

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Development and Implementation of A Remedial Investigation, Feasibility Study for an Inactive Hazardous Waste Disposal Site Under Article 27, Title 13 of the Environmental Conservation Law of the State of New York (the "ECL") by:

ORDER
ON
CONSENT

NIAGARA MOHAWK POWER CORPORATION

RESPONDENT

Site I.D. #915063
Index #B9-047-8410

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WHEREAS:

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Article 27, Title 13 of the ECL entitled "Inactive Hazardous Waste Disposal Sites".

2. Respondent, Niagara Mohawk Power Corporation, is a corporation organized and existing under the laws of the State of New York, with offices in Syracuse, New York.

3. Respondent owns real property along the west side of River Road in the Town of Tonawanda, in Erie County, New York. Said property has been referred to locally as the "Cherry Farm Site" (the "Site"). A map of the Site is attached to this order as Appendix "A".

4. The Site is an inactive hazardous waste disposal site, as that term is defined in ECL Section 27-1301(2) and has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York as Site Number 915063.

5. The Department has determined, pursuant to ECL

Section 27-1305, that the Site constitutes a significant threat to the environment and has classified the Site as classification 2, "significant threat to the public health or environment - action required".

6. Pursuant to ECL Section 27-1313(3)(a), whenever the Commissioner of Environmental Conservation (the "Commissioner") "finds that hazardous wastes at an inactive hazardous waste site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such sites and (if) to implement such program within reasonable time limits specified in the order".

7. Niagara Mohawk Power Corporation is a "person responsible" pursuant to ECL §27-1313 and 6 NYCRR Part 375.2 in that Respondent is the current owner of the Site.

8. Respondent is willing to cooperate fully with the Department by planning and conducting, at Respondent's expense, a Remedial Investigation/Feasibility Study of the Site. In furtherance of such willingness, Respondent has developed and submitted to the Department a detailed work plan for a Remedial Investigation/Feasibility Study for the Site. Such plan, which has been approved by the Department is attached hereto and incorporated into this Order as

Appendix "B".

9. The Department and Respondent acknowledge that the goal of this Order is the implementation of a Remedial Investigation/Feasibility Study for the Site as contained in Appendix "B". A remedial program, if determined necessary, will be addressed in a subsequent Order.

10. The Department acknowledges that the issuance and entry of this Order is not based on any allegation of negligence on the part of Respondent, nor is it based on allegations that any law, regulation or standard of care has been violated by Respondent.

11. The Department recognizes that the Respondent has the right to seek contribution and indemnity from any or all "persons" as defined in Section 101(21) of CERCLA, 42 U.S.C. §9601(21), not a party to this Order for costs incurred by Respondent in performing the work set forth in the work plan identified in paragraph 8 above and in complying with the requirements of this Consent Order. Nothing in this Order shall be construed as limiting Respondent's right to seek contribution and indemnity from any or all other responsible parties not a party to this Order.

12. The Department agrees to provide non-privileged, relevant documents to aid Respondent in seeking indemnity and contribution.

13. Respondent voluntarily consents to the issuance and entry of this Order, waives the right to a hearing herein as provided by law and agrees to be bound by the

provisions, terms and conditions of this Order.

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

I. Respondents shall undertake and complete at the Site the Remedial Investigation and Feasibility Study program as defined and described in Appendix "B", subject to the approval of the Department of any specific procedures and protocols that are not delineated in Appendix "B" and subject to modifications and revisions as approved by the Department resulting from the selection of a particular consultant and/or contractor to implement Appendix "B". Any such Departmentally approved procedures, protocols, modifications or revisions shall be designed and executed in accordance with Requisite Technology. As used in this Order, Requisite Technology means engineering, scientific and construction principles and practices which (a) are technologically feasible, and (b) will most effectively identify, mitigate and/or eliminate any present or potential future threat to the environment posed by the disposal of hazardous waste at the Site.

The failure of Respondents: (a) to submit or undertake the proposal, report, field investigation, construction program plan or any supplement or revision thereof, as contained within Appendix "B", or (b) to undertake any procedures or protocols not specifically delineated within Appendix "B", and/or approved modification and revision thereof, in accordance with Requisite Technology shall

constitute a violation of this Order. Any such Departmentally approved procedures, protocols, modifications or revisions shall be in writing and incorporated herein as Appendix "C".

II. As used herein, "hazardous wastes" shall mean hazardous wastes, as defined in ECL 27-1301(1), any hazardous constituents thereof, and any toxic degradation products of such wastes and of such constituents.

III. Within 90 days of the date specified for completion of the Remedial Investigation as provided pursuant to the approved Work Plan, Respondent shall submit to the Department a Remedial Investigation report (the "Report"), founded upon its performance of the Remedial Investigation in accordance with the Approved Proposal. The Report shall include a copy of the Approved Proposal and all data generated, and all other information obtained, during the Remedial Investigation and shall include, but shall not be limited to, the following specific information with respect to the Site and areas affected by the disposal of hazardous and industrial wastes at the Site:

a. A topographic survey and a resultant plot plan, including establishment of on-Site benchmarks;

b. A summary of all environmental conditions, including, but not limited to: Site drainage, stream flow data, soil conditions, hydrogeologic characteristics, surface and groundwater quality; said summary to include maps, tables, graphics, and any other appropriate means of

presenting all information;

c. All data collected during the Remedial Investigation and/or used in preparing the Report, including, but not limited to: soil boring logs, well data, and the results of chemical analyses performed on samples obtained during the Remedial Investigation; said data presented in tabulated and/or graphic form where appropriate;

d. A determination of the types and quantities of hazardous and industrial wastes present as well as the areal and vertical extent of such wastes, which determination shall result in the preparation of a waste location and concentration map;

e. A study and evaluation of the hydrogeologic conditions at and in the vicinity of the Site;

f. A determination of the nature and extent of actual and potential release and migration of hazardous wastes from the Site through surface water, groundwater, soil and sediment to areas at and in the vicinity of the Site.

g. A determination of the areal and vertical extent to which both on-Site and off-Site surface water, ground water, soil and sediment have been, are being or may be contaminated by hazardous wastes emanating from the Site;

h. An assessment of the results of the Remedial Investigation and a determination of the current or potential impacts of any threat to the environment which

exists, or may exist in the future, as a result of the hazardous wastes disposed of at the Site, and as a result of the determinations made pursuant to subparagraphs f. and g. above;

i. References to all scientific or technical literature used in the preparation of the Report; and

j. Names, titles and disciplines of all professionals engaged in the preparation of the Report.

IV. The Department reserves the right to require a modification and/or amplification and expansion of the Remedial Investigation and Report by Respondent to address specific areas if the Department demonstrates that further investigation is necessary, as a result of reviewing data generated by the Remedial Investigation or as a result of reviewing other data or facts.

V. Within sixty (60) days after its receipt of the Report, the Department shall determine if the remedial Investigation was conducted, and the Report prepared in accordance with the terms, provisions and conditions of this Order, and shall provide written notification to Respondent of its approval or disapproval of the Report.

If the Department disapproves the Report, the Department shall notify Respondent in writing of the Department's objections. Within forty-five (45) days after its receipt of notice of disapproval, Respondent shall revise and re-submit the Report to the Department. If it is necessary to re-perform the work or supplement the Remedial

Investigation in accordance with the terms, provisions and conditions of this Order, Respondent shall undertake such work in a timely manner, and shall, within thirty (30) days after its completion of any supplemental work, submit to the Department a Report which has been revised in accordance with the Department's objections (the "Revised Report").

Within thirty (30) days after its receipt of the Revised Report, the Department shall determine if the revised Report is in accordance with the terms, provisions and conditions of this Order and shall provide written notification to Respondent of its approval or disapproval of the Revised Report.

If the Department disapproves the Revised Report and the parties hereto cannot agree to the terms, conditions and provisions of the Revised Report, Respondent shall be in violation of this Order, unless it has invoked within ten (10) days of receipt of the disapproval, the dispute resolution mechanism set forth in Paragraph XVI. If the procedure set forth in Paragraph XVI is invoked, Respondent shall comply with the final determination of the Commissioner, failing which it shall be in violation of the Order. In such event, the Department shall pursue whatever remedies may be available at law.

The Report or the Revised Report, whichever is approved by the Department, shall become incorporated in and made a part of this Order, and shall be attached hereto as Appendix "D". Such Report shall hereafter be referred to as the

"Approved Report".

VI. Within sixty (60) days after receipt of the Department's approval of the Report or Revised Report, or within such greater period as the Department may allow for good cause shown, Respondent shall submit to the Department a feasibility study (the "Feasibility Study") evaluating remedial actions which will eliminate or mitigate the health and environmental hazards and potential hazards attributable to the Site.

The Feasibility Study shall be prepared in conformance with current United States Environmental Protection Agency guidance on Feasibility Studies under the Superfund Amendments and Reauthorization Act of 1986, and shall include, but not be limited to, the following:

a. A summary of all identified health and environmental hazards and potential hazards attributable to the Site.

b. As to each such hazard or potential hazard, a statement of the remedial actions necessary to eliminate or mitigate the same, and a categorization of the discrete elements which are included in each such remedial action.

c. As to each such discrete element, a statement of the alternative technologies available to effectuate the same, and analyses thereof, including, but not limited to:

1. Unit cost estimates.
2. Operation and maintenance requirements and cost estimates.

3. Long-term integrity.
4. Timeliness of implementation.
5. Conformity to applicable law.

d. As to each discrete element, the selection of one alternative technology to effectuate same.

VII. Within sixty (60) days after its receipt of the Feasibility Study, the Department shall determine if the Feasibility Study was prepared in accordance with the terms, provisions and conditions of this Order, and shall provide written notification of its approval or disapproval.

If the Department disapproves the Feasibility Study, the Department shall notify Respondent in writing of the Department's objections. Within forty-five (45) days after its receipt of notice of disapproval, Respondent shall revise the Feasibility Study and shall submit to the Department a Feasibility Study which has been revised in accordance with the Department's objections (the "Revised Feasibility Study").

Within fifteen (15) days after its receipt of the Revised Feasibility Study, the Department shall determine if the Revised Feasibility Study is in accordance with the terms, provisions, and conditions of this Order, and shall provide written notification to Respondent of its approval or disapproval of the Revised Feasibility Study.

If the Department disapproves the Revised Feasibility Study and the parties hereto cannot agree to the terms, conditions and provisions of the Revised Feasibility Study,

Respondent shall be in violation of this Order, unless it has invoked within ten (10) days of receipt of the disapproval, the dispute resolution mechanism set forth in Paragraph XVI. If the procedure set forth in Paragraph XVI is invoked, Respondent shall comply with the final determination of the Commissioner, failing which it shall be in violation of the Order. In such event, the Department shall pursue whatever remedies may be available at law.

The Feasibility Study or the Revised Feasibility Study, whichever is approved by the Department, shall become incorporated in and made a part of this Order, and shall be attached hereto as Appendix "E". Such Feasibility Study shall hereafter be referred to as the "Approved Feasibility Study".

VIII. The Department shall have the right to obtain for the purpose of comparative analysis "split samples" or "duplicate samples", at the Department's option, of all substances and materials sampled by Respondent pursuant to this Order. As used herein: "split samples" shall mean whole samples divided into aliquots; "duplicate samples" shall mean multiple samples, collected at the same time from exactly the same location, using the same sampling apparatus, collected into identical containers prepared identically, filled to the same volume, and thereafter identically handled and preserved.

IX. Respondent and the Department shall mutually agree on an appropriate date for the start of any

excavating, drilling or sampling to be conducted pursuant to the terms of this Order, but in no case shall such activities be scheduled less than five (5) working days in advance of the agreed upon date.

X. Respondent shall permit any duly designated officer, employee, consultant, contractor or agent of the Department to enter upon the Site or areas in the vicinity of the Site which may be under the control of Respondent, for inspection purposes and for the purpose of making or causing to be made such sampling and tests as the Department deems necessary, and for ascertaining Respondent's compliance with the provisions of this Order.

XI. Respondent shall retain a third-party professional consultant, contractor and/or laboratory to perform the technical, engineering and analytical obligations required by this Order.

XII. Respondent shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or relief, if it cannot comply with any requirements of the provisions hereof because of an act of God, war, riot or other condition as to which negligence or willful misconduct on the part of Respondent was not the proximate cause, provided, however, that Respondent shall immediately notify the Department in writing when it obtains knowledge of any such condition and requests an appropriate extension or modification of the

provisions hereof.

XIII. Respondent shall take appropriate action to obtain whatever permits, easements, rights-of-way, rights-of-entry, approvals or authorizations which are necessary in order to perform the field investigation and all of Respondent's other obligations pursuant to this Order.

XIV. A. Within ninety (90) days after approval by the Department of the Feasibility Study, or the Revised Feasibility Study, Respondents shall pay (if no written objection pursuant to subpart (B) is made) to the Department a sum of money which represents the administrative costs incurred by the Department for its activities in association with the Remedial Investigation and Feasibility Study, including, but not limited to, reasonable costs incurred for:

(a) reviewing proposals, reports, plans and specifications and procedures and protocols submitted in accordance with this order;

(b) overseeing by the Department of the implementation of the Remedial Investigation and Feasibility Study including, but not limited to, inspection of construction and monitoring and maintenance activities associated therewith;

(c) any other activities undertaken by the Department in relation to securing and overseeing implementation of the Remedial Investigation and Feasibility Study.

B. An accounting of such administrative costs

shall be prepared by the Department and transmitted to the Respondents at the time the Department approves the Feasibility Study, or Revised Feasibility Study, and shall be made a part of this Order and shall be attached hereto as Appendix "F". Respondent shall have forty-five (45) days to review said accounting and provide the Department with written notice of any objections. Any portion not objected to, shall be paid in accordance with subparagraph "A" above. If Respondent objects to the accounting, or any part of it, and the objections cannot be settled by agreement of the parties, Respondent shall be in violation of this Order unless it has invoked the dispute resolution mechanism set forth in Paragraph XVI before the expiration of the aforesaid 90-day period.

XV. The failure of Respondent to comply with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL.

XVI. Any dispute between Respondent and the Department concerning the terms of any submittals pursuant to Paragraphs V, VII, or XIV of this Order shall be settled in accordance with the following procedures:

A. Either party, upon written notice to the other, may request the Commissioner of Environmental Conservation to appoint an Administrative Law Judge ("ALJ"), and to hold a hearing if appropriate, to settle the dispute. If the ALJ deems it necessary to convene a hearing, the

taking of evidence shall be concluded within fifteen (15) working days of the receipt of the written request to appoint an ALJ.

In all proceedings hereunder:

1. The parties shall be Respondent and the Department.
2. The burden of going forward shall be on the Respondent.
3. The ALJ shall have all powers conferred by 6 NYCRR §622.12.
4. All proceedings conducted pursuant to this Paragraph shall be stenographically recorded. The Respondent, at his expense, shall arrange for an expedited stenographic transcript to be made within three (3) working days after conclusion of the proceeding, and for the original and two copies of the transcript to be delivered to the ALJ.
5. The ALJ shall prepare, no later than thirty (30) working days after receipt of the transcript of the proceeding, a written summary of the documentation and testimony received during the proceeding and a recommended decision. The summary and recommendation shall be hand-delivered to the Department's representative and sent by certified mail, return receipt requested, and another copy by Express Mail, to Respondent.
6. The ALJ's recommended decision shall become the final determination of the Commissioner unless, within

five (5) working days from receipt of the recommended decision, either Respondent or the Department objects in writing. Any objections shall be submitted in writing to the ALJ with a copy by Express Mail, telecopier or hand-delivery to the other party, which shall serve and file its response, if any, within two (2) working days of receipt of the objection by Express Mail, telecopier or hand-delivery. Upon receipt of the objections and any response, the ALJ shall refer the matter to the Commissioner for final determination.

7. The final determination of the Commissioner shall be made within fifteen (15) working days of receipt of the referral by the ALJ.

8. The procedure outlined herein shall be Respondent's sole legal remedy in the event of a dispute concerning the terms of any submittals pursuant to Paragraphs V, VII, XIV.

XVII. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting (1) any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the Department may have against anyone other than Respondent, its directors, officers, employees, servants, agents, successors and assigns; (2) the Department's right to enforce, at law or in equity, the terms and conditions of this Order against Respondent, its directors, officers,

employees, servants, agents, successors and assigns in the event that Respondent shall fail to fulfill any of the provisions hereof; and (3) the Department's right to bring any action, at law or in equity against Respondent, its directors, officers, employees, servants, agents, successors and assigns with respect to areas or resources that may have been affected or contaminated as a result of the release or migration of hazardous or industrial wastes from the Site. Nothing herein shall be construed as affecting the Department's right to commence any action or proceeding to which it may be entitled in connection with, relating to, or arising out of Respondent's disposal of hazardous or industrial wastes at the Site.

XVIII. The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

XIX. With regard to any physical activities conducted by Respondent pursuant to the provisions of this Order, Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the

provisions of this Order by Respondent, its directors, officers, employees, servants or agents.

XX. The effective date of this Order shall be the date this Order is signed by the Commissioner or his designee.

XXI. If, for any reason, Respondent desires that any provision of this Order be changed, Respondent shall make timely written application therefore to the Commissioner setting forth reasonable grounds for the relief sought.

XXII. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the real property records of the Erie County Clerk's Office, for the purpose of providing notice of this Order to all potential future purchasers of any portion of the Site. Said Declaration must indicate that any successor in title to any portion of the Site shall be responsible for implementing the provisions of this Order. A certified copy of said filing shall be provided to the Department.

XXIII. In the event that Respondent proposes to convey the whole or any part of its ownership interest in the Site, Respondent shall, not less than 30 days prior to the consummation of such proposed conveyance, notify the Department in writing of the identity of the transferee and of the nature and date of the proposed conveyance. In advance of such proposed conveyance, Respondent shall notify the transferee in writing, with a copy to the Department, of

the applicability of this Order.

XXIV. A. All communication required hereby to be made between the Department and Respondent shall be made in writing and transmitted by United States Postal Service return receipt requested, or hand delivered to the address listed below. All reports and submissions herein required shall be submitted in eight (8) copies to the following address:

New York State Department of Environmental
Conservation
Division of Environmental Enforcement
600 Delaware Avenue
Buffalo, New York 14202-1073

B. Communication to be made from the Department to Respondent shall be made as follows:

William C. Weiss
System Law Department
Niagara Mohawk Power Corporation
300 Erie Boulevard, West
Syracuse, New York 13202

XXV. The provisions of this Order shall be deemed to bind Respondent, its officers, directors, agents, servants, employees, successors and assigns.

XXVI. Nothing herein shall be construed to bind any entity not specifically bound by the terms of this Order.

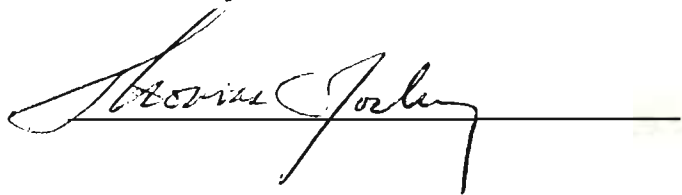
XXVII. The provisions hereof shall constitute the complete and entire Order between Respondent and the Department concerning the Site. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding unless made in writing and

subscribed by the party to be bound. No informal advice, guidance, suggestions or comments by the Department regarding reports, proposals, plans, specifications, schedules or any other writing submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

DATED: Albany, New York

April 27, 1988

THOMAS C. JORLING
Commissioner
New York State Department of
Environmental Conservation

A handwritten signature in cursive script, reading "Thomas C. Jorling", is written over a horizontal line.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of the foregoing Order, waives its right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

NIAGARA MOHAWK POWER CORPORATION

BY: John M. Toennies *WCT*

TITLE: Mgr, Env. Aff. and Eng. Tech. Serv.

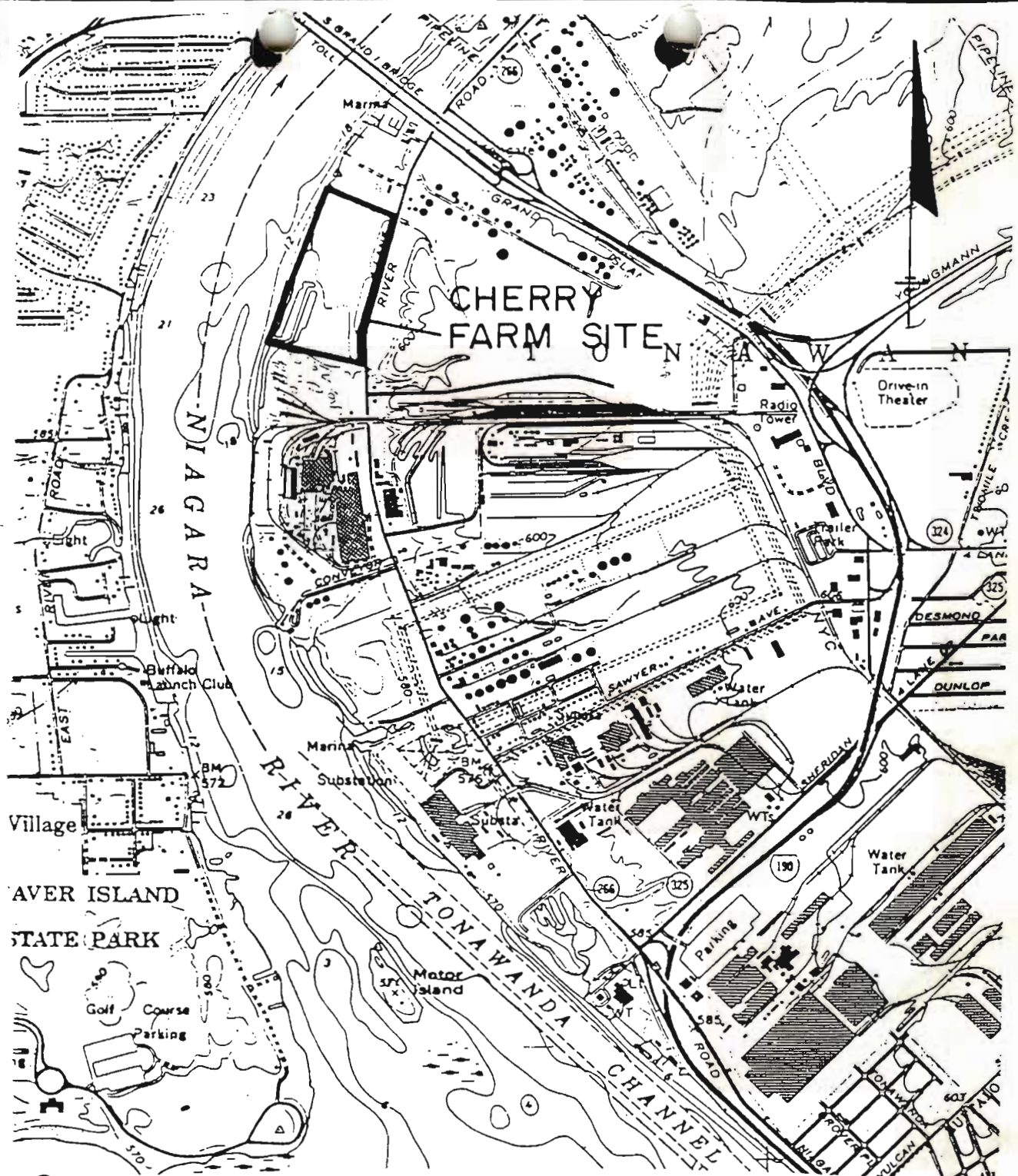
DATE: March 31, 1988

State of New York)
County of Onondaga) s.s.:
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On this 31ST day of MARCH, 1988,

before me personally came JOHN M. TOENNIES to me known, who, being by me duly sworn, did depose and say that he resides in BALDWINVILLE, N.Y. ; that he is the ^{MGR. OF ENVIRONMENTAL AFFAIRS & ENGINEERING TECHNICAL SERVICES} OF NIAGARA MOHAWK POWER 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.

William C. Weiss
NOTARY PUBLIC
WILLIAM C. WEISS
Notary Public in the State of New York
Qualified in Onondaga County No. 4719925
My Commission Expires ~~March 30, 1988~~
Oct 31



CHERRY FARM
SITE LOCATION MAP
NIAGARA MOHAWK POWER CORP.
TONAWANDA, NEW YORK

ADAPTED FROM U.S.G.S. (7.5 MIN.) BUFFALO NW N.Y. -
 ONTARIO QUADRANGLE 1965

SCALE 1" = 2,000'