

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

ORDER ON CONSENT

In the Matter of the  
Development and Implementation  
of Remedial Programs for "MGP" Sites and  
Inactive Hazardous Waste Disposal  
Sites, Under Article 27, Title 13,  
and Article 71, Title 27 of the  
Environmental Conservation Law  
of the State of New York by  
Niagara Mohawk,  
Respondent.

Index # A4-0473-0000  
(Former Index #D0-0001-  
9210, D0-0001-9612,  
A6-0201-89-05, A6-0208-  
89-09, A6-0260-91-04,  
and D6-0001-9210)

WHEREAS,

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

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

C. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13, ECL Article 71, Title 27, and ECL 3-0301 and is intended to supercede and replace Order D0-0001-9210 ( 21 Site Order), Order D0-0001-9612 ( Cost Cap Order), and Order A6-0201-89-05, A6-0208-89-09, A6-0260-91-04, and D6-0001-9210) (Harbor Point Orders), which are referred to collectively as the "Predecessor Orders."

2. Respondent is the owner of the former manufactured gas plant ("MGP") sites at the following locations at which coal tar and associated hazardous substances ("MPG wastes") were, or which may have been, disposed at various times in the past: Gloversville, Rome (Kingsley), Schenectady (Broadway), Oneida, Glens Falls, Troy (Water Street), North Albany, Watertown, Troy (Smith Avenue), Syracuse (Hiawatha), Syracuse (Erie), Oswego, Albion, Fulton, Herkimer, Ilion, Canajoharie, Johnstown, Fort Plain, Schenectady (Seneca), Rome (Jay and Madison Streets), Harbor Point Utica, and Mohawk Valley Oil (individually, "the Site;" collectively, "the Sites").

3. Some of the Sites are currently listed in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* with a Classification "2" pursuant to ECL 27-1305. The listing of the Sites on the Registry, or the lack of such a listing, does not affect, in any manner, the jurisdiction of the Department to require the abatement and remediation of conditions at the sites in accordance with Article 27, Title 13.

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

5. The parties recognize that the objective of the Order and Remedial Program is to clean up the Sites in accordance with Article 27, Title 13 of the ECL and regulations promulgated thereunder at 6 NYCRR Part 375, so as to allow the Sites to be productively developed and used. The parties agree that implementation of this Order will avoid prolonged and complicated litigation between the parties, and that this Order is mutually acceptable, fair, reasonable, and in the public interest.

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

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

**I. Initial Submittal**

Prior to the effective date of this Order, Respondent has submitted to the Department numerous reports and documents that deal with some of the Sites. Future submissions will be in accordance with the agreed upon schedule set forth as Exhibit "A."

**II. Development, Performance, and Reporting of Work Plans**

**A. Work Plans**

All activities at any Site that comprise any element of an Inactive Hazardous Waste Disposal Site Remedial Program shall be conducted pursuant to one or more Department-approved work plans ("Work Plan" or "Work Plans") and this Order. The Work Plan(s)

under this Order shall address both on-Site and off-Site conditions and shall be developed and implemented in accordance with CERCLA, the NCP, and all statutes, regulations, and guidance documents then in effect and applicable to the Site. All Department-approved Work Plans shall be incorporated into and become an enforceable part of this Order and shall be attached as Exhibit "B." Upon approval of a Work Plan by the Department, Respondent shall implement such Work Plan in accordance with the schedule contained in such Work Plan. For purposes of this Order, "approval" shall mean acceptance of the document by the DEC without conditions. Nothing in this Subparagraph shall mandate that any particular Work Plan be submitted. Further, each Work Plan submitted shall use one of the following captions on the cover page:

1. "Site Characterization Work Plan" ("SC Work Plan"): a Work Plan the objective of which is to identify the presence of any hazardous waste disposed of at the Site. Such Work Plan shall be developed in accordance with Exhibit "F";
2. "Remedial Investigation/Feasibility Study Work Plan" ("RI/FS Work Plan"): a Work Plan the objective of which is to perform a Remedial Investigation and a Feasibility Study. Such Work Plan shall be developed and implemented in accordance with the requirements set forth in Exhibit "G";
3. "IRM Work Plan": a Work Plan the objective of which is to provide for an Interim Remedial Measure. Such Work Plan shall be developed in accordance with Exhibit "H";
4. "Remedial Design/Remedial Action Work Plan" ("RD/RA Work Plan"): a Work Plan the objective of which is to provide for the development and implementation of the final plans and specifications for implementing the remedial alternative set forth in the ROD. Such Work Plan shall be developed in accordance with Exhibit "I"; or
5. "OM&M Work Plan": a Work Plan the objective of which is to provide for all activities required to maintain and monitor the effectiveness of the Remedial Action or an IRM. Such Work Plan shall be developed in accordance with Exhibit "J."

B. Submission/Implementation of Work Plans

1. (a) The Work Plans required by this Order shall be submitted to the Department and implemented in accordance with the timeframes set forth below, except as modified by mutual consent of the parties, and shall generally be in accordance with the annual schedule attached to this Order as Exhibit "A":
  - i. Field work shall commence no later than forty-five (45) Days after the date any investigation workplan is approved;

ii. The Remedial Investigation Report shall be submitted no later than one hundred and twenty (120) Days after completion of significant field work, or in accordance with the schedule contained in the approved Remedial Investigation Workplan;

iii. The Feasibility Study shall be submitted no later than one hundred and eighty (180) Days after the date the Remedial Investigation Report is approved;

iv. The Remedial Design Workplan shall be submitted no later than sixty (60) Days after the date the Record of Decision is received by Respondent;

v. The Preliminary Remedial Design (50-90% submittal as defined by the approved Remedial Design Workplan) shall be submitted no later than ninety (90) Days after the date the Remedial Design Workplan is approved (unless a different schedule is required by the approved Remedial Design Workplan);

vi. The Final Remedial Design shall be submitted no later than sixty (60) Days after the date the Department provides comments on the Preliminary Remedial Design unless a different schedule is established by the approved Final Remedial Design;

vii. The Remedial Construction Contract shall be procured and awarded no later than ninety (90) Days after the date the Department approves the Final Remedial Design for bidding;

viii. The contractor shall be mobilized no later than thirty (30) Days after the date the Remedial Construction Contract is awarded;

ix. The Final Operation, Maintenance, and Monitoring Plan shall be submitted upon substantial completion of Remedial Construction; and

x. The Final Engineering Report shall be submitted no later than sixty (60) Days after completion of Remedial Construction.

(b) The Department may request that Respondent submit such other, additional, or supplemental Work Plans as are appropriate to advance the Remedial Program at the Sites. Any such request for other, additional, or supplemental Work Plans shall be in writing and shall specify the reasons for making such request. Within thirty (30) Days after the Department's written request, Respondent shall advise the Department in writing whether it will submit and implement the requested additional Work Plan (or Supplemental Work Plan) or whether it intends to invoke the dispute resolution provisions of Paragraph XII. If Respondent elects to submit and implement such Work Plan, Respondent shall submit a Work Plan providing for implementation of the activities

requested within sixty (60) Days after such election. If Respondent elects to invoke dispute resolution, the schedule for implementation shall be modified pending said dispute.

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

(d) Any request made by the Department under Subparagraph II.B.1.(b) shall be subject to dispute resolution pursuant to Paragraph XII.

2. A Professional Engineer must stamp and sign all Work Plans other than a Work Plan for an RI/FS or an SC.

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

#### C. Revisions to Work Plans

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

#### D. Submission of Final Reports and Annual Reports

1. In accordance with the schedule contained in a Work Plan, Respondent shall submit a final report which includes the caption of that Work Plan on the cover page and a certification that all requirements of the Work Plan have been complied with and all activities have been performed in full accordance with such Work Plan. Such certification shall be by the person with primary responsibility for the day to day performance of the activities under this Order and, except for RI and SC final reports, shall be by a Professional Engineer.

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

3. In the event that the ROD for the Site, if any, or any Work Plan for the Site requires operation, maintenance, and monitoring (OM&M), including reliance upon

institutional or engineering controls, Respondent shall submit an annual report by the 1<sup>st</sup> Day of the month following the anniversary of the start of the OM&M.. Respondent shall file such annual report until the Department notifies Respondent in writing that it can be discontinued. Such annual report shall be signed by a Professional Engineer and shall contain a certification that any institutional and engineering controls put in place pursuant to this Order are still in place, have not been materially altered, and are still effective in achieving their objectives. Respondent shall notify the Department within twenty-four (24) hours of discovery of any upset, interruption, or termination of such controls without the prior approval of the Department. Further, Respondent shall take all reasonable actions required by the Department to maintain conditions at the Site that achieve the objectives of the Remedial Program and are protective of public health and the environment. An explanation of such upset, interruption, or termination of one or more controls and the steps taken in response shall be included in the foregoing notice and in the annual report required by this Subparagraph, as well as in any progress reports required by Paragraph III. Respondent can petition the Department for a determination that the institutional and/or engineering controls may be terminated. Such petition must be supported by a Professional Engineer stating that such controls are no longer necessary for the protection of public health and the environment. The Department shall not unreasonably withhold its approval of such petition.

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

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

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

3. In the event the rejected submittal is a Work Plan submitted prior to the Department's approval of the RD/RA Work Plan, Respondent shall have the option to invoke the dispute resolution process pursuant to Paragraph XII.

4. Within thirty (30) Days after the Department's approval of a final report, Respondent shall submit such final report to the Department, 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 so advise the Department and, if the Department concurs, submit such document in an alternative format acceptable to the Department.

F. Department's Issuance of a ROD

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

G. Release and Covenant Not to Sue

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

This release and covenant not to sue shall be null and void, *ab initio*, in the event of fraud relating to the execution or implementation of this Order or in the event of Respondent's failure to materially comply with any provision of this Order. The Department's determination that Respondent has committed fraud or has materially failed to comply with this Order shall be subject to dispute resolution.

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

### III. Progress Reports

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

### IV. Penalties

A. 1. Respondent's failure to comply with any term of this Order constitutes a violation of this Order, the ECL, and 6 NYCRR Section 375-1.2(d). Nothing herein abridges Respondent's right to contest, defend against, dispute, or disprove any such claim, assertion, or allegation that it has violated this Order.

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



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

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

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

2. Respondent shall notify the Department in writing within seven (7) Days after it obtains knowledge of any Force Majeure Event. Respondent shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such seven (7) Day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall be deemed to know of any circumstance 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 was or will be 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 under this Order that are affected by the Force Majeure Event shall be extended by the Department for such time as is reasonably necessary to complete those obligations.

5. If Respondent asserts that an event provides a defense to non-compliance with this Order pursuant to Subparagraph IV.B and the Department rejects such

assertion, Respondent shall be in violation of this Order unless it invokes dispute resolution pursuant to Paragraph XII and Respondent's position prevails.

V. Entry upon Site

A. To the extent authorized by law, Respondent hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site (or areas in the vicinity of the Site which may be under the control of Respondent) by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to matters addressed pursuant to this Order, and by any agent, consultant, contractor, or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site, for (i) inspecting, sampling, and copying records related to the contamination at the Site; (ii) implementing this Order; and (iii) testing and any other activities necessary to ensure Respondent's compliance with this Order. Upon request, Respondent shall (i) provide the Department with suitable office 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 have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of all sampling and scientific measurements taken under this Subparagraph available to Respondent.

VI. Payment of State Costs

A. 1. Respondent shall continue to fund environmental monitors. Funds required to support the monitoring requirements shall be provided to the Department in a sum based upon annual environmental monitor service costs, in an amount that will maintain an account balance sufficient to meet the next year's anticipated expenses, subject to revision on an annual basis. Respondent will be billed annually for each fiscal year beginning April 1, 2004, with payments to be made in advance of the period in which they will be expended.

2. The Department may revise the required payment on an annual basis to include all costs of monitoring incurred by the Department. The annual revision may take into account factors such as inflation, salary increases, the need for additional environmental monitors, and supervision of the environmental monitors. The Department will provide a written explanation of the basis for any modification upon Respondent's request. The

Department will notify Respondent of any revisions at least sixty (60) days in advance of any such revisions.

B. Within forty-five (45) Days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for State Costs for work performed at or in connection with the Site through and including the Termination Date.

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

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

Charles Willard  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

E. Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-7010.

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

G. Respondent may contest, in writing, invoiced costs under Subparagraph VI.B if it believes that (i) the cost documentation contains clerical, mathematical, or accounting errors; (ii) the costs are not related to the State's activities with respect to the Remedial Program for the Site; or (iii) the Department is not otherwise legally entitled to such costs. If Respondent objects to an invoiced cost, Respondent shall pay all costs not objected to within the time frame set forth in Subparagraph VI. A and shall, within thirty (30) Days after its receipt of an invoice, identify, in writing, all costs objected to and the basis of the

objection. This objection shall be filed with the BPM Director. The BPM Director or the BPM Director's designee shall have the authority to relieve Respondent of the obligation to pay invalid costs. Within forty-five (45) Days after the date of the Department's determination of the objection, Respondent shall either pay to the Department the amount which the BPM Director or the BPM Director's designee determines Respondent is obligated to pay or commence an action or proceeding seeking appropriate judicial relief.

H. In the event any instrument for the payment of any money due under this Order fails of collection, such failure of collection shall constitute a violation of this Order, provided that (i) the Department gives Respondent written notice of such failure of collection, and (ii) the Department does not receive from Respondent a certified check or bank check in the amount of the uncollected funds within fourteen (14) Days after the date of the Department's written notification.

## VII. Reservation of Rights

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

## VIII. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all third-party claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns except for liability

arising from (i) vehicular accidents occurring during travel to or from the Site; or (ii) willful, wanton, or malicious acts or omissions, and acts or omissions constituting gross negligence or criminal behavior by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Order. The Department shall provide Respondent with written notice no less than thirty (30) Days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

IX. Public Notice

A. Within sixty (60) Days after the effective date of this Order, Respondent shall cause to be filed a Department-approved Notice of Order, which Notice shall be substantially similar to the Notice of Order attached to this Order as Exhibit "C," with the Clerk of the County wherein the Site is located to give all parties who may acquire any interest in the Site notice of this Order. Within sixty (60) Days of such filing (or such longer period of time as may be required to obtain a certified copy, provided Respondent advises the Department of the status of its efforts to obtain same within such thirty (30) Days), Respondent shall also provide the Department with a copy of such instrument certified by such County Clerk (or the City Register) to be a true and faithful copy.

B. If Respondent proposes to convey the whole or any part of Respondent's ownership interest in the Site, or becomes aware of such conveyance, Respondent shall, not fewer than forty-five (45) Days before the date of conveyance, or within forty-five (45) Days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed 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.

X. Declaration of Covenants and Restrictions

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

certified copy, provided Respondent advises the Department of the status of its efforts to obtain same within such thirty (30) Day period). If Respondent's compliance with this Subparagraph X.A. would interfere with the rights of a third-party property owner, Respondent shall so notify the Department in writing and an alternate approach shall be developed.

2. Respondent may petition the Department to modify or terminate the Declaration of Covenants and Restrictions filed pursuant to Subparagraph X.A.1 at such time as it can certify that reliance upon such covenants and restrictions is no longer required to meet the goals of the Remedial Program. Such certification shall be made by a Professional Engineer. The Department shall not unreasonably withhold its consent to such petition.

B. If the ROD provides for "no action" other than implementation of one or more institutional controls, the Department shall request Respondent to cause same to be recorded under the provisions of Subparagraph X.A.1. If Respondent does not cause such institutional control(s) to be recorded, Respondent cannot obtain a release and covenant not to sue pursuant to Subparagraph II.G.

#### **XI. Communications**

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

1. Communication from Respondent shall be sent to:

Robert Schick, P.E.  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7010  
Note: three copies of work plans are required to be sent.

with copies to:

Gary Litwin  
Bureau of Environmental Exposure Investigation  
New York State Department of Health  
Flanigan Square  
547 River Street  
Troy, New York 12180-2216  
Note: two copies of work plans are required to be sent, and

The Regional Director for the Region the Site is located in:

Regional Director, Region 4  
New York State Department of Environmental Conservation  
1150 North Westcott Road  
Schenectady, New York 12306-2014, or

Regional Director, Region 5  
New York State Department of Environmental Conservation  
Route 86, P.O. Box 296  
Ray Brook, New York 12977-0296, or

Regional Director, Region 6  
New York State Department of Environmental Conservation  
317 Washington Avenue  
Watertown, New York 13601, or

Regional Director, Region 7  
New York State Department of Environmental Conservation  
615 Erie Boulevard West  
Syracuse, New York 13204-2400, and

Deborah Christian  
Division of Environmental Enforcement  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-5500  
Note: correspondence only

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

Allyson Donahue  
National Grid  
55 Bearfoot Road  
Northboro, Massachusetts 01532

Charles Willard  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

William Holzhauer  
Niagara Mohawk Power Corporation  
300 Erie Boulevard West  
Syracuse, New York 13202

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

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

## XII. Dispute Resolution

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

B. 1. Respondent shall file with the OH&M a request for formal dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis, or opinion supporting its position, and all supporting documentation upon which Respondent relies (hereinafter called the "Statement of Position"). A copy of such request and written statement shall be provided contemporaneously to the Director and to the parties listed under Subparagraph XI.A.1.

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

3. Respondent shall have the burden of proving by substantial evidence that the Department's position does not have a rational basis and should not prevail. The OH&M can conduct meetings, in person or via telephone conferences, and request additional information from either party if such activities will facilitate a resolution of the issues.



4. The OH&M shall prepare and submit a report and recommendation to the Director. The Director shall issue a final decision resolving the dispute in a timely manner. The final decision shall constitute a final agency action and Respondent shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR provided that Respondent notifies the Department within thirty (30) Days after receipt of a copy of the final decision of its intent to commence an Article 78 proceeding and commences such proceeding within sixty (60) Days after receipt of a copy of the Director's final decision. Respondent shall be in violation of this Order if it fails to comply with the final decision resolving this dispute within forty-five (45) Days after the date of such final decision, or such other time period as may be provided in the final decision, unless it seeks judicial review of such decision within the sixty (60) Day period provided. In the event that Respondent seeks judicial review, Respondent shall be in violation of this Order if it fails to comply with the final Court Order or settlement within thirty (30) Days after the effective date of such Order or settlement, unless otherwise directed by the Court. For purposes of this Subparagraph, a Court Order or settlement shall not be final until the time to perfect an appeal of same has expired.

5. The invocation of dispute resolution shall not extend, postpone, or modify Respondent's obligations under this Order with respect to any item not in dispute unless or until the Department agrees or a Court determines otherwise. The invocation of the procedures set forth in this Paragraph XII shall constitute an election of remedies and such election shall constitute a waiver of any and all other administrative remedies which may otherwise be available to Respondent regarding the issue in dispute.

6. The Department shall keep an administrative record of any proceedings under this Paragraph XII which shall be available consistent with Article 6 of the Public Officers Law.

7. Nothing in this Paragraph XII shall be construed as an agreement by the parties to resolve disputes through administrative proceedings pursuant to the State Administrative Procedure Act, the ECL, or 6 NYCRR Part 622 or Section 375-2.1.

8. 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.

### XIII. Termination of Order

A. This Order will terminate upon the Department's written determination that Respondent has completed all phases of the Remedial Program (including OM&M), in which event the termination shall be effective on the 5<sup>th</sup> Day after the Department issues its approval of the final report relating to the final phase of the Remedial Program.

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

#### XIV. Miscellaneous

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

B. Respondent shall allow the Department to attend and shall notify the Department at least seven (7) Days in advance of any field activities as well as any pre-bid meetings, job progress meetings, the substantial completion meeting and inspection, and the final inspection and meeting; nothing in this Order shall be construed to require Respondent to allow the Department to attend portions of meetings where privileged matters are discussed.

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

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

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

F. 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.

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

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

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

iii. Changes to a time frame set forth in this Order shall be accomplished by a written request to the Department's project attorney and project manager, which request shall be timely responded to in writing. The Department's decision relative to the request for a time frame change shall be subject to dispute resolution pursuant to Paragraph XII.

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

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

3. Notwithstanding the foregoing Subparagraphs XIV.H.1 and 2, if multiple parties sign this Order as Respondents but not all of the signing parties elect, pursuant to Subparagraph II.B, to implement a Work Plan, then all Respondents are jointly and severally liable for each and every obligation under this Order through the completion of the activities in such Work Plan that all such parties consented to; thereafter, only those 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 provided under Subparagraph II.G.

I. To the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law § 15-108, and any other applicable law, Respondent shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2) for "matters addressed" pursuant to and in accordance with this Order. "Matters addressed" in this Order shall mean all response actions taken by Respondent to implement this Order or any Predecessor Order for the Sites and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Order or any Predecessor Order, which costs have been paid by Respondent, including reimbursement of State Costs pursuant to this Order or any Predecessor Order. Furthermore, to the extent authorized under 42 U.S.C. Section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response action and/or for some or all of the costs of such action, Respondent is entitled to seek contribution from any person except those who are entitled to contribution protection under 42 U.S.C. Section 9613(f)(2).

J. All activities undertaken by Respondent pursuant to this Order shall be performed in accordance with the requirements of all applicable Federal and State laws, regulations, and guidance documents.

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

L. 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.

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

N. 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: NOV - 7 2003

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

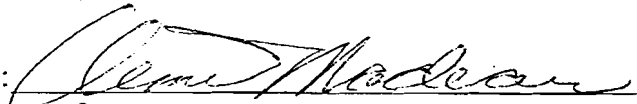
By:

A handwritten signature in black ink, appearing to read 'Dale A. Desnoyers', is written over a horizontal line.

Dale A. Desnoyers, Director  
Division of Environmental Remediation

CONSENT BY RESPONDENT

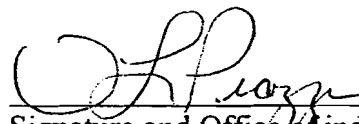
Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

By:   
Clement E. Nadeau  
Title: Senior Vice President, New York  
Distribution Operations  
Date: October 23, 2003

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(2/22/03)*

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

On the 23<sup>rd</sup> day of October, in the year 2003, before me, the undersigned, personally appeared Clement E. Nadeau, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (~~are~~) subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument, the individual(~~s~~), or the person upon behalf of which the individual(~~s~~) acted, executed the instrument.

  
Signature and Office of individual  
taking acknowledgment

VICKI L. PIAZZA  
Notary Public in the State of New York  
Qualified in Onondaga County, No. 4848073  
My Commission Expires March 30, 2004