

*Gregg
10/15/96 NCL*

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Implementation of a
Response Program for
Burn Rite Salvage Yard by

AGREEMENT
INDEX NUMBER: R6-0002-96-10

Ventura-Herkimer, LLC,
Volunteer.

CONSIDERING,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law of the State of New York ("ECL"). This Agreement is entered into pursuant to the Department's authority under that law.
2. Ventura-Herkimer, LLC is a limited liability company ("Volunteer"), having offices at 132.5 Albany Street, P.O. Box 106, Cazenovia, New York 13035. Any reference to "Volunteer" includes Volunteer's predecessor in interest, William Feinstein, d/b/a Ventura Development Company.
3. Volunteer plans to undertake the commercial development of a 7.6 acre parcel at the intersection of Routes 5 and 28 in Herkimer, Herkimer County, New York, Tax Map 113.081-02-61. Exhibit "A" of this Agreement is a map of the Site showing its general location. The Site was previously used as a salvage yard and is currently unoccupied.
4. Volunteer represents, and for the purposes of this Agreement, the Department relies on those representations, that Volunteer's involvement with the Site and with the facility on that Site is limited to the following: Volunteer has not taken title to the Site, has not previously owned or operated the Site, and is not otherwise responsible under law to remediate the Existing Contamination.
5. Volunteer's executed an Agreement with the Department, Index Number D-00001-96-05, pursuant to which he performed a Department-approved investigation to determine whether to undertake the development of the Site for commercial purposes. The Site Investigation Report, dated November 22, 1996, established the presence of and characterized certain contaminants on the site, including PCBs, volatile organic compounds, and heavy metals among others, and the existence of petroleum contamination will be further studied ("Existing Contamination").
6. As a result of the investigation, Volunteer intends to proceed with Site

development pursuant to a Work Plan which will include, as a minimum, the following conceptual elements, which were subject to public review pursuant to the Investigation Agreement cited above:

A. All soils having a PCB concentration of 50 ppm or greater will be excavated and properly disposed of off-Site, subject to the following conditions:

i. should the amount of such soil exceed 500 tons, the Department will authorize Volunteer to limit off-Site disposal to the amount of soil that contains concentrations of PCBs in excess of 100 ppm and to consolidate the remainder on-Site and cover it with a cap providing performance equivalent to a final cover system described in 6 NYCRR Subpart 360-2.

ii. In all cases, all soils containing PCBs in concentrations exceeding 100 ppm will be properly disposed of off-Site.

Volunteer shall be responsible for compliance with the Toxic Substances Control Act.

B. i. If the groundwater underlying or emanating from the Site is not contaminated with PCBs above New York State groundwater standards, Volunteer shall consolidate on-Site all soils with PCB concentrations of greater than 10 ppm but less than 50 ppm and cover them

a. with an asphalt parking area, including a suitable noncontaminated sub-base, or

b. with at least 12 inches of clean soil and vegetation.

No building would be allowed to be constructed over soils containing greater than 10 ppm PCBs.

ii. If the groundwater underlying or emanating from the Site is contaminated with PCBs at concentrations exceeding New York State groundwater standards, Volunteer shall excavate and properly dispose of off-Site all soils with PCB concentrations of greater than 10 ppm PCBs but less than 50 ppm PCBs; provided, however, that Volunteer may consolidate and contain such soil on-Site with a cap providing performance equivalent to a final cover system described in 6 NYCRR Subpart 360-2.

C. Volunteer shall cover all surface soils contaminated with

inorganic compounds at levels exceeding the soil cleanup objectives contained in DHWR TAGM 4046 or with PCBs with concentrations from 1 to 10 ppm

- i. with an asphalt parking area, including a suitable noncontaminated sub-base, or
- ii. with at least 12 inches of clean soil and vegetation, or
- iii. with a building.

D. Any and all underground storage tanks will be removed in compliance with applicable regulatory requirements. Any contaminated soil associated with the tank removals or which is determined to be a source of groundwater contamination will be removed or treated in compliance with applicable regulatory requirements. This agreement does not require that Volunteer independently address the remediation of groundwater other than in the context of source removal.

7. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

8. A. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2, based upon the presence of PCBs.

B. ECL 27-1313.3 provides that the Department shall be responsible for inactive hazardous waste disposal site remedial programs, except as provided in Section 1389-b of the Public Health Law. ECL 27-1313.3.a provides that whenever the Commissioner of Environmental Conservation finds that hazardous wastes at an inactive hazardous waste disposal site constitutes a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order.

C. The regulations implementing ECL Article 27, Title 13 authorize at 6 NYCRR 375-1.2(e)(2)(ii) the proponents of any activity to demonstrate to the Department that such activity will not have the effect described in 6 NYCRR 375-1.2(e)(2)(i) by such demonstration as the Department may find acceptable.

D. Volunteer wishes to enter into this Agreement in order to ensure, and the Department hereby determines that this Agreement constitutes a demonstration, that the response action undertaken under this Agreement will be

in compliance with the ECL and will not:

- i. prevent or interfere significantly with any proposed, ongoing or completed remedial program at the Site, or
- ii. expose the public health or the environment to a significantly increased threat of harm or damage.

9. Navigation Law §173 prohibits the unpermitted "discharge" of "petroleum" as those terms are defined under Article 12 of the Navigation Law and a preliminary investigation conducted by others at the Site has revealed that petroleum may have been discharged at the Site.

10. Navigation Law § 176 permits, upon approval by the Commissioner, any person to clean up and remove a discharge of petroleum without admission of responsibility for such discharge.

11. A. Volunteer wishes to enter into this Agreement in order to resolve its potential liability for remediating the Existing Contamination pursuant to this Agreement as an operator under ECL Article 27, Title 13 and the Navigation Law. The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

B. Volunteer, desirous of implementing a response program acceptable to the Department sufficient to allow Volunteer to proceed with its plans to use the Site for the contemplated use, consents to the terms and conditions of this Agreement.

12. The Department published notice of entry into this Agreement in the March 5, 1997 issue of the Department's Environmental Notice Bulletin and provided timely written notice to the County, Town and Village of Herkimer of the proposed entry of this Agreement and solicited comments from the public and from those local governments as this Agreement, including the remedial Work Plan for the site. The Department received no comments.

13. The Department and Volunteer agree that the goals of this Agreement are:

A. for Volunteer to, (i) implement a Department-approved remedial work plan for the Site ("Remedial Program"); and (ii) reimburse the State's administrative costs as provided in this Agreement, and

B. for the Department and the Trustee of New York State's natural

resources (the "Trustee") to release Volunteer and its successors, assigns, lessees, sublessees, and respective secured creditors under the conditions set forth in this Agreement, from any claim or cause of action, civil or criminal, in law or in equity, suits, and proceedings (including but not limited to any claims for State administrative costs) by the Department or the Trustee, which may arise under any applicable law solely as a result of the Existing Contamination.

14. Volunteer agrees to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Agreement, and agrees not to contest the validity of this Agreement or its terms.

IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S RELEASE AND COVENANT NOT TO SUE SET FORTH IN THIS AGREEMENT, VOLUNTEER AGREES TO THE FOLLOWING:

I. Performance and Reporting of the Remedial Program

A. Within 30 days after the effective date of this Agreement, Volunteer shall commence implementation of the remedial work plan ("Work Plan") attached to this Agreement and made part of it as Exhibit "B."

B. Volunteer shall perform the Remedial Program in accordance with the Work Plan and Department approved plans and specifications attached to this Agreement and made part of it as Exhibit "C". Volunteer shall notify the Department of any significant difficulties that may be encountered in implementing the Work Plan, any Department-approved modification to the Work Plan, or any Department-approved detailed document or specification prepared by or on behalf of Volunteer pursuant thereto and shall not modify any obligation unless first approved by the Department.

C. During implementation of all remedial activities identified in the Work Plan, Volunteer shall have on-Site a full-time representative who is qualified to supervise the work done.

D. In accordance with the schedule contained in the Work Plan, Volunteer shall submit to the Department a final engineering report. The final engineering report shall include "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that the Remedial Program was implemented and all construction activities were completed in full accordance with the Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteer pursuant thereto, and this Agreement. The "as built" drawings, final engineering report,

and certification must be prepared, signed, and sealed by a professional engineer.

E. Volunteer shall implement the O&M Plan in accordance with the schedule and requirements of the Department-approved O&M Plan.

F. 1. Within 30 days after receipt of the final engineering report and certification, the Department shall notify Volunteer in writing whether the Department is satisfied that the Response Program was completed in compliance with the implementation of the Work Plan and Department-approved design.

2. Upon being satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan have been reached, the Department shall notify Volunteer in writing of its satisfaction and the Department and the Trustee shall, except for the reservations identified below, release, covenant not to sue and forbear from bringing any action, proceeding, or suit against Volunteer and Volunteer's lessees, sublessees, successors and assigns and their respective creditors for the further investigation and remediation of the Site, or for natural resources damages, based upon the release or threatened release of any Existing Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of this Agreement continue to be or have been made to the Department, (b) Volunteer and/or its lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any, and (c) appropriate notices and deed restrictions have been recorded in accordance with Paragraphs IX and X of this Agreement. Should the Herkimer County Industrial Development Agency ("IDA") provide Volunteer with financial assistance for Volunteer's proposed commercial development, and should the IDA take title to the Site, then such release, covenant not to sue and forbearance shall extend to the IDA as well. Nonetheless, the Department and the Trustee hereby reserve all of their respective rights concerning, and such forbearance shall not extend to, any further investigation or remedial action the Department deems reasonably necessary:

i. due to offsite migration of petroleum contaminants that was not addressed by the Work Plan, but only if said petroleum contamination has its source on Site;

ii. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Work Plan which indicates that Site conditions are not sufficiently protective of human health and environment for the reasonably anticipated commercial use of the

Site;

iii. due to credible information received, in whole or in part, after the Department's approval of the final engineering report and certification, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the reasonably anticipated commercial use of the Site;

iv. due to Volunteer's failure to implement this Agreement to the Department's satisfaction; or

v. due to fraud committed by Volunteer in demonstrating that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan were reached.

Additionally, the Department and Trustee hereby reserves all of their respective rights concerning, and any such release, covenant, and forbearance shall not extend to, any further investigation or abatement it deems necessary to be undertaken in the event that Volunteer causes or suffers the release or threat of release at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law §172[15]) after the effective date of this Agreement; or Volunteer causes a, or suffers the use of the Site to, change from the reasonably anticipated commercial use of the Site to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment.

3. Notwithstanding any other provision in this Agreement, if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this Agreement shall be construed, or deemed, to preclude the State of New York from recovering such claim.

G. If the Department is satisfied with the implementation of the Work Plan and Department-approved design, along with its notification of satisfaction referred to in Subparagraph I.F.1., of this Agreement, the Department shall provide Volunteer with a separate written "clean site notification" letter the form of which is attached to this Agreement and incorporated in this Agreement as Exhibit "C."

H. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph I.F or in a "clean site notification" letter issued under

Subparagraph I.G of this Agreement shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

2. Except as above provided in Subparagraph I.F of this Agreement and in the "clean site notification" letter issued under Subparagraph I.G of this Agreement, nothing in this Agreement is intended as a release, forbearance, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Department, the Trustee or the State of New York may have against any person, firm, corporation, or other entity not a party to this Agreement. In addition, notwithstanding any other provision in this Paragraph I of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph I.F and in the "clean site notification" letter issued under Subparagraph I.G of this Agreement shall not extend to parties that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

II. Progress Reports

A. Volunteer shall submit to the parties identified in Subparagraph XI. A.1 in the numbers specified therein copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;
2. include all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteer;
3. identify all work plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous month;
4. describe all actions, including, but not limited to, data collection and implementation of the Work Plan, that are scheduled for the next month and provide other information relating to the progress at the Site;
5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Volunteer's obligations under the Agreement, and efforts

made to mitigate those delays or anticipated delays;

6. include any modifications to any work plans that Volunteer has proposed to the Department or that the Department has approved; and include any modifications to the Work Plan that the Department has approved.

B. Volunteer shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Agreement and Volunteer's obligation to submit the progress reports shall terminate upon receipt of the written notification from the Department.

C. Volunteer also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

D. Upon written request of Volunteer's construction lender, which request shall not be made more frequently than once a month, the Department shall, within ten days of receipt of such request, issue a letter to such construction lender setting forth the status of Volunteer's progress based upon the information that the Department then has in its possession, and further stating whether or not the Department is satisfied with Volunteer's compliance with the Agreement as of the date of the letter. If the Department states that it is dissatisfied, it shall set forth in the letter the reason(s) therefor.

III. Review of Submittals

A. 1. The Department shall review each of the submittals Volunteer makes pursuant to this Agreement 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 Agreement and generally accepted technical and scientific principles and applicable guidance(s) as determined by the Department. The Department shall notify Volunteer in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. a. If the Department disapproves a submittal, it shall so notify Volunteer in writing and shall specify the reasons for its disapproval within 30 days after its receipt of the submittal and may request Volunteer to modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Work Plan. Within 30 days after receiving written notice that

Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Volunteer in writing within 30 days of its approval or disapproval. If the Department disapproves the revised submittal, the Department and the Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

B. Within 30 days after the Department's approval of the final engineering report and certification, Volunteer shall submit to the Department one microfilm copy (16 millimeter roll film M type cartridge) of that report and all other Department-approved drawings and submittals. Such submission shall be made to:

Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

IV. Enforcement

A. This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York.

B. Volunteer shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Volunteer's reasonable control ("force majeure event"). Volunteer shall, within five working days of when it obtains knowledge of any such force majeure event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B.

V. Entry Upon Site

Volunteer hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the Remedial Program for purposes of inspection, sampling, and testing and to ensure Volunteer's compliance with this Agreement. The Department shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Volunteer shall permit the Department full access to all records relating to matters addressed by this Agreement and job meetings.

VI. Payment of State Costs

Within thirty (30) days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses (including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs) incurred by the State of New York for reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, and administrative costs associated with this Agreement. Each such payment shall be made by certified or bank check 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
50 Wolf Road
Albany, NY 12233-7010

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.

VII. Reservation of Rights

A. Except as provided in Subparagraph I.F. of this Agreement and in any "clean site notification" letter issued under Subparagraph I.G. of this

Agreement, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights with respect to any party other than Volunteer, Volunteer's lessees, sublessees, successors and assigns and their respective secured creditors.

B. Nothing contained in this Agreement shall prejudice any rights of the Department or the Trustee to take any investigatory or remedial action it may deem necessary if Volunteer fails to comply with this Agreement or contamination other than Existing Contamination is encountered at the Site.

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

D. Nothing contained in this Agreement shall be construed to affect the Department's right to terminate this Agreement at any time during its implementation if Volunteer fails to comply substantially with this Agreement's terms and conditions.

VIII. Indemnification

Volunteer shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement by Volunteer and/or any of Volunteer's directors, officers, employees, servants, agents, successors, and assigns, provided, however, that this indemnification shall not apply to grossly negligent, unlawful, willful, or malicious acts or omissions of the Department, the State of New York, or either of their respective representatives or employees.

IX. Notice of Sale or Conveyance

A. Within 30 days after the transfer of this property to Volunteer, Volunteer shall file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the Herkimer County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement.

B. If Volunteer proposes to convey the whole or any part of Volunteer's ownership interest in the Site, Volunteer shall, not fewer than 45 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance

and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Agreement.

X. Deed Restriction

Within 30 days of its receipt of the Department's notification pursuant to Subparagraph I.F.1 of this Agreement approving Volunteer's final engineering report and certification, Volunteer shall record an instrument with the Herkimer County Clerk, to run with the land, that shall prohibit the Site from ever being used for purposes other than of a commercial enterprise (unless such other use does not require a lower level of residual contamination as reasonably determined by the Department) without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department. Volunteer shall provide the Department with a copy of such instrument certified by the Herkimer County Clerk to be a true and faithful copy of the instrument as recorded in the Office of the Herkimer County Clerk.

XI. Communications

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

1. Communication from Volunteer shall be sent to:

Darrell Sweredoski, P.E.
New York State Department of Environmental Conservation
317 Washington Street
Watertown, New York 13601

with copies to:

G. Anders Carlson, Ph.D.
Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203

Judy Drabicki, Esq.
New York State Department of Environmental Conservation
317 Washington Street
Watertown, New York 13601

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

- Two copies (one unbound) to Mr. Sweredoski
- Two copies to Dr. Carlson
- One copy to Ms. Drabicki

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

James Blasting
Adirondack Environmental Services
308 Syracuse Building
224 Harrison Street
Syracuse, New York 13202

with a copy to:

William A. Feinstein
Ventura-Herkimer, LLC
132 S. Albany Street
P.O. Box 106
Cazenovia, NY 13035

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other given in accordance with this Paragraph XI.

XII. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that it has fully and accurately disclosed to the Department all information known to Volunteer and all information in the possession or control of Volunteer's employees, contractors, and agents which relates in any way to the contamination existing on the effective date of this Agreement or any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site and to their application for this Agreement. Volunteer also certifies that it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at, or from, the Site.

2. If the Department determines that information Volunteer provided and certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void, and the Department shall reserve all rights that it may have.

B. Volunteer shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators reasonably acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Agreement. The responsibility for the performance of the professionals retained by Volunteer shall rest solely with Volunteer. Adirondack Environmental Services and Resource Associates are consultants the Department finds sufficiently acceptable to implement the Work Plan and to report the results thereof.

C. Upon reasonable prior notice to Volunteer's consultant to allow such consultant to collect sufficient amounts, the Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Volunteer, and the Department also shall have the right to take its own samples. Volunteer shall make available to the Department the results of all sampling and/or tests or other data generated by Volunteer with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement. Should the Department take its own samples, unless circumstances dictate a shorter notice time, the Department shall provide Volunteer reasonable prior notice of its intent to do so, and thereafter, upon reasonable prior notice from Volunteer to allow the Department to collect sufficient amounts, Volunteer shall have the right to obtain split samples, duplicate samples, or both, of all substances or materials sampled by the Department.

D. Volunteer shall notify the Department at least five (5) working days in advance of any field activities to be conducted pursuant to this Agreement.

E. 1. The Volunteer shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform the Volunteer's obligations under this Agreement.

2. In carrying out the activities identified in the Work Plan, the Department may exempt Volunteer from the requirement to obtain any Department permit for any activity that is conducted on the Site and that satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. Volunteer, Volunteer's agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's lessees, successors, and assigns shall be bound by this Agreement. Volunteer's employees, servants, and agents shall be obliged to comply with the relevant provisions of this Agreement in the performance of their designated duties on behalf of Volunteer.

G. Volunteer shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteer with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteer or Volunteer's contractors shall provide written notice of this Agreement to all subcontractors hired to perform any portion of the work required by this Agreement. Volunteer shall nonetheless be responsible for ensuring that Volunteer's contractors and subcontractors perform the work in satisfaction of the requirements of this Agreement.

H. All references to "professional engineer" in this Agreement are to an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

I. All references to "days" in this Agreement are to calendar days unless otherwise specified.

J. The section headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Agreement.

K. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by the Volunteer, to the Commissioner setting forth reasonable grounds for the relief

sought. Copies of such written application shall be delivered or mailed to Mr. Sweredoski and to Ms. Drabicki.

L. In undertaking the work required under this Agreement, Volunteer and its agents, servants, employees, representatives, contractors and subcontractors are deemed for the purpose of ECL 27-1321.3 and any other similar provision of state or federal law, to be performing services related to cleanup or restorative work which is conducted pursuant to a contract with the Department.

M. The provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteer otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Volunteer's insurers, for payments made previously or in the future for response costs.

N. Volunteer and Volunteer's employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the Site.

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

P. If Volunteer seeks to withdraw from the remedial commitments it has made in this Agreement and demonstrates to the Department that either 1) the cost of remediation exceeds 50 percent of the estimated cost as set forth in the Work Plan or 2) despite due diligence Volunteer is unable to obtain all necessary approvals, permits or financing for the construction of the proposed commercial development of the Site, then the Department shall permit Volunteer to withdraw. Upon such withdrawal, Volunteer must leave the site no worse than before it entered into the Agreement, as determined by the Department. If the Department approves Volunteer's withdrawal under this provision, Volunteer will not be liable to the Department under this Agreement for further investigation, remediation or other costs or activities at the Site. Such withdrawal will not excuse Volunteer from its obligations pursuant to Paragraph VI of this Agreement relating to State Costs incurred prior to withdrawal.

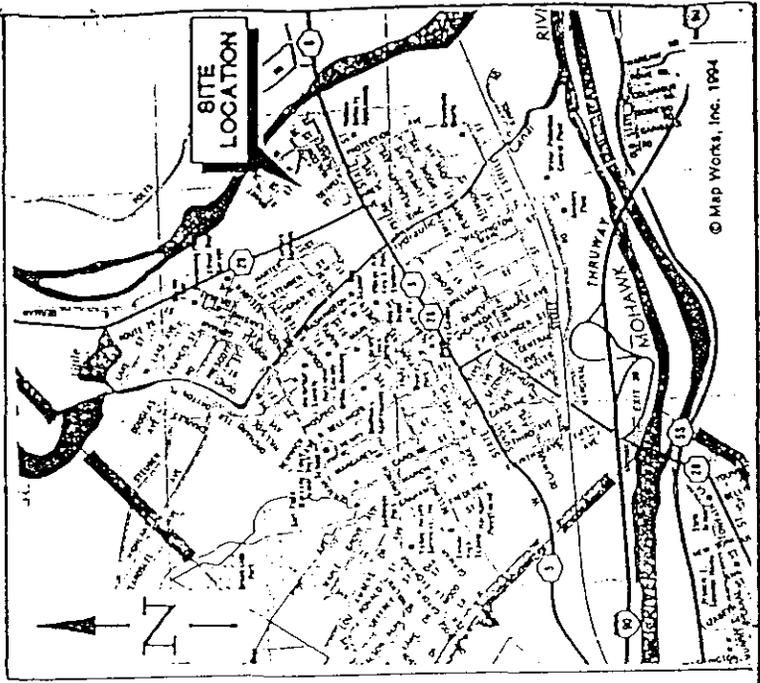


N. Y. S. ROUTE 28



EAST ALBANY STREET

N. Y. S. ROUTE 5



Agreement Exhibit A
Site Map with Site Location
Exhibit "A"

EXHIBIT "B"

Department-Approved Work Plan

EXHIBIT "C"

**Assignable Release and Covenant Not To Sue
By
by Department of Environmental Conservation**

[On Department Letterhead]

[Insert Date]

To whom it may concern:

The New York State Department of Environmental Conservation (Department) is pleased to report that the Department is satisfied that the Department-approved Work Plan to implement a response program at the parcel of land located at the intersection of Routes 5 and 28 in the Village and Town of Herkimer, a map of which is attached hereto as Appendix "A" (the "Site") has been successfully implemented. So long as no information has been withheld from the Department or mistake made as to the hazard posed by any Site-related compound or analyte of concern, the Department believes that no further investigation or response will be required at the Site for any contamination existing as of **[insert effective date of this Agreement]** to render the Site safe for use as commercial property.

Assignable Release and Covenant Not To Sue by Department:

The Department, and the Trustee of New York State's natural resources ("Trustee"), therefore, hereby release, covenant not to sue, and forbear from bringing any action, proceeding, or suit against Ventura-Herkimer, LLC ("Volunteer"), Volunteer's lessees, sublessees, successors, and assigns, and their respective secured creditors, for the further investigation or remediation of the Site, or for natural resource damages, based upon the release or threatened release at the Site of Existing Contamination, as that term is defined in an Agreement between Volunteer and the Department, Index No. R6-0002-96-10 ("Agreement"); provided that (a) timely payments of the amounts specified in Paragraph VI of the Agreement between the Department and the Volunteer continue to be, or have been, made to the Department; (b) Volunteer and/or its lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved post-response operation and maintenance plan, if any; and (c) appropriate notices and deed restrictions have been recorded in accordance with Paragraphs IX and X of the Agreement. Should the Herkimer County Industrial Development Agency ("IDA") provide Volunteer with financial assistance for Volunteer's proposed commercial

development, and should the IDA take title to the Site, then such release, covenant not to sue and forbearance shall extend to the IDA as well. Nevertheless, the Department and Trustee hereby reserve all of their respective rights concerning, and such release, covenant, and forbearance shall not extend to, any further investigation or remedial action the Department deems reasonably necessary:

- due to offsite migration of petroleum contaminants that was not addressed by the Work Plan, but only if said petroleum contamination has its source on Site;

- due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the remedial work plan which indicates that Site conditions are not sufficiently protective of human health and the environment for the reasonably anticipated commercial use of the Site;

- due to credible information received, in whole or in part, after the Department's approval of the final engineering report and certification pertaining to the Work Plan's implementation, which indicates that remedial activities identified in the Work Plan and performed under the Agreement is not sufficiently protective of human health and the environment for the reasonably anticipated commercial use of the Site;

- due to Volunteer's failure to implement this Agreement to the Department's satisfaction; or

- due to fraud committed by Volunteer in demonstrating that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan were reached.

Additionally, the Department and Trustee hereby reserves all of their respective rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to:

- Volunteer if it causes a, or suffers the, release or threat of release, at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]) after **[insert the effective date of this Agreement]**; or if it causes a, or suffers the use of the Site to, change from the reasonably anticipated commercial use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; nor to

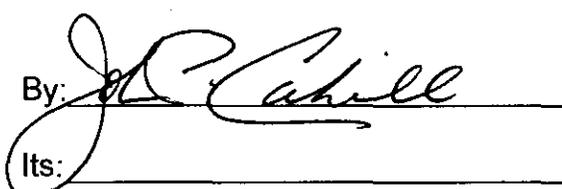
●any of Volunteer's lessees, sublessees, successors, or assigns who causes a, or suffers the, release or threat of release, at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]) after **[insert the effective date of this Agreement]**; who causes a, or suffers the use of the Site to, change from the reasonably anticipated commercial use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; or who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation they may have respecting same established resulting solely from the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department or Trustee, the one seeking the benefit of this release shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

Notwithstanding any other provision in this release, if with respect to the property there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this release shall be construed, or deemed, to preclude the State of New York from recovering such claim.

In conclusion, the Department is pleased to be part of this effort to return the subject property to commercial use, a use of benefit to the entire community.

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

By: 

Its: _____



N. Y. S. ROUTE 20

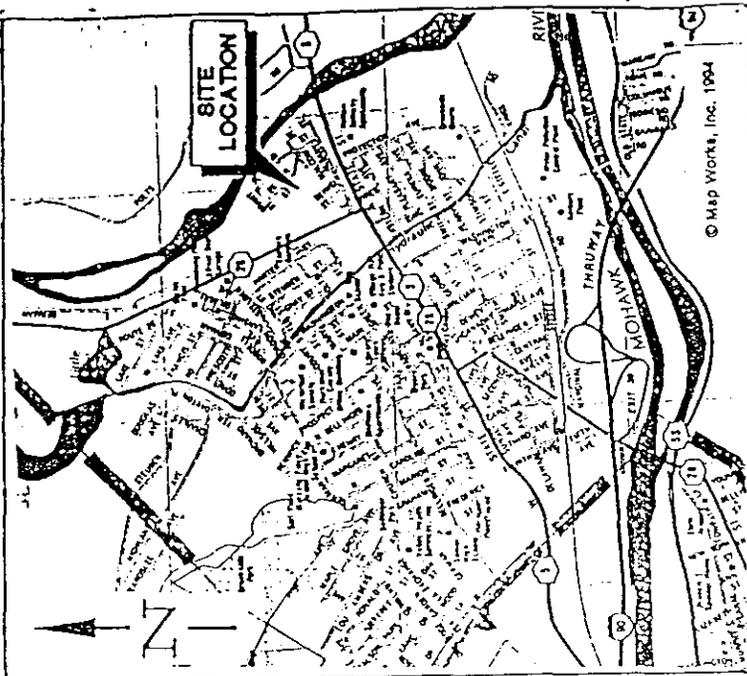
PLANTERY
WARD HOUSE
SCALE

EAST

ALBANY

STREET

N. Y. S. ROUTE 5



© Map Works, Inc. 1994

Agreement Exhibit A
Site Map with Site Location
Appendix 'A'
(to Exhibit 'C')

Exhibit D

NOTICE OF AGREEMENT

This Notice is made as of the ____ day of _____, 199_ by **Ventura-Herkimer, LLC**, the fee owner of a parcel of real property located at Routes 5 and 28 in the Village of Herkimer as more particularly described on Appendix "A" attached hereto (the "Property"); and

WHEREAS, there is presently located on the Property including PCBs, volatile organic compounds, among others; and

WHEREAS, **Ventura-Herkimer, LLC**, by authorized signature, entered into an administrative Agreement with the Department, Index #R-6-0002-96-10 (the "Agreement"), concerning the remediation of the Property, which Agreement was signed by the Commissioner of Environmental Conservation on _____, 1997; and

WHEREAS, in return for the remediation of the Property pursuant to the Agreement to the satisfaction of the Department, the Department has provided **Ventura-Herkimer, LLC**, and its successors, assigns, lessees and sublessees, including their respective secured creditors, with a release and covenant not to sue or bring any action, proceeding, or suit related to the further investigation or remediation based upon the release or threatened release of Existing Contamination as that term is defined in the Agreement, subject to certain reservations set forth in the Agreement; and

WHEREAS, pursuant to the Agreement, **Ventura-Herkimer, LLC**, agreed that it would give notice of the Agreement to all parties who may acquire any interest in the Property by filing this Notice with the Herkimer County Clerk,

NOW, THEREFORE, **Ventura-Herkimer, LLC**, for himself, his successors and its assigns declares that:

1. Notice of the Agreement is, hereby, given to all parties who may acquire any interest in the Property.
2. This Notice shall terminate upon the filing by Ventura-Herkimer, LLC, or his successors and assigns, of a termination of notice of Agreement.

**IN WITNESS WHEREOF, Ventura-Herkimer LLC, has executed this
Notice of Agreement by its duly authorized representative.**

Ventura-Herkimer LLC,

Dated: _____, 1997

By: _____

Its: _____

[acknowledgement]



N. Y. S. ROUTE 20

PAVING
WARD HOUSE
SCALE

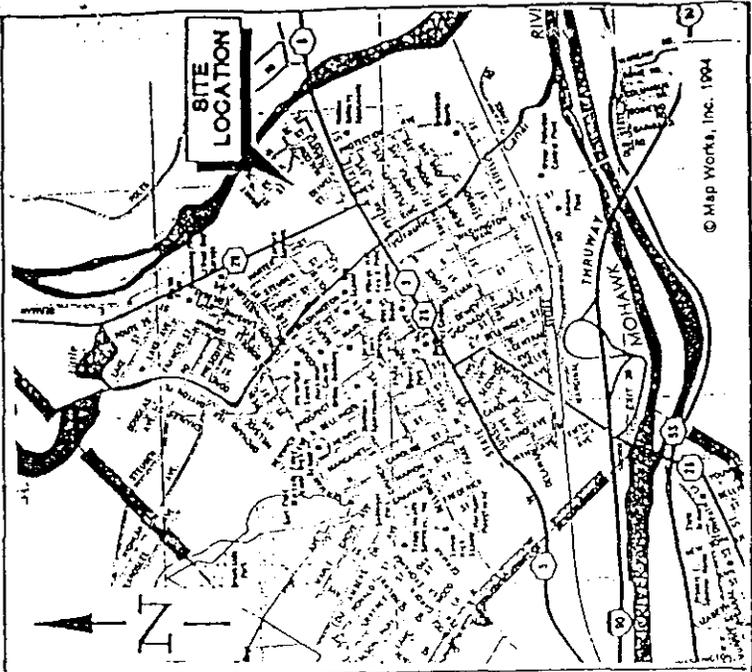
DEMEL STREET

EAST

ALBANY

STREET

N. Y. S. ROUTE 5



Agreement Exhibit A
Site Map with Site Location
Appendix "A"
(to Exhibit "D")