

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STATE SUPERFUND PROGRAM
ECL §27-1301 *et seq.*

In the Matter of a Remedial Program for

DEC Site Name: Former Rome Cable Site,
Parcels 3, 5, and 6
DEC Site Nos.: E633073 and 633073
Site Address: Henry Street, Rome, New York

Hereinafter referred to as "Site"

**ORDER ON
CONSENT AND
ADMINISTRATIVE
SETTLEMENT**

**Index No.
CO 6-20220801-37**

by: **Oneida County Industrial Development Agency**

Hereinafter referred to as "Respondent"

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

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

C. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13 and ECL 3-0301, and resolves Respondent's liability to the State as provided at 6 NYCRR 375-1.5(b)(5).

2. A portion of the Site is currently listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 633073 with a Classification of 02 pursuant to ECL 27-1305.

3. Respondent is an active New York public benefit corporation with a mailing address of 584 Phoenix Drive, Rome, NY 13441 and is the current owner of the Site, which is further defined herein.

4. Pursuant to Article 56 of the ECL, Respondent and the Department executed a State Assistance Contract dated February 25, 2009 (the "SAC") to develop and implement an Environmental Restoration Program ("ERP") project for the Site. Upon

approval of a Remedial Investigation/Alternatives Analysis Report, the Department determined that additional remediation of the Site was required. The Department subsequently selected remedies for the Site, which were presented in two (2) Records of Decision (“RODs”) issued by the Department on March 30, 2013.

5. Respondent elected to request that the Department develop and implement the RODs, and Respondent and the Department executed a New York Works II Environmental Restoration Project Agreement dated March 19, 2015 (the “NYWII ERP Agreement”) for the design and implementation of the remedies. The NYWII ERP Agreement, attached to this Order as Exhibit C, is incorporated as an enforceable part of this Order insofar as it pertains to Paragraph II – NYWII ERP Agreement Survival Provisions.

6. Based on an updated assessment of the condition of the Site buildings, the Department identified the need to demolish the building complex at the Site to implement the selected remedies. The abandoned buildings were either partially or fully dilapidated and contained universal wastes (i.e., lighting ballasts, instrumentation switches, impacted wood block flooring), drummed waste, above-ground storage tanks (“ASTs”) within a flooded basement, and asbestos-containing materials.

7. The inclusion of the required demolition work added significant costs to the original remedies. The Department issued a ROD Amendment on July 31, 2019, summarizing the amended remedy, which covered an approximately 21.45-acre portion of the Site. The Department estimated that the cost to implement the ROD Amendment was \$13,000,000, and the estimated cost to construct the original ROD remedy was \$1,630,000.

8. Due to the significant cost increase, which was more than three times the original ROD remedy, Respondent elected to terminate the NYWII ERP Agreement pursuant to Paragraph XIV, Sub-Paragraph C of the NYWII ERP Agreement.

9. Pursuant to the legal authorities cited herein, the Department has incurred costs, and anticipates the need to incur additional costs, paid from the hazardous waste remedial fund for the implementation of a Remedial Program, including the investigation and remediation of hazardous wastes and/or substances identified on or in proximity to the Site. These expenditures are authorized by and in conformance with relevant and applicable State and federal law.

10. Respondent and the Department agree that the objectives and conditions of this Order are for: (i) Respondent to provide Site access and cooperate with the Department in the Department’s implementation of the Remedial Program for the Site; (ii) the Department to release and covenant not to sue the Respondent for the investigation and remediation of the Site and for the reimbursement of Site-related response costs; and (iii) the Department to provide Respondent with contribution protection provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and/or any other applicable federal or state law for matters addressed by this Order.

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

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

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

I. Real Property

The Site subject to this Order has been assigned numbers E633073 and 633073, consists of approximately 49.65 acres, and is as follows:

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

Tax Map/Parcel No.: Section 241 Block 1 Lots 7.1 and 54.1
Henry Street, Rome, NY
Owner: Oneida County Industrial Development Agency

II. Scope of Order

The following Sections of the "Standard Clauses for All New York State Superfund Orders" attached to this Order as Appendix A are without effect:

I – Citizen Participation Plan;
II – Initial Submittal;
III – Development, Performance and Reporting of Work Plans;
IV – Penalties;
VI – Payment of State Costs;
VII – Release and Covenant Not to Sue;
X – Public Notice;
XIII – Progress Reports;
XIV – Termination of Order; and
XVI – Miscellaneous, Subparagraphs A, B, F and H.

III. NYWII ERP Agreement Survival Provisions

Pursuant to Paragraph XV of the NYWII ERP Agreement, the following requirements of the NYWII ERP Agreement survived its termination:

- Paragraph II (Allowable Use);
- Paragraph IV (Entry Upon Site);
- Paragraph VI (Disposition of Site);
- Paragraph VII (Cost Recovery);
- Paragraph X (Change of Use);
- Paragraph XI (Environmental Easement);
- Paragraph XII (Site Lease/Transfer Conditions); and
- Paragraph XIII (Communications).

The selected remedy in the ROD Amendment allows the use and development of the Site for commercial and industrial uses as defined by 6 NYCRR Part 375-1.8(g). Consistent with the ROD Amendment, therefore, this Order supplements the Allowable Use in Paragraph II of the NYWII ERP Agreement to include commercial and industrial uses as defined by 6 NYCRR Part 375-1.8(g).

IV. Cost Recovery

The State hereby reserves the right to seek to recover the full amount of any response costs incurred by the State under the NYWII ERP Agreement and any prior ERP SAC or Agreement for this Site through litigation brought under Article 56 of the ECL or other statute or under common law, or through cooperative agreements, with responsible parties, other than the following:

1. The Respondent;
2. Successors in title to the Site;
3. Lessees of the Site; and any
4. Any person that provides financing to successors in title and lessees relative to the remediation, restoration, or redevelopment of the Site.

Provided that such successor in title or lessee did not generate, arrange for, transport, or dispose, and did not cause the generation, arrangement for, transportation, or disposal of any contamination located at the Site, and did not own the Site.

V. Site Access

A. Commencing on the Effective Date of this Order, Respondent shall provide the Department and its agents, employees, contractors and subcontractors (collectively its "Representatives") with access to the Site at all reasonable times for the purposes of the Department's implementing the remedy selected by the Department in the July 31, 2019 ROD Amendment. The Department and/or its Representatives shall make good faith efforts to notify Respondent or Respondent's authorized representative

prior to entering the Site and, to the extent possible and reasonable, avoid interfering with business activities at the Site.

B. Subject to IV.A above, the Department and its Representatives will enter the Site for the performance of work thereon for one or more of the purposes set forth in Environmental Conservation Law (“ECL”) Sections 27-1309(3)-(4) and 27-1313(8), and particularly for the purpose of conducting remedial activities at the Property. Department shall engage it best efforts to minimize interference with operations of tenants or third parties at the Site. This is not a notice that the Department intends to acquire the property nor is it an offer to acquire it.

C. Subject to IV.A above, Respondent will permit entry, subject to tenant authorization, on and use of the Property by the Department and its Representatives to:

- (i) Operate work areas;
- (ii) Remove therefrom any material generated from the Department’s remedial activities;
- (iii) Carry on any activity necessary for the remediation of the Property, including site management (as necessary), together with the rights at all times during the duration of this Order of ingress, egress and regress by the Department and its Representatives;
- (iv) Collection of soil, groundwater and/or soil vapor and indoor air samples; and
- (v) Perform site restoration activities, including but not limited to, placement and grading of clean backfill, replacement in kind of disturbed driveway and parking lot areas, replacement in kind of disturbed concrete sidewalks and walkways, replacement in kind of Property fencing, reseeding of disturbed areas and replacement in kind of disturbed vegetation. All areas of the Property disturbed by the Department’s remedial activities will be restored to pre-existing conditions.

D. While still in ownership of the Site, Respondent shall take reasonable steps to ensure that any lessees and sublessees of the Site provide the Department and its Representatives with Site access.

VI. Environmental Easement

A. The remedy selected by the Department for the Site as described in the ROD Amendment relies upon institutional and/or engineering controls. Upon the Department’s written request, Respondent shall submit to the Department for approval an Environmental Easement for the Site to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36.

B. The Environmental Easement executed by Respondent shall comply with the requirements of 6 NYCRR § 375-1.8(h)(2) and DEC Program Policy DER-33: Institutional Controls: A Guide to Drafting and Recording Institutional Controls, Issued December 3, 2010 (“DER-33”).

C. Upon acceptance of the Environmental Easement by the Department, Respondent shall file and record the Environmental Easement in accordance with ECL § 71-3605(8).

D. Within ten (10) days of recording the Environmental Easement with the Oneida County Clerk, Respondent shall submit proof of recording to the Department.

VII. Release and Covenant Not to Sue

A. Respondent shall not be liable to the Department or New York State upon any statutory or common law cause of action, including, but not limited to, those for natural resource damages, arising out of the presence of any contaminants in, on or emanating from the Site at any time before the effective date of this Order.

B. The terms of this release are consistent with those governing the issuance of a Certificate of Completion, including limitations, reopener provisions and extension to corporate successors and corporate assigns, found in 6 NYCRR § 375-2.9.

C. The liability protections set forth in this section shall extend to successors or assigns through acquisition of title to the Site and to a person who develops or otherwise occupies the Site; provided that such persons did not cause the generation, arrangement for, transportation, or disposal of any contamination located at the Site, and did not own the Site; and provided that such persons act with due care and in good faith to not interfere with the requirements of relevant institutional controls, including but not limited to the Department-approved Site Management Plan (“SMP”), including any and all Department-approved amendments to the SMP and comply with an Environmental Easement.

D. Respondent shall be entitled to receive contribution protection and/or to seek contribution to the extent authorized by ECL § 27-1421(6) and 6 NYCRR § 375-1.5(b)(5).

E. The Department hereby reserves all its respective rights concerning, and such release and covenant not to sue shall not extend to, any further investigation and/or remedial action the Department deems necessary due to:

- Respondent’s failure to comply with this Order; or
- Fraud committed by Respondent in executing or implementing this Order.

F. Additionally, the Department reserves all of its rights, and any such release and covenant not to sue shall not extend to Respondent, if Respondent causes

or allows a release or a threat of release of any hazardous waste (as that term is defined at 6 NYCRR § 375-1.2[w]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than the contamination existing at the Site upon the effective date of this Order (the "Present Contamination").

G. Notwithstanding any other provision in this release and covenant not to sue:

- 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 Order shall be construed or deemed to preclude the State of New York from recovering such claim against any party, including the Respondent.
- Except as provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights (including, but not limited to, the right to recover natural resource damages) with respect to any party, including the Respondent.
- Nothing contained in this Order shall prejudice any of the Department's rights to take any investigatory or remedial action it deems necessary if Respondent fails to comply with this Order or if contamination other than the Present Contamination is encountered at the Site.
- Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.
- Nothing contained in this Order shall be construed to affect the Department's right to terminate the Order and this "Release and Covenant Not to Sue" under the terms of the Order at any time during its implementation if Respondent fails to comply with the Order's terms and conditions.

H. 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: (1) Respondent may have against anyone other than the Department, including but not limited to rights of contribution under Section 113(f)(B)(3) of CERCLA, 42 U.S.C. § 9613(f)(B)(3); and (2) the Department may have against anyone other than the Respondent.

I. Except as otherwise provided in this Order, Respondent specifically reserves all rights and defenses under applicable law respecting any assertion by the Department or other party 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, hearing, appeal and to any other due process. The existence of this Order or Respondent's compliance thereto shall not be construed as an admission of any 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.

VIII. Communications

A. All written communications required by this Consent Order shall be transmitted by electronic means, whenever possible. Paper copies should be provided upon request.

1. Communication from Respondent shall be sent to:

Evelyn Hussey, Project Manager
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, N.Y. 12233
evelyn.hussey@dec.ny.gov

Michael C. Murphy (correspondence only)
New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway
Albany, N.Y. 12233-1500
michael.murphy1@dec.ny.gov

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

Shawna M. Papale
Secretary & Executive Director
Oneida County Industrial Development Agency
584 Phoenix Drive
Rome, New York 13441
Telephone: (315) 338-0393
Email: spapale@mvedge.org

B. The Department and Respondent reserve the right to designate additional or different addressees for communication on written notice to the other. Additionally, the Department reserves the right to request that the Respondent provide more than one paper copy of any work plan or report.

C. Each party shall notify the other within ninety (90) days after any change in the addresses listed in this Paragraph VIII. See Appendix A Paragraph VI.D for instruction on notification of contact and address changes.

XI. Miscellaneous

A. Appendix A - "Standard Clauses for All New York State, State Superfund Orders" is attached to and, subject to the limitations set forth in Paragraph II, hereby made a part of this Order as if set forth fully herein.

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

C. The effective date of this Order is the 10th day after it is signed by the Commissioner or the Commissioner's designee.

DATED: September 12, 2022

BASIL SEGGOS
COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By:

Andrew Guglielmi

Andrew O. Guglielmi, Director
Division of Environmental Remediation

CONSENT BY RESPONDENT

[INDEX No. CO 6-20220801-37]

Respondent, **Oneida County Industrial Development Agency**, hereby consents to the issuance of the foregoing order without further notice, waives its right to a hearing herein, and agrees to be bound by the terms, provisions, and conditions contained herein.

Oneida County Industrial Development Agency

By [Signature]:

David C. Grow

Name [Print]:

David C. Grow

Title:

Chairman

Date:

August 8, 2022

Email:

dgrow@mjglaw.com

Acknowledgment

STATE OF NEW YORK)

) SS:

COUNTY OF Oneida)

On the 3rd day of August, in the year 2022, before me, the undersigned, personally appeared David C. Grow, 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]
Notary Public



If you are unable to secure notarization, you must sign the statement below.

In signing this document, I acknowledge under penalty of perjury that I understand the contents and purpose of this document; the signature above is my own and I signed willingly. I have also submitted state-issued identification verifying my identity. I am aware that any false statement made herein is punishable as a class A misdemeanor pursuant to section 210.45 of the Penal Law of the State of New York.

Signature

Printed name

EXHIBIT "A"

Map



Former Rome Cable Parcels 3, 5 & 6
Operable Unit No. 2

Former Rome Calbe Parcels 3, 5 & 6
Operable Unit No. 1

Former Rome Cable Corporation
Proposed Remedial Action Plan

OU1 - Western Portion - Parcel 5
OU2 - Eastern Portion - Parcel 3, 5 & 6

Figure 3
Operable Units

EXHIBIT "B"
RECORDS SEARCH REPORT
NOT APPLICABLE

EXHIBIT “C”

**New York Works II Environmental Restoration Project Agreement dated March 19,
2015 (the “NYWII ERP Agreement”)**

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
NEW YORK WORKS II ENVIRONMENTAL RESTORATION PROJECT

In the Matter of the
implementation of a
Remedial Program for

NYWII ERP AGREEMENT
Index No. NYWII-E633073-12-14

Former Rome Cable Site, Parcels 3, 5, and 6
DEC Site Number: **E633073**
Henry Street
Rome, New York 13440

Hereinafter referred to as "Site"

by:

Oneida County Industrial Development Agency
584 Phoenix Drive
Rome, New York 13441

Hereinafter referred to as "Municipality"

WHEREAS, the New York State Department of Environmental Conservation ("Department" or "NYSDEC") is authorized by Article 56 of the New York State Environmental Conservation Law (hereinafter the "ECL") to address contamination at municipal sites; and

WHEREAS, the Legislature has determined that the preservation, enhancement, restoration and improvement of the quality of the State's environment is one of government's most fundamental obligations; and

WHEREAS, Chapter 54, Laws of 2013 (the "Law of 2013"), provides New York Works funding for services, expenses, and indirect costs related to various environmental projects including, but not limited to, environmental restoration projects. The Law of 2013 allows the Department to enter into agreements with municipalities to undertake environmental restoration projects on behalf of a municipality upon request, provided that the municipality shall provide ten percent of the total project costs (hereinafter referred to as "NYWII ERP Agreement"); and

WHEREAS, the Legislature authorized the Department to develop and implement environmental restoration investigation and remediation projects for certain properties held in title by them; and

WHEREAS, the Municipality submitted an Application requesting that the Department undertake the development and implementation (i.e., the remedial design and remedial construction) of an environmental restoration remediation project (the "Project"), the purpose and scope of which is set forth in the Record of Decision ("ROD") provided in Exhibit A of this NYWII ERP Agreement, on the Site that is described in Exhibit B by metes and bounds and by reference to a recorded map showing its boundaries and bearing the seal and signature of a licensed land surveyor; and

WHEREAS, the Municipality agrees to comply with all terms and conditions of this NYWII ERP Agreement; and

WHEREAS, the Municipality submitted an approvable Application, including submission of its documentation of its authorization to enter into this NYWII ERP Agreement, and of its authorization of the person signing the same to do so; and

WHEREAS, the Project was given a priority ranking based on a score derived from information provided in the Application and is eligible to participate in NYWII ERP; and

WHEREAS, the Municipality has disclosed all responsible party payments received related to the Site prior to entering into this Agreement. Except as provided herein relative to responsible party funding, the Municipality may use any other funding available (i.e., federal, State or other private party monies) towards its cost share; and

WHEREAS, the Department's execution of this NYWII ERP Agreement is made in reliance upon the information provided by, and representations of, the Municipality in its application papers and in this NYWII ERP Agreement; and

WHEREAS, the Municipality has complied, and commits to comply, with the requirements for municipalities established under Article 56 of the ECL.

NOW, THEREFORE, IN CONSIDERATION OF AND IN EXCHANGE FOR THE MUTUAL COVENANTS AND PROMISES, THE PARTIES AGREE TO THE FOLLOWING:

I) Duties and responsibilities of the Department and the Municipality.

A) The Department, as required by the scope of the Project, shall:

- 1) implement a Citizen Participation Plan (CPP) for the Project consistent with DER-23; and
- 2) design and implement the remedy set forth in the ROD; and
- 3) prepare any necessary Environmental Easement (EE) documents for the Municipality's execution; and
- 4) prepare any necessary Site Management Plan (SMP).

B) The Municipality shall:

- 1) provide necessary assistance to the Department in the implementation of the Site CPP, including providing venues for meetings and contact information; and
- 2) execute and implement any Department prepared EE; and

- 3) implement the SMP, if one is required under this NYWII ERP Agreement, including all operation, maintenance and monitoring; and
- 4) provide the required Periodic Review Reports (PRR) as set forth in the SMP.

In the event that the remedy for the Site, or any Work Plan for the Site, requires a SMP as a consequence of operation, maintenance, and monitoring requirements, including reliance upon institutional or engineering controls, the Municipality shall file the initial PRR on the first day of the eighteenth month following the anniversary of the start of the SMP and continuing at the Department designated period until the Department notifies the Municipality in writing that such PRR may be discontinued.

Such PRR shall be signed by a Professional Engineer or by a qualified environmental professional as defined in 6 NYCRR 375-1.2(ak) approved by the Department to perform that function and certified under penalty of perjury that the institutional and/or engineering controls are unchanged from the previous certification and that nothing has occurred that would impair the ability of such controls to protect public health and the environment or constitute a violation or failure to comply with the approved SMP.

The Municipality shall notify the Department within twenty-four (24) hours of discovery of any breach, upset, interruption, or termination of one or more controls without the prior approval of the Department. Further, the Municipality shall take all actions required by the Department to maintain conditions at the Site that achieve the objectives of the remedy and/or the Work Plan 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 PRR required by this.

The Municipality 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. The Department shall not unreasonably withhold its approval of such petition.

II) Allowable Use

The ROD determined that the Site will be used for Commercial Use, and the Municipality agrees for itself and for its lessees and successors in title that any proposed change to the Contemplated Use shall be governed by the provisions of ECL § 56-0511 and any implementing regulations thereto.

III) Enforcement and Force Majeure

This NYWII ERP Agreement shall be enforceable as a contractual agreement under the laws of the State of New York. The Municipality shall not suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of this NYWII ERP Agreement as a result of a Force Majeure Event provided it notifies the Department in writing within ten (10) days of when it obtains knowledge of any such event. The Municipality 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 NYWII ERP Agreement. The Municipality shall have the burden of proving by a preponderance of the evidence that an event qualifies as a Force Majeure Event pursuant to this Paragraph.

IV) Entry upon Site

The Municipality hereby agrees to provide access to the Site and to all relevant information regarding activities that may have involved hazardous waste at the Site in accordance with the provisions of ECL § 56-0515. Such access shall be for purposes of implementing any investigation, design, and remediation activities necessary to complete the ROD required remedy and inspecting the Site to ensure that any SMP for the conditions on such Site is being implemented satisfactorily, that the engineering and/or institutional controls are continually maintained in the manner the Department may require, that no person has engaged or is engaging in any activity that is not consistent with restrictions placed upon the use of the Site or that will or that reasonably is anticipated to: prevent or interfere significantly with a proposed, ongoing or completed project; or expose the public health or the environment to a significantly increased risk of harm or damage from such Site.

- A) The Department shall have the right to periodically inspect the Site to ensure that the use of the Site complies with the terms and conditions of this NYWII ERP Agreement; such right of inspection shall survive termination of this NYWII ERP Agreement.
- B) If the Department determines that the Municipality has failed to comply with the terms of the NYWII ERP Agreement, the Department may carry out any measures necessary to return the Site to a condition sufficiently protective of human health, in accordance with ECL § 56-0509.4; and neither the Municipality nor any of successors in title, lessees or lenders shall interfere with such access. The Municipality or successor and assign shall pay all costs incurred by the State and any release and indemnification shall be revoked.

V) Payment of State Costs

- A) The Municipality hereby agrees to pay the Department for the Municipality's share of the Project. The Municipality's share is ten percent (10%) of the Project cost for design and construction of the remedy. Construction costs are estimated at \$1,606,000 based on the Capital Cost provided in the ROD dated 03/30/13. The actual Project costs may vary.

- B) The Department will invoice the Municipality periodically. Within ninety (90) days after receipt of an invoice from the Department, the Municipality shall reimburse the Department for the Project costs incurred by the Department at a rate of ten percent (10%) of the Project costs.
- C) Costs shall be documented as provided by 6 NYCRR § 375-1.5(b)(3)ii. 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) Each such payment shall be made payable to the New York State Department of Environmental Conservation and shall be sent to:

Director, Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-7012
- E) The provisions of 6 NYCRR §§ 375-1.5 (b)(3)(v) and (vi) shall apply to any objections by the Municipality to any invoiced costs under this NYWII ERP Agreement. Objections shall be sent to the Department as provided under subparagraph V.D.
- F) In the event of non-payment of any invoice within the ninety (90) days provided herein, the Department may seek enforcement of this provision pursuant to Paragraph III or the Department may commence an enforcement action for non-compliance with the Laws of 2013 and ECL § 71-4003. If such failure to pay is after the issuance of the Certificate of Completion (COC), enforcement shall include revocation of the COC and loss of any liability protection.

VI) Disposition of Site

- A) In the event that there is a Disposition of the Site or any portion of such Site, the Municipality is required to reimburse the State the amount owed. The amount owed shall consist of the "value of the Disposition of the Site" less the Municipal costs allowed to offset such value. The maximum amount of money owed the State is defined as an amount of money, not to exceed the State's costs incurred for the investigation and remediation of this Site under this NYWII ERP Agreement and any prior ERP State Assistance Contract (SAC) or Agreement for this Site. The Municipality's allowed costs consist of taxes owed to the Municipality upon acquisition and the Municipality's share of the Project costs (related to the disposed property) provided under this NYWII ERP Agreement as well as any costs allowed under the prior ERP SAC or Agreement for this Site.

For purposes of this subparagraph, the "value of the Disposition of the Site", or that portion of the Site that is disposed, consists, if the Site is disposed by transfer of title, of

the higher of the Site's sale price or the Site's fair market value at time of sale; or, if the Site is disposed by lease, the higher of the present worth of the stream of rent over a 30 year period beginning the effective date of this NYWII ERP Agreement or the present worth of the fair market value of the stream of rent over the same 30 year period.

However, if the Site is located in an economic development zone or in a zone equivalent area, as those terms are defined in Sections 957 and 959(bb), respectively, of the General Municipal Law; or if the Site is located in a project area that is the subject of a redevelopment plan approved by Municipality's legislative body under Article 18-B of the General Municipal Law; or if the Site will be used to maintain or expand the supply of housing for persons of low income and families of low income as Section 2 of the Private Housing Finance Law defines them, then if the Site is disposed by sale, the "value of the Disposition of the Site", or that portion of the Site that is disposed, consists of the Site's sale price, and if the Site is disposed by lease, the present worth of the stream of rent over a 30 year period beginning the effective date of this NYWII ERP Agreement.

- B) If the Municipality disposes of the Site by sale to a responsible party, the disposition must be at fair market value. Additionally, the Municipality shall collect from such responsible party, in addition to such other consideration, an amount of money constituting the amount of Project costs incurred by the State under this NYWII ERP Agreement and any prior ERP SAC or Agreement for this Site plus accrued interest and transaction costs. The Municipality shall pay such funds immediately to the Department for deposit into an appropriate account.

VII) Cost Recovery

- A) The State hereby reserves the right to seek to recover the full amount of any Project Costs incurred by the State under this NYWII ERP Agreement and any prior ERP SAC or Agreement for this Site through litigation brought under Article 56 of the ECL or other statute or under the common law, or through cooperative agreements, with responsible parties, other than the following:
 - 1) The Municipality; and
 - 2) any successor in title to the Site, any lessee of the Site, and any person that provides financing to the Municipality, such successor in title, or such lessee relative to the remediation, restoration, or redevelopment of the Site, that did not generate, arrange for, transport, or dispose, and did not cause the generation, arrangement for, transportation, or disposal of any hazardous substance located at the Site and did not own the Site before the Municipality acquired title to the Site.
- B) The Municipality shall assist the Department and/or the State in compelling responsible parties to bear the cost of the Project by providing upon request by the Department all information that exists as of the start of the term of this NYWII ERP Agreement and any prior ERP SAC or Agreement for this Site that identifies the Site's responsible parties and all other information acquired during the course of the Project's implementation.

- C) Upon approval by the Department, the Municipality may make efforts to recover costs from responsible parties. The Municipality hereby agrees to provide the Department with timely advance written notice of any negotiations, proposed agreements, proposed settlements or legal action by which recovery is sought. The Municipality further agrees not to commence such legal action nor enter into any such proposed agreement or settlement without the approval of the Department.
- D) If any responsible party payments and/or other responsible party consideration become available to the Municipality during or after the completion of an environmental restoration project, the Municipality shall immediately notify the Department of such availability. The State is entitled to its share of the amount recovered from the responsible party under this NYWII ERP Agreement and any prior ERP SAC or Agreement for this Site. If the Municipality shall fail to make such payment to the State within sixty (60) days of receipt of any responsible party payment (or within ninety (90) days of signing this NYWII ERP Agreement, if the payment was received before the NYWII ERP Agreement was signed), the Department may take measures provided for by law.

If any responsible party payments are received prior to entering into this Agreement, the Municipality must pay the State ninety (90) percent of such payments, unless such payments were received for remedial activities conducted under any prior ERP SAC or Agreement for this Site.

The Municipality agrees that it will immediately notify the Department in writing of its receipt of funds from other sources for any of the Municipality's expenditures incurred pursuant to this NYWII ERP Agreement. Any such funds shall first be applied to the Municipality project share. Any additional funds shall then be applied to the State's share of the project costs.

VIII) Liability Protection

As set forth at ECL § 56-0509, the Municipality and applicable successors and assigns shall be entitled to certain liability protections, subject to the terms and conditions stated therein, upon the issuance of a COC for the Site by the Department. However, if the Municipality or its successor or assigns fails to comply with the EE and/or the SMP for the Site after the issuance of the COC, the Department reserves its right to revoke the COC and rescind any release of liability granted to the Municipality pursuant to ECL Article 56.

IX) Indemnification

The Municipality shall indemnify and save harmless the Department and the State of New York from and against all losses from claims, demands, payments, suits, actions, recoveries and judgments, of every nature and, description brought or recovered against it by reason of any acts or omissions of the Municipality, its agents, employees, or contractors related to this Site.

X) Change of Use

The Municipality shall notify the Department at least sixty (60) days in advance of any change of use as defined in ECL § 56-0511, which is proposed for the Site. In the event that the proposed change of use is inconsistent with the remedial program, the Department shall notify the Municipality of such determination within forty-five (45) days of receipt of such notice. In such event, the Municipality shall not implement the proposed change of use.

XI) Environmental Easement

A) If the Department's issuance of a ROD relies upon one or more institutional and/or engineering controls, the Department shall provide an EE for signature. The authorized representative for the Municipality shall within sixty (60) days of receipt of the EE, sign and submit it to the Department for execution. The Municipality's submittal shall satisfy the statutory and regulatory requirements of law as set forth in ECL Article 71, Title 36 and 6 NYCRR Part 375. The executed EE shall be recorded with the recording officer for the county in which the Site is located.

B) The Municipality or the owner of the Site may petition the Department to modify or extinguish the EE filed pursuant to this NYWII ERP Agreement at such time as it can certify that the Site is protective of human health and the environment without reliance upon the restrictions set forth in such instrument. Such certification shall be made by a Professional Engineer. The Department will not unreasonably withhold its consent.

C) Engineering and Institutional Controls

- 1) In the event that engineering and/or institutional controls are components of the remedy selected in the Department's ROD pertaining to the Site, the Department will cause the development of a plan to ensure that such controls are continually maintained in the manner satisfactory to the Department. The Municipality and its successors in title, lessees and lenders are prohibited from challenging the imposition or continuance of such controls, and failure to implement or comply with the Department-approved plan or to maintain such controls constitute a violation of this NYWII ERP Agreement and for the duration of such failure, the release and indemnification granted pursuant to ECL § 56-0509.1 shall have no force and effect.
- 2) The municipality's or successors' in title, lessees' and lenders' failure to cure such violation of engineering or institutional controls in the time period set by the Department will result in the Department seeking recovery of any funds expended on the Site and permanent revocation of any release and indemnification.

XII) Site Lease/Transfer Conditions

The Municipality shall not enter into any lease or transfer title to, the Site or any portion of it until the Municipality binds itself and its lessees and its successors in title, to the following conditions:

- A) The Site will not be used for the use set forth in Paragraph II or any less restrictive use until it is remediated. The Site may continue to be used for the purpose for which it is being used as of the start of the term of this NYWII ERP Agreement if the Department or DOH has not found that the existing state of contamination is such as to prohibit such use from continuing, giving due regard for public health and environmental protection; and
- B) If, before an EE for the Site is executed and recorded, the Municipality wishes to subdivide the Site into separate parcels, it may do so after submitting a change of use notice pursuant to 375-1.11(d).
- C) If a Municipality wishes to sell all or part of a Site before it is remediated, the Municipality's successor in title must first agree to remediate all such parcels under Department oversight in accordance with the Department's ROD and any such parcel cannot be used for the use set forth in Paragraph II or any less restrictive use until it is remediated. The Site may continue to be used for the purpose for which it is being used as of the start of the term of this NYWII ERP Agreement if the Department or DOH has not found that the existing state of contamination is such as to prohibit such use from continuing, giving due regard for public health and environmental protection.

XIII) Communications

- A) All written communications required by this NYWII ERP Agreement shall be transmitted by electronic mail unless otherwise specified by the DER project manager.

1) Communication from the Municipality shall be sent to:

- (i) George Hetizman, P.E., Director
Remedial Bureau C
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-9662
Email: george.heitzman@dec.ny.gov

- (ii) Krista Anders, Director
Bureau of Environmental Exposure Investigation
New York State Department of Health
Empire State Plaza
Corning Tower, Room 1787
Albany, New York 12237

[Email: krista.anders@health.ny.gov](mailto:krista.anders@health.ny.gov)

(iii) Andrew Guglielmi, Esq.
NYSDEC Office of General Counsel
625 Broadway
14th Floor
Albany, New York 12233-1500
Phone: (518) 402-9185
Email: andrew.guglielmi@dec.ny.gov

2) Communication from the Department to the Municipality shall be sent to:

Shawna Papale, Executive Director
Oneida County Industrial Development Agency
584 Phoenix Drive
Rome, New York 13441
Phone: 315-338-0393
Email: farcuri@mvedge.org

B) The Department and the Municipality reserve the right to designate additional or different addressees for communication on written notice to the other.

C) Each party shall notify the other within ninety (90) days after any change in the addresses listed in this Paragraph.

XIV) Completion or Termination of NYWII ERP Agreement

A) If the Municipality complies with the requirements of applicable State and federal laws and regulations and with the terms of this NYWII ERP Agreement, the Department shall issue a COC. This NYWII ERP Agreement shall end when the Department issues the COC.

B) The Department may terminate this NYWII ERP Agreement without prejudice or waiver of any other rights the State has if the Municipality fails to comply with any of the requirements of applicable State or federal laws and regulations or with any of the requirements of this NYWII ERP Agreement. The Department shall provide written notification to the Municipality of its breach of contract, setting forth in writing the basis for termination of the NYWII ERP Agreement and allowing the Municipality a reasonable and specific amount of time within which to cure its breach. If the Municipality does not cure its breach of contract within the period of time allowed by the Department, this NYWII ERP Agreement shall terminate on the date set forth in the letter ("Termination Letter"). The Department shall notify the Municipality of the amount of money that the Municipality owes the State for repayment of State costs incurred for the Project, including the Department's oversight costs and for any other costs incurred by the State in administering and terminating the Municipality's environmental restoration

remediation project ("Demand Letter"). The Municipality agrees that if this NYWII ERP Agreement is terminated by the Department under this Subparagraph B:

- 1) the Municipality, a successor in title, lessee and lender are not entitled to claim any liability limitation benefits provided under ECL § 56-0509 because the Municipality has failed to satisfy the requirement of ECL § 56-0509 (1)(a)(I) to comply with all of the terms and conditions of the NYWII ERP Agreement; and
- 2) the Municipality shall pay to the Department an amount of money constituting the amount of Project costs incurred by the State under this NYWII ERP Agreement plus accrued interest and transaction costs, with interest thereon as provided by law, within 45 days of the Municipality's receipt of the Department's Demand Letter.

C) The Municipality may terminate this NYWII ERP Agreement without prejudice or waiver of any other rights within thirty (30) days of receiving notice of the completion of the Remedial Design if the associated engineer's estimate of project costs exceeds the costs as set forth in Paragraph V.A by at least three times. The requirement for the Municipality to pay ten percent (10%) of the Project cost committed up to the date of termination survives the termination.

XV) If this NYWII ERP Agreement is completed or terminated, the following requirements shall survive such completion or termination: Paragraphs VI (Disposition of Site), VII (Cost Recovery), and XII (Site Lease/Transfer Conditions).

If this NYWII ERP Agreement is terminated, the following requirements shall survive such termination: Paragraphs II (Allowable Use), IV (Entry upon Site), V (Payment of State Costs), X (Change of Use), XI (Environmental Easement), and XIII (Communications).

XVI) Miscellaneous

- A) The Municipality shall file all appropriate forms for registration and closure for all known or identified petroleum bulk storage tanks on the Site, and/or all known or identified chemical bulk storage tanks on the Site to allow proper registration and/or closure of all such tanks.
- B) The Department is exempt from the requirement to obtain any State or local permit or other authorization for any activity conducted pursuant to 6 NYCRR Part 375.
- C) The Municipality shall cooperate with the Department to obtain all Site access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls, or authorizations necessary to perform the obligations under this NYWII ERP Agreement.
- D) The Municipality shall not be considered an operator of the Site solely by virtue of having executed and/or implemented this NYWII ERP Agreement.

- E) The paragraph headings set forth in this NYWII ERP Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this NYWII ERP Agreement.
- F) The terms of this NYWII ERP Agreement shall constitute the complete and entire agreement between the Department and Municipality concerning the implementation of the activities required by this NYWII ERP Agreement. No term, condition, understanding, or agreement purporting to modify or vary any term of this NYWII ERP Agreement shall be binding unless made in writing and subscribed by both parties. In the event of a conflict between the terms of this NYWII ERP Agreement and any Work Plan submitted pursuant to this NYWII ERP Agreement, the terms of this NYWII ERP Agreement shall control over the terms of the Work Plan(s). The Municipality consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this NYWII ERP Agreement and further agrees not to contest the validity of this NYWII ERP Agreement or its terms.
- G) Unless otherwise expressly provided herein, terms used in this NYWII ERP Agreement which are defined in ECL Article 56 or in 6 NYCRR Part 375 shall have the meaning assigned to them under said statute or regulations.
- H) The Municipality's obligation under this NYWII ERP Agreement represents payment for or reimbursement of response costs, and shall not be deemed to constitute any type of fine or penalty. This NYWII ERP Agreement does not constitute a permit and does not confer upon the Municipality the right to engage in the Contemplated Use or any other use of the Site for any particular purpose.
- I) No delay or omission on the part of either party in exercising any right under this NYWII ERP Agreement shall operate as a waiver of such right or of any other right under this NYWII ERP Agreement. A waiver shall not be construed as a bar to any right and/or remedy. No waiver or consent shall be binding unless it is in writing and executed by the Department and the Municipality.
- J) This NYWII ERP Agreement may be executed for the convenience of the parties hereto, individually or in combination, in one or more counterparts, each of which shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.
- K) The effective date of this NYWII ERP Agreement is the date it is signed by the Commissioner or the Commissioner's designee after all other parties have signed.
- L) The Municipality acknowledges that it has read, understands, and agrees to abide by all the terms set forth in this NYWII ERP Agreement.
- M) In accordance with Section 41 of the State Finance Law, the State shall have no liability under this NYWII ERP Agreement beyond funds available for this NYWII ERP Agreement.

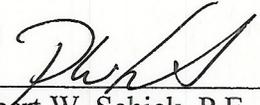
N) Notwithstanding any provision to the contrary, the Department expressly reserves its rights to postpone, suspend, abandon or terminate this NYWII ERP Agreement, and such actions shall in no event be deemed a breach of this NYWII ERP Agreement.

DATED:

MAR 19 2015

JOSEPH J. MARTENS
COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By:

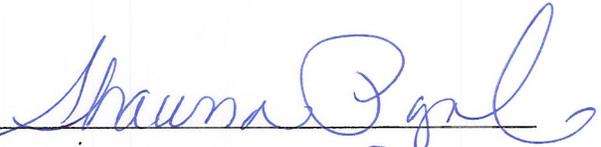


Robert W. Schick, P.E., Director
Division of Environmental Remediation

CONSENT BY MUNICIPALITY

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

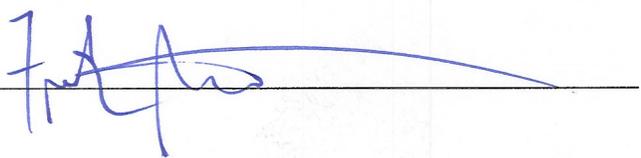
Municipality's Name:

By: 
Printed Name: Shawna Papale
Title: Executive Director
Date: 3/2/15

STATE OF NEW YORK

COUNTY OF ONEIDA

On the 2 day of March in the year 2015, before me, the undersigned, personally appeared Shawna Papale (full name) personally known to me who, being duly sworn, did depose and say that he/she resides at Whitesboro NY (full mailing address) and that he/she is the EXECUTIVE DIRECTOR of the OCIDA (full legal name of municipality), the municipality described in and which executed the above instrument; and that he/she signed his/her name thereto as authorized by said municipality.

Notary Public, State of New York 

FREDRICK J ARCURI
Notary Public, State of New York
No. 02AR6108720
Qualified in Oneida County
Commission Expires April 19, 2016

APPENDIX "A"

STANDARD CLAUSES FOR ALL NEW YORK STATE STATE SUPERFUND ORDERS

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

I. Citizen Participation Plan

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

II. Initial Submittal

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

III. Development, Performance, and Reporting of Work Plans

A. Work Plan Requirements

All activities at the Site that comprise any element of an Inactive Hazardous Waste Disposal Site Remedial Program shall be conducted pursuant to one or more Department-approved work plans ("Work Plan" or "Work Plans"). This Order and all activities shall be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, as required under CERCLA, 42 U.S.C. § 9600 *et seq.* The Work Plan(s) under this Order shall address both on-Site and off-Site conditions and shall be developed and implemented in accordance with 6 NYCRR § 375-1.6(a), and 375-6. All Department-

approved Work Plans shall be incorporated into and become enforceable parts of this Order. Upon approval of a Work Plan by the Department, Respondent shall implement such Work Plan in accordance with the schedule contained therein. Nothing in this Subparagraph shall mandate that any particular Work Plan be submitted.

The Work Plans shall be captioned as follows:

1. "Site Characterization ("SC") Work Plan": a Work Plan which provides for the identification of the presence of any hazardous waste disposal at the Site;

2. "Remedial Investigation/Feasibility Study ("RI/FS") Work Plan": a Work Plan which provides for the investigation of the nature and extent of contamination within the boundaries of the Site and emanating from such Site and a study of remedial alternatives to address such on-site and off-site contamination;

3. "Remedial Design/Remedial Action ("RD/RA") Work Plan": a Work Plan which provides for the development and implementation of final plans and specifications for implementing the remedial alternative set forth in the ROD;

4. "IRM Work Plan" if the Work Plan provides for an interim remedial measure;

5. "Site Management Plan" if the Work Plan provides for the identification and implementation of institutional and/or engineering controls as well as any necessary monitoring and/or operation and maintenance of the remedy; or

6. "Supplemental" if additional work plans other than those set forth in III.A.1-5 of this Appendix A, are required to be prepared and implemented.

B. Submission/Implementation of Work Plans

1. Respondent may opt to propose one or more additional or supplemental Work Plans (including one or more IRM Work Plans) at any time, which the Department shall review for appropriateness and technical sufficiency.

2. Any proposed Work Plan shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan.

i. The Department shall notify Respondent in writing if the Department determines that any element of a Department-approved Work Plan needs to be modified in order to achieve the objectives of the Work Plan as set forth in Subparagraph III.A or to ensure that the Remedial Program otherwise protects human health and the environment. Upon receipt of such notification, Respondent shall, subject to dispute resolution pursuant to Paragraph XV, modify the Work Plan.

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

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

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

5. A Professional Engineer licensed and registered in New York State must stamp and sign all Work Plans other than SC or RI/FS Work Plans.

C. Submission of Final Reports and Periodic Reports

1. In accordance with the schedule contained in an approved Work Plan,

Respondent shall submit a final report as provided at 6 NYCRR 375-1.6(b) and a final engineering report as provided at 6 NYCRR 375-1.6(c).

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

3. In the event that the final engineering report for the Site requires Site management, Respondent shall submit an initial periodic report in accordance with the schedule in the Site Management Plan and thereafter in accordance with a schedule determined by the Department. Such periodic report shall be signed by a Professional Engineer or by such other qualified environmental professional as the Department may find acceptable and shall contain a certification as provided at 6 NYCRR 375-1.8(h)(3). Respondent may petition the Department for a determination that the institutional and/or engineering controls may be terminated. Such petition must be supported by a statement by a Professional Engineer that such controls are no longer necessary for the protection of public health and the environment. The Department shall not unreasonably withhold its approval of such petition.

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

D. Review of Submittals

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

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

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

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

iv. Respondent may have one re-submission following a modification, request for modification, or disapproval of a submission. If, in the Department's sole judgment, a re-submission needs further modifications or is again disapproved, the Department may develop a replacement for such submission, which, subject to dispute resolution pursuant to

Paragraph XV, Respondent shall implement or be in violation of this Order.

2. Within thirty (30) Days after the Department's approval of a final report, Respondent shall submit such final report, as well as all data gathered and drawings and submittals made pursuant to such Work Plan, in an electronic format acceptable to the Department. If any document cannot be converted into electronic format, Respondent shall submit such document in an alternative format acceptable to the Department.

E. Department's Issuance of a ROD

1. Respondent shall cooperate with the Department and provide reasonable assistance, consistent with the Citizen Participation Plan, in soliciting public comment on the proposed remedial action plan ("PRAP"), if any. After the close of the public comment period, the Department shall select a final remedial alternative for the Site in a ROD. Nothing in this Order shall be construed to abridge any rights of Respondent, as provided by law, to judicially challenge the Department's ROD. Pursuant to Section XV(C) of this Appendix A, the Department's issuance of a ROD is not subject to dispute under this Order.

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

3. Nothing in this Order, in any submittal, or in any work plan(s) submitted pursuant to this Order shall modify, expand, reduce, or otherwise change the remedial activities (including site management) required by a ROD issued by the Department.

F. Institutional/Engineering Control Certification

In the event that the remedy for the Site, if any, or any Work Plan for the Site, requires institutional or engineering controls, Respondent

shall submit a written certification in accordance with 6 NYCRR 375-1.8(h)(3) and 375-3.8(h)(2).

IV. Penalties

A. 1. Respondent's failure to comply with any term of this Order constitutes a violation of this Order, the ECL, and 6 NYCRR 375-2.11(a)(4). Nothing herein abridges Respondent's right to contest any allegation that it has failed to comply with this Order.

2. Payment of any penalties shall not in any way alter Respondent's obligations under this Order.

B. 1. Respondent shall not suffer any penalty or be subject to any proceeding or action in the event it cannot comply with any requirement of this Order as a result of any Force Majeure Event as provided at 6 NYCRR 375-1.5(b)(4). Respondent must use best efforts to anticipate the potential Force Majeure Event, best efforts to address any such event as it is occurring, and best efforts following the Force Majeure Event to minimize delay to the greatest extent possible. "Force Majeure" does not include Respondent's economic inability to comply with any obligation, the failure of Respondent to make complete and timely application for any required approval or permit, and non-attainment of the goals, standards, and requirements of this Order.

2. Respondent shall notify the Department in writing within five (5) Days of the onset of any Force Majeure Event. Failure to give such notice within such five (5) Day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall be deemed to know of any circumstance which it, any entity controlled by it, or its contractors knew or should have known.

3. Respondent shall have the burden of proving by a preponderance of the evidence that (i) the delay or anticipated delay has been or will be caused by a Force Majeure Event; (ii) the duration of the delay or the extension sought is warranted under the circumstances; (iii) best efforts were exercised to avoid and mitigate the effects of the delay; and (iv) Respondent complied with the requirements of Subparagraph IV.B.2 regarding timely notification.

4. If the Department agrees that the delay or anticipated delay is attributable to a Force Majeure Event, the time for performance of the obligations that are affected by the Force Majeure Event shall be extended for a period of time equivalent to the time lost because of the Force majeure event, in accordance with 375-1.5(4).

5. If the Department rejects Respondent's assertion that an event provides a defense to non-compliance with this Order pursuant to Subparagraph IV.B, Respondent shall be in violation of this Order unless it invokes dispute resolution pursuant to Paragraph XV and Respondent's position prevails.

V. Entry upon Site

A. Respondent hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site (or areas in the vicinity of the Site which may be under the control of Respondent) by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to matters addressed pursuant to this Order, and by any agent, consultant, contractor, or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site, for inspecting, sampling, copying records related to the contamination at the Site, testing, and any other activities necessary to ensure Respondent's compliance with this Order. Upon request, Respondent shall (i) provide the Department with suitable work space at the Site, including access to a telephone, to the extent available, and (ii) permit the Department full access to all non-privileged records relating to matters addressed by this Order. Raw data is not considered privileged and that portion of any privileged document containing raw data must be provided to the Department. In the event Respondent is unable to obtain any authorization from third-party property owners necessary to perform its obligations under this Order, the Department may, consistent with its legal authority, assist in obtaining such authorizations.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Respondent shall each have the right to obtain

split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of any such sampling and scientific measurements available to Respondent.

VI. Payment of State Costs

A. Within forty-five (45) days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for State Costs as provided by 6 NYCRR 375-1.5 (b)(3)(i). Failure to timely pay any invoice will be subject to late payment charge and interest at a rate of 9% from the date the payment is due until the date the payment is made.

B. Costs shall be documented as provided by 6 NYCRR 375-1.5(b)(3). The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.

C. Each such payment shall be made payable to the "Commissioner of NYSDEC" and shall be sent to:

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

D. The Department shall provide written notification to the Respondent of any change in the foregoing address. The Respondent shall provide written notification to the Department (at the foregoing address) of any changes to the invoice contact and address provided under Paragraphs III or IV of the Consent Order.

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

F. In the event of non-payment of any invoice within the 45 days provided herein, the Department may seek enforcement of this provision pursuant to Paragraph IV or the

Department may commence an enforcement action for non-compliance with ECL '27-1423 and ECL 71-4003.

VII. Release and Covenant Not to Sue

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

VIII. Reservation of Rights

A. Except as provided at 6 NYCRR 375-1.9 and 375-2.9, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights or authorities, including, but not limited to, the right to require performance of further investigations and/or response action(s), to recover natural resource damages, and/or to exercise any summary abatement powers with respect to any person, including Respondent.

B. Except as otherwise provided in this Order, Respondent specifically reserves all rights and defenses under applicable law respecting any Departmental assertion of remedial liability and/or natural resource damages against Respondent, and further reserves all rights respecting the enforcement of this Order, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Order or Respondent's compliance with it shall not be construed as an admission of liability, fault, wrongdoing, or breach of standard of care by Respondent, and shall not give rise to any presumption of law or finding of fact, or create any rights, or grant any cause of action, which shall inure to the benefit of any third party. Further, Respondent reserves such rights as it may have to seek and obtain contribution, indemnification, and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers for past or future response and/or cleanup costs or such other costs or damages arising from the contamination at the Site as may be provided by law, including but not limited to rights of contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

IX. Indemnification

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

X. Public Notice

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

XI. Change of Use & Transfer

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

B. If Respondent proposes to transfer by sale or lease the whole or any part of Respondent's interest in the Site, or becomes aware of such transfer, Respondent shall, not fewer than forty-five (45) Days before the date of transfer, or within forty-five (45) Days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed or actual date of the conveyance, and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order. However, such obligation shall not extend to a conveyance by means of a corporate reorganization or merger or the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security agreement, lease, or any other right accruing to a person not affiliated with Respondent to secure the repayment of money or the performance of a duty or obligation.

XII. Environmental Easement

A. If a Record of Decision for the Site relies upon one or more institutional and/or

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

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

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

XIII. Progress Reports

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

XIV. Termination of Order

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

1. Respondent's election in accordance with Paragraph III.E.2 not to implement the remedial activities required pursuant to the ROD. In the event of termination in accordance with this Subparagraph, this Order shall terminate effective the 5th Day after the Department's receipt of the written notification, provided, however, that if there are one or more Work Plan(s) for which a final report has not been approved at the time of Respondent's notification of its election not to implement the remedial activities in accordance with the ROD, Respondent shall complete the activities required by such previously approved Work Plan(s) consistent with the schedules contained therein. Thereafter, this Order shall terminate effective the 5th Day after the Department's approval of the final report for all previously approved Work Plans; or

2. The Department's written determination that Respondent has completed all phases of the Remedial Program (including Site Management), in which event the termination shall be effective on the 5th Day after the date of the Department's letter stating that all phases of the remedial program have been completed.

B. Notwithstanding the foregoing, the provisions contained in Paragraphs VI and IX shall survive the termination of this Order and any violation of such surviving Paragraphs shall be a violation of this Order, the ECL, and 6 NYCRR 375-2.11(a)(4), subjecting Respondent to penalties as provided under Paragraph IV so long as such obligations accrued on or prior to the Termination Date.

C. If the Order is terminated pursuant to Subparagraph XIV.A.1, neither this Order nor its termination shall affect any liability of Respondent for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA, nor shall it affect any defenses to such liability that may be asserted by Respondent. Respondent shall also ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which existed before any activities under

this Order were commenced. Further, the Department's efforts in obtaining and overseeing compliance with this Order shall constitute reasonable efforts under law to obtain a voluntary commitment from Respondent for any further activities to be undertaken as part of a Remedial Program for the Site.

XV. Dispute Resolution

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

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

C. Nothing contained in this Order shall be construed to authorize Respondent to invoke dispute resolution with respect to the remedy selected by the Department in the ROD or any element of such remedy, nor to impair any right of Respondent to seek judicial review of the Department's selection of any remedy.

XVI. Miscellaneous

A. Respondent agrees to comply with and be bound by the provisions of 6 NYCRR Subparts 375-1 and 375-2; the provisions of such Subparts that are referenced herein are referenced for clarity and convenience only and the failure of this Order to specifically reference any particular regulatory provision is not intended to imply that such provision is not applicable to activities performed under this Order.

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

C. 1. Respondent shall use best efforts to obtain all Site access, permits, easements, approvals, institutional controls, and/or authorizations necessary to perform Respondent's obligations under this Order, including all Department-approved Work Plans

and the schedules contained therein. If, despite Respondent's best efforts, any access, permits, easements, approvals, institutional controls, or authorizations cannot be obtained, Respondent shall promptly notify the Department and include a summary of the steps taken. The Department may, as it deems appropriate and within its authority, assist Respondent in obtaining same.

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

D. The paragraph headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this Order.

E. 1. The terms of this Order shall constitute the complete and entire agreement between the Department and Respondent concerning the implementation of the activities required by this Order. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order. In the event of a conflict between the terms of this Order and any Work Plan submitted pursuant to this Order, the terms of this Order shall control over the terms of the Work Plan(s). Respondent consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this Order.

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

ii. If Respondent seeks to modify an approved Work Plan, a written request shall be made to the Department's project manager,

with copies to the parties listed in Subparagraph IV.A.1.

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

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

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

3. Notwithstanding the foregoing Subparagraphs XVI.F.1 and 2, if multiple parties sign this Order as Respondents but not all of the signing parties elect to implement a Work Plan, all Respondents are jointly and severally liable for each and every obligation under this Order through the completion of activities in such Work Plan that all such parties consented to; thereafter, only those Respondents electing to perform additional work shall be jointly and severally liable under this Order for the obligations and activities under such additional Work Plan(s). The parties electing not to implement the additional Work Plan(s) shall have no obligations under this Order relative to the activities set forth in such Work Plan(s). Further, only those Respondents electing to implement such additional Work Plan(s) shall be eligible to receive the release and covenant not to sue referenced in Paragraph VII.

G. Respondent shall be entitled to receive contribution protection and/or to seek contribution to the extent authorized by ECL 27-1421(6), 6 NYCRR 375-1.5(b)(5), and Section 113(f)(2) of CERCLA, as amended, 42 U.S.C. § 9613(f)(2).

H. Any time limitations set forth in Section 113(g)(1) of CERCLA, as amended, 42 U.S.C. § 9613(g)(1), Section 1012(h)(2) of the Oil Pollution Act, as amended, 33 U.S.C. § 2712(h)(2), the Federal Water Pollution Control Act, the New York Navigation Law, the New York Environmental Conservation Law, or any other federal or state statute or regulation with respect to potential claims for natural resource damages against Respondent or any other time limitations for the filing of potential natural resource damages claims against Respondent under any other applicable state or federal law are tolled in their entirety from the effective date of this Order until termination of this Order.

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

J. 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.

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

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