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**EM** U.S. Department of Energy  
Office Of Environmental Management

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# West Valley Demonstration Project (WVDP) Administrative Consent Order, August 27, 1996

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AND THE

UNITED STATES DEPARTMENT OF ENERGY  
EPA ID NUMBER NYD980779540

In the Matter of

UNITED STATES  
DEPARTMENT OF ENERGY,

RESPONDENT

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ORDER  
Docket No. \_\_\_\_\_

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## Parties

The New York State Department of Environmental Conservation (DEC) and the United States Department of Energy (DOE) enter into this Order regarding DOE's West Valley Demonstration Project (WVDP) near West Valley, New York.

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## Jurisdiction

A. This Administrative Consent Order (Order) is issued to the DOE under the authority of Article 27, Title 9 and Article 71, Title 27 of the New York State Environmental Conservation Law (ECL) and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901 *et seq.*, and the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) further amended by the Federal Facility Compliance Act (FFC Act) of 1992, Pub.L. No. 102-386, 106 Stat. 1505 (1992).

B. DEC is responsible for the enforcement of the ECL and of Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (6 NYCRR).

C. DEC administers a hazardous waste management program pursuant to ECL Article 27, Title 9 and 6 NYCRR Part 370 *et seq.* The State of New York is authorized by the United States Environmental Protection Agency (EPA) to administer its hazardous waste management program in lieu of the Federal hazardous waste management program. DEC is further authorized to regulate mixed waste.

D. DOE, a department of the executive branch of the federal government, operates the WVDP (the Project) which is a waste management demonstration project established and defined in the West Valley Demonstration Project Act, Pub. L. 96-368 (WVDP Act). DOE generates, transports and manages hazardous waste at the WVDP and is therefore subject to and must comply with all applicable federal and state requirements respecting hazardous waste. DOE agrees not to contest the jurisdictional elements of this Order, except that DOE reserves its right to seek judicial review of DEC's interpretation of this Order.

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## Purpose and Scope

A. The purposes of this Order are as follows:

(1) Establishing commitments regarding compliance with the approved Site Treatment Plan (STP) for mixed wastes submitted by DOE pursuant to the FFC Act, regarding mixed waste stored and generated at the WVDP.

(2) Establishing an enforceable framework in which DOE will develop and apply treatment or otherwise meet Land Disposal Restriction (LDR) requirements of 40 CFR Part 268 and 6 NYCRR Part 376 with respect to LDR mixed waste at the Project which are defined as covered wastes in Section IV,B.

(3) Providing for storage of current and projected LDR mixed wastes at the WVDP pending the development of treatment technology or capacity, and ultimate treatment or other disposition of such wastes according to LDR requirements during the term of this Order.

B. DEC and DOE agree that this Order fulfills the requirements contained in the Federal Facility Compliance Act of 1992; therefore, pursuant to Section 105(a) of the FFC Act, it is the intent of the Parties that this Order shall stand in lieu of any other interpretations of DOE's requirement to develop and submit a plan for the development of treatment capacities and technologies pursuant to Section 3021(b) of RCRA.

C. In the event that the terms and conditions of this Order are inconsistent with those of the Plan Volume, the terms and conditions of this Order shall be controlling. In the event that there is a conflict between the provisions of 40 CFR Part 268 and 6 NYCRR Part 376 the provisions of 6 NYCRR Part 376 shall be controlling.

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## **Statement of Facts & Conclusions of Law**

A. WVDP is a federally operated facility.

B. Pursuant to 6 NYCRR 376.5(a)(2) and 376.5(a)(3) (40 CFR §268.50), in the case of any hazardous waste which is prohibited from one or more methods of land disposal, the storage of such LDR waste is prohibited unless such storage is solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal.

C. DOE notified DEC that DOE is currently storing LDR mixed wastes, for which adequate treatment capacity is not currently available. DEC has determined that the storage of LDR mixed waste, which is not solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment or disposal, may constitute a violation of applicable hazardous waste laws and regulations, 6 NYCRR 376.5 (40 CFR §268.50).

D. DOE is currently constructing or planning to construct, or obtain facilities that will treat and/or dispose of the wastes described in the STP to meet the LDR requirements.

E. DEC is fully authorized to enforce orders pursuant to the FFC Act in New York State and has approved the STP.

**THEREFORE**, pursuant to DEC's authority under ECL Article 27, Title 9, the FFC Act and ECL Article 71, DEC and DOE have agreed to enter into this Order for the purpose and scope stated above.

**NOW THEREFORE** it is ordered with the consent of DOE, that:

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## **I. Implementation of the STP**

Immediately upon execution of this Order, DOE shall begin implementation of the Plan Volume of the approved STP appended hereto as part of Appendix A and incorporated by reference herein, in accordance with the implementation schedules contained within the Plan Volume of the STP.

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## **II. Annual Updates**

A. By February 15, 1997, and by February 15 of each fiscal year thereafter in which this Order is in effect, DOE shall provide an Annual Update of the STP to DEC for review and comment. Each Annual Update to the STP will bring the STP current to the end of the previous fiscal year (September 30). The Annual Update to the STP will minimize the paperwork necessary to document changes and be handled by page changes to the extent practicable. These changes will be marked for comparison to the previous STP.

B. The Annual Update of the STP shall be divided into two volumes, an update to the Background Volume of the STP and an update to the Plan Volume of the STP.

(1) The update to the Background Volume will provide the following information:

a) The amount of each covered waste as defined in Section IV,B., stored at the WVDP as follows: 1) the estimated amount in storage at the end of the previous fiscal year, and 2) the estimated amount anticipated to be placed in storage in the next five fiscal years (including the current fiscal year).

b) A description of progress made up to the end of the last fiscal year on treatment or technology development of each treatment facility or activity scheduled in the Plan Volume of the STP. If applicable, DOE will also describe the current or anticipated alternative treatment technology which is being evaluated for use in lieu of treatment technologies or capacities identified in the Plan Volume of the STP. This description will include potential alternate commercial treatment, and off-site DOE treatment capacity or DOE technology development.

c) A description of DOE's funding for the STP and any funding issues which may impact the schedule as it is known at the reporting time.

d) The status of any pending or planned requests for Amendments, treatability variance or no migration petition.

e) Information which has changed or has not been previously included regarding waste form, waste code, technology and capacity needs.

f) For any newly identified waste included in the STP pursuant to Section V (Inclusion of New Waste Streams), a discussion of available treatment technologies and rationale to support the selection of a preferred treatment alternative.

g) Notification of the deletion of waste streams in accordance with Section IX (Deletion of Wastes and Termination of the STP).

(2) The update to the Plan Volume will provide the following:

- a) Documentation to support the completion of milestones from the previous year.
- b) Any approved Amendments to the Plan Volume incorporated since the previous Annual Update.
- c) Any conditionally approved Amendments.
- d) Any proposed Amendments to the Plan Volume submitted in accordance with Section VI (Amendments), including, but not limited to:
  - i) Any proposed changes to the Milestones or Planning Schedule Activities identified in the Plan Volume;
  - ii) The proposed preferred treatment alternative and proposed schedule for the treatment of any newly identified waste streams included in the STP pursuant to Section V (Inclusion of New Waste Streams);
  - iii) The proposed preferred treatment alternative and/or proposed schedule for the treatment of waste streams for which characterization and technology assessment had not been done or approved on the effective date of this Order.
- e) A proposed schedule reflecting the annual conversion of planning schedule activities to milestones, with any approved, conditionally approved, or proposed Amendments.

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### **III. Establishing Milestones and Planning Schedule Activities**

A. Milestones identify specific dates on which a certain activity is scheduled to occur and are enforceable pursuant to this Order. Milestones shall be established for a three year rolling period consisting of the current federal fiscal year (FY) plus two additional federal fiscal years (FY+1 and FY+2). On the effective date of this Order, enforceable milestones in the approved STP are established for the next three federal fiscal years: FY (October 1, 1995 - September 30, 1996); and FY+1 (October 1, 1996 - September 30, 1997) and FY+2 (October 1, 1997 - September 30, 1998). After expiration of the current fiscal year what were previously FY+1 milestones will become FY milestones and what were previously FY+2 milestones will become FY+1 milestones. The planning schedule activities identified in the approved STP as FY+3 dates shall be converted to FY+2 milestones. All conversions will be automatic and will remain in effect, unless the milestones have been amended pursuant to Section VI, Amendments.

B. Planning schedule activities shall be established for the out-years beyond the three year rolling milestone period. On the effective date of this Order, non-enforceable planning schedule activities in the Approved STP are established for the out-years beyond FY+2.

C. In accordance with Section XII (Funding), the DEC will consider funding availability in reviewing DOE proposals for establishing and adjusting milestones and planning schedule activities pursuant to

this Order.

D. Schedule dates shall be identified by reference to fiscal year quarters. The specific date of the milestone or planning schedule activity shall be the last day of the quarter identified.

The date corresponding to the last day of each quarter is as follows:

first quarter (1Q) - December 31;  
second quarter (2Q) - March 31;  
third quarter (3Q) - June 30;  
fourth quarter (4Q) - September 30.

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#### **IV. Covered Matters**

A. The Plan Volume of the STP addresses LDR requirements pertaining to storage of covered wastes, and the selection and scheduling of treatment, whether such wastes are generated or accumulated in the past, present or future. The Plan Volume of the STP and this Order do not address any other state or federal requirements applicable to the management, storage, treatment and disposal of hazardous or mixed wastes, and compliance with these requirements are not "covered matters."

B. Covered wastes are all mixed waste at WVDP identified in the STP or added to the STP in accordance with Section V (Inclusion of New Waste Streams), except those mixed wastes which 1) meet LDR requirements, regardless of the time of generation; 2) are being stored or will be stored when generated, solely for the purposes of accumulating sufficient quantities of mixed waste as are necessary to facilitate proper recovery, treatment, or disposal; or 3) are new waste streams that have not been approved for inclusion in the STP pursuant to Section V (Inclusion of New Waste Streams).

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#### **V. Inclusion of New Waste Streams**

A. New mixed waste streams, including mixed wastes which are newly discovered, identified, generated, or received from off-site, and mixed wastes which are generated through Project environmental restoration and Project decontamination and decommissioning activities to the extent such mixed wastes are intended to become a covered waste, shall be included in the STP as follows:

B. To the extent such mixed wastes are intended to become covered wastes the STP will include, without DEC approval, the following new waste streams:

- 1) Any Project waste stream in existence at the site on the effective date of this Order, whether or not it has been identified or discovered by that date;
- 2) Any Project waste stream projected to be generated or received at the site, that has been identified before the effective date of this Order;
- 3) Any Project wastes generated through environmental restoration, decontamination and decommissioning activities, regardless of when generated;

4) Any Project waste streams generated or received at the site before January 1, 2001.

After the year 2000, any new waste stream not included in the list above will be included as a Covered waster only upon approval of DEC, as an Amendment of the STP pursuant to Section VI (Amendments).

C. DOE shall notify DEC of additional or new mixed wastes or mixed waste streams which have been generated or stored, within 30 days of generation, identification, or storage, and may notify DEC of mixed wastes anticipated to be generated or stored at the Project, which are expected to be covered wastes. Unless otherwise specified in the modification, or unless approval is required pursuant to Paragraph B of this Section, the mixed waste will be a covered waste and subject to the requirements of the Plan Volume 1) upon receipt of such notification or 2) when generated or stored at the Project, whichever is later. If approval is required, the mixed waste will be a covered waste and subject to the requirement of the Plan Volume upon approval by DEC. To the extent practicable, DOE shall provide a description of the waste code, waste form, volumes, technology and capacity needs and similar pertinent information in the notification.

D. Additional detail on new mixed waste streams and proposed plans and schedules for treatment will be submitted as a proposed Amendment in the next regularly scheduled Annual Update.

E. If DOE cannot provide such information or schedules as required by subsection D of this Section because of inadequate characterization or it is otherwise impracticable, DOE shall include appropriate justification, supporting information, and proposed plans for developing such information and schedules.

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## **VI. Amendments**

A. An Amendment is a change to the Plan Volume. Unless otherwise specified herein, any Amendment requires DEC approval. Amendments such as the addition of a treatment capacity or technology development not previously included in the Plan Volume, or a proposed change to a milestone for a period greater than one year may constitute a Revision and require publication of a notice of availability to the public and consultation with affected states and EPA pursuant to the STP and section 3021(b)(2),(3) and (4) of RCRA. Other Amendments such as changes in waste volume, the addition or deletion of wastes or waste types, changes to milestones for a period less than a year, or changes to planning schedule activity dates may not require public participation and/or consultation with other states/EPA.

B. Amendments to the STP shall be made as follows:

(1) DOE shall identify to DEC in writing of the need to amend the Plan Volume and provide supporting information on the basis for the Amendment. For each proposed Amendment to the Plan Volume submitted by DOE, DEC shall determine whether the Amendment constitutes a "Revision," which requires an opportunity for public participation and consultation with EPA and any other state in which a facility affected by the Amendment is located. If it is determined that public participation and/or consultation with EPA and any other state in which a facility affected by the Amendment is located is not required, DEC shall approve the Amendment,

return it to DOE with comments so that changes can be made for resubmittal, or disapprove it. If it is determined that the Amendment is a Revision, DEC may conditionally approve the Revision, return it to DOE with comments so that changes can be made for resubmittal, or disapprove it. Conditional approval of a Revision is a determination by DEC that the Revision is acceptable subject to the results of public comment and consultation with affected states and EPA.

(2) Subsequent to conditional approval of a proposed Revision, DEC shall publish a notice of availability and make the Revision to the STP available to the public for review and comment and to affected states and EPA for consideration and consultation. Revisions shall be approved, approved with modification, or disapproved by DEC within four months after DEC publishes a notice of availability of the proposed Revision unless DEC requests and DOE agrees to extend this time period.

(3) If DEC returns a proposed Amendment to DOE with comments, or approves a Revision with modifications subsequent to public review and comment and consultation with other states/EPA or disapproves of a proposed Amendment, and DOE disagrees with DEC's comments, modification, or disapproval of the proposed Amendment, DOE may, within 60 days of receipt of the comments, modified approval or disapproval, raise the issue of Dispute Resolution, pursuant to Section X (Dispute Resolution).

(4) To the extent practicable, proposed Amendments to the STP will be submitted in conjunction with the Annual Update to the STP.

C. DOE may, at any time, request an Amendment of a milestone date, a planning schedule activity date, or deliverable date established by the Plan Volume or this Order. Any request for an Amendment shall be made to DEC prior to the deadline or schedule or deliverable date, either in writing or orally with a written follow-up request within ten (10) business days from the date of the oral request. The written request shall specify:

- (1) The milestone, planning schedule activity or deliverable date that is sought to be amended;
- (2) The nature of the Amendment sought;
- (3) The reason(s) for requesting the Amendment;
- (4) Any related milestone or other requirement that would be affected if the Amendment were granted.

D. Any Amendment request must be approved by DEC. Amendment requests shall negotiated and resolved between the Project Managers. Except as provided for in Paragraph B.(3) of this Section, if Project Managers cannot reach an agreement within 60 days of DOE's receipt of DEC's determination to return the proposed Amendment with comments, approve it with modification after public participation, or disapprove it, DOE may elevate the issue to Dispute Resolution, in accordance with Section X (Dispute Resolution). If DOE fails to elevate the issue to Dispute Resolution within the 60-day period, the milestone, planning schedule activities, or deliverable date shall remain unchanged.

E. A timely and good faith request for an Amendment shall automatically extend the time period for completion of work affected by the request for an Amendment for a period equal to the number of



days taken to resolve the request. There shall be no assessment of penalties or initiation of any action to enforce the milestone(s) related to the extension of the affected milestone(s) until a final decision has been issued with respect to the request.

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## **VII. Project Managers**

A. DOE and DEC shall each designate a Project Manager, and shall notify the other Party in writing of the Project Manager they have selected within 30 days of execution of this Order. The Project Managers shall be responsible for overseeing the implementation of this Order. A Party may change its designated Project Manager by notifying the other Party in writing, ten (10) days before the change, to the extent possible. To the extent possible, communications between the Parties concerning the terms and conditions of this Order shall be directed through the Project Managers. Each Project Manager shall be responsible for assuring that all communication from the other Party and Project Manager is disseminated appropriately to the responsible Project Manager's organization.

B. The Project Managers shall have authority to act for their respective agency to agree to changes to schedules and requirements, subject to the provisions of this Order regarding Disputes and Amendments. The Project Managers shall meet periodically, as appropriate, to discuss progress and issues relating to all work under this Order

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## **VIII. Notification**

Two copies of all documents to be submitted pursuant to this Order shall be sent, via first class mail, over-night mail services, or hand delivered, to the Project Manager at the address stated below. Any Party may request additional copies of any document submitted pursuant to this Order.

Project Manager  
West Valley Mixed Waste Consent Order  
NYS Department of Environmental Conservation  
Division of Solid & Hazardous Materials  
Bureau of Hazardous Compliance & Land Management  
50 Wolf Road  
Albany, New York 12233-7252

Project Manager  
U.S. DOE-WVAO  
P.O. Box 191  
West Valley, NY 14171-0191

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## **IX. Deletion of Wastes and Termination of the STP and Order**

A. Deletion of Wastes - The requirements of the Plan Volume of the STP and this Order shall terminate with regard to any covered waste upon DOE's notice to DEC of the following:

- 1) Completion of activities required pursuant to a milestone under the Plan Volume for final treatment of such waste;
- 2) Shipment of wastes off-site for final treatment, disposal, or storage pending treatment or disposal (unless such waste is returned to the Project );
- 3) Changes to statute or regulation or determinations of the regulatory authority which cause a waste or waste categories to be no longer subject to the requirements of RCRA or the LDR requirements of RCRA;
- 4) Storage for the sole purpose of accumulating such quantities of covered wastes as are necessary to facilitate proper recovery, treatment or disposal;
- 5) Information demonstrating that the waste meets the treatment standards of RCRA, section 3004(m);
- 6) Treatment in accordance with the conditions of an approved LDR treatability variance; or
- 7) Mutual agreement between DOE and DEC.

B. This Order and the STP shall terminate either at such time as 1) there is no longer any mixed waste, regardless of when generated, being stored or generated at the Project which does not meet LDR requirements; or 2) the mixed waste being stored or generated at the Project is being stored, or will be stored when generated, solely for the purpose of accumulating sufficient quantities of mixed wastes as are necessary to facilitate proper recovery, treatment, or disposal.

C. DOE will notify DEC of such termination independently and/or in the Annual Updates to the STP.

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## **X. Dispute Resolution**

A. Any determination by DEC or failure to issue within a reasonable time period a determination regarding any matter subject to DEC approval which leads to or generates a dispute regarding this Order, including but not limited to, requests made under Sections VI and XV.B, is subject to resolution under this Section.

B. DOE and DEC shall make reasonable efforts to informally resolve disputes as expeditiously as possible at the Project Manager level. If resolution cannot be achieved informally, DOE may elevate the dispute for resolution pursuant to this Section.

C. To initiate formal dispute resolution, DOE shall submit to DEC within 60 days of the determination under dispute, a written Notice of Dispute specifying:

- 1) the nature of the dispute;
- 2) the work affected by the dispute;
- 3) DOE's position with respect to the dispute; and
- 4) the information DOE is relying upon to support its position.

Within 30 days of receipt of the Notice of Dispute, DEC shall respond, in writing, to DOE, indicating its position with respect to each matter in controversy.

D. If a mutually agreed upon resolution is not reached within 45 days of DEC's receipt of the Notice of Dispute and all associated documentation, the dispute shall be escalated to the appropriate Assistant Manager of DOE's Ohio Field Office and DEC's Deputy Commissioner of Environmental Quality/Remediation (Deputy Commissioner) for consultation.

E. If, after consultation, a mutually agreed upon resolution is not reached, the Deputy Commissioner shall issue a final determination of DEC within 30 days of escalation. This decision shall be binding on the Parties and constitute a final agency action, subject to timely administrative or judicial appeal, according to applicable law, except as provided in Section XV,B.

F. Except as provided in this Section, DOE shall maintain compliance with this Order. However, if the Parties agree that there is a good faith dispute, the time period for completion of work affected by the dispute shall automatically be extended for a period of time not to exceed the actual time taken to resolve such good faith dispute in accordance with this Section. The time periods designated in this Section may be extended by mutual written agreement of the Parties. States affected by the dispute and/or EPA may be consulted by the Parties as part of the dispute resolution process.

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## **XI. Force Majeure**

A. DOE shall not suffer any penalty under this Order, or be subject to any proceeding or action, if it cannot perform the requirements of this Order within the time frames set forth, approved, or established herein if performance is prevented or delayed by any event that constitutes a force majeure. A force majeure shall mean any event arising from causes beyond the control of DOE that causes a delay in or prevents the performance of any obligations under this Order, and which could not be overcome by due diligence on the part of DOE.

B. DOE shall immediately notify DEC in writing when it obtains knowledge of an event of force majeure and shall request an Amendment pursuant to Section VI (Amendments).

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## **XII. Funding**

A. DOE shall take all necessary steps to obtain sufficient funding to comply with the provisions of the approved STP and this Order. DOE shall consult with DEC in formulating its annual EM budget request as set forth in this section.

B. By March 31 of each year following issuance of this Order, DOE shall provide DEC with information or a briefing on the proposed EM budget request for the facility including, at DEC's request, appropriate supporting documents. In the process of formulating its annual budget request, DOE may be subject to target funding guidance directed by the Office of Management and Budget (OMB). The information or briefing shall address the impacts of such OMB target funding guidance.

C. DOE shall notify DEC when it provides confidential budget information to DEC. DEC will not release confidential budget information to any other entities prior to submission of the President's budget request to Congress, unless authorized by DOE or required to do so by the New York State Freedom of Information Law, Public Officers Law Article 6 §§ 84 *et seq.* or court order. DOE may seek to intervene in any proceeding brought to compel or enjoin release of this information. If allowed to intervene, DOE may assert its interest in, and the legal basis for, maintaining the confidentiality of this information.

D. DOE and DEC shall discuss work scope, priorities, milestones, and planning schedule activities funding levels required to comply with the approved STP and this Order. These discussions shall be conducted before DOE submits its annual budget request and supporting Activity Data Sheets (ADS) to the DOE Headquarters. DEC will consider funding availability in reviewing DOE proposals for establishing and adjusting milestones and planning schedule activities pursuant to this Order. DEC's comments to DOE may include those additional or accelerated activities recommended by DEC that are outside of EM target funding levels for the facility. DOE may revise its budget request and supporting documents to resolve the comments of DEC. DOE reserves the right to identify which activities it believes cannot be accomplished within the established EM target funding levels for the facility. Nothing herein shall affect DOE's ultimate responsibility or authority to formulate and submit to the President appropriate budget requests and to allocate appropriate funds to serve DOE's missions.

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### **XIII. Enforceability**

A. It is further agreed that any failure by DOE to comply with the terms of this Order, including any schedules established or incorporated into the Plan Volume of the STP, may constitute a default and a failure to perform under this Order, and a violation under the ECL. In such event, DEC shall be entitled to seek any relief allowable at law or in equity in a proceeding initiated by the Attorney General or DEC, including, but not limited to an action or suit by the State pursuant to the citizen suit provisions of RCRA, 42 U.S.C. § 6972.

B. DOE agrees that this Order shall be admissible as evidence in any proceeding to enforce this Order. Nothing in this Order shall constitute an admission on the part of DOE, in whole or in part, in any proceeding except a proceeding to enforce this Order.

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### **XIV. Covenants and Reservations**

A. DEC expressly reserves, subject only to Paragraph B of this Section, all of its statutory and regulatory powers, authorities, rights, remedies, and defenses, both legal and equitable.

B. As long as this Order is in effect, the STP and this Order shall stand in lieu of any administrative, legal, and equitable remedies which are available to DEC against DOE, its contractors, and subcontractors at any tier and all persons bound by the STP and this Order for violations of RCRA Section 3004(j) and 6 NYCRR 376.5(a)(2) and (3), for storage of covered waste in excess of one year, provided that DOE and all parties bound by the STP and this Order are in compliance with the

STP and Order as determined by DEC or a court of competent jurisdiction. Nothing in this Order shall be construed as waiving or compromising in any way the applicability and enforcement of any other statutes, regulations, orders or existing agreements applicable to DOE's activities at the Project.

C. Except as provided in Paragraph B of this Section, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of DEC's rights, including but not limited to, the following:

1. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that DEC may have with respect to investigatory, remedial or corrective action or with respect to claims for natural resource damages as a result of any release or threatened release of hazardous substances from the Project.
2. Any legal or equitable rights or claims, actions proceedings, suits, causes or action or demands whatsoever that DEC may have against anyone other than DOE, its contractors and subcontractors.
3. DEC's right, to the extent provided for by law, to enforce this Order against DOE, its contractors and subcontractors, in the event that DOE shall fail to fulfill any of the terms or provisions hereof.
4. DEC's right, to the extent provided by law, to require that DOE undertake additional measures required to protect public health or the environment, including interim remedial measure, when appropriate.
5. DEC's right, to the extent provided for by law, to seek relief for any violations not addressed in this Order.

D. Additionally, no term of this Order shall be construed to prohibit the Commissioner of DEC or his duly authorized representative from exercising any summary abatement powers pursuant to Section 71-0301 of the ECL.

E. Except as specifically set forth herein, DOE reserves and does not waive any rights, authority, claims or defenses, including sovereign immunity, that it may have at law or in equity or under any existing agreement or order or wish to pursue in any administrative, judicial or other proceeding with respect to any person; nor does DOE waive any claim of jurisdiction over matters which may be reserved to DOE by law, including the Atomic Energy Act 42 U.S.C. 2011 *et seq.* Except as otherwise provided in this Order, DOE specifically reserves all rights it may have by law to seek and obtain administrative or judicial review or appeal according to applicable law, of any determination made by DEC pursuant to this Order.

F. It is the position of DEC that the federal Anti-Deficiency Act, 31 U.S.C. § 1341, as amended, does not apply to any obligations set forth in this Order, and except as otherwise provided in this Order, obligations hereunder are unaffected by the DOE's failure to obtain adequate funds or appropriations from Congress. It is DOE's position that the obligations set forth in this Order are subject to funding availability and the provisions of the Anti-Deficiency Act, 31 U.S.C. § 1341.

G. Except as provided in this Order, this Order shall not relieve DOE from its obligation to comply with any of the applicable provisions of RCRA including any permit, closure, post closure, public

notice and comment, or other hazardous waste requirement. This Order shall not relieve DOE from its obligation to comply with any other applicable federal, state or local law or any interagency or other agreements between DEC and DOE.

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## **XV. Modification**

A. This Order may be modified only by mutual agreement of DOE and DEC. Any modification of this Order shall be in writing, shall be effective upon signature and issuance by the Commissioner of DEC or his designee, and shall be incorporated into this Order and be enforceable in the same manner as any requirement of this Order.

B. In February of 1999, and periodically (e.g., every three (3) years) thereafter, as appropriate, unless DOE and DEC mutually agree that no modification of this Order is warranted, DOE and DEC shall conduct a good faith dialogue to determine whether the compliance schedule and funding structure of this Order should be modified. Such dialogue shall consider the experiences and perspectives of DOE and DEC regarding the implementation of this Order during the previous three federal fiscal years, the most recent information on current and projected funding availability, and the status of major technical issues that are expected to affect the management of the Project's mixed waste. If DOE and DEC agree that modification of this Order is warranted, DOE and DEC shall endeavor to complete and implement such modifications within six (6) months of the initiation of such dialogue. Subject to paragraph A of this section, if DOE and DEC disagree as to whether modification of this Order is warranted, or regarding the extent to which this Order should be modified, either DOE or DEC may invoice formal Dispute Resolution, pursuant to Section X to facilitate agreement; however, the decision of the Deputy Commissioner at the conclusion of the Dispute Resolution process shall not be subject to administrative or judicial review.

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## **XVI. Severability**

If any provision or authority of this Order or the application of this Order is held by any judicial or administrative authority to be invalid, the remainder of the Order shall remain in force and shall not be affected thereby.

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## **XVII. Effective Date**

The effective date of this Order shall be the date of signature by the Commissioner of DEC or his designee. The undersigned representatives of the Parties warrant that they are fully authorized to and do hereby enter into and legally bind their agency to this Order.

For Respondent:

United States Department of Energy  
Ohio Field Office

Date: 5/28/96

By: J.P. Hamric  
Manager

For: New York State Dept. of Environmental Conservation

Date: 8/27/96

By:

New York State Dept. of  
Environmental Conservation

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Last Updated 04/17/97 (mmj)