

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel

625 Broadway, 14th Floor, Albany, New York 12233-1500

P: (518) 402-9185 | F: (518) 402-9018

www.dec.ny.gov

August 24, 2017

**SENT VIA FIRST CLASS MAIL AND BY
ELECTRONIC MAIL**

Mr. Scott Gerber, VP
Kimco Realty Corporation
3333 New Hyde Park Rd.
New Hyde Park, NY 11042
sgerber@kimcorealty.com

**RE: Order on Consent and Administrative Settlement
Index No.: 2-20170417-146
Site Name: Charlton Cleaners
Site No.: 243019 & V00252**

Dear Mr. Gerber:

Enclosed is the fully executed Order on Consent and Administrative Settlement referencing the site located at 24 Barrett Avenue, Staten Island, NY and KIOP Forest Ave. L.P., c/o Kimco Realty Corporation.

If you have any further questions or concerns relating to this matter, please contact Michael Murphy at 518-402-8564.

Sincerely,



Maria Mastroianni
Remediation Bureau
Office of General Counsel

Enclosure

ec: M. Murphy, Esq., NYSDEC

cc: Kimco Realty Corporation



Department of
Environmental
Conservation

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

In the Matter a Remedial Program for

**ORDER ON CONSENT AND
ADMINISTRATIVE SETTLEMENT**
Index No. 2-20170417-146

DEC Site Name: Charlton Cleaners
DEC Site Nos.: 243019 and V00252
Site Address: 24 Barrett Avenue, Staten Island, New York

Hereinafter referred to as "Site"

by: KIOP Forest Ave. L.P.
c/o Kimco Realty Corporation
3333 New Hyde Park Road
Suite 100
New Hyde Park, New York 11042

Hereinafter referred to as "Respondent"

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

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

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

2. The Site is currently listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State (the "Registry") as Site Number 243019, with a Classification of "2" pursuant to ECL 27-1305, and Site Number V00252 in the Voluntary Cleanup Program.

3. The Site is a portion of the Forest Avenue Shopping Center, which is currently owned by Respondent. On or about February 20, 2002 Respondent entered the Site

into the Department's Voluntary Cleanup Program ("VCP") as a Volunteer to address environmental issues at the Site related to a former dry cleaning operation at the Site.

4. The Site, other portions of the Forest Avenue Shopping Center, and other off-site areas, have been impacted by contamination emanating from the Charlton Cleaners site, as well as the Former Paul Miller Dry Cleaners (Site No. 243018), which adjoins the Forest Avenue Shopping Center to the south.

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

6. Respondent and the Department agree that the primary goals of this Order are for Respondent to pay the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00) to resolve its liability to New York State for the existing contamination at the Site and for the Department to access the Site and the Forest Avenue Shopping Center to implement, at the expense of the Department, a remedial program to address existing contamination from historic dry cleaning operations at the Site and the adjacent Former Paul Miller Dry Cleaners site (Site No. 243018).

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

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

I. Real Property

The Site subject to this Order has been assigned Site Numbers V00252 and 243019 and is as follows:

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

Tax Map/Parcel No.: Portion of Section 5, Block 1053, Lot 138
ADDRESS: 24 Barrett Avenue, Staten Island, NY
Owner: KIOP Forest Ave. L.P.

The former Charlton Cleaners was located in an approximately 2,000-square-foot portion of the Rock-Landau building in the Forest Avenue Shopping Center at 24 Barrett Avenue in Staten Island, Richmond County, New York. The Site is located in the northern portion of the Forest Avenue Shopping Center along Barrett Avenue.

II. Scope of Order

Respondent is resolving its liability for existing contamination from historic dry cleaning operations at the Site through payment of money to the Department as provided in Section III of this Order.

- A. To the extent not already submitted, within 60 days after request by the Department, Respondent will provide the Department with all reports and engineering calculations as requested by the Department and prepared by Respondent's consultants under the VCP for the feasibility study and/or remedial design.
- B. The following Sections of the "Standard Clauses for All New York State Superfund Orders" attached to this Order as Appendix A are without effect:
 - I – Citizen Participation Plan;
 - II – Initial Submittal;
 - III – Development, Performance and Reporting of Work Plans;
 - VI – Payment of State Costs;
 - VII – Release and Covenant Not to Sue;
 - IX – Indemnification;
 - X – Public Notice;
 - XII – Environmental Easement;
 - XIII – Progress Reports;
 - XIV – Termination of Order; and
 - XVI – Miscellaneous, Subparagraphs B, C and F.
- C. The following Sections of the "Standard Clauses for All New York State Superfund Orders" attached to this Order as Appendix A are incorporated herein, as modified herein, and remain in full force and effect:
 - IV – Penalties;
 - V – Entry Upon Site;
 - VIII – Reservation of Rights;

XI – Change of Use;
XV – Dispute Resolution; and
XVI – Miscellaneous, Subparagraphs A, D, E, G, H, I, J and K.

III. Payment to Resolve Liability for Existing Contamination

A. In full satisfaction and resolution of any and all claims by the Department related to the existing contamination at the Site, Respondent shall pay the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00) to the Department according to the following schedule.

B. Within thirty (30) days after the effective date of this Order, Respondent shall pay to the Department a sum in the amount of ONE MILLION ONE HUNDRED THOUSAND DOLLARS (\$1,100,000.00) made payable to the “New York State Department of Environmental Conservation”.

C. On or before December 31, 2017, Respondent shall pay to the Department a sum in the amount of FOUR HUNDRED THOUSAND DOLLARS (\$400,000.00) made payable to the “New York State Department of Environmental Conservation.”

D. Respondent shall send the above payments to:

Michael C. Murphy, Esq.
New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway – 14th Floor
Albany, NY 12233-1500

IV. Department Access to Site and Surrounding Forest Avenue Shopping Center

A. Respondent hereby grants the Department and its agents, employees, contractors and subcontractors (collectively its “Representatives”) reasonable non-exclusive access to the Site and the surrounding Forest Avenue Shopping Center (Block 1053, Lot 138) (hereinafter the “Property”) to implement the remedy selected by the Department in the Records of Decision (“RODs”) for the Site and the Former Paul Miller Dry Cleaners site. This grant of access shall not convey any property interest in the Site to the State of New York. The Department acknowledges that the Forest Avenue Shopping Center is a retail shopping center open and operating for business 24 hours per day, 365 days per year, with various retail, entertainment, service, restaurant and other commercial tenants. Therefore, all such access shall be done in such a manner so as to cause the least amount of interference with the business operations of the tenants and the common areas as is reasonably possible. All access to the Forest

Avenue Shopping Center shall be coordinated through the owners' property management team.

B. Subject to IV.A above, the Property will be entered upon and occupied by the Department and its Representatives for the performance of work thereon for one or more of the purposes set forth in Environmental Conservation Law ("ECL") Sections 27-1309(3)-(4) and 27-1313(8), and particularly for the purpose of conducting remedial activities at the Property.

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

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

D. The Department agrees to provide Respondent with a Remedial Action Work Plan that, among other things, identifies areas of the Property where remedial activities will occur. The Department agrees to work with Respondent to perform the Remedial Action, and to locate and store equipment, in a manner to minimize interference with use of the Property by Respondent, tenants and customers of the shopping center.

E. Currently the New York State Department of Health ("NYSDOH") does not require vapor intrusion mitigation for buildings at the Site. If NYSDOH requires future vapor intrusion investigation/mitigation for current buildings at the Site, the Respondent will provide the Department with Site access so that the Department can carry out any activity necessary for vapor intrusion investigation and/or mitigation.

V. Environmental Easement

A. If a Record of Decision for the Site relies upon one or more institutional and/or engineering controls, the Department shall prepare an Environmental Easement to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36, and 6 NYCRR 375-1.8(h)(2) (the "Environmental Easement"). The Department shall provide a draft Environmental Easement to Respondent for review and comment. Upon finalization of the Environmental Easement, Respondent shall comply with the requirements of 6 NYCRR 375-1.8(h)(2).

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

C. If Respondent does not cause the final approved Environmental Easement to be recorded in accordance with 6 NYCRR 375-1.8(h)(2), the Department may file an Environmental Notice on the Site.

VI. Release and Covenant Not to Sue

A. Upon the full execution of this Order and the Department's receipt of Respondent's initial payment pursuant to Section III.B. of this Order, Respondent shall not be liable to the Department upon any statutory or common law cause of action, including, but not limited to, those for natural resource damages, arising out of the presence of any contaminants in, on or emanating from the Site at any time before the effective date of this Order.

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

C. The liability protections set forth in this section shall extend to successors or assigns through acquisition of title to the Site and to a person who develops or otherwise occupies the Site; provided that such persons act with due care and in good faith to adhere to the requirements of relevant institutional controls, including but not limited to a Site Management Plan and the Environmental Easement in accordance with Section V of this Order. Respondent shall have an opportunity to review and comment on the Site Management Plan and Environmental Easement, if required by the Department. However, pursuant to 6 NYCRR 375-2.9(c), such liability protections do not extend to, and cannot be transferred, to a responsible party as of the effective date of this Order, unless that person is a party to the Order.

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

VII. Communications

A. All written communications required by this Consent Order shall be transmitted by United States Postal Service, by private courier service, by hand delivery, or by electronic mail.

1. Communication from Respondent shall be sent to:

Charles Post, DEC Project Manager
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, N.Y. 12233
charles.post@dec.ny.gov

Michael C. Murphy, Esq. (correspondence only)
New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, N.Y. 12233
michael.murphy1@dec.ny.gov

Krista Anders (electronic copy only)
New York State Department of Health
Bureau of Environmental Exposure Investigation
Empire State Plaza
Corning Tower Room 1787
Albany, N.Y. 12237
krista.anders@health.ny.gov

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

Scott Gerber, Vice President
Kimco Realty Corporation
3333 New Hyde Park Road
New Hyde Park, NY 11042
SGerber@kimcorealty.com

With a copy to
Kimco Realty Corporation

3333 New Hyde Park Road
New Hyde Park, NY 11042
Attn: Director, NE Region Property Management

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

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

VIII. Termination of Voluntary Cleanup Agreement

Upon the effective date of this Order, the Voluntary Cleanup Agreement for the Site executed by Respondent and the Department with an effective date of February 20, 2002 is hereby terminated.

IX. Miscellaneous

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

B. Following the completion of the remedy selected by the Department in the Record of Decision, including the recording of the Environmental Easement as described in Section V above, the Department will reevaluate the conditions at the Site and either reclassify or delist the Site from the Registry. Notwithstanding the foregoing, the Department shall be required to, and hereby undertakes to, perform any and all investigation and remediation, including obtaining any state or local permit or other authorization required for any activity pursuant to this Order, required to reclassify and, ultimately, to delist the Site from the Registry of Inactive Hazardous Waste Sites.

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

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

DATED: August 23, 2017

BASIL SEGGOS
COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By:



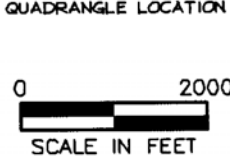
Robert W. Schick, P.E., Director
Division of Environmental Remediation

EXHIBIT "A"

Map



SOURCE: USGS TOPOGRAPHIC QUADRANGLES ELIZABETH AND ARTHUR KILL, NEW YORK-NEW JERSEY (PHOTOREVISED 1981).



FORMER CHARLTON CLEANERS FACILITY
 VCP # W3-0891-01-06
 FOREST AVENUE SHOPPERS TOWN
 24 BARRETT AVENUE
 STATEN ISLAND NEW YORK

SITE LOCATION MAP

DATE	REVISED

PREPARED BY:
LEGGETTE, BRASHEARS & GRAHAM, INC.
 Professional Groundwater and Environmental Engineering Services
 110 Corporate Park Drive
 Suite 112
 White Plains, NY 10604
 (914) 694-5711



DRAWN:	RAC	CHECKED:	PW	DATE:	09/14/10	FIGURE:	1
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LEGEND

— SITE BOUNDARY

• MW-1
GROUNDWATER MONITORING WELL LOCATION

⊗ PROPOSED INJECTION POINT TEST BORING

FORMER CHARLTON CLEANERS FACILITY
 VCP # W3-0891-01-06
 FOREST AVENUE SHOPPERS TOWN
 24 BARRETT AVENUE
 STATEN ISLAND NEW YORK

DATE REVISIONS

DATE 12/12/11 DRAWN 2

PREPARED BY: LEOJETTE, BRASHEARS & GRAHAM, INC.
 Professional Geotechnical and Environmental Engineering Services
 110 Corporate Park Drive
 Suite 112
 White Plains, NY 10604
 (914) 666-5711

PROJECT: SITE PLAN WITH MONITOR WELLS AND PROPOSED PILOT TEST BORING



0 150
 APPROXIMATE SCALE IN FEET

EXHIBIT "B"

RECORDS SEARCH REPORT

NOT REQUIRED

APPENDIX "A"

**STANDARD CLAUSES FOR ALL NEW YORK STATE
STATE SUPERFUND ORDERS**

APPENDIX A

**STANDARD CLAUSES FOR ALL NEW YORK STATE
SUPERFUND ADMINISTRATIVE ORDERS**

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

I. Citizen Participation Plan

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

II. Initial Submittal

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

III. Development, Performance, and Reporting of Work Plans

A. Work Plan Requirements

All activities at the Site that comprise any element of an Inactive Hazardous Waste Disposal Site Remedial Program shall be conducted pursuant to one or more Department-approved work plans ("Work Plan" or "Work Plans") and this Order and all activities shall be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, as required under CERCLA, 42 U.S.C. § 9600 *et seq.* The Work Plan(s) under this Order shall address both on-Site and off-Site conditions and shall be developed and implemented in accordance with 6 NYCRR § 375-1.6(a), 375-3.6, and 375-6. All Department-approved Work Plans shall be incorporated into and become enforceable parts of this Order. Upon approval of a Work Plan by the Department, Respondent shall implement such Work Plan in accordance with the schedule contained therein. Nothing in this Subparagraph shall mandate that any particular Work Plan be submitted.

The Work Plans shall be captioned as follows:

1. Site Characterization ("SC") Work Plan: a Work Plan which provides for the identification of the presence of any hazardous waste disposal at the Site;
2. Remedial Investigation/Feasibility Study ("RI/FS") Work Plan: a Work Plan which provides for the investigation of the nature and extent of contamination within the boundaries of the Site and emanating from such Site and a study of remedial alternatives to address such on-site and off-site contamination;
3. Remedial Design/Remedial Action ("RD/RA") Work Plan: a Work Plan which provides for the development and implementation of final plans and specifications for implementing the remedial alternative set forth in the ROD;
4. "IRM Work Plan" if the Work Plan provides for an interim remedial measure;
5. "Site Management Plan" if the Work Plan provides for the identification and implementation of institutional and/or engineering controls as well as any necessary monitoring and/or operation and maintenance of the remedy; or

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

B. Submission/Implementation of Work Plans

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

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

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

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

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

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

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

C. Submission of Final Reports and Periodic Reports

1. In accordance with the schedule contained in a Work Plan, Respondent shall submit a final report as provided at 6 NYCRR 375-1.6(b) and a final engineering report as provided at 6 NYCRR 375-1.6(c).

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

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

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

D. Review of Submittals

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

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

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

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

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

E. Department's Issuance of a ROD

1. Respondent shall cooperate with the Department and provide reasonable assistance, consistent with the Citizen Participation Plan, in soliciting public comment on the proposed remedial action plan ("PRAP"), if any. After the close of the public comment period, the Department shall select a final remedial alternative for the Site in a ROD. Nothing in this Order shall be construed to abridge any rights of Respondent, as provided by law, to judicially challenge the Department's ROD.

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

F. Institutional/Engineering Control Certification

In the event that the remedy for the Site, if any, or any Work Plan for the Site, requires institutional or engineering controls, Respondent shall submit a written certification in accordance with 6 NYCRR 375-1.8(h)(3) and 375-3.8(h)(2).

IV. Penalties

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

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

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

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

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

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

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

V. Entry upon Site

A. Respondent hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site (or areas in the vicinity of the Site which may be under the control of Respondent) by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to matters addressed pursuant to this Order, and by any agent, consultant, contractor, or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site, for inspecting, sampling, copying records related to the contamination at the Site, testing, and any other activities necessary to ensure Respondent's compliance with this Order. Upon request, Respondent shall (i) provide the Department with suitable work space at the Site, and (ii) permit the Department full access to all non-privileged records relating to matters addressed by this

Order. Raw data is not considered privileged and that portion of any privileged document containing raw data must be provided to the Department.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Respondent shall each have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of any such sampling and scientific measurements available to Respondent.

VI. Payment of State Costs

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

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

C. Each such payment shall be made payable to the New York State Department of Environmental Conservation and shall be sent to:

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

D. The Department shall provide written notification to the Respondent of any change in the foregoing addresses.

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

F. In the event of non-payment of any invoice within the 45 days provided herein, the Department may seek enforcement of this provision pursuant to Paragraph IV or the Department may commence an enforcement action for non-compliance with ECL '27-1423 and ECL 71-4003.

VII. Release and Covenant Not to Sue

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

VIII. Reservation of Rights

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

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

IX. Indemnification

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

X. Public Notice

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

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

XI. Change of Use

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

XII. Environmental Easement

A. If a Record of Decision for the Site relies upon one or more institutional and/or engineering controls, the Department (or the owner of the Site) shall propose and Respondent shall accept an Environmental Easement to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36, and 6 NYCRR 375-1.8(h)(2). Upon acceptance of the Environmental Easement by the State and Respondent, Respondent shall comply with the requirements of 6 NYCRR 375-1.8(h)(2).

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

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

XIII. Progress Reports

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

XIV. Termination of Order

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

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

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

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

C. If the Order is terminated pursuant to Subparagraph XIV.A.1, neither this Order nor its termination shall affect any liability of Respondent for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA, nor shall it affect any defenses to such liability that may be asserted by Respondent. Respondent shall also ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which existed before any activities under this Order were commenced. Further, the Department's efforts in obtaining and overseeing compliance with this Order shall constitute reasonable efforts under law to obtain a voluntary commitment from Respondent for any further activities to be undertaken as part of a Remedial Program for the Site.

XV. Dispute Resolution

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

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

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

XVI. Miscellaneous

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

B. As the Respondent has no obligation to perform any work hereunder, the Department has exempted Respondent from the requirement to obtain any state or local permit or other authorization for any activity conducted pursuant to this Order in accordance with 6 NYCRR 375-1.12(b), (c), and (d).

C. 1. Respondent shall use commercially reasonable efforts to obtain all Site access from parties under its control so that the Department can perform its obligations under this Order, including all Department-prepared Work Plans and the schedules contained therein. If, despite Respondent's best efforts, any access, cannot be obtained, Respondent shall promptly notify the Department and include a summary of the steps taken. The Department may, as it deems appropriate and within its authority, assist Respondent in obtaining same.

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

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

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

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

ii. If Respondent seeks to modify an approved Work Plan, a written request shall be made to the Department's project manager, with copies to the parties listed in Subparagraph IV.A.1.

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

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

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

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

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

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

I. Respondent's obligations under this Order represent payment for or reimbursement of response costs, and shall not be deemed to constitute any type of fine or penalty.

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

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