DRAFT
FOR NEGOTIATION PURPOSES ONLY
SUBJECT TO FURTHER GOVERNMENT REVIEW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF: LOWER LEY CREEK OPERABLE UNIT OF THE ONONDAGA LAKE SUPERFUND SITE	ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL DESIGN CERCLA Docket No. 02-2016-2014
Carrier Corporation; Onondaga County; Eaton Corporation (successor to Cooper Industries, Inc., Crouse-Hinds Division); Niagara Mohawk Power Corporation (d/b/a National Grid); Plaza East, LLC; Town of Salina; Syracuse China Corporation; City of Syracuse. Respondents.	Proceeding under Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606, 9607, and 9622.

ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL DESIGN

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("AOC") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Carrier Corporation; Onondaga County; Eaton Corporation (successor to Cooper Industries, Inc., Crouse-Hinds Division); Niagara Mohawk Power Corporation (d/b/a National Grid); Plaza East, LLC; the Town of Salina; Syracuse China Corporation; and the City of Syracuse (collectively "Respondents"). This AOC provides that Respondents shall undertake a Remedial Design ("RD"), including various pre-RD activities, to produce a detailed set of plans and specifications for implementation of the remedy selected in EPA's September 30, 2014 Record of Decision for the Lower Ley Creek Operable Unit ("Lower Ley Creek OU") of the Onondaga Lake Superfund Site ("Site") in Onondaga County, New York. In addition, Respondents shall reimburse the United States for Future Response Costs that it incurs, as provided herein.

2. This AOC is issued under the authority vested in the President of the United States by Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9604, 9606, 9607, and 9622. This authority was delegated to the EPA Administrator by Executive Order 12580 (52 *Fed. Reg.* 2923, Jan. 29, 1987). This authority was further delegated to the Regional Administrators of EPA by EPA Delegation Nos. 14-14-C and 14-14-D and redelegated within Region 2 to the Director of the Emergency and Remedial Response Division by Regional Order No. R-1200, dated November 23, 2004.

3. EPA and Respondents recognize that this AOC has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this AOC do not constitute an admission of any liability, or an admission as to the Findings of Fact or Conclusions of Law and Determinations set forth in Section IV and V, below. Respondents retain the right to controvert in any subsequent proceeding other than a proceeding to implement or enforce this AOC the validity of the Findings of Fact, Conclusions of Law, and Determinations in Section IV and V of this AOC. Respondents agree to undertake all actions required by the terms and conditions of this AOC and also agree not to contest the validity or terms of this AOC in any action to enforce its provisions.

4. The objectives of EPA and Respondents in entering into this AOC are to perform the design of a response action for the Lower Ley Creek OU, reimburse EPA's Future Response Costs, and resolve EPA's claims against Respondents as provided in this AOC.

5. In accordance with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (the "State") on November 18, 2014 of negotiations with potentially responsible parties ("PRPs") regarding the implementation of the remedial design for the Lower Ley Creek OU. Pursuant to a consultation agreement between EPA and the Onondaga Nation, EPA notified the Onondaga Nation of negotiations with PRPs concerning the remedial design at this OU on September 17, 2015.

6. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the federal natural resource trustees on September 23, 2015 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustees to participate in the negotiation of this AOC.

II. PARTIES BOUND

7. This AOC applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this AOC. The signatories to this AOC certify that they are authorized to execute and legally bind the parties they represent.

8. Respondents are jointly and severally liable for carrying out all activities required by this AOC. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this AOC, the remaining Respondents shall complete all such requirements.

9. Respondents shall provide a copy of this AOC to all contractors, subcontractors, laboratories, and consultants that are retained to conduct any Work, as defined below, to be performed under this AOC, within fourteen (14) days after the Effective Date of this AOC or after the date of such retention. Respondents shall condition any such contracts upon satisfactory compliance with this AOC, and all applicable laws and regulations. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this AOC and for ensuring that their employees, contractors, consultants, subcontractors, and agents comply with this AOC.

III. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this AOC that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this AOC, in the documents attached to this AOC, or incorporated by reference into this AOC, the following definitions shall apply:

a. "AOC" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this AOC and any appendix, this AOC shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

c. "Day" shall mean a calendar day. In computing any period of time under this AOC, where the last day would fall on a Saturday, Sunday, or federal holiday, this period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this AOC as provided in Section XXVIII (Effective Date and Subsequent Modification).

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, and other items pursuant to this AOC, including verifying the Work, or otherwise implementing, overseeing, or enforcing this AOC, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 49 (costs and attorneys' fees and any monies paid to secure access, including the amount of just compensation) and Paragraph 85 (Work Takeover). Future Response Costs are limited to those costs relating to remedial design activities, as described above, and shall not include any remedial action activities.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Lower Ley Creek OU" shall mean the lower two miles of Ley Creek (including the Creek channel and adjacent floodplains), including (i) that portion of Ley Creek beginning at and under the Route 11 bridge (a.k.a. Brewerton Road Bridge) and ending downstream where it empties into Onondaga Lake ("Lake"), (ii) a 3.7-acre wetland situated on the southern bank of the Creek adjacent to the Cooper/Crouse-Hinds North Landfill, (iii) "Old Ley Creek Channel," an original section of the Creek before Ley Creek was widened and its path was reconfigured during a flood control project in the 1970s, and (iv) several sections along the banks of the Creek where dredged sediments were placed during a flood control project.

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

j. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State, defined below.

k. "Paragraph" shall mean a portion of this AOC identified by an Arabic numeral.

l. "RA Settling Defendants" shall mean those parties that execute a consent decree, which is entered by the court, to implement the Remedial Action at the Lower Ley Creek OU.

m. "Record of Decision" or "2014 ROD" shall mean the EPA Record of Decision dated September 30, 2014 by which the Director of the Emergency Remedial Response Division, EPA Region 2, selected a remedy for the Lower Ley Creek OU, including all attachments thereto, attached hereto as Appendix B.

n. "Remedial Action" or "RA" shall mean those activities performed to implement the remedy selected in the 2014 ROD, except for operation and maintenance activities which are required to maintain the effectiveness of the implemented remedy, in accordance with the final Remedial Design.

o. "Remedial Design" or "RD" shall mean those activities to be undertaken by Respondents to develop the final plans and specifications for the Remedial Action for the Lower Ley Creek OU pursuant to the RD Work Plan, as defined below.

p. "Remedial Design Work Plan" or "RD Work Plan" shall mean the document developed pursuant to Section 3 of the RD SOW and approved by EPA, and any amendments thereto.

q. "Remedial Design SOW" or "RD SOW" shall mean the Statement of Work for the remedial design of the Lower Ley Creek OU, attached hereto as Appendix A.

r. "Respondents" shall mean Carrier Corporation; Onondaga County; Eaton Corporation (successor to Cooper Industries, Inc., Crouse-Hinds Division); Niagara Mohawk Power Corporation (d/b/a National Grid); Plaza East, LLC; the Town of Salina; Syracuse China Corporation; and the City of Syracuse.

s. "Section" shall mean a portion of this AOC identified by an upper-case Roman numeral and includes one or more Paragraphs.

t. "Site" shall mean the Onondaga Lake Superfund Site in Onondaga County, New York.

u. "State" shall mean the State of New York.

v. "United States" shall mean the United States of America.

w. "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any "pollutant or contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any "solid waste" under Section 1004(27) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6903(27).

x. "Work" shall mean all activities that Respondents are required to perform under this AOC, except those required by Section XIII (Record Retention).

IV. EPA'S FINDINGS OF FACT

11. The Site, which includes Onondaga Lake itself, six major and minor tributaries and various upland sources of contamination, was placed on EPA's National Priorities List ("NPL") on December 16, 1994. EPA has, to date, organized response activities for the Site into multiple operable units. The Lower Ley Creek OU became part of the Site in 2009.

12. The Lower Ley Creek OU consists of the lower two miles of Ley Creek (including the Creek channel and adjacent floodplains) beginning at and including the Route 11 bridge (a.k.a. Brewerton Road Bridge) and ending downstream where it empties into Onondaga Lake ("Lake"). The Lower Ley Creek OU also includes a 3.7-acre wetland situated on the southern bank of the Creek adjacent to the Cooper/Crouse-Hinds North Landfill and "Old Ley Creek Channel," an original section of the Creek before Ley Creek was widened and its path was reconfigured during a flood control project in the 1970s. Beginning in 1970, the Onondaga County Department of Drainage and Sanitation widened, deepened, and rerouted the Creek through the Town of Salina Landfill to address poor channel conditions that had historically caused extensive flooding. In addition, the Lower Ley Creek OU includes several sections along the banks of the Creek where dredged sediments were placed during that flood control project.

13. Several entities have owned property or operated facilities near Ley Creek and its branches since the late 19th and early 20th centuries. The industrial nature of this area influenced the Lower Ley Creek OU and contributed to its current condition.

14. There are a number of upland sources that have contributed contamination to Ley Creek, including the General Motors ("GM") Inland Fisher Guide Facility/Ley Creek Deferred Media subsite; Ley Creek PCB Dredgings subsite; and Salina Landfill subsite, which are also part of the Site. GM is documented to have released large volumes of polychlorinated biphenyls ("PCBs") into Ley Creek from its Inland Fisher Guide facility.

15. On June 1, 2009, GM filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

16. On October 30, 2009, EPA sent general notice letters to the Crouse-Hinds Division of Cooper Industries (now Eaton Corporation), Niagara Mohawk Power Corporation, d/b/a National Grid ("National Grid"), the Town of Salina, Onondaga County, GM, Carrier

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Corporation ("Carrier"), Oberdorfer LLC, and Syracuse China Company ("Syracuse China") informing the parties that EPA considered them to be PRPs at the Lower Ley Creek OU and to determine whether they would volunteer to conduct or fund a remedial investigation and feasibility study ("RI/FS") for the Lower Ley Creek OU. Subsequently, on April 8, 2014, EPA sent a general notice letter to Plaza East a/k/a East Plaza informing it that EPA considered it to be a PRP with respect to the Lower Ley Creek OU.

17. Because none of the PRPs which received the October 30, 2009 notice letter agreed to perform the RI/FS, EPA conducted the field investigations at the Lower Ley Creek OU from 2009 through 2011, which culminated in the completion of an RI/FS report in January 2014.

18. On November 28, 2009, the United States filed a timely proof of claim asserting environmental liabilities against GM, including claims for environmental liability at the Lower Ley Creek OU. On June 29, 2012, the United States Bankruptcy Court for the Southern District of New York approved a settlement agreement resolving the United States' claims against GM at the Lower Ley Creek OU. Pursuant to that settlement, the United States, on behalf of EPA, received an allowed general unsecured claim totaling $38,344,177. Ultimately, EPA received $21,032,202.98 from this settlement, which was put into the special account for the Lower Ley Creek OU ("Special Account"). Pursuant to paragraphs 4 and 11 of the approved bankruptcy settlement, those settlement funds, "shall be used to conduct or finance response actions at or in connection with the Lower Ley Creek [OU]," and, "shall reduce the liability of non-settling [PRPs] for that site by the amount of the credit."

19. On September 30, 2014, EPA issued a record of decision ("2014 ROD") wherein it selected a remedy to address soil and sediment contamination at the Lower Ley Creek OU and which included the following components:

a. Excavation of PCB-contaminated soils located along the upland areas adjacent to the Creek to meet soil cleanup objectives;

b. Excavation of PCB-contaminated sediment within the Creek exceeding sediment criteria;

c. Excavation of PCB-contaminated sediment from the adjacent wetlands to meet sediment criteria;

d. Transport of the excavated contaminated soils and sediments containing greater than 50 milligrams per kilogram (mg/kg) of PCBs to a Toxic Substances Control Act ("TSCA")-compliant facility;

e. Transport of those soils and sediments which fail Toxic Characteristic Leaching Procedure testing and are determined to be characteristic hazardous waste and are non-TSCA waste (*i.e.,* less than 50 mg/kg PCBs) to an off-site, Resource Conservation and Recovery Act ("RCRA")-compliant facility;

f. Proper disposal of those soils and sediments that are not TSCA-regulated (less than 50 mg/kg of PCBs) and are not characteristic hazardous waste at a local disposal facility, if available. If a local disposal facility is not a feasible option, these soils and sediments will be transported to a non-local facility for disposal;

g. The excavated wetland areas will be backfilled with soil that meets the unrestricted soil cleanup objectives;

h. Excavated soil areas will be restored with clean substrate and vegetation consistent with an approved habitat restoration plan;

i. Habitat restoration of Ley Creek will include the placement of at least one foot of substrate similar to the existing sediments over disturbed areas and restoration of vegetation;

j. Institutional controls in the form of environmental easements/restrictive covenants will be filed in the property records of Onondaga County that will, at a minimum, restrict the use of the properties within the Lower Ley Creek OU to commercial and industrial uses and restrict intrusive activities in areas where residual contamination remains above unacceptable, risk-based levels unless the activities are in accordance with an EPA-approved Site Management Plan ("SMP");

k. Development of an SMP that will provide for the proper management of all post-construction remedy components.

l. Performance of a detailed hydrologic analysis to determine the effect of the remedy on stream flow, flooding, and dynamics and to identify the appropriate materials and bathymetry for restoration and long-term sustainability;

m. Performance of a Phase 1 Cultural Resources Survey to document the Lower Ley Creek OU's historic resources; and

n. Capping of contaminated soil and sediment areas which are determined to be areas that cannot be safely excavated to ensure protectiveness.

20. On March 3, 2015, EPA sent general notice letters to Carrier, Onondaga County, Cooper Crouse Hinds, National Grid, Plaza East, Town of Salina, Syracuse China, and the City of Syracuse to provide notice of liability at the Lower Ley Creek OU and requesting that they volunteer to perform the remedial design for the remedy selected in the 2014 ROD.

21. A remedy was selected for the General Motors – Inland Fisher Guide Operable Unit 2 of the Site on March 31, 2015.

V. EPA'S CONCLUSIONS OF LAW AND DETERMINATIONS

22. The Lower Ley Creek OU is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

23. The contamination found at the Lower Ley Creek OU, as identified in the Findings of Fact above, includes hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

24. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

25. Respondents Carrier; Eaton Corporation; National Grid; Plaza East; and Syracuse China are corporations and therefore are "persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

26. Respondents Onondaga County; the Town of Salina; and the City of Syracuse are political subdivisions of the State and therefore are "'persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

27. Each Respondent is a responsible party as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is subject to this AOC under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Respondents are jointly and severally liable for performance of response action under this AOC and for reimbursement of Future Response Costs to be incurred at the Lower Ley Creek OU.

28. Respondents have discussed with EPA the basis for this AOC and its terms.

29. In accordance with Section 126 of CERCLA, 42 U.S.C. § 9626, and pursuant to Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments, November 2000) and the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), EPA has determined that consultation with the Onondaga Nation related to the Work is required under this AOC.

VI. ORDER

30. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for the 2014 ROD, it is hereby ordered and agreed that Respondents shall comply with all provisions of this AOC, including, but not limited to, all attachments to this AOC and all documents incorporated by reference into this AOC. Respondents shall make best efforts to coordinate in the performance of the Work required by this AOC with any person not a party to this AOC who offers to perform or, in lieu of performance to pay for, in whole or in part, the Work required by this AOC.

VII. DESIGNATED PROJECT MANAGER AND COORDINATOR

31. Within ten (10) days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions required by Respondents pursuant to this AOC and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on-site, or readily available, during performance of the Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within ten (10) days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this AOC shall constitute receipt by all Respondents.

32. Respondents shall retain one or more contractor(s) to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within thirty (30) days of the Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least ten (10) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall propose a different contractor and shall notify EPA of that contractor's name and qualifications within ten (10) days of EPA's disapproval. With respect to any contractor proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with the Uniform Federal Policy for Implementing Quality Systems ("UFP-QS"), (EPA/505/F-03/001, March, 2005), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). EPA will issue a notice of disapproval or an authorization to proceed. Any decision not to require submission of the contractor's QMP should be documented in a memorandum from the EPA remedial project manager ("RPM") and Regional Quality Assurance personnel to the Lower Ley Creek OU file.

33. EPA has designated Pamela Tames of EPA Region 2's Emergency and Remedial Response Division as its RPM. Except as otherwise provided in this AOC, Respondents shall direct all submissions required by this AOC to her at:

Pamela Tames, P.E.
U.S. EPA, Region 2
290 Broadway, 20th Floor
New York, NY 10007
[HYPERLINK "mailto:tames.pam@epa.gov"].

34. EPA's RPM shall have the authority lawfully vested in a RPM by the NCP. In addition, EPA's RPM shall have the authority, consistent with the NCP, to halt any Work required by this AOC and to take any necessary response action when the RPM determines that conditions at the Lower Ley Creek OU may present an immediate endangerment to public

health, welfare, or the environment. The absence of the RPM from the area under study pursuant to this AOC shall not be cause for the stoppage or delay of Work.

35. EPA and Respondents shall have the right, subject to Paragraph 31, to change their respective designated RPM and Project Coordinator. Respondents shall notify EPA fourteen (14) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

36. Respondents shall perform all actions necessary to implement the RD SOW, which is incorporated into and an enforceable part of this AOC. Respondents shall perform the Work in accordance with the schedules, standards, specifications, and other requirements of the Pre-Design Investigation ("PDI") Work Plan (hereinafter, "PDI Work Plan"), the RD Work Plan, and any other deliverables of the RD SOW, both as initially approved by EPA and as they may be amended or modified by EPA prior to completion of the RD, and shall comply with all other requirements of this AOC. The funding of the Work shall be entirely provided by Respondents, consistent with Paragraph 65 below.

37. Emergency Response and Notification of Releases.

a. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Lower Ley Creek OU that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action to prevent, abate, or minimize such release or endangerment caused or threatened by the release. Respondents shall take these actions in accordance with all applicable provisions of this AOC and RD SOW, including, but not limited to, the Health and Safety Plan. Respondents shall also immediately notify the EPA RPM at (212) 637-4255 or, in the event of her unavailability, Respondents shall immediately notify her supervisor, the Chief of the Central New York Remediation Section, at (212) 637-4258, of the incident or conditions at the OU. If neither of these persons is available, Respondents shall notify the EPA Response and Prevention Branch, Emergency and Remedial Response Division, Region 2, at (732) 548-8730. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, these costs incurred by EPA shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA for those costs which are not inconsistent with the NCP pursuant to Section XV (Payment of Future Response Costs).

b. Nothing in the preceding subparagraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or

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threatened release of hazardous substances on, at, or from the Lower Ley Creek OU.

c. Upon the occurrence of any event during performance of the Work required hereunder which, pursuant to Section 103 of CERCLA, requires reporting to the National Response Center, telephone number 1-800-424-8802, Respondents shall also immediately orally notify the EPA RPM at (212) 637-4255 or, in the event of her unavailability, Respondents shall immediately notify her supervisor, the Chief of the Central New York Remediation Section at (212) 637-4258 of the incident or conditions at the OU in addition to the reporting required by Section 103 of CERCLA, 42 U.S.C. § 9603. Within fourteen (14) days of the onset of such an event, Respondents shall also furnish EPA with a written report setting forth the events which occurred and the measures taken, and to be taken, in response thereto. The reporting requirements of this subparagraph are in addition to, not in lieu of, reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

38. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this AOC, in a notice to Respondents, EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within thirty (30) days or other time frame as determined by EPA, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved because of material defects.

39. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraphs 38 (a), (b) or (c) above, Respondents shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 38 and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVIII (Stipulated Penalties).

40. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 38, Respondents shall, within thirty (30) days or such longer time as specified by EPA in such

notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVIII, shall accrue during the 30-day or otherwise specified period, but such penalties shall not be payable unless the resubmission is disapproved or modified because of a material defect as provided in Paragraphs 41 and 42.

b. Notwithstanding any receipt of a notice of disapproval, Respondents shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission, subject to Subparagraphs 40(c) and (d) below. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVIII (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks as they relate to the PDI Work Plan, PDI Data Evaluation Report, or the RD Work Plan, respectively, until receiving EPA approval, approval on condition, or a modified version of these documents.

d. EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point.

41. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondents to correct the deficiencies. EPA also retains the right to modify or develop the plan, report, or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified, or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XVI (Dispute Resolution).

42. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA because of a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately, unless EPA, in its sole discretion, authorizes that a further resubmission is appropriate or Respondents invoke the dispute resolution procedures in accordance with Section XVI (Dispute Resolution) and EPA's disapproval is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XVI (Dispute Resolution) and Section XVIII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified, or superseded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XVI, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVIII.

43. In the event that EPA takes over some of the tasks, Respondents shall incorporate and integrate information supplied by EPA into the final reports.

44. All plans, reports, and other deliverables submitted to EPA under this AOC shall, upon approval or modification by EPA, be incorporated into and enforceable under this AOC. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this AOC, the approved or modified portion shall be incorporated into and become enforceable under this AOC.

X. SUBMISSION OF PLANS AND REPORTING REQUIREMENTS

45. Reporting

a. Respondents shall submit written progress reports to EPA concerning actions undertaken pursuant to this AOC and pursuant to the schedules provided in the RD SOW until termination of this AOC, unless otherwise directed in writing by EPA.

b. Respondents shall submit electronic copies of all plans, reports, or other submissions required by this AOC, the RD SOW, or any approved work plans as set forth below. All electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Reports should be submitted to the following:

Pamela Tames, P.E.
Emergency and Remedial Response Division
U.S. Environmental Protection Agency Region 2
tames.pam@epa.gov

Lauren Charney
Office of Regional Counsel
United States Environmental Protection Agency Region 2
charney.lauren@epa.gov

Richard Mustico, P.E.
New York State Department of Environmental Conservation
[HYPERLINK "mailto:richard.mustico@dec.ny.gov"]

Alma Lowry
Law Office of Joseph Heath
[HYPERLINK "mailto:alowry@hamilton.edu"]

In addition to an electronic submission, the final design document shall also be submitted in hard copy to:

Pamela Tames, P.E.
Emergency and Remedial Response Division

U.S. Environmental Protection Agency Region 2
290 Broadway, 20th Floor
New York, New York 10007
Attention: Lower Ley Creek Remedial Project Manager

XI. SITE ACCESS

46. If any Respondent owns or controls any part of the Lower Ley Creek OU, or any other property where access is needed to implement this AOC, such Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Lower Ley Creek OU, or such other property, to conduct any activity related to this AOC. Respondents who own or control property at the Lower Ley Creek OU shall, at least thirty (30) days prior to the conveyance of any interest in real property at the Lower Ley Creek OU, give written notice to the transferee that the property is subject to this AOC and written notice to EPA and all other Respondents of the proposed conveyance, including the name and address of the transferee. Respondents also agree to use best efforts to require that their successors comply with the immediately preceding sentence, this Section, and Section XII (Access to Information).

47. Where any action under this AOC is to be performed in areas owned by, or in possession of, someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within thirty (30) days after the Effective Date, or as otherwise specified in writing by EPA. Respondents shall immediately notify EPA if, after using their best efforts, they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Any costs incurred by EPA in obtaining access shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Future Response Costs).

48. Notwithstanding any provision of this AOC, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

49. If Respondents cannot obtain access agreements, EPA may obtain access for Respondents, perform those tasks or activities with EPA contractors, or terminate this AOC. If EPA performs those tasks or activities with EPA contractors and does not terminate this AOC, Respondents shall perform all other activities not requiring access to such property. Any costs incurred by EPA in performing these activities shall fall within the definition of Future Response Costs, and Respondents shall reimburse EPA for all costs incurred in performing such activities. Respondents shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

XII. ACCESS TO INFORMATION

50. Subject to Paragraphs 51 and 52, Respondents shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Lower Ley Creek OU or to the implementation of Work pursuant to this AOC, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

51. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this AOC to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this AOC for which Respondents assert business confidentiality claims.

52. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege in lieu of providing documents, they shall provide EPA with the following: a) the title of the document, record, or information; b) the date of the document, record, or information; c) the name and title of the author of the document, record, or information; d) the name and title of each addressee and recipient; e) a general description of the contents of the document, record, or information; and f) the privilege asserted by Respondents. However, no documents, reports, or other information created or generated for submission to EPA pursuant to the requirements of this AOC shall be withheld on the grounds that they are privileged.

53. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at, or around, the Lower Ley Creek OU generated pursuant to the requirements of this AOC.

XIII. RECORD RETENTION

54. During the pendency of this AOC and until 10 years after Respondents' receipt of EPA's notification that the Work has been completed, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Lower Ley Creek OU, regardless of any corporate retention policy to the contrary. Until ten (10) years after notification that the Work has been completed, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.

55. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such documents, records, or other information and, upon request by EPA, Respondents shall deliver any such documents, records, or other information to EPA. Consistent with the requirements set forth in Paragraph 52, above, Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law.

56. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Lower Ley Creek OU since notification of potential liability by EPA or the State, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XIV. COMPLIANCE WITH OTHER LAWS

57. Respondents shall undertake all action that this AOC requires in accordance with the requirements of all applicable local, state, and federal laws and regulations, unless an exemption from such requirements is specifically provided by law or in this AOC. The activities conducted pursuant to this AOC, if approved by EPA, shall be considered consistent with the NCP.

58. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

59. This AOC is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XV. PAYMENT OF FUTURE RESPONSE COSTS

60. Respondents hereby agree to reimburse EPA for Future Response Costs. EPA will periodically send billings to Respondents for Future Response Costs. The billings will be accompanied by a printout of cost data from EPA's financial management system. Respondents shall remit payment to EPA via electronic funds transfer ("EFT") within thirty (30) days of receipt of each such billing.

61. To effect payment via EFT, Respondents shall instruct their bank to remit payment in the required amount via EFT using the following information, or such other updated EFT information that EPA may subsequently provide to Respondents:

. Amount of payment

- Bank: **Federal Reserve Bank of New York**
- Account code for Federal Reserve Bank account receiving the payment: **68010727**
- Federal Reserve Bank ABA Routing Number: **021030004**
- SWIFT Address: **FRNYUS33**
  33 Liberty Street
  New York, NY 10045
- Field Tag 4200 of the Fedwire message should read:
  D 68010727 Environmental Protection Agency
- Name of remitter:
- AOC Index number: **CERCLA - 02-2016-2014**
- Site/spill identifier: **024Q**

At the time of payment, Respondents shall send notice that such payment has been made by email to:

Elizabeth McGuffey
Cincinnati Finance Office
U.S. Environmental Protection Agency
AcctsReceivable.CINWD@epa.gov and
McGuffey.Elizabeth@epa.gov

Pamela Tames, Remedial Project Manager
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
Tames.pam@epa.gov

Lauren Charney
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
Charney.lauren@epa.gov

Such notice shall reference the date of the EFT, the payment amount, the "Lower Ley Creek OU of the Onondaga Lake Site" and the AOC index number.

The total amounts to be paid by Respondents pursuant to this Paragraph shall be deposited into the Lower Ley Creek OU Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Lower Ley Creek OU, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

62. In the event that any payments for Future Response Costs are not made within thirty (30) days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States

by virtue of Respondents' failure to make timely payments under this Section, including but not limited to payment of stipulated penalties pursuant to Section XVIII.

63. Respondents may contest payment of any billed Future Response Costs under Paragraph 60, if they determine that EPA has made an accounting error, or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the EPA RPM. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall, within the thirty (30)-day period, pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 61. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA RPM a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 61. If Respondents prevail concerning a portion of the contested costs, Respondents shall pay to EPA in the manner described in Paragraph 61 that portion of the costs (plus associated accrued interest) for which they did not prevail. Respondents shall be disbursed those funds in the escrow account if they prevail entirely or any balance of the escrow account if they partially prevail. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for Future Response Costs.

64. As set forth above in Paragraph 18, EPA received $21,032,202.98 as a result of its allowed general unsecured claim in the GM bankruptcy proceeding. Those funds have been deposited in the Special Account designated for conducting or financing the Remedial Action at the Lower Ley Creek OU. EPA anticipates that these monies will become available to any party or parties that implement the Remedial Action selected for the Lower Ley Creek OU, whether to fund the Remedial Action directly should EPA perform that work or through a reimbursement of expenditures if one or more of Respondents or any other party(ies) agree to implement the Remedial Action.

65. <u>Disbursement of Special Account Funds.</u>

a. Timing and Request for Reimbursement. Respondents shall be responsible for funding all of their obligations under this AOC, including performance of the Work and reimbursement of Future Response Costs. Upon entry of a judicially-approved consent decree that embodies an obligation by one or more of Respondents to this AOC to implement the Remedial Action for the Lower Ley Creek OU, those

Respondents that are settlors in any such consent decree (RA Settling Defendants) may submit a request for reimbursement of the RD Costs that all Respondents incurred in performance or funding of the Work under this AOC, including for Future Response Costs that have been reimbursed to EPA. That request must be jointly submitted to the extent there are multiple RA Settling Defendants. Respondents agree that any reimbursed funds shall be used exclusively for advance-funding of the Remedial Action, pursuant to the terms of any such judicially-approved consent decree. Any such request for reimbursement shall include (a) a complete and accurate written cost summary; (b) a detailed, itemized accounting of the costs incurred in performing the Work under this AOC, including Future Response Costs reimbursed to EPA; and (c) certification of the costs incurred and paid by Respondents for the Work related to the RD for which reimbursement is sought. The basis for and the amount of any reimbursement to the RA Settling Defendants will be dependent on (a) the availability of funds in the Special Account; (b) the Work's consistency with the NCP, which EPA agrees can be demonstrated by EPA's written approval of the Work; (c) EPA's acceptance of the cost documentation set forth in support of a cost summary and certification, subject to any costs excluded from the disbursement; and (d) the aforementioned pre-condition of the participation of one or more of the Respondents to this AOC in a future, judicially-approved settlement to implement the Remedial Action selected for the Lower Ley Creek OU. EPA intends to memorialize these criteria for reimbursement of one or more RA Settling Defendants in a future, judicially-approved consent decree that embodies an obligation by one or more of Respondents to this AOC to implement the Remedial Action for the Lower Ley Creek OU. The Parties to this AOC acknowledge that EPA intends to reimburse itself of its past response costs incurred at the Lower Ley Creek OU from the Special Account. Respondents agree not to object to or challenge such reimbursement of EPA's past response costs whether such reimbursement occurs in advance of or subsequent to any reimbursement(s) to the RA Settling Defendants consistent with this Paragraph and pursuant to any future, judicially-approved settlement to implement the Remedial Action selected for the Lower Ley Creek OU. Any reimbursement of EPA's past response costs from the Special Account shall reduce the potential liability of the Respondents to the United States by the amount of such reimbursement.

b. Costs Excluded from Reimbursement. The following costs are excluded from, and shall not be sought by Respondents for, reimbursement: (a) any payments of Interest or Stipulated Penalties made by Respondents to the United States pursuant to Section XV (Payment of Future Response Costs) or XVIII (Stipulated Penalties) of this AOC; (b) attorneys' fees and costs, except for reasonable attorneys' fees and costs necessarily related to obtaining access pursuant to Section XI of this AOC; (c) costs of any response activities Respondents perform that are not required under, or approved by EPA pursuant to, this AOC; (d) costs related to a Respondent or Respondents' litigation against, settlement with, development of potential contribution claims against, or identification of other

potentially liable parties; (e) internal costs of Respondents, including but not limited to salaries, travel costs, or in-kind services, except for those costs that represent the work of employees of Respondents directly performing the Work; (f) any costs incurred by Respondents prior to the Effective Date other than costs related to the preparation of the PDI Work Plan; or (g) any costs incurred by Respondents pursuant to Section XVI (Dispute Resolution).

c. Termination and Recapture of Special Account Reimbursement. In any future, judicially-approved consent decree that embodies an obligation by one or more of Respondents to this AOC to implement the Remedial Action for the Lower Ley Creek OU, EPA intends to memorialize its obligation to reimburse the RA Settling Defendants from the Special Account, consistent with this Paragraph. EPA intends to include provisions in any such consent decree regarding that future obligation to reimburse the RA Settling Defendants that the obligation shall terminate and/or EPA may recapture any funds that have been reimbursed to the RA Settling Defendants if EPA determines that the RA Settling Defendants have (a) knowingly submitted a materially false or misleading cost summary and certification or (b) submitted a materially inaccurate or incomplete cost summary and certification, and have failed to correct the materially inaccurate or incomplete cost summary and certification within 45 days after being notified of, and given the opportunity to cure, the deficiency. EPA intends that any such future obligation to reimburse funds shall also be memorialized so as to terminate upon EPA's assumption of performance of work under any such future consent decree, but EPA acknowledges that the final terms of any such decree remain subject to negotiation with the RA Settling Defendants and the approval of the court.

XVI. DISPUTE RESOLUTION

66. Unless this AOC expressly provides otherwise, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this AOC. The Parties shall attempt to resolve any disagreements concerning this AOC expeditiously and informally.

67. Notwithstanding any other provision of this AOC, Respondents may not invoke dispute resolution procedures more than once regarding the same issue.

68. If Respondents object to any EPA action taken pursuant to this AOC, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within thirty (30) days of such action, or in the case of billings for Future Response Costs, within thirty (30) days of receipt of each such bill, unless the objection(s) has/have been resolved informally or unless EPA has agreed to extend the period of informal negotiations beyond the thirty (30) days. EPA and Respondents shall have twenty (20) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The

Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted verbally but must be confirmed in writing.

69. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this AOC. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Deputy Division Director level will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this AOC. Respondents' obligations under this AOC for matters not directly in dispute shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondents agree with the decision.

XVII. FORCE MAJEURE

70. Respondents agree to perform all requirements of this AOC within the time limits established under this AOC, unless the performance is delayed by a *force majeure* event. For purposes of this AOC, a *force majeure* event is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including, but not limited to, their contractors and subcontractors, that delays or prevents performance of any obligation under this AOC despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential *force majeure* event: (a) as it is occurring; and (b) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. A *force majeure* event does not include financial inability to complete the Work or increased cost of performance.

71. If any event occurs or has occurred that may delay the performance of any obligation under this AOC, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within seven (7) days of when Respondents first knew that the event might cause a delay. Within five (5) days thereafter, Respondents shall provide to EPA in writing: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of a *force majeure* event for that event for the period of time of such failure to comply and for any additional delay caused by such failure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known.

72. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this AOC that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of any extension for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

73. If Respondents fail to comply with any of the requirements or time limits set forth in or established pursuant to this AOC, without prior EPA approval, and such failure is not excused under the terms of Paragraphs 70 through 72 above (Force Majeure), Respondents shall, upon demand by EPA, pay a stipulated penalty to EPA in the amount indicated below:

a. For all requirements of this AOC, other than the timely provision of progress reports required by Section 4 of the RD SOW and Subparagraph 45(a), stipulated penalties shall accrue in the amount of $500 per day, per violation, for the first seven days of noncompliance, $1,000 per day, per violation, for the 8th through 15th day of noncompliance, $2,000 per day, per violation, for the 16th through 25th day of noncompliance, and $4,000 per day, per violation, for the 26th day of noncompliance and beyond.

b. For the progress reports required by Section 4 of the RD SOW and Subparagraph [REF _Ref366572567 \w \h * MERGEFORMAT]), stipulated penalties shall accrue in the amount of $250 per day, per violation, for the first seven days of noncompliance, $500 per day, per violation, for the 8th through 15th day of noncompliance, $1,000 per day, per violation, for the 16th through 25th day of noncompliance, and $2,000 per day, per violation, for the 26th day of noncompliance and beyond.

74. In the event that EPA assumes performance of remaining Work pursuant to Paragraph 85, Respondents shall be liable for a stipulated penalty in the amount of $250,000.

75. All penalties shall begin to accrue on the day after the complete performance is due, or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: a) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and b) with respect to a decision by the EPA management official at the Deputy Division Director level, or his or her designee, under Paragraph 69 of Section XVI (Dispute Resolution), during the period, if any,

beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this AOC.

76. Following EPA's determination that Respondents have failed to comply with a requirement of this AOC, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

77. Respondents shall pay EPA all penalties accruing under this Section within thirty (30 days) of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be made via EFT in accordance with the payment procedures in Paragraph 61, above.

78. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this AOC.

79. Penalties shall continue to accrue during any dispute resolution period but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

80. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 76.

81. Nothing in this AOC shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this AOC or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3); however, EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c) (3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this AOC or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by EPA), Paragraph 85. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this AOC.

XIX. COVENANT NOT TO SUE BY EPA

82. In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this AOC, and except as otherwise specifically

provided in this AOC, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and Future Response Costs. This covenant not to sue is conditioned upon Respondents' complete and satisfactory performance of all obligations under this AOC, including, but not limited to, the satisfactory performance of the Work and the payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATION OF RIGHTS BY EPA

83. Except as specifically provided in this AOC, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Lower Ley Creek OU. Further, except as specifically provided in this AOC, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this AOC, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

84. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this AOC is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this AOC;

b. liability for the United States' costs not included within the definition of Future Response Costs;

c. liability for performance of response action other than the Work, which includes but is not limited to the pre-design and design of the remedy selected in the 2014 ROD;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and

f. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site.

85. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner that may cause an

endangerment to human health or the environment, EPA may assume the performance of any or all portion(s) of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs that EPA incurs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XV (Payment of Future Response Costs). Notwithstanding any other provision of this AOC, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

86. Except as provided herein, Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this AOC, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at, or in connection with, the Lower Ley Creek OU, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work under this AOC or payment of Future Response Costs as defined under this AOC.

Notwithstanding Subparagraphs 86(a) – (c), nothing in this provision shall preclude Respondents from asserting a request for reimbursement from the Special Account for eligible costs.

87. Respondents reserve, and this AOC is without prejudice to, claims against the United States subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671, nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Respondents' plans or activities. The foregoing applies only to claims that are brought pursuant to any statute

other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

88. Nothing in Paragraph 86 above or in this AOC shall be construed to be a waiver by Respondents of any claims or causes of action against the United States, or its contractors or employees, relating to any future settlement regarding future performance of the Remedial Action or subsequent operation and maintenance activities necessary to maintain the effectiveness of the implemented remedy.

89. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

90. By issuance of this AOC, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this AOC.

91. Nothing in this AOC shall be construed to create any rights in, or grant any cause of action to, any person not a party to this AOC. Respondents expressly reserve any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which Respondents may have with respect to any matter, transaction, or occurrence relating in any way to the Lower Ley Creek OU against any person not a party hereto, except as provided in Section XXI (Covenant Not to Sue by Respondents). Nothing in this AOC diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2). The "matters addressed" in this AOC are the Work and Future Response Costs.

92. No action or decision by EPA pursuant to this AOC shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION PROTECTION

93. The Parties agree that this settlement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work and Future RD Response Costs. The Parties further agree that this Settlement

Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B), pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work and Future Response Costs.

XXIV. INDEMNIFICATION

94. Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this AOC. In addition, Respondents agree to pay the United States all costs incurred by the United States, including, but not limited to, attorneys' fees and other expenses of litigation and settlement, arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this AOC. The United States shall not be held out as a party to any contract entered into, by or on behalf of Respondents in carrying out activities pursuant to this AOC. Neither Respondents nor any such contractor shall be considered an agent of the United States. With respect to Respondents which are State or local governmental entities, the indemnity obligations under this Paragraph shall only apply to the extent permitted by and consistent with State law.

95. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling any such claim.

96. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from, or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on, or relating to, the Lower Ley Creek OU, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from, or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on, or relating to, the Lower Ley Creek OU.

XXV. INSURANCE

97. At least seven (7) days prior to commencing any Work at the Lower Ley Creek OU, Respondents shall submit to EPA certificates demonstrating that Respondents or their contractors and subcontractors have adequate comprehensive general liability and automobile insurance coverage in the amount of $5 million or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondents pursuant to this AOC. Respondents shall ensure that such insurance or indemnification is maintained for the duration of the Work required by this AOC.

XXVI. FINANCIAL ASSURANCE

98. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of EPA in the amount of $1.3 million in one or more of the following forms, to secure the full and final completion of Work by Respondents:

a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;

b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;

c. a trust fund administered by a trustee acceptable in all respects to EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;

e. a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondents, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a corporate guarantee to perform the Work by one or more of Respondents, including a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

With respect to Respondents which are State or local governmental entities, the financial assurance obligations under this Paragraph shall only apply to the extent permitted by and consistent with State law. All costs paid by Respondents, individually or jointly, to secure financial assurance under this Section XXVI shall be eligible for reimbursement pursuant to the terms and conditions of Paragraph 65.

99. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 98, above. In addition, if at any time EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability

to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this AOC.

100. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph 98(e) or 98(f) of this AOC, Respondents shall: (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to EPA. For the purposes of this AOC, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of $1.3 million for the Work at the Lower Ley Creek OU shall be used in relevant financial test calculations.

101. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 98 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA.

102. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution).

XXVII. INTEGRATION/APPENDICES

103. This AOC, its appendices, and any deliverables, technical memoranda, specifications, schedules, documents, plans, or reports (other than progress reports) that will be developed pursuant to this AOC and become incorporated into, and enforceable under, this AOC constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this AOC. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this AOC.

104. In the event of a conflict between any provision of this AOC and the provisions of any document attached to this AOC or submitted or approved pursuant to this AOC, the provisions of this AOC shall control.

105. The following documents are attached to and incorporated into this AOC:
Appendix A is the RD SOW
Appendix B is the 2014 ROD

Appendix C is a map that generally depicts the Lower Ley Creek OU.

XXVIII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

106. This AOC shall be effective upon receipt by counsel for Respondents after the AOC is signed by the Director of the Emergency and Remedial Response Division or his designee.

107. This AOC may be amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA. EPA's RPM does not have the authority to sign amendments to the AOC.

108. No informal advice, guidance, suggestion, or comment by EPA's RPM or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this AOC, or to comply with all requirements of this AOC, unless it is formally modified.

XXIX. NOTICE OF COMPLETION OF WORK

109. When EPA determines that all Work has been fully performed in accordance with the other requirements of this AOC, with the exception of any continuing obligations required by this AOC, including payment of Future Response Costs or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this AOC, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the applicable work plan(s), if appropriate, to correct such deficiencies. Respondents shall implement the modified and approved work plan(s) and shall submit the required deliverables. Failure by Respondents to implement the approved modified work plan(s) shall be a violation of this AOC.

By: _____ _____

Walter E. Mugdan, Director — Date
Emergency and Remedial Response Division
EPA, Region 2

In the Matter of Lower Ley Creek Operable Unit of the Onondaga Lake Superfund Site, Administrative Order on Consent, Index No. 02-2016-2014

Agreed this ___ day of _____, 2016.

For Respondent _____

Signature: _____

Name (print): _____

Title: _____

Address: _____

_____

_____