UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

REGIONAL SOLICITOR
RECEIVED
APR 22 1996
U.S. DEPT. OF THE INTERIOR
NORTHEAST REGION

UNITED STATES OF AMERICA

and

STATE OF NEW YORK

Plaintiffs,

v.

NIAGARA TRANSFORMER CORPORATION;
BELL AEROSPACE TEXTRON;
GENERAL ELECTRIC COMPANY;
GENERAL MOTORS CORPORATION;
NEW YORK STATE ELECTRIC & GAS CORP;
NIAGARA MOHAWK POWER CORPORATION;
and, UNION CARBIDE CORPORATION,

Defendants.

CIV-89-1358A

FILED
96 MAR 22 PM 4:52
U.S. DISTRICT COURT
W.D.N.Y.-BUFFALO

CONSENT DECREE

WHEREAS, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), the Department of the Interior ("DOI"), and the National Oceanic and Atmospheric Administration ("NOAA"), and the State of New York ("State"), have filed complaints against Niagara Transformer Corporation ("Settling Defendant"), pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. § 9607(a) ("CERCLA"), seeking recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Wide Beach Development Superfund Site,

DEPARTMENT OF JUSTICE
APR 16 1996
LANDS & ENFORCEMENT

#1C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and STATE OF NEW YORK Plaintiffs, v. NIAGARA TRANSFORMER CORPORATION; BELL AEROSPACE TEXTRON; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; NEW YORK STATE ELECTRIC & GAS CORP; NIAGARA MOHAWK POWER CORPORATION; and, UNION CARBIDE CORPORATION, Defendants.	CIV-89-1358A

RECEIVED
DEC 15 1995
U.S. DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

CONSENT DECREE

WHEREAS, the United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), the Department of the Interior ("DOI"), and the National Oceanic and Atmospheric Administration ("NOAA"), and the State of New York ("State"), have filed complaints against Niagara Transformer Corporation ("Settling Defendant"), pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. § 9607(a) ("CERCLA"), seeking recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Wide Beach Development Superfund Site

("Site"), and damages for injury, destruction, and/or loss of natural resources;

WHEREAS, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658;

WHEREAS, investigations of the Site, including a remedial investigation performed by EPA pursuant to CERCLA in 1984 and 1985 disclosed the release and threatened release of polychlorinated biphenyls ("PCBs") at and from the Site;

WHEREAS, the PCBs released and threatened to be released at and from the Site are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 101(14);

WHEREAS, pursuant to a Record of Decision issued on September 30, 1985 (the "Record of Decision"), EPA selected a remedy to address the PCB contamination at and from the Site and the State concurred in such remedy;

WHEREAS, the United States and the State have incurred and continue to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, the United States and the State have reviewed materials provided by Settling Defendant to the United States and the State relating to the financial status of Settling Defendant and the United States and the State are entering into this

Consent Decree based upon their respective analyses of Settling Defendant's ability to pay;

WHEREAS, the United States, the State, and Settling Defendant agree that settlement of this case without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action;

WHEREAS, the purpose of this Consent Decree is to provide for settlement between EPA, DOI, NOAA, the State, and Settling Defendant. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED and DECREED:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District, and shall not challenge the entry of this Consent

Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II. DEFINITIONS

2. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or such regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 42 U.S.C. §§ 9601, et seq.

b. "Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

c. "DOI" shall mean the United States Department of the Interior and any successor departments or successor agencies of the United States, both for itself; and on behalf of and as trustee for the Seneca Nation pursuant to and under the authority of the September 28, 1995 Resolution of the Seneca Nation to enter into a settlement regarding the Site.

d. "EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. "Hazardous Materials" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); and/or (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

f. "Natural Resource Damages" shall mean damages, including costs of damage assessment, recoverable under Section 107 of CERCLA for injury to, destruction of, or loss of any and all natural resources relating to the Site.

g. "NOAA" shall mean the National Oceanic and Atmospheric Administration, an agency of the United States Department of Commerce, and any successor departments or successor agencies of the United States.

h. "Paragraph" means a portion of this Consent Decree identified by an arabic numeral.

i. "Parties" means the United States, the State of New York, and Settling Defendant.

j. "Record of Decision" or "ROD" means the EPA Record of Decision relating to the Site issued by EPA on September 30, 1985, and all attachments thereto.

k. "Remedial Action" means the remedial action selected in the Record of Decision for the Site issued on September 30, 1985 and performed by EPA.

l. "Section" means a portion of this Consent Decree identified by a roman numeral.

m. "Seneca Nation" means the Seneca Nation of Indians of the Allegany, Cattaraugus, and Oil Spring reservations, a federally recognized sovereign Indian Nation.

n. "Settling Defendant" means Niagara Transformer Corporation.

o. "Site" means the Wide Beach Development Site, located at Brant, New York, as described in the Record of Decision for the Site issued by EPA on September 30, 1985.

p. "State" means the State of New York, including its agencies, departments, and instrumentalities.

q. "United States" means the United States of America, including its agencies, departments, and instrumentalities.

III. PARTIES BOUND

3. This Consent Decree shall apply to and be binding upon the United States and the State and shall apply to and be binding upon Settling Defendant, and its successors and assigns. Any change in ownership or corporate status of Settling Defendant, including, but not limited to, any transfer of assets or real or personal property shall in no way alter Settling Defendant's responsibilities under this Consent Decree. Each signatory to this Consent Decree represents that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party represented by him or her.

IV. REIMBURSEMENT OF RESPONSE COSTS AND NATURAL RESOURCE DAMAGES

4. Payments to the United States

a. Settling Defendant shall pay to the United States the total amount of eight hundred sixty-nine thousand five hundred and sixty-nine dollars ($869,569) as reimbursement for the United States' response costs at the Site, plus interest at the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995). Such payments to the United States shall be made as follows:

(i) three hundred thousand dollars ($300,000) within thirty (30) days of the entry of this Consent Decree;

(ii) two hundred and ninety-two thousand eight hundred and sixty-nine dollars ($292,869) on or before March 1, 1996, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995);

(iii) two hundred and seventy-six thousand seven hundred dollars ($276,700) on or before March 1, 1997, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995, and the applicable rate for the period beginning October 1, 1996).

b. Settling Defendant shall pay to the United States the amounts set forth in Paragraph 4 a. of this Consent Decree by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, referencing the CERCLA Number (02-46) and the United States Attorneys Office file number (89 V 0805). Payment shall be made in accordance with instructions provided by the United States to Settling Defendant upon execution of the Consent Decree. Any EFTs received at the U.S. Department of Justice lockbox bank after 11:00 A.M. (Eastern Time) will be credited on the next business day.

c. Settling Defendant shall pay to the United States the total amount of fifty seven thousand nine hundred and seventy-four ($57,974) for natural resource damages, plus interest at the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995). Such payments to the United States shall be made as follows:

(i) twenty thousand dollars ($20,000) within thirty (30) days of the entry of this Consent Decree;

(ii) nineteen thousand five hundred and twenty-four dollars ($19,524) on or before March 1, 1996, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995);

(iii) eighteen thousand four hundred and fifty dollars ($18,450) on or before March 1, 1997, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995, and the applicable rate for the period beginning October 1, 1996).

d. Settling Defendant shall pay to the United States the amounts set forth in Paragraph 4(c) of this Consent Decree in the form of a certified check made payable to "U.S. Department of the Interior", and referencing Account Number 14X1618 and the name of the Site, the Wide Beach Superfund Site. The Settling Defendant shall forward the certified check by certified mail, return receipt requested to:

Chief, Division of Finance
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Arlington, VA 2203

with a copy to:

Mark Barash
Office of the Regional Solicitor
United States Department of Interior
One Gateway Center, Suite 612
Newton Corner, MA 02158-2868

and

Marguerite Matera
National Oceanic and Atmospheric Administration
Office of General Counsel
1 Blackburn Drive
Gloucester, MA 01930

and shall reference that the payment is for natural resource damages for resources under the trusteeship of DOI, NOAA, and the

Seneca Nation with respect to the Wide Beach Superfund Site. A copy of the check paid pursuant to this subparagraph, and any accompanying transmittal letter, shall be sent to the United States as provided in Section X of this Consent Decree.

e. The jurisdictions and trusteeships of the DOI, NOAA, and the Seneca Nation as natural resource trustees over the injured natural resources overlap. Accordingly, all monies recovered for natural resource damages arising from the Site shall be held by the Department of the Interior in an interest bearing account in its Natural Resource Damage Assessment and Restoration Fund, and said monies shall only be spent for restoration and to reimburse past trustee assessment set forth in a Memorandum of Agreement to be entered into between the DOI, NOAA, and the Seneca Nation. None of the monies recovered for natural resource damages arising from the Site shall be obligated or expended prior to the execution of a mutually agreed upon Memorandum of Agreement.

5. Payments to the State

a. Settling Defendant shall pay to the State the total amount of eighty six thousand nine hundred and fifty-six dollars ($86,956) as reimbursement for the State's response costs at the Site, plus interest at the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995). Such payments to the State shall be made as follows:

(i) thirty thousand dollars ($30,000) within thirty (30) days of the entry of this Consent Decree;

(ii) twenty nine thousand two hundred and eighty-six dollars ($29,286) on or before March 1, 1996, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995);

(iii) twenty seven thousand six hundred and seventy dollars ($27,670) on or before March 1, 1997, plus interest from October 1, 1995, at the rate equal to the rate on investments of the Hazardous Substances Superfund in accordance with Section 107 of CERCLA (5.85 per cent per annum for the one year period beginning October 1, 1995, and the applicable rate for the period beginning October 1, 1996).

b. Settling Defendant shall pay to the State the amount set forth in Paragraph 5 a. above by certified check payable to "The State of New York" forwarded to:

David A. Munro, Esq.
Assistant Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224

6. Settling Defendant shall have the right to prepay all or any part of any payments due pursuant to Paragraphs 4 and 5 of this Consent Decree. Any such prepayment shall be applied against the next successive payment due. In the event that, prior to the time that Settling Defendant has made all payments

pursuant to Paragraphs 4 and 5 of this Consent Decree, Settling Defendant files a voluntary petition in bankruptcy, or is adjudicated a bankrupt under the Bankruptcy Code of the United States, or a federal or state court has appointed a trustee or receiver in bankruptcy or insolvency, or makes a general assignment for the benefit of creditors, Settling Defendant agrees that, any remaining payments required by Paragraphs 4 and 5 of this Consent Decree shall be accelerated and become due and payable at the time of such voluntary petition, adjudication, or assignment.

7. Settling Defendant shall simultaneously send a notification that it has made the payments pursuant to the procedures in Paragraphs 4 and 5 of this Consent Decree to:

Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway
New York, NY 10007
Attention: Wide Beach Development Site Attorney

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ # 90-11-3-417

V. STIPULATED PENALTIES

8. United States Stipulated Penalties. For each day that Settling Defendant fails to comply with any requirement of this Consent Decree, the Settling Defendant shall pay to the United States, as a stipulated penalty, $90 for each day of

violation of any requirement of the Consent Decree with which Settling Defendant is not in compliance. Stipulated penalties are immediately due and payable. All payments under this Paragraph shall be paid by certified check made payable to "EPA Hazardous Substance Superfund," shall be mailed to EPA Region II, P.O. Box 360197M, Pittsburgh, PA 15251, and shall reference CERCLA Site/Spill Identification number 02-46 and DOJ Case Number 90-11-3-417. Copies of checks paid pursuant to this Paragraph, and any accompanying transmittal letter, shall be sent to the United States and to EPA as provided in Section X of this Consent Decree. Penalties shall accrue and become due as provided above regardless of whether EPA has notified the Settling Defendant of the violation or made a demand for payment.

9. State Stipulated Penalties. For each day that Settling Defendant fails to comply with any requirement of this Consent Decree, the Settling Defendant shall pay to the State, as a stipulated penalty, $10 for each day of violation of any requirement of the Consent Decree with which Settling Defendant is not in compliance. Stipulated penalties are immediately due and payable. Unless otherwise instructed by the State in writing at any time after lodging of this Consent Decree, all payments under this Paragraph shall be paid by certified check made payable to the "State of New York" and shall be mailed to:

David A. Munro, Esq.
Assistant Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224

and shall reference United States and the State of New York v. Niagara Transformer Corporation. Copies of checks paid pursuant to this Paragraph, and any accompanying transmittal letter, shall be sent to the United States and to the State as provided in Section X of this Consent Decree. Penalties shall accrue as provided above regardless of whether the State has notified the Settling Defendant of the violation or made a demand for payment.

10. In the event Settling Defendant fails to comply with any term of this Consent Decree, the United States or the State may institute proceedings in this action or in a new action in the United States District Court for the Western District of New York for any appropriate relief. If the United States or the State must bring an action to enforce any term of this Consent Decree, the Settling Defendant shall reimburse the United States and the State for all costs of such action, including but not limited to costs of attorney time.

11. Nothing in the Consent Decree is intended to abrogate any remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to comply with the terms of this Consent Decree, including but not limited to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l).

VI. COVENANTS NOT TO SUE BY PLAINTIFFS; RESERVATIONS

12. Covenant not to sue by the United States. In consideration of the payments that will be made by the Settling Defendant under the terms of this Consent Decree, and except as specifically provided in Paragraphs 13 and 18 hereof, the United

States on behalf of EPA, DOI, and NOAA covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for reimbursement of response costs and damages for injury, destruction, and/or loss of natural resources relating to the Site. These covenants not to sue by the United States shall take effect upon the receipt by the United States of the payments required by Section IV of this Consent Decree. These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant and do not extend to any other parties or persons.

13. United States' Reservations.

a. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant (1) to perform response actions relating to the Site, or (2) to reimburse the United States for additional costs of response if,

(a) conditions at the Site, previously unknown to EPA, are discovered, or

(b) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines based on these previously unknown conditions or this information together with other relevant information that

the Remedial Action is not protective of human health or the environment.

b. Notwithstanding any other provision of this Decree, the United States, on behalf of its natural resources trustees, reserves the right to institute proceedings against the Settling Defendant in this action or in a new action seeking recovery of natural resource damages, based on (1) conditions with respect to the Site, unknown to the United States at the date of lodging of this Decree, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources, or (2) information received after the date of lodging of the Consent Decree which, together with other relevant information, indicates that there is injury to, destruction of, or loss of natural resources, of a type that was unknown, or of a magnitude greater than was known to the United States at the date of lodging of this Consent Decree.

14. For purposes of Paragraph 13 a., the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, and post-ROD documents contained in the Site file established by EPA pursuant to the NCP following issuance of the Record of Decision through the date of this Consent Decree.

15. Covenant not to sue by the State. In consideration of the payments that will be made by the Settling Defendant under the terms of this Consent Decree, and except as

specifically provided in Paragraphs 16 and 18 hereof, the State covenants not to sue or to take administrative action against the Settling Defendant for claims relating to the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for reimbursement of State response costs, and for claims pursuant to state common law. These covenants not to sue by the State shall take effect upon the receipt by the State of the payments required by Section IV of this Consent Decree. These covenants not to sue by the State are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue by the State extend only to the Settling Defendant and do not extend to any other persons.

16. State's Reservations. Notwithstanding any other provisions of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, any right jointly with, or separately from, the United States to institute proceedings in this action or in a new action seeking to compel the Settling Defendant (1) to perform response actions at the Site, or (2) to reimburse the State for additional costs of response, to the extent that EPA has determined that any response actions required or taken under (1) and (2) above in this Paragraph will not be inconsistent with the Remedial Action, if:

(a) conditions at the Site, previously unknown to the State, are discovered or become known, or

(b) information previously unknown to the State

is received by the State, in whole or in part, and the State determines, based on these previously unknown conditions or this information together with any other relevant information, that the Remedial Action is not protective of human health or the environment. The United States reserves all rights it may have under applicable law to oppose any determinations made or any actions taken, ordered or proposed by the State pursuant to this Paragraph. The State also reserves its claim for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.

17. For purposes of Paragraph 16, the information and the conditions known to the State shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, the State's Site file, and post-ROD documents contained in the Site file established by EPA pursuant to the NCP following issuance of the Record of Decision through the date of this Consent Decree.

18. General Reservations of Rights.

a. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraphs 12 and 15 of this Consent Decree. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect

to all other matters, including but not limited to, the following:

(i) claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;

(ii) liability arising from the past, present, or future disposal, release, or threat of release of Hazardous Materials outside of the Site;

(iii) criminal liability; and,

(iv) liability arising from the future disposal, release, or threat of release of Hazardous Materials at the Site.

b. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States or the State to seek or obtain further relief from Settling Defendant, and the covenants not to sue in Section VI of this Consent Decree are null and void as to Settling Defendant, if (i) Settling Defendant has failed to provide to the United States and the State any information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which would materially affect the representation of its financial standing set forth in the materials provided to the United States and the State; (ii) the information furnished to the United States and the State is false or misleading in any material respect or omits data represented to be contained therein; or (iii) Settling Defendant has breached a covenant contained in Paragraph 20 of this Consent Decree.

c. Nothing in this Consent Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States or State may have against any person, firm, corporation, or other entity not a Party to this Consent Decree.

d. Notwithstanding any of the provisions of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

VII. COVENANTS BY SETTLING DEFENDANT

19. In consideration of the United States' and the State's covenants not to sue set forth in Section VI of this Consent Decree, Settling Defendant agrees not to assert any claims or causes of action against the United States or the State, including any department, agency, or instrumentality of the United States or the State, with respect to the Site or this Consent Decree, including but not limited to: any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law; any claim pursuant to CERCLA Sections 107 or 113 related to the Site; any claim under the United States Constitution, State Constitution, state statutory law, or common law relating to or arising from response actions at the Site; or to seek any other costs, damages, or attorneys

fees arising out of this litigation or any matters covered by this Consent Decree. Nothing in this Consent Decree shall be deemed to constitute 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).

20. Settling Defendant covenants and certifies that to the best of its knowledge and belief it has fully and accurately disclosed to the United States and the State all information which is currently in Settling Defendant's possession and/or in the possession of its agents and which relates in any material way to its finances and/or ability to pay response costs in this matter, including but not limited to, the financial statement prepared for the Settling Defendant for the fiscal year ended December 31, 1994. In addition, the Settling Defendant covenants and certifies that the financial information provided to the United States and the State fairly and accurately represents, in all material respects, the financial position of Settling Defendant as of the date or dates of each item of financial information, and that there have been no material changes in the financial position of Settling Defendant since December 31, 1994. The United States and the State expressly condition their consent to this Consent Decree on the foregoing certifications in this Paragraph.

21. A breach of a covenant contained in Paragraph 20 of this Consent Decree constitutes a violation of this Consent Decree and, in the event of such a breach, in addition to any

other remedies available to them, the United States and/or the State may apply to the Court for an Order seeking such relief as may be warranted under the circumstances. Payment of any amount awarded by the Court shall be made in accordance with the procedures set forth in Section IV of this Consent Decree and shall be divided between the United States and the State in the same ratio as governs the payments made by Settling Defendant to the United States and the State pursuant to Section IV of this Consent Decree.

VIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

22. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

23. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this

Consent Decree. "Matters addressed" include Settling Defendant's liability for all costs incurred or to be incurred by the United States or the State in response to releases or threatened releases of hazardous substances at or from the Site, provided that such hazardous substances originally came to be located at the Site prior to lodging of this Consent Decree, except that "matters addressed" do not include liability for any claims reserved in Paragraphs 13, 16, and 18 of this Consent Decree.

24. The Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim. The Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree it will notify in writing the United States and the State within 10 days of service of the complaint on it. In addition, Settling Defendant shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

25. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon

the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section VI of this Consent Decree.

IX. RETENTION OF RECORDS

26. Until five (5) years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the liability of any person for response actions conducted at the Site or response costs incurred or to be incurred at or relating to the Site, regardless of any corporate retention policy to the contrary.

27. At the conclusion of this document retention period, Settling Defendant shall notify the United States and the State at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States or the State, Settling Defendant shall deliver any such records or documents to EPA or the State. The Settling Defendant 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 the Settling Defendant asserts such a privilege, it shall provide the Plaintiffs with

the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

28. The Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not knowingly altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since the date of Settling Defendant's receipt of EPA's first Request for Information pursuant to Section 104(e) of CERCLA regarding the Site 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/or Section 3007 of RCRA, 42 U.S.C. § 6927.

X. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those

individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to the United States, EPA, the State, and the Settling Defendant.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: 90-11-3-417

and

Director, Emergency and Remedial Response Division
U. S. Environmental Protection Agency - Region II
290 Broadway
New York, NY 10007

As to EPA:

Office of Regional Counsel
Attn: Trial Attorney, Wide Beach Development Superfund Site
U.S. Environmental Protection Agency - Region II
290 Broadway
New York, NY 10007-1866
Re: 02-46

As to the State:

David A. Munro, Esq.
Assistant Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224

As to Settling Defendant:

Daniel M. Darragh
Buchanan Ingersoll
One Oxford Centre,
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410

XI. RETENTION OF JURISDICTION

30. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

31. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

32. This Consent Decree shall be subject to a thirty (30) day public comment period consistent with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent to the Consent Decree if comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. The State may withdraw its consent to the entry of this Consent Decree if comments received disclose that the Consent Decree

violates state law. The United States reserves the right to challenge in court the State's withdrawal from the Consent Decree, including the right to argue that the requirements of state law have been waived, pre-empted or otherwise rendered inapplicable by federal law. The State reserves the right to oppose the United States' position taken in opposition to the proposed withdrawal. In addition, in the event of the United States' withdrawal from this Consent Decree, the State reserves its right to withdraw from this Consent Decree. Settling Defendant consents to the entry of this Consent Decree without further notice.

33. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any Party. The terms of the Consent Decree may not be used as evidence in any litigation, except in any action to resolve a dispute under this Consent Decree or to enforce any provision of this Consent Decree.

XIII. SIGNATORIES/SERVICE

34. The undersigned representative of the Settling Defendant, the Assistant Attorney General of the State of New York, and the Assistant Attorney General for Environment and Natural Resources of the Department of Justice each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

35. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

36. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XIV. FINAL JUDGMENT

37. Upon entry by the Court, this Consent Decree shall constitute a final judgment by and between the United States, the State and the Settling Defendant for purposes of Rule 54 of the Federal Rules of Civil Procedure.

XV. MODIFICATION

38. No material modification shall be made to this Consent Decree without the written agreement of the Parties and the written approval of the Court. Modifications to this Consent Decree that do not materially alter the Consent Decree may be made by written agreement of the Parties and will become effective upon filing by the United States with the Court.

Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XVI. EFFECTIVE DATE

39. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by this Court, following public comment pursuant to Section XII of this Consent Decree.

FOR PLAINTIFF UNITED STATES OF AMERICA

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division

PETER K. KAUTSKY
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

PATRICK H. NeMOYER
United States Attorney

MARY K. ROACH
Assistant United States Attorney
Western District of New York
138 Delaware Avenue
Buffalo, NY 14202

William J. Muszynski / 9/30/95

JEANNE M. FOX
Regional Administrator, Region II
U.S. Environmental Protection
Agency
290 Broadway
New York, NY 10007-1866

Dated: Oct 23, 1995

Dennis C. Vacco
Attorney General of the State of
New York

By: David A. Munro
David A. Munro
Assistant Attorney General

Attorney for Plaintiff State of
New York

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States v. Niagara Transformer Corporation and State of New York v. Niagara Transformer Corporation, relating to the Wide Beach Development Superfund Site.

Date: Sept 30, 1995

Fred W Darby

FRED W. DARBY
Printed Name of Representative

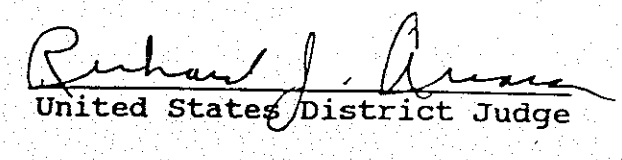
PRESIDENT NIAGARA TRANSFORMA
Title of Representative

1747 DALE RD
BUFFALO NY 14225
Address of Representative

SO ORDERED this _____ day of _____, 1995.

_____
United States District Judge

SO ORDERED this 22nd day of March, 1996.



United States District Judge

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and
STATE OF NEW YORK,

Plaintiffs,

v.

NIAGARA TRANSFORMER CORPORATION;
BELL AEROSPACE TEXTRON;
GENERAL ELECTRIC COMPANY;
GENERAL MOTORS CORPORATION;
NEW YORK STATE ELECTRIC & GAS CORP;
NIAGARA MOHAWK POWER CORPORATION;
and, UNION CARBIDE CORPORATION,

Defendants. **89-CV-1358A**

The undersigned hereby certifies that she is an employee of the United States Attorney's Office for the Western District of New York and is a person of such age and discretion as to be competent to serve papers.

That on December 15, 1995, she served a copy of the **CONSENT DECREE** in this action by placing a copy in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Post Office Box at 138 Delaware Avenue, Buffalo, New York 14202.

ADDRESSEE(S):

Daniel M. Darragh, Esq.
Buchanan Ingersoll
One Oxford Centre
301 Grant Street
20th Floor
Pittsburgh, PA 15219-1410

David A. Monro, Esq.
Assistant Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224

Karen L. Dimitri

KAREN L. DIMITRI