: 15px; margin-right: 5px;"></span> RAILROAD</li> <li><span style="border-bottom: 1px solid blue; display: inline-block; width: 15px; margin-right: 5px;"></span> CONNECTOR</li> <li><span style="border-bottom: 1px solid blue; display: inline-block; width: 15px; margin-right: 5px;"></span> PERENNIAL STREAM</li> <li><span style="border-bottom: 1px solid blue; display: inline-block; width: 15px; margin-right: 5px;"></span> INTERMITTENT STREAM</li> <li><span style="border-bottom: 1px solid blue; display: inline-block; width: 15px; margin-right: 5px;"></span> ARTIFICIAL PATH</li> </ul>	<p>N</p>	<p>0 100 200 400 600 800 Feet</p>
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**EXHIBIT B**  
**RECORDS SEARCH REPORT**  
**NOT APPLICABLE**

## APPENDIX A

### STANDARD CLAUSES FOR ALL NEW YORK STATE SUPERFUND ADMINISTRATIVE ORDERS

The parties to the State Superfund Order (hereinafter "Order") agree to be bound by the following clauses which are hereby made a part of the Order. The word "Respondent" herein refers to any party to the Order, other than the New York State Department of Environmental Conservation (hereinafter "Department").

#### I. Citizen Participation Plan

Within twenty (20) days after the effective date of this Order, Respondent shall submit for review and approval a written citizen participation plan prepared in accordance with the requirements of ECL §27-1417 and 6 NYCRR sections 375-1.10 and 375-3.10. Upon approval, the Citizen Participation Plan shall be deemed to be incorporated into and made a part of this Order.

#### II. Initial Submittal

Within thirty (30) days after the effective date of this Order, Respondent shall submit to the Department a Records Search Report prepared in accordance with Exhibit "B" attached to the Order. The Records Search Report can be limited if the Department notifies Respondent that prior submissions satisfy specific items required for the Records Search Report.

#### III. Development, Performance, and Reporting of Work Plans

##### A. Work Plan Requirements

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 and all activities shall be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, as required under CERCLA, 42 U.S.C. § 9600 *et seq.* The Work Plan(s) under this Order shall address both on-Site and off-Site conditions and shall be developed and implemented in accordance with 6 NYCRR § 375-1.6(a), 375-3.6, and 375-6. All Department-approved Work Plans shall be incorporated into and become enforceable parts of this Order. Upon approval of a

Work Plan by the Department, Respondent shall implement such Work Plan in accordance with the schedule contained therein. Nothing in this Subparagraph shall mandate that any particular Work Plan be submitted.

The Work Plans shall be captioned as follows:

1. Site Characterization ("SC") Work Plan: a Work Plan which provides for the identification of the presence of any hazardous waste disposal at the Site;
2. Remedial Investigation/Feasibility Study ("RI/FS") Work Plan: a Work Plan which provides for the investigation of the nature and extent of contamination within the boundaries of the Site and emanating from such Site and a study of remedial alternatives to address such on-site and off-site contamination;
3. Remedial Design/Remedial Action ("RD/RA") Work Plan: a Work Plan which provides for the development and implementation of final plans and specifications for implementing the remedial alternative set forth in the ROD;
4. "IRM Work Plan" if the Work Plan provides for an interim remedial measure;
5. "Site Management Plan" if the Work Plan provides for the identification and implementation of institutional and/or engineering controls as well as any necessary monitoring and/or operation and maintenance of the remedy; or
6. "Supplemental" if additional work plans other than those set forth in II.A.1-5 are required to be prepared and implemented.

##### B. Submission/Implementation of Work Plans

1. Respondent may opt to propose one or more additional or supplemental Work Plans (including one or more IRM Work Plans) at any time, which the Department shall review for appropriateness and technical sufficiency.
2. Any proposed Work Plan shall be submitted for the Department's review and approval

and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan.

i. 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 III.A or to ensure that the Remedial Program otherwise protects human health and the environment. Upon receipt of such notification, Respondent shall, subject to dispute resolution pursuant to Paragraph XV, modify the Work Plan.

ii. The Department may request, subject to dispute resolution pursuant to Paragraph XV, that Respondent submit additional or supplemental Work Plans for the Site to complete the current remedial phase within thirty (30) Days after the Department's written request.

3. A Site Management Plan, if necessary, shall be submitted in accordance with the schedule set forth in the IRM Work Plan or Remedial Work Plan.

4. During all field activities conducted under a Department-approved Work Plan, Respondent shall have on-Site a representative who is qualified to supervise the activities undertaken in accordance with the provisions of 6 NYCRR 375-1.6(a)(3).

5. A Professional Engineer must stamp and sign all Work Plans other than SC or RI/FS Work Plans.

#### C. Submission of Final Reports and Periodic Reports

1. In accordance with the schedule contained in a Work Plan, Respondent shall submit a final report as provided at 6 NYCRR 375-1.6(b) and a final engineering report as provided at 6 NYCRR 375-1.6(c).

2. Any final report or final engineering report that includes construction activities shall include "as built" drawings showing any changes made to the remedial design or the IRM.

3. In the event that the final engineering report for the Site requires Site management, Respondent shall submit an initial periodic report by

in accordance with the schedule in the Site Management Plan and thereafter in accordance with a schedule determined by the Department. Such periodic report shall be signed by a Professional Engineer or by such other qualified environmental professional as the Department may find acceptable and shall contain a certification as provided at 6 NYCRR 375-1.8(h)(3). Respondent may petition the Department for a determination that the institutional and/or engineering controls may be terminated. Such petition must be supported by a statement by a Professional Engineer 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.

4. Within sixty (60) days of the Department's approval of a Final Report, Respondent shall submit such additional Work Plans as is required by the Department in its approval letter of such Final Report. Failure to submit any additional Work Plans within such period shall be a violation of this Order.

#### D. Review of Submittals

1. The Department shall make a good faith effort to review and respond in writing to each submittal Respondent makes pursuant to this Order within sixty (60) Days. The Department's response shall include, in accordance with 6 NYCRR 375-1.6(d), an approval, modification request, or disapproval of the submittal, in whole or in part.

i. Upon the Department's written approval of a Work Plan, such Department-approved Work Plan shall be deemed to be incorporated into and made a part of this Order and shall be implemented in accordance with the schedule contained therein.

ii. If the Department modifies or requests modifications to a submittal, it shall specify the reasons for such modification(s). Within fifteen (15) Days after the date of the Department's written notice that Respondent's submittal has been disapproved, Respondent shall notify the Department of its election in accordance with 6 NYCRR 375-1.6(d)(3). If Respondent elects to modify or accept the Department's modifications to the submittal, Respondent shall make a revised submittal that incorporates all of the Department's modifications to the first submittal in accordance with the time period set forth in 6 NYCRR 375-1.6(d)(3). In the event that Respondent's revised submittal is disapproved, the Department shall set forth its reasons for such disapproval in writing and Respondent shall be in

violation of this Order unless it invokes dispute resolution pursuant to Paragraph XV and its position prevails. Failure to make an election or failure to comply with the election is a violation of this Order.

iii. If the Department disapproves a submittal, it shall specify the reasons for its disapproval. Within fifteen (15) Days after the date of the Department's written notice that Respondent's submittal has been disapproved, Respondent shall notify the Department of its election in accordance with 6 NYCRR 375-1.6(d)(4). If Respondent elects to modify the submittal, Respondent shall make a revised submittal that addresses all of the Department's stated reasons for disapproving the first submittal in accordance with the time period set forth in 6 NYCRR 375-1.6(d)(4). In the event that Respondent's revised submittal is disapproved, the Department shall set forth its reasons for such disapproval in writing and Respondent shall be in violation of this Order unless it invokes dispute resolution pursuant to Paragraph XV and its position prevails. Failure to make an election or failure to comply with the election is a violation of this Order.

2. 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, in an electronic format acceptable to the Department. If any document cannot be converted into electronic format, Respondent shall submit such document in an alternative format acceptable to the Department.

#### E. Department's Issuance of a ROD

1. Respondent shall cooperate with the Department 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 any rights of Respondent, as provided by law, to judicially challenge the Department's ROD.

2. Respondent shall have 60 days from the date of the Department's issuance of the ROD to notify the Department in writing whether it will implement the remedial activities required by such ROD. If the Respondent elects not to implement the required remedial activities, then this order shall terminate in accordance with Paragraph XIV.A. Failure to make an election or failure to comply with the election is a violation of this Order.

#### F. Institutional/Engineering Control Certification

In the event that the remedy for the Site, if any, or any Work Plan for the Site, requires institutional or engineering controls, Respondent shall submit a written certification in accordance with 6 NYCRR 375-1.8(h)(3) and 375-3.8(h)(2).

#### 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 375-2.11(a)(4). Nothing herein abridges Respondent's right to contest any allegation that it has failed to comply with this Order.

2. Payment of any penalties shall not in any way alter Respondent's obligations under 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 Force Majeure Event as provided at 6 NYCRR 375-1.5(b)(4). Respondent must use best efforts to anticipate the potential Force Majeure Event, best efforts to address any such event as it is occurring, and best efforts following the Force Majeure Event to minimize delay 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 five (5) Days of the onset of any Force Majeure Event. Failure to give such notice within such five (5) 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 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 (i) the delay or anticipated delay has been or will be caused by a Force Majeure Event; (ii) the duration of the delay or the extension sought is warranted under the circumstances; (iii) best efforts were exercised to avoid and mitigate the effects of the delay; and (iv) Respondent complied with the requirements of Subparagraph IV.B.2 regarding timely notification.



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 that are affected by the Force Majeure Event shall be extended for a period of time equivalent to the time lost because of the Force Majeure event, in accordance with 375-1.5(4).

5. If the Department rejects Respondent's assertion that an event provides a defense to non-compliance with this Order pursuant to Subparagraph IV.B, Respondent shall be in violation of this Order unless it invokes dispute resolution pursuant to Paragraph XV 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 inspecting, sampling, copying records related to the contamination at the Site, testing, and any other activities necessary to ensure Respondent's compliance with this Order. Upon request, Respondent shall (i) provide the Department with suitable work space at the Site, including access to a telephone, to the extent available, and (ii) 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. In the event Respondent is unable to obtain any authorization from third-party property owners necessary to perform its obligations under this Order, the Department may, consistent with its legal authority, assist in obtaining such authorizations.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Respondent shall each have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of any such sampling and scientific measurements 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 as provided by 6 NYCRR 375-1.5 (b)(3)(i). Failure to timely pay any invoice will be subject to late payment charge and interest at a rate of 9% from the date the payment is due until the date the payment is made.

B. Costs shall be documented as provided by 6 NYCRR 375-1.5(b)(3). 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. Each such payment shall be made payable to the New York State Department of Environmental Conservation and shall be sent to:

Director, Bureau of Program Management  
Division of Environmental Remediation  
New York State Department of Environmental  
Conservation  
625 Broadway  
Albany, New York 12233-7012

D. The Department shall provide written notification to the Respondent of any change in the foregoing addresses.

E. If Respondent objects to any invoiced costs under this Order, the provisions of 6 NYCRR 375-1.5 (b)(3)(v) and (vi) shall apply. Objections shall be sent to the Department as provided under subparagraph VI.C above.

F. In the event of non-payment of any invoice within the 45 days provided herein, the Department may seek enforcement of this provision pursuant to Paragraph IV or the Department may commence an enforcement action for non-compliance with ECL 27-1423 and ECL 71-4003.

#### VII. Release and Covenant Not to Sue

Upon the Department's issuance of a Certificate of Completion as provided at 6 NYCRR 375-1.9 and 375-2.9, Respondent shall obtain the benefits conferred by such provisions, subject to the terms and conditions described therein.

#### VIII. Reservation of Rights

A. Except as provided at 6 NYCRR 375-1.9 and 375-2.9, 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, and/or to exercise any summary abatement powers with respect to any person, 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 and/or natural resource damages 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, including but not limited to rights of contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

#### IX. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, the Trustee of the State's natural resources, and their representatives and employees harmless as provided by 6 NYCRR 375-2.5(a)(3)(i).

#### X. Public Notice

A. Within thirty (30) Days after the effective date of this Order, Respondent shall provide notice as required by 6 NYCRR 375-1.5(a). Within sixty (60) Days of such filing, Respondent shall provide the Department with a copy of such instrument certified by the recording officer to be a true and faithful copy.

B. If Respondent proposes to transfer by sale or lease the whole or any part of Respondent's interest in the Site, or becomes aware of such transfer, Respondent shall, not fewer than forty-five (45) Days before the date of transfer, 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 or actual 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.

#### XI. Change of Use

Applicant shall notify the Department at least sixty (60) days in advance of any change of use, as defined in 6 NYCRR 375-2.2(a), which is proposed for the Site, in accordance with the provisions of 6 NYCRR 375-1.11(d). In the event the Department determines that the proposed change of use is prohibited, the Department shall notify Applicant of such determination within forty-five (45) days of receipt of such notice.

#### XII. Environmental Easement

A. If a Record of Decision for the Site relies upon one or more institutional and/or engineering controls, Respondent (or the owner of the Site) shall submit to the Department for approval an Environmental Easement to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36, and 6 NYCRR 375-1.8(h)(2). Upon acceptance of the Environmental Easement by the State, Respondent shall comply with the requirements of 6 NYCRR 375-1.8(h)(2).

B. If the ROD provides for no action other than implementation of one or more institutional controls, Respondent shall cause an environmental easement to be recorded under the provisions of Subparagraph XII.A.

C. If Respondent does not cause such environmental easement to be recorded in accordance with 6 NYCRR 375-1.8(h)(2), Respondent will not be entitled to the benefits conferred by 6 NYCRR 375-1.9 and 375-2.9 and the Department may file an Environmental Notice on the site.

#### XIII. Progress Reports

Respondent shall submit a written progress report of its actions under this Order to the parties

identified in Subparagraph IV.A.1 of the Order 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 as set forth in Paragraph XIV, unless a different frequency is set forth in a Work Plan. Such reports shall, at a minimum, include: all actions relative to the Site 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 this Site, whether under this Order or otherwise, in the previous reporting period, including quality assurance/quality control information; information regarding percentage of completion; unresolved delays encountered or anticipated that may affect the future schedule and 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.

#### XIV. Termination of Order

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

1. Respondent's election in accordance with Paragraph III.E.2 not to implement the remedial activities required pursuant to the ROD. 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, provided, however, that 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 not to implement the remedial activities in accordance with the ROD, Respondent shall 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 Site Management), in which event the termination shall be effective on the 5th Day after the date of the Department's letter stating that all phases of the remedial program have been completed.

B. Notwithstanding the foregoing, the provisions contained in Paragraphs VI and IX 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 375-2.11(a)(4), 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 XIV.A.1, neither this Order nor its termination shall affect any liability of Respondent for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA, nor shall it affect any defenses to such liability that may be asserted by Respondent. 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 existed before any activities under this Order were commenced. Further, the Department's efforts in obtaining and overseeing compliance with this Order shall constitute reasonable efforts under law to obtain a voluntary commitment from Respondent for any further activities to be undertaken as part of a Remedial Program for the Site.

#### XV. Dispute Resolution

A. In the event disputes arise under this Order, Respondent may, within fifteen (15) Days after Respondent knew or should have known of the facts which are the basis of the dispute, initiate dispute resolution in accordance with the provisions of 6 NYCRR 375-1.5(b)(2).

B. All costs incurred by the Department associated with dispute resolution are State costs subject to reimbursement pursuant to this Order.

C. 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.

#### XVI. Miscellaneous

A. Respondent agrees to comply with and be bound by the provisions of 6 NYCRR Subparts 375-1 and 375-2; the provisions of such Subparts that are referenced herein are referenced for clarity and convenience only and the failure of this Order to specifically reference any particular regulatory

provision is not intended to imply that such provision is not applicable to activities performed under this Order.

B. The Department may exempt Respondent from the requirement to obtain any state or local permit or other authorization for any activity conducted pursuant to this Order in accordance with 6 NYCRR 375-1.12(b), (c), and (d).

C. 1. Respondent shall use best efforts to obtain all Site access, permits, easements, approvals, institutional controls, and/or authorizations necessary to perform Respondent's obligations under this Order, including all Department-approved Work Plans and the schedules contained therein. If, despite Respondent's best efforts, any access, permits, easements, approvals, institutional controls, or authorizations cannot be obtained, Respondent shall promptly notify the Department and include a summary of the steps taken. The Department may, as it deems appropriate and within its authority, assist Respondent in obtaining same.

2. If an interest in property is needed to implement an institutional control required by a Work Plan and such interest cannot be obtained, the Department may require Respondent to modify the Work Plan pursuant to 6 NYCRR 375-1.6(d)(3) to reflect changes necessitated by Respondent's inability to obtain such interest.

D. 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 provisions of this Order.

E. 1. The terms of this Order shall constitute the complete and entire agreement between the Department and Respondent concerning the 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). Respondent consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this Order.

2. i. Except as set forth herein, if Respondent desires that any provision of this Order be changed, Respondent shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph IV.A.1.

ii. If Respondent seeks to modify an approved Work Plan, a written request shall be made to the Department's project manager, with copies to the parties listed in Subparagraph IV.A.1.

iii. Requests for a change to a time frame set forth in this Order shall be made in writing to the Department's project attorney and project manager; such requests shall not be unreasonably denied and a written response to such requests shall be sent to Respondent promptly.

F. 1. If there are multiple parties signing this Order, the term "Respondent" shall be read in the plural, the obligations of each such party under this Order are joint and several, and the insolvency or failure by any Respondent to implement any obligations under this Order shall not affect the obligations of the remaining Respondent(s) under this Order.

2. If Respondent is a partnership, the obligations of all general partners (including limited partners who act as general partners) under this Order are joint and several and the insolvency or failure of any general partner to implement any obligations under this Order shall not affect the obligations of the remaining partner(s) under this Order.

3. Notwithstanding the foregoing Subparagraphs XVI.F.1 and 2, if multiple parties sign this Order as Respondents but not all of the signing parties elect to implement a Work Plan, all Respondents are jointly and severally liable for each and every obligation under this Order through the completion of activities in such Work Plan that all such parties consented to; thereafter, only those Respondents 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 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 Respondents electing to implement such additional Work Plan(s) shall be eligible to receive the release and covenant not to sue referenced in Paragraph VII.

G. Respondent shall be entitled to receive contribution protection and/or to seek contribution to

the extent authorized by ECL 27-1421(6) and 6 NYCRR 375-1.5(b)(5).

H. Unless otherwise expressly provided herein, terms used in this Order which are defined in ECL Article 27 or in regulations promulgated thereunder shall have the meaning assigned to them under said statute or regulations.

I. 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.

J. Respondent and Respondent's successors and assigns shall be bound by this Order. Any change in ownership or corporate status of Respondent shall in no way alter Respondent's responsibilities under this Order.

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