

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation
of a Remedial Program for an
Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13,
and Article 71, Title 27 of the
Environmental Conservation Law
of the State of New York by

ORDER
ON
CONSENT

Index # B8-0460-94-08

MERCURY AIRCRAFT, INC., and

THE TOWN OF URBANA,

Site Code # 8-51-007

Respondents.

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites." This Order is issued pursuant to the Department's authority under ECL Article 27, Title 13 and under ECL 3-0301.

2. A. Mercury Aircraft, Inc., ("Mercury") is a corporation doing business in the State of New York in that Mercury operates a manufacturing facility in Hammondsport, Steuben County. Wastes generated at that facility were reported to have been disposed of on property located at Crows Nest Road in the Town of Urbana, Steuben County ("the Site").

B. The Town of Urbana ("Urbana") is a municipality within Steuben County where the Site is located, and which has

an interest in assuring that the Site is properly addressed and maintained.

3. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2, and presents a significant threat to the public health or environment. The Site has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 8-51-007. The Department has classified the Site as a Classification "2" pursuant to ECL 27-1305.4.b.

4. A. Pursuant to ECL 27-1313.3.a, whenever the Commissioner of Environmental Conservation (the "Commissioner")

"finds that hazardous wastes at an inactive hazardous waste disposal site constitute 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."

B. Any person under order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the remedial program committed to under order. ECL 71-2705 provides that any person who fails to perform any

duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. 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.

5. Following a period of public comment, the Department selected a final remedial alternative for the Site in a Record of Decision ("ROD") dated March, 1998. Respondent Mercury proposed a modification to the final remedial alternative and the Department acknowledges its acceptance of design changes in an Explanation of Significant Differences ("ESD"). The ROD, the ESD and all other amendments are attached to this Order as Appendix "A", are incorporated herein, and shall be collectively referred to as the ROD.

6. The Department and Respondents agree that the goals of this Order are for Respondent Mercury to (i) develop and implement, in accordance with the ROD, an inactive hazardous waste disposal site remedial program ("Remedial Program") for the Site that shall include the design and implementation of the Remedial Program, and the contents of a post-construction operation, maintenance and monitoring program for the selected remedial alternative; and (ii) for the Town of Urbana to implement the tasks of the operation, maintenance and monitoring program specified for the Town of Urbana after the program is reviewed and approved by the Department, and (iii) for

Respondent Mercury to reimburse the State's administrative costs incurred pursuant to this Order.

7. A. Respondent Mercury, without admitting any facts or any of the Department's determinations, assertions, or conclusions of law, and while reserving all other rights available to it, waives its right to a hearing herein as provided by law, and 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.

B. Respondent Urbana, having waived its right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order and having independently settled on the allocation of obligations with Respondent Mercury, 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.

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

I. Remedial Design Contents

A. Before the expiration of 30 days from the effective date of this Order, Respondent Mercury shall have submitted to the Department a schedule for development of the

remedial design to implement the remedial alternative for the Site selected by the Department in the ROD (the "Remedial Design"). In accordance with the schedule as approved by the Department, Respondent shall submit the Remedial Design for approval. The Remedial Design shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Remedial Design was prepared in accordance with this Order.

B. The Remedial Design shall be prepared in accordance with the objectives of the Remedial Action Work Plan, which has been approved by the Department. The Remedial Design shall include the following:

1. A detailed description of the remedial objectives and the means by which each element of the selected remedial alternative will be implemented to achieve those objectives, including, but not limited to:

a. the construction and operation of any structures;

b. the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;

c. the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;

6. A contingency plan to be implemented if any element of the Remedial Design fails to achieve any of its objectives or otherwise fails to protect human health or the environment;

7. A health and safety plan for the protection of persons at and in the vicinity of the Site during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional; and

8. A citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "Citizen Participation in New York's Hazardous Waste Site Remediation Program: A Guidebook" dated June 1998, and any subsequent revisions thereto, and 6 NYCRR Part 375.

II. Remedial Design Construction and Reporting

A. Within 30 days of the Department's approval to do so, Respondent Mercury shall commence construction of the Remedial Design.

B. Respondent Mercury shall implement the Remedial Design in accordance with the Department-approved Remedial Design.

C. Respondent Urbana shall furnish, at its cost, a single phase 240 volt alternating current power supply at the designated locations for the groundwater treatment system and soil vapor extraction system.

D. During implementation of all construction activities identified in the Remedial Design, Respondent shall have on-Site a full-time representative who is qualified to supervise the work done.

E. Within 45 days after completion of the construction activities identified in the Remedial Design, Respondent Mercury shall submit to the Department a detailed post-remedial operation and maintenance plan ("O&M Plan"); final drawings and a final engineering report (each including all changes made to the Remedial Design during construction); and a certification by a professional engineer that the Remedial Design was implemented and all construction activities were completed in accordance with the Department-approved Remedial Design. The O&M Plan shall include the parameters, conditions, procedures and protocols to affirm the effectiveness of the Remedial Design, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site. The O&M Plan shall include a description of a Performance Analysis and Design Modification Plan to be used to monitor and evaluate the effectiveness of the remedy and to direct changes, if needed, to improve the ability of the selected remedy to achieve the remedial goals. The Plan shall include specific and measurable performance criteria and steps to be taken if the criteria are not met. The O&M Plan, final drawings, final engineering report, and certification must be prepared, signed, and sealed

by a professional engineer.

F. Upon the Department's approval of the scope and content of the O&M Plan, and after the Department confers with Respondent Urbana regarding the O&M Plan, Respondent Urbana shall implement those elements of the O&M Plan delegated to Urbana in accordance with the Department-approved O&M Plan. Elements of the O&M Plan to be delegated to Urbana include mowing of the cover system vegetation; repairs of minor cover system damage, drainage structure and riprap maintenance; trimming and maintenance of the poplar tree plantings; maintenance and repairs to access roads and gates as needed; and furnish and pay for the power supply for the soil vapor extraction system and the groundwater collection and treatment system.

G. After receipt of the final drawings, final engineering report, and certification, the Department shall notify Respondents in writing whether the Department is satisfied that all construction activities have been completed in compliance with the approved Remedial Design.

H. If the Department concludes that any element of the Remedial Program fails to achieve its objectives or otherwise fails to protect human health or the environment, Respondents shall take whatever action the Department determines necessary to achieve those objectives or to ensure that the Remedial Program otherwise protects human health and the

environment.

III. Progress Reports

A. Respondent Mercury shall submit to the parties identified in Subparagraph XI.B in the numbers specified therein copies of written quarterly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Order during the previous quarter;
2. include all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents in the previous quarter, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent;
3. identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous quarter;
4. describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next quarter 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 the Respondent's obligations under the Order, and efforts made to

mitigate those delays or anticipated delays;

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

7. describe all activities undertaken in support of the Citizen Participation Plan during the previous quarter and those to be undertaken in the next quarter.

B. Respondent shall submit these progress reports to the Department by the tenth day of every January, April, July and October following the effective date of this Order.

C. Respondent also shall allow the Department to attend, and shall provide the Department at least seven days advance notice of, any of the following activities which are conducted in relation to the Remedial Design: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

IV. Review of Submittals

A. 1. The Department shall review each of the submittals Respondents make pursuant to this Order 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 Order and generally accepted technical and scientific principles. The Department shall notify Respondents in writing of its approval or disapproval of the submittal, except for the submittal discussed in Paragraph I.B.(7). All

Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

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

b. After receipt of the revised submittal, the Department shall notify Respondents in writing of its approval or disapproval. If the Department disapproves the revised submittal, Respondents shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. Respondents shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary.

V. Dispute Resolution

A. In the event of a dispute between the Department and Respondents regarding the disapproval of a submittal or the need for modification or amplification of a submittal pursuant to Paragraph IV, the parties shall first attempt to resolve the dispute informally between them. If informal discussions and negotiations do not appear to be resolving the dispute within thirty (30) days of Respondents' receipt of the notice of the Department's disapproval of a submittal, Respondents shall be entitled to invoke this paragraph to resolve the issues in dispute.

1. Within 30 days of the date on which the Department issues a notification to Respondents of its disapproval, Respondents shall be entitled to request the appointment of an Administrative Law Judge ("ALJ") to resolve the dispute.

2. An appeal to the ALJ shall consist of delivering a written statement of the issues in dispute along with the relevant facts upon which the dispute is based and the factual data, analyses or opinions supporting Respondents' position, and all other supporting documentation on which Respondents rely ("Statement of Position"). The papers shall be directed to the Office of Hearings at the Department of Environmental Conservation, located at 50 Wolf Road, Albany, New York, 12233-1550, with copies also delivered to Joseph Moloughney and to Glen Bailey at the addresses provided herein

at Paragraph XI.

3. The Department staff shall deliver its Statement of Position to the ALJ and to Respondents no later than fifteen (15) business days after receipt of Respondents' Statement of Position.

4. The Department shall compile an administrative record of any dispute pursuant to this paragraph. The record shall include the Statement of Position of each party and any other identified relevant information. The record shall be available for review to all parties and to the public.

5. An appearance in person before the ALJ and the presentation of any oral argument or statement regarding the issues in dispute shall be solely at the discretion of the ALJ. Upon review of the administrative record, the ALJ shall issue a final decision and order resolving the dispute. Respondents shall have the burden of proving that there is no rational basis for the Department's position giving rise to the dispute. Respondents shall have those rights available pursuant to Article 78 of the Civil Practice Laws and Rules of the State of New York ("CPLR"); provided that a petition under Article 78 is filed within ten (10) business days of receipt of the decision and order issued by the Director.

B. The invocation of the procedures stated in this paragraph shall not extend, postpone, or modify Respondents' obligations under this Order with respect to any undisputed

items. Respondents shall not be in violation of this Order for failure to perform tasks or obligations which are directly related to the issues in dispute or which may be altered or revised in the resolution of the issues in dispute. The invocation of the procedures provided in this paragraph shall constitute an election of remedies by the party initiating the proceedings, and such election of this remedy shall constitute a waiver of any and all other remedies which may otherwise have been available to the party regarding the issue in dispute.

VI. Penalties

A. Respondents' failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

B. Respondents shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of war, riot, or an unforeseeable disaster arising exclusively from natural causes which the exercise of ordinary human prudence could not have prevented. Respondents shall, within five days of when they obtain knowledge of any such condition, notify the Department in writing. Respondents shall include in such notice the measures taken and to be taken by Respondents to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondents shall

have the burden of proving that an event is a defense to compliance with this Order pursuant to this Subparagraph VI.B.

VII. Entry upon Site

Respondents hereby consent to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Respondents by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order. Respondents shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Order and to job meetings.

VIII. Payment of State Costs

Within 30 days after receipt of an itemized invoice from the Department, Respondent Mercury shall pay to the Department a sum of money, not to exceed \$75,000.00, 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 work performed attributable to the Site since the issuance of the Record of Decision, for reviewing and revising submittals made in contemplation of or pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs

associated with this Order. Such payment shall be made by certified check payable to the Department of Environmental Conservation. Payment shall be sent to the Bureau of Program Management, Division of Environmental Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, NY 12233-7010. Itemization of the costs shall include an accounting of personal services indicating 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. This information shall be documented by reports of Direct Personal Service. 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.

IX. Department Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's civil, criminal, administrative, or equitable rights or authorities.

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

X. Indemnification

Respondents 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 Order by Respondents, and/or Respondents' directors, officers, employees, servants, agents, successors, and assigns.

XI. Communications

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

Communication from Respondents shall be sent to:

Joseph Moloughney, P.E.
Division of Environmental Remediation
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233-7010

with copies thereof sent to:

1. Director, Bureau of Environmental
Exposure Investigation
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216
2. New York State Department of Environmental
Conservation
Division of Environmental Remediation
6271 East Avon-Lima Road
Avon, New York 14414-0057
3. David Napier, P.E.
Department of Health
South Fitzhugh Street
Rochester, New York 14692

4. Glen R. Bailey, Esq.
New York State Department of Environmental
Conservation
Division of Environmental Enforcement
270 Michigan Avenue
Buffalo, New York 14203-2999

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

1. Four copies, one unbound, to Joseph Moloughney, Division of Environmental Remediation, Albany.
2. Two copies to the Director, Bureau of Environmental Exposure Investigation, Department of Health, Troy.
3. Two copies to the Division of Environmental Remediation, Region 8, Avon.
4. One copy to David Napier, Department of Health, Rochester.
5. One copy to Glen Bailey, Division of Environmental Enforcement, Buffalo.

C. Within 30 days of the Department's approval of any report submitted pursuant to this Order, Respondent Mercury shall submit to Joseph Moloughney, at the Division of Environmental Remediation in Albany, a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format, or a 16 mm standard roll microfiche film copy of drawings and reports, as requested.

D. Communication to be made from the Department to Respondents shall be sent to:

William H. Helferich III, Esq.
Harter, Secrest & Emery, LLP
700 Midtown Tower
Rochester, New York 14604-2070

and to: Samuel D'Angelo
Mercury Aircraft, Inc.
17 Wheeler Avenue
Hammondsport, New York 14840

and to: Paul Werthman, P.E.
Benchmark Environmental Engineering and Science, PLLC
Key Tower, Suite 1350
50 Fountain Plaza
Buffalo, New York 14201-0642

and to: Richard G. Gardiner
Supervisor, Town of Urbana
41 Lake Street
P. O. Box 186
Hammondsport, New York 14840

E. The Department and Respondents reserve the right to designate additional or different addressees for communication or written notice to the other.

XII. Miscellaneous

A. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous wastes at the Site.

B. Respondents shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. The experience, capabilities, and qualifications of the firms or

individuals selected by Respondents shall be submitted to the Department within 5 days after the effective date of this Order. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which Respondents and such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by Respondents shall rest solely with Respondents.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondents, and the Department also shall have the right to take its own samples. Respondents shall make available to the Department the results of all sampling and/or tests or other data generated by Respondents with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

D. Respondents shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondents shall use their best efforts to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondents' obligations under this Order.

F. Respondents and Respondents' officers, directors, agents, servants, employees, successors, and assigns shall be bound by this Order. Any change in ownership or

corporate status of either Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondents' responsibilities under this Order. Respondents' officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondents.

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

H. All references to "professional engineer" in this Order 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 Order are to calendar days unless otherwise specified.

J. 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 of the provisions of this Order.

K. 1. The terms of this Order shall constitute the complete and entire Order between Respondents and the Department concerning the Site. 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 regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondents of Respondents' obligation to obtain such formal approvals as may be required by this Order.

2. If Respondents desire that any provision of this Order be changed, Respondents shall make timely written application, signed by Respondents, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Joseph Moloughney and to Glen R. Bailey.

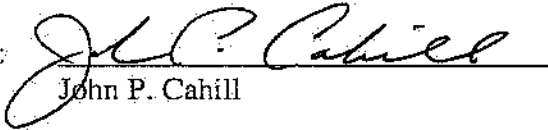
L. The effective date of this Order shall be the

date ten days after being signed by the Commissioner or his designee.

DATED: *Albany*, New York
November 1, 2000

JOHN P. CAHILL
Commissioner
New York State Department of
Environmental Conservation

By:


John P. Cahill

CONSENT BY RESPONDENT

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

MERCURY AIRCRAFT, INC.

By: *J. F. Meade III*
(TYPE NAME OF SIGNER)
Title: *President*
Date: *6/21/00*

STATE OF *New York*)
COUNTY OF *Steuben*) s.s.:

On this *21st* day of *June*, 2000,
before me, the undersigned, personally appeared
J. F. Meade III, personally known to me or
proved to me on the basis of satisfactory evidence to be the
individual(s) whose name(s) 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, he/she/they, or the person upon
behalf of whom the individual acted, executed the instrument.

Janet M. Dolliver
Notary Public

JANET M. DOLLIVER
Notary Public, State of New York
Steuben County No. 4776428
My Commission Expires June 30, 20*02*

CONSENT BY RESPONDENT

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

TOWN OF URBANA.

By: Richard J. Gardner
(TYPE NAME OF SIGNER)
Title: Supervisor
Date: 7/18/2000

STATE OF New York)
) s.s.:
COUNTY OF Steuben)

On this 18 day of July, 2000,
before me, the undersigned, personally appeared
Richard Gardner, personally known to me or
proved to me on the basis of satisfactory evidence to be the
individual(s) whose name(s) 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, he/she/they, or the person upon
behalf of whom the individual acted, executed the instrument.

Deborah K. Pierce
Notary Public

Deborah K. Pierce
Notary Public
Steuben County
No. 01PI5087573
Term Expires November 3, 2001