

1 copy to [unclear] 1 [unclear] copy

STATE OF NEW YORK: 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 of the State of New York  
by

ORDER  
ON  
CONSENT

THE CARBORUNDUM COMPANY  
Specialty Graphite Unit of the  
Metaullics Systems Division

Respondent

Site #932102  
INDEX #B9-0229-88-07  
-----

WHEREAS:

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites". This Order is entered into under authority of ECL §27-1301 et seq. and §§71-2705(1) and 71-2727.

2. The Carborundum Company - Specialty Graphite Unit of the Metaullics Systems Division ("Respondent") is a corporation organized and existing under the laws of the State of Delaware and is doing business in the State of New York in that Respondent owns and operates an industrial facility at 2050 Cory Drive in the Town of Wheatfield, County of Niagara, State of New York (the "Site").

3. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301(2). The Site has been listed in the Registry of Inactive Hazardous Waste Disposal

Sites in New York State as Site Number 932102. The Department has classified the Site as a Classification "2" pursuant to ECL Section 27-1305(4)(b) having found that the Site presents a "significant threat to the public health or environment - action required". Respondent denies that the Site presents a "significant threat to the public health or environment" and Respondent does not agree with the classification "2" for the Site by the Department. Respondent, nevertheless, enters into and agrees to abide by the terms of this Order.

4. 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 disposal 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 site, and (ii) to implement such program within reasonable time limits specified in the order."

5. The Respondent entered into a Consent Order with the Department on February 9, 1989, whereby Respondent agreed to perform a Remedial Investigation/Feasibility Study at the Site.

The Respondent has fulfilled the technical obligations under the February 9, 1989 Consent order and has identified and characterized the contamination and developed the final remedial action at the "Site" using requisite technology not inconsistent

with the Superfund Amendments and Reauthorization Act of 1986 and the EPA document entitled "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (March 1988).

6. The Commissioner executed a Record of Decision on August 21, 1991 selecting the final remedial program for the Site.

7. The Department and Respondent agree that the goals of this Order shall be the development and implementation by the Respondent of a Remedial Program for the Site in accordance with the Record of Decision. (The Record of Decision is attached to this Order as Appendix "A".)

8. Respondent, having waived its right to a hearing herein pursuant to ECL Section 27-1313(4), and having consented to the issuance and entry of this Order, agrees to be bound by its terms.

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

I. Respondent has and shall continue to retain qualified professional consultants, contractors, laboratories quality assurance, quality control personnel and data validators to perform the technical, engineering and analytical obligations required by this Order.

II. Within 30 days after the effective date of this Order, Respondent shall submit to the Department all data within its possession or control regarding environmental conditions on-Site

and off-Site and other information described below, to the extent that such data have not previously been provided to the Department.

III. Within 30 days after the effective date of this Order, Respondent shall submit to the Department the Remedial Design Work Plan.

The Remedial Design Work Plan shall be prepared and certified by an individual registered to practice professional engineering by the State of New York, who may be an employee of Respondent, or an individual or member of a firm which is authorized to offer engineering services in accordance with Article 145 of the New York State Education Law.

The Remedial Design Work Plan shall include the following:

a. A detailed description of the means by which each essential element of the Remedial Program will be performed, to include but not be limited to:

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

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

3. physical security and posting of the Site;

4. health and safety of persons living

and/or working at or in the vicinity of the Site;

5. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Program; *QAPP*

6. monitoring which integrates needs which are present both on-Site and off-Site during implementation of the Remedial Program; and

b. A schedule for submission to the Department of "Biddable Quality" documents for the Remedial Program, including plans and specifications prepared and certified by an individual registered to practice professional engineering by the State of New York who may be an employee of the Respondent, or an individual or member of a firm which is authorized to offer engineering services in accordance with Article 145 of the New York State Education Law. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

c. A time schedule for the Remedial Program and provisions for periodic work-in-progress reports during the Remedial Program;

d. The parameters, conditions, procedures and protocols to determine the effectiveness of the Remedial Program, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;

e. A description of operation, maintenance and monitoring activities to be undertaken following completion of the Remedial Program, including the number of years during which

such activities will be performed;

f. A contingency plan describing organized, planned, and technically coordinated courses of action to be followed in case of emergency or other special conditions, including but not limited to equipment breakdowns, fire, odor, explosion, spills, receipt or release of hazardous or toxic materials or substances, and other incidents that could threaten human health or safety or the environment; and

g. A health and safety plan for the protection of persons at and in the vicinity of the Site during construction and after completion of the Remedial Program. The Plan shall be prepared in accordance with 29 C.F.R. 1910 by a certified health and safety professional.

IV. A. (1) The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and/or whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be attached to, and shall become an enforceable part of, this Order.

(2) (a) If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within 30 days (or

such longer time period as is designated by the Department in its written notice) after receiving written notice that its submittal has been disapproved, Respondent shall make a revised submittal to the Department that addresses all of the Department's stated reasons for disapproving the first submittal.

(b) After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order unless Respondent invokes the dispute resolution mechanism set forth in paragraph XXI of this Order within 10 days of receipt of written notice of disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. The Department may require Respondent to modify and/or amplify and expand a submittal if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary.

C. In the event the Department disapproves the revision of a submittal which has been submitted pursuant to Paragraph III of this Order, or in the event the Department requires modification and/or amplification and expansion of a submittal pursuant to Paragraph IV.B. of this Order, Respondent shall have the right during the ten day period immediately

following receipt of written notification of the Department's determination to invoke the dispute resolution mechanism set forth in Paragraph XXI.

V. A. Respondent shall implement the Remedial Program in accordance with the approved Remedial Design Work Plan which shall be attached hereto as Appendix "B" and the schedule contained therein. Respondent must obtain written approval from the Department prior to deviating from the approved Remedial Design Work Plan.

B. During implementation of all construction activities identified in the Remedial Design Work Plan, Respondent shall have on-Site a representative who is qualified to inspect the work on a basis consistent with generally accepted industry practices.

C. Respondent shall submit to the Department 4 copies of written monthly progress reports that: (i) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (ii) include a summary of all results of sampling and tests and all other data received or generated by Respondent or its contractors or agents in the previous month whether conducted pursuant to this Order or conducted independently by Respondent; (iii) identify all work plans, reports and other deliverables required by this Order which were completed and submitted during the previous month; (iv) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled

*See memo  
on Reduction  
of Paperwork*



for the next month and provide other information relating to the progress at the Site; (v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Respondent's obligations under the Order, and description of efforts made to mitigate those delays or anticipated delays; (vi) include any modifications to any work plans that Respondent has proposed to the Department or that have been approved by the Department; and (vii) describe all activities undertaken in support of the Citizen Participation Plan during the previous month and those to be undertaken in the next month. Respondent shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Consent Order.

✓ D. Within 60 days after completion of the construction activities identified in the Remedial Design Work Plan, Respondent shall submit a Remedial Action Construction Closeout Report ("Closeout Report"). The Closeout Report will include documentation and sampling test results substantiating that the performance standards have been met and will also include as-built✓ drawings, a final engineering report (each reflecting all changes made during construction), ✓ final operation, maintenance and monitoring plan and a certification that the Remedial Design was completed in accordance with the approved plans and specifications. Such certification shall be made by an individual registered to practice professional

engineering by the State of New York who may be an employee of the Respondent, or an individual or member of a firm which is authorized to offer engineering services in accordance with Article 145 of the New York State Education Law and who supervised and inspected the work as it was performed.

E. Prior to its acceptance and approval of the Closeout Report and the engineer's certification that construction was completed in accordance with the approved Remedial Design, the Department may require the Respondent to modify the Remedial Design and Construction if the Department determines that such modification is necessary due to:

*Apr 1995  
Approved*

1. environmental conditions on-site or off-site which are related to the presence of hazardous wastes at the site and were unknown to the Department at the time of the effective date of this Order, or

2. information received, in whole or in part, after the effective date of this Order, where such unknown environmental conditions or such information indicates that the Remedial Program is not protective of human health or the environment.

In the event the Department requires modification of the Remedial Design and Construction, Respondent shall have the right during the ten day period immediately following receipt of written notification of such Department determination to invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order.

F. After receipt of the Closeout Report including as-built drawings, final engineering report and certification, the Department shall notify Respondent in writing whether it is satisfied that all construction activities have been completed in compliance with the approved Remedial Design. In the event the Department determines that all construction activities have not been completed in accordance with the approved Remedial Design, Respondent shall have the right during the ten day period immediately following receipt of the written notification of such Department determination to invoke the dispute resolution mechanism set forth in Paragraph XXI.

VI. If the Department concludes that any element of the Remedial Program fails to operate in accordance with the Remedial Design or otherwise fails to protect human health or the environment, the Department may require the Respondent to take whatever action is necessary to ensure that the Remedial Program operates in accordance with the Remedial Design or that the Remedial Program otherwise protects human health and the environment.

In the event the Department requires Respondent to take any action pursuant to this Paragraph, Respondent shall have the right during the ten day period immediately following receipt of notification of such Department's written requirement to invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order.

VII. Respondent shall operate, maintain and monitor all

elements of the Remedial Program for the period of years set forth in the Record of Decision, implement the contingency plan contained in the approved Remedial Design as appropriate, and implement the health and safety plan contained in the approved Remedial Design after completion. Respondent shall perform reviews at least every 5 years. Reviews may also be performed by Respondent at periods of less than 5 years should such a review be appropriate. Respondent may apply for site delisting or termination of a specific aspect of the Remedial Program at any time, if the Remedial Action Objectives set forth in the Record of Decision are obtained.

In the event Respondent does not agree with any determination made by the Department concerning any Respondent review of the Remedial Program pursuant to this paragraph, Respondent shall have the right during the ten day period immediately following receipt of written notification of such Department determination to invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order.

VIII. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent and the Department shall also have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data generated by Respondent with respect to implementation of this Consent Order, and shall submit these results in the status reports required under the Remedial Design

Work Plan and this Order. If the Department takes a sample, Respondent has the right, when possible, to take a split sample of same. With the exception of samples taken for the purpose of determining compliance with Department issued permits or discharge or emission limitations, the Department shall make reasonable efforts to provide the Respondent with five (5) days notice prior to taking samples.

IX. Respondent shall provide notice to the Department at least five (5) working days in advance of any field activities to be conducted pursuant to this Order.

X. Respondent shall use its best efforts to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration. If any access or authorization required to perform this Order is not obtained despite best efforts within 45 days of the effective date of this Order, or within 45 days of the date the Department notifies the 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 attempt to obtain such access or authorization. In the event that Respondent through its best efforts is unable to obtain the access or authorization necessary to perform its obligations under this Order, the

Department shall, consistent with its legal authority, assist in obtaining such access or authorizations for or on behalf of Respondent. The Department shall grant appropriate extensions of time for the fulfillment of the terms of this Order. The Department may, as it deems appropriate, assist Respondent in obtaining access. Respondent shall reimburse the Department, in accordance with the procedures in paragraph XX, for all costs incurred by the Department in obtaining access (including, but not limited to, attorneys fees).

In the event Respondent is not in agreement with the Department determination concerning extension of time or modification of Order, Respondent shall have the right during the ten day period immediately following receipt of written notification of such Department determination to invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order.

XI. Respondent shall permit any duly designated employee, consultant, contractor or agent of the Department or any State agency to enter upon the Site or areas in the vicinity of the Site which may be under the control of Respondent for purposes of inspection, sampling and testing and to assure Respondent's compliance with this Order. During implementation of the Remedial Program, Respondent shall provide the Department with reasonable use of suitable office space, including access to a telephone, and shall permit the Department full access to all records and job meetings.

XII. Respondent shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of an act of God, war, riot or strikes or because of any condition or event entirely beyond the control of Respondent or its agent or agents carrying out Respondent's obligations under this Order. Respondent shall immediately notify the Department in writing when it obtains knowledge of any such condition and request an appropriate extension or modification of this Order.

In the event Respondent is not in agreement with the Department determination concerning extension or modification of this Order, Respondent shall have the right during the ten day period immediately following receipt of Department's written determination concerning extension or modification to invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order.

XIII. The failure of the Respondent to comply with any term of this Order shall be a violation of this Order and the ECL.

XIV. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the Department's rights, which include, but are not limited to, the following:

a. the right to bring any action or proceeding against anyone other than Respondent, its directors, officers, employees, servants, agents, successors and assigns;

b. the right to enforce this order against Respondent, its directors, officers, employees, servants, agents, successors and assigns in the event that Respondent shall fail to satisfy any of the terms hereof;

c. the right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous wastes or constituents at or from the Site or areas in the vicinity of the Site.

XV. If, after review, the Department accepts and approves the engineer's certification that construction of the Remedial Program was completed in accordance with the approved Remedial Design, then, unless a supplementary remedial program is required pursuant to Paragraph VI, and except for the provisions of paragraphs III(f), VII, XIV, XVII and XX hereof, such acceptance shall constitute a full and complete satisfaction and release of each and every claim, demand, remedy or action whatsoever against Respondent, its directors, officers, employees, agents, successors and assigns, which the Department has or may have pursuant to Article 27, Title 13 of the ECL relative to or arising from the disposal of hazardous wastes at the Site; provided, however, that the Department specifically reserves all of its rights concerning, and any such release and satisfaction shall not extend to, any investigation or remediation the Department deems necessary due to:



(1) environmental conditions on-site or off-site which are related to the disposal of hazardous wastes at the Site and were unknown to the Department at the time of its approval of the Remedial Investigation Report; or

(2) information received, in whole or in part, after the Department's approval of the Remedial Investigation Report, and such unknown environmental conditions or information indicates that the Remedial Program is not protective of human health or the environment. The Department shall notify the Respondent of such environmental conditions or information and its basis for determining that the Remedial Program is not protective of human health and the environment.

This release shall inure only to the benefit of the Respondent, its directors, officers, employees, agents, successors and assigns, with respect to the aforesaid matter.

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 the Department may have against anyone other than Respondent, its directors, officers, employees, agents, successors and assigns.

XVI. This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

XVII. 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 this Order by Respondent, its directors, officers, employees, servants, agents, successors or assigns. Respondent shall not indemnify the Department, the State of New York, and their representatives and employees for their unlawful, willful or malicious acts or omissions.

XVIII. The effective date of this order shall be the date a fully executed copy of the Order is received by the Respondent.

XIX. If Respondent desires that any provision of this Order be changed, it shall make timely written application signed by the Respondent to the Commissioner, setting forth reasonable grounds for the relief sought. A copy of such written application shall be delivered or mailed to the Department project manager for the Site.

XX. Within 30 days after receipt of an itemization of costs from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for the Department's reasonable expenses including, but not limited to, labor, overhead, travel, analytical costs and contractor costs incurred by the State of New York for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, and collecting and analyzing split samples.

Respondent shall not reimburse the Department for Department staff attorney time except as provided in Paragraph X of this Order. Other than for the costs associated with split samples, Respondent shall not reimburse the Department for costs associated with any State sampling activities undertaken pursuant to this Order unless specifically agreed to by Respondent.

Itemization of costs shall include an accounting of personal services indicating 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. This information shall be documented by the Department's quarterly reports of Direct Personal Service. The Department's approved fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (supplies and materials, travel, contractual) and shall be documented by the New York State Office of the State Comptroller's quarterly expenditure reports. If Respondent objects to some or all of such claimed costs, Respondent may, during the 10 day period immediately following receipt of the itemization of costs from the Department, invoke the dispute resolution mechanism set forth in Paragraph XXI of this Order for those costs objected to. If Respondent does not invoke the dispute resolution mechanism within the 10 day period immediately following receipt of itemization of costs, Respondent shall pay all costs as presented by the Department.

Such payment shall be made by certified check payable to the New York State Department of Environmental Conservation for payment into the Hazardous Waste Remedial Fund established under Section 97-b of the State Finance Law. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Room 208 Albany, New York 12233-7010.

XXI. A. Whenever the dispute resolution mechanism is authorized under this Consent Order, the following is the procedure to be used: Respondent requests to meet with the Director of the Division of Hazardous Waste Remediation ("the Director") in order to discuss the Department's determination or requirement. At this meeting, Respondent shall be given an opportunity to present its responses to the Department's determination or requirement, and the Director shall have the authority to modify and/or withdraw such determination or requirement.

B. Following such meeting Respondent shall (1) revise any submittal in accordance with the Department's specific comments as modified, except for those which have been withdrawn by the Director and shall submit a revised submittal or (2), except as provided in subparagraph C, undertake any action required by the Department as modified by the Director. The period of time within which the submittal must be revised or the required action taken will be the period specified by the Department in its notice of determination or requirement unless

the Department revised the time frame during the meeting referenced above. After receipt of the revised submittal or performance of any required action by Respondent, the Department shall notify the Respondent in writing of its approval or disapproval. If the Department determination is one of disapproval both the Department and Respondent shall have the right to pursue whatever remedies at law may be legally available to them, without prejudice to either's right to contest the same.

C. Following the dispute resolution meeting and the Director's decision, when the Department requirement is a construction activity, the Respondent has the right to pursue whatever remedies at law may be legally available and to postpone the construction activity which was the subject of dispute resolution pending resolution of the dispute by judicial means. Any associated activities whose performance is dependent upon the outcome of resolution of the dispute may be postponed pending judicial resolution.

XXII. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the Niagara County Clerk to give all parties who may acquire any interest in the Site notice of this Order.

XXIII. Respondent shall implement a citizen participation program in coordination with and subject to the approval of the Department. The citizen participation program shall be consistent with the Department's publication entitled "New York

State Inactive Hazardous Waste-Site Citizen Participation Plan".

XXIV. In the event Respondent proposes to convey the whole or any part of its interest in the Site, Respondent shall, not fewer than 60 days prior to the proposed conveyance, notify the Department in writing of the identity of the transferee and of the nature and date of the proposed conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

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

A. Communication from Respondent shall be made as follows:

1. Director, Division of Hazardous Waste Remediation  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, new York 12233
2. Director, Bureau of Environmental Exposure Investigation  
New York State Department of Health  
2 University Place  
Albany, New York 12203
3. Regional Engineer  
Region 9  
New York State Department of Environmental Conservation  
600 Delaware Avenue  
Buffalo, new York 14202-1073
4. Division of Environmental Enforcement  
New York State Department of Environmental Conservation  
600 Delaware Avenue  
Buffalo, New York 14202-1073

B. Copies of work plans and reports shall be submitted

as follows:

1. 2 copies to the Director, Division of Hazardous Waste Remediation
2. 1 copy to the Director, Bureau of Environmental Exposure Investigation
3. 4 copies to Regional Engineer

C. Communication to be made from the Department to the

Respondent shall be made as follows:

Mr. Richard Frankoski  
Manager Environmental Properties  
BP America, Inc.  
200 Public Square  
Cleveland, Ohio 44114-2375

Ronald F. Spears, Jr.  
Senior Environmental Specialist  
The Carborundum Company  
1625 Buffalo Avenue  
Niagara Falls, New York 14302


XXVI. Respondent, its officers, directors, agents, servants, employees, successors and assigns shall be bound by the terms of this Order.

XXVII. The terms hereof shall constitute the complete and entire Order between Respondent and the Department concerning the Site. No term, condition, understanding or agreement 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, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule or any other submittal shall be construed as relieving

Respondent of its obligation to obtain such formal approvals as may be required by this Order.

DATED:

Albany, New York  
Dec. 23, 1991



---

EDWARD O. SULLIVAN  
Deputy Commissioner  
New York State Department of  
Environmental Conservation



