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NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the  
Implementation of a Remedial  
Response Program for  
Amsterdam Riverlink Park  
by

AGREEMENT

INDEX NUMBER: D4-0001-99-03

New York State Department of  
Transportation,  
Niagara Mohawk Power Corporation and  
New York State Canal Corporation,  
Volunteer.

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DEFINITIONS

For purposes of this Agreement, the following terms have the following definitions:

- A. "Contemplated Use": a public recreation area and a public highway, which areas will be maintained by the New York State Department of Transportation ("NYSDOT").
- B. "Covered Contamination": the concentrations of Existing Contamination to which the Existing Contamination shall have been remediated both on-Site and off-Site in accordance with the requirements of the Remediation Work Plan. The Department's requirements as to reduction in volume, distribution and/or concentration of Existing Contamination shall be determined and implemented such that any residual post-remedial contamination which remains on Site shall be at levels consistent with the Contemplated Use of the remediated Site.
- C. "ECL": the New York State Environmental Conservation Law.
- D. "Day": a calendar day unless otherwise specified.
- E. "Department": the New York State Department of Environmental Conservation.
- F. "Existing Contamination": hazardous substances ("hazardous substances"), which term shall mean any substance which appears on the list promulgated pursuant to ECL 37-0103, associated with the manufactured gas plant ("MGP") wastes which resulted from the MGP formerly operated on the Site. The term includes any contamination encountered during implementation of any Work Plan, the existence, nature and/or extent of which were not known at the time of approval of such Work Plan, to the extent such contamination is related to the operations of NMPC or its predecessors.

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G. "Professional engineer": an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

H. "Site": that property which was acquired by the State of New York in 1966 depicted on Map #100 as Parcel #126 in the City of Amsterdam, County of Montgomery and State of New York. Exhibit "A" of this Agreement is a map of the Site showing its general location.

I. "Trustee": the Trustee of New York State's natural resources.

J. "Volunteer": for purposes of this Agreement the following entities are collectively referred to as "Volunteer":

1. Niagara Mohawk Power Corporation (NMPC), a corporation formed under the laws of the State of New York, with corporate offices at 300 Erie Boulevard West, Syracuse, New York 13202-4250,

2. New York State Department of Transportation (NYSDOT), an executive agency of the State of New York with its main office located at Building 5, State Office Campus, Albany, New York. NYSDOT maintains a regional office at Utica State Office Building, Genesee Street, Utica, New York, and

3. New York State Canal Corporation ("NYSCC") is a subsidiary of the New York State Thruway Authority, organized and operating as a public benefit corporation pursuant to Title 9, Article 2, of the Public Authorities Law, as amended, with its principal office at 200 Southern Boulevard, City and County of Albany, State of New York (mailing address: P.O. Box 189, Albany, NY 12201). NYSCC is not the owner or the operator of the Site, but the owner of property directly adjacent to the Site.

K. "Investigation Work Plan": the Department-approved work plan that shall be developed under this Agreement for implementation by NMPC, the purpose of which shall be to determine and characterize the nature and extent of contamination on-Site and off-Site which resulted from the NMPC or NMPC's predecessor's operations. The Investigation Work Plan shall be attached to this Agreement as Exhibit "B" and shall be an enforceable part of this Agreement.

L. "Remediation Work Plan": the Department-approved work plan specifying the remedial action to be implemented by NMPC to address conditions relating to the Existing Contamination, both on-Site and off-Site, to the extent that such conditions have been determined to require remediation and have not been addressed through the prior implementation of IRMs. The Remediation Work Plan shall be attached to this Agreement as Exhibit "C", and any Department-approved modifications to the Remediation Work Plan shall be attached as



Exhibit "C-1" of this Agreement. The approved Remediation Work Plan and all approved modifications thereto shall be considered enforceable parts of this Agreement.

M. Interim Remedial Measure ("IRM"): a discrete activity or set of activities which have been determined by the Department to be of benefit to the environment and/or public health, and to require immediate or near-term implementation to address both emergency and non-emergency site conditions. Thus, the decision to implement an Interim Remedial Measure does not require extensive prior investigation and evaluation. Interim Remedial Measures are intended to prevent, mitigate, or remedy environmental damage or the consequences of environmental damage attributable to the Site and may include such measures as contamination source removal or segregation, elimination of ongoing discharge points, or measures to limit access to areas of concern.

N. "IRM Work Plan": a Department-approved work plan for performance of one or more IRMs to be implemented consistent with the terms of this Agreement, the purpose of which shall be to address conditions related to the Existing Contamination. The IRM Work Plan shall include a chronological description of the anticipated IRM activities together with a schedule for performance of those activities.

#### CONSIDERING

1. The Department is responsible for enforcement of the ECL. This Agreement is entered into pursuant to the Department's authority under that law and constitutes an administrative settlement for purposes of 42 USC 9613(f).

2. A. Site was formerly the location of a MGP operated by the Chuctanunda Gas Light Company from the 1860's until around 1930. In 1930, the Chuctandunda Gas Light Company merged with New York Power and Light Corporation, a corporate predecessor of NMPC. In February 1966, the State of New York appropriated the former MGP property for highway purposes.

B. Volunteer represents, and for the purposes of this Agreement, the Department relies on these representations, that its involvement with the Site is limited to the following:

- i. NMPC's involvement with the Site is as follows: NMPC owned the Site from 1950 until the date of the Site's acquisition by the State in 1966. Corporate predecessors of NMPC operated a MGP on the subject property from the 1860's until around 1930.
- ii. NYSDOT's involvement with the Site is that it appropriated the Site in 1966 on behalf of the People of the State of New York for "highway purposes", constructed a highway (bridge structure) thereon and has continually maintained and operated the highway on the Site since that

date. The Department purposes, via revocable permit, to allow the City of Amsterdam to use the Site for public recreation purposes.

- iii. NYSCC is not the owner or the operator of the Site, but is the owner of property directly adjacent to the Site. NYSCC's involvement with this Agreement is as a adjacent property owner.

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

4. The Department's authority to require abatement and remediation of releases of, inter alia, hazardous substances that are in violation of law or that exceed State environmental quality standards (as those set forth in 6 NYCRR Part 703), is varied, including, but not limited to, ECL 1-0101, 3-0301, 71-1929, 71-2703, and 71-2705. In addition, the Department has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution caused, by *inter alia*, the release of hazardous substances into the environment. ECL 3-0301.1.i. Furthermore, the Department has authority to require abatement and remediation of significant threats to the public health or the environment caused by threatened releases of hazardous substances that are hazardous wastes as that term is defined in ECL 27-1301.

5. A. The Department finds that the activities undertaken in accordance with the terms of this Agreement are in the public interest.

B. Volunteer consents to the terms and conditions of this Agreement.

6. The Department and Volunteer agree that the goals of this Agreement are:

A. for NMPC to:

- i. develop and implement a Department-approved Investigation Work Plan, and, if necessary, develop and implement a Department-approved Remediation Work Plan for the Existing Contamination which work plans shall address any off-Site impacts determined by the Department to require remediation; and
- ii. reimburse the State's administrative costs as provided in this Agreement;

B. For the State of New York, NYSCC and NMPC to expedite the performance of activities specified by this Agreement in a reasonable and appropriate manner so as to minimize the inherent delay occasioned thereby upon the City of Amsterdam's proposed Riverlink Park Project.



7. Volunteer agrees to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department to enter into or enforce this Agreement, and agrees not to contest the validity of this Agreement or its terms.

IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S RELEASE AND COVENANT NOT TO SUE NMPC SET FORTH IN THIS AGREEMENT AND FOR THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN, VOLUNTEER AGREES TO THE FOLLOWING:

I. Performance and Reporting of the Investigation Work Plan and Development and Implementation of the Remediation Work Plan, if Necessary

A. 1. Within 30 days of the effective date of this Agreement, Volunteer shall submit to the Department all data within Volunteer's possession or control regarding environmental conditions on-Site and off-Site, and other information described below, unless the Department advises Volunteer that such data have previously been provided to the Department. The data and other information shall include:

i. A brief history and description of the Site, including the types, quantities, physical state, location, and dates of disposal of hazardous substances including methods of disposal and spillage of such wastes;

ii. A concise summary of information held by Volunteer and Volunteer's attorneys and consultants with respect to all persons responsible for such disposal of hazardous substances, including but not limited to names, addresses, dates of disposal and any proof linking each such person responsible with hazardous substances identified pursuant to Subparagraph I.A.1; and

iii. A comprehensive list and copies of all existing relevant reports with titles, authors, and subject matter, as well as a description of the results of all previous investigations of the Site and areas in the vicinity of the Site, including copies of all available topographic and property surveys, engineering studies and aerial photographs.

2. Within 120 days of NMPC's receipt of the Department's written notice of approval of the Riverlink Park-Plaza Area IRM Engineering Report prepared in accordance with the requirements of Paragraph II of this Agreement, NMPC shall submit to the Department, NYSDOT and NYSCC a detailed Investigation Work Plan describing the methods and procedures to be implemented in performing an Investigation for the Site. The Investigation Work Plan shall include, but not be limited to, the following:

i. A chronological description of the anticipated investigation activities together with a schedule for the performance of these activities.

ii. A Sampling and Analysis Plan that shall include:

a. A quality assurance project plan that describes the quality assurance and quality control protocols necessary to achieve the initial data quality objectives. This plan shall designate a data validation expert and must describe such individual's qualifications and experience.

b. A field sampling plan that defines sampling and data gathering methods in a manner consistent with the "Field Methods Compendium," OSWER Directive 9285.2-11 (draft June 1993), as supplemented by the Department.

c. A health and safety plan to protect persons at and in the vicinity of the Site during the performance of the Investigation Work Plan which shall be prepared in accordance with 29 CFR 1910 and all other applicable standards by a certified health and safety professional. NMPC shall add supplemental items to this plan necessary to ensure the health and safety of all persons at or in the vicinity of the Site during the performance of any work pursuant to this Order.

d. A citizen participation plan that is, at a minimum, consistent with the Department's requirements under the Voluntary Cleanup Program.

3. The Investigation Work Plan shall incorporate all elements of a Remedial Investigation ("RI") 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 entitled "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 Investigation Work Plan is submitted, and appropriate USEPA and Department technical and administrative guidance documents. While not specifically so required by the Department, NMPC reserves the right to incorporate all elements of an NCP-compliant Feasibility Study (FS) as set forth in the same documents described above with reference to the elements of an Investigation Work Plan; and, to the extent NMPC incorporates the elements of a Feasibility Study into the submitted Investigation Work Plan, the Department will review and approve such elements as if such elements had been specifically required by the terms of this Agreement.

4. Upon receipt by NMPC of the Department's written approval of the Investigation Work Plan, NMPC shall commence implementation of said Work Plan and implement it in accordance with its terms.

B. 1. NMPC shall notify the Department, NYSDOT and NYSCC of any significant difficulties that may be encountered in implementing the Investigation Work Plan or any Department-approved modification to it and shall not modify any obligation unless first approved by the Department.



2. Any Existing Contamination encountered during implementation of the Investigation Work Plan, the existence, nature and/or extent of which were not known at the time of approval of the Investigation Work Plan shall be fully characterized to the satisfaction of the Department.

C. In accordance with the schedule contained in the Investigation Work Plan, NMPC shall submit to the Department, NYSDOT and NYSCC a Final Investigation Report. The Final Investigation Report shall:

1. include all data generated and all other information obtained during the investigation;
2. provide all of the assessments and evaluations identified in the Investigation Work Plan;
3. identify any additional data that must be collected; and
4. include a certification by the individual or firm with primary responsibility for the day to day performance of the investigation that all activities that comprised the investigation were performed in full accordance with the Investigation Work Plan.

D. 1. After its acceptance of the Final Investigation Report submitted under Subparagraph I.C of this Agreement, the Department shall determine whether it has sufficient information respecting the nature and extent of the contamination relating to the Site.

i. If the Department determines that it does not have sufficient information respecting the nature and extent of the Site's contamination, it will so notify Volunteer in writing. To the extent that the additional information required by the Department relates to the Existing Contamination, NMPC shall collect such additional data under a Department-approved revision to the Investigation Work Plan, which shall be attached to this Agreement as Exhibit "B-1" and made a part of this Agreement. To the extent that the additional information required by the Department relates to contamination other than the Existing Contamination, Volunteer parties other than NMPC, as appropriate, shall be responsible for development and implementation of resulting revisions to the Investigation Work Plan.

ii. If the Department determines that it has sufficient information respecting the nature and extent of the Site's contamination, it will so inform NMPC, NYSDOT, and NYSCC in writing.

2. Any party to this Agreement may elect to opt-out of this Agreement within 30 days of the Department's notification to the parties pursuant to Subparagraph I.D.1.ii. If any party elects to opt-out of this Agreement pursuant to this Subparagraph, the remaining parties shall negotiate in good faith any modifications to this Agreement that may be required thereby.

However, if after goodfaith negotiations, the parties cannot agree upon the terms of such revisions, then, except with respect to

i. NMPC's obligations under Paragraphs VII and IX of this Agreement; and

ii. NMPC's obligation, here incurred, to ensure that it does not leave the Site, or any off-Site areas which have been impacted by this Agreement, in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any remedial activities were commenced; and

iii. the Department's right to enforce the obligations described in Subparagraphs I.D.2.iii and I.D.2.iv of this Agreement under Paragraph V of this Agreement,

this Agreement shall terminate effective the date of the Department's written notification to the remaining parties that negotiations have failed; and the remaining parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

3. Subject to the opt-out provision of Subparagraph I.D.2 above, NMPC shall develop within days of NMPC's receipt of the writing identified in Subparagraph I.D.1.ii a proposed Remediation Work Plan based on the Contemplated Use as defined under this Agreement, which Remediation Work Plan provides for the remediation, as determined appropriate by the Department, of both on-Site and off-Site Existing Contamination, subject to the Department's approval. The proposed Remediation Work Plan shall be noticed for public comment in accordance with Subparagraph I.D.4 of this Agreement. The proposed Remediation Work Plan shall include, among other requirements, an evaluation of the proposed remedy considering the factors set forth in 6 NYCRR 375-1.10(c). At a minimum, the proposed remedial plan must eliminate or mitigate all significant threats to the environment or public health determined to result from Existing Contamination and must be sufficient to provide for safe implementation of the Contemplated Use of the Site. In addition, the proposed Remediation Work Plan shall provide:

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

a. the construction and operation of any structures;

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

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



- d. physical security and posting of the Site;
  - e. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Construction; and
  - f. monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-approved remedial activities.
- ii. "Biddable Quality" documents for the Remedial Design including, but not limited to, documents and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;
  - iii. A time schedule to implement the Remedial Design;
  - iv. The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;
  - v. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction of the Remedial Design, including an estimate of the number of years during which such activities will be performed (where appropriate) a specific description of the criteria to be used to decide when an operation of the remedy may be discontinued.
  - vi. A contingency plan to be implemented if any element of the Remedial Design fails to achieve any of its objectives or otherwise fails to protect human health or the environment;
  - vii. A health and safety plan for the protection of persons at and in the vicinity of the Site during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional;
  - viii. A citizen participation plan which incorporates appropriate activities as required under the Voluntary Cleanup Program; and
  - ix. A provision that if during the Remediation Work Plan's implementation, contamination within the definition of Existing Contamination is discovered that was not discussed in the Final Investigation Report, NMPC shall investigate the nature and extent of such newly discovered contamination, and, if necessary, the Remediation Work Plan will be revised to have NMPC remediate such newly discovered contamination in the event that this remediation is needed to allow the Contemplated Use to proceed.

4. Upon development of a proposed Remediation Work Plan, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the public's opportunity to submit to the Department by no later than 30 days after the date of the issue of the Environmental Notice Bulletin in which the notice shall appear, comments on the proposed Remediation Work Plan and shall mail an equivalent notice to the City of Amsterdam and the County of Montgomery. If, as a result of its review of the comments received, the Department determines that the proposed Remediation Work Plan to implement the Department-approved remedial activities for the Site must be revised:

i. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the proposed Remediation Work Plan; or

ii. due to information received, in whole or in part, after the Department's approval of the proposed Remediation Work Plan, which indicates that the activities carried out in accordance with it are not sufficiently protective of human health and the environment for the Contemplated Use,

then the Department will so notify NMPC and to the extent such contamination is within the scope of the Existing Contamination the Department will immediately commence negotiations with NMPC to revise the proposed Remediation Work Plan accordingly. If the contamination is not within the scope of the Existing Contamination, the Department will immediately commence negotiations with the remaining Volunteers in an effort to obtain a proposed Remediation Work Plan for such party or party's implementation accordingly. If the Department and NMPC agree upon the terms of such revisions to the proposed Remediation Work Plan, as appropriate, the revised proposed Remediation Work Plan shall become the final Remediation Work Plan and shall be attached to this Agreement as Exhibit "C" and made a part of this Agreement. However, if after good faith negotiations, NMPC and the Department cannot agree upon the terms of such revisions to the proposed Remediation Work Plan, then, except with respect to

iii. NMPC's obligations under Paragraphs VII and IX of this Agreement; and

iv. NMPC's obligation, here incurred, to ensure that it does not leave the Site, or any off-Site areas which have been impacted by this Agreement, in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any remedial activities were commenced; and

v. the Department's right to enforce the obligations described in Subparagraphs I.D.4.iii and I.D.4.iv of this Agreement under Paragraph V of this Agreement,

this Agreement shall terminate effective the date of the Department's written notification to Volunteer that negotiations have failed to develop an acceptable Remediation Work Plan; and all



parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

If, following the 30 day comment period, the Department determines that the proposed Remediation Work Plan to implement the Department-approved remedial activities for the Site does not need to be revised then the proposed Remediation Work Plan shall become the final Remediation Work Plan and shall be attached to this Agreement as Exhibit "C" and made a part of this Agreement.

5. NMPC shall commence implementation of, and implement, the final Remediation Work Plan contained in Exhibit "C" in accordance with its terms. However, the parties agree that the final Remediation Work Plan will be modified in the event that contamination within the scope of Existing Contamination previously unknown or inadequately characterized is encountered during implementation of the final Remediation Work Plan unless after good faith negotiations, NMPC and the Department cannot agree upon modifications to the final Remediation Work Plan. In such event, except with respect to

i. NMPC's obligations under Paragraphs VII and IX of this Agreement; and

ii. NMPC's obligation, here incurred, to ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any remedial activities were commenced; and

iii. the Department's right to enforce the obligations described in Subparagraphs I.D.5.i and I.D.5.ii of this Agreement under Paragraph V of this Agreement,

this Agreement shall terminate effective the date of the Department's written notification to Volunteer that negotiations have failed to develop an acceptable modification to the final Remediation Work Plan; and all parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

E. 1. In accordance with the schedule contained in Exhibit "C," as may be modified by agreement between the parties (which modifications shall appear in Exhibit "C-1" of this Agreement), NMPC shall submit to the Department a Final Remedial Action Engineering Report that shall include "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the Remediation Work Plan, any Department-approved modification to the Remediation Work Plan, any, document, or specification prepared by or on behalf of NMPC pursuant thereto, and this Agreement.

2. NMPC shall submit a detailed post-remedial operation, maintenance, and monitoring plan ("O&M Plan"), if needed, in accordance with the schedule set forth in the Remediation Work Plan.

3. A professional engineer must prepare, sign, and seal the O&M Plan, "as built" drawings, Final Remedial Action Engineering Report, and certification.

F. Should post-remedial operation and maintenance prove to be necessary, upon the Department's approval of the O&M Plan, NMPC shall implement, or otherwise arrange for the implementation by the owner Volunteer entity or entities as appropriate, the O&M Plan in accordance with the schedule and requirements of the Department-approved O&M Plan.

G. 1. After receipt of the Final Remedial Action Engineering Report, the Department shall notify Volunteer in writing whether the Department is satisfied that the Remediation Work Plan was satisfactorily implemented in compliance with Exhibit "C" (and, as appropriate "C-1") and the Department-approved design, which notification shall not be unreasonably withheld.

2. Upon being satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Remediation Work Plan, both on-Site and off-Site, have been reached, the Department shall notify Volunteer in writing of its satisfaction and, except for the reservations identified below, the Department releases covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against, NMPC for the further investigation and remediation of the Site, based upon the release or threatened release of any Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VII of this Agreement continue to be or have been made to the Department, and (b) NMPC and/or NMPC successors, or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any. Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to natural resource damages nor to any further investigation or remedial action the Department deems necessary:

i. due to the off-Site presence of Existing Contamination that may have migrated off-Site from an on-Site source resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential, irrespective of whether the information available to Volunteer and the Department at the time of the development of the Remediation Work Plan disclosed the existence or potential existence of such off-Site presence;

ii. due to environmental conditions related to the Existing Contamination that were unknown to the Department at the time of its approval of the Remediation Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;

iii. due to information received, in whole or in part, after the Department's approval of the Final Remedial Action Engineering Report, which indicates that the activities carried out in accordance with the Remediation Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;



iv. due to Volunteer's failure to implement this Agreement to the Department's satisfaction; or

v. due to fraud committed, or mistake made, by NMPC in demonstrating that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Remediation Work Plan were reached.

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to a party who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same established resulting solely from this Agreement's execution.

3. Notwithstanding any other provision in this Agreement, if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this Agreement shall be construed, or deemed, to preclude the State of New York from recovering such claim.

4. Within 30 days of the Department's issuance of the forbearance, covenant not to sue, or release set forth in Subparagraph I.G of this Agreement, NMPC shall release, covenant not to sue and shall forbear from bringing any action, proceeding or suit against the State of New York, NYSCC and the New York State Thruway Authority for NMPC's response costs related to the Existing Contamination. The aforesaid release shall be provided in writing and shall include the same reservations as specified in subparagraphs I.G.2.i, I.G.2.ii and I.G.2.iii.

H. If the Department is satisfied with the implementation of the Remediation Work Plan, any Department-approved modification to the Remediation Work Plan, and Department-approved details, documents, and specifications prepared by or on behalf of NMPC pursuant thereto, the Department shall provide NMPC with a written "no further action" letter substantially similar to the model letter attached to this Agreement and incorporated in this Agreement as Exhibit "D," and shall provide a copy of same to NYSCC and NYSDOT.

I. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department, the party seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph I.G or in a "no further action" letter issued under Subparagraph I.H of this Agreement shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Covered Contamination.

2. Except as above provided in Subparagraph I.G of this Agreement and in the "no further action" letter issued under Subparagraph I.H of this Agreement, nothing in this Agreement is intended as a release, forbearance, or covenant not to sue for any claim or cause of

action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Department, or the State of New York may have against any person, firm, corporation, or other entity not a party to this Agreement. In addition, notwithstanding any other provision in this Paragraph I of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph I.G and in the "no further action" letter issued under Subparagraph I.H of this Agreement shall not extend to i) NYSDOT, ii) NYSCC or iii) to parties (other than NMPC) that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

## II. Interim Remedial Measures

A. On March 26, 1999, NMPC submitted for approval by the Department a draft Interim Remedial Investigation Work Plan designed to provide additional data necessary to prepare an IRM Work Plan, the purpose of which is to remediate the central area of the proposed park so that construction of what is referred to as the Plaza Area may recommence by August 1, 1999. This proposed IRM shall also address a below-grade tar/water separation located to the west of the Riverlink Plaza Area. This IRM shall be referred to as the "Riverlink Park-Plaza Area IRM" and shall be carried out in accordance with the procedure specified in Subparagraph II.B through II.F below.

B. Volunteer, either individually or collectively, may propose one or more IRMs for the Site. In proposing each IRM, the proponent shall submit to the Department, (and, if applicable, to each non-submitting Volunteer) an IRM Work Plan that includes a chronological description of the anticipated IRM activities together with a schedule for performance of those activities.

C. Upon the Department's determination that the proposal is an appropriate IRM and upon the Department's approval of such IRM Work Plan, the IRM Work Plan shall be incorporated into and become an enforceable part of this Agreement; and the proponent shall submit to the Department (and, if applicable, to each non-submitting Volunteer) for their review and (as appropriate) the Department's approval, in accordance with the schedule contained in the Department-approved IRM Work Plan, detailed documents and specifications prepared, signed, and sealed by a professional engineer to implement the Department-approved IRM. Such documents shall include:

1. A chronological description of the anticipated investigation activities together with a schedule for the performance of these activities.
2. A Sampling and Analysis Plan that shall include:
  - i. A quality assurance project plan that describes the quality assurance and quality control protocols necessary to achieve the initial data quality objectives. This plan shall designate a data validation expert and must describe such individual's qualifications and experience.



ii. A field sampling plan that defines sampling and data gathering methods in a manner consistent with the "Field Methods Compendium," OSWER Directive 9285.2-11 (draft June 1993), as supplemented by the Department.

iii. A health and safety plan to protect persons at and in the vicinity of the Site during the performance of the Investigation Work Plan which shall be prepared in accordance with 29 CFR 1910 and all other applicable standards by a certified health and safety professional. Respondent shall add supplemental items to this plan necessary to ensure the health and safety of all persons at or in the vicinity of the Site during the performance of any work pursuant to this Agreement.

iv. A citizen participation plan that is consistent with the Department's requirements under the Voluntary Cleanup Program and the citizen participation plan developed under the Investigation Work Plan.

The proponent shall then carry out such IRM in accordance with the requirements of the Department-approved IRM Work Plan, detailed documents and specifications, and this Agreement. NMPC shall notify the Department (and each non-submitting Volunteer) of any significant difficulties that may be encountered in implementing the Department-approved IRM Work Plan, detailed documents, or specifications and shall not modify any obligation unless first approved by the Department.

D. During implementation of all construction activities identified in the Department-approved IRM Work Plan, the proponent shall have on-Site a full-time representative who is qualified to supervise the work done. Such representative may be an employee of the performing Volunteer's contractor as approved by the Department pursuant to Paragraph XIII of this Agreement.

E. Within the schedule contained in the Department-approved IRM Work Plan, the proponent shall submit to the Department (and each non-submitting Volunteer) a Final IRM Engineering Report prepared by a professional engineer that includes a certification by that individual that all activities that comprised the Department-approved IRM were completed in accordance with the Department-approved IRM Work Plan and this Agreement.

1. If the performance of the Department-approved IRM encompassed construction activities, the Final IRM Engineering Report also shall include a detailed post-remedial operation and maintenance plan ("IRM O&M Plan"); "as-built" drawings and a Final IRM Engineering Report (each including all changes made to the Remedial Design during construction); and a certification by a professional engineer that the Department-approved IRM was implemented and all construction activities were completed in accordance with the Department-approved detailed documents and specifications for the Department-approved IRM and all such activities were personally witnessed by him or her or by a person under his or her direct supervision. The IRM O&M Plan, "as built" drawings, Final IRM Engineering Report, and certification must be prepared, signed, and sealed by a professional engineer.

2. Upon the Department's approval of the IRM O&M Plan, the proponent shall implement the IRM O&M Plan in accordance with the requirements of the Department-approved IRM O&M Plan.

F. After receipt of the Final IRM Engineering Report and certification, the Department shall notify the proponent in writing whether the Department is satisfied that the Department-approved IRM was completed in compliance with the Department-approved IRM Work Plan and design.

### III. Progress Reports and Meetings

A. NMPC shall submit to the parties identified in Subparagraphs XII.A.1 and XII.A.2 in the numbers specified in those Subparagraphs copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;
2. include all results of sampling and tests and all other data received or generated by NMPC or NMPC's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by NMPC;
3. identify all work plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous month;
4. describe all actions, including, but not limited to, data collection and implementation of either the Investigation Work Plan, the Remediation Work Plan or the O&M Plan, that are scheduled for the next month and provide other information relating to the progress at the Site;
5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of NMPC's obligations under this Agreement, and efforts made to mitigate those delays or anticipated delays; and
6. include any modifications to the Investigation Work Plan, the Remediation Work Plan or the O&M Plan that NMPC has proposed to the Department and any that the Department has approved.

B. NMPC shall submit these progress reports by the tenth day of every month following the effective date of this Agreement; and NMPC's obligation to submit the progress reports shall terminate upon its receipt of the written satisfaction notification identified in Subparagraph I.G.2 of this Agreement approving NMPC's Final Remedial Action Engineering Report concerning the Remediation Work Plan's implementation. However, NMPC shall



continue to submit reports concerning the implementation of any O&M Plan that may be required under this Agreement, in accordance with that Plan's requirements.

C. NMPC also shall allow the Department, NYSDOT and NYSCC to attend, and shall provide the Department, NYSDOT and NYSCC at least five days advance notice of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting. In the case of the implementation of an IRM Work Plan, the proponent shall allow the Department and all other parties to this Agreement to attend, and shall provide the Department and all other parties to this Agreement at least five 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 made pursuant to this Agreement 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 Agreement and with generally accepted technical and scientific principles. The Department shall use its best efforts to notify NMPC, or the proponent in the case of an IRM submittal, in writing, no earlier than 15 days after its receipt, of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. i. If the Department disapproves a submittal, it shall so notify NMPC, or the proponent in the case of IRM submittal, in writing and shall specify the reasons for its disapproval and may request NMPC, or the proponent in the case of an IRM submittal, to modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Investigation Work Plan, the Remediation Work Plan, the IRM Work Plan or the O&M Plan. Within 30 days after receiving written notice that the submittal has been disapproved, a revised submittal shall be made to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

ii. After receipt of the revised submittal, the Department shall notify NMPC, or the proponent in the case of an IRM submittal, of its approval or disapproval. If the Department disapproves the revised submittal, the parties may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to their right to contest the same. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

B. Within 30 days after receipt of written notice of the Department's approval of the Final IRM Engineering Report, NMPC, or the Volunteer otherwise responsible for implementation of the IRM, shall submit to the Department one microfilm copy (16 millimeter roll film M type cartridge) of that report and all other Department-approved drawings and submittals. Such submission shall be made to:

Director, Division of Environmental Remediation  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, New York 12233-7010

V. Enforcement

A. This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York.

B. Volunteer shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Volunteer's reasonable control ("force majeure event"). Volunteer shall, within five working days of when it obtains knowledge of any such force majeure event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B of this Agreement.

VI. Entry upon Site

NYSDOT and NYSCC hereby consent upon reasonable notice under the circumstances presented to the entry upon the Site or areas in the vicinity of the Site which may be under the control of NYSDOT or NYSCC by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the matters addressed in the Investigation Work Plan, the Remediation Work Plan or the O&M Plan (if necessary) as well as NMPC, NMPC's employees, consultants, contractors and agents for purposes of inspection, sampling, and testing, and remedial activities. NYSDOT and NYSCC also consent to the Department's entry as herein set forth for the additional purpose of ensuring NMPC's compliance with this Agreement. Each of the parties agree not to interfere with any other party while performing activities at the Site under this Agreement except as otherwise provided under this Paragraph VI. The Department shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Upon request, NMPC 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 Agreement and to job meetings.

Notwithstanding, NYSDOT shall have full access to the Site at all times and shall have the ability to require that work being conducted by any Volunteer pursuant to this Agreement be suspended and order changes to the work being performed under this Agreement, subject to the Department's approval, for the sole purpose of preserving and protecting the integrity of the



highway facility which crosses the Site on the structure. Further, NYSCC shall have access to the Site and shall have the ability to require that work being conducted by any Volunteer pursuant to this Agreement be suspended and require changes to the work being performed under this Agreement, subject to the Department's approval, for the sole purpose of preserving and protecting the integrity of the terminal wall and tie back system on the NYSCC property.

#### VII. Payment of Departments of Environmental Conservation and Health Costs

Paragraph XII of Department Order Index No. D0-0001-9210 is hereby revised to allow the Department to draw from the interest-bearing account described in that paragraph to pay for environmental monitors and all other State expenses, except for expenses incurred by NYSDOT, incurred for work related to the Site to the effective date of this Agreement, as well as for negotiating this Agreement, reviewing and revising submittals made pursuant to this Agreement, collecting and analyzing samples, and administrative costs associated with this Agreement.

#### VIII. Department Reservation of Rights

A. Except as provided in Subparagraph I.G.2 of this Agreement and in any "no further action" letter issued under Subparagraph I.H of this Agreement, nothing contained in this Agreement 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 right to recover natural resources damages) with respect to any party, including Volunteer.

B. Nothing contained in this Agreement shall prejudice any rights of the Department to take any investigatory or remedial action it may deem necessary.

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

D. Nothing contained in this Agreement shall be construed to affect the Department's right to terminate this Agreement at any time during its implementation if Volunteer fails to comply substantially with this Agreement's terms and conditions.

E. Except as otherwise provided in this Agreement, Volunteer specifically reserves all defenses Volunteer may have under applicable law respecting any Departmental assertion of remedial liability against Volunteer; and reserves all rights Volunteer may have respecting the enforcement of this Agreement, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Agreement or Volunteer's compliance with this Agreement shall not be construed as an admission of liability, fault, or wrongdoing by Volunteer, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

IX. Indemnification

NMPC shall indemnify and hold the Department, the State of New York, NYSCC, the New York State Thruway Authority and each of their respective 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 Agreement by NMPC and/or any of NMPC's members, partners, employees, servants, agents, successors, and assigns. However, the NMPC shall not be required to indemnify the State or NYSCC for malicious, intentional or grossly negligent acts by any of the State's or NYSCC's representatives or employees.

X. Notice of Sale or Conveyance

A. Within 30 days after the effective date of this Agreement, NYSDOT shall

1. file the Notice of Agreement, which is attached to this Agreement as Exhibit "E," with the Montgomery County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement and
2. provide the Department with evidence of such filing.

NYSDOT may terminate the Notice when the Department notifies Volunteer in writing pursuant to Subparagraph I.G.2 of this Agreement that the Department is satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Remediation Work Plan have been reached and that the O&M Plan has been successfully implemented.

B. If NYSDOT proposes to convey the whole or any part of NYSDOT's ownership interest in the Site, NYSDOT 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 Agreement.

XI. Deed Restriction

A. Within 30 days of NYSDOT's receipt of the Department's notification pursuant to Subparagraph I.F.2 of this Agreement approving NMPC's Final Remedial Action Engineering Report concerning the Remediation Work Plan, NYSDOT shall record an instrument with the Montgomery County Clerk, to run with the land, that:

1. shall prohibit the Site from ever being used for purposes other than for the Contemplated Use without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;
2. shall prohibit the use of the groundwater underlying the Site without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the



user first obtains permission to do so from the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;

3. shall provide that NYSDOT, on behalf of itself and its successors and assigns, hereby consents to the enforcement by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department, of the prohibitions and restrictions that this Paragraph XI requires to be recorded, and hereby covenants not to contest such enforcement.

B. Within 30 days of NYSCC's receipt of the Department's notification pursuant to Subparagraph I.F.2 of this Agreement approving NMPC's Final Remedial Action Engineering Report concerning the Remediation Work Plan, NYSCC shall record an instrument with the Montgomery County Clerk, to run with the land, that:

1. shall prohibit the restricted area of NYSCC's property as agreed to by the parties from ever being used for any use other than park or commercial purposes without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;

2. shall prohibit the use of the groundwater underlying such restricted area unless the user first obtains permission to do so from the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;

3. there shall be no use, development, construction, excavation or other disturbance of the soil in such restricted area below the permeable barrier at the two (2) foot level unless a written Health and Safety Plan developed in accordance with all local, State and Federal regulations and laws is implemented to address worker exposure for PAH and BTEX. Notice shall be provided to both the New York State Department of Health and the Department at least ten (10) days prior to any use, development, construction, excavation or other disturbance of the soil in the restricted area. A waiver of these requirements may be sought, on a project-by-project basis, if the demonstration is made that there will no potential worker exposure to PAH and BTEX.

4. shall require NYSCC and NYSCC's successors and assigns to continue in full force and effect any and all institutional controls and engineering controls that the Department may require be put into place and maintained; and

5. shall provide that NYSCC, on behalf of itself and its successors and assigns, hereby consents to the enforcement by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the

Department, of the prohibitions and restrictions that this Paragraph XI requires to be recorded, and hereby covenants not to contest such enforcement.

6. compliance with the foregoing restrictions on the restricted area may be waived, modified or excused with the prior written consent of the New York State Department of Health and the Department, which consent shall not be unreasonably withheld and shall be annexed thereto.

C. Within 30 days after NYSDOT's and NYSCC's receipt of the Department's notification pursuant to Subparagraph I.G.2 of this Agreement approving NMPC's Final Remedial Action Engineering Report concerning the Remediation Work Plan, NYSDOT and NYSCC shall provide the Department with a copy of such instrument certified by the Montgomery County Clerk to be a true and faithful copy of the instrument as recorded in the Office of the Montgomery County Clerk.

## XII. Communications

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

1. Communication from Volunteer shall be sent to:

James VanHoesen, P.E. Project Manager  
NYS Department of Environmental Conservation  
50 Wolf Road - Rm. 267  
Albany, NY 12233-7010

with copies to:

G. Anders Carlson, Ph.D.  
Director, Bureau of Environmental Exposure Investigation  
New York State Department of Health  
Flanigan Square  
547 River Street  
Troy, New York 12180-2216

Dale A. Desnoyers, Esq.  
New York State Department of Environmental Conservation  
50 Wolf Road, Room 410A  
Albany, New York 12233-5550

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

- Four copies (one unbound) to James VanHoesen, P.E.



- Two copies to Dr. Carlson

2. Communication to be made from the Department to Volunteer shall be sent to:

NMPC

William C. Weiss/John T. Parkinson  
System Law Department (A-3)  
Niagara Mohawk Power Corporation  
300 Erie Blvd. W.  
Syracuse, NY 13202

NYSDOT

Alan N. Bloom  
Regional Director  
New York State Department of Transportation  
Region 2  
Utica State Office Building  
Genesee Street  
Utica, NY 13501

Jeanne L. Hewitt  
Environmental Analysis Bureau  
New York State Department of Transportation  
Building 5, Room 303  
1220 Washington Avenue  
Albany, NY 12232

NYSCC

Shannon Hoffman, Esq.  
New York State Canal Corporation  
200 Southern Blvd.  
P.O. Box 189  
Albany, NY 12201-0189

John Dergosits, P.E.  
New York State Canal Corporation  
200 Southern Blvd.  
P.O. Box 189  
Albany, NY 12201-0189

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other given in accordance with this Paragraph XII.

### XIII. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that Volunteer has fully and accurately disclosed to the Department all information known to Volunteer and all information in the possession or control of Volunteer's officers, directors, employees, contractors, and agents which relates in any way to the contamination existing on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants, at or from the Site and to their application for this Agreement.

2. If the Department determines that information Volunteer provided and certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void *ab initio* except with respect to the provisions of Paragraphs VII and IX and except with respect to the Department's right to enforce those obligations under this Agreement, and the Department shall reserve all rights that it may have.

B. Any party performing work pursuant to this Agreement 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 Agreement. The responsibility for the performance of the professionals retained shall rest solely with the party retaining such professionals.

C. The Department, NYSDOT, and NYSCC shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by NMPC, and the Department, NYSDOT, and NYSCC also shall have the right to take their own samples in which case NMPC shall have the same right to obtain split samples, duplicate samples, or both. NMPC, or the proponent of an IRM, shall make available to the Department, and all other parties to this Agreement the results of all sampling and/or tests or other data generated with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement.

D. Any party conducting work under this Agreement shall notify the Department and the other parties to this Agreement at least five working days in advance of any field activities to be conducted pursuant to this Agreement.

E. 1. Subject to Subparagraph XIII.E.2 of this Agreement, NMPC, or the proponent of an IRM, shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform the obligations under this Agreement.

2. In carrying out the activities identified in the Investigation Work Plan, the Remediation Work Plan, the IRM Work Plan or the O&M Plan, the Department, NYSDOT and NYSCC may exempt a party from the requirement to obtain any Department, NYSDOT or NYSCC permit for any activity that is conducted on the Site, or on property owned by the State of New York or NYSCC, and that the Department, NYSDOT or NYSCC, respectively for each



of their permits, determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. 1. Volunteer, Volunteer's officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's lessees, successors, and assigns shall be bound by this Agreement.

2. Any change in ownership or corporate status of NMPC including, but not limited to, any transfer of assets or real or personal property, shall in no way alter NMPC's responsibilities under this Agreement.

3. Volunteer's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Agreement in the performance of their designated duties on behalf of Volunteer.

G. A copy of this Agreement shall be provided by the contracting party to each contractor hired to perform work required by this Agreement and to each person representing a party to this Agreement with respect to the work required by this Agreement and each party to this Agreement shall condition all contracts entered into by such party in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Each party to this Agreement shall provide written notice of this Agreement to all subcontractors hired on their behalf to perform any portion of the work required by this Agreement. Each party to this Agreement shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the work in satisfaction of the requirements of this Agreement.

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

I. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement 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 Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by the Volunteer, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to all parties listed under Subparagraph XII.A.

J. This Agreement constitutes an exercise of the Department's prosecutorial discretion and accordingly, the remedial activities to be undertaken under the terms of this

Agreement are not subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations, 6 NYCRR Part 617.

K. Except as to matters specifically covered by and addressed through implementation of this Agreement, the provisions of this Agreement do not constitute and shall not be deemed a waiver of any right each respective Volunteer otherwise may have to seek and obtain contribution and/or indemnification from the other respective Volunteer entities under this Agreement for payments made previously or in the future for response costs at the Site. Further, the provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteer otherwise may have to seek and obtain contribution and/or indemnification from potentially responsible parties or their insurers, or Volunteer's insurers, for payments made previously or in the future for response costs.

L. Volunteer and Volunteer's employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the Site.

M. The effective date of this Agreement shall be the date it is signed by the Commissioner or his designee.

N. This Agreement may be executed in counterparts, all of which taken together shall constitute the original.

DATED: November 26, 1999

JOHN P. CAHILL, COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

A handwritten signature in cursive script, reading "John P. Cahill", is written over a horizontal line.





CONSENT BY NYSCC

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

NYS Canal Corporation

By: John R. Platt  
John R. Platt  
Executive Director

Date: August 17, 1999

STATE OF NEW YORK    )  
                                  : ss.:  
COUNTY OF ALBANY    )

On this 17<sup>th</sup> day of August, in the year 1999 before me, the undersigned, a Notary Public in and for said State, personally appeared John Platt personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person on behalf of which the individual acted, executed the instrument.

Shannon L. Hoffman  
Notary Public

SHANNON L. HOFFMAN  
Notary Public, State of New York  
No. 02HO6006213  
Qualified in Albany County  
Registration Expires April 27, 2000





**EXHIBIT "A"**

**Map of Site**



**EXHIBIT "B"**

**Department-Approved Investigation Work Plan**

**EXHIBIT "C"**

**Department-Approved Remediation Work Plan**



## EXHIBIT "D"

### Assignable Release and Covenant Not To Sue

[On Department Letterhead]

[Insert Date]

Niagara Mohawk Power Corporation  
300 Erie Blvd. West  
Syracuse, New York 13202-4250

Unless otherwise specified in this letter, all terms used in this letter shall have the meaning assigned to them under the terms of the Voluntary Agreement entered into between the New York State Department of Environmental Conservation (the "Department"), New York State Department of Transportation ("NYSDOT"), New York State Canal Corporation ("NYSCC") and Niagara Mohawk Power Corporation ("NMPC") (NYSDOT, NYSCC and NMPC are collectively referred to as "Volunteer"), Index No. D4-0001-99-03 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Remediation Work Plan, covering the remediation of the Existing Contamination as defined in the Agreement at that property which was acquired by the State of New York in 1966 depicted on Map #100 as Parcel #126 in the City of Amsterdam, County of Montgomery and State of New York (the "Site") including the remediation of Existing Contamination off-Site, has been successfully implemented.

The Department, therefore, hereby releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against NMPC and NMPC's lessees and sublessees and NMPC's successors and assigns and their respective secured creditors, for the further investigation and remediation of the Site based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VII of the Agreement continue to be or have been made to the Department, and (b) NMPC and/or Volunteer's successors, or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any. Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to natural resource damages nor to any further investigation or remedial action the Department deems necessary:

- due to off-Site migration of contaminants related to the Existing Contamination resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential and to off-Site migration of petroleum, irrespective of whether the information available to Volunteer and the Department at the time of the development of the Remediation Work Plan disclosed the existence or potential existence of such off-Site migration;

- due to environmental conditions related to Existing Contamination at the Site that were unknown to the Department at the time of its approval of the Remediation Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;
- due to information received, in whole or in part, after the Department's approval of the Final Remedial Action Engineering Report, which indicates that the activities carried out in accordance with the Remediation Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;
- due to Volunteer's failure to implement the Agreement to the Department's satisfaction; or
- due to fraud committed, or mistake made, by Volunteer in demonstrating that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Remediation Work Plan were reached.

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to:

- contamination at the Site other than Existing Contamination;
- any party who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same established resulting solely from the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of this release, covenant not to sue, and forbearance shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Covered Contamination.

Notwithstanding any other provision in this release, covenant not to sue, and forbearance,

- if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this release shall be construed, or deemed, to preclude the State of New York from recovering such claim.
- except as provided in Subparagraph I.G of the Agreement and in this letter, nothing contained in the Agreement or in this letter shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to NMPC or any other party, including Volunteer.



- nothing contained in this letter shall prejudice any rights of the Department to take any investigatory or remedial action it may deem necessary if Volunteer fails to comply with the Agreement or if contamination other than Existing Contamination or Covered Contamination is encountered at the Site.
- nothing contained in this letter shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.
- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement at any time during its implementation if Volunteer fails to comply substantially with the Agreement's terms and conditions.

In conclusion, the Department is pleased to be part of this effort to return the Site to productive use of benefit to the entire community.

Dated:

, 1999

JOHN P. CAHILL, COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By: \_\_\_\_\_

Its: \_\_\_\_\_

Appendix "A"  
(to Exhibit "D")  
Map of the Site



Exhibit "E"

NOTICE OF AGREEMENT

This Notice is made as of the \_\_\_\_ day of \_\_\_\_\_, 19-- by the New York State Department of Transportation (NYSDOT) with respect to a parcel of real property which was acquired by the State of New York in 1966 depicted on Map #100 as Parcel #126 in the City of Amsterdam, County of Montgomery and State of New York as more particularly described on Appendix "A" attached hereto (the "Property"); and

WHEREAS, Niagara Mohawk Power Corporation (NMPC), the New York State Canal Corporation (NYSCC) and NYSDOT, by authorized signature, entered into an agreement with the Department, Index # D4-0001-99-03 ( the "Agreement"), concerning the remediation of contamination present on the Property, which Agreement was signed by the Commissioner of Environmental Conservation on \_\_\_\_\_; and

WHEREAS, in return for the remediation of the Property pursuant to the Agreement to the satisfaction of the Department, the Department will provide NMPC and NMPC's successors and assigns, including its respective secured creditors, with a release, covenant not to sue, and forbearance from bringing any action, proceeding, or suit related to the Site's further investigation or remediation, subject to certain reservations set forth in the Agreement; and

WHEREAS, pursuant to the Agreement, NYSDOT agreed that it would give notice of the Agreement to all parties who may acquire any interest in the Property by filing this Notice with the Montgomery County Clerk,

NOW, THEREFORE, NYSDOT, on behalf of the People of the State of New York declares that:

1. This Notice of the Agreement is hereby given to all parties who may acquire any interest in the Property; and that
2. This Notice shall terminate upon the filing by NYSDOT, or it's successors and assigns, of a termination of notice of Agreement after having first received approval to do so from the New York State Department of Environmental Conservation.

IN WITNESS WHEREOF, NYSDOT has executed this Notice of Agreement by its duly authorized representative.

NYS Department of Transportation

Dated:

By: \_\_\_\_\_

Its: \_\_\_\_\_

**Appendix "A"**

**(to Exhibit "E")**

**Map of the Property**



