

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Development  
and Implementation of an Interim Remedial  
Measure and Feasibility Study for an Inactive  
Hazardous Waste Disposal Site Pursuant to  
Article 27, Title 13 of the Environmental  
Conservation Law of the State of New York  
by

ORDER  
ON  
CONSENT

OSMOSE WOOD PRESERVING, INC.

Index #B9-0314-90-01  
Site I.D. #915143

RESPONDENT

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WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department" or "DEC") is responsible for the enforcement of Article 27, Title 13, of the Environmental Conservation Law of the State of New York (the "ECL"), entitled "Inactive Hazardous Waste Disposal Sites".
2. Respondent, Osmose Wood Preserving, Inc., a corporation organized and existing under the laws of the State of New York, is doing business in the State of New York in that Respondent owns and has operated a facility at 980 Ellicott Street, in the City of Buffalo, County of Erie, State of New York from approximately 1951 to the present (the "Site").
3. The Department has determined that 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 915143. The Department has classified the Site as a classification "2" pursuant to ECL 27-1305.4.b.
4. Respondent's operations at the Site allegedly resulted

in contamination of the environment by creosote and other hazardous substances and/or hazardous wastes. As used in this Order, the term hazardous waste shall be defined as indicated in ECL Section 27-1301. Respondent, through its consultant, has conducted previous investigative activities to determine the existence of creosote and other contamination in the area of the Site.

5. The Department alleges that Respondent is the person responsible for the Site and the contamination within the meaning of ECL Section 27-1313(3)(a).

6. Respondent has conducted previous response actions at the Site including the digging up of three underground storage tanks, one or more of which may have leaked, and associated contaminated soil. The tanks were removed and the contaminated soil is presently the subject of a Bio-remediation Program under a prior order on consent.

7. Respondent has developed and submitted to the Department a Work Plan for an Interim Remedial Measure for the Site ("IRM Work Plan"). The goal of the IRM Work Plan is to upgrade an existing extraction and treatment system for contaminated groundwater and light non-aqueous phase liquids (LNAPL) in the groundwater. The IRM Work Plan has been approved by the Department and is attached to and incorporated into this Order as Appendix "A".

8. The Respondent has also submitted to the Department a Table of Contents Outline for the development and performance of

a Feasibility Study ("Appendix B"). Appendix B has been approved by the Department and is attached to and incorporated into this Order.

9. The Department and Respondent acknowledge that the goals of this Order shall be that Respondent, with the approval of the Department, (a) shall perform the Interim Remedial Measure ("IRM") by implementing the IRM Work Plan in accordance with the schedule included in Appendix "A", (b) shall develop and perform a Feasibility Study approvable by the Department in accordance with Appendix "B", within the time limits specified herein and (c) reimburse the State's administrative costs as specified herein.

10. Respondent, without admitting any of the factual allegations or conclusions of law set forth above or hereafter, having waived its 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 the terms hereof. 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. IRM Implementation

Respondent shall undertake and implement the IRM Work Plan for the Site as defined and described in Appendix "A", pursuant to the schedule in the IRM Work Plan, under the

oversight of the Department. Any modifications or revisions which may be required due to unanticipated field conditions shall be subject to approval by the Department. Any such modification or revisions shall be attached to and incorporated into this Order as an Appendix. DEC, for good cause shown, reserves the right to change the IRM schedule which is included in the IRM Work Plan in Appendix "A". For good cause shown, Respondent may request DEC to change the IRM schedule.

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

Within the time frame set forth in the IRM Work Plan, Respondent must prepare an IRM report ("IRM Report") that includes all data generated and all other information obtained during the IRM Program and identifies any additional data that must be collected. The IRM Report shall be prepared by and have the signature and seal of a professional engineer who shall certify that the IRM Report was prepared in accordance with this Order.

## II. Progress Reports

A. If the IRM field work requires more than two months for completion, Respondent shall submit to the parties identified in subparagraph XII(B) in the numbers specified therein copies of written quarterly progress reports that: (i) describe the actions which have been taken under this Order during the previous quarter; (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 quarter, 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 quarter; (iv) 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; (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 twentieth day of every quarter following the effective date of this Order.

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

### III. Review of Submittals

A. 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 Respondents 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. The IRM Report shall be attached to this Order as Appendix C.

B. If the Department disapproves a submittal, it will so notify Respondent in writing and shall specify the reasons for its disapproval. Within the period of time specified in the notice of disapproval, but not less than 30 days in the case of the IRM Report and Feasibility Study, 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.

C. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department disapproves the revised submittal, the 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 mechanism

provided in paragraph XI herein.

IV. Feasibility Study

A. Within 90 days of the effective date of this Order, Respondent shall, in accordance with Appendix B, submit to the Department a Feasibility Study evaluating on-Site and off-Site remedial action alternatives which address all health and environmental hazards and potential hazards allegedly attributable to hazardous waste disposal at the Site. The Feasibility Study shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Feasibility Study was prepared in accordance with this Order.

B. Respondent shall perform, prepare and submit the Feasibility Study in accordance with Appendix "B" and paragraph III of this Order. Respondent shall incorporate all elements of and be consistent with a Feasibility Study as set forth in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") [42 USC 9601 et seq.], as amended, the National Contingency Plan ("NCP") of March 8, 1990 [40 CFR Part 300], the USEPA guidance document entitle "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," dated October 1988, and any subsequent revisions to that guidance document in effect at the time the Feasibility Study is submitted, and appropriate USEPA and Department technical and administrative guidance documents.

C. Subject to the foregoing, the Feasibility Study shall be attached as Appendix "D" and incorporated into this

Order.

D. Within 30 days after the Department's approval of the Feasibility Study, Respondent shall cooperate and assist the Department in soliciting public comment on the Feasibility Study and the proposed remedial action plan identified therein, in accordance with CERCLA, the NCP, and the guidance documents identified in the Feasibility Study, Work Plan or SOW. After the close of the public comment period, the Department shall select a final remedial alternative for the Site in a Record of Decision ("ROD").

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 an act of God, war, riot, or because of any condition or event entirely beyond the control of Respondent or its agent or agents carrying out Respondent's obligations under this Order. Respondent 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. Failure to give such notice constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to compliance with this Order. The Department's disapproval of any requested extension



or modification of this Order as provided above is subject to Paragraph XI of this Order.

VI. Entry Upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Respondent 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. Any such person shall check in with the Site's Health and Safety Officer, if present, and shall comply with the terms of any approved Health and Safety Plan related to the IRM Work Plan. During IRM field activities 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

Within 30 days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money not to exceed \$12,500 which shall represent reimbursement for the State's expenses incurred not inconsistent with the ECL and National Contingency Plan, including, but not limited to, direct labor, 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 corporate 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 spend (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. In no event shall the Respondent be responsible for reimbursement under the terms of this Order of any of the foregoing expenses which shall exceed the aggregate sum of \$12,500.

VIII. Reservation of Rights

A. Except as expressly provided elsewhere in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to nor

exemplified by, the following:

1. the Department's right to bring any action or proceeding against anyone other than Respondent, its directors, officers, employees, servants, agents, successors, and/or assigns;
2. the Department's right to enforce this Order against Respondent and consistent with subparagraph XIII(F) of this Order, its directors, officers, employees, servants, agents, successors, and/or 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, its directors, officers, employees, servants, agents, successors, and/or 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, its directors, officers, employees, servants, agents, successors, and/or 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, its directors, officers, employees, servants, agents, successors, and/or 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. Respondent reserves any and all rights, defenses, claims, demands, and causes of action which it has with respect to any matter concerning the Site, except as expressly provided elsewhere in this Order.

D. In consideration of Respondent's compliance with the provisions of this Order and as long as Respondent continues in compliance with the IRM Work Plan and Feasibility Study Table of Contents Outline, the Department will not bring any action against Respondent to require it to undertake remedial activities that are the subject of this Order in a manner inconsistent with or duplicative of the IRM Work Plan or the Feasibility Study Outline.

#### 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 its directors, officers, employees, servants, agents, successors, and/or assigns, but only to the extent said claims, suits, actions, damages and costs do not arise out of or result from the unlawful, willful or malicious acts or omissions on the

part of the Department, the State of New York and their representatives and employees.

X. Public Notice

A. Within 60 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 60 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. Dispute Resolution

A. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Paragraph shall be the exclusive mechanism to resolve any disputes arising between Respondent and the Department under or with respect to this Order. However, the procedures set forth in this Paragraph shall not apply to actions by the Department to enforce obligations of this Respondent that have not been disputed in accordance with this Paragraph.

B. A dispute, except a dispute concerning the Department's disapproval of a revised submittal or a revised Feasibility Study, shall be considered to have arisen when one

party sends a written Notice of Dispute to the other party in accordance with paragraph XII. In such a case, the Department and Respondent shall attempt to resolve any disagreements arising under or with respect to this Order expeditiously and informally. In the event any such disagreement is not resolved through informal means within 20 days from the time the disagreement arises and the Respondent does not serve a written Statement of Position as provided in the subparagraph D below with the Department's Director of Hazardous Waste Remediation (the "Director"), then the position of the Department shall be the position which resolves the dispute. The period for informal resolution may be shortened or extended by mutual agreement of the parties.

C. If the Department disapproves a revised submittal made pursuant to this Order as provided in paragraph III above, Respondent shall be in violation of this Order unless, within 20 days of receipt of the Department's notice of disapproval, the Respondent obtains the Department's approval of a re-revised submittal or serves a written Statement of Position with the Director.

D. A Statement of Position shall contain the Respondent's statement of the issues in dispute, the relevant facts upon which the dispute is based, and the factual data, analysis or opinion supporting its position, and all supporting documentation on which such party relies. The Department shall serve its Statement of Position, including supporting

documentation, no later than (20) days after receipt of the Respondent's Statement of Position. The periods for filing Statements of Position may be extended by mutual agreement of the parties.

E. 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.

F. Upon review of the administrative record as developed pursuant to this Paragraph, the Director shall issue a final decision and order resolving the dispute. Unless Respondent invokes its rights under Subparagraph XI.I. below, Respondent shall revise the submittal in accordance with the Department's specific comments, as may be modified by the Director and except for those which have been withdrawn by the Director, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the Director revises the time frame in the Director's final decision and order resolving the dispute.

G. If Respondent submits a revised submittal pursuant to the Director's final decision, the Department shall notify Respondent in writing of its approval or disapproval of the revised submittal. If the revised submittal fails to

address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, Respondent shall be in violation of this Order and the ECL unless within twenty (20) days of receipt of such disapproval, Respondent exercises its rights pursuant to Article 78 of the Civil Practice and Rules ("CPLR") of New York.

H. In review by the Director of any dispute pursued under this Paragraph, Respondent shall have the burden of proving that there is no rational basis for the Department's position.

I. The invocation of the procedures stated in this Paragraph shall not extend, postpone, or modify Respondent's obligations under this Order with respect to any disputed items, unless and until the Department agrees or a court determines otherwise. With respect to the final determination of the Department, the Respondent shall have those rights granted pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") of New York, provided that a petition is filed within twenty (20) business days of receipt of final decision and Order issued by the Department.

XII. 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, NY 12233-1070
2. Director, Bureau of Environmental Exposure  
Investigation  
New York State Department of Health  
2 University Place  
Albany, NY 12203
3. Regional Director, Region 9  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999
4. Division of Environmental Enforcement  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999

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

1. Four copies (one unbound) to  
Martin Doster  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999
2. Two copies to  
Director, Bureau of Environmental Exposure  
Investigation  
New York State Department of Health  
2 University Place  
Albany, NY 12203
3. One copy to  
Division of Hazardous Waste Remediation  
New York State Department of Environmental  
Conservation  
50 Wolf Road  
Albany, NY 12233-1070

4. One Copy to  
Division of Environmental Enforcement  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999

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

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

Mr. Michael Rider  
Osmose Wood Preserving, Inc.  
980 Ellicott Street  
Buffalo, NY 14209

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

XIII. Miscellaneous

A. Consistent with the terms of this Order, 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 and approved by the Department before the start of any activities for which the Respondent and such firms or individuals will be responsible. The Department hereby approved Groundwater Technology, Inc for purposes of this Paragraph XIII(B). 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. The Department shall provide Respondent with split samples of any independent samples it takes. 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. The Department shall provide Respondent with the results of all sampling and/or tests or other data generated by the Department with respect to any samples it takes.

D. Respondent shall notify the Department at least 5 working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondent shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations

necessary to perform Respondent's obligations under this Order. The Department shall assist the Respondent to the extent practicable in the event the Respondent is unable, after good faith efforts, to secure any such necessary permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations needed to perform this Order.

F. Respondent and Respondent's 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, except with the written consent of the Department. 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 for 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 Respondent desires that any provision of

this Order be changed, Respondent shall make timely written application, signed by the Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to:

Joseph P. Ryan, Esq.  
Division of Environmental Enforcement  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999

Martin Doster  
Division of Hazardous Waste Remediation  
New York State Department of Environmental  
Conservation  
270 Michigan Avenue  
Buffalo, NY 14203-2999

M. The effective date of this Order shall be the date a fully executed copy is received by Respondent at the address designated in Paragraph XII(D).

DATED: 5/16/95, New York  
, 1995

MICHAEL D. ZAGATA  
COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By:



MICHAEL J. O'TOOLE

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.

OSMOSE WOOD PRESERVING, INC.

By: Robert E. Weber

Robert E. Weber

(TYPE NAME OF SIGNER)

Title: President

Date: April 20, 1995

STATE OF NEW YORK )  
                          ) s.s.:  
COUNTY OF ERIE     )

On this 20TH day of APRIL, 1995,  
before me personally came ROBERT E. WEBER, to  
me known, who being duly sworn, did depose and say that he  
resides in WILLIAMSVILLE, NEW YORK;  
that he is the PRESIDENT of  
OSMOSE WOOD PRESERVING, INC., the corporation described in and  
which executed the foregoing instrument; that he knew the seal  
of said corporation; that the seal affixed to said instrument  
was such seal; that it was so affixed by the order of the Board  
of Directors of said corporation and that he signed his name  
thereto by like order.

Linda A. Siragusa

Notary Public  
LINDA A. SIRAGUSA  
NOTARY PUBLIC, State of New York  
Qualified in Erie County  
My Commission Expires 11/30/95