

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
the Investigation and, if necessary,
Remediation of Certain Former
Manufactured Gas Plant ("MGP") Locations

ORDER
INDEX NUMBER:D0-0001-0011

by

Niagara Mohawk Power Corporation ("NMPC")
Respondent.

DEFINITIONS

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

A. "CERCLA": the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601 et seq.) and all amendments.

B. "Contemplated Use": with respect to each individual property covered by this Order, it is agreed that the Contemplated Use for each property shall be as set forth in Exhibit "A" to this Order, provided, however that Respondent may elect, upon written notice to the Department, to change the use of any individual property prior to its submittal of a proposed remedial work plan, if any, or before the issuance of a release pursuant to Subparagraph II.J.2 in the event that the Department determines that no remediation is necessary at an individual property. After the submittal of proposed remedial work plan or after the issuance of a release pursuant to Subparagraph II.J.2 in the event that the Department determines that no remediation is necessary at an individual property, the Respondent must obtain the Department's express written waiver of such use, which waiver shall not be unreasonably withheld but may be conditioned upon further remedial activity or restrictions at such property.

C. "Covered Contamination": for each Site, the concentrations of Existing Contamination to which the Existing Contamination shall have been remediated both on-Site and off-Site in accordance with the requirements of the Work Plan(s) for such Site. The Department's requirements as to reduction in volume, distribution and/or concentration of Existing Contamination shall be determined and implemented such that any residual post-remedial contamination which remains shall be at levels protective of public health and the environment given the Contemplated Use of each Site.

D. "Day": a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday or State holiday. 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.

E. "Department": the New York State Department of Environmental Conservation.

F. "ECL": the New York State Environmental Conservation Law.

G. "Existing Contamination": any substance which is identified and characterized to the Department's satisfaction during the implementation of this Order provided such substance:

1) is included on the list of hazardous substances promulgated pursuant to ECL § 37-0103, and is a component of manufactured gas plant wastes associated with the MGP believed to have been operated in the past at each Site, or which otherwise resulted from the operations of Respondent or its predecessor entities; or

2) is included on the list of hazardous substances promulgated pursuant to ECL § 37-0103, and is commingled or intermingled with wastes which are a component of manufactured gas plant wastes associated with the MGP believed to have been operated in the past at each Site, or which otherwise resulted from the operations of Respondent or its predecessor entities in a circumstance whereby the level of contamination set forth in Subparagraph G.1 supra, if present alone, would independently require the implementation of remedial action.

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

I. "IRM Work Plan": a Department-approved work plan for performance of one or more IRMs to be implemented consistent with the terms of this Order, the purpose of which shall be to address conditions related to the Existing Contamination. Each IRM Work Plan shall include a chronological description of the anticipated IRM activities together with a schedule for performance of those activities. Each IRM Work Plan shall be attached to this Order as Exhibit "E", and any Department-approved modifications to any IRM Work Plan shall be attached as appendixes to Exhibit "E". Each approved IRM Work Plan and all approved modifications thereto shall be considered enforceable parts of this Order.

J. "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.

K. "Remedial Action Selection ("RAS") Report": an engineering report containing without limitation a detailed description (engineered conceptual model) of the proposed remedy along with a demonstration that the remedy can achieve the cleanup goals for the site or area of concern. The RAS Report can be a component of the RA Work Plan and shall include, among other requirements, an evaluation of the proposed remedy considering the factors set forth in 6 NYCRR 375-1.10(c)(1)-(6).

L. "Remedial Action ("RA") Work Plan": a Department-approved work plan to be developed and implemented by Respondent with respect to any Site which is determined by the Department to require the implementation of remedial action. Each RA Work Plan shall address conditions relating to the Existing Contamination both on and off the subject Site, to the extent such conditions are determined to require remediation by the Department and have not been fully addressed previously through the implementation of IRMs. At a minimum, each RA Work Plan must provide for the eliminate or mitigate all significant threats to the environment or public health determined to result from Existing Contamination and must be sufficient to provide for safe implementation of the Contemplated Use of such Site Each approved RA Work Plan and any modifications thereto shall be considered enforceable parts of this Order. Each Department-approved RA Work Plan shall be attached to this Order as Exhibit "D", and any Department-approved modifications thereto shall be attached as appendices to Exhibit "D".

M. "Remedial Investigation ("RI") Work Plan": a Department-approved work plan to be developed and implemented by Respondent with respect to any Site which is determined by the Department to require the implementation of a remedial investigation. Such RI Work Plan shall be submitted in accordance with a schedule to be agreed upon between the Department and Respondent. The purpose of each RI Work Plan shall be to determine and characterize the nature and extent of contamination which may exist on-Site and off-Site as a result of the former operations of Respondent or Respondent's predecessor entities at each Site. Each RI Work Plan shall be attached to this Order to make up Exhibit "C", and shall be considered an enforceable part of this Order.

N. "Site": Each individual property listed in Exhibit "A" to this Order, which Exhibit also further identifies each property by a map indicating the location and specifies a description of the Contemplated Use of each property. Exhibit "A" shall also include a copy of the deed or other document indicating current ownership and a metes-and-bounds description, which deed shall be added as soon as this information is determined by Respondent. The term "Site" shall be construed to mean all the individual properties when the context of this Order requires such construction to give full meaning to this Order.

O. "Site Characterization ("SC")/IRM Study Work Plan": the Department-approved SC/IRM Study Work Plan pertaining to Existing Contamination at the Site that the Respondent

shall implement. Such SC/IRM Study Work Plan shall be submitted in accordance with a schedule set forth below. The purpose of each SC/IRM Study Work Plan shall be to cause the generation of information sufficient to: i) enable the Department to generally characterize the nature and extent of distribution of any Existing Contamination at the subject Site; ii) enable the Department to determine if a full investigation of the nature and extent of Existing Contamination at the subject Site is warranted; and iii) enable the Respondent to determine whether the nature and extent of any Existing Contamination relating to the Site are such that the implementation of one or more IRMs may be appropriate for consideration by the Department at each Site. Each SC/IRM Study Work Plan shall be attached to this Order to make up Exhibit "B", and shall be considered an enforceable part of this Order.

P. "Respondent": Niagara Mohawk Power Corporation, a corporation formed under the laws of the State of New York, with corporate offices at 300 Erie Boulevard West, Syracuse, New York 13202-4250.

CONSIDERING:

1. On December 7, 1992 Respondent consented to the Department's issuance of an administrative Order on Consent by which Respondent would investigate and, as necessary, remediate 21 former MGP sites located on property owned by Respondent, and on the same date consented to the Department's issuance of a separate administrative Order on Consent by which Respondent would investigate and, as necessary, remediate an additional former MGP site located on Respondent's property at Harbor Point in Utica, New York. Respondent has demonstrated its commitment to cooperate with the Department and to effectively meet the objectives of each Order.
2. Additionally, on November 26, 1999 and February 14, 2000, Respondent and the Department entered into Voluntary Cleanup Agreements to investigate and, as necessary, remediate former MGP Sites located, respectively, in Amsterdam, New York (Index #D4-0001-99-03) and Oneida, New York (Index #D7-0001-99-04), which sites are owned and intended for future beneficial development by entities other than Respondent.
3. At the request of Respondent, the Oneida (Cedar St.) Site, which as of the date of this Order remains subject to the requirements of Voluntary Cleanup Agreement Index #D4-0001-99-04 issued by the Department on February 14, 2000, will be covered with respect to all further investigative and remediation-related activities, and to the respective rights and obligations of the parties, by the terms of this Order.
4. By letter dated October 22, 1999 the Department requested information from Respondent with regard to the existence of any former MGP locations in addition to those locations previously identified to the Department in prior notifications.
5. By letters dated November 9, 1999 and January 21, 2000, Respondent tentatively

identified 24 locations which may at one time have been the location of former MGPs and which may have been operated by historic predecessor entities which, by merger and/or consolidation, led to the corporate existence of Respondent. Thereafter, Respondent agreed to voluntarily enter into this Order to develop under the Department's Voluntary Cleanup Program, and consistent with Respondent's mandate and objectives, a comprehensive program to address such Sites. In so doing, Respondent became one of the first utilities in New York State to commit to comprehensively deal with such sites.

6. Respondent holds no current ownership interest in 21 of the 24 potential former MGPs identified as described above, and, therefore, has no existing right of access and no basis upon which it may assert any control over the use of such properties absent the agreement and consent of the current owner of each property.

7. Nearly all of the MGP operations potentially associated with each Site ceased operations more than 50 years prior to the date of this Order, with 8 of them having ceased operations more than 100 years prior to said date. As of the date of this Order, Respondent does not have any information relevant to the issue of whether any Site is characterized by, or has been affected by, releases or discharges of hazardous substances attributable to industrial or other sources which are unrelated to the Existing Contamination, and as to which there is accordingly no legal basis upon which Respondent should assume liability.

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

9. Respondent represents, and for the purposes of this Order, the Department relies on these representations, that its involvement with each Site is limited to the following: Respondent does not presently own any Site, except for the Fort Edward Site, the Albany Site and the Whitehall Site (as to which Respondent currently holds an ownership interest in all or part of the affected property) and it is believed that Respondent's involvement with each Site is limited to former ownership and/or past operation of a MGP on or in proximity to each Site by one or more of Respondent's corporate predecessors.

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

11. The Department's authority to require abatement and remediation of releases of, inter alia, hazardous substances, is varied, including, but not limited to, ECL 1-0101, 3-0301, 71-1929, 71-2703, and 71-2705. In addition, the Department has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution caused, by inter alia, the release of hazardous substances into the environment. ECL 3-0301.1.i. Furthermore, the Department has authority to require abatement and remediation of significant threats to the public health or the environment caused by threatened releases of hazardous substances that are hazardous wastes as

that term is defined in ECL 27-1301.

12. A. Respondent has entered into this Order in order to resolve Respondent's potential liability, under ECL Article 27, Title 13, for remediating the Existing Contamination in its capacity as the successor to historic predecessor entities which may have generated residual hazardous substances located on-Site and off-Site as a result of the operations of said predecessors at varying intervals between the years of approximately 1850 and 1950. The Department finds that such resolution, undertaken in accordance with the terms of this Order, is in the public interest.

B. Respondent consents to the terms and conditions of this Order.

13. The Department and Respondent agree that the goals of this Order are:

A. for Respondent to:

1. implement, as required, the SC/IRM Study Work Plan and, if necessary, develop and implement a Department-approved RI Work Plan to appropriately investigate the nature and extent of Existing Contamination at each Site where the Department determines that investigative activities are required, and, if necessary, subject to Respondent's right to opt-out pursuant to Subparagraph II.A and Subparagraph II.G.1.iii, develop and implement a Department-approved RA Work Plan to appropriately address any Existing Contamination at each Site where the Department determines that remedial activities are required. These work plans shall address any on-Site and off-Site impacts related to Existing Contamination determined by the Department to require remediation;

2. reimburse the State's administrative costs as provided in this Order;

B. For the Department and the Respondent to expedite the performance of activities specified by this Order in a reasonable and appropriate manner so as to minimize, to the extent practicable, any negative impacts occasioned by such activities upon the respective Site Owner's use of the property.

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

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

I. Performance and Reporting of the SC/IRM Study Work Plan

A. With respect to each of the Sites identified, Respondent shall submit to the Department no later than the date specified in Table "A" all data within Respondent's possession

or control regarding environmental conditions on-Site and off-Site to the extent the information has not already previously been provided to the Department.

B. With respect to each of the Sites identified, Respondent shall submit to the Department no later than the date specified in Table “A,” for its review and approval, a detailed SC/IRM Study Work Plan that describes the methods and procedures to be used in implementing (i) a SC and ii) a study of possible IRMs to be considered, if any, for implementation at each Site. The SC/IRM Study will provide the parties with sufficient information to enable the parties to evaluate the appropriateness of proposing any IRMs for Departmental consideration under Paragraph III of this Order.

Table “A”

<u>Site</u> (Exh. A)	<u>Data Submittal</u> (¶I.A)	<u>SC/IRM Study Work Plan</u> (¶I.B)
Cohoes Site.....	1/31/02	1/31/02
Albany Site.....	1/31/02	1/31/02
Little Falls Site.....	1/31/02	1/31/02
Herkimer Site.....	1/31/02	1/31/02
Fort Edward Site.....	1/31/02	1/31/02
Malone Site.....	1/31/02	1/31/02
Watertown Site.....	1/31/02	1/31/02
Watervliet Site.....	1/31/02	1/31/02
Altamont Site	12/31/02	1/31/03
Canastota Site.....	12/31/02	1/31/03
Ogdensburg Site	12/31/02	1/31/03
Saratoga Springs Site	12/31/02	1/31/03
Schenectady Site	12/31/02	1/31/03
Gloversville Site.....	12/31/02	1/31/03
Attica Site.....	12/31/03	1/31/04
Fulton Site	12/31/03	1/31/04
Mohawk Site.....	12/31/03	1/31/04
Oswego Site	12/31/03	1/31/04
Troy (Liberty St.) Site	12/31/03	1/31/04
Troy (Jefferson St.) Site.....	12/31/03	1/31/04
Rensselaer Site	12/31/03	1/31/04
Whitehall Site	12/31/03	1/31/04
Ballston Spa Site.....	12/31/03	1/31/04
Cherry Valley Site	12/31/03	1/31/04

NOTE: The Oneida (Cedar Street) Site is subject to a previous Voluntary Cleanup Agreement-based schedule and is therefore not subject to these Table A submittals.

C. Each Site's SC/IRM Study Work Plan shall describe the methods and procedures to be implemented in undertaking a study at the Site to which it pertains that will cause the generation of information sufficient to: i) enable the Department to characterize the nature and extent of distribution of any Existing Contamination on or off the subject Site; ii) enable the Department to determine if a full investigation of the nature and extent of Existing Contamination at the subject Site is warranted; and iii) enable the Respondent to determine whether the nature and extent of any Existing Contamination relating to the Site are such that the implementation of one or more IRMs may be appropriate for consideration by the Department.

D. Each SC/IRM Study Work Plan shall include, but not be limited to, the following:

(1) a chronological description of the anticipated investigative activities together with a schedule for the performance of these activities. Such schedule shall take into account, at a minimum, the submission of draft documents, Department review of such documents, and submission of final approvable documents.

(2) A Sampling and Analysis Plan that shall include:

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

(b) a field sampling plan that defines sampling and data gathering methods in a manner consistent with the "Compendium of Superfund Field Operations Method" (EPA/540/P-87/001), OSWER Directive 9355.0-14, December 1987) as supplemented by the Department; and

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

E. Upon receipt by Respondent of the Department's written approval of a SC/IRM Study Work Plan, Respondent shall commence implementation of such SC/IRM Study Work Plan and implement it in accordance with its terms

F. 1. In accordance with the schedule contained in the SC/IRM Study Work

Plan for each Site, Respondent shall prepare a SC Report in a format acceptable to the Department for such Site that shall:

- a. include all data generated and all other information obtained during the relevant SC;
- b. provide all of the assessments and evaluations set forth in applicable Division of Environmental Remediation Technical & Administrative Guidance Memorandum and other appropriate Departmental technical and administrative guidelines that shall have been developed as of the time of submission of the SC/IRM Study Work Plan for the subject Site except those assessments and evaluations that the Respondent has already provided the Department;
- c. identify any additional data that must be collected related to the Existing Contamination for the subject Site; and
- d. include a certification by the individual or firm with primary responsibility for the day to day performance of the SC that all activities that comprised the SC for the subject Site were performed in full accordance with the Department-approved SC/IRM Study Work Plan.

2. In accordance with the schedule contained in the SC/IRM Study Work Plan for each Site, Respondent shall prepare a IRM Report in a format acceptable to the Department for such Site that shall include "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the SC/IRM Study Work Plan for such Site and any Department-approved modification to that work plan, and this Order.

G. 1. After its acceptance of the SC Report for a Site submitted under Subparagraph I.F of this Order, the Department shall determine and notify Respondent in writing whether further investigation and/or remediation of the Existing Contamination is necessary at such Site.

2. If the Department determines that no further investigation of the Existing Contamination is necessary and remediation of the Existing Contamination is not required to allow such Site to be used for the Contemplated Use, it shall so state in writing and shall provide Respondent with the forbearance, release, and covenant not to sue described in Subparagraph II.J of this Order and with the notification letter described in Subparagraph II.K of this Order.

3. If the Department determines that further investigation and/or remediation is needed to allow such Site to be used for the Contemplated Use, it shall so state in writing; and both parties shall attempt in good faith to develop a proposed RI Work Plan in accordance with Paragraph II.A of this Order.

H. If any of the Department's determinations in subparagraph I.G above would require the filing of deed restrictions and Respondent is unable or elects not to obtain such deed restrictions from the current landowner(s), Respondent retains the right to investigate and, if necessary, remediate the Site so that no deed restrictions will be required by the Department under a Department-approved modification to the appropriate Work Plan(s) for such Site.

II. Development and Implementation of Any Required RI Work Plans; and Development and Implementation of Any Required RA Work Plans, if Necessary

A. If the Department issues a determination pursuant to Subparagraph I.G. that further investigation and/or remediation is needed to allow a particular Site to be used for the Contemplated Use, both parties shall attempt in good faith to develop a proposed RI Work Plan incorporating the requirements set forth in Subparagraphs II.B and II.C unless within 10 days after receipt of the Department's written determination, Respondent elects not to develop a RI Work Plan. However, if after good faith negotiations, Respondent and the Department cannot agree upon the terms of such revisions to the proposed RI Work Plan for such Site,

then, except with respect to

1. Respondent's obligations under Paragraphs VIII and X of this Order relative to the subject Site; and

2. Respondent's obligation, here incurred, to ensure that it does not leave the subject Site, or any off-Site areas affected by activities conducted pursuant to this Order for such Site, in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any activities under this Order were commenced; and

3. the Department's right to enforce under Paragraph VI of this Order the obligations described in the above Subparagraphs II.A.1 and II.A.2 of this Order, the subject Site shall be withdrawn from this Order effective either on the date of the Department's receipt of Respondent's written notification of its election not to develop an RI Work Plan, or on the date of the Department's written notification to Respondent that negotiations have failed to develop an acceptable RI Work Plan for such Site, whichever is applicable; and both parties retain whatever rights they may have had respecting each other as they had before the effective date of this Order with respect to the withdrawn Site.

B. Each RI Work Plan shall include, but not be limited to, the following:

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

2. A Sampling and Analysis Plan that shall include:

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

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

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

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

C. Each RI Work Plan shall incorporate all elements of a Remedial Investigation ("RI") as set forth in CERCLA the National Contingency Plan ("NCP") of March 8, 1990 and appropriate USEPA and Department guidance documents. While not specifically so required by the Department, NMPC reserves the right to incorporate all elements of a NCP compliant Feasibility Study as set forth in the same documents described above with reference to the elements of any RI Work Plan; and, to the extent Respondent incorporates the elements of a Feasibility Study into a submitted RI Work Plan, the Department will review and approve such elements as if such elements had been specifically required by the terms of this Order. The Department reserves the right to require the Respondent to provide information relative to additional remedial measures for the Department's consideration in the selection of a remedy for any particular site.

D. Within 30 days of receipt by Respondent of the Department's written approval of a RI Work Plan or within 30 days after Respondent's receipt of the requisite grant of access by the relevant site owner, whichever is later, Respondent shall commence implementation of such RI Work Plan and implement it in accordance with its terms.

E. 1. Respondent shall notify the Department of any significant difficulties that may be encountered in implementing any RI Work Plan or any Department-approved modification thereto and shall not modify any obligation unless the proposed modification is first approved by the Department.

2. Existing Contamination encountered during implementation of any RI Work Plan, the existence, nature and/or extent of which were not known at the time of approval

of such RI Work Plan shall be fully characterized to the satisfaction of the Department.

F. In accordance with the schedule contained in each RI Work Plan, Respondent shall submit to the Department a Final RI Report, which shall:

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

G. 1. After its acceptance of each Final RI Report submitted under Subparagraph II.F of this Order, the Department shall determine whether it has sufficient information respecting the nature and extent of the contamination relating to the subject Site to allow for a valid and complete assessment of the need to implement any remedial activity. To the extent that the Department determines that it has sufficient information regarding the nature and extent of contamination at the Site, it shall determine whether remedial activity is required to make such Site protective of public health and the environment based upon the Contemplated Use.

i. If the Department determines that it does not have sufficient information respecting the nature and extent of the subject Site's contamination, it will so notify Respondent in writing. To the extent that the additional information required by the Department relates to the Existing Contamination, Respondent shall collect such additional information under a Department-approved revision to the respective RI Work Plan, which shall be attached to this Order as Exhibit "C-1" and made a part of this Order.

ii. If the Department determines that environmental conditions exist at such Site so as to require the implementation of remedial action to make such Site protective of public health and the environment based upon the Contemplated Use, then, subject to Subparagraph I.G.iii, the Respondent shall within 120 days of Respondent's receipt of the writing identified in this Subparagraph II.G.ii with respect to a Site, develop a proposed RA Work Plan for such Site based on the Contemplated Use as defined under this Order.

iii. If the Respondent determines that

- a. the conditions of concern are substantially attributable to

the presence of hazardous substances which do not fall within the scope of Existing Contamination, and

b. such hazardous substances are not intermingled or commingled with Existing Contamination in a circumstance whereby the level of Existing Contamination, if present alone, would independently require the implementation of remedial action,

then Respondent shall provide written notification to the Department, directed to the individuals specified in Section XIII of this Order, to inform the Department of Respondent's determination that the subject Site is characterized by circumstances as described above. The written notification shall further provide a detailed outline describing Respondent's basis for such determination. The Department may request additional information or data to be developed and submitted by Respondent to substantiate Respondent's determination. The Department shall review the notification and the supporting documentation, including any additional information or data required by the Department to be developed and submitted by Respondent to substantiate Respondent's determination, and shall make a determination agreeing or disagreeing with the Respondent's determination. If the Department agrees with the Respondent's determination, then the Respondent shall, as of the date of issuance by the Department of such notification, have no further obligations in respect of the affected Site, except for Respondent's obligation, here incurred, i) to ensure that it does not leave the subject Site, or any off-Site areas affected by remedial activities conducted pursuant to this Order for such Site, in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any activities under this Order were commenced; and ii) to, through the date of issuance of the Department's notification, reimburse the Department for its expenses with respect to the subject Site and indemnify the Department. If the Department disagrees with the Respondent, the Respondent shall within 120 days of Respondent's receipt of the Department's determination under this Subparagraph, develop a proposed RA Work Plan for such Site based on the need to remediate Existing Contamination given the Contemplated Use as defined under this Order

2. If a RA Work Plan is required, it shall provide for the remediation both on-Site and off-Site of all Existing Contamination as specified by the Department, and subject to the Department's approval. If a proposed RA Work Plan relies upon the use of institutional controls, the Respondent shall undertake diligent and reasonable efforts to effectuate such institutional controls. A RA Work Plan may be modified for any Site where institutional controls required by such RA Work Plan cannot be secured. Each proposed RA Work Plan shall be noticed for public comment in accordance with Subparagraph II.G.3 of this Order. Each proposed RA Work Plan shall provide:

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

- a. the construction and operation of any structures;
- b. the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;
- c. the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;
- d. physical security and posting of the subject Site (if appropriate);
- e. quality control and quality assurance procedures and protocols to be applied during implementation of the RA Work Plan;
- f. monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-approved remedial alternative; and
- g. efforts by Respondent to secure the recordation of deed restrictions (if determined appropriate by the Department).

ii. A description of the proposed contents and a schedule for preparation and submittal of "Biddable Quality" documents for implementation of the RA Work Plan including, but not limited to, documents and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

iii. A time schedule to implement such RA Work Plan;

iv. The parameters, conditions, procedures, and protocols to determine the effectiveness of such RA Work Plan, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;

v. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction, if any, required by such RA Work Plan, including an estimate of the number of years during which such activities will be performed (where appropriate) a specific description of the criteria to be used to decide when an operation of the remedy may be discontinued.

vi. A contingency plan to be implemented if any element of such RA Work Plan fails to achieve any of its objectives or otherwise fails to protect human health or the environment;

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

viii. A citizen participation plan which incorporates appropriate activities as required under the Voluntary Cleanup Program; and

ix. A provision that if, during implementation of such RA Work Plan, contamination within the definition of Existing Contamination is discovered that was not discussed in the Final RI Report for the subject Site, Respondent shall investigate the nature and extent of such newly discovered contamination, and, if necessary, such RA Work Plan will be revised to have Respondent remediate such newly discovered contamination in the event that this remediation is needed to allow the Contemplated Use at the subject Site to proceed.

3. Upon development of each proposed RA Work Plan, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the public's opportunity to submit comments to the Department, by no later than 30 days after the date of the issue of the Environmental Notice Bulletin in which the notice appears, on such proposed RA Work Plan. The Department also shall mail an equivalent notice to the municipality and the County in which such affected Site is located. Additionally, Respondent shall provide a copy of the RA Work Plan to the current owner of the subject Site along with a notice of the current owner's ability to comment within 30 days of receipt. If, as a result of its review of the comments received, the Department determines that a proposed RA Work Plan for any Site must be revised due to information received, in whole or in part which indicates that the activities carried out in accordance with it are not sufficiently protective of human health and the environment for the Contemplated Use, then the Department will so notify Respondent and, to the extent such environmental conditions or information received relates to Existing Contamination, the Department will immediately commence negotiations with Respondent to revise the proposed RA Work Plan for such Site accordingly. If the Department and Respondent agree upon the terms of such revisions to such Site's proposed RA Work Plan, as appropriate, the revised proposed RA Work Plan for such Site shall become the final RA Work Plan and shall be attached to this Order as Exhibit "D" and made a part of this Order. However, if after good faith negotiations, Respondent and the Department cannot agree upon the terms of such revisions to the proposed RA Work Plan for such Site, then, except with respect to

iii. Respondent's obligations under Paragraphs VIII and X of this Order relative to the subject Site; and

iv. Respondent's obligation, here incurred, to ensure that it does not leave the subject Site, or any off-Site areas affected by remedial activities conducted pursuant to this Order for such Site, in a condition, from the perspective of human health and environmental

protection, worse than that which prevailed before any activities under this Order were commenced; and

v. the Department's right to enforce under Paragraph VI of this Order the obligations described in the above Subparagraphs II.G.3.iii and II.G.3.iv of this Order, the subject Site shall be withdrawn from this Order effective the date of the Department's written notification to Respondent that negotiations have failed to develop an acceptable RA Work Plan for such Site; and both parties retain whatever rights they may have had respecting each other as they had before the effective date of this Order with respect to the withdrawn Site.

If, following the 30 day comment period, the Department determines that the proposed RA Work Plan to implement the Department-approved activities for a Site does not need to be revised, then the Department shall notify Respondent in writing of its approval of the proposed RA Work Plan and that Plan shall become the final RA Work Plan for such Site and shall be attached to this Order as Exhibit "D" and made a part of this Order.

4. Respondent shall implement each final RA Work Plan contained in Exhibit "D" in accordance with its terms. However, the parties agree that in the event the Department determines that a proposed RA Work Plan to implement the Department-approved remedial activities for any Site must be revised if contamination within the scope of Existing Contamination previously unknown or inadequately characterized is encountered during implementation of such final Remediation Work, then the Department will so notify Respondent and, to the extent such contamination is within the scope of the Existing Contamination, the Department will immediately commence negotiations with Respondent to revise such proposed RA Work Plan accordingly. If the Department and Respondent agree upon the terms of the revisions to such RA Work Plan, the revised RA Work Plan shall become the final RA Work Plan for such Site and shall be attached to this Order as Exhibit "D-1" and made a part of this Order. However, if after good faith negotiations, Respondent and the Department cannot agree upon the terms of such revisions to such RA Work Plan, then, except with respect to

i. Respondent's obligations under Paragraphs VIII and X of this Order relative to such Site; and

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

iii. the Department's right to enforce under Paragraph VI of this Order the obligations described in Subparagraphs II.G.4.i and II.G.4.ii of this Order,

the subject Site shall be withdrawn from this Order effective the date of the Department's written notification to Respondent that negotiations have failed to develop an acceptable modification to the final RA Work Plan for such Site; and all parties retain whatever rights they may have had

respecting each other as they had before the effective date of this Order with respect to such Site.

H. 1. In accordance with the schedules contained in Exhibit "D", as may be modified by agreement between the parties (which modifications shall appear in Exhibit "D-1" of this Order), Respondent shall submit to the Department a Final RA Engineering Report for each Site for which a RA Work Plan has been developed. Each Final RA Engineering Report shall include "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the RA Work Plan for such Site and any Department-approved modification to that work plan, and this Order.

2. Respondent shall submit a detailed post-remedial operation, maintenance, and monitoring plan ("OM&M Plan"), if needed for a Site, in accordance with the schedule set forth in each RA Work Plan. Each OM&M Plan shall be attached to this Order as Exhibit "F", and any Department-approved modifications to any OM&M Plan shall be attached as appendixes to Exhibit "F". Each approved OM&M Plan and all approved modifications thereto shall be considered enforceable parts of this Order.

3. A professional engineer must prepare, sign, and seal every OM&M Plan, RA Work Plan, Final RA Report, Final OM&M Engineering Report, and certification as well as all "as built" drawings.

I. 1. Should post-remedial operation and maintenance prove to be necessary at any Site, upon the Department's approval of the OM&M Plan for a Site, Respondent shall implement, or otherwise arrange for the implementation, as appropriate, of the OM&M Plan in accordance with its terms.

2. Respondent shall submit to the Department a Final OM&M Engineering Report for each Site for which a OM&M Work Plan has been developed. Each Final OM&M Engineering Report shall include a certification that all activities were completed in full accordance with the OM&M Work Plan for such Site and any Department-approved modification thereto, and this Order.

3. After receipt of the Final OM&M Report for each Site, the Department shall notify Respondent in writing whether the Department is satisfied that the OM&M Work Plan for the subject Site was satisfactorily implemented which notification shall not be unreasonably withheld.

J. 1. After receipt of the Final RA Report for each Site, the Department shall notify Respondent in writing whether the Department is satisfied that the RA Work Plan for the subject Site was satisfactorily implemented in compliance with Exhibit "D" (and, as appropriate "D-1") and the Department-approved design, which notification shall not be unreasonably withheld.

2. Upon being satisfied that the cleanup levels for a Site which are identified in, or to be identified in accordance with, the RA Work Plan for each Site requiring remediation have been reached or that a Site doesn't require remedial activity to make such Site protective of public health and the environment based upon the Contemplated Use and upon recording of the appropriate notices and deed restrictions, if any, in accordance with Paragraph XII of this Order, the Department shall notify Respondent in writing of its satisfaction relative to such Site and, except for the reservations identified below, shall provide in such notification that the Department releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against, Respondent for any further investigation and remediation of such Site, based upon the release or threatened release of any Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VIII of this Order for the subject Site continue to be or have been made to the Department, and (b) Respondent, and/or Respondent's successors or assigns, promptly commence and diligently pursue to completion the Department-approved OM&M Plan, if any, for the subject Site. Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to natural resource damages nor to any further investigation or remedial action the Department deems necessary:

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

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

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

iv. due to Respondent's failure to implement this Order to the Department's satisfaction; or

v. due to fraud committed, or mistake made, by Respondent in demonstrating that the cleanup levels identified in, or to be identified in accordance with, the RA Work Plan for the subject Site were reached;

vi. if Respondent or Respondent's successors or assigns causes a, or

allows or permits the, release or threat of release, at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination; or

vii. if Respondent or Respondent's successors or assigns causes, allows or permits a change of use of the Site from the Contemplated Use to a use requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment.

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

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

4. Within 30 days of the Department's issuance of the forbearance, covenant not to sue, or release set forth in this Subparagraph II.J of this Order, Respondent shall provide the Department with a written release, covenant not to sue and forbearance from bringing any action, proceeding or suit against the State of New York for Respondent's response costs related to the Existing Contamination.

K. If the Department is satisfied with the implementation of the RA Work Plan for a Site, any Department-approved modification to such RA Work Plan, and Department-approved details, documents, and specifications prepared by or on behalf of Respondent pursuant thereto, the Department shall provide Respondent with a written "no further action" letter for such Site substantially similar to the model letter attached to this Order and incorporated in this Order as Exhibit "H;"

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

2. Except as above provided in Subparagraph II.J of this Order and in a "no further action" letter issued under Subparagraph II.K of this Order, nothing in this Order is intended as a release, forbearance, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the

Department, or the State of New York may have against any person, firm, corporation, or other entity not a party to this Order. In addition, notwithstanding any other provision in this Paragraph II of this Order, a forbearance, covenant not to sue, and release described in Subparagraph II.J and in a "no further action" letter issued under Subparagraph II.K of this Order shall not extend to parties (other than Respondent) that were responsible under law before the effective date of this Order to address the Existing Contamination.

M. 1. Due to the geographic proximity of Sites listed in Exhibit "A" to other former MGP sites currently being addressed by Respondent under NYSDEC Orders on Consent #DO-0001-9612 and #D6-0001-9210, and the probable similarity of environmental conditions at each Site which may require remediation, Respondent has requested the Department's consideration and approval of Respondent's efforts to provide for coordination of investigative and/or remedial activity as between all sites for which it is presently implementing a remedial program, so as to, for example, reduce the need for multiple mobilizations of contractor activity and provide for the most efficient use of equipment transported for use. As of the effective date of this Order, Respondent has identified geographically proximate Sites in Watertown, Saratoga Springs, Gloversville and Troy as being potential candidates for such activity coordination.

2. The Department shall consider requests for appropriate modifications of the schedule under which investigations or remedial activity is to be conducted at either of two geographically proximate Sites in order to provide for such activity coordination. The Department will approve any such request which the Department determines to be appropriate based upon a review of all relevant factors including, but not limited to, the potential impact of any resultant schedule modifications on the environment and/or public health.

III. Interim Remedial Measures

A. Respondent may propose one or more IRMs for each Site. In proposing each IRM, Respondent shall submit to the Department an IRM Work Plan that includes an explanation of the basis for Respondent's conclusion that performance of the IRM is warranted, and a chronological description of the anticipated IRM activities together with a schedule for performance of those activities.

B. Upon the Department's determination that the proposal is an appropriate IRM and upon the Department's approval of such IRM Work Plan, such IRM Work Plan shall be incorporated into and become an enforceable part of this Order; and Respondent shall submit to the Department for its review and approval, in accordance with the schedule contained in the Department-approved IRM Work Plan, detailed documents and specifications prepared, signed, and sealed by a professional engineer to implement the Department-approved IRM at each Site. Such documents shall include:

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

2. A Sampling and Analysis Plan that shall include:

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

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

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

iv. A citizen participation plan that is consistent with the Department's requirements under the Voluntary Cleanup Program and the citizen participation plan developed under this Order for the subject Site.

The Respondent shall then carry out such Department-approved IRM in accordance with the requirements of the Department-approved IRM Work Plan, detailed documents and specifications, and this Order. Respondent shall notify the Department of any significant difficulties that may be encountered in implementing the Department-approved IRM Work Plan, detailed documents, or specifications and shall not modify any obligation unless first approved by the Department.

C. During implementation of all construction activities identified in the Department-approved IRM Work Plan, Respondent shall have a full-time representative at the subject Site who is qualified to supervise the work done. Such representative may be an employee of the performing Respondent's contractor as approved by the Department pursuant to Paragraph XV of this Order.

D. Within the schedule contained in each Department-approved IRM Work Plan, Respondent shall submit to the Department a Final IRM Engineering Report and a detailed post remedial operation and maintenance plan ("IRM OM&M Plan"), if needed, prepared by a professional engineer that includes a certification by that individual that all activities that comprised the Department-approved IRM were completed in accordance with the Department-approved IRM Work Plan and this Order. Each IRM OM&M Plan shall be attached to this Order as Exhibit "F", and any Department-approved modifications to such OM&M Plan shall be

attached as appendixes to Exhibit "F." The approved IRM OM&M Plan and all approved modifications thereto shall be considered enforceable parts of this Order.

1. If the performance of the Department-approved IRM Work Plan for a Site encompassed construction activities, the Final IRM Engineering Report for such Site also shall include "as-built" drawings, all changes made to the IRM Work Plan during its implementation; and a certification by a professional engineer that the Department-approved IRM was implemented and all construction activities were completed in accordance with the Department-approved detailed documents and specifications for the Department-approved IRM for such Site and all such activities were personally witnessed by him or her or by a person under his or her direct supervision.

2. Each IRM OM&M Plan, "as built" drawings, Final IRM Engineering Report, and certification must be prepared, signed, and sealed by a professional engineer.

3. Upon the Department's approval of each IRM OM&M Plan, Respondent shall implement the IRM OM&M Plan in accordance with its terms. Within the schedule contained in each Department-approved IRM OM&M Plan, Respondent shall submit to the Department a Final IRM OM&M Engineering Report prepared by a professional engineer that includes a certification by that individual that all activities that comprised the Department-approved IRM OM&M Plan were completed in accordance with the Department-approved IRM OM&M Plan and this Order.

E. After receipt of each Final IRM Engineering Report and certification, and each Final IRM OM&M Engineering Report and certification, the Department shall notify Respondent in writing whether the Department is satisfied that such report was completed in compliance with the appropriate work plan and design.

IV. Progress Reports and Meetings

A. Respondent shall submit to the parties identified in Subparagraphs XIII.A.1 and XIII.A.2, in the numbers specified in those Subparagraphs, copies of written monthly progress reports for each Site as specified by IV.B below, which reports may be in an electronic format acceptable to the Department, that:

1. describe the actions which have been taken toward achieving compliance with this Order relative to the subject Site during the previous month;

2. include all results of sampling and tests and all other data received or generated relative to the subject Site by Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent;

3. identify all work plans, reports, and other deliverables required by this Order relative to the subject Site that were completed and submitted during the previous month;

4. describe all actions relative to the subject Site that are scheduled for the next month and provide other information relating to the progress at the subject Site;

5. include information relative to the subject Site regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Respondent's obligations under this Order, and efforts made to mitigate those delays or anticipated delays; and

6. include any modifications relative to the subject Site to any work plan that Respondent has proposed to the Department and any that the Department has approved.

B. Respondent shall submit these progress reports by the tenth day of every month following the date upon which Respondent receives the Department's written notice of approval of the SC/IRM Study Work Plan, as specified by subparagraph I.E, for each Site; and Respondent's obligation to submit the progress reports applicable to a Site shall terminate upon its receipt of the written notification identified in Subparagraph II.J.2 of this Order approving Respondent's Final RA Report concerning the RA Work Plan's implementation for that Site. However, Respondent shall continue to submit reports concerning the implementation of any OM&M Plan for the subject Site that may be required under this Order, if the Plan for a particular Site so specifies.

C. Respondent also shall allow the Department to attend, and shall provide the Department at least five days advance notice of any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

V. Review of Submittals

A. 1. The Department shall review each of the submittals (except monthly progress reports) made pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and with 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 incorporated into and become an enforceable part of this Order.

2. i. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval and may request Respondent to modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work for the subject

Site as described in appropriate SC Work Plan, RI Work Plan, RA Work Plan, IRM Work Plan or OM&M Plan. Within 30 days after receiving written notice that the submittal has been disapproved, a revised submittal shall be made to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

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

B. Within 30 days after the Department's approval of a Final RA Report, Respondent shall submit to the Department one copy of that report and all other Department-approved drawings and submittals related to that Site in an electronic format acceptable to the Department. Such submission shall be made to:

Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7010

VI. Enforcement

A. This Order shall be enforceable under the laws of the State of New York.

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

VII. Respondent's Acquisition of Right of Access; Entry upon Site

A. Respondent, as of the effective date of this Order, has secured no right of access to any Site so as to allow the commencement of investigative activities or any subsequent remedial

activity which may be deemed necessary with respect to any individual Site not owned by Respondent.

1. Within 120 Days of the effective date of this Order, or such other time frame as the parties may agree in writing, the Respondent shall forward a written communication to the record Site Owner of each Site listed in Exhibit "A" as of the effective date of this Order, the purpose of which shall be to inform the Site Owner that i) the subject property has been identified as being the probable historic location of a MGP; ii) that there may be potential environmental and/or public health related concerns associated with the Site; iii) that Respondent has agreed to assume the responsibility to investigate, and if necessary and related to the MGP or Respondent's predecessor's operations, remediate potential concerns; iv) Respondent has entered into this Order with the Department; and v) that a representative of Respondent will be contacting the Site Owner to provide additional information and discuss the nature and extent of the requirement for access and to begin the process of formulating an access agreement designed to appropriately address the individual needs and concerns of each respective Site Owner, taking into account the nature of the existing use of the affected property. The Respondent's communication shall further set forth the Department's position that voluntary cooperation between the Site Owner and Respondent is encouraged in order to achieve the goals of this Order, and that the Department supports Respondent's efforts to achieve a prompt, efficient and appropriate means of carrying out all necessary activities. The communication shall also make reference therein to the statutory authority inter alia under the ECL which provides the Department with the authority to access each Site in the event that Site Owner and Respondent are unable to achieve agreement subject to appropriate terms and conditions.

2. i. Within two weeks after Respondent's issuance of the communication described above, Respondent shall contact each respective Site Owner of the first eight Sites listed in Table "A" above, as well as the Site Owner of any additional Site as to which the Department, or the Site Owner in response to the written communication sent pursuant to Subparagraph VII.A.1 above, has requested such a meeting. The purpose of the meeting shall be to provide additional relevant information and to commence the process for obtaining the necessary access.

ii. No less than 60 Days prior to the planned commencement of field work at each of the remaining Sites listed in Table "A", Respondent shall contact the Site Owner(s) of each respective Site for the purposes specified in the preceding Subparagraph. In connection with subsequent negotiation of terms for access, Respondent shall give reasonable consideration to the individual needs and requirements of the each Site Owner with regard for the existing use of the property, as well as consideration of reasonable and appropriate steps or methods to mitigate potential impacts and disruptions which may result from the investigatory process, and/or as a result of any remedial activity which ultimately may be required, to the extent Respondent's ability to achieve the objectives and requirements of this Order are not thereby unreasonably compromised.

3. i. If, 60 days after the commencement of such negotiations, despite having undertaken a reasonable program of diligent and good-faith efforts to negotiate reasonable terms and conditions for access to an individual property to accomplish the purposes of this Order, Respondent remains unable to secure the requisite access to a particular Site, then Respondent shall notify the Department in writing of the existence of the apparent impasse.

ii. Respondent's written notice to the Department shall include a description of the nature and timing of specific efforts undertaken by Respondent to secure the requisite access, and shall include copies of any written correspondence relevant thereto.

iii. Upon its concurrence that the requisite access is being withheld despite Respondent's attempt to secure such access under reasonable terms and conditions, the Department may undertake to provide prompt written notice to the Site Owner of the Department's authority under, for example, Section 27-1309 of the Environmental Conservation Law, and may further undertake to assist Respondent and Site Owner in an effort to acquire access for Respondent whereby Respondent will be able to fulfill its obligations under this Order. In the event that such intervention on the part of the Department does not lead to a prompt and mutually acceptable resolution of outstanding access-related issues, the Department may, upon due notice to Site Owner, assert as required the enforcement authority available to it under the Environmental Conservation Law to allow Respondent to accomplish the objectives of this Order.

4. Respondent's inability to obtain the requisite access to any property covered by the terms of this Order, despite having undertaken reasonable good-faith efforts as articulated to the Department in the written notice described above, shall constitute a circumstance of force majeure for purposes of paragraph VI.B (Enforcement) above.

B. Respondent hereby consents, upon reasonable notice under the circumstances presented, to the entry upon each Site or areas in the vicinity of each Site which may be under the control of Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the matters addressed in any work plan under this Order for purposes of inspection, sampling, and testing, and remedial activities. Respondent also consents to the Department's entry as herein set forth for the additional purpose of ensuring Respondent's compliance with this Order. The Department shall abide by the health and safety rules in effect for work performed at each Site under the terms of this Order. Upon request, Respondent shall provide the Department with suitable office space at each Site, including access to a telephone, provided such office space and telephone is available to Respondent at such Site, and shall permit the Department full access to all records relating to matters addressed by this Order and to job meetings.

VIII. Payment of Departments of Environmental Conservation and Department of Health Costs

Respondent shall make payments to the Department in order to pay for State expenses (including, but not limited to, direct labor and fringe benefits, overhead, travel, analytical costs and contractor costs). Costs associated with the environmental monitors will be paid from an advance of funds submitted by the Respondent and all other State costs associated with this Order will be reimbursed, after the fact, based on an itemized invoice from the Department for work under this Order.

The procedures for each type of costs are set forth below.

A. Environmental Monitor Costs

Paragraph XII of Department Order Index No. D0-0001-9210 is hereby revised to allow the Department to draw from the interest-bearing account described in that Paragraph to pay for environmental monitor expenses, to the extent such monitors are utilized by the Department, incurred for work related to each Site on and after the effective date of this Order.

B. All Other State Expenses

Within 30 days after receipt of an itemized invoice for all other State expenses (including, but not limited to, direct labor and fringe benefits, overhead, travel, analytical costs and contractor costs) from the Department, the Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses incurred for work related to each Site to the effective date of this Order and for all other State expenses incurred in association with this Order. Such payments shall be sent to the following address:

New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, New York 12233
Attention: Director, Bureau of Program Management, DER

C. Cost Documentation

State eligible costs include, but are not limited to, direct labor, fringe benefits, indirect cost, travel, supplies, equipment, including the lease of vehicles (if necessary) and their full operating costs, analytical costs and other contractual costs for work related to each Site to the effective date of this Order, as well as for the activities conducted pursuant to this Order.

1. Personal Service

- i. Actual personal service costs (direct labor) will be based on site specific time and activity (T&A) codes and costs.

- ii. Itemization of the personal service costs shall include an accounting of personal services indicating the employee name, title, bi-weekly salary, and time spent (in hours) on the project on the site during the billing period identified by an assigned time and activity code. This information shall be documented by reports of Direct Personal Service.
- ii. Federally approved agency fringe benefits and indirect cost rates shall be applied to personal service costs.

1. Non-Personal Service

- i. Non-personal service costs are prorated based on the percentage of T&A incurred for each site subject to this Order for that time period.
- ii. Non-personal service costs shall be summarized by category of expense (e.g., supplies, travel, equipment, contractual) and shall be documented by expenditure reports. Copies of actual invoices will not be provided but shall be made available for auditing purposes.

D. Respondent may dispute an invoice by informing the Department in writing within 30 days of receipt of such billing that the amount of such invoice is unreasonable and shall state the basis of such assertion. For purposes of this Order, the sole grounds for determining that an invoice is unreasonable are that it (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 any Site; or (iii) the Department is not otherwise legally entitled to such costs. The procedures contained in this Subparagraph shall be used to resolve such dispute, and Respondent shall pay all non-disputed amounts within 30 days of its receipt of the invoice. The disputed amounts may be withheld and final payment of the invoice shall be determined by the dispute resolution process set forth in this Subparagraph and the amounts so determined, if any, to be due and owing from Respondent shall be paid within 30 days of the Respondent's receipt of the dispute resolution determination.

E. Upon the later termination of this Order and upon payment of any outstanding costs and expenses, the Department shall return the unexpended advance balance in the Environmental Monitor Account, including interest, to Respondent.

F. The Department can bill for expenses under this Paragraph for each Site subject to this Order until such date as i) the Site is withdrawn from this Order; ii) the Department's notification that Respondent shall have no further obligations in respect of each Site due to the existence of a Site of ubiquitous contamination outside the scope of Existing Contamination under circumstances as described in Subparagraph II.G.1.iii; or iii) the Department's issuance of

the release and covenant not to sue and forbearance pursuant to subparagraph II.J.2 unless there is an OM&M Plan to be implemented with respect to such Site, in which case it is upon completion of the OM&M Plan.

IX. Reservation of Rights

A. Except as provided in Subparagraph II.J.2 of this Order and in any “no further action” letter issued under Subparagraph II.K of 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 (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to any party, including Respondent.

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

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

D. Nothing contained in this Order shall be construed to affect the Department's right to terminate this Order at any time during its implementation if Respondent fails to comply substantially with this Order's terms and conditions, including without limitation the schedules set forth in the various work plans approved by the Department.

E. Except as otherwise provided in this Order, Respondent specifically reserves all defenses Respondent may have under applicable law respecting any Departmental assertion of remedial liability against Respondent; and reserves all rights Respondent may have 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 this Order shall not be construed as an admission of liability, fault, or wrongdoing by Respondent, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

X. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and each of their respective representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent and/or any of Respondent's members, partners, employees, servants, agents, successors, and assigns. However, the Respondent shall not be required to indemnify the State for malicious, intentional or grossly negligent acts by any of the State's representatives or employees.

XI. Notice of Order

A. With respect to any site for which Respondent develops and the Department approves an RI Work Plan for a Site, the Respondent shall use reasonable efforts to cause such Site Owner to file a Notice of Order in substantially the same form as Exhibit "I" in the records of the appropriate County Clerk within 30 days of the Department's approval of the RI Work Plan. Notwithstanding the foregoing, the Department reserves the right to require the filing of such Notice of Order for any Site prior to the development and approval of an RI Work Plan if it deems such filing to be necessary, in which event Respondent shall use reasonable efforts to cause the filing of a Notice of Order within 30 days of the Department's request for filing. The purpose of such Notice shall be to inform all parties who may acquire an interest in such Site that it is subject to the requirements of this Order.

B. Within the 30 day period set forth in Subparagraph A of this Paragraph, Respondent shall provide the Department with evidence of such filing.

C. The particular Site Owner may terminate the Notice when i) the Department notifies Respondent in writing pursuant to Subparagraph II.J.2 of this Order that no remedial action will be required at the subject Site pursuant to this Order, or that the Department is satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the RA Work Plan for such Site have been reached and that the OM&M Plan has been successfully implemented; or ii) when a Site is withdrawn from this Order.

XII. Deed Restriction

A. Within 90 days after the Department's approval of an RA Work Plan which relies in part upon the imposition of restrictions upon future use of such Site, Respondent shall undertake diligent and reasonable efforts to have the Site Owner file a Declaration of Covenants and Restrictions, which instrument must be in a format to be specified by the Department and shall be acceptable to the Department, with the Clerk of the County in which the affected Site is located. Such instrument shall run with the land and shall:

1. prohibit such Site from ever being used for purposes other than for the Contemplated Use without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;

2. require the Site Owner and its successors and assigns to continue in full force and effect any and all use restrictions, institutional controls and engineering controls that the Department may require be put into place and maintained; and

3. provide that Site Owner, on behalf of itself and its successors and assigns, thereby consents to the Department's jurisdiction and authority, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the

Department, to enforce the prohibitions and restrictions that this Paragraph XII requires to be recorded, and thereby covenants not to contest such enforcement jurisdiction and authority.

B. Respondent shall further undertake to assure that the Department be provided with a copy of such instrument certified by the respective County Clerk to be a true and faithful copy of the instrument as recorded.

XIII. Communications

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

1. Communication from Respondent shall be sent to:

Robert W. Schick, P.E.
Chief, MGP Remedial Section
NYS Department of Environmental Conservation
625 Broadway
Albany, New York 12233

with copies to:

Department of Environmental Conservation
Regional Office within which the subject Site is located
Attn: Division of Environmental Remediation
Regional Hazardous Waste Engineer

Gary Litwin
Bureau of Environmental Exposure Investigation
New York State Department of Health
Flarigan Square
547 River Street
Troy, New York 12180-2216

Dale A. Desnoyers, Esq.
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-5500

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

Four copies (one unbound) to Robert Schick, P.E.

One copy to the Regional Hazardous Waste Engineer

Two copies to Gary Litwin

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

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

Mr. Michael W. Sherman
Environmental Affairs Department (A-2)
Niagara Mohawk Power Corporation
300 Erie Blvd. W.
Syracuse, NY 13202

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

C. The Respondent may submit communications, if approved by the Department, in an electronic format acceptable to the Department.

XIV. Involvement of Additional Responsible Parties

A. In the event that Respondent, during the course of conducting any investigation or implementing any remedial action in connection with any Site subject to the requirements of this Order, locates or otherwise identifies the presence of hazardous substances, or apparent impacts thereof, presumably attributable to a former MGP operation, but, in addition, also locates or otherwise identifies the presence of hazardous substances outside the scope of Existing Contamination, or other environmental impacts attributable to sources unrelated to any former MGP operation as to which Respondent is liable or has assumed liability, Respondent shall immediately notify the Department as to the existence and nature of such contamination or other environmental impacts, and shall further provide all relevant information available at that time regarding the actual or probable origin of such non-MGP-related conditions. As soon as practicable upon receipt of such notice from Respondent, the Department shall provide Respondent with copies of all relevant non-privileged information in its possession relating to the subject Site or areas in the vicinity of the subject Site with respect to the entity or entities responsible for such impacts, and any such information related to the specific operations conducted by such entity or entities which may have affected the subject Site provided the

documents are otherwise subject to the FOIL and are non-privileged; or, in situations where Respondent has not yet been identified a particular entity likely to be responsible for such non-MGP-related environmental conditions at a Site, the Department shall endeavor to furnish all available information in its possession which is otherwise subject to the FOIL and are non-privileged and relevant to the furtherance of Respondent's ability to identify the responsible entity or entities.

B. In any situation in which Respondent has incurred additional or incremental costs attributable to investigating and/or remediating non-MGP-related hazardous substances attributable to one or more known entities (or viable successors-in-interest thereto), such entities thereby being subject to a claim for contribution by Respondent as provided under CERCLA, Respondent shall provide written notification to the Department, which notification shall include such information as is necessary to substantiate the relevant facts and circumstances. As soon as practicable upon receipt of such notification from Respondent and subject to the exercise of its regulatory discretion and its concurrence with the Respondent's findings, the Department shall provide in a timely manner, information responsive to any request (otherwise in conformity with the Freedom of Information Law's requirements) by such entity related to conditions at or emanating from the subject Site and any other relevant information that may be helpful in substantiating Respondent's claim. Similarly, if Respondent requests access to non-privileged and otherwise disclosable information in the Department's possession and relevant to the potential liability of any person or entity who may be subject to such claim by Respondent for contribution or cost recovery, the Department will take reasonable steps to expedite Respondent's access to such information including information regarding the relevant Site, its history and the nature of residual environmental conditions which must be (or have been) addressed in relation to the past or present operations or activities conducted at (or otherwise affecting) such Site.

XV. Miscellaneous

A. 1. By entering into this Order, Respondent certifies that Respondent has fully and accurately disclosed to the Department all information known to Respondent and all information in the possession or control of Respondent's officers, directors, employees, contractors, and agents which relates in any way to the Existing Contamination at each Site covered by this Order as of its effective, and to any past or potential future release of hazardous substances, pollutants, or contaminants, at or from a Site and to their application for this Order.

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

B. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. The responsibility for the performance of the professionals retained shall rest solely with Respondent.

C. 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 also shall 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 with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

D. Respondent shall notify the Department at least five working days in advance of any field activities to be conducted pursuant to this Order.

E. 1. Subject to Subparagraph XV.E.2 of this Order, Respondent shall obtain all permits, and shall expeditiously undertake to obtain easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform the obligations under this Order.

2. In carrying out the activities identified in either a SC/IRM Study Work Plan, IRM Work Plan, RI Work Plan or a RA Work Plan, or any required OM&M Plans the Department may exempt Respondent from the requirement to obtain any Department permit for any activity that is conducted on any Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

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

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

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

G. Respondent shall provide a copy of this Order to each Site Owner and each contractor hired to perform work required by this Order and to each person representing Respondent with respect to any Site and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. Respondent or Respondent's contractors 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.

H. 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 of the provisions of this Order.

I. 1. 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 regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

2. If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by an appropriately authorized representative of Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Robert Schick, P.E. and to Dale A. Desnoyers, Esq.

J. This Order constitutes an exercise of the Department's prosecutorial discretion and accordingly, the remedial activities to be undertaken under the terms of this Order are not subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations, 6 NYCRR Part 617.

K. Except as to matters specifically covered by and addressed through implementation of this Order, the provisions of this Order do not constitute and shall not be deemed a waiver of any right Respondent otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Respondent's insurers, for payments made previously or in the future for response costs. To the extent authorized under 42 USC 9613 and any other applicable law, Respondent shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the Existing Contamination. In any future action brought by Respondent against a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the provision of 42 USC 9613(f)(3) shall apply.

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

Site.

M. Respondent and the Department agree that Exhibit "A" may be amended at any time during the effective period of this Order to include additional properties beyond those initially listed in Exhibit "A." Such amendments shall not be limited to the potential Sites listed in Respondent's letter responses dated October 22, 1999 and January 21, 2000 to the Department's inquiry regarding the identity of such Sites.

N. In the event that the implementation of this Order results in a Department determination that a consequential amount of hazardous waste was disposed at an individual Site, such Site will be listed in the Annual Report described in ECL 27-1305 as a Class "V" inactive hazardous waste disposal site. Such Site shall remain so listed during the pendency of the Order's implementation regarding such Site provided that i) Respondent remains in compliance with this Order; ii) the subject Site continues to be investigated and remediated pursuant to this Order; and iii) that the remediation of the subject Site, at a minimum, eliminates or mitigates to the extent feasible all significant threats to the public health or environment posed by the hazardous wastes. The Department will reassess such Site for listing at the completion of the Order's implementation relative to such Site.

O. 1. Either or both the Department and Respondent may propose modifications to the schedules required by this Order to reflect relevant and evolving circumstances and conditions encountered during the course of implementation of the requirements of this Order. Factors to be considered for purposes of proposed schedule modification may include, by way of example but not limitation, re-prioritization of remedial activity to be implemented, based upon the Department's concurrence as to the relative significance of various environmental conditions to be addressed; Respondent's inability to obtain adequate access rights within the specified time frame; the achievement of potential efficiencies in connection with concerns such as contractor mobilization requirements associated with the implementation of remedial and/or investigative work at one or more Sites, or the potential to achieve economies in relation to the need for accumulation and off-Site disposal of excavated waste materials at one or more Sites; and any other factors related to the ability of Respondent's Site Investigation and Remediation personnel and contractors to address each Site covered by this Order in an efficient and effective manner.

2. Neither party shall unreasonably withhold or delay its approval of, or agreement to, any such schedule modification proposal related to investigation activity at any Site, or to a similar proposal regarding any schedule for conducting subsequent remedial activity deemed necessary with respect to any individual Site. If, after due consideration of the basis for proposing such modification, a party determines not to approve the request, such party shall articulate its basis for such determination, by letter directed to the representative(s) of the other party as specified in Section XIII of this Order.

P. Respondent shall, upon request of the Department, submit data, figures and reports in an electronic format compatible with AutoCAD (dxf.format). Further, all submissions

including without limitation work plans, final reports and monthly reports shall be in a format acceptable to the Department.

Q. The parties agree that the Respondent's expenditures under this Order, except as expressly provided in this Subparagraph, shall not be computed for purposes "Cost Cap" set forth in the Order on Consent issued by the Department on May 12, 1997, bearing Index #: D0-0001-9612 ("Cost Cap Order"). Accordingly, the expenditures incurred under this Order shall be in addition to any and all expenditures incurred by the Respondent under any Orders, Agreements or other commitment instruments, including those which are subject to the Cost Cap Order. This Subparagraph shall not apply to expenditures incurred by Respondent in connection with the Oneida (Cedar St.) MGP Site, which prior to the effective date of this Order was covered by Voluntary Cleanup Agreement Index No. D7-0001-99-04 (dated: February 14, 2000).

R. Respondent may at any time during the effective period of this Order, at its sole discretion, elect to convert this Order to a Voluntary Cleanup Agreement having the same terms as this Order or such other terms as both parties may agree upon. The Department shall, as soon as practicable upon receipt of such written request on behalf of Respondent, prepare such a Voluntary Cleanup Agreement and arrange for execution of such Agreement once the Agreement has been signed by Respondent as Volunteer thereunder. Upon execution by Respondent of the substitute Agreement, this Order shall be terminated except for Respondent's obligations (i) to pay for State costs pursuant to Paragraph VIII and (ii) to indemnify the State pursuant to Paragraph X. Such termination shall be confirmed in writing by the Department.

S. The effective date of this Order shall be the date it is signed by the Commissioner or the Commissioner's designee.

DATED: JAN 25 2002

ERIN M. CROTTY, COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By:



Susan I. Taluto


Deputy Commissioner

Water Quality and Environmental Remediation

CONSENT BY RESPONDENT

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

Niagara Mohawk Power Corp.

By:  VP
[name and title of the signatory]

Date: July 3, 2001

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

On this 3rd day of July, 2001, before me personally came RICHARD H. RYCZEK, to me known, who being duly sworn, did depose and say that he/~~she~~ resides in Manlius, New York; that he/~~she~~ is the VP-Env. Affairs & Property Mgt of the corporation described in and which executed the foregoing instrument; and that he/~~she~~ signed his/~~her~~ name on behalf of Niagara Mohawk Power Corporation and was authorized to do so.

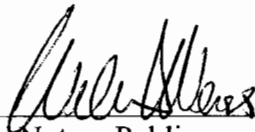

Notary Public
WILLIAM C. WEISS
Notary Public, State of New York
No. 4719925
Qualified in Onondaga County
My Commission Expires October 31, 2002

EXHIBIT "A"

List of Each Site and associated Contemplated Uses and Maps

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EXHIBIT "B"

Department-Approved SC/IRM Study Work Plan

.

EXHIBIT "C"

Department-Approved RI Work Plan

EXHIBIT "D"

Department-Approved RA Work Plan

EXHIBIT "E"

Department-Approved IRM Work Plan

EXHIBIT "F"

Department-Approved IRM OM&M Plan

EXHIBIT "G"

Department-Approved OM&M Plan

EXHIBIT "H"

Assignable Release and Covenant Not To Sue

[On Department Letterhead]

[Insert Date]

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

Unless otherwise specified in this letter, all terms used in this letter shall have the meaning assigned to them under the terms of the Voluntary Agreement entered into between the New York State Department of Environmental Conservation (the "Department") and Niagara Mohawk Power Corporation ("Respondent"), Index No. _____ (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Order's Work Plans, covering the investigation and/or remediation of the Existing Contamination as defined in the Order at **[describe location]** in the --- of ---, Tax Map Parcel No./Tax Section, block, and lot no. ("Property" or "Site"), have been successfully implemented.

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

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

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

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

due to Respondent's failure to implement the Order to the Department's satisfaction; or

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

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

Respondent if Respondent causes a, or permits or allows the, release or threat of release, at the Property of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination; or if Respondent causes a, or permits or allows the use of the Property to, change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; nor to

any of Respondent's lessees, sublessees, successors, or assigns who causes a, or suffers the, release or threat of release, at the Property of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination, after the effective date of the Order; who causes a, or suffers the use of the Property to, change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; or any party who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same established resulting solely from the Order's execution.

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

Notwithstanding any other provision in this release, covenant not to sue, and forbearance, if with respect to the Property there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this release shall be construed, or deemed, to preclude the State of New York from recovering such claim.

Except as provided in Subparagraph II.J of the Order and in this letter, nothing contained in the Order or in this letter shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to Respondent or any other party, including Respondent.

Nothing contained in this letter shall prejudice any rights of the Department to take any investigatory or remedial action it may deem necessary if Respondent fails to comply with the Order or if contamination other than Existing Contamination or Covered Contamination is encountered at the Property.

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

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

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

Dated:

_____, 2001

ERIN M. CROTTY, COMMISSIONER
NEW YORK STATE DEPARTMENT
ENVIRONMENTAL CONSERVATION

By: _____

Its: _____

Appendix "A"

(to Exhibit "H")

Map of the Property

Exhibit "I"

NOTICE OF ORDER

This Notice is made as of the ____ day of _____, 2001 by _____ ("Owner") with respect to a parcel of real property located at address _____, NY; as more particularly described in Appendix "A" attached hereto (the "Property"); and

WHEREAS, Niagara Mohawk Power Corporation ("Respondent") by authorized signature, consented to the issuance by the Department of the Order, Index # _____ (the "Order"), concerning the remediation of contamination present on the Property, which Order was signed by the Commissioner of Environmental Conservation on _____; and

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

WHEREAS, pursuant to the Order, Respondent agreed that it would give notice of the Order to all parties who may acquire any interest in the Property by filing this Notice with the Clerk of the County in which the Property is located.

NOW, THEREFORE, Owner, for itself, for its successors and assigns, declares that:

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

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

Owner

Dated:

By: _____

Its: _____

[acknowledgment]

Appendix "A"

(to Exhibit "I")

Map of the Property