

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Implementation of an
Interim Remedial Measure 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

VIBRATECH, INC.
Respondent.

915165

INDEX #B9-0471-95-01

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 3-0301.

2. Vibratech, Inc. ("Respondent"), a corporation organized and existing under the laws of the State of Delaware, is doing business in the State of New York in that Respondent owns and operates a facility at 537 East Delavan Avenue in the City of Buffalo, County of Erie, State of New York. The facility includes an inactive hazardous waste site (the "Site") which is depicted on the map which is Appendix "A" to this Order.

3. The Department is in the process of listing the Site as an inactive hazardous waste disposal site, as the term is defined at ECL Section 27-1301.2, in the Registry of Inactive Hazardous Waste Disposal Sites in New York State.

4. Respondent has submitted, and the Department has approved, an Interim Remedial Measure Work Plan (the "IRM Work Plan") which is incorporated into this Order and which is attached as Appendix "B".

5. A. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

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

6. The Department and Respondent agree that the goals of this Order are for Respondent to (i) implement an Interim Remedial Measure Program ("IRM Program") for the Site ; and (ii) reimburse the State's administrative costs.

7. Respondent, without making any admissions of fact or law, having waived its right to a hearing herein as provided by ECL 27-1313.4, and having consented to the issuance and entry of this Order, 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. Site Information

Respondent, within 15 days after receipt of a written request of the Department, will provide in accordance with and

to the extent required by ECL Section 27-1307, information and data, if any, within Respondent's possession or control.

II. Performance and Reporting of IRM Program

A. Within 30 days after the effective date of this Order, Respondent shall commence the IRM Program.

B. Respondent shall perform the IRM Program in accordance with the IRM Work Plan.

C. During the performance of the IRM Program, Respondent must have on-Site a full-time representative who is qualified to supervise the work done.

D. Respondent shall notify the Department of any significant difficulties that may be encountered in implementing the IRM Work Plan or specifications and shall not modify any element of the IRM Program unless it is first approved by the Department.

E. In accordance with the schedule contained in the IRM Work Plan, Respondent shall submit to the Department a final engineering report prepared by a professional engineer that includes a certification by that individual that all activities that comprised the IRM were performed in full accordance with the IRM Work Plan and specifications, and this Order.

(1) If the performance of the IRM Program encompassed construction activities, the final engineering report shall also include: (a) a detailed post-construction operation and maintenance plan ("O & M Plan"); and (b) "as-built" drawings. The O & M Plan and "as built" drawings must also be prepared, signed, and sealed by a professional engineer.

(2) Upon the Department's approval of the O & M Plan, Respondent shall implement the O & M Plan.

F. After receipt of the final engineering report and certification, the Department shall notify Respondent in writing whether the Department is satisfied that the IRM was completed in compliance with the IRM Work Plan. Respondent may include the Department's notification in any petition to either remove the Site from the Registry of Inactive Hazardous Waste Sites or to reclassify the Site.

III. Progress Reports

If the IRM field work requires more than two months for completion, Respondent shall submit to the parties identified in subparagraph XI.B in the numbers specified 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 Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent; (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 Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays; and (vi) include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved. Respondent shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Order. Respondent also shall allow the Department to attend, and shall, unless the Department agrees otherwise, provide the Department at least seven days advance notice 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 Respondent 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 Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(2) (a) If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within 15 days after

receiving written notice that Respondent's submittal has been disapproved, Respondent 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 Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, Respondent 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, unless Respondent invokes the dispute resolution provisions of subparagraph IV.C.

B. Respondent 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.

C. If the Department disapproves a revised submittal under subparagraph IV.A(2)(b), or if Respondent objects to a directive by the Department pursuant to subparagraph IV.B, Respondent may, within twenty-one (21) days of receipt of the notice of disapproval or the directive, ask and be entitled to meet with the Director of the Division of Hazardous Waste Remediation (the "Director"). At that meeting, Respondent shall

be given an opportunity to present its response to the Department's reasons for disapproval or directive, and the Director shall have the authority to modify and/or withdraw such disapproval or directive. Following the meeting with the Director, Respondent shall either: (1) revise the submittal in accordance with the Department's specific comments, as modified, except for those which have been withdrawn by the Director, and shall submit a revised submittal; or (2) submit a written statement identifying the decisions of the Director accepted by Respondent, with the corresponding revisions to the submittal, as well as identifying the Director's decisions not accepted by Respondent, which will be the subject of an Article 78 proceeding. The period of time within which either the submittal must be revised or Respondent's written statement submitted shall be determined during the meeting referenced above.

After receipt of the revised submittal or written statement, the Department shall notify Respondent in writing of its approval or disapproval.

If the revised submittal fails to address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, or if Respondent has submitted only the written statement described above, Respondent shall be in violation of this Order unless it commences a proceeding to review that decision pursuant to Article 78 of the CPLR within thirty (30) days of receipt of written notice of disapproval; the disapproval shall be deemed

final agency action for purposes of such proceeding. The standard of judicial review in any Article 78 proceeding brought to challenge a disapproval or directive of the Department made or issued pursuant to this Order shall be the applicable statutory or common law standard related to proceedings under Article 78 of the CPLR; nothing in this Order shall alter, modify or be construed as a waiver of the judicial review standard otherwise applicable under Article 78 of the CPLR.

The invocation of formal dispute resolution procedures under this Paragraph shall suspend and toll any obligation of Respondent under this Order which is in dispute or necessarily dependent upon resolution of the matter(s) in dispute.

V. Penalties

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

B. Respondent 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. Respondent shall, within ten (10) days of when it obtains knowledge of any such condition, notify the Department in writing. Respondent shall include in such notice the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such ten-day period constitutes a waiver of any claim

that a delay is not a violation of this Order. Respondent shall have the burden of proving that an event is a defense to compliance with this Order pursuant to Subparagraph V.B.

VI. Entry upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which are under the control of the Respondent, at reasonable times and upon reasonable notice (which need not exceed 24 hours notice), 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. Respondent 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 State Costs

A. Within 30 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 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 at the Site to date, as well as for negotiating this Order, reviewing and revising submittals made 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 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.

B. The aggregate amount due from Respondent pursuant to subparagraph VII.A., for all invoices for all years, shall not exceed \$15,200. If the Department considers the total sum of money paid pursuant to subparagraph VII.A. to be insufficient to reimburse the State's oversight costs, the Department may, at its option, seek to recover additional reimbursement in a proceeding outside the scope of this Order.

VIII. 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 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 Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns;

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

3. the Department's right to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, 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 bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to hazardous substances that are present at the Site or that have migrated from the Site;

5. the Department's right to bring any criminal action against the Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns; and

6. 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.

C. Nothing in this paragraph shall be construed as creating or conferring on the Department any right or authority not otherwise created or conferred by law. Nor shall anything in this paragraph be construed to limit any defense which Respondent may have in response to an action taken by the Department pursuant to this reservation of rights.

D. Unless the Department determines that Respondent is in violation of this Order, the Department shall refrain from bringing any action against which seeks any relief which is inconsistent with or duplicative of the requirements of this Order and any appendix hereto, except in circumstances, which the Department determines supports summary abatement.

IX. Indemnification

Respondent 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 Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns, but only to the extent that such claims, suits, actions, damages and/or costs do not arise out of or result from the negligence or other culpable conduct of the Department, the State of New York and/or their representatives and employees.

X. Public Notice

A. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the Erie County Clerk to give all parties who may acquire any interest in the Site notice of this Order.

B. If Respondent proposes to convey the whole or any part of Respondent's ownership interest in the Site, Respondent shall, not fewer than 10 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

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 Respondent 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. Peter Buechi, P.E.
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999

4. Division of Environmental Enforcement
New York State Department of Environmental
Conservation
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:

Peter Buechi, P.E.
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999
2. Two copies to: Director, Bureau of
Environmental Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203
3. One copy to: Division of Hazardous Waste
Remediation
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233-7010
4. One copy to:
Division of Environmental Enforcement
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999

C. Within 30 days of the Department's approval of any report submitted pursuant to this Order, Respondent shall submit to the Division of Environmental Enforcement a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format.

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

Ralph Yorio, President
Vibratech, Inc.
537 East Delavan Avenue
Buffalo, New York 14211

Rick W. Kennedy, Esq.
Hodgson, Russ, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, New York 14203

E. The Department and Respondent 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 waste at the Site.

B. Respondent 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 Respondent shall be submitted to the Department within 15 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 the Respondent and such firms or individuals will be responsible; the Department's approval shall not be unreasonably withheld. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent.

C. The Department shall have the right to obtain

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

D. Unless otherwise agreed, Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondent shall use its best efforts to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order. For purposes of this paragraph "best efforts" includes the payment of reasonable sums of money in consideration. If any access required to perform the work required by this Order is not obtained despite best efforts within forty-five (45) days of the effective date of this Order, or within forty-five (45) days of the date the Department notifies Respondent in writing that additional access beyond that previously secured is necessary, Respondent shall promptly notify the Department, and shall include in that notification a summary of the steps Respondent has taken to attempt to obtain access. The Department may, as it deems appropriate, assist Respondent in obtaining access.

F. Respondent and Respondent's officers, directors,

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

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

H. "Interim Remedial Measure" shall have the meaning set forth in 6 NYCRR Part 375.

I. 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.

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

K. 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.

L. (1) The terms of this Order shall constitute the complete and entire Order between Respondent 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 Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

(2) If either party desires that any provision of this Order be changed, it shall make timely written application to the other, setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed respectively to:

(a) Division of Environmental Enforcement, Western Field Unit Region 9 Office; or

(b) Rick W. Kennedy, Esq., Hodgson, Russ, Andrews, Woods & Goodyear, 1800 One M & T Plaza, Buffalo, New York 14203.

M. The effective date of this Order shall be the date

Respondent receives written notice that it has been signed by
the Commissioner or his designee.

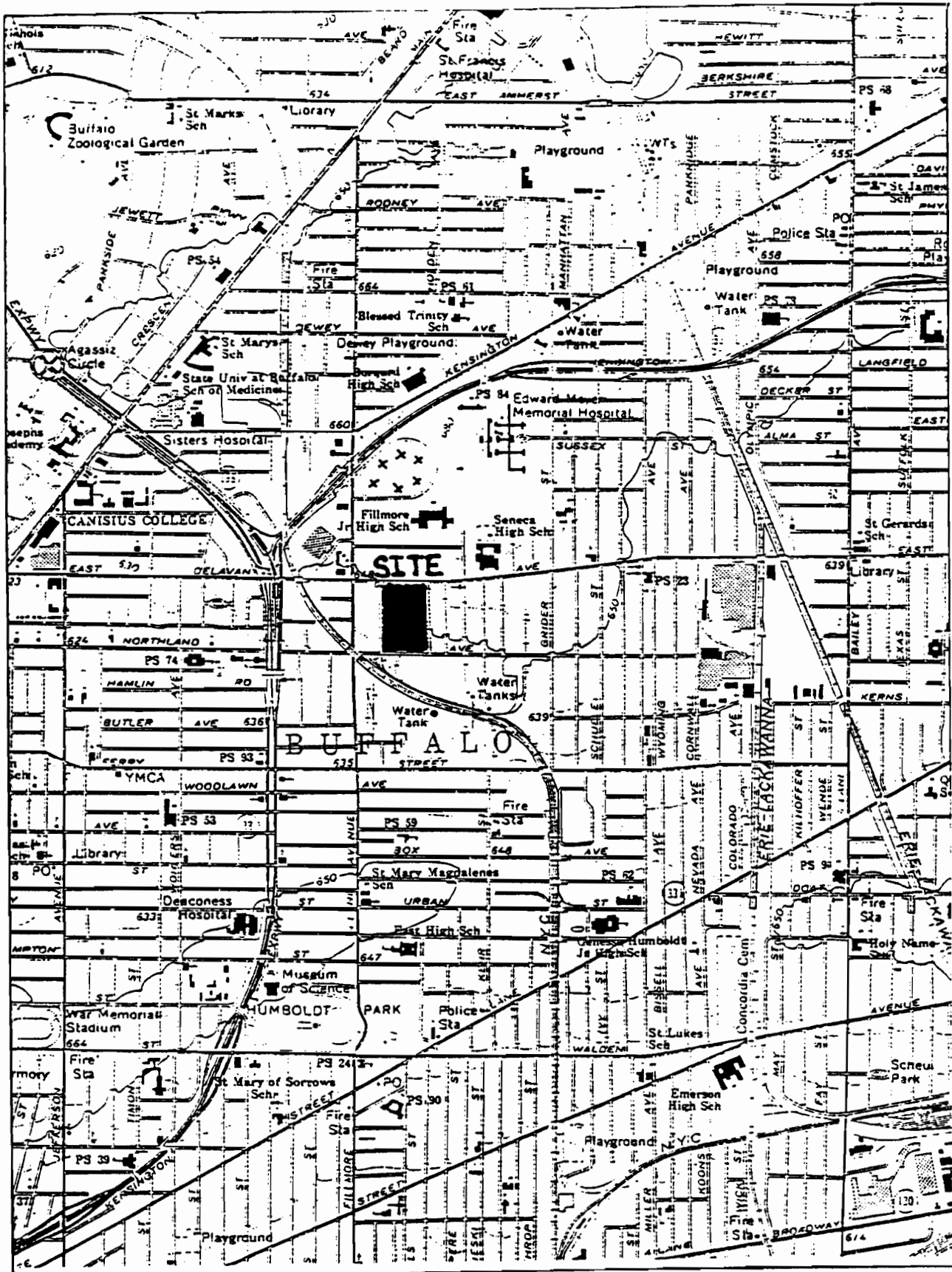
DATED: 9/11 , New York
, 1995

MICHAEL D. ZAGATA

Commissioner
New York State Department of
Environmental Conservation

By: 
Michael O'Toole

FIGURE 1
SITE MAP



SOIL VAPOR EXTRACTION WORK PLAN

Vibratech, Inc.
Buffalo, New York

MAY 1995

REF. NO. 5927 (4)

This report is printed on recycled paper.

CONESTOGA-ROVERS & ASSOCIATES