

MEMORANDUM FROM

**MARC GERSTMAN**, Deputy Commissioner and General Counsel

New York State  
Department of Environmental Conservation

March 24, 1994

TO: J. Langdon Marsh

SUBJECT: Final RD/RA Order on Consent for Signature  
Union Road Site No. 915128

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I attach for your review, approval and signature duplicate originals of an Order on Consent for the Union Road Site. The Order on Consent requires Penn Central to implement the Remedial Design/Remedial Action at the site in accordance with the Record of Decision which was signed by the Department on March 9, 1992.

The Union Road Site is a 70-acre, fenced site in the Town of Cheektowaga, New York, about one mile east of Union Road, between Losson and French Roads. New York Central Railroad, a predecessor corporation of Penn Central, the Respondent, ran a railroad maintenance facility on the site from 1900 until 1958 when the yard was dismantled; however, the roundhouse area remains. The railroad used a tar pit located on the site to dispose of waste oil, lubricants, and sludges from rail car and locomotive servicing that occurred on the site. A railroad track spur leading directly to a high drop off point above the tar pit allowed direct disposal of waste from drums to the pit that were emptied out of railroad cars which accessed the spur. The site also contains a marsh with contaminated sediment.

The site is an undeveloped property in a residential area with residences adjacent to the site in the north and west, and within 1/8 mile to the east and south. Commercial buildings are located within one mile of the site and a town park is within 1/2 mile northeast of the site. The site is bounded on the southeast by Deer Lik Creek and on the south by Slate Bottom creek into which Deer Lik drains. There is a large apartment complex immediately adjacent to Slate Bottom creek to the south. There are no known users of groundwater in the area. The creeks are freely accessible for recreational use, and signs of dirt bike activity at and near the site have been observed by Department staff.

On January 20, 1960, Witben Realty Corporation and related corporations through their owner, Louis Wolfson, took title to a large tract of land, which included the site, and which he eventually developed into the residences surrounding site.

This site has historically been the subject of various investigations by Erie County and Witben Realty. In 1986, the Department conducted a Phase I study and the USEPA fenced and posted the site and installed a filter fence to reduce migration

to the creeks. At some point, the Department conducted an IRM to dredge some of the contaminated creek sediments. The Department funded an RI/FS for the site after Witben and Penn Central declined to do so.

These actions and investigations showed lead and PAHs to be, among others, the major contaminants of concern (arsenic in the roundhouse area), and the primary transport routes are contaminated groundwater movement through the marsh to the creeks and discharge to the sediments and surface water runoff to the creeks and sediments. The Town historically periodically dredged sediments from Slate Bottom creek up onto its banks for flood control purposes, although they have recently agreed not to dredge the creek area adjacent to the site.

The selected remedial action plan, worth an estimated \$12 million, will include, pursuant to the attached RD/RA work plan, installation of a slurry wall and cap around the tar pit with initial dewatering and follow-up pumping as necessary with expected discharge to a local POTW (the preliminary authorizations have already been obtained, final agreements are under development), construct a new on-site marsh area if the Corp of Engineers permit for dredging the contaminated wetland requires such action, rip-rapping of Deer Lik and Slate Bottom Creeks in the site area and operation and maintenance of the site. The State will have to obtain deed notification of the site remedy because Penn Central does not currently own the site. Witben Realty has declined to enter a consent order with the Department for this purpose; negotiations on deed notice are continuing with Witben.

This consent order provides that Penn Central shall pay the State's oversight costs up to a cap of \$275,000 (which includes possible overage of 35% over the Department estimate). It also provides that Penn Central shall pay to the Department 50% of any actual gross collected cost recovery dollars that it obtains either through settlement with or litigation with other parties responsible for the site remediation who declined to negotiate this consent order with the Department for past state costs. Penn Central's obligation to reimburse the State for its past costs of approximately \$1.9 million is limited to this payment of collected cost recovery dollars.

This consent order was prepared and negotiated by Cheryl Peterson, an attorney with DEE's Western Field Unit. DEC technical staff under the lead of Shive Mittal developed the record of decision and will review and oversee the remedial design and action. I recommend that you sign this Order.

  
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Marc S. Gerstman

Att = C. Peterson<sup>2</sup>  
Pm = Shive Mittal RD/RA

10/1/02  
4-2-03

Attachments

cc: M. Gerstman  
A. DeBarbieri  
M. O'Toole  
P. Buechi  
J. Ryan  
E. Armater  
P. Nelson

A:P119

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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

THE PENN CENTRAL CORPORATION  
Respondent.

ORDER  
ON  
CONSENT  
INDEX # B9-0148-92-03

Site Code #915128

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WHEREAS,

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

2. The Penn Central Corporation ("Penn Central"), a Respondent, is authorized to do business in New York and is organized in the Commonwealth of Pennsylvania. The Department alleges that a predecessor to Penn Central conducted activities which resulted in the disposal of hazardous waste on that property currently owned by Witben Realty and Universal Marion Corporation which may be controlled by Louis Wolfson, among others, known as the Union Road Site in Cheektowaga, NY (the "Site"). There is evidence of alleged unauthorized dumping at

the Site after Respondent's predecessor was allegedly connected with the Site.

3. Following a period of public comment, the Department selected a final remedial alternative for the Site in a Record of Decision ("ROD"). The ROD, attached to this Order as Appendix "A", as implemented by the RD/RA Work Plan, is incorporated as an enforceable part of this Order.

4. Penn Central has submitted, and the Department has approved, a Remedial Design/Remedial Action Work Plan ("RD/RA Work Plan") for the site which is incorporated herein and which is attached as Appendix "B".

5. The Site is an inactive hazardous waste disposal Site, as that term is defined at ECL Section 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 915128**. The Department has classified the Site as a **Classification "2"** pursuant to ECL Section 27-1305.4.b.

6. A. Pursuant to ECL Section 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 Section 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 Section 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 Section 3-0301.1.i.

7. The Department and Penn Central agree that the goals of this Order are for Penn Central to (i) implement, in accordance with the ROD, as implemented by the RD/RA Work Plan, an inactive hazardous waste disposal site remedial program ("Remedial Program") for the Site that shall include design and implementation, and operation, maintenance and monitoring of the selected remedial alternative; and (ii) reimburse the Department's administrative costs.

8. Penn Central, having waived Penn Central's right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agrees to be bound by its terms. Penn Central 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. Pursuant to the schedule in Appendix "B", Penn Central shall submit to the Department a remedial design to implement the remedial alternative for the Site selected by the Department in the ROD in Appendix "A", as implemented by the RD/RA Work Plan in Appendix "B" (the "Remedial Design"). 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 include the following:

1. A detailed description of the remedial objectives and the means by which each essential 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;

- d. physical security and posting of the Site;
- e. health and safety of persons living and/or working at or in the vicinity of the Site;
- f. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Design; and
- g. monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-selected remedial alternative.

2. "Biddable Quality" documents for the Remedial Design including, but not limited to, documents and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

3. A time schedule to implement the Remedial Design;

4. The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;

5. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction of the Remedial Design, including the number of years during which such activities will be performed;

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 C.F.R. 1910 by a certified health and safety professional; and

8. A citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto.

II. Remedial Design Construction and Reporting

A. Within 90 days of the Department's approval of the Remedial Design, Penn Central shall commence construction of the Remedial Design.

B. Penn Central shall implement the Remedial Design in accordance with the RD/RA Work Plan and with Department-approved Remedial Design.

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

D. Within 90 days after completion of the construction activities identified in the Remedial Design, Penn Central shall submit to the Department a detailed post-remedial operation and maintenance plan ("O & M Plan"); "as-built" 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, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Upon the Department's approval of the O & M Plan, Penn Central shall implement the O & M Plan in accordance with the requirements of the Department-approved O & M Plan.

F. Within sixty days after receipt of the "as-built" drawings, final engineering report, and certification, the Department shall notify Penn Central in writing whether the Department is satisfied that all construction activities have been completed in compliance with the approved Remedial Design. Such satisfaction shall not be unreasonably withheld.

G. 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, Penn Central shall take whatever action the Department

reasonably determines necessary to achieve those objectives or to ensure that the Remedial Program otherwise protects human health and the environment. If Penn Central disagrees with such determination, Penn Central shall be in violation of this Order, unless within ten days of receipt of notice of such determination, it invokes the dispute resolution mechanism in paragraph XII. This is without prejudice, however, to Penn Central's right to contest any allegation that it has violated this Order and without prejudice to any and all legal rights otherwise available to Penn Central.

### III. Progress Reports

A. Penn Central shall submit to the parties set forth in paragraph XI in the numbers indicated therein copies of written monthly progress reports that: (i) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (ii) include all results of sampling and tests and all other data received or generated by Penn Central or Penn Central's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Penn Central; (iii) identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month; (iv) describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information

relating to the progress at the Site; (v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Penn Central's obligations under the Order, and efforts made to mitigate those delays or anticipated delays; (vi) include any modifications to any work plans that Penn Central has proposed to the Department or that the Department has approved; and (vii) describe all activities undertaken in support of the Citizen Participation Plan during the previous month and those to be undertaken in the next month. Penn Central shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Order.

B. Penn Central shall allow the Department to attend, and shall provide the Department at least seven days advance notice of the occurrence of, any of the following: 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 Penn Central makes 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, within sixty days of receipt of a submittal, Penn

Central 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 Penn Central in writing and shall specify the reasons for its disapproval. Within a reasonable period of time specified by the Department in the notification, but in no event less than 60 days following its receipt of the disapproval notice, Penn Central 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) Within sixty days of receipt of the revised submittal, the Department shall notify Penn Central in writing of its approval or disapproval. If the Department disapproves the revised submittal, the Department shall notify Penn Central in writing of the Department's objections and the reasons therefor. Within a reasonable period of time specified by the Department in the notification, but in no event less than sixty days, Penn Central shall review the notice and submit a re-revised submittal. Within sixty days of receipt of the re-revised submittal, the Department shall notify Penn Central in writing of its approval or disapproval. If the Department disapproves the re-revised submittal, Penn Central shall be in violation of this Order, unless within 15 business

days of its receipt of the notice of disapproval, Penn Central invokes the dispute resolution mechanism set forth in paragraph XII herein. This is without prejudice however to Respondent's right to contest any allegation that it has violated this Order and without prejudice to any and all legal rights otherwise available to Penn Central. If the Department approves the revised or re-revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. The Department may require Penn Central to modify and/or amplify and expand a submittal and associated work 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. If Penn Central disagrees with such determination, it shall be in violation of this Order, unless within 15 business days of receipt of notice of the same, Penn Central invokes the dispute resolution mechanism set forth in paragraph XII herein. This is without prejudice however to Respondent's right to contest any allegation that it has violated this Order and without prejudice to any and all legal rights otherwise available to Penn Central.

V. Penalties

A. (1) Penn Central's material failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

(2) Except as provided in paragraph V. (B) herein, Penn Central shall be liable for payment to the Department of the sums set forth in the ECL for each day or part thereof that Penn Central is in violation of the terms of this Order. Payment of any penalties under the ECL shall not in anyway alter Penn Central's obligation to complete performance of the terms of this Order.

B. Penn Central shall not suffer any penalty under this Order or be subject to any proceeding or action for any remedy or relief if it cannot comply with any scheduling requirements of this Order because of an act of God, war, or riot or because of any condition or event entirely beyond the control of Penn Central or its agent or agents carrying out Penn Central's obligations under this Order. Penn Central shall immediately notify the Department in writing when it obtains knowledge of any such condition and request an appropriate extension or modification of this Order.

Penn Central shall, within five days of when they obtain knowledge of any such condition, notify the Department in writing. Penn Central shall include in such notice the measures taken and to be taken by Penn Central to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Such extension or modification shall not be unreasonably withheld. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. Penn Central

shall have the burden of proving that an event is a defense to compliance with this Order pursuant to this subparagraph.

Increased costs or expenses of any work to be performed under this Order, the financial inability of Penn Central to perform such work, the failure of Penn Central to make complete and timely application for any required approval or permit, and nonattainment of the goals, standards and requirements of this Order do not constitute conditions or events warranting the relief set forth in this subparagraph.

VI. Entry upon Site

Penn Central hereby consents to the entry upon the Site or areas in the vicinity of the Site to the extent to which they are under the temporary, if not permanent, control of Penn Central by any duly designated employee, consultant, contractor, or agent of the Department or any State agency to ensure Penn Central's compliance with this Order, and following reasonable notice, for purposes of inspection, sampling, and testing. Penn Central 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 job meetings.

VII. Payment of Costs

Within 30 days after receipt of quarterly itemized invoices from the Department, Penn Central shall pay to the Department a sum of money which shall represent reimbursement

for the amount of the invoice setting forth the State's "reasonable oversight expenses" including, but not limited to, direct labor, overhead, travel, analytical costs, and contractor costs incurred by the State of New York for work performed pursuant to this Order, as well as for reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, and collecting and analyzing samples. "Reasonable oversight expenses" is defined as an amount not to exceed \$275,000.00 during the course of the Remedial Program, and may be less than that amount.

Additionally, within 30 days of any actual collection and recovery of Penn Central's gross response costs ("Collected Cost Recovery Dollars") from the Site owners or operators, or other responsible parties in Penn Central's cost recovery action(s) against such other responsible parties at the Site, Penn Central shall pay to the Department a sum constituting fifty percent (50%) of such Collected Cost Recovery Dollars, not to exceed \$1.9M, which shall represent reimbursement for the State's past expenses at the Site, including but not limited to RI/FS work performed for the Site ("Past Costs"). Penn Central's obligation to reimburse the State for such Past Costs is limited to such Collected Cost Recovery Dollars, and Penn Central has no obligation to reimburse the State for such Past Costs other than as a result of such actual Collected Cost Recovery Dollars.

Penn Central shall vigorously use its best efforts to pursue actual collection and recovery of its response costs. Penn Central shall provide the Department with monthly progress reports describing its efforts in this matter. Penn Central shall report to the Department in writing any settlement in this matter sixty days prior to its acceptance. Penn Central shall commence a lawsuit to collect its response costs within sixty days from the date Penn Central first submits the engineer's certification referred to in paragraph II.D. herein if this matter has not been resolved prior to that time.

Such payments 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 Hazardous Waste 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 quarterly 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 the New York State Office of the State Comptroller's quarterly expenditure reports.

VIII. Department Reservation of Rights

A. Nothing contained in this Order, except as specified in paragraph IX, shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to nor exemplified by, the following:

1. the Department's right to bring any action or proceeding against anyone other than Penn Central and/or any of Penn Central's directors, officers, employees, servants, agents, successors, and assigns;

2. the Department's right to enforce this Order against Penn Central and/or any of Penn Central's directors, officers, employees, servants, agents, successors, and assigns if Penn Central fails to satisfy any of the terms of this Order;

3. the Department's right to bring any action or proceeding against Penn Central and/or any of Penn Central's successors, and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous substances or constituents at or from the Site or areas in the vicinity of the Site;

4. the Department's right to gather information and enter and inspect property and premises.

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

## IX. Release

If, after review, the Department approves, in accordance with the procedures set forth in paragraph IV, the engineer's certification that construction of the Remedial Program was completed in accordance with the approved Remedial Design, then unless a supplementary remedial program is required pursuant to paragraph II.G., and except for the provisions of paragraph X hereof, and except for the future Operation and Maintenance of the site, reimbursement of Department expenditures at the Site as specified in paragraph VII, and any Natural Resource Damage claims that may arise, such approval shall constitute a release for each and every claim, demand, remedy or action whatsoever against Penn Central, its directors, officers, employees, agents, successors and assigns, which the Department has or may have pursuant to Article 27, Title 13 of the ECL, and to the extent within the Department's jurisdiction, similar provisions of federal law, relative to or arising from the disposal of hazardous wastes at the Site; provided, however, that the Department specifically reserves all of its rights concerning, and any such release and satisfaction shall not extend to, any investigation or remediation the Department deems necessary due to:

(1) environmental conditions on-site or off-site which are related to the disposal of hazardous wastes at the Site and were unknown to the Department at the time of its approval of the Remedial Investigation Report; or

(2) information received, in whole or in part, after the Department's approval of the Remedial Investigation Report;

and such environmental conditions or information received indicates that the Remedial Program is not protective of human health or the environment. The Department shall notify Penn Central of such environmental conditions or information and its basis for determining that the Remedial Program is not protective of human health and the environment.

This release shall inure only to the benefit of Penn Central, its directors, officers, employees, agents, successors and assigns.

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 the Department may have against anyone other than Penn Central, its directors, officers, employees, agents, successors and assigns.

The release granted herein shall be given the force and effect of a release as set forth in New York General Obligations Law 15-108. Pursuant to that Section and to the extent provided by 42 U.S.C. 113(f), CERCLA, Penn Central shall not be liable for claims for contribution and, except as provided in paragraph X, indemnification regarding any matters covered by the release and satisfaction set forth herein.

X. Indemnification

Penn Central 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 Penn Central, and/or Penn Central's directors, officers, employees, servants, agents, successors, and assigns. Penn Central, however, shall not be required to indemnify and hold the Department, the State of New York or their employees harmless for any claims, suits, actions, damages and costs arising from the negligence of Department or the State, or their representatives or employees.

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 Penn Central shall be sent to:

1. Director, Division of Hazardous  
Waste Remediation  
New York State Department of Environmental  
Conservation  
50 Wolf Road  
Albany, New York 12233-7010
2. Director, Bureau of Environmental Exposure  
Investigation  
New York State Department of Health  
2 University Place  
Albany, New York 12203
3. Regional Director  
New York State Department of Environmental  
Conservation, Region 9  
270 Michigan Avenue  
Buffalo, New York 14203

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

1. Four copies (one unbound) to Director, Division of Hazardous Waste Remediation.
2. Two copies to the Director, Bureau of Environmental Exposure Investigation.
3. One copy to Regional Director, Region 9
4. One copy to Cheryl Peterson, Division of Environmental Enforcement, New York State Department of Environmental Conservation, 270 Michigan Avenue, Buffalo, NY 14203

C. Communication to be made from the Department to the Penn Central shall be sent to:

See new address { James J. Periconi, Esq. *As of 11/28/06*  
~~Donovan, Leisure, Newton & Irvine Periconi LLC~~  
~~30 Rockefeller Plaza 708 3rd Avenue, 17th Floor~~  
~~New York, NY 10112 New York, NY 10017~~

Michael L. Cioffi, Esq.  
Assistant General Counsel  
The Penn Central Corporation  
1400 Provident Tower  
One East Fourth Street  
Cincinnati, OH 45202

Robert Weireter  
Integrated Environmental Services  
44 Shelter Rock Road  
Danbury, CT 06810

D. The Department and Penn Central reserves the right to designate additional or different addressees for communication or written notice to the other.

XII. Pursuant to subparagraphs II.G, IV.B or XIII.B or if the Department disapproves a re-revised submittal pursuant to paragraph IV, Penn Central shall be in violation of this Order unless, within 15 business days of receipt of the Department's notice of disapproval, Penn Central serves on the Department's Director of Hazardous Waste Remediation ("the Director") a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis or opinion supporting its position, and all supporting documentation on which Penn Central relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation no later than fifteen business (15) days after receipt of Penn Central's Statement of Position. In the event that these 15-day time periods for exchange of Statements of Position may cause a delay in the work being performed under this Order, the time periods may be shortened upon and in accordance with notice by the Department as agreed to by Penn Central.

An administrative record of any dispute under this paragraph shall be maintained by the Department. The record shall include the Statement of Position of each party served pursuant to the preceding subparagraph, and any relevant

information. The record shall be available for review of all parties and the public.

Upon review of the administrative record as developed pursuant to this paragraph, the Director shall issue a final decision and order resolving the dispute. With respect to the final determination of the Director, Penn Central shall have those rights granted pursuant to Article 78 of the Civil Practice Law and Rules of New York (CPLR), provided that a Petition is filed within forty-five (45) business days of receipt of the final decision and order issued by the Director.

In review by the Director of any dispute pursued under this paragraph, Penn Central shall have the burden of proof in this proceeding.

The invocation of the procedures stated in this paragraph shall not extend, postpone or modify Penn Central's obligations under this Order with respect to any nondisputed items, unless and until the Department agrees or a court determines otherwise. The invocation of the procedures stated 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 be available to that party regarding the issue in dispute.

#### XIII. 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 waste at the Site.

B. Penn Central 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 Penn Central shall be submitted to the Department within 30 days after the effective date of this Order or as specified in the RD/RA Work Plan. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which the Penn Central and such firms or individuals will be responsible. Any disputes between the Department and Penn Central as to the qualifications of firms or individuals shall be subject to the dispute resolution mechanism in paragraph XII herein. The responsibility for the performance of the professionals retained by Penn Central shall rest solely with Penn Central.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Penn Central, and the Department also shall have the right to take its own samples. Penn Central shall make available to the Department the results of all sampling and/or tests or other data generated by Penn Central

with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

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

E. Penn Central shall use best efforts to obtain all Federal permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Penn Central's obligations under this Order. For purposes of this paragraph "best efforts" include the payment of reasonable sums of money in consideration. If any access required to perform this Order is not obtained despite best efforts within 45 days of the effective date of this Order, or within 45 days of the date the Department notifies the Penn Central in writing that additional access beyond that previously secured is necessary, Penn Central shall promptly notify the Department, and shall include in that notification a summary of the steps Penn Central has taken to attempt to obtain access. The Department shall consistent with its legal authority, assist Penn Central in obtaining access, permits or authorizations which Penn Central was unable to obtain. Penn Central shall reimburse the Department for all costs incurred by the Department in obtaining access, including, but not limited to, attorneys fees. If Penn Central cannot, despite its best efforts, obtain such permits, access, or other authorizations within the period of time specified by the Department, the time for performance

of any obligation dependent upon such authorization shall be appropriately extended by the Department or this Order shall be appropriately modified. Penn Central, after using its best efforts, shall not be penalized for failure to obtain the necessary permits or authorizations necessary to perform Penn Central's obligations under this Order.

F. Penn Central and Penn Central's officers, directors, agents, servants, employees, successors, and assigns shall be bound by this Order. Any change in ownership or corporate status of Penn Central including, but not limited to, any transfer of assets or real or personal property shall in no way alter Penn Central's responsibilities under this Order.

G. Penn Central shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Penn Central with respect to the Site. Penn Central or Penn Central's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Penn Central shall nonetheless be responsible for ensuring that Penn Central's 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.

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

J. The section 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 Penn Central 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 Penn Central of Penn Central's obligation to obtain such formal approvals as may be required by this Order.

(2) If Penn Central desires that any provision of this Order be changed, Penn Central shall make timely written application, signed by the Penn Central, to the Commissioner setting forth reasonable grounds for the relief sought. A copy of such written application shall be delivered or mailed to:

Cheryl Peterson  
Division of Environmental Enforcement  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203

L. The effective date of this Order shall be fifteen days after the date it is signed by the Commissioner or his designee.

DATED: Albany, New York  
March 28 1994

NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION

  
\_\_\_\_\_  
J. LANGDON MARSH  
Acting Commissioner

