

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation
of an Interim Remedial Measure for an
Inactive Hazardous Waste
Disposal Site under Article 27
Title 13 of the Environmental
Conservation Law by:

APPLE VALLEY CORP.,

Respondent.

ORDER ON CONSENT

Index # A4-0499-1003

Site # 3-14-084

WHEREAS,

1. A. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of New York State's Environmental Conservation Law ("ECL") entitled "Inactive Hazardous Waste Disposal Sites." The Department asserts that any person under order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the Inactive Hazardous Waste Disposal Site Remedial Program committed to under order. The Department asserts that ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative, and/or criminal sanctions.

B. The Department also asserts that it has the authority, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. *See, e.g.*, ECL 3-0301.1.i.

C. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13, and ECL 3-0301.

2. Apple Valley Corp. ("Respondent") is the owner of the property which is the subject of this Order. The property is located at the intersection of New York State Route 55 and Titusville Road in the Town of LaGrange, New York (hereinafter referred to as the "Site").

3. The Site is listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 314084 with a Classification "2" pursuant to ECL 27-1305.

4. Respondent consents to the Department's 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, or (ii) an acknowledgment that there has been a release or threatened release of hazardous waste or that a release or threatened release of hazardous waste at or from the Site constitutes a significant threat to the public health or environment.

5. The Site is the subject of an Administrative Order on Consent Index Number II-CERCLA-10224 issued by the United States Environmental Protection Agency Region II (hereinafter referred to as "EPA") on September 30, 1991 to James A. Klein, the predecessor in interest to Apple Valley Corp. as the owner of the Site. Attached hereto as Exhibit "A" is a copy of the EPA Administrative Order on Consent. Pursuant to the EPA Administrative Order on Consent, James A. Klein and his successor, Apple Valley Corp. undertook a response action at the Site which *inter alia* included the installation and operation and maintenance of a system of extraction wells for the removal and treatment of contaminated groundwater.

6. The parties recognize that implementation of this Order will expedite the cleanup of the Site initiated and conducted pursuant to the EPA Administrative Order on Consent and may avoid prolonged and complicated litigation between the parties, and that this Order is mutually acceptable, fair, reasonable, and in the public interest.

7. Solely with regard to the matters set forth below, Respondent hereby waives its right to a hearing herein as provided by law, consents to the issuance 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.

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

I. Performance and Reporting of Work Plan

A. Work Plan

Respondent shall implement an Interim Remedial Measure (IRM), together with any necessary operation, monitoring and maintenance of such program, pursuant to the Department-approved Work Plan ("Work Plan") attached hereto as Exhibit "B" and incorporated into and made an enforceable part of this Order.

During all field activities, Respondent shall have on-Site a representative who is qualified to supervise the activities undertaken. Such representative may be an employee or a consultant retained by Respondent to perform such supervision.

B. Revisions to Work Plans

The Department shall notify Respondent in writing if the Department determines that any element of the Department-approved IRM Work Plan needs to be modified in order to achieve the objectives of the Work Plan or to ensure that the Remedial Program otherwise protects human health and the environment. Upon receipt of such notification, Respondent shall, subject to Respondent's right to invoke dispute resolution pursuant to Paragraph XII, submit a supplement to the IRM Work Plan for such requested work to the Department within 30 Days after the date of the Department's written notice pursuant to this Subparagraph.

C. Submission of Final Reports and Annual Reports

1. In accordance with the schedule contained in the Work Plan, Respondent shall submit a final report that includes the caption of that Work Plan on the cover page and a certification that all requirements of the Work Plan have been complied with and all activities have been performed in full accordance with such Work Plan. Such certification shall be by a Professional Engineer.

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

3. In the event that the IRM Work Plan for the Site requires operation, maintenance, and monitoring (OM&M), including reliance upon institutional or engineering controls, Respondent shall submit an annual report by the 1st Day of the month following the anniversary of the start of the OM&M. Respondent shall submit such annual report until this Order is terminated in accordance with the provisions hereof. Such annual report shall be signed by a Professional Engineer or by such other expert as the Department may find acceptable and shall contain a certification under penalty of perjury that any institutional and/or engineering controls required by this Order are unchanged from the previous certification and that nothing has occurred that would impair the effectiveness of such control or constitute a violation of or failure to comply with the approved OM&M Plan. Respondent shall notify the Department within twenty-four (24) hours of discovery of any upset, interruption, or termination of such controls that occurs without the prior approval of the Department. During such upset, interruption, or termination of controls, Respondent shall take all actions required by the Department to maintain conditions at the Site that achieve the objectives of the Remedial Program and are protective of public health and the environment. An explanation of such upset, interruption, or termination of one or more controls and the steps taken in response shall be included in the foregoing notice and in the annual report required by this Subparagraph, as well as in any progress reports required by Paragraph II. 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.

D. Review of Submittals other than Progress Reports and Health and Safety Plans

1. The Department shall make good faith efforts to review and respond in writing to each of the submittals Respondent makes pursuant to this Order within 60 days. The Department's response shall include an approval or disapproval of the submittal in whole or in part. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

2. If the Department disapproves a submittal, it shall specify the reasons for its disapproval. Within 30 days after the date of the Department's written notice that Respondent's submittal has been disapproved, Respondent shall elect, in writing, to either (i) modify the submittal to address the Department's comments or (ii) invoke dispute resolution pursuant to Paragraph XII. If Respondent elects to modify the submittal, Respondent shall, within 60 days after such election, make a revised submittal that addresses all of the Department's stated reasons for disapproving the first submittal. 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 Respondent invokes dispute resolution pursuant to Paragraph X and its position prevails.

3. Within 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.

D. Release and Covenant Not to Sue

Upon the Department's approval of the IRM Work Plan final report evidencing that no further remedial action (other than OM&M activities) is required to meet the goals of the Remedial Program, then, except for the provisions of Paragraphs VI and VIII, and except for the future OM&M of the Site and any Natural Resource Damage claims, such acceptance shall constitute a release and covenant not to sue for each and every claim, demand, remedy, or action whatsoever against Respondent, its directors, officers, employees, agents, servants, successors, and assigns (except successors and assigns who were responsible under law for the development and implementation of a Remedial Program at the Site prior to the effective date of this Order), and their respective secured creditors, which the Department has or may have pursuant to Article 27, Title 13 of the ECL or pursuant to any other provision of statutory or common law involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes (or other contaminants remediated by Respondent to the Department's satisfaction pursuant to the ROD or Work Plans) at the Site; provided, however, that the Department specifically reserves all of its rights concerning, and any such release and covenant not to sue shall not extend to any further investigation or remediation the Department deems necessary due to environmental conditions on-Site or off-Site which are related to the disposal of hazardous wastes at the Site and which indicate that the Remedial Program is not protective of public health and/or the environment. The Department shall notify Respondent of such environmental conditions or information and its basis for determining that the Remedial Program is not protective of public health and/or the environment. This release and covenant not to sue shall be null and void, *ab initio*, in the event of fraud relating to the execution or implementation of this Order or in the event of Respondent's failure to materially comply with any provision of this Order. The Department's determination that Respondent has committed fraud or has materially failed to comply with this Order shall be subject to dispute resolution.

Nothing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that (i) Respondent may have against anyone other than the Department, and (ii) the Department may have against anyone other than Respondent, its directors, officers, employees, agents, and servants, and those successors and assigns of Respondent that were not responsible under law for the development and implementation of a Remedial Program at the Site prior to the effective date of this Order, and their respective secured creditors.

II. Progress Reports

Respondent shall submit written progress reports to the parties identified in Subparagraph IX.A.1 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, unless a different frequency is set forth in a Work Plan. Such reports shall, at a minimum, include: all actions taken pursuant to this Order during the reporting period and those anticipated for the upcoming reporting period; all approved modifications to work plans and/or schedules; all results of sampling and tests and all other data received or generated by or on behalf of Respondent in connection with the Site, during the reporting period, including quality assurance/quality control information; and information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule, efforts made to mitigate such delays, and information regarding activities undertaken in support of the Citizen Participation Plan during the reporting period and those anticipated for the upcoming reporting period.

III. 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 Section 375-1.2(d). Nothing herein abridges Respondent's right to contest, defend against, dispute, or disprove any such claim, assertion, or allegation that it has violated this Order.

2. Within thirty (30) Days after the effective date of this Order, Respondent may elect, in writing, to opt out of the application of statutory penalties and, in lieu thereof, to have the following stipulated penalties apply in the event of Respondent's failure to comply with this Order:

<u>Period of Non-Compliance</u>	<u>Penalty Per Day</u>
1st through 15th day	\$ 500.00
16th through 30th day	\$ 1,000.00
31st day and thereafter	\$ 1,500.00

3. 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 event arising from causes beyond the reasonable control of Respondent, of any entity controlled by Respondent, and of Respondent's contractors, that delays or prevents the performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation ("Force Majeure Event"). The requirement that Respondent exercise best efforts to fulfill the obligation includes using 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 seven (7) Days after it obtains knowledge of any Force Majeure Event. Respondent shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such seven (7) 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 III.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 such time as is reasonably necessary to complete those obligations.

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

IV. 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 office space at the Site, including access to a telephone, to the extent available; 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. In the event Respondent is unable to obtain any authorization from third-party property owners necessary to perform its obligations under this Order, the Department may, consistent with its legal authority, assist in obtaining such authorizations.

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.

V. Payment of State Costs

A. Respondent shall reimburse the Department for costs incurred by the Department in association with the oversight work performed in connection with the implementation of the IRM plan Work Plan at the Site. Within forty-five (45) Days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money that shall represent reimbursement for State Costs for work performed in connection with the IRM Work Plan at the Site, through and including the Termination Date.

B. Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports. 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. Such invoice shall be sent to Respondent at the following address:

Apple Valley Corp.
1070 Route 9
Fishkill, New York 12524

D. Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-7010.

E. Each party shall provide written notification to the other within ninety (90) Days of any change in the foregoing addresses.

F. Respondent may contest, in writing, invoiced costs under Subparagraph V.B if it believes that (i) the cost documentation contains clerical, mathematical, or accounting errors; (ii) the costs are not related to the State's activities with respect to the Remedial Program for the Site; or (iii) the Department is not otherwise legally entitled to such costs. If Respondent objects to an invoiced cost, Respondent shall pay all costs not objected to within the time frame set forth in Subparagraph V.B and shall, within thirty (30) Days after its receipt of an invoice, identify, in writing, all costs objected to and the basis of the objection. This objection shall be filed with the BPM Director. The BPM Director or the BPM Director's designee shall have the authority to relieve Respondent of the obligation to pay invalid costs. Within forty-five (45) Days after the date of the Department's determination of the

objection, Respondent shall either pay to the Department the amount which the BPM Director or the BPM Director's designee determines Respondent is obligated to pay or commence an action or proceeding seeking appropriate judicial relief.

G. In the event any instrument for the payment of any money due under this Order fails of collection, such failure of collection shall constitute a violation of this Order, provided that (i) the Department gives Respondent written notice of such failure of collection, and (ii) the Department does not receive a certified check or bank check in the amount of the uncollected funds within fourteen (14) Days after the date of the Department's written notification.

VI. Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights 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.

VII. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all third-party claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns except for liability arising from (i) vehicular accidents occurring during travel to or from the Site, or (ii) willful, wanton, or malicious acts or omissions, and acts or omissions constituting gross negligence or criminal behavior by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Order. The Department shall provide Respondent with written notice no less than thirty (30) Days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

VIII. Public Notice

A. Within 30 days after the effective date of this Order, Respondent shall cause to be filed a Department-approved Notice of Order, which Notice shall be substantially similar to the Notice of Order attached to this Order as Exhibit "C," with the recording officer of the county wherein the Site is located to give all parties who may acquire any interest in the Site notice of this Order. Within 60 days of such filing, Respondent shall also 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 convey the whole or any part of Respondent's ownership interest in the Site, or becomes aware of such conveyance, Respondent shall, not fewer than 45 days before the date of conveyance, or within 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.

IX. Communications

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

1. Communication from Respondent shall be sent to:

Gary Litwin
Bureau of Environmental Exposure Investigation
New York State Department of Health
547 River Street
Troy, New York 12180-2216
Note: two copies of work plans are required to be sent, and

Michael MacCabe
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7016

Anthony Quartararo, Esq
NYSDEC
625 Broadway
Albany, New York 12233-5500
Note: correspondence only required for attorney

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

David A. Engel, Esq.
Tuczinski, Cavalier, Burstein & Collura, P.C.
90 State Street, Suite 1011
Albany, New York 12207

Mark Millspaugh, P.E.
Sterling Environmental
Engineering P.C.
One Columbia Circle
Albany, New York 12203

James A. Klein
Apple Valley Corp.
1070 Route 9
Fishkill, New York 12524

Jon Conrad
Conrad Geoscience
Raymond Avenue
Poughkeepsie, NY 12603

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

C. Each party shall notify the other within 90 Days after any change in the addresses in this Paragraph IX or in Paragraph V.

X. Dispute Resolution

A. If Respondent disagrees with the Department's notice under (i) Subparagraph I.B requesting supplemental Work Plans; (ii) Subparagraph I.C disapproving a submittal, a proposed Work Plan, or a final report; (iii) Subparagraph III.B rejecting Respondent's assertion of a Force Majeure Event; or (iv) Subparagraph XII.G.2.ii requesting modification of a time frame, Respondent may, within 30 days of its receipt of such notice, make a written request for informal negotiations with the Department in an effort to resolve the dispute. A copy of such request shall be sent by Respondent to the appropriate Remedial Bureau Chief in the Department's Central Office. The Department and Respondent shall consult together in good faith and exercise best efforts to resolve any differences or disputes without resort to the procedures described in Subparagraph X.B. The period for informal negotiations shall not exceed 30 days from the date of the Department's initial response to the Respondent's request for informal negotiations. If the parties cannot resolve a dispute by informal negotiations during this period, the Department's position shall be considered binding unless Respondent notifies the Department in writing within 30 days after the conclusion of the 30 day period for informal negotiations that it invokes the dispute resolution provisions provided under Subparagraph X.B.

B. 1. Respondent shall file with the Office of Hearings & Mediation ("OH&M") a request for formal dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis, or opinion supporting its position, and all supporting documentation upon which Respondent relies (hereinafter called the "Statement of Position"). A copy of such request and written statement shall be provided contemporaneously to the Director and to the parties listed under Subparagraph IX.A.1.

2. The Department shall serve its Statement of Position no later than 20 days after receipt of Respondent's Statement of Position.

3. Respondent shall have the burden of proving by substantial evidence that the Department's position does not have a rational basis and should not prevail. The OH&M may conduct meetings in person or via video or telephone conference, and may request additional information from either party if such activities will facilitate a resolution of the issues.

4. The OH&M shall prepare and submit a report and recommendation to the Director. The Director shall issue a final decision in a timely manner. The final decision shall constitute a final agency action and Respondent shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR provided that Respondent notifies the Department within 30 days after receipt of a copy of the final decision of its intent to commence an Article 78 proceeding and commences such proceeding within 60 days after receipt of a copy of the Director's final decision. Respondent shall be in violation of this Order if it fails to comply with the final decision within 45 days after the date of such final decision, or such other time period as may be provided in the final decision, unless it seeks judicial review of such decision within the 60 day period provided. In the event that Respondent seeks judicial review, Respondent shall be in violation of this Order if it fails to comply with the final Court Order or any settlement within 30 days after the effective date of such Order or settlement, unless otherwise directed by the Court. For purposes of this Subparagraph, a Court Order or settlement shall not be final until the time to perfect an appeal of same has expired.

5. The invocation of dispute resolution shall not extend, postpone, or modify Respondent's obligations under this Order with respect to any item not in dispute unless or until the Department agrees or a Court orders otherwise. Except as otherwise provided in this Order, the invocation of the procedures set forth in this Paragraph X shall constitute an election of remedies and such election shall constitute a waiver of any and all other administrative remedies which may otherwise be available to Respondent regarding the issue in dispute.

6. The Department shall keep an administrative record of any proceedings under this Paragraph XII that shall be available consistent with Article 6 of the Public Officers Law.

7. Nothing in this Paragraph X shall be construed as an agreement by the parties to resolve disputes through administrative proceedings pursuant to the State Administrative Procedure Act, the ECL, or 6 NYCRR Part 622 or Section 375-2.1.

8. 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.

XI. Termination of Order

A. This Order will terminate upon the Department's written determination that Respondent has completed all phases of the Interim Remedial Measures Work Plan (including OM&M), in which

event the termination shall be effective on the 5th Day after the date of the Department's approval of the final report relating to the final phase of the Remedial Program.

B. Notwithstanding the foregoing, the provisions contained in Paragraphs V and VII 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 Section 375-1.2(d), subjecting Respondent to penalties as provided under Paragraph IV so long as such obligations accrued on or prior to the Termination Date.

XII. Miscellaneous

A. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and third party data validators ("Respondent's Contractors") acceptable to the Department to perform its obligations under this Order. If the Department has not previously approved Respondent's Contractors for the work required by this Order, Respondent shall submit the Contractors' qualifications to the Department a minimum of 30 days before the start of any activities for which each such Contractor will be responsible. The Department's approval of each such Contractor shall be obtained prior to the start of work by that Contractor. The responsibility for the performance of all Contractors retained by Respondent shall rest solely with Respondent. Subject to the requirements of this Subparagraph, Respondent retains the right to select or change firms or individuals in its sole discretion.

B. Respondent shall allow the Department to attend and shall notify the Department at least 5 days in advance of any field activities as well as any pre-bid meetings, job progress meetings, the substantial completion meeting and inspection, and the final inspection and meeting; nothing in this Order shall be construed to require Respondent to allow the Department to attend portions of meetings where privileged matters are discussed.

C. Respondent shall use "best efforts" to obtain all Site access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls, or authorizations necessary to perform Respondent's obligations under this Order, except that the Department may exempt Respondent from the requirement to obtain any state or local permit or other authorization for any activity needed to implement this Order that the Department determines is conducted in a manner which satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit. If, despite Respondent's best efforts, any necessary Site access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls, or authorizations required to perform this Order are not obtained within 45 days after the effective date of this Order, or within 45 days after the date the Department notifies Respondent in writing that additional access beyond that previously secured is necessary, Respondent shall promptly notify the Department, and shall include in that notification a summary of the steps Respondent has taken to obtain access. The Department may, as it deems appropriate and within its authority, assist Respondent in obtaining access. If any interest in property is needed to implement an institutional control required by a Work Plan and such interest cannot be obtained, the Department may require Respondent to modify the Work Plan pursuant to Subparagraph II.C of this Order to reflect changes necessitated by the lack of access and/or approvals.

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

E. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and shall condition all contracts entered into pursuant to this Order upon performance in conformity with the terms of this Order. Respondent or its contractor(s) shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

F. 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.

G. 1. The terms of this Order shall constitute the complete and entire agreement between the Department and Respondent concerning 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) attached as Exhibit "B."

2. i. Except as set forth herein, if Respondent desires that any provision of this Order be changed, other than a provision of a Work Plan or a time frame, Respondent shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph IX.A.1. The Commissioner or the Commissioner's designee shall timely respond.

ii. Changes to a time frame set forth in this Order shall be accomplished by a written request to the Department's project attorney and project manager, which request shall be timely responded to in writing. The Department's decision relative to the request for a time frame change shall be subject to dispute resolution pursuant to Paragraph X.

H. To the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law § 15-108, and any other applicable law, Respondent shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2) for "matters addressed" pursuant to and in accordance with this Order. "Matters addressed" in this Order shall mean all response actions taken by Respondent to implement this Order for the Site and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Order, which costs have been paid by Respondent, including reimbursement of State Costs pursuant to this Order. Furthermore, to the extent authorized under 42 U.S.C. Section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response action and/or for some or all of the costs of such action, Respondent is entitled to seek contribution from any person except those who are entitled to contribution protection under 42 U.S.C. Section 9613(f)(2).

I. Unless otherwise expressly provided herein, terms used in this Order which are defined in ECL Article 27, Title 13, or in regulations promulgated under such statute shall have the meaning assigned to them under said statute or regulations. Whenever terms listed in the Glossary attached hereto are used in this Order or in the attached Exhibits, the definitions set forth in the Glossary shall apply. In the event of a conflict, the definition set forth in the Glossary shall control.

J. 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.

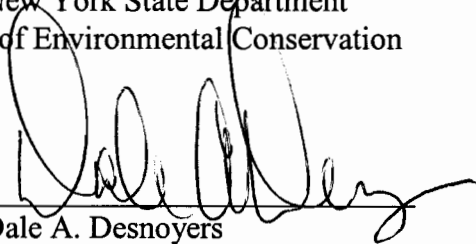
K. This Order may be executed for the convenience of the parties hereto, individually or in combination, in one or more counterparts, each of which for all purposes shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.

L. The effective date of this Order is the 10th Day after the date the Commissioner or the Commissioner's designee signs this Order.

DATED: NOV - 5 , 2004
Albany, New York

ERIN M. CROTTY
Commissioner
New York State Department
of Environmental Conservation

By:


Dale A. Desnoyers
Director
Division of Environmental Remediation

edms 80743

CONSENT BY RESPONDENT

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

By: [Signature]
Title: Pres.
Date: 10/19/04

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

On the 19 day of October, in the year 2004, before me personally came James A. Klein, to me known, who being duly sworn, did depose and say that he resides in Greenburgh NY; that he is the President of Apple Valley Corp., the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Signature]
Notary Public

RONALD A. MERMER
Notary Public, State of New York
No. 4721657
Qualified in Westchester County
Expires September 30, 2006

EXHIBIT "A"

Administrative Order on Consent with EPA

EXHIBIT "B"

Department-Approved IRM Work Plan

EXHIBIT "C"

NOTICE OF ORDER

Apple Valley Corporation ("Respondent") is subject to an Order On Consent, Index # A4-0499-1003 (the "Order") issued by the Commissioner of the New York State Department of Environmental Conservation (the "Department") under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York ("ECL") for a site located at New York State Route 55 and Titusville Road, Town of LaGrange, New York (the "Site").

The Site has been designated by the Department as an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301.2, and has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site # 3-14-084. The Department has classified the Site as a Class "2" site pursuant to ECL Section 27-1305.4.b. This classification means that the Department has determined that the Site presents a significant threat to the public health or environment. The Site is more particularly described in the legal description that is attached hereto as Schedule "A."

The purpose of the Order is to provide for the development and implementation of an inactive hazardous waste disposal site remedial program for the Site. The effective date of the Order was _____. A copy of the Order, as well as any and all Department-approved Work Plans under this Order can be reviewed by contacting the project manager, Michael MacCabe, at the Department's Division of Environmental Remediation offices located at 625 Broadway, Albany, NY.

This Notice of Order is being filed with the _____ recording officer in accordance with Paragraph IX of the Order to give all parties who may acquire any interest in the Site notice of this Order.

WHEREFORE, the undersigned has signed this Notice of Order in compliance with the terms of the Order.

By: _____

Title: _____

[acknowledgement]

Glossary of Terms

The following terms shall have the following meanings:

“BPM Director”: the Director of the Bureau of Program Management within the Division of Environmental Remediation.

“CERCLA”: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq.

“Day”: a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday or State holiday, the period shall run until the close of business of the next working day.

“Department”: the New York State Department of Environmental Conservation.

“Director”: the Division Director, Division of Environmental Remediation.

“Force Majeure Event”: an event which is brought on as a result 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 Respondent’s reasonable control.

“Inactive Hazardous Waste Disposal Site Remedial Program” or “Remedial Program”: activities undertaken to eliminate, remove, abate, control, or monitor existing health hazards, existing environmental hazards, potential health hazards, and/or potential environmental hazards in connection with the Site and all activities to manage wastes and contaminated materials at or removed from the Site. (See ECL 27-1301(3) and 6 NYCRR 375-1.3(m))

“Interim Remedial Measure” or “IRM”: a discrete set of activities, including removal activities, to address both emergency and non-emergency Site conditions, which can be undertaken without extensive investigation or evaluation, to prevent, mitigate, or remedy environmental damage or the consequences of environmental damage attributable to the Site. (See 6 NYCRR Part 375-1.3(n))

“National Contingency Plan” or “NCP”: the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, and codified at 40 C.F.R. Part 300, and any amendments thereto.

“OH&M”: the Office of Hearings and Mediation Services.

“OM&M”: post-construction operation, maintenance, and monitoring; the last phase of a remedial program, which continues until the remedial action objectives for the Site are met.

“Order”: this Order and all exhibits attached hereto.

“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.

“Record of Decision” or “ROD”: the document reflecting the Department’s selection of a remedy relative to the Site or any Operable Unit thereof. The ROD shall be attached to and made enforceable under this Order as Exhibit “L.”

“Spill Fund”: the New York State Environmental Protection and Spill Compensation Fund as established by Article 12, Part Three of the NL.

“State Costs”: all the State’s response expenses related to this Site, including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating, implementing, overseeing, administering, or enforcing this Order, and any other response costs as defined under CERCLA. Approved agency fringe benefit and indirect cost rates will be applied.

“Termination Date”: the date that this Order is terminated pursuant to Paragraph XIII.