

# New York State Department of Environmental Conservation

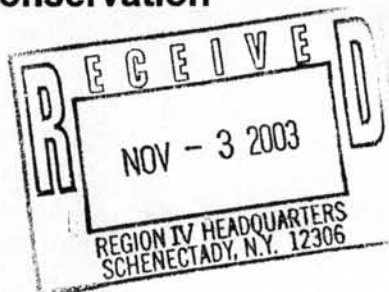
## Division of Environmental Enforcement

Central Field Unit, Room 627

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Erin M. Crotty  
Commissioner

October 31, 2003

### Via Fax and Regular Mail

Nancy Lake Martin

Senior Counsel

BASF Corporation

3000 Continental Drive - North

Mount Olive, NJ 07828-1234

RE: 36 Riverside Avenue, Rensselaer, NY  
Inactive Hazardous Waste Disposal Site # 4-22-027

Dear Ms. Martin:

Now that the Department and BASF have concluded negotiations on the Order on Consent to implement the on site remedy for the facility, it is time to address the off-site investigation. The Department requests that BASF submit a remedial investigation work plan to the Department within 30 days which will identify the nature and extent of off-site impacts from the site. It is my understanding that technical staff from the company and the Department have recently met and had preliminary discussions concerning the scope of work. Technical staff of the Department will be available for any future meetings or conference calls as may be necessary to help BASF meet this goal.

Thank you for your assistance in this matter and feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Anthony B. Quartararo".

Anthony B. Quartararo  
Assistant Counsel

cc: R. Trinks  
D. Lightsey ✓  
J. Greenthal, Esq

NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION

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

**BASF Corporation**

Respondent.

**ORDER ON CONSENT**

Index # A4-0490-0703

Site # 4-42-027

**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. BASF Corporation ("Respondent") purchased the property that is the subject of this Order in 1978. The property is located at 36 Riverside Avenue in the City of Rensselaer, New York (hereinafter referred to as the "Site").

3. The Site is currently listed in the *Registry of Inactive Hazardous Waste Disposal Sites in New York State* as Site Number 4-42-027 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 parties recognize that implementation of this Order will expedite the cleanup of the Site and may avoid prolonged and complicated litigation between the parties, and that this Order is mutually acceptable, fair, reasonable, and in the public interest.

6. 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. Development, Performance, and Reporting of Work Plans

A. Work Plans

Respondent shall implement the Record of Decision for Operable Unit 1 ("OU-1") by conducting a Remedial Design and Remedial Action program, together with any necessary operation, monitoring and maintenance of such program, pursuant to one or more Department-approved work plans ("Work Plan" or "Work Plans") and this Order. The Work Plan(s) under this Order shall be developed and implemented in accordance with 6 NYCRR 375-1.10 and Exhibits "D," "E" and "F." All Department-approved Work Plans shall be incorporated into and become enforceable parts of this Order and shall be attached as Exhibit "A." Upon approval of a Work Plan by the Department, Respondent shall implement such Work Plan in accordance with the schedule contained in such Work Plan.

B. Submission/Implementation of Work Plans

1. (a) The Remedial Design/Remedial Action Work Plan shall be submitted to the Department within sixty (60) Days of the effective date of this Order.

(b) The Department may request that Respondent submit supplemental Work Plans as are appropriate to implement the OU-1 Record of Decision at the Site. Within thirty (30) Days after the Department's written request, Respondent shall advise the Department in writing whether it will submit and implement the requested supplemental Work Plan or whether it elects to terminate this Order pursuant to Paragraph XII. If Respondent elects to submit and implement such Work Plan, Respondent shall submit the requested Work Plan within sixty (60) Days after such election. If Respondent elects to terminate this Order or fails to make a timely election, this Order shall terminate pursuant to Paragraph XII.

(c) Respondent may, at Respondent's option, propose one or more additional or supplemental Work Plans at any time, which Work Plan(s) shall be reviewed for appropriateness and technical sufficiency.

(d) Any request made by the Department under Subparagraph I.B.1.(b) shall be subject to dispute resolution pursuant to Paragraph XI.

2. A Professional Engineer must stamp and sign all Work Plans.

3. 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.

C. Submission of Final Reports and Annual Reports

1. In accordance with the schedule contained in a 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 ROD or RD/RA 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 1<sup>st</sup> 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 Paragraph XII 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 ROD or RD/RA Work Plan 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 sixty (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 thirty (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 XI. If Respondent elects to modify the submittal, Respondent shall, within sixty (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 XI and its position prevails. Failure to make an election or failure to comply with the election is a violation of this Order.

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

E. Department's Issuance of a ROD

The Department has selected a final remedial alternative for the on-site portion of the remedy for the Site, known as Operable Unit 1, in its Record of Decision ("ROD") dated September 12, 2003. Nothing in this Order shall be construed to abridge the rights of Respondent, as provided by law, to judicially challenge the Department's ROD.

F. Release and Covenant Not to Sue

Upon the Department's approval of the RD/RA Work Plan final report evidencing that no further remedial action (other than OM&M activities) is required, then, except for the provisions of Paragraphs V and VI, and except for the future OM&M of the Site and any Natural Resource Damage claims, such approval 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 State or Federal statutory or common law involving or relating to investigative or remedial activities associated with Respondent's



implementation of the ROD for OU-1 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 newly discovered 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 in writing 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 pursuant to Paragraph XI.

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 X.A.1 by the 10<sup>th</sup> 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.

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 XI 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. 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 at or in connection with 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:

Rudolph Trinks  
BASF Corporation



3000 Continental Drive North  
Mount Olive, NJ 07828-1234

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. Except as otherwise provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights 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 thirty (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 "B," 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 sixty (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 forty-five (45) Days before the date of conveyance, or within forty-five (45) Days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed or actual date of the conveyance, and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order. However, such obligation shall not extend to a conveyance by means of a corporate reorganization or merger or the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security agreement, lease, or any other right accruing to a person not affiliated with Respondent to secure the repayment of money or the performance of a duty or obligation.

IX. Declaration of Covenants and Restrictions

A. If a Department-approved Work Plan or the ROD for the Site relies upon one or more institutional controls, Respondent shall, within thirty (30) Days after the Department's approval of such Work Plan or within ninety (90) Days after issuance of the ROD, whichever is earlier, submit to the Department for approval a Declaration of Covenants and Restrictions to run with the land which provides for covenants and restrictions consistent with the Work Plan or the ROD. This submittal shall be substantially similar to Exhibit "C." Respondent shall cause such instrument to be recorded with the recording officer of the county wherein the Site is located within thirty (30) Days of the Department's approval of such instrument. Respondent shall provide the Department with a copy of such instrument certified by the recording officer to be a true and faithful copy within sixty (60) Days after such recording.

B. Respondent may petition the Department to modify or terminate the Declaration of Covenants and Restrictions filed pursuant to Subparagraph IX.A. at such time as it can certify that reliance upon such covenants and restrictions is no longer required to meet the goals of the ROD or Work Plans. Such certification shall be made by a Professional Engineer. The Department shall not unreasonably withhold its consent to such petition.

X. 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:

Al Geisendorfer  
NYSDEC  
1150 N. Westcott Rd  
Schenectady, NY 12306

Note: four copies (one unbound) of work plans are required to be sent.

with copies 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

Edward Belmore  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-8010

Anthony Quartararo, Esq  
NYSDEC  
625 Broadway  
Albany, NY 12233-5500  
Note: work plans are not required to be sent to attorney

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

Rudolph Trinks  
BASF Corporation  
3000 Continental Drive North  
Mount Olive, NJ 07828-1234

Nancy Lake Martin, Esq.  
BASF Corporation  
3000 Continental Drive North  
Mount Olive, NJ 07828-1234

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 ninety (90) Days after any change in the addresses in this Paragraph X or in Paragraph V.

XI. Dispute Resolution

A. If Respondent disagrees with the Department's notice under (i) Subparagraph I.B requesting supplemental Work Plans; (ii) Subparagraph I.D disapproving a submittal, a proposed Work Plan, or a final report; (iii) Subparagraph I.F. finding that Respondent materially failed to comply with the Order; (iv) Subparagraph III.B rejecting Respondent's assertion of a Force Majeure Event; or (v) Subparagraph XIII.G.2.iii requesting modification of a time frame, Respondent may, within thirty (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 XI.B. The period for informal negotiations shall not exceed thirty (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 thirty (30) Days after the conclusion of the thirty (30) Day period for informal negotiations that it invokes the dispute resolution provisions provided under Subparagraph XI.B.

B. 1. Respondent shall file with the 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 X.A.1.

2. The Department shall serve its Statement of Position no later than twenty (20) Days after receipt of Respondent's Statement of Position.

3. Respondent shall have the burden of proving 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 thirty (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 sixty (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 forty-five (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 sixty (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 thirty (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 XI 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 XI that shall be available consistent with Article 6 of the Public Officers Law.

7. Nothing in this Paragraph XI 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.

XII. Termination of Order

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

1. Respondent's election to terminate pursuant to Subparagraph I.B.1.b. In the event of termination in accordance with this Subparagraph XII.A.1, this Order shall terminate effective the 5<sup>th</sup> Day after the Department's receipt of the written notification terminating this Order or the 5<sup>th</sup> Day after the time for Respondent to make its election has expired, whichever is earlier or

2. the Department's written determination that Respondent has completed all phases of the remedial action (including OM&M) as required by the ROD or Work Plans, in which event the termination shall be effective on the 5<sup>th</sup> Day after the date of the Department's approval of the final report relating to the final phase of the remedial action.

B. Notwithstanding the foregoing, the provisions contained in Paragraphs V and VI 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 III so long as such obligations accrued on or prior to the Termination Date.

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

XIII. 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 thirty (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 five (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 forty-five (45) Days after the effective date of this Order, or within forty-five (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 submit a supplemental Work Plan pursuant to Subparagraph I.B.1(b) 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 "A."

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 X.A.1. The Commissioner or the Commissioner's designee shall timely respond.

ii. Changes to a Work Plan shall be accomplished as set forth in Subparagraph I.B.1(b) and (c) of this Order.

iii. 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 XI.

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.

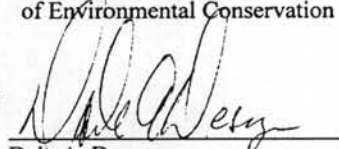
L. The effective date of this Order is the 10<sup>th</sup> Day after the date the Commissioner or the Commissioner's designee signs this Order.

DATED: Albany, New York

OCT 10 2003

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

By:




Dale A. Desnoyers  
Director  
Division of Environmental Remediation

### CONSENT BY RESPONDENT

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



By: 

Title: Director, Real Estate

Date: 9-25-03

STATE OF NEW JERSEY )  
 ) s.s.:  
COUNTY OF Morris )

On the 25<sup>th</sup> day of September, in the year 2003, before me, the undersigned, personally appeared William E. Pearson, 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/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Jeane Marie Hahn  
Signature and Office of individual  
taking acknowledgment

**JEANNE MARIE HAHN**  
A Notary Public of New Jersey  
My Commission Expires October 24, 2007



BASF Corporation

**BASF****ENVIRONMENTAL SIGNATURE AUTHORIZATION**

**WHEREAS** certain federal and state environmental laws require certain permit applications, reports or related documents to be executed on behalf of a Corporation by a Principal Corporate Officer or by an official having significant policy or decision-making responsibility.

And, **WHEREAS** the Director Real Estate in responsible charge of all Corporate Inactive Sites is an official having significant policy and decision-making responsibilities within the company.

Now, therefore I, Kurt W. Bock, Executive Vice President and Chief Financial Officer of the Finance Division of BASF Corporation on the 10<sup>th</sup> day of April, 1998 do hereby authorize the Director Real Estate to execute any such permit applications, reports and related documents on behalf of BASF Corporation.



Kurt W. Bock  
Kurt W. Bock  
Executive Vice President  
Chief Financial Officer  
BASF Corporation

Deborah Carter  
Notary/Witness

DEBORAH CARTER  
NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires August 27, 2001

**EXHIBIT "A"**

**Department-Approved Work Plan(s)**

**EXHIBIT "B"****NOTICE OF ORDER**

BASF Corporation ("Respondent") is subject to an Order On Consent, Index # A4-0490-0703 (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 36 Riverside Avenue, City of Rensselaer, 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 # 4-42-027. 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 September , 2003. A copy of the Order, as well as any and all Department-approved Work Plans under this Order can be reviewed at the Department's Region 4 offices located in Rotterdam by contacting the Bureau of Hazardous Waste Remediation.

This Notice of Order is being filed with the Rensselaer County Clerk in accordance with Paragraph VIII 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: \_\_\_\_\_

[acknowledgment]

**Appendix "A"**

**(to Exhibit "B")**

**Map of the Property**

**EXHIBIT "C"****DECLARATION of COVENANTS and RESTRICTIONS**

**THIS COVENANT**, made the \_\_\_ day of \_\_\_\_\_ 2003 , by BASF, a corporation organized and existing under the laws of the State of \_\_\_\_\_ and having an office for the transaction of business at 3000 Continental Drive North, Mount Olive, New Jersey.

**WHEREAS**, BASF Corporation is the owner of an inactive hazardous waste disposal site which is listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 442-027, located on 36 Riverside Avenue in the City of Rensselaer, County of Rensselaer State of New York, which is part of lands conveyed by \_\_\_\_\_ to \_\_\_\_\_ by deed dated \_\_\_\_\_ and recorded in the Rensselaer County Clerk's Office on \_\_\_\_\_ in Book \_\_\_\_\_ of Deeds at Page \_\_\_\_\_ and being more particularly described in Appendix "A" attached to this declaration and made a part hereof, and hereinafter referred to as "the Property"; and

**WHEREAS**, the Property is the subject of a consent order issued by the New York State Department of Environmental Conservation to BASF Corporation in September 2003; and

**WHEREAS**, the New York State Department of Environmental Conservation set forth a remedy to eliminate or mitigate all significant threats to the environment presented by hazardous waste disposal at the Site in a Record of Decision ("ROD") dated September 12, 2003 and such ROD or the Work Plan for the implementation of the ROD required that the Property be subject to restrictive covenants.

**NOW, THEREFORE**, BASF Corporation, for itself and its successors and/or assigns, covenants that:

First, the Property subject to this Declaration of Covenants and Restrictions is as shown on a map attached to this declaration as Appendix "B" and made a part hereof, and consists of all that real property described as follows: [insert metes and bounds description]

Second, unless prior written approval by the New York State Department of Environmental Conservation or, if the Department shall no longer exist, any New York State agency or agencies subsequently created to protect the environment of the State and the health of the State's citizens, hereinafter referred to as "the Relevant Agency," is first obtained, no person shall engage in any activity that will, or that reasonably is anticipated to, prevent or interfere significantly with any proposed, ongoing or completed program at the Property or that will, or is reasonably foreseeable to, expose the public health or the environment to a significantly increased threat of harm or damage.

Third, the owner of the Property shall restriction excavation on the Property without first obtaining the written approval of the Relevant Agency. All excavated soils shall be handled and managed in compliance with a Department-approved soils management plan.



Fourth, the owner of the Property shall prohibit the Property from ever being used for purposes other than for restricted commercial/industrial without the express written waiver of such prohibition by the Relevant Agency.

Fifth, the owner of the Property shall prohibit the use of the groundwater underlying the Property without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the user first obtains permission to do so from the Relevant Agency.

Sixth, the owner of the Property shall continue in full force and effect any institutional and engineering controls the Department required Respondent to put into place and maintain unless the owner first obtains permission to discontinue such controls from the Relevant Agency.

Seventh, this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of the Property and shall provide that the owner, and its successors and assigns, consents to the enforcement by the Relevant Agency of the prohibitions and restrictions that Paragraph IX of the Order requires to be recorded, and hereby covenants not to contest the authority of the Department to seek enforcement.

Eighth, any deed of conveyance of the Property, or any portion thereof, shall recite, unless the Relevant Agency has consented to the termination of such covenants and restrictions, that said conveyance is subject to this Declaration of Covenants and Restrictions.

**IN WITNESS WHEREOF**, the undersigned has executed this instrument the day written below.

[acknowledgment]

**EXHIBIT "D"****Remediation Work Plan Requirements**

The Remediation ("RD/RA") Work Plan shall include the following:

1. 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:
  - (i) the construction and operation of any structures;
  - (ii) the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;
  - (iii) the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;
  - (iv) physical security and posting of the Site;
  - (v) quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Construction; and
  - (vi) monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-selected remedial alternative.
2. A schedule for submission of "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;
3. A time schedule to implement the Remedial Design;
4. The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including a schedule for periodic sampling of all media of concern, including groundwater monitoring wells on-Site and off-Site;
5. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction of the Remedial Design, including the number of years during which such activities will be performed (where appropriate) and a specific description of the criteria to be used to decide when operation of such activities may be discontinued.

6. 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;

7. A health and safety plan for the protection of persons at and in the vicinity of the Site during and after construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional; and

8. A citizen participation plan which incorporates appropriate activities outlined in the Department's publication "Citizen Participation in New York's Hazardous Waste Site Remediation Program: A Guidebook," dated June 1998, any subsequent revisions thereto, and 6 NYCRR Part 375.

**EXHIBIT "E"****OM&M Work Plan Requirements**

The OM&M Work Plan shall provide for:

1. Operation and maintenance of engineering controls and/or treatment systems;
2. Maintenance of institutional controls, where applicable;
3. Yearly certification by a Professional Engineer of the continued effectiveness of any institutional and/or engineering controls, where applicable. The certification must identify the required controls and evaluate whether the controls should remain in place and effective for the protection of public health and/or the environment;
4. A monitoring plan which describes the measures for monitoring the performance and effectiveness of the remedy at the Site;
5. A contingency plan which describes procedures which may be required to protect and/or maintain the operation of the remedy in the event of an emergency, such as a fire, spill, tank or drum overflow or rupture, severe weather, or vandalism;
6. A health and safety plan and a list of records and references;
7. Monitoring and reporting of the performance and effectiveness of the remedy, both short and long-term, by:
  - (i) Assessing compliance with actual or equivalent discharge permit limits;
  - (ii) Assessing achievement of the remedial performance criteria; and,
  - (iii) Sampling and analysis of appropriate media.
8. A determination that the remedy is complete by demonstrating that the remedial action objectives have been achieved.

**EXHIBIT "F"**

**Record of Decision**



### 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.

"ECL": the Environmental Conservation Law, Chapter 43-B of the Consolidated Laws of New York, as amended.

"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))

"National Contingency Plan" or "NCP": the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, and codified at 40 C.F.R. Part 300, and any amendments thereto.

"NL": the Navigation Law, Chapter 37 of the Consolidated Laws of New York, as amended.

"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 "F."

"Remedial Action": those activities, except for OM&M, to be undertaken under this Order to implement the ROD.

"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 XII.

"USEPA": the United States Environmental Protection Agency.