

COPIES SENT

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

NEW YORK STATE

vs.

NIAGARA MOHAWK POWER CORP., and  
M. WALLACE AND SON, INC.

date

By

U.S. DISTRICT COURT  
N.D. OF N.Y.

FILED

MAY - 1 1995

GEORGE A. HAY, Clerk  
ALBANYCIVIL NO. 85-CV-219  
(CGC-DS)

**JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary. Upon completion of settlement, parties are directed to file a Stipulation of Discontinuance with the Court.

IT IS FURTHER ORDERED that the Clerk shall forthwith serve copies of this Judgment by United States Mail upon the attorneys for the parties appearing in this action.

Dated this 21<sup>st</sup> day of April, 1995 at Watertown, New York.

  
U. S. Magistrate Judge

Post-It® brand fax transmittal memo 7671		# of pages • 1
To <i>Dean Lighter</i>	From <i>Dean Sommer</i>	NNERTY
Co.	Co.	F LAW
Dept.	Phone #	ALO, NEW YORK 14202
Fax #	Fax #	FAX 716-849-1717

April 27, 1994

DAVID M. HEHR

Dean S. Sommer, Esq.  
Assistant Attorney General  
State of New York  
Department of Law  
The Capitol  
Albany, NY 12224

VIA FACSIMILE 518-473-2534Re: State v. Niagara Mohawk and Wallace

Dear Dean:

Confirming our telephone conference of April 27, 1994, Niagara Mohawk today informed me of DEC's concern that monthly progress reports relative to the Wallace site are past due.

It was our understanding that the clock for submittals begins to run from the "Effective Date," which is defined in the Decree as the date of entry by the Court. We still await word from the Court that the Decree has been approved and entered.

Nevertheless, in keeping with the spirit of the Decree, we shall consider May 1, 1994 to be the "Effective Date" for purposes of deliverables under the Decree. Additionally, I advised you that Niagara Mohawk has already submitted the Phase II RI Workplan, and we are awaiting comments by the State. *Project Review on 5/16 and comments on 6/1/94* OK

Thank you for your attention to this matter.

Very truly yours,

STENGER &amp; FINNERTY

By

DAVID M. HEHR

DMH:lp

cc: David C. Hatch, Esq. (via fax 315-428-6149)  
James F. Morgan, Esq. (via fax 315-428-3549)

STENGER & FINNERTY

Dean S. Sommer, Esq.

April 7, 1994

Page 2

**RECEIVED**

APR 1 1 1994

Region 4  
Headquarters

cc: Alan Belenz, NYSDOL  
Steven Hammond, P.E., NYSDEC  
Daniel Lightsey, P.E., NYSDEC  
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DAVID M. HEHR

April 7, 1994

Dean S. Sommer, Esq.  
Assistant Attorney General  
Environmental Protection Bureau  
New York State Department of Law  
The Capitol  
Albany, New York 12224

**RE:** M. Wallace & Son, Inc. Scrapyard  
Cobleskill, New York  
Phase I Remedial Investigation  
Site No. 44003

Dear Mr. Sommer:

Please find enclosed the Phase II Remedial Investigation Work Plan for the above-referenced site. This Work Plan has been prepared in accordance with the Consent Order (Case No. 85-CV-219) entered into between Niagara Mohawk Power Corporation (NMPC) and the State of New York; and a February 16, 1994 letter from the NYSDOL to NMPC presenting the NYSDOL, the New York State Department of Environmental Conservation (NYSDEC), and the New York State Department of Health (NYSDOH) comments on the proposed Phase II Remedial Investigation Work Plan.

Please feel free to call me if you have any questions regarding the enclosed.

Very truly yours,

STENGER & FINNERTY

By   
DAVID M. HEHR

DMH:mm  
Enclosure

COPIES SENT  
JAS 8/22/00

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK,

Plaintiffs,

- against -

NIAGARA MOHAWK POWER CORPORATION  
AND M. WALLACE AND SON, INC.,

Defendants.

U. S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

AUG 21 2000

LAWRENCE K. BAERMAN, CLERK  
ALBANY

CONSENT DECREE

85-CV-219  
(Cholakis)

WHEREAS, in February, 1985, the State of New York commenced an action against Niagara Mohawk Power Corporation and M. Wallace and Son, Inc. over the alleged disposal of hazardous substances, including polychlorinated biphenyls, at a scrap yard owned by M. Wallace and Son, Inc. in Cobleskill, New York; and

WHEREAS, in December, 1987, the State and Niagara Mohawk entered into an Interim Consent Order which required Niagara Mohawk to implement an initial investigation of hazardous substance conditions at the Site (as hereinafter defined); and

WHEREAS, the initial investigation, which included analysis of soils, sediments, surface and ground water at the Site, was completed in 1989 and a final investigation report was submitted to the State in June, 1990; and

WHEREAS, the initial investigation found PCB contamination in soils as high as 2100 ppm in surface soils in the area where

PCB containing electrical equipment was disassembled (the "gut") and lesser concentrations at other parts of the Site; and

WHEREAS, the initial investigation found that surface water, groundwater and sediments in a quarry pond (the "pond") on the Site and sediments in the quarry pond outlet channel off-site were contaminated with PCBs; and

WHEREAS, based on the results of the initial investigation, Niagara Mohawk agreed to perform interim remedial measures ("IRMs") at the Site and prepared a Work Plan for Interim Remedial Measures which was submitted to the State in March, 1991; and

WHEREAS, in July, 1991, the State, Niagara Mohawk and M. Wallace and Son entered into a Stipulation and order, approved by the Court on August 28, 1991, that required Niagara Mohawk to implement the March, 1991 Interim Remedial Measures Work Plan; and

WHEREAS, the interim remedial measures undertaken by Niagara Mohawk included the removal of contaminated sediment from the quarry pond outlet channel and the excavation and disposal of approximately 2900 cubic yards soils from the gut area with PCB contamination in excess of 1 ppm. However, post-excavation sampling in the gut area indicated the PCB contamination in soils remained above 1 ppm; and

WHEREAS, the IRM Work Plan included underwater reconnaissance of the quarry pond which revealed the presence of debris including electrical wire spools, transformers and drums. In addition, sediment samples from 37 locations in the quarry pond were analyzed for PCBs indicating PCB contamination up to 63 ppm in the sediment; and

WHEREAS, during 1992, Niagara Mohawk undertook additional IRMs at the Site (the 111992 IRMII) including erecting a fence around the Site to prevent access of unauthorized persons, installing a silt fence to control surface water run off, draining of the pond, removal of debris from the pond, constructing a dam to prevent off-site discharges of untreated surface water from the quarry pond, installing a long-term water treatment system to prevent off-site discharges of PCBs, analysis of oil on the surface of the pond, pond sediment in the pond outlet channel as part of the Phase I RI, together with two sediment samples in a downstream storm water drainage channel on the SUNY Cobleskill campus; and

WHEREAS, analysis of samples collected during the 1992 IRM showed the potential for PCB contamination in groundwater entering the pond, oil contaminated with PCBs on the surface of the pond, in the pond sediment and at two downstream sampling points on the SUNY Campus; and

WHEREAS, based on the results of the interim investigations completed to date, it is necessary to conduct a comprehensive Remedial Investigation / Feasibility Study ("RI/FS") of the Site and, if deemed appropriate by the Feasibility Study, remediation of the Site.

NOW, THEREFORE, IT IS STIPULATED AND ORDERED AS FOLLOWS:

1. GOALS

The goals of this Consent Decree are to protect the environment and human health in and around the M. Wallace and Son scrap yard in Cobleskill, New York by requiring Niagara Mohawk to investigate and remediate the Site and abate the public nuisance created by the release of hazardous substances at the Site, by conducting a Remedial Investigation/Feasibility Study of the Site which is expected to lead to the remediation of, inter alia, soil, sediments and debris contaminated with PCBs and/or other hazardous substances, all in a manner consistent with CERCLA, the ECL (as herein defined) and the common law of public nuisance. Following the completion of the RI Phase of the RI/FS, Niagara Mohawk will, in a Feasibility Study, recommend remedial

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Date \_\_\_\_\_

From \_\_\_\_\_

To MWS - TBI/TEM  
Thought you'd be  
interested in them.  
Wrote Response to my  
letter of Concern of 10/1/02  
attached

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 appropriate remedial  
 by Niagara Mohawk,  
 environment. This



Consent Decree will make it possible for Niagara Mohawk to conduct a RI/FS and implement a remedy at the Site in an expedited fashion. The RI/FS is described in the Phase I Remedial Investigation Work Plan and Phase II Supplemental Investigation Work Plans (attached to this Consent Decree as Appendix A), along with prior environmental investigative actions which have already been taken at and in the vicinity of the site 1 and as may be supplemented pursuant to § 4(C) herein, together with the Feasibility Study Work Plan.

## 2. DEFINITIONS

The following terms will have the meanings set forth below for purposes of this Consent Decree:

(1) The term "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, et seq., as amended by Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

(2) The term "C.F.R." means the Code of Federal Regulations.

(3) The term "DEC" or "Department" means the New York State Department of Environmental Conservation and its Commissioner.

(4) The term "DOH" means the New York State Department of Health and its Commissioner.

(5) The term "ECL" means the New York State Environmental Conservation Law.

(6) The term "Effective Date" means the date this Decree is entered by the Court.

(7) The term "Hazardous Substances" means those substances referred to in Section 101(14) of CERCLA and those substances referred to as hazardous wastes in Section 27-1301 of ECL as of the date this Consent Decree is entered by this Court.

(8) The term "National Contingency Plan" or "NCP" means the plan promulgated in accordance with CERCLA, 42 U.S.C. § 9605.

(9) The term "Niagara Mohawk" or "NMPC" means defendant Niagara Mohawk Power Corporation.

(10) The term "non-settling parties" means any entity or entities other than Niagara Mohawk who or which may be legally responsible for either conditions at the Site or remediation thereof.

(11) The term "Off-Site" means any property other than that defined as the "Site" in paragraph (14), below.

(12) The term "Consent Decree" or "Decree" means this agreement partially settling Niagara Mohawk's liability to the State of New York.

(13) The term "Response Costs" shall have the same meaning as in CERCLA section 107(a)(4).

(14) The term "Site" means the M. Wallace and Son Scrapyard located at the intersection of New York State Route 10 (Elm Street) and West Street in the Village of Cobleskill, Schoharie

County, New York and its affected environs, including PCB contaminated reaches of the quarry pond outlet channel, village storm sewers draining the Site and, if found to be contaminated, certain reaches of Cobleskill Creek, as depicted generally in Figure 2 included in the Phase I Remedial Investigation Work Plan attached to this Consent Decree, and includes the adjacent areas to which access is required to carry out the investigation and remediation of the Site.

(15) The term "State" means the State of New York.

(16) The term "Wallace" means defendant M. Wallace and Son, Inc.

All terms not otherwise defined herein shall have their ordinary meanings, except that those terms defined in Section 101 of CERCLA, 42 U.S.C. § 9601, or in the NCP, shall have the meanings set forth therein.

### 3. PERFORMANCE OF REMEDIAL INVESTIGATION

(a) RI Work Plans shall incorporate all elements of a RI as set forth in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") [42 U.S.C. 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 Remedial Investigation Work Plan is submitted, and appropriate USEPA and Department technical and administrative guidance documents.

(b) Niagara Mohawk has submitted, and the State has approved, a Phase I Remedial Investigation Work Plan. Niagara Mohawk shall perform the Phase I Remedial Investigation ("RI") and prepare a Remedial Investigation Report in accordance with the schedules contained in the RI Work Plan. The RI will include, among other things, the gathering of data on the distribution and concentrations of Hazardous Substances in and around the Site in soil, groundwater, surface waters, sediments, and biota for specified off-site locations. A copy of the Remedial Investigation Work Plan is attached hereto as Attachment A.

(c) Following completion of the Phase I RI, Niagara Mohawk shall submit a Phase I RI Report in accordance with the schedule provided in the Phase I RI Work Plan.

4. PERFORMANCE AND REPORTING OF REMEDIAL INVESTIGATION

(a) (1) Within 30 days of receiving State comments on the Phase II Report, which included recommendations for Phase II activities' Niagara Mohawk shall submit for review and approval a Phase II RI Work Plan in accordance with prior direction from the State.

(2) Within 30 days of the Effective Date of this Decree, Niagara Mohawk shall initiate and perform the Remedial

Investigations in accordance with the State-approved RI Work Plans and the schedule contained therein. Nothing herein shall prevent Niagara Mohawk from initiating the Phase I RI prior to the Effective Date of this Decree so long as Niagara Mohawk has received written approval of the Phase I RI Work Plan from the State, provides 5 days notice to the State prior to implementation of the activity and implements the program in accordance with the approved work plan.

(3) During the performance of the Remedial Investigation, Niagara Mohawk shall have on-Site a full-time representative who is qualified to supervise the RI work.

(b) Within the time frame set forth in the RI Work Plans, Niagara Mohawk shall prepare a Final Remedial Investigation Report that shall:

(1) include all data generated and all other information obtained during the Remedial Investigation;

(2) provide all of the assessments and evaluations set forth in CERCLA, the NCP, and 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 work plan is submitted.

(3) identify any additional data that must be collected; and

(4) include a certification by the individual or firm with primary responsibility for the day to day performance of the Remedial Investigations that all activities that comprised the Remedial Investigations were performed in full accordance with the State-approved Phase I and Phase II RI Work Plans.

(c) If deemed necessary by the State, Niagara Mohawk shall perform supplemental investigations to provide sufficient information to prepare a Feasibility Study of possible remedial actions.

5. PREPARATION, PERFORMANCE AND REPORTING OF FEASIBILITY STUDY

(a) Within 30 days of the State's approval of the RI Report, Niagara Mohawk shall submit a Feasibility Study Work Plan ("FS") which will detail the steps necessary to prepare a Feasibility Study in accordance with CERCLA, the NCP, applicable USEPA guidance documents and any Department policy and guidance documents in effect at the time the FS Work Plan is submitted. Within 30 days of submittal of the FS Work Plan, the State shall take appropriate approval action.

(b) Within 90 days after receipt of the State's approval of FS Work Plan, Niagara Mohawk shall submit to the State a Feasibility Study evaluating on-Site and off-Site remedial actions to eliminate, to the maximum extent practicable, health and environmental hazards and potential hazards attributable to

hazardous substance releases at the Site. The Feasibility Study shall also include a recommendation as to the ARARs related to the remedial actions (if any), in accordance with § 121(d) of CERCLA, 42 U.S.C. § 9621(d), and the pertinent provisions of the NCP, particularly 40 C.F.R. §§ 300.5, 300.400(g) and 300.430(e) and (f). If the Feasibility Study concludes that certain ARARs need not be attained, it shall provide a detailed supporting rationale for that conclusion, including a discussion of the provisions of §124(d)(4) of CERCLA and 40 C.F.R. § 300.430(f)(1)(ii)(C) regarding the waiver of ARARs. 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 Consent Decree.

(c) Niagara Mohawk shall prepare and perform the Feasibility Study in accordance with the State-approved RI/FS Work Plan and in a manner-consistent with CERCLA, the NCP, and the USEPA guidance documents identified supra.

(d) Within 60 days after the State's approval of the Feasibility Study, Niagara Mohawk shall cooperate and assist the State in soliciting public comment on the RI/FS and on the proposed remedial action plan prepared by the State, in accordance with CERCLA, the NCP, the guidance documents identified in subparagraph 3.(a), and with any Department policy and guidance documents in effect at the time the public comment

period is initiated. After the close of the public comment period, the State shall select a final remedial alternative for the Site in a Record of Decision ("ROD"). If Niagara Mohawk does not agree with the remedial alternative that the Department selects for the site, and cannot resolve any such disagreement with the Department through informal negotiations, Niagara Mohawk may invoke the Dispute Resolution provision set forth in paragraph 13 hereof.

(e) Within 90 days after the ROD is signed, Niagara Mohawk shall submit to the Department a Remedial Design to implement the remedial alternative selected by the Department, including but not limited to operation and maintenance plans. 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 the Decree. Upon the Department's approval of the Remedial Design, Niagara Mohawk shall implement the Remedial Design, as set forth below.

6. INSTALLATION AND CERTIFICATION OF APPROVED REMEDIAL DESIGN

(a) Niagara Mohawk shall commence implementation of the selected approved remedy in accordance with the Approved Remedial Design and schedules contained therein no later than 60 days after the remedial design documents are approved by the State.

(b) After completion of installation of the Approved Remedial Plan, including any modification thereof agreed upon by



the parties or ordered by the Court, Niagara Mohawk shall provide the State with a report of such implementation, including a certification by a professional engineer licensed in New York State that the Remedial Plan was installed in accordance with the remedial design as approved by the State. Within 45 days of receiving the report, the State shall determine whether the work performed by Niagara Mohawk was in accordance with the Approved Remedial Design. If the State approves the report, the State shall so notify Niagara Mohawk in writing. If not, the State will indicate any deficiency in implementation of such final design which must be addressed by Niagara Mohawk. Niagara Mohawk shall either take such action as is necessary to correct any such deficiency identified by the State or may invoke the dispute resolution provisions set forth in section 13 hereof.

(c) During the installation of the Approved Remedial Design and until Niagara Mohawk provides the report and certification required by subsection (b) of this Section, Niagara Mohawk shall provide the State with monthly reports as provided in Section 8, PERIODIC PROGRESS REPORTS.

7. REVIEW AND APPROVAL PROCEDURE

(a) The State shall review each of the submittals Niagara Mohawk makes pursuant to this Consent Decree 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 Decree and generally accepted technical and scientific principles. The State shall notify Niagara Mohawk in writing of its approval or disapproval of any submittal. Submittals approved by the State shall be attached to this Consent Decree as appendices and shall become enforceable parts hereof.

(b) (1) If the State disapproves a submittal, it shall so notify Niagara Mohawk in writing and shall specify the reasons for its disapproval. Within 30 days after receiving written notice that Niagara Mohawk's submittal has been disapproved, Niagara Mohawk shall make a revised submittal to the State that addresses and resolves all of the State's stated reasons for disapproving the first submittal.

(2) After receipt of the revised submittal, the State shall notify Niagara Mohawk in writing of its approval or disapproval. If the State disapproves the revised submittal, Niagara Mohawk shall revise the submittal in accordance with the State's comments, or, within 15 days, invoke dispute resolution (Section 13). Submittals approved by the State or the Court shall be attached to this Consent Decree as appendices and shall become enforceable parts hereof.

(c) The State may require Niagara Mohawk to modify and/or amplify and expand a submittal if the State determines, as a result of reviewing data generated by an activity required under this Decree or as a result of reviewing any other data or

facts, that further work is necessary to determine the existence or extent of releases of hazardous substances from the Site, to assess remedial alternatives, or to determine the existence or extent of injuries to natural resources. Any such requirement by the State shall be in writing and shall describe the basis for the requirement. Niagara Mohawk shall either implement the requirements described by the State or shall initiate dispute resolution in accordance with section 13 hereof.

8. PERIODIC PROGRESS REPORTS

(a) During the conduct of the RI and FS, Niagara Mohawk shall submit monthly progress reports to the State. The reports shall include, but shall not be limited to (i) the actions which have been taken toward achieving compliance with this Decree during the previous month; (ii) all results of sampling and tests and all other data received or generated by Niagara Mohawk or Niagara Mohawk's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Decree or conducted independently by Niagara Mohawk; (iii) all work plans, reports, and other deliverables required by this Decree that were completed and submitted during the previous month; (iv) 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; (v) information

regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Niagara Mohawk's obligations under the Decree, and efforts made to mitigate those delays or anticipated delays; (vi) any modifications to any work plans that Niagara Mohawk has proposed to the State or that the State has approved; and (vii) all activities undertaken in support of the Citizen Participation Plan during the previous month and those to be undertaken in the next month.

(b) Reports shall be submitted to the State by the tenth day of every month following the effective date of this Decree.

9. RELEASE OF LIABILITY AND COVENANT NOT TO SUE

(a) Nothing in this Decree shall be deemed to release Niagara Mohawk from liability for Hazardous Substance conditions the Site or the State's response costs (as defined in CERCLA) arising therefrom except as provided in this Section.

(b) In consideration of, and contingent upon, Niagara Mohawk's compliance with the provisions of this Decree, and until the releases provided for in paragraph (c) of this Section take effect, the State covenants not to sue, execute judgment, or take any civil, judicial, or administrative action under federal or State law, (other than the enforcement of prior orders of this Court), against Niagara Mohawk arising out of or relating to the past releases of Hazardous Substances at the Site.

(c) Upon certification as provided in subsection (b) of Section 6 that the Remedial Design has been installed in accordance with the Approved Remedial Design, including modifications agreed upon by the parties or ordered by the Court, and payment by Niagara Mohawk of the State's outstanding Response Costs as provided in Section 12 of this Decree, PAYMENT OF PRE - AND POST JUDGMENT RESPONSE COSTS, the State shall provide a release from liability to Niagara Mohawk, its officers, directors, employees and agents for all claims, demands, remedies or actions whatsoever, arising out of or relating to (A) the past release of Hazardous Substances or chemicals or chemical wastes, as these terms are used in the State's complaint in this action, that have come to be located at the Site other than claims for damages arising from injuries to the Natural Resources of the State; (B) State response costs; and (C) the lawful, non-negligent implementation of the Approved Remedial Design in accordance with this Decree.

(d) Nothing in this release shall preclude the State from taking such action as is authorized by law with respect to any soils removed from the Site for shipment to a permitted facility.

(e) Nothing in this release shall be construed as releasing Niagara Mohawk from liability for damages for injuries to the State's Natural Resources pursuant to Common Law, the New York Environmental Conservation Law or CERCLA.

(f) Nothing in this Decree shall in any way constitute or be construed as a release of claims by the State against any person not a party to this Decree.

(g) Nothing in this Decree shall in any way constitute or be construed as a release of claims by Niagara Mohawk or Wallace against each other or any other person not a Party to this Decree.

#### 10. REOPENERS

This Consent Decree and any Release that Niagara Mohawk may subsequently receive from the State may be reopened by the State upon any of the following circumstances:

(1) the discovery that the implementation of the Remedial Plan as installed pursuant to this Decree, does not prevent the migration of Hazardous Substances from the Site;

(2) the discovery of releases of Hazardous Substances from the Site and its environs which were not known or detected on or before the Judgment Date, and which indicate that the remedial action is not protective of human health and the environment; or

(3) after completion of implementation of the Approved Remedial Plan, the State receives additional scientific information that is scientifically valid, which was not available at the time of, or prior to, the Judgment Date concerning the scientific determinations upon which the Approved Remedial Plan, including any agreed upon modification thereto, were based, and

the additional information demonstrates that either the releases of Hazardous Substances or the health or environmental threats posed thereby are different than those reported in the Remedial Investigation Report referred to in Section 4, REMEDIAL INVESTIGATION, and those conditions indicate that the remedial action is not protective of human health and the environment.

11. PROTECTION OF NIAGARA MOHAWK FROM FURTHER CONTRIBUTION

(a) Upon entry of this Decree, and subject only to continued compliance with the terms of this Decree, it shall be deemed that Niagara Mohawk has resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2). Specifically, if the obligations set forth in this Decree are met, Niagara Mohawk shall not be liable for any claim for contribution regarding matters associated with the release or migration of Hazardous Substances at or from the Site.

(b) The provisions of this Section shall not apply to any action which is brought by the State pursuant to Section 20, ENFORCEMENT OF CONSENT DECREE.

12. PAYMENT OF PRE- AND POST DECREE RESPONSE COSTS

(a) (1) Niagara Mohawk shall pay the costs incurred by the State after the Effective Date of this Decree in the enforcement and/or monitoring of the activities carried out by Niagara Mohawk under this Consent Decree.

(2) The State shall provide Niagara Mohawk with a written statement of oversight costs on a State fiscal year basis. The Statement provided to Niagara Mohawk shall summarize --

(a) time and activity records of each DEC and DOH employee involved in overseeing implementation of the Decree and shall include each person's job title and the basis for the rate or other compensation assigned to each person;

(b) the fringe benefits and indirect costs attributed to each person identified in the statement;

(c) a summary of non-personnel expenses, including supplies, travel costs, equipment and contractual expenses; and

(d) any other costs incurred in oversight activities.

(3) Within 30 days of receipt of the statement, Niagara Mohawk shall either pay the sum set forth in the statement or notify the State in writing as to those expenditures to which it, in good faith, objects. If Niagara Mohawk objects to any expenditure on the ground that the level of detail provided in the statement is insufficient to allow Niagara Mohawk to make an evaluation of the propriety of that expenditure, Niagara Mohawk shall so state in its notice of objection. If Niagara Mohawk's objections cannot be resolved by the parties within 30 days of receipt of Niagara Mohawk's written objection, Niagara Mohawk shall pay the undisputed amount. Niagara Mohawk may request that the State produce any underlying documents to substantiate any



disputed item summarized in the statement. Disputed costs that are unresolved at the end of the 30-day negotiation period shall be reserved for consideration by the Court. In any such proceeding, Niagara Mohawk shall have the burden of proof that costs incurred by the State were inconsistent with the terms of this decree and the NCP.

(b) (1) Niagara Mohawk shall pay the response costs incurred by the State prior to the Effective Date of this Decree.

(2) As soon as possible after the effective date of this Decree, the State shall provide Niagara Mohawk with a written statement of costs of response incurred by the State prior to the Effective Date of this Decree. The statement provided to Niagara Mohawk shall contain, to the greatest degree possible, the same information as provided by subparagraph (a) (2) of this Section including summaries of time spent by the State's technical personnel, along with appropriate rates of compensation, fringe benefits, indirect costs, non-personnel expenses and any other costs incurred by the State in responding to hazardous substance conditions at the Site.

(4) Within 30 days of receipt of the statements provided for above, Niagara Mohawk shall either pay the sums set forth in the statements or notify the State in writing as to those expenditures to which it, in good faith, objects. If Niagara Mohawk objects to any expenditure on the ground that the level of

detail provided in the statement is insufficient to allow Niagara Mohawk to make an evaluation of the propriety of that expenditure, Niagara Mohawk shall so state in its notice of objection. If Niagara Mohawk's objections cannot be resolved by the parties within 30 days of receipt of Niagara Mohawk's written objection, Niagara Mohawk shall pay the undisputed amount. Niagara Mohawk may request that the State produce any underlying documents to substantiate any disputed item summarized in the statement. Disputed costs that are unresolved at the end of the 30-day negotiation period shall be reserved for consideration by the Court as described in section 3 above.

(c) By accepting payment of a disputed claim, the State does not waive any rights to assert a claim for the full amount in dispute and reserves its right to recover attorneys fees incurred in successfully defending a challenge to the reasonableness of the State's costs.

### 13. DISPUTE RESOLUTION

(a) This Section applies to any unresolved dispute between or among the State and NMPC arising under this Consent Decree except those involving response costs (§ 12).

(b) If the Department disapproves a revised submittal, NMPC shall be in violation of the order unless, within 10 days of receipt of the Department's notice of disapproval, NMPC serves on the Department's Director of Hazardous Waste Remediation ("the

Director") 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 NMPC relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation no later than ten business (10) days after receipt of NMPC's Statement of Position. In the event that these 10-day time periods for exchange of Statements of Position 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 NMPC.

A record of any dispute under this Paragraph shall be maintained by the Department. The record shall include the Statement of Position of each party served pursuant to the preceding Subparagraph, and any relevant information. The record shall be available for review of all parties and the public.

Upon review of the record as developed pursuant to this Paragraph, the Director shall issue a final decision and order resolving the dispute. NMPC shall revise the submittal in accordance with the Department's specific comments, as may be modified by the Director and except for those which have been withdrawn by the Director, 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 Director revises the time frame in the Director's final decision and order resolving the dispute.

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

If the revised submittal fails to address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, NMPC shall be in violation of this order and the ECL.

In review by the Director of any dispute pursued under this Paragraph, NMPC shall have the burden of proving the Department's position is arbitrary and capricious or not in conformance with this Decree.

The invocation of the procedures stated in this Paragraph shall not extend, postpone, or modify NMPC's obligations under this Order with respect to any disputed items, unless and until the Department agrees. The decision of the Division Director shall not be reviewable, subject to the provisions of paragraph 24 of this Decree.

14. CONSISTENCY WITH THE LAWS OF THE STATE OF NEW YORK AND FEDERAL LAW

(a) Approval by the State of the Remedial Investigation and Feasibility Study Work Plans and Reports and the Remedial Design

and work conducted pursuant thereto shall be deemed to be a finding by the State that all such approved Plans, Reports, Designs and work complies with the NCP and the substantive provisions of all applicable State laws and regulations and that no further State or local authorizations or permits are required.

(b) In the event this Court determines that this Consent Decree or the activities to be implemented pursuant to it are inconsistent with the NCP, CERCLA § 121 or applicable State laws and regulations, the parties may seek to eliminate such inconsistencies and submit a modified Consent Decree to the Court. In the event that the parties cannot reach agreement concerning the submission of a modified Consent Decree within 120 days of this Court's-determination, this Decree shall not take effect and shall be null and void.

15. EASEMENTS AND ACCESS AGREEMENTS

(a) access arrangements between Niagara Mohawk and Wallace are attached hereto and made a part hereof as Appendix B.

(b) (1) Niagara Mohawk shall use its best efforts to obtain on a timely basis such property or property rights necessary to carry out its obligations pursuant to this Consent Decree. Niagara Mohawk shall promptly notify the State in the event of its inability to obtain appropriate authorizations on a timely basis. Niagara Mohawk shall include in its notification written documentation of its efforts to obtain the property and property

rights necessary to carry out its obligations under this Decree. Upon receipt of such notification, the State shall review Niagara Mohawk's efforts, and, if the State finds that Niagara Mohawk's efforts were adequate under the circumstances, the State may use its best efforts to procure such property or property rights consistent with its legal authority.

(2) For the purposes of the first sentence of subsection (a) of this Section, the term "best efforts" shall mean that Niagara Mohawk shall have made, at a minimum, a fair market value offer for such property or property rights.

(b) The State shall have access to all property to which Niagara Mohawk has access at all times necessary to observe and monitor the progress of installation of the investigation and remediation of the Site. The State shall have the right to obtain split samples or, at its option, duplicate samples of all materials or substances sampled by Niagara Mohawk in the course of the performance of its obligations hereunder. Niagara Mohawk shall have the right to obtain split samples or, at its option, duplicate samples of all materials or substances sampled by the State in the course of its observations and monitoring activities hereunder.

(c) Niagara Mohawk and the State shall have access to the Site and all other property under control of M. Wallace and Son

at all times in order to carry out the requirements of this Decree.

(d) NMPC shall allow the department to attend, and shall provide the department with 7 days advance notice of the occurrence of any of the following: prebid meetings, job progress meetings, substantial completion meetings and inspection, and final inspection and meeting.

(e) Nothing herein limits or otherwise affects any right of entry to the Site by the State pursuant to applicable laws, regulations, or permits.

16. FORCE MAJEURE

(a) Niagara Mohawk shall not be in default of compliance with this Consent Decree or suffer any penalty under this Decree or be subject to any proceeding or action if it cannot comply with any requirement of this Decree because of the action of a governmental body, court, or an act of God or other condition beyond Niagara Mohawk's reasonable control; provided, however, Niagara Mohawk shall notify the State in writing within three working days after it obtains knowledge of any such condition and request an appropriate modification of the pertinent requirement or other appropriate relief. Such notification shall include a written statement of (1) the reason(s) for the delay and the anticipated duration of the delay; (2) any measure taken by Niagara Mohawk to minimize or prevent the delay; and (3) a

schedule for implementation of any such measure. Failure to comply with the notification requirement of this subsection shall constitute a waiver of any claim or force majeure.

(b) For purposes of this Section, force majeure shall not include increased costs or expenses associated with Niagara Mohawk's compliance with its obligations incurred under this Consent Decree; provided, however, that this subsection shall not supersede the terms of paragraph (a) of Section 15, EASEMENTS AND ACCESS AGREEMENTS.

17. PROJECT COORDINATORS

The State and Niagara Mohawk shall each designate a Project Coordinator and an alternate. Within 15 days following the execution of this Decree by the parties, each such party shall advise the other parties of the names and titles of the persons so designated. A party may, at any time, change its designation of Project Coordinator or alternate, or both, upon notice in writing to the other parties. To the maximum extent possible, communications between or among the parties concerning the work to be performed under this Decree shall be made between or among Project Coordinators.

18. ENFORCEMENT OF CONSENT DECREE

If any party to this Consent Decree considers that any other party has failed to comply with any term or condition of this Decree, the party alleging non-compliance may seek appropriate



relief from this Court including the payment of penalties for contempt of Court or violations of the ECL.

19. INDEMNIFICATION

(a) Niagara Mohawk shall indemnify and hold harmless the State and its officers, employees and representatives, from claims, suits, actions, damages and costs of every name and description brought against the State arising out of or resulting from the negligent performance or negligent attempted performance by Niagara Mohawk of its obligations hereunder.

(b) Except as provided in Section 11, PROTECTION OF NIAGARA MOHAWK FROM FURTHER CONTRIBUTION, nothing herein shall prevent the State or Niagara Mohawk from seeking contribution from any party for any claims brought against the State or Niagara Mohawk arising out of the performance or attempted performance by Niagara Mohawk of its obligations hereunder.

20. PUBLIC PARTICIPATION

Final approval and entry of this Consent Decree and selection and approval of any remedy selected and/or approved by the State shall be subject to the State's public participation requirement.

21. MODIFICATION

(a) This Consent Decree may only be modified upon the written consent of Niagara Mohawk, Wallace (with regard to issues

of access and use of the Site) and the State. All modifications shall become effective as of the date of approval by the Court.

(b) The terms and conditions of any Work Plans, schedules, reports or remedial plans and specification developed pursuant to this Decree may be modified only upon written approval by the State. No informal advice, guidance, suggestions or comments by the State or any of its representatives regarding reports, proposals, plans, specifications, schedules or any other writing submitted by Niagara Mohawk shall be construed as relieving Niagara Mohawk of its obligation to obtain such formal approvals as may be required by this Decree.

22. NOTICE REQUIREMENTS

The original or copy of any communication required by this Consent Decree between or among any of the parties shall be sent to the list of designated representatives of the parties appended hereto.

23. APPENDICES INCORPORATED

Appendices annexed hereto are an integral part of this Consent Decree and are hereby incorporated by reference as though they were set forth herein.

24. THE COURTS CONTINUED JURISDICTION

The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree, to resolve disputes arising hereunder as may be necessary or appropriate for the

construction or enforcement of this Decree and to decide any remaining claims set forth in the State's complaint herein, including claims for damages arising from injuries to the Natural Resources of the State.

25. PRESERVATION OF CLAIMS

(a) Niagara Mohawk reserves all rights that it may have to assert any claim against its insurers or any third party for matters arising from this action, including, without limitation, claims for breach of contract, contribution, tortious conduct and indemnity.

(b) Niagara Mohawk, in entering into this Consent Decree, does not admit or acknowledge any liability or fault by it with respect to any matter arising out of or relating to the Site or admit any of the allegations in the complaints other than those admitted in its answers.

(c) Neither this Consent Decree nor any part hereof shall constitute an admission of law or fact or evidence of same, except between the parties for the purpose of enforcing the terms of this Decree, nor any violation of any law or regulations. The Parties hereto may rely upon this Consent Decree only in this action or in another action or proceeding concerning the Site.

(d) Nothing in this Consent Decree shall be construed as barring the State's right to enforce the terms of the August 28, 1991

Stipulation and order except as provided in section 9, RELEASE OF LIABILITY AND COVENANT NOT TO SUE, paragraph (b).

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

(f) Nothing herein shall be construed as barring, diminishing, expanding, adjudicating or in any way affecting any legal or equitable rights or claims that any entity not a party to this Third Consent Decree may have against Niagara Mohawk, or creating any presumptions of law or findings of fact which shall inure to, or be for the benefit of, any non party.

25. REPORTING OF DATA

Within 30 days of the Effective Date of this Decree, Niagara Mohawk shall submit to the State all records, data and/or information within their possession or control not previously submitted to the State regarding disposal of wastes at the Site. Except as otherwise specifically provided in any Plan or schedule approved by the State pursuant to this Decree, any party generating sampling or analytical data under this Decree shall provide such data to the other Parties within five business days after such data becomes available to the party generating such data.

27. MISCELLANEOUS

(a) This Consent Decree shall apply to and be binding upon and inure to the benefit of all parties to this Decree, their officers, directors, agents, servants, employees, successors, and assigns.

(b) None of Niagara Mohawk's obligations under this Decree shall be deemed to constitute any type of fine or penalty.

(c) Except as otherwise provided in this Decree, the parties agree that they will bear their respective costs and disbursements.


(d) Niagara Mohawk shall pay all costs incurred by the State, including reasonable attorneys fees, in the exercise of its powers pursuant to Section 15, BASEMENTS AND ACCESS AGREEMENTS.

28. EFFECTIVE DATE

This Consent Decree is effective upon the date of its entry by the Court. The authorized representatives of the State and Niagara Mohawk having reviewed the terms and conditions of this Decree, hereby consent to its terms and conditions.


G. OLIVER KOPPELL  
Attorney General of the State  
of New York  
New York State Department of Law  
The Capitol  
Albany, New York 12224

Dated: February  
~~January~~ 1994

  
Dean S. Sommer  
Assistant Attorney General  
State of New York

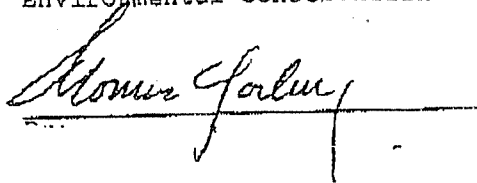
NIAGARA MOHAWK POWER CORPORATION

Dated: February  
~~January~~ 1994

  
Thomas R. Fair  
Vice President  
Environmental Affairs

Dated: Feb 9 , 1994

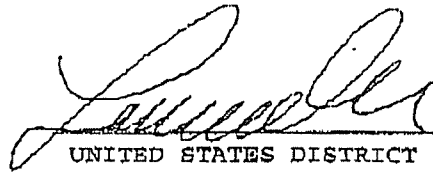
Thomas C. Jorling  
Commissioner  
New York State Department of  
Environmental Conservation



SO ORDERED:

DATED:

8/2/00

  
UNITED STATES DISTRICT JUDGE