BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of

Orange and Rockland Utilities, Inc.

Cases 14-E-0493 and 14-G-0494

March 2015

Prepared Exhibit of:

Site Investigation and Remediation Panel

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Relied Upon O&R Responses to Information Requests

Table of Contents

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 12/29/2014
Responding Witness: Maribeth McCormick

Question No. : 268

SIR Non-compliance Sites. For each of the Company's SIR sites that are either currently not in compliance with NYSDEC or other regulatory orders and agreements or for which the Company has previously (within the past 5 years) paid fines and/or incurred penalties for non-compliance with NYSDEC or other regulatory orders and agreements:

1. Provide an explanation for the non-compliance.
2. Identify any costs incurred by the Company as a result of the non-compliance.

Response
All of the Company's SIR sites are in compliance with NYSDEC or other regulatory orders and agreements.

The Company has not paid any fines or incurred any penalties for non-compliance with NYSDEC or other regulatory orders and agreements.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 12/29/2014
Responding Witness: Maribeth McCormick

Question No. : 276

SIR Competitive Procurement. Regarding the Company's competitive procurement processes for remediation contractors and consultants:

1. State whether the Company implements a screening process for its remediation contractors and consultants and, if yes, what criteria are applied.
2. Describe the Company's process for soliciting bids for SIR work. State how bid solicitations are announced and/or distributed and whether the Company selectively requests bids from specific contractors and consultants based on the nature of the work and the qualifications of the contractors/consultants.
3. Provide a copy of the remediation contractor management protocols referenced on page 35 of O&R witness Maribeth McCormick's testimony.

Response

1. O&R does implement a screening process for both its remediation consultants and contractors. This information is detailed in the Company's SIR Annual report (a copy of which is attached to this response) and is set forth below.

i. Procedures for Selecting and Retaining Environmental Consultants and Contractors

The following is a description of the process that Orange and Rockland uses to select its environmental consultants and contractors. While this discussion focuses primarily on its MGP program, the Company uses a similar process to retain environmental consultants and contractors for other SIR program sites.

a. Selection Process for SIR Consultants

The procurement process to hire an environmental consultant consists of the following general steps:

- Preparation of Purchase Requisition – This is the formal request to the Company's Purchasing department ("Purchasing") for procurement action. The Purchase Requisition is issued by the Company's Environmental Health and Safety department ("EH&S") and includes the services requested, estimated budget, recommended bidders, scope of work and any other related documents. As described below, in some cases a technical evaluation is performed as a pre-qualification phase before a Purchase Requisition is issued.

- The Purchase Requisition must be approved by the appropriate level within EH&S before it is sent to Purchasing.

- Issuance of Bid Package/Request for Proposal - After Purchasing receives a Purchase Requisition, Purchasing assigns a buyer to the project. The buyer works with EH&S to prepare a Request for Proposal ("RFP") inviting the consultants to submit a technical proposal and commercial proposal. The RFP may include a pre-bid meeting and always includes a deadline for submitting the proposals.

- Pre-Bid Meeting (if necessary) – If necessary, a pre-bid meeting is conducted at least one week after the consultants receive the RFP. This allows the consultants to review the scope of work prior to the meeting and to ask pertinent questions.

- Review of Technical Proposals – The RFP requires the consultants to submit separate technical and commercial proposals. Technical proposals are forwarded by Purchasing to EH&S for review. The commercial proposals are retained by Purchasing for later evaluation if the bidding consultants' technical proposals are found to be acceptable. Technical evaluation criteria are normally established by EH&S prior to the issuance of the RFP, and the consultants are informed of those criteria. After completion of its technical review, EH&S provides a report with the review results to Purchasing. The report is transmitted by the person in EH&S who signed the Purchase Requisition.

- Review of Commercial Proposals – After receiving the results of the technical evaluation from EH&S, Purchasing opens the commercial proposals submitted by those consultants with acceptable technical scores. For projects that do not require a technical proposal, the commercial evaluation begins upon the receipt of the commercial proposals. Purchasing identifies the low bidder (or bidders if multiple contracts are to be awarded), and negotiates pricing with the low bidder(s), if appropriate. A meeting with the consultant(s) may be held to avoid misunderstandings regarding the required work scope.

- Contract Award – The consultants that have been found to be technically acceptable and that have submitted the lowest cost proposal based on the commercial evaluation are recommended by the Purchasing buyer for award of a purchase order to perform the consulting services. The level of approval required depends on the value of the purchase order ("PO").

In 1997, the Company retained two consultants to support its MGP program. Contracts were awarded for 2-3 year terms after which the Company solicited proposals from qualified consultants for ongoing project support. In 2007, Orange and Rockland determined that it was more efficient and cost effective to award MGP consultant contracts utilizing the rates that had been negotiated with qualified consultants by Con Edison. Therefore, Orange and Rockland's POs were issued to align with the Con Edison POs for MGP consulting services. With the implementation of a new corporate accounting system in 2012, the MGP POs became global and are currently used by both Orange and Rockland and Con Edison.

Earlier in the program, MGP project work was assigned to a consultant by the Project Manager based on the consultant's qualifications, performance and the historical knowledge that a particular consultant had with a specific MGP site. In 2010, Orange and Rockland began a process of soliciting bids from the qualified MGP consultants at specific project milestones such as the Feasibility Study or remedial design. This approach has resulted in both cost savings and confirmation of the required level of effort for a particular phase of a project.

b. Selection Process for Remediation Contractors

The selection of remediation contractors is a multi-step process. The first step in Orange and Rockland's remediation contractor procurement process for its SIR program is the development of a pre-qualified bidders list. The purpose of this list is to streamline the selection process by establishing a short list of contractors pre-qualified to bid on future MGP site, as well as other, remediation projects. The list obviates the need to evaluate which firms should be invited to bid on each remediation project. Orange and Rockland uses the Con Edison-approved remediation contractor list.

In 2005, a questionnaire related to the contractor's experience with construction and remediation was sent to 28 remediation contractors. The questionnaire was developed by a team comprised of representatives from Con Edison's Purchasing, Construction Management ("CM") and EH&S departments. Timely responses were received from 17 of the 28 firms. The responses were reviewed by a team from CM and EH&S in accordance with predetermined scoring criteria developed to evaluate potential contractor qualifications for remedial construction work. The team concluded, and the Purchasing department concurred, that 15 of the 17 contractors met the Company's qualification requirements. Based on their past experience, including the size of the remediation projects previously handled by them, the 15 firms were placed in three contract value categories (i.e., less than $2.5 million, between $2.5 million and $10 million, and greater than $10 million). Subsequent to the approval of these 15 firms, five additional remediation contractors were evaluated and approved by Con Edison. O&R uses the same approved contractor list as Con Edison.

The procurement process to hire a remediation contractor consists of the following general steps:

- Preparation of Purchase Requisition – This is the formal request to Purchasing for procurement action. The Purchase Requisition is issued by Project Management ("PM"), and it includes the services requested, estimated budget, recommended bidders, detailed specifications and other related documents. The Purchase Requisition must be approved by the appropriate level within PM before it is sent to Purchasing.

- Issuance of Bid Package/Request for Proposal -- After Purchasing receives a Purchase Requisition, Purchasing assigns a buyer to the project. The buyer works with PM and EH&S to prepare an RFP inviting the contractors to submit a technical proposal and commercial proposal. The RFP includes a scheduled field visit to the site and a deadline to submit the proposals.

- Field Visit – The field visit is typically conducted at least one week after the contractors receive the RFP. This allows the contractors to review the specifications prior to the field visit and ask pertinent questions.

- Review of Technical Proposals – The RFP requires the contractors to submit separate technical and commercial proposals. Technical proposals are forwarded by Purchasing to PM and EH&S for their review. The commercial proposals are retained by Purchasing for later evaluation if the bidding contractors' technical proposals are found to be acceptable. Technical

evaluation criteria are normally established by PM and EH&S prior to the issuance of the RFP, and the contractors are informed of those criteria. The technical review report is transmitted to Purchasing.

- Review of Commercial Proposals – After receiving the results of the technical evaluation from PM and EH&S, Purchasing opens the commercial proposals submitted by those contractors with acceptable technical scores. For projects that do not require a technical proposal, the commercial evaluation begins upon the receipt of the commercial proposals. A meeting with the contractor may be held to avoid misunderstandings regarding the required work scope.

- Contract Award – The contractor that submitted a technically acceptable proposal and the lowest cost proposal based on the commercial evaluation is recommended by the Purchasing buyer for award of a PO to perform the remediation. The level of approval required before the PO can be finalized depends on the value of the PO.

2. Please see the Company's response to Question 1 above.

3. In the Company's SIR Annual Report, Orange and Rockland notes that the remediation contractor management protocols include the Company's Project Execution Manual and the Standard Terms and Conditions for Construction Contracts. Copies of these documents are provided as attachments to this response.

Carolyn W. Jaffe
Assistant General Counsel
Law Department

April 30, 2014

By Electronic Mail
Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 11-M-0034 - Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation ("SIR") Costs

Dear Secretary Burgess:

On behalf of Orange and Rockland Utilities, Inc. ("Orange and Rockland"), as required by the November 28, 2012 Order Concerning Costs for Site Investigation and Remediation in the above-referenced proceeding, I submit Orange and Rockland's Annual Report of SIR Costs for the 2013 reporting period.

Respectfully submitted,

Carolyn W. Jaffe

Attachment

cc: Jane Cicerani, Esq. (via email)

Consolidated Edison Company of New York, Inc.
4 Irving Place – Room 1850–S New York NY 10003 212 460 2178 212 260-8627 fax jaffec@coned.com

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 11-M-0034 – Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs

ANNUAL REPORT CONCERNING THE STATUS OF SITE INVESTIGATION AND REMEDIATION COSTS, SCHEDULES AND REGULATORY COMPLIANCE (REPORTING PERIOD: JANUARY 1 – DECEMBER 31, 2013)

ORANGE AND ROCKLAND UTILITIES, INC.

Prepared By:

Maribeth McCormick
Orange and Rockland Utilities, Inc.
One Blue Hill Plaza
Pearl River, NY 10965

Dated: April 30, 2014

EXECUTIVE SUMMARY

This Annual Report for the period January 1, 2013, through December 31, 2013, is submitted by Orange and Rockland Utilities, Inc. ("Orange and Rockland" or the "Company") pursuant to the New York State Public Service Commission's (the "Commission") Order, dated November 28, 2012 (the "Order"), in Case 11-M-0034 - Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs. As required by the Order, this Annual Report summarizes the status and associated costs of Orange and Rockland's efforts to comply with its obligations under applicable federal and state laws and regulations for the investigation and remediation of contamination caused by releases of hazardous substances, hazardous wastes, and/or petroleum from Orange and Rockland's and its predecessor companies' facilities and operations (the "SIR Program"). In preparing this Annual Report, the Company has followed the template prepared by the Staff of the Department of Public Service and filed with the Commission on February 20, 2013.

1. Overview of SIR Program

As discussed in this Annual Report, the sites that Orange and Rockland is presently obligated to investigate and, if necessary, remediate under federal and state laws and regulations and the consent orders issued pursuant to them encompass the following types of sites, each of which is discussed fully in this Annual Report: (1) Manufactured gas plant and manufactured gas storage holder facilities (collectively "MGP Sites") pursuant to Consent Orders with the New York State Department of Environmental Conservation ("DEC"); (2) Superfund Sites; and (3) Underground Storage Tank ("UST") Sites.

Orange and Rockland has made significant progress investigating and implementing remediation programs for these sites. As of December 31, 2013, the following site investigation/remediation activities have been completed for them:

- MGP Sites: Orange and Rockland has completed its remedial investigations and the DEC has issued Records of Decision for five of the seven MGP sites. A Feasibility Study ("FS") was completed in 2013 for one MGP site and the DEC has developed the Proposed Remedial Action Plan for this site. An FS has been developed for the remaining MGP site and is being reviewed by the DEC. Remediation has been completed at one site and at portions of two other sites. Remedial construction is planned for early 2014 for a portion of one site. Remedial design is in progress for 1 MGP site and a portion of another.

- Superfund Sites: At the one Superfund Site where Orange and Rockland is not part of a group of potentially responsible parties ("PRPs"), the DEC has reclassified the site and post-remediation operation, maintenance and monitoring ("OM&M") activities are being implemented.

- UST Sites: Remediation was conducted at Orange and Rockland's one UST site in 2013.

2. Summary of SIR Program Costs

i. Past SIR Costs

As of December 31, 2013, Orange and Rockland has incurred SIR costs as follows:

MGP Sites	$ 53,685,151
Superfund Sites	$ 3,160,891
UST Sites	$ 247,912
Total	$ 57,093,954

ii. SIR Costs During the Reporting Period

For the reporting period, the Company incurred total SIR costs as follows:

MGP Sites	$ 4,832,717
Superfund Sites	$ 70,388
UST Sites	$ 187,841
Total	$ 5,090,946

Orange and Rockland currently has a total of nine active, non-PRP sites. Six of these nine sites incurred SIR costs during the reporting period that varied from the projected SIR costs for that period by more than $100,000 or 10%, whichever is greater. All six of these sites had variations below the projections. As required, Orange and Rockland has provided explanations for these variations in Section 5.5. The reasons for these variations fall into the following general categories:

- Inability to obtain access to property owned by others (3 sites);
- Timing of regulatory agency approvals (1 site);
- Timing of contractor procurement (1 site); and
- Timing of receipt of invoice (1 site).

iii. Projected SIR Costs for Upcoming Reporting Period

As explained in the report, the Company's projected SIR costs are based on forecasted activities and spending levels for it SIR Program. These projected SIR costs are subject to change based on, among other things, changes in the extent of known contamination, changes in the remedial design and construction-related contingencies, changes in regulatory requirements and regulatory approval schedules, changes in planned activities, local government permitting requirements, gaining access to the property or cooperation from property owners and other third-parties, unanticipated field conditions and/or force majeure events.

Based on current projections, the Company estimates that it will incur SIR costs of approximately $12,932,000 in connection with its SIR Program during the upcoming reporting period. The breakdown of these projected costs is as follows:

MGP Sites	$11,522,000
Superfund Sites	$ 40,000
UST Sites	$ 1,370,000
Total	$12,932,000

iv. Impact on Ratepayers

SIR costs currently included in rates for Orange and Rockland are

Electric:	$4,307,000
Gas:	$1,646,000

Orange and Rockland follows the management/mitigation practices set forth in the Inventory of Best Practices for Utility SIR Programs adopted by the State's electric and gas utilities pursuant to the Commission's Order issued November 28, 2012 in Case 11-M-0034. A copy of the Inventory of Best Practices for Utility SIR Programs dated March 28, 2013 is provided in Exhibit A to this report.

3. Adherence to Established Remediation Schedules

Orange and Rockland adheres to all formal schedule requirements imposed by the DEC and other regulatory agencies for the Company's SIR sites to the fullest extent possible. When site conditions or other factors necessitate a change in schedule, that information is shared promptly with the Company's regulators. During the reporting period, changes in schedule became necessary for one site. The site with a schedule change is identified in Table 2 of this report. The reasons for this change are provided in Section 5.3 of this report, as part of the site-

specific information presented for the Orange and Rockland SIR Program site for which SIR costs were incurred during the reporting period or are projected to be incurred during the upcoming year. Additional information concerning the projected work schedules Orange and Rockland has submitted to the DEC for approval is presented in Section 3.1 of this report.

4. Compliance with Regulatory Orders and Agreements

During the reporting period, in connection with its SIR Program, Orange and Rockland was in compliance with all consent decrees, consent orders and cleanup agreements that it has entered into with the United States Environmental Protection Agency ("EPA"), the DEC, and other government agencies.

5. Site Specific Reports

Site specific reports have been prepared for all sites in Orange and Rockland's SIR Program for which recovery of costs in rates is sought for the reporting period. Information on past costs for sites for which no further action is required and no future costs are currently anticipated is provided generally to the extent available in Table 1.

TABLE OF CONTENTS

Page

1. SITE INVESTIGATION AND REMEDIATION (SIR) PROGRAM OVERVIEW

1.1. Historical Background

- Provide a general discussion of the SIR program and requirements.

Response to 1.1:

Overview of SIR Program

Orange and Rockland has a comprehensive on-going program for managing its SIR sites and verifying that required remedial response measures (investigations followed by any necessary remedial action) are properly performed for sites that have been contaminated by past releases of petroleum products, hazardous wastes, and hazardous substances from Orange and Rockland's and its predecessor companies' facilities and/or operations. This program encompasses the following types of sites: (1) MGP Sites; (2) Superfund Sites; and (3) UST Sites.

- MGP Sites. Pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund law") and to comparable provisions of the New York State Environmental Conservation Law ("ECL"), Orange and Rockland is responsible for the investigation and remediation of environmental conditions at its MGP Sites. The DEC has required New York State's investor-owned utilities to investigate and, when necessary to protect human health and the environment, to undertake remedial response actions for contamination stemming from operations at the sites of their former MGPs. Orange and Rockland and its predecessor companies formerly manufactured gas and maintained storage holders for manufactured gas at seven MGP Sites located in Orange and Rockland Counties. In 1996, Orange and Rockland entered into a Consent Order with the DEC to conduct investigations at its seven MGP sites. Subsequent Consent Orders were executed in March 1999, which required continued investigation and remediation of all of these sites, if necessary. One of the Consent Orders includes six of the Orange and Rockland MGP sites and a second Consent Order was negotiated for the Nyack site. Several of these sites are now owned by parties other than Orange and Rockland and have been redeveloped by their owners for other uses, including, residential and commercial developments. Of these seven sites, four are owned in whole or in part by the Company.

- Superfund Sites. Orange and Rockland is responsible for the investigation and remediation of environmental conditions at its Superfund Sites. Superfund Sites include:

- Third party-owned sites to which Orange and Rockland shipped hazardous substances or waste for treatment, storage, or disposal and has been designated a PRP for the investigation and remediation of site contamination by the EPA, the DEC, or another government environmental agency pursuant to CERCLA or to comparable state statutes, including statutes imposing liability for the costs of investigating and cleaning up oil spills;
- One site at which Orange and Rockland was required to conduct cleanup work because of releases of petroleum and PCBs, from its or its predecessor companies' equipment, facilities, or operations.

- UST Sites. Orange and Rockland's USTs are regulated under both EPA and DEC regulations. EPA's regulations at 40 CFR 280 ["Technical Standards and Corrective Action Requirements For Owners and Operators of Underground Storage Tanks (UST)"] require UST owners and operators to investigate known or suspected releases from their UST systems and, if necessary, to remediate the contamination caused by those releases under the direction of the implementing state agency (DEC in New York). New York State regulations also require UST owners and operators to report known or suspected releases from their UST systems and to address them to the DEC's satisfaction.

1.2. Responsibilities of the Company

- Briefly describe the company's understanding of its role and responsibilities in planning and implementing the SIR program required by New York State Department of Environmental Conservation (DEC).

Response to 1.2:

Focusing primarily on the Company's MGP Program, and more generally on other SIR programs, the following is an overview of the Company's SIR Program process, from the start of investigation to the implementation of remedies approved by the appropriate regulatory agencies. Also discussed are the regulatory roles played by the DEC, the New York State Department of Health ("DOH") and others in the SIR process, and by the Company, its consultants and contractors, local community members and other interested parties.

i. Investigation of MGP Sites

The process to investigate the Company's MGP sites is governed by Orange and Rockland's Consent Orders. Depending on the conditions encountered at the site, the process may include multiple rounds of investigation. Each step of the process is subject to the review and approval of the DEC and DOH and must be conducted consistent with applicable DEC regulations, guidance and policies. In addition, Orange and Rockland has prepared DEC-approved Citizen Participation Plans ("CPP") for each of its MGP sites. The CPP describes the procedures that Orange and Rockland will follow to communicate to interested citizens and

elected officials the investigation and remediation activities that the Company is required to undertake for its MGP Sites.

The first step of the investigation process is to conduct a DEC-approved Preliminary Site Assessment (PSA), which is a subsurface investigation to evaluate whether there is evidence of historical MGP-related contamination in the soil, soil vapor, or groundwater at a site. The DEC-approved PSA work plans focus on site areas that were the former locations of MGP structures that produced or stored feedstock or residual materials capable of causing environmental contamination, such as ammonia wells, condensers, gas holders, oil and coal tar storage tanks, relief holders, and tar wells. As required by the DEC and DOH, the PSA work plan must include site background information, including the known/suspected locations of former gas production and storage structures, prior investigation findings, if any, and the proposed work scope (*e.g.*, soil boring and test pit locations, soil vapor sampling, groundwater monitoring well installation, air monitoring, and laboratory analytical requirements).

Based upon the historical information that the Company has compiled for the manufactured gas production and/or storage operations formerly conducted at an MGP Site and the input and guidance provided by the Company's Environmental, Health and Safety ('EH&S") project manager, Orange and Rockland's environmental consultant prepares a draft work plan for the Company's review. The Company's EH&S project manager actively communicates with the DEC and DOH site project managers and the Company's consultants during the preparation of draft work plans to comply with the DEC's and DOH's requirements and the Company's expectations. After any revisions based on the Company's EH&S project manager's review are made, the draft PSA work plan is submitted to the DEC and DOH for their review and approval.

For sites no longer owned by Orange and Rockland, the Company must obtain the property owner's consent in the form of an access agreement before the PSA fieldwork commences. The negotiation of access agreements can be a challenging and time-consuming process due to the nature of the operations currently being conducted on the sites, such as apartment building complexes, private residences, municipal properties, railroads and commercial businesses. Access agreements for such sites typically include provisions specifically developed to minimize site assessment field work interference with on-going site operations.

Only after the draft work plan has been approved by the DEC and DOH, and access to the site has been obtained, may the PSA field work begin. A fact sheet is typically prepared for distribution to appropriate stakeholders prior to the start of PSA fieldwork.

Upon the completion of the PSA fieldwork, a report is submitted to the DEC and DOH for regulatory review and approval. Depending on the findings of the PSA, these agencies will determine which of the following three steps is the most appropriate for a site:

- No further action is required because there is no evidence of MGP-related impacts warranting further investigation or remediation;

- Additional investigation is required to better characterize and delineate the nature and extent of the MGP-related impacts present on and around the site; or

- Remediation is necessary to address the MGP-related impacts that have been sufficiently characterized and delineated, and the Company must proceed with the development/evaluation of remedial alternatives.

All of Orange and Rockland's MGP sites required additional investigation. The Remedial Investigation ("RI") refers to the second and subsequent rounds of investigation beyond the PSA. More than one round of on-site investigation and, in many cases, off-site investigation was necessary to define the contamination with a sufficient degree of certainty to support the assessment of potential remedial alternatives and the development of a Remedial Design ("RD") incorporating the remedial activities that the DEC and DOH deem appropriate. The RI process is similar to that for PSAs, with community outreach and, when the work is done at a third party-owned property, access agreement negotiations. RI work plans must be approved by the DEC and DOH.

After the RI fieldwork and sample analyses are completed, a draft RI report is submitted to the DEC and DOH for their review and approval. Based on the results of the RI, these agencies will make one of the three determinations specified above in the discussion of the PSA process.

ii Remediation of MGP Sites

a. DEC and DOH Make Remedial Determinations

The DEC and DOH require remediation when they determine that the contamination present at a site presents a current or potential future significant threat of harm to human health and/or the environment or is necessary to meet statutory or regulatory goals and objectives. This determination is made on the basis of the results of the PSA and/or RI for a site. With regard to potential human health impacts, the DOH will consider whether potential complete exposure pathways have been identified at the site during the investigation work. While the DEC and DOH do not consider economic impacts as one of the two threshold criteria in determining whether and to what extent remediation is required, DEC's regulations and guidance documents permit consideration of costs in evaluating remedial alternatives. Under those regulations and guidance documents, "cost effectiveness" is a secondary permissible criterion for such evaluations and can be considered by DEC when it evaluates and determines whether to select one of two or more remedial alternatives that are protective of public health and the environment and that are consistent with applicable and relevant laws, rules, regulations, and guidance. For example, under DEC regulations and guidance documents, a goal of remediation is to restore sites to their pre-contamination condition to the extent technically feasible to do so. If this goal cannot be met, the remediation selected must, at a minimum, adequately protect human health and the environment, and include technically feasible remediation measures for "source materials" such as free coal tar, coal tar-contaminated soil, and purifier waste. If two or more competing remedial alternatives are capable of meeting these goals, but one alternative is projected to cost less to implement, DEC can select the least costly alternative.

b. Remedial Planning Process

Under the MGP Consent Orders, once the DEC and DOH determine that remediation is required, Orange and Rockland is required to identify and evaluate potential applicable remedial alternatives for approval by the DEC and DOH. While we will describe the process Orange and Rockland follows in its development of proposed remedial alternatives for MGP Sites, the process applicable to other types of SIR Program sites is similar.

First, Orange and Rockland must prepare a Feasibility Study (FS) for DEC and DOH consideration and approval. In the FS report, Orange and Rockland must identify potential remedial alternatives, screen them to determine which alternatives appear technically feasible to implement, and then assess the feasible alternatives using the evaluation criteria discussed below.

The first step in the FS process is to meet with the DEC and DOH to discuss their views on the general parameters of what they believe would comprise an approvable remediation program for a site, given the site's use and the extent of the contamination present. For sites no longer owned by Orange and Rockland, meetings are also scheduled with the site owners to identify any changes in site use being considered by them. These meetings are essential to understanding the perspective of the regulatory agencies and property owners, so that Orange and Rockland does not waste time and resources pursuing "dead ends."

Pursuant to the DEC's requirements, the FS must identify potential remedial alternatives and evaluate them against the following criteria in order to determine which alternative is the most appropriate based on all the relevant factors:

- protection of human health and the environment;
- compliance with standards, criteria, and guidance;
- long-term effectiveness;
- reduction in toxicity, mobility, or volume;
- short-term impacts and effectiveness;
- implementability; and
- cost-effectiveness.

If the DEC and DOH do not find the Company's FS to be approvable, these agencies will inform the Company of their reasons for disapproval and specify the revisions that the Company must incorporate into the draft FS. For example, the DEC or the DOH may prefer a different alternative over the one recommended by the Company. Once the DEC and DOH approve the FS, the DEC develops a Proposed Remedial Action Plan ("PRAP"). The PRAP describes the remedy that the DEC and DOH are proposing for the site. Fact Sheets are distributed to stakeholders and a public meeting is held at which the DEC, DOH, and Orange and Rockland present the recommended remedial alternative and receive comments from the public. The comment period for comments on the PRAP is 30 days.

While Orange and Rockland may suggest remedial alternatives, Orange and Rockland does not make the final decision on which remedial alternative must actually be implemented. That decision is made by the DEC. After the close of the public comment period, DEC will issue

a Record of Decision (ROD) that describes the remedial alternative that DEC has selected. The ROD is incorporated into and becomes an enforceable part of the Consent Order. Depending on the comments received, the remedy may have to be revised to reflect public input. Community acceptance is one of the criteria considered by DEC in the selection of an approved remedial alternative.

The ROD generally contains only summary information about the remedial alternative. The RD that Orange and Rockland is required to prepare for DEC and DOH approval must be prepared by a professional engineer and include detailed drawings, plans, and specifications needed to implement the selected remedial alternative. In some cases, additional studies may be required before the design can be completed. For example, geotechnical information may be required for excavation support design or additional studies may be required to design an effective groundwater treatment system. The detailed drawings, plans, and specifications for construction of the selected remedial alternative are subject to DEC/DOH review and approval.

c. Remedial Construction Process

Orange and Rockland's Project Management Department ("PM") is responsible for supporting EH&S's efforts to manage the remedial construction phase of remediation projects. Remedial design plans and specifications and engineer's cost estimates are prepared by the Company's environmental engineering consultants working jointly with the EH&S project manager and PM. Depending on the estimated cost of remediation, one of three lists of pre-qualified remediation contractors will be used to solicit technical proposals and bids for the performance of the remedial construction work. For small or non-complex projects, a technical proposal and associated technical evaluation may not be required.

After the award of a purchase order to the selected remediation contractor through competitive procurement, PM will manage the contractor's performance of the work with the EH&S project manager participating as a key member of the team. Since Orange and Rockland does not have the in house capability to oversee the construction of these remediation projects, Orange and Rockland contracts with a consultant who has construction management experience to oversee the project on a day to day basis. This consultant may be from the same consulting firm who completed the engineering design for the project. The DEC generally has a full-time inspector assigned to sites for which significant remedial construction work is required to see that the Company complies with the requirements of the approved remedy and design specifications and to participate in project team meetings. For projects entailing less significant remedial activities, the DEC inspector will visit the sites periodically. In addition, the environmental engineering consultant who prepared the approved design and bid specifications will be present to see that the agency-approved remedy and design and bid specifications are implemented properly, to obtain information needed to prepare the Construction Completion Report and/or Final Engineering Report Orange and Rockland utilizes the services of an independent air monitoring contractor to perform the required air monitoring during remediation.

When remediation is to be performed at third party sites, the Company must enter into an access agreement with the property owner. In addition to providing access, the agreements

contain commitments by the property owner not to violate post-remediation institutional controls required as part of the DEC-approved remedy and not to interfere with the operation of any DEC-required engineering controls.

iii. Post-Remediation Requirements

The Company's obligations with respect to a site often do not cease upon completion of the remedy. Because many of the sites in the Company's SIR program are located in well-developed areas covered with existing buildings, or present other logistical challenges, it is frequently not feasible to remediate a site to meet "unrestricted use" standards pursuant to DEC regulations and guidance. At other sites, it may not be cost-effective to meet "unrestricted use" standards due to the background levels or depths of contaminants present at the site. In such cases, Orange and Rockland may propose, and DEC and DOH may allow, remediation to alternative standards that protect public health and the environment for certain specified uses of the site. If Orange and Rockland does not remediate a site to "unrestricted use" standards, the Company must comply with one or more institutional and/or engineering controls at the site to address the remaining contamination after completing remedial construction. Examples of institutional controls include restrictions on the use and redevelopment of a remediated property that must be made enforceable by DEC through environmental easements or deed restrictions. Engineering controls could include a containment barrier, sub-slab ventilation system, or product (*e.g.*, coal tar, gasoline, or fuel oil) recovery system. These controls are required in perpetuity or until the DEC, with DOH concurrence, determines that they are no longer necessary.

In order to comply with these various controls, the Company is required to prepare a Site Management Plan ("SMP") for DEC's approval. A typical SMP includes procedures to:

- operate and maintain engineering controls and/or treatment systems;
- maintain compliance with institutional controls, where applicable;
- inspect and evaluate site information periodically to determine whether the remedy continues to be effective; and
- monitor and report the performance and effectiveness of the remedy, including periodic sampling.

iv. Investigation and Remediation of Other SIR Program Sites

The Company also performs investigation and remediation projects for other types of SIR Sites. For federal Superfund sites, the laws, rules, regulations, and guidance documents that the Company must follow are specified in the administrative consent orders ("ACOs") and consent decrees that the Company has entered into with the EPA. For New York State Superfund sites, the required process and protocol are governed by Orange and Rockland's Consent Order with the DEC. For UST sites, the required procedures and protocols are specified in EPA and DEC regulations and guidance. While there are some differences in the specific investigation and remediation processes for each of these types of sites, the goal of the process applicable to each such site is the same: to see that the scope of the investigation characterizes and delineates the

nature and extent of a site's contamination with sufficient specificity to support a determination by the DEC, DOH, and/or EPA as to whether remediation is necessary to protect human health and/or the environment from the risks posed by the contamination and, if remediation is needed, to assess and determine the scope of the required remediation activities.

v. The Role of Company Personnel, Consultants and Contractors in the SIR Program

The following is an overview of the role of Company personnel, consultants and contractors in the Company's overall SIR Program.

a. Role of Company Personnel

The Company currently has three employees directly involved in its SIR Program on a full-time or regular basis. This includes two employees in the EH&S Department and one employee in the PM Department. Orange and Rockland receives support from the Con Edison Law Department under a Shared Service agreement.

The Remediation Section of EH&S has overall responsibility within the Company for managing the Company's SIR Program. This department consists of a Director and a Technical Manager. The Technical Manager serves as the Project Manager for sites under the SIR Program. The Technical Manger's responsibilities include:

- Directing the consultants on the development of work plans (investigation, remediation, remedial design) and reports (investigation, FS, remediation, site management plan) for DEC and DOH approval and review of remediation contractor engineering submittals;
- Coordinating with Regulatory Services, Public Affairs, and property owners to complete access agreements;
- Providing input to PM concerning proposed remediation contractor change order requests;
- Reviewing and approving the consultants' budgets and invoices;
- Participating in public meetings and other meetings with stakeholders in connection with investigation findings, proposed remedies, and other project-related issues;
- Coordinating and negotiating with the DEC, DOH, EPA, consultants, and property owners on the development of proposed remedies;
- Participating in the procurement process to select a remediation contractor for each of their remediation projects;
- Participating in negotiations with property owners on cooperation agreements with respect to remediation responsibilities and cost sharing;
- Preparing quarterly projections of expenditures and estimates of future liability; and
- Providing periodic reports on the status of their projects to Company management.

PM employees support EH&S in the implementation of the SIR Program remediation work. Currently, PM has one Project Manager, assigned to remediation projects. As discussed at length below, their work on the SIR Program includes support of remediation fieldwork, review of bid specifications, and management of remediation contracts and contractors.

The Law Department provides environmental legal support, including: (1) the negotiation and preparation of access and other agreements with the present owners, lessees, and/or developers of the Company's and its corporate predecessors' former MGP and other sites; (2) the negotiation and preparation of consent orders, consent decrees, PRP group participation agreements, and other agreements for Superfund sites owned by third parties; and (3) when appropriate, litigation to protect the Company's interests when negotiations are unsuccessful in resolving important issues (*e.g.*, claims against insurance carriers and third parties).

Other Company employees who support the SIR Program on an intermittent basis include, but are not limited to, employees in Public Affairs, Corporate Communications, Safety, Real Estate, other groups within EH&S, and other organizations as necessary.

b. Role of Consultants and Contractors in the SIR Program

The Company uses a team of qualified and competitively priced environmental consultants to prepare investigation work plans, perform investigations and prepare reports of investigation findings, evaluate remedial alternatives, prepare remedial action plans and design specifications, perform treatability and pilot tests, as well as remediation oversight, prepare remediation reports, and prepare site management plans. In addition, the Company hires remediation contractors to implement agency-approved remedial action work plans and bid specifications.

The Company looks to the environmental consultants for overall management of the investigations, including oversight and coordination of the subcontractors (about half a dozen in most cases). The Company's environmental consultants typically use drilling subcontractors to perform test pits and to install soil borings and monitoring wells, laboratory subcontractors to perform sample analyses required by agency-approved work plans, and surveyor subcontractors to document the precise coordinates of test pit, boring, and well locations. There is not sufficient regularly scheduled work to justify the purchase of drilling equipment and hiring of full-time operators.

Remediation contractors typically use: (i) engineering subcontractors to prepare detailed design documents (*e.g.*, sheeting and shoring plans) and to obtain building permits; (ii) environmental/safety consultants to prepare environment, health and safety plans, perform air and personnel monitoring, and obtain wastewater discharge permits, waste transporters and waste management facilities for the disposal of wastes generated during the remediation project; and (iii) laboratories to perform analyses required by waste management facilities or for other purposes.

In addition, remediation contractors use various material and equipment suppliers and installers. The Company does not contract directly with these subcontractors because it believes that it is more appropriate to place responsibility for these activities on the contractor. This makes the contractor accountable for all aspects of the work, including work performed by subcontractors. For example, if there are delays in obtaining materials (*e.g.*, steel for sheeting), in obtaining permits (*e.g.*, City sewer discharge permit for wastewater, City Department of Buildings permits), or in obtaining approvals from waste management facilities, or delays caused by the presence of off-specification material for waste disposal, the contractor would be responsible. There is not sufficient regularly scheduled work to justify the purchase of specialized construction equipment and the hiring of specially trained operators. Examples of specialty equipment include large diameter (*e.g.*, 30 inches) drill rigs for installing secant piles, equipment used to install slurry walls, equipment for performing in-situ chemical treatment, and equipment for performing in-situ contaminant stabilization.

1.3. Number and Location of Sites

- Indicate the number of SIR sites for which the company is wholly or partially responsible and describe the general locations of these sites.

Response to 1.3:

As of December 31, 2013, the Company is currently wholly or partially responsible for a total of 13 active SIR sites. Table 1 includes site specific information on all sites for which costs were incurred during the reporting period and/or for which costs are currently projected to be incurred after the reporting period. Information on past costs for sites where no further action is required, no costs were incurred during the reporting period, and no future costs are currently anticipated in provided in Table 1 by program, and, where available, by site.

Most of the Company's SIR sites are located within the Company's service territory; some of the third-party Superfund sites are located outside this area.

2. OVERALL SIR COSTS

2.1. Costs Incurred By Utility To Date

- Briefly summarize the total costs incurred by the company for its SIR projects.
- Describe the estimated liability for the Company's overall SIR program and explain any changes or significant issues that have arisen since the previous reporting period.
- Complete Table 1 showing total estimated liability, total SIR costs to date, anticipated costs for reporting period, actual costs for reporting period and total project costs for upcoming reporting period for specific details.

Response to 2.1:

Table 1 provides information on: (i) total SIR costs incurred by site through December 31, 2013; (ii) actual SIR costs by site incurred during the reporting period; and (iii) projected SIR costs by site for the upcoming reporting period.[1]

For SIR sites listed in Table 1, total costs incurred through December 31, 2013 are $57,093,954.

i. Total Past Costs

Through December 31, 2013, the Company's total cumulative cost of its SIR Program was $57,093,954. The breakdown by SIR Program is as follows:

MGP Sites	$ 53,685,151
Superfund Sites	$ 3,160,891
UST Sites	$ 247,912
Total	$ 57,093,954

[1] All actual SIR costs in Table 1 are rounded to the nearest dollar; projected SIR costs are rounded to the nearest thousand dollars.

ii. Total Projected Costs

As of December 31, 2013, the Company's accrual for potential liability was $105,085,177 for all its SIR Program sites. With respect to MGP sites, the Company's accrual for potential liability was $103,097,030.

In 2013, the Company worked with a consultant to develop estimated future liability estimates for its MGP sites. For those sites still in the investigation phase, or sites with completed investigations but which were still in the remedial alternative evaluation process, a probabilistic model was used to project total future liability through remediation and post-remediation long-term obligations. Based on updated assessments of environmental conditions and related uncertainties as to actual conditions and possible future remedies, using this probabilistic model, Orange and Rockland estimated that the upper range of aggregate undiscounted potential liability for the investigation and remediation of coal tar and/or other MGP-related contaminants should be $167,400,000. These estimates were based on the assumption that there is contamination at all sites, including those that have not yet been fully investigated, and additional assumptions about the extent of the contamination and the type and extent of the remediation that may be required. Actual costs may be materially different. Revisions to the estimated total future liability will be made as the project progresses, the actual scope of required remediation becomes known, and firmer cost figures become available.

iii. Costs Incurred During the Reporting Period

For the reporting period, the Company incurred total SIR costs as follows:

MGP Sites	$ 4,832,717
Superfund Sites	$ 70,388
UST Sites	$ 187,841
Total	$ 5,090,946

iv. Projected Costs for the Upcoming Reporting Period

The Company's projected SIR costs are based on forecasted activities and spending levels for it SIR Program. The projections are reviewed so that they reflect current information as to the anticipated timing, scope, and costs of the required investigation and remediation activities for these sites. These projected SIR costs are subject to change based on, among other things, changes in the extent of known contamination, changes in the remedial design and construction-related contingencies, changes in regulatory requirements and regulatory approval schedules, changes in planned activities, local government permitting requirements, gaining access to the property or cooperation from property owners and other third-parties, unanticipated field conditions and/or force majeure events.

Based on current projections, the Company estimates that it will incur costs of approximately $12,932,000 for its SIR Program during the upcoming reporting period. The breakdown of these projected costs by SIR Program is provided below:

MGP Sites	$11,522,000
Superfund Sites	$ 40,000
UST Sites	$ 1,370,000
Total	$12,932,000

v. Description of the SIR Cost Estimating Process

Estimating SIR costs is an iterative process that builds on information that is gathered over the course of the SIR process, including site characterization and investigation, remedy selection and remedy implementation. Over time, estimates become firmer as the site investigation and remediation process proceeds. The major change over time in the estimates is the evolution from investigation to remediation. The following description of how cost estimates for SIR projects are developed specifically addresses MGP sites and generally applies to other types of sites.

Initial cost estimates for SIR projects are based on costs associated with site characterization and investigation. These initial estimates capture the costs associated with determining whether or not there is evidence of historical contamination in the soil, soil vapor or groundwater. The initial estimates may be based on assumed default values for each site. Once additional information is obtained concerning the planned scope of work, revised estimates may be developed by qualified environmental consultants in consultation with the Orange and Rockland project manager. If evidence of contamination is found, additional rounds of investigation are conducted to more fully characterize and delineate the nature and extent of the contamination. As additional information is gathered, the estimates are updated to reflect the expanded investigation costs and, if warranted, potential remediation costs. Once a remedial investigation is completed, the DEC, in consultation with the DOH determines whether remediation is required. If the DEC determines that remediation is required, a Feasibility Study is prepared. This report identifies potential remedial alternatives; screens them to determine which alternatives appear technically feasible to implement; assesses the feasible alternatives using DEC-specified evaluation criteria; and recommends a preferred alternative. Cost estimates are developed at this time for the various alternatives evaluated, including the preferred alternative. If necessary, the cost estimate for the site is updated based on the preferred alternative that is selected. The DEC, in consultation with the DOH, evaluates the Feasibility Study Report and tentatively selects a remedy, which may differ from Orange and Rockland's recommended remedy. If necessary, the site's cost estimate is updated to reflect the selected remedy.

Once the DEC selects a remedy, a remedial design document, which includes detailed drawings, plans and specifications needed to implement the selected remedy, is prepared for

DEC review. At this time, an engineering cost estimate is developed in conjunction with the detailed design and bid solicitation for implementation of the remedy. If appropriate, site cost estimates are once again updated to reflect the engineering cost estimate, which could change based on any DEC comments concerning the remedial design document. The site cost estimate may be adjusted again, based on the actual bid pricing in the remediation contract that is awarded after the procurement process has been completed. The cost estimate may be further adjusted during remedial construction to reflect findings of additional contamination or other changed conditions.

The major drivers of the magnitude and timing of SIR cost estimates and changes to those estimates include the nature and extent of contamination; the timing of agency approvals, agency determinations, including decisions concerning the selected remedy (if any); third party property owner issues including access, environmental easements/deed restrictions and potential diminution of property value if institutional controls are required; site redevelopment; local government permit requirements; off-site impacts to private property or natural resources; and shifts in prioritization of sites for investigation and remediation. In the case of third party Superfund sites for which Orange and Rockland is one of many PRPs, the cost estimates will also depend on the ultimate determination of Orange and Rockland's share of the costs.

2.2. Impacts on Ratepayers

- Provide amount of SIR expense the company is currently recovering from its ratepayers, including base rates and surcharges.

- Describe the projected impacts to the company's ratepayers, including base rates and surcharges, the company requests in any pending rate filings.

Response to 2.2:

SIR costs currently included in rates for Orange and Rockland are:

Electric:	$4,307,000
Gas:	$1,646,000

Orange and Rockland has no pending rate filings.

2.3. General Cost Management and Mitigation Strategies

- Describe the Company's standard best management practices for SIR cost management/mitigation strategies.

Response to 2.3:

Orange and Rockland follows the management/mitigation practices set forth in the Inventory of Best Practices for Utility SIR Programs adopted by the State's electric and gas utilities pursuant to the Commission's Order issued November 28, 2012 in Case 11-M-0034. A copy of the Inventory of Best Practices for Utility SIR Programs dated March 28, 2013 is provided in Exhibit A to this report.

In an effort to track and analyze MGP program schedules and costs in a manner consistent with the Company's approach to other large capital projects, Orange and Rockland is in the process of incorporating the MGP program portfolio into the Company's Enterprise Portfolio Scheduling and Tracking systems. Costs for the program set up are estimated to be $60,000 and are being apportioned to each MGP site based on the relative SIR costs associated with each site.

2.4. Procurement Processes Overview

- Describe the company's policies and practices for procuring services required for SIR projects.

Response to 2.4:

Orange and Rockland has a comprehensive system of internal controls in place to see that it performs its SIR projects at the lowest reasonable cost. The following internal controls are employed by the Company to achieve this objective: (i) standardized remediation contractor and consultant management protocols; (ii) established procedures for selecting and retaining environmental consultants and remediation contractors; (iii) rigorous process for the review and approval of SIR Program consultant and contractor invoices; and (iv) internal audit process.

i. <u>Remediation Contractor and Consultant Management Protocols</u>

The Company's remediation contractor management protocols include the Company's Project Management Manual ("PMM"), Contract Management Procedure ("CM-1") and the Standard Terms and Conditions of Construction Contracts ("Standard Terms").

The purpose of the PMM and CM-1 is to provide direction for Company personnel in the management of projects and administration of contracts to promote the efficient use of Company and contractor resources, as well as compliance with all applicable laws, rules, regulations, and guidance.

The Company's remediation contractor protocols include the Company's Standard Terms and conditions for construction contracts ("Standard Terms"). The Company's Standard Terms are incorporated into its contracts for construction services, including remediation-related construction work. The Standard Terms define the contractual obligations of the construction contractor and the Company. The obligations and stipulations that are addressed include, but are not limited to: Contract Formation; Specifications, Plans, and Drawings; Price and Payment; Time for Completion; Excusable Delay; Safeguards in Work; Work Conditions; Contractor's Performance; Orange and Rockland's Authority; Estimated Quantities; Warranties; Changes; Claims; Codes, Laws and Regulations; and Maintenance of Work.

The Company's environmental consultant management protocols include PMM, CM-1 and the Standard Terms and Conditions of Service Contracts.

Orange and Rockland's Standard Terms contain specific language governing change orders and change of work. In addition, the project specifications also include a detailed explanation regarding the change order process. Change order requests must be submitted in writing and include scope, schedule impacts and cost. They must include an explanation of why the change is required and they must be signed by the contractor. These requests are reviewed by the construction manager and the project manager. If the change order is necessary, the change order form must be approved and signed by both the construction manager and the project manager. In the event of design changes, an engineering review would be required and depending upon the impacts that such a change might have on the authorized project budget, would require various levels of approval.

ii. Procedures for Selecting and Retaining Environmental Consultants and Contractors

The following is a description of the process Orange and Rockland uses to select its environmental consultants and contractors. While this discussion focuses primarily on the MGP program, the process used by the Company to retain environmental consultants and contractors for other SIR program sites is generally similar.

a. Selection Process for SIR Consultants

The procurement process to hire an environmental consultant consists of the following general steps:

- Preparation of Purchase Requisition – This is the formal request to the Company Purchasing Department ("Purchasing") for procurement action. The Purchase

Requisition is issued by EH&S and includes the services requested, estimated budget, recommended bidders, scope of work and any other related documents. As described below, in some cases a technical evaluation is performed as a pre-qualification phase before a Purchase Requisition is issued.

- The Purchase Requisition must be approved by the appropriate level within EH&S before it is sent to Purchasing.
- Issuance of Bid Package/Request for Proposal - After Purchasing receives a Purchase Requisition, a buyer is assigned to the project. The buyer works with EH&S to prepare a Request for Proposal ("RFP") inviting the consultants to submit a technical proposal and commercial proposal. The RFP may include a pre-bid meeting and always includes a deadline for submitting the proposals.

- Pre-Bid Meeting (if necessary) – If necessary, a pre-bid meeting is usually conducted at least one week after the consultants receive the RFP. This allows the consultants to review the scope of work prior to the meeting and to ask pertinent questions.

- Review of Technical Proposals – The RFP requires the consultants to submit separate technical and commercial proposals. Technical proposals are forwarded by the Purchasing Department to EH&S for review. The commercial proposals are retained by Purchasing for later evaluation if the bidding consultants' technical proposals are found to be acceptable. Technical evaluation criteria are normally established by EH&S prior to the issuance of the RFP, and the consultants are informed of those criteria. After completion of its technical review, EH&S provides a report with the review results to Purchasing. The report is transmitted by the person in EH&S who signed the Purchase Requisition.

- Review of Commercial Proposals – After receiving the results of the technical evaluation from EH&S, Purchasing opens the commercial proposals submitted by those consultants with acceptable technical scores. For projects that do not require a technical proposal, the commercial evaluation begins upon the receipt of the commercial proposals. Purchasing identifies the low bidder (or bidders if multiple contracts are to be awarded), and negotiates pricing with the low bidder(s), if appropriate. A meeting with the consultant(s) may be held to avoid misunderstandings regarding the required work scope.

- Contract Award– The consultants that have been found to be technically acceptable and that have submitted the lowest cost proposal based on the commercial evaluation are recommended by the Purchasing buyer for award of a purchase order to perform the consulting services. The level of approval required depends on the value of the purchase order.

In 1997, the Company retained two consultants to support its MGP program. Contracts were awarded for 2-3 year terms after which the Company solicited proposals from qualified consultants for ongoing project support. In approximately 2007, Orange and Rockland determined that it was more efficient and cost effective to award MGP consultant contracts

utilizing the rates that had been negotiated with qualified consultants by Con Edison. Therefore, Orange and Rockland POs were issued to align with the Con Edison POs for MGP consulting services. With the implementation of a new accounting corporate accounting system in 2012, the MGP purchase orders became global and are currently used by both Orange and Rockland and Con Edison.

Earlier in the program, MGP project work was assigned to a consultant by the Project Manager based on the consultant's qualifications, performance and the historical knowledge that a particular consultant had with a specific MGP site. In 2010, Orange and Rockland began a process of soliciting bids from the qualified MGP consultants at specific project milestones such as the Feasibility Study or remedial design. This approach has resulted in both cost savings and confirmation of the required level of effort for a particular phase of a project.

The Company's procurement process to retain environmental consulting services for the other SIR programs is similar to the process described above for the MGP program.

b. Selection Process for Remediation Contractors

The selection of remediation contractors is a multi-step process. The first step in Orange and Rockland's remediation contractor procurement process for its SIR program is the development of a pre-qualified bidders list. The purpose of this list is to streamline the selection process by establishing a short list of contractors pre-qualified to bid on future MGP Site, as well as other, remediation projects. The list obviates the need to evaluate which firms should be invited to bid on each remediation project. Orange and Rockland utilizes the Con Edison-approved remediation contractor list.

In 2005, a questionnaire related to the contractor's experience with construction and remediation was sent to 28 remediation contractors. The questionnaire was developed by a team comprised of representatives from Con Edison's Purchasing, CM and EH&S Departments. Timely responses were received from 17 of the 28 firms. The responses were reviewed by a team from CM and EH&S in accordance with predetermined scoring criteria developed to evaluate potential contractor qualifications for remedial construction work. The team concluded, and the Purchasing Department concurred, that 15 of the 17 contractors met the Company's qualification requirements. Based on their past experience, including the size of the remediation projects previously handled by them, the 15 firms were placed in three categories, so that the smaller firms are not invited to bid on larger, more complex remediation projects. Subsequent to the approval of these 15 firms, the Company evaluated and approved five additional remediation contractors.

The procurement process to hire a remediation contractor consists of the following general steps:

- Preparation of Purchase Requisition – This is the formal request to Purchasing for procurement action. The Purchase Requisition is issued by PM, and it includes the services requested, estimated budget, recommended bidders, detailed specifications

and other related documents. The Purchase Requisition must be approved by the appropriate level within PM before it is sent to Purchasing.

- Issuance of Bid Package/Request for Proposal -- After Purchasing receives a Purchase Requisition, a buyer is assigned to the project. The buyer works with PM and EH&S to prepare an RFP inviting the contractors to submit a technical proposal and commercial proposal. Depending on the scope of work and other considerations, Purchasing may issue a Request for Bids ("RFB") under which the contractors are requested to submit a commercial proposal without a technical proposal. The RFP or RFB includes a scheduled field visit to the site and a deadline to submit the proposals.

- Field Visit – The field visit is typically conducted at least one week after the contractors receive the RFP or RFB. This allows the contractors to review the specifications prior to the field visit and ask pertinent questions.

- Review of Technical Proposals – The RFP requires the contractors to submit separate technical and commercial proposals. Technical proposals are forwarded by Purchasing to PM and EH&S for their review. The commercial proposals are retained by Purchasing for later evaluation if the bidding contractors' technical proposals are found to be acceptable. Technical evaluation criteria are normally established by PM and EH&S prior to the issuance of the RFP, and the contractors are informed of those criteria. The technical review report is transmitted to Purchasing.

- Review of Commercial Proposals – After receiving the results of the technical evaluation from PM and EH&S, Purchasing opens the commercial proposals submitted by those contractors with acceptable technical scores. For projects that do not require a technical proposal, the commercial evaluation begins upon the receipt of the commercial proposals. A meeting with the contractor may be held to avoid misunderstandings regarding the required work scope.

- Contract Award – The contractor that submitted a technically acceptable proposal and the lowest cost proposal based on the commercial evaluation is recommended by the Purchasing buyer for award of a purchase order to perform the remediation. The level of approval required before the purchase order can be finalized depends on the value of the purchase order.

iii. Review and Approval of SIR Program Consultants and Contractor Invoices

a. Types of Consultant and Contractor Contracts

With respect to consultants, purchase orders issued to support the Company's SIR program typically include a combination of consultant labor rates as well as fixed price and unit price items. For example, the preparation of a SCS work plan for an MGP Site is a lump sum item but the cost of drilling is on a per foot basis. Most of the professional consulting services

such as investigation fieldwork, report preparation, and remedial alternatives evaluation are based on hourly labor rates negotiated with the consultants. In some cases, consultants use subcontractors to perform work for which there is not a fixed price or unit price specified in the consultants' contracts. In that situation, the consultant contracts allow the consultants to bill the Company based on their cost plus a negotiated mark-up.

As to contractors, remediation construction projects are procured primarily as fixed price contracts that may have unit prices for certain types of work such as soil excavation and disposal, import of clean backfill, and water treatment. All costs are competitively bid and are incorporated in the contract's purchase order. These costs are fixed and are not contracted on a fee plus cost basis.

b. Review and Approval of SIR Consultant Invoices

Orange and Rockland's EH&S Department manages contracts with environmental consultants. The following steps are generally followed by EH&S project managers in their review of invoices submitted by the consultants:

- Utilize an accounting system that was implemented in July 2012 and that tracks all unit rates specified in the purchase order for labor, material charges, and other line items. This feature of the system eliminates the potential for consultants to charge rates that are not specified in the purchase order and eliminates potential contractor calculation errors that could occur with paper invoices.

- Reconcile the number of units for each line item/work activity claimed to have been used/performed with the number of units actually used/performed. This is done through a review of field notes and other supporting documentation. Under the current accounting system, consultants submit electronic invoices on the system in lieu of submitting paper invoices. Before a consultant submits an invoice electronically, the consultant provides the EH&S project manager with the quantity of each purchase order line item that it plans to invoice and the information that supports the planned invoice, such as time sheets or subcontractor invoices. The project manager then is required to review the supporting information to verify that it is consistent with the information specified in the purchase requisition used by Orange and Rockland to request the consultant's services. Purchase requisitions specify the requested services by purchase order line item and identify the appropriate project and task numbers (previously known as account numbers or work order numbers) that will be charged.

- Once the project manager is satisfied that the charges proposed for invoicing by the consultant are substantiated, the project manager will enter the approved quantities for each line item in the system as having been received.

c. Review and Approval of Remediation Contractor Invoices

PM is responsible for the review and approval of MGP SIR Program remediation contractors invoices. The process by which remediation contractor invoices are approved as follows: The remediation contractor is required to submit a "Performance Statement" that correlates with his/her project schedule. Performance Statements are tabulated summaries of the contractor's work and mirror the contractor's price schedule. Lump sum, unit price and change order items are listed on the Performance Statement and include information on the description of work, the quantity of work, the unit price of work if applicable, and the total value of work. The Performance Statements indicate the value of work completed to date, the value of work requested for the current payment application and the total value of work remaining. Orange and Rockland receives invoices from the contractor which include back-up information such as weight tickets, survey measurements and as-built drawings and that are used to substantiate the accuracy of the invoice. These invoices are reviewed by the consultant who is acting as the construction manager on a job. If the invoice is not approvable in its entirety, the contractor is required to revise it as appropriate or approval of partial payment may be recommended. Once the invoice is approved by the construction manager, the invoice is sent to the Project Manager where invoice reconciliation is performed again. Invoices are again reviewed and approved for receipting into the Company's accounting system.

d. Review of Financial Reports for SIR Sites

Con Edison's Accounting Department prepares and distributes reports on a monthly basis indicating site-specific and program-specific expenditures. The listed expenditures are reviewed by Accounting Department and EH&S Remediation staff. If any expenditures are identified that appear to have been charged to a SIR site account erroneously, Accounting and EH&S investigate and, if appropriate, have the charge transferred to appropriate accounts.

iv. Audits of SIR Projects

Audits of SIR projects are conducted by Con Edison's Auditing Department.

3. ADHERENCE TO ESTABLISHED REMEDIATION SCHEDULES

3.1. SIR Program Schedule Summary

- Briefly describe the overall schedule of the company's SIR program.
- Provide an overview of the number of sites adhering to the anticipated schedule, the number of sites ahead of schedule and the number of sites experiencing schedule slippage.
- Indicate any schedule milestones achieved since the previous reporting date.

Response to 3.1:

In conjunction with annual MGP program meetings with DEC, Orange and Rockland developed a 10 year plan for its MGP sites to provide DEC with an overview of the company's investigation and remediation plans. As work has progressed and priorities or circumstances have changed, the 10 year plan has been updated. Orange and Rockland has completed all of its site investigations and has received Records of Decision for 5 of its 7 MGP sites. Therefore, the Company is in the remedial planning, design and construction phases of its program. Orange and Rockland plans to have all of the MGP site remedial designs completed by 2018. In addition, the overall schedule calls for continued remedial action/construction activities at the sites where the remedial design is complete. These schedules are more accurately described as projections based on the best information available at the time they are made. As is the case with any projection, these schedules are subject to change due to various contingencies including: the discovery of different or more extensive contamination during pre-design investigation or remedy implementation; delays in applicable regulatory reviews or approvals; changes to anticipated remedies due to regulatory agency, community or affected landowner concerns; delays in obtaining required local agency permits for remedy implementation; access and cooperation issues with affected property owners for the implementation of investigation or remediation activities; and, unanticipated field conditions and/or force majeure.

For the non-MGP program sites, any schedules and project milestones are established on an individual project basis through discussions and agreements with the DEC project managers. Although these schedules and milestones are not submitted to the DEC on an annual basis nor formalized with the DEC, all schedules for non-MGP and MGP programs are reviewed and evaluated at least annually and more frequently for active projects. Specifically, project schedules are generally subject to revision due to the contingencies noted above.

Orange and Rockland is adhering to all formal schedule requirements imposed by the DEC and other regulatory agencies for the Company's SIR sites to the fullest extent possible. When site conditions or other factors necessitate a change in schedule, that information is shared promptly with the Company's regulators. During the reporting period, as identified in Table 2 of this report, a change in schedule became necessary for one site, the Nyack MGP site. The reasons for this change are provided in Section 5.3 of this report, as part of the site-specific

information presented for the Orange and Rockland SIR Program site for which SIR costs were incurred during the reporting period or are projected to be incurred during the upcoming year.

3.2. SIR Program Schedule Changes

- Describe any changes in the anticipated schedule of the company's SIR program and provide an explanation for any scheduling delays resulting from non site-specific causes.

Response to 3.2:

See response to Section 3.1 above. There are no scheduling delays resulting from non-site specific causes.

4. COMPLIANCE WITH NYSDEC AND OTHER REGULATORY ORDERS AND AGREEMENTS

4.1. Non-compliance Sites

- Indicate all sites that are not in compliance and provide an explanation for the non-compliance.

Response to 4.1:

None.

4.2. Regulatory Requirements Changes

- Summarize any changes to the regulatory requirements for sites under the SIR program. Indicate the regulatory agency responsible for the change, describe the change, and indicate any anticipated effects such change will have on the program's overall schedule and cost.

Response to 4.2:

There were no changes to the regulatory requirements for Orange and Rockland SIR Program Sites during the reporting year.

5. SITE SPECIFIC REPORTS

5.1. General Site Information

Provide the following information for all of the Company's SIR sites:

- Site name
- Site location
- NYSDEC (or other regulatory agency) remediation program and site identification number

5.2. Site Background

For each of the Company's non-Potentially Responsible Party (non-PRP) sites provide:

- A brief description of the requirements of the Company under the Record of Decision (ROD) or Decision Document (DD).
- The scope of SIR work for the site.
- Statement indicating the status of the Company's compliance with the ROD or Decision Document.

5.3. Status of Site Investigation and Remediation

5.3.1. Status of NYSDEC Remediation Program

- Briefly summarize the status of the investigation, remediation, and operation, maintenance and monitoring (OM&M) efforts for the non-PRP SIR sites and complete Table 2.

5.3.2. Scope of Work

- For any site where deviations from the approved remediation plan have occurred or are anticipated, provide justification for all such changes.

5.3.3. Schedule

- For any site in which a variation from the previously projected status is indicated in Table 2, provide a description and explanation for the variation.

5.4. Project Procurement Exceptions

- Indicate any contracts for project services awarded without following the company's standard procurement process described in Section 2.4 and provide justification for the exception.

5.5. Project Costs

5.5.1. Project Costs Summary

- Briefly summarize the anticipated and actual SIR costs for the reporting period and the projected costs for the upcoming reporting period for the non-PRP sites and complete Table 3.

5.5.2. Changes in Cost

- Explain and justify all material deviations (10% or $100,000, whichever is greater) from prior cost forecasts for the reporting period for each project.

5.5.3. Cost Management and Mitigation Strategies

- Describe the measures taken by the company to minimize its SIR costs for any individual site which deviates from the standard practices described in Section 2.3.

Response to 5:

This section of the report provides site-specific information. Individual site specific reports have been prepared for all active sites identified in Table 1. Program status reports for all non-PRP sites are provided in Table 2. Consultant, contractor and other costs are provided for all non-PRP sites for the reporting period and for the upcoming year in Table 3. Included in the "other costs" category are regulatory agency (e.g., DEC, EPA) oversight costs and other legal and permitting costs and fees as well as internal costs. Internal costs include overtime labor costs of Orange and Rockland employees associated with site investigation and remediation activities. Internal costs for the UST site also include labor costs of CECONY employees (mostly those persons in the Construction Management Department who directly oversee contractors performing field work).

For sites at which multiple activities occurred in 2013, the Company's accounting system does not explicitly break down all costs into the investigation, remediation and OM&M phases of work identified in Table 3. In those situations, the Company used its professional judgment to allocate costs into each phase.

Although not required by the template, for context, background information is provided for all active PRP sites. Other sections in the site-specific reports are not required for the PRP sites.

All reporting period costs specified in site-specific reports and in Tables 1 and 3 are rounded to the nearest dollar.

All projected costs were based on information available at the time they were developed and on anticipated actions of others such as approval by the DEC, access provided by property owners, and property owners' development plans. The projected estimated costs are subject to change based upon, among other things, design and construction-related contingencies, which may include regulatory review, approval schedules, permitting processes, access and other cooperation issues with property owners, results of site investigations, unanticipated field conditions and/or force majeure events. Delays in a project may result in acceleration or substitution of other projects. All projected costs provided in Table 1 and in site-specific reports, including those set forth in Table 3, are rounded to the nearest thousand dollars.

The site-specific report template includes references to a ROD or DD where applicable. Although a ROD or DD is required for Orange and Rockland's MGP sites and most of its Superfund Sites, a ROD or DD is not required for its UST sites. For sites requiring an agency to issue a ROD or DD, such ROD or DD will not be issued until an investigation has been completed and a remedy has been selected. Therefore, for sites where a ROD or DD is not required or has not yet been issued, Orange and Rockland has provided general information on the status of the investigation or remediation and compliance with regulatory directives.

Site Specific information by SIR Program is provided below:

MGP Sites

5.1 General Site Information

Site Name: CLOVE AND MAPLE AVENUE

Site Location: 120 Maple Avenue, Haverstraw, New York

Remediation Program: DE**C** MGP Consent Order

Site Identification No.: DEC Site #3-44-049

5.2 Site Background (Non-PRP Sites Only)

The Clove and Maple Avenue MGP encompasses the approximately one-acre grounds of the former MGP that Orange and Rockland's predecessor companies operated from 1887 through 1935 at 120 Maple Avenue in a mixed residential/commercial section of Haverstraw, New York. The site is bounded by residential properties to the northwest, an apartment building complex and former pond area to the northeast, Clove Avenue to the southwest, and Maple Avenue to the southeast. After the MGP was closed, Orange and Rockland, which continues to own the site, operated it as a natural gas regulator station until 2007, when that facility was retired from service and decommissioned. The site is currently zoned for light industrial uses and is vacant except for piping associated with the former gas regulator station. The DEC has divided the site into three Operable Units ("OUs"): OU1 consists of the grounds of the former MGP; OU2 consists of residential properties, including a five-building apartment complex and several single family residential properties with MGP contamination, and OU3 consists of MGP-contaminated sediment in an embayment area of the adjacent Hudson River. Orange and Rockland investigated the site and off-site OU2 and OU3 areas pursuant to DEC Consent Order D3-0002-94, dated January 8, 1996, and DEC Consent Order D3-0001-98-03, dated September 29, 1998, and is obligated to implement the DEC's required remedy for the MGP contamination present on those areas under DEC Consent Order D3-0001-99-01, dated March 11, 1999, which superseded DEC Consent Orders D3-0002-94 and D3-0001-98-03, and which applies to six of Orange and Rockland's former MGP locations, including the site (the "DEC Multi-Site Order").

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued a Record of Decision ("ROD") for OU1 of the site in March 2011, and issued a ROD for OU2 of the site in March 2012. Both RODs require the excavation of contaminated soil and the installation of clean soil cover systems and implementation of institutional controls and a Site Management Plan ("SMP") for areas with soils or groundwater that contain residual concentrations of MGP-related contaminants. The DEC has not yet issued a ROD for OU3 of the site.

Scope of Site SIR Work:

DEC-approved Remedial Investigations ("RIs") have been completed for all operable units of the site. Site-related MGP soil and groundwater contamination have been identified on portions of OU1 and OU2 of the site. Site-related MGP contamination has been identified in the sediments of the OU3 Hudson River embayment area. DEC-approved Feasibility Studies ("FSs") were completed for OU1 and OU2. A DEC-approved remedial design for OU2 has been initiated.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the RODs for OU1 and OU2.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, Orange and Rockland has initiated the DEC-approved remedial design for OU2. The Remedial Design Work Plan ("RDWP") and the Pre-Design Investigation ("PDI") Work Plan have been approved by the DEC. The PDI field work for OU2 will be conducted once site access agreements are finalized.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No deviations from the approved remediation plan have occurred. However, because of uncertainty over plans by the apartment complex owner to redevelop his property, there is a strong possibility that the approved remedy for OU2 may need to be redesigned to accommodate a single phase remediation in lieu of the two-phased remediation that is currently prescribed in the ROD for OU2.

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $525,000 in total SIR costs during the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $84,549 for finalization of the DEC-approved OU2 RDWP and PDI Work Plan, preliminary design activities, and development of a master MGP program schedule and cash flow projection. During the upcoming reporting period, Orange and Rockland projects that, if access to the offsite properties is secured, it will incur SIR costs totaling approximately $625,000 for the OU2 PDI and remedial design work, and for the site's proportional share of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. The total SIR costs were lower than projected due to delays caused by uncertainty over the property owner's development plans that will affect the remedy that will be designed and implemented for the property. In addition, there were delays resulting from inability to secure access to some of the impacted off-site properties.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Clove and Maple Avenue **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			500,000	84,436			500,000	84,436
Other Cost*			25,000	113			25,000	113
Total Costs	0	0	525,000	84,549	0	0	525,000	84,549

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		600,000		600,000
Other Cost*		25,000		25,000
Total Costs	0	625,000	0	625,000

*"Other Costs" include mailing costs.

*Projected "Other Costs" include DEC oversight costs.

5.1 General Site Information

Site Name: FULTON STREET MGP

Site Location: Fulton Street, Middletown, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC 3-36-030

5.2 Site Background (Non-PRP Sites Only)

The Fulton Street MGP site is located in a mixed use commercial/industrial/residential area of Middletown, New York. The site is owned by a third party and is occupied by an automotive repair and body shop. Numerous investigations have been conducted on the MGP site itself and on several off-site properties. Most of the site and the adjoining properties are covered by paved parking areas, roadways and buildings. The section of Fulton Street fronting the site is a four lane New York State highway with a large storm water culvert in the median. Impacts from the MGP site have migrated under Fulton Street and onto down gradient properties, including a United States Postal Service office and sorting/distribution facility. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and off-site properties with site-related MGP impacts pursuant to the DEC Multi-Site Consent Order..

Record of Decision (ROD)/Decision Document (DD) Requirements:

Not applicable. The DEC has not yet issued a ROD or other final Decision Document for this site.

Scope of Site SIR Work:

Orange and Rockland has implemented DEC-approved investigation work plans for the site and off-site properties discussed above. MGP impacts have been found in soil and groundwater on the site, under Fulton Street, and portions of the off-site properties owned by the United States Postal Service and Associated Supermarket. A draft Feasibility Study ("FS") Report has been prepared and submitted to the DEC, but has not yet been approved by the DEC pending additional investigation to more fully delineate the scope of the contamination caused by the former MGP's operations.

Status of Compliance with ROD/DD:

Not Applicable. Orange and Rockland is in compliance with all applicable DEC SIR program requirements for the site.

5.3 Status of Site Investigation and Compliance (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, Orange and Rockland completed and submitted a draft FS Report to the DEC in 2010. Following review of the FS Report in 2011, the DEC requested additional investigation within Fulton Street to assess impacts under the roadway and adjacent to the storm culvert. A supplemental FS work plan to conduct this investigation was developed in 2012. Efforts to obtain the necessary access agreements/road opening permits have been unsuccessful to date, but will continue during the upcoming reporting period.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No.

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $170,000 in total SIR costs during the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $2,949 for the site's proportional share of the development of a comprehensive

master MGP program schedule and cash flow projection. During the upcoming reporting period, if access is provided, Orange and Rockland projects that it will incur SIR costs totaling approximately $170,000 for implementation of the supplemental FS work plan and finalization of the FS report, and for the cost associated with the site's proportional share of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. The total SIR costs were lower than projected due to delays resulting from inability to gain access to the subject property needed to implement the FS work plan for the section of Fulton Street fronting the site.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No**.**

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Fulton Street MGP **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			150,000	2,949			150,000	2,949
Other Cost*			20,000	0			20,000	0
Total Costs			170,000	2,949	0	0	170,000	2,949

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		150,000		150,000
Other Cost*		20,000		20,000
Total Costs	0	170,000	0	170,000

* Projected "Other Costs" include DEC oversight costs and permit fees.

5.1 General Site Information

Site Name: GENUNG STREET

Site Location: Genung Street, Middletown, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site#3-36-050

5.2 Site Background (Non-PRP Sites Only)

The Genung Street site is comprised of four parcels located along the intersection of Genung, Palmer and Phillips Streets in a multifamily residential (apartment/townhouse) and industrial area of the City of Middletown. The four parcels total approximately 2.6 acres and are vacant with the exception of an Orange and Rockland gas regulator station on Parcel 3. All parcels are owned by Orange and Rockland. Manufactured gas production was conducted on Parcel 1 which is the location of the most significant MGP contamination. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued a Record of Decision ("ROD") for this site in February 2005. The ROD requires excavation of MGP contaminated soils and MGP subsurface structures on Parcels 1 and 2; the installation of a clean soil or pavement cap on all site parcels; and the implementation of institutional controls and a Site Management Plan ("SMP").

Scope of Site SIR Work:

MGP impacts were identified in soil and groundwater on Parcel 1 and Parcel 2 during the remedial investigation. A DEC-required predesign investigation has been conducted at the site. Further delineation along the property line of Parcel 1 is required to determine whether MGP impacts extend under an adjacent abandoned railroad embankment.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the ROD.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, a DEC-approved remedial design is in progress at this site. Supplemental pre-design investigation ("PDI") of an adjacent railroad embankment is required in order to complete the design and delineate more fully the extent of contamination caused by former MGP operations. Efforts to obtain access from the railroad have been unsuccessful to date but will continue during the upcoming reporting period.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No.

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $103,000 in total SIR costs during the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $311 for the site's proportional share of the cost of the development of a comprehensive master MGP program schedule/cash flow projection. During the upcoming reporting period, Orange and Rockland projects that, if access to the property is secured, it will incur SIR costs totaling approximately $150,000 for implementing the supplemental PDI and continued work on the remedial design, and for the site's proportional share of the cost of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. Total SIR costs were lower than projected due to delays resulting from inability to secure access to the subject property.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Genung Street **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			100,000	311			100,000	311
Other Cost*			3,000				3,000	0
Total Costs	0	0	103,000	311	0	0	103,000	311

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($)

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		140,000		140,000
Other Cost*		10,000		10,000
Total Costs	0	150,000	0	150,000

* "Other Costs" include DEC oversight costs and permit fees.

5.1 General Site Information

Site Name: 93B MAPLE AVENUE

Site Location: 93B Maple Avenue, Haverstraw, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site #3-44-044

5.2 Site Background (Non-PRP Sites Only)

The 93B Maple Avenue MGP Site is located in a predominately residential section of the Village of Haverstraw, New York. The site consists of flat, rectangular-shaped parcel that encompasses , an area of approximately 0.21 acres. The site is bounded by residential lots on Maple Avenue to the southwest, residential lots on Tor Avenue to the northwest, an alley to the northeast, and residential lots to the southeast. The site is zoned for light industrial usage. Haverstraw Bay of the Hudson River is located approximately 800 feet to the east of the site. OU1 of the site consists of the parcel on which the former MGP was located and adjacent off-site lots on which MGP impacts were successfully remediated through the implementation of DEC-approved remedial excavation activities. The site is not owned by Orange and Rockland and the implementation of the DEC-approved remedial excavation work necessitated the relocation of the current site owner's construction business. OU2 of the site consists of a concrete block building located at 93B Maple Avenue and the contaminated former stream channel that extends through the backyards of the residential homes located at 95, 99 and 103 Maple Avenue. Orange and Rockland investigated and remediated the site and affected off-site properties pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued two RODs for the site. The DEC's ROD for OU1 was issued in 2005 and required the excavation of subsurface soils and MGP structures. The DEC's ROD for OU2 was issued in 2006 and required the excavation of contaminated subsurface soil within portions of the former stream channel located down-gradient of the site, in situ chemical oxidation of subsurface soils under the building located at 93B Maple Avenue, and the implementation of intuitional controls and an SMP for those site areas that could not be remediated to the DEC's "unrestricted residential use" cleanup levels.

Scope of Site SIR Work:

A manufactured gas holder foundation and contaminated subsurface soils were identified on the site during the site's DEC-approved remedial investigation. In the course of conducting DEC-

approved remediation on OU1, additional MGP-related contamination was identified along the former stream channel that extends through the backyards of the downgradient residential properties discussed above. MGP-impacted soils were excavated from these properties in accordance with the RODs and in situ chemical oxidation was conducted in an attempt to address the residual MGP contamination under the 93B Maple Avenue building. The DEC-approved remedial action required under the site RODs has been completed.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the RODs.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, DEC-required remedial action has been completed. Orange and Rockland is still working with the DEC on the finalization of the SMP for the two parcels where DEC's unrestricted residential use cleanup standards could not be achieved because of the presence of the building. Once the DEC approves the proposed SMP, Orange and Rockland will need to negotiate access and cooperation agreements with the two property owners whose lands could not be remediated to those standards.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No.

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $105,000 in total SIR costs during the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $70,384 for rent paid to relocate the property owner and the site's proportional share of the development of a master MGP program schedule/cash flow projection. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR costs totaling approximately $125,000 for finalization of the SMP, negotiation of access and cooperation agreements with the two affected property owners, and for the site's proportional share of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

No.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: 93B Maple Avenue **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs					5,000	0	5,000	0
Other Cost*					100,000	70,384	100,000	70,384
Total Costs	0	0	0	0	105,000	70,384	105,000	70,384

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs			25,000	25,000
Other Cost*			100,000	100,000
Total Costs	0	0	125,000	125,000

*"Other Costs" include relocation expenses.

5.1 General Site Information

Site Name: NYACK

Site Location: Gedney Street, Nyack, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-44-046

5.2 Site Background (Non-PRP Sites Only)

The Nyack site is a vacant third-party owned property located along the west bank of the Hudson River in the downtown area of Nyack, New York. The site consists of an upper terrace at the elevation of Gedney Street and a lower terrace along the Hudson River. The entire site is currently landscaped to the rip/rap shoreline. The area of Nyack in the vicinity of the sites consists of a blend of residential and commercial properties, including a marina immediately to the north and a multi-unit residential complex immediately to the south of the site. The site is zoned "waterfront," which is intended to encourage uses along and near the Hudson River related to, and appropriate for, a waterfront area. The DEC has divided the site into two operable units. OU1 is comprised of the upland portion of the site, while OU2 includes the site's shoreline area and MGP-contaminated sediment in the section of the Hudson River along the site. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site pursuant to DEC Consent Order D#-0001-98-08.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC's Records of Decision include the excavation of subsurface MGP structures and contaminated soils, in situ solidification of impacted soils for which excavation is not practicable, the dredging of impacted Hudson River sediment, the installation of a clean soil cover over the site, and the implementation of institutional controls and a Site Management Plan ("SMP"). The DEC issued its ROD for OU1 in March 2004 and its ROD for OU2 in March 2011.

Scope of Site SIR Work:

DEC-required remediation of OU1, the portion of the site above the 100 year flood line, is complete. A large scale excavation was completed in the western portion of OU1 during 2006. Contaminated soils in two other areas to the south and east were treated with an in-situ solidification process in 2006 and 2007. OU1 was then covered with clean topsoil and restored to a park-like setting. DEC-required remediation of the OU2 shoreline and sediments was

deferred at the time that the upland portion of the site was remediated. DEC-approved remedial design and permitting for the required OU2 remedy were completed in 2013.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the RODs for OU1 and OU2.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, DEC-approved remedial design and permitting for OU2 was completed in 2013. DEC-required remedial construction including sediment dredging and shoreline in situ solidification ("ISS") will be conducted during the upcoming reporting period.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No.

Does Table 2 indicate a variation from the projected status?

Yes. DEC-required remedial construction was delayed briefly and did not begin at the end of the 4th quarter of the reporting period as anticipated but instead began at the beginning of the 1st quarter of the upcoming reporting period.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $1,364,000 in total SIR costs during the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $233,421 for completion of the DEC-approved remedial design, procurement and this site's proportional share of the cost of the development of a comprehensive master MGP program schedule/cash flow projection. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR costs totaling approximately $9,345,000 for remedial construction and the site's proportional share of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. SIR costs were lower than projected due to a delay in commencing the remedial construction phase of the project which caused the start date to shift from the 4th quarter of the reporting period to the 1st quarter of the upcoming reporting period due to additional time being required to complete the contractor procurement process.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No**.**

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Nyack **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			1,339,000	233,421			1,339,000	233,421
Other Cost*			25,000				25,000	0
Total Costs	0	0	1,364,000	233,421	0	0	1,364,000	233,421

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		9,320,000		9,320,000
Other Cost*		25,000		25,000
Total Costs	0	9,345,000	0	9,345,000

* "Other Costs" include DEC oversight costs.

5.1 General Site Information

Site Name: PORT JERVIS MGP

Site Location: 16 Pike Street, Port Jervis, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-36-049

5.2 Site Background (Non-PRP Sites Only)

The Port Jervis MGP site is located at 16 Pike Street in a residential/commercial section of the City of Port Jervis, New York. The site itself is zoned for commercial and industrial purposes. The site is located immediately north of the State Route 209 bridge across the Delaware River. The site is generally bordered by Brown Street to the north, Water Street to the west, King Street to the east and Pike Street to the south. The Delaware River is located approximately 160 feet to the southwest of the site. This stretch of the Delaware River is a Class A water body. The site consists of approximately 1.2 acres of land owned by Orange and Rockland, which was utilized for equipment storage, utility service and customer service. The site is fenced and primarily covered with a gravel/asphalt surface and the multiple-use service building. Site-related MGP contamination migrated to an off-site commercial property located adjacent to the site and commercial and residential properties located along the southern side of Pike Street. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and off-site properties with site-related MGP impacts pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued the Record of Decision ("ROD") for this site in December 2007 and requires excavation and removal of former MGP structures and their contents and excavation of source area soils to a maximum depth of 20 ft. on site. The ROD also requires the installation of NAPL collection wells on and off site to address contamination that will not be removed during the excavation phase. In addition, the installation of a soil cover system (pavement) on site and the implementation of institutional controls and the development of a Site Management Plan ("SMP") are required for the site and impacted off-site commercial properties.

Scope of Site SIR Work:

The DEC-required remedial excavation activities for the site and adjoining off-site commercial property were initiated in 2012 and completed in 2013. In addition, a pilot test was conducted to

evaluate well construction and drilling methods to optimize collection of dense nonaqueous phase liquid ("NAPL").

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the ROD.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, the excavation phase of the DEC-required remediation was completed during the reporting period and included excavation of subsurface structures and impacted soils. Following completion of the pilot study for the NAPL collection wells, a conceptual remedial design was developed. Following receipt of the DEC's comments on the conceptual design, the engineering design for the recovery wells is in progress.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

Yes. Due to subsurface site conditions, the remediation contractor was unable to drive sheet pile to the depth necessary to provide the support necessary to allow safe soil excavation and gas holder demolition. An alternate response action was designed and approved by the DEC, allowing the project to be completed on schedule and within budget. The design change made it possible for Orange and Rockland to conduct in situ solidification of soils from approximately 15 -20 feet below ground surface in lieu of excavation.

Does Table 2 indicate a variation from the projected status?

No**.**

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $4,645,175 in total SIR costs during the reporting period at this site. Actual SIR costs incurred during the reporting period totaled $3,941,187 for components of the DEC-approved remedy, including excavation of subsurface structures and in-situ solidification of impacted subsurface soils, site restoration, the NAPL recovery well pilot test/ remedial design and the site's proportional share of the development of a master MGP program schedule/cash flow projection. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR costs totaling approximately $485,000 for completion of site restoration, engineering design and construction of the NAPL recovery wells, confirmatory sampling of one of the impacted offsite properties for purposes of possible sale, and for the site's proportional share of the cost of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. Total SIR costs were lower than projected due to unused contingency in the soil remediation contract and modifications to the remedial design for the NAPL recovery wells based on DEC comments that extended the implementation of this phase of the remedy into the upcoming reporting period.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No**.**

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Port Jervis MGP **SITE TYPE: MGP**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			4,605,175	3,941,187			4,605,175	3,941,187
Other Cost*			40,000	0			40,000	0
Total Costs	0	0	4,645,175	3,941,187	0	0	4,645,175	3,941,187

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		450,000		450,000
Other Cost*		35,000		35,000
Total Costs	0	485,000	0	485,000

* "Other Costs" include DEC oversight costs.

5.1 General Site Information

Site Name: SUFFERN

Site Location: Pat Malone Drive, Suffern, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-44-045

5.2 Site Background (Non-PRP Sites Only)

The Suffern MGP Site is located on Pat Malone Drive in the Village of Suffern, New York, in close proximity to the Village's municipal water supply well field. After the site was sold, it was redeveloped as a school bus fabrication facility. Subsurface MGP structures and MGP-impacted soils were identified under the school bus fabrication facility's main building during the DEC-approved remedial investigation that Orange and Rockland conducted for the site. Orange and Rockland acquired and subsequently demolished the facility to facilitate remediation. MGP impacts have been identified in the soil and groundwater on the site and on an adjacent off-site property that is a right of way for an active New Jersey Transit rail line. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and affected off-site property pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD)/Decision Document (DD) Requirements:

Not applicable. A Record of Decision ("ROD") or other final Decision Document has not yet been issued for this site.

Scope of Site SIR Work:

An extensive multi-year, DEC-required remedial investigation has been completed for the site. Orange and Rockland's Feasibility Study for the site and impacted off-site New Jersey Transit property was approved by the DEC in October 2013. Due to the proximity of the site to the Village of Suffern well field, quarterly groundwater monitoring is required for several sentinel wells to monitor for potential migration of contaminants from the site toward the Village's drinking water supply wells.

Status of Compliance with ROD/DD:

Not Applicable. Orange and Rockland is in compliance with all applicable DEC SIR programs requirements for this site.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, the DEC-approved FS for the site was completed and approved by the DEC during the reporting period. The DEC has developed a proposed remedial action plan and is expected to issue a ROD for the site during the upcoming reporting period. Due to proximity of this site to the Suffern Village drinking water supply wells, quarterly groundwater monitoring is being conducted and will continue to be conducted until the DEC-required site remediation program is implemented.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No.

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $127,000 in total SIR costs during the reporting period at this site. Actual SIR costs incurred during the reporting period totaled $74,382 for the finalization of the DEC-approved FS, quarterly groundwater sampling, analysis and reporting and for the site's proportional share of the development of a master MGP program schedule and cash flow projection. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR costs totaling approximately $325,000 for ongoing quarterly groundwater monitoring, initiation of remedial design/predesign investigation tasks and for the site's proportional share of the cost of the continued development of a master MGP program schedule/cash flow projection.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

No.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			125,000	74,382			125,000	74,382
Other Cost*			2,000	0			2,000	0
Total Costs	0	0	127,000	74,382	0	0	127,000	74,382

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		300,000		300,000
Other Cost*		25,000		25,000
Total Costs	0	325,000	0	325,000

* Projected "Other Costs" include DEC oversight costs and permit fees.

Superfund Sites

5.1 General Site Information

Site Name: BORNE CHEMICAL

Site Location: 632 South Front Street, Elizabeth, New Jersey

Remediation Program: New Jersey Spill Act Program (PRP Site)

Site Identification No.: NJDEP Site #NJD002167237

Additional Information:

The Borne Chemical site is a PRP site. The site was a 14-acre former petrochemical packaging/waste oil recycling facility located along the Arthur Kill waterway in Elizabeth, New Jersey. The site was abandoned in 1985 when its owner went bankrupt. The site is being investigated and remediated by a PRP steering committee in compliance with administrative directives issued by the New Jersey Department of Environmental Protection ("NJDEP") pursuant to the New Jersey Spill Compensation and Control Act ("Spill Act"). Orange and Rockland joined the PRP steering committee as part of the settlement it entered into with the members of the steering committee. As directed by the NJDEP, the PRP steering committee has investigated the site and completed a $10 million NJDEP-approved program to clean out the site's oil and chemical storage tanks and piping systems. The PRP Group is now implementing an NJDEP-approved remediation plan to collect the free-phase oil present beneath portions of the site and to excavate and cap contaminated soils on the site. The NJDEP is evaluating, but has not yet approved, a remediation plan for the site's contaminated groundwater.

Orange and Rockland's share of estimated total liability for this site is 2.27%.

Because this site is a PRP site, the remaining sections of this site specific report are not applicable.

5.1 General Site Information

Site Name: **ELLIS ROAD/AMERICAN ELECTRIC CORPORATION**

Site Location: Jacksonville, Duval County, Florida

Remediation Program: EPA Superfund (PRP Site)

Site Identification No.: 04-2010-3768

Additional Information:

The Ellis Road/American Electric Corporation site is a PRP site. The site is a former polychlorinated biphenyl ("PCB") waste consolidation, storage and treatment facility that was operated by the now defunct American Electric Corporation ("AEC") from 1979 until 1984. In 1984, the warehouse building that AEC used at the site for the processing and storage of regulated PCB equipment and materials was destroyed by a fire that resulted in PCBs being released to the environment. EPA performed an emergency response action and a series of initial removal actions to secure the site and to prevent further releases of PCBs. EPA subsequently identified AEC's former customers and demanded that they fund an additional removal action for the site. Orange and Rockland was designated a Superfund PRP for the site because it shipped 440 gallons of PCB-contaminated waste water to the site for treatment. Approximately 200 of AEC's former customers, including Orange and Rockland, joined together in 1988 to form a PRP Group. In 1989, the members of the PRP Group entered into an EPA administrative order on consent ("Consent Order") that obligated the group to perform EPA's required site removal action. Between 1990 and 1991, the PRP Group performed the required removal action and excavated PCB-contaminated surface soil, disposed of about 20,000 gallons of PCB-contaminated liquid waste, and emptied and decontaminated the above ground storage tanks that EPA installed at the site as part of its initial emergency response and removal actions. However, because the site is located near residential properties and more recent soil and groundwater sampling detected PCBs at concentrations that exceeded EPA's residential PCB cleanup standards, at the end of 2011 EPA notified all presently existing site PRPs of the need for a new removal action and demanded that they enter into another Consent Order under which the group would reimburse EPA for site oversight costs, and either implement or fund the implementation of the required removal action. In March 2012 Orange and Rockland entered into an agreement with the other PRP Group members regarding allocation of costs to be incurred pursuant to the proposed Consent Order. Orange and Rockland signed the Consent Order with EPA in July 2012. The total cost of cleanup for the site is currently estimated to be $5.4 million.

Orange and Rockland's share of estimated total liability for this site is 0.24%.

Because this site is a PRP site, the remaining sections of this site specific report are not applicable.

5.1 General Site Information

Site Name: **METAL BANK**

Site Location: 7301 Milnor Street, Philadelphia, Pennsylvania

Remediation Program: EPA Superfund (PRP Site)

Site Identification No.: EPA PAD046557096

Additional Information:

The Metal Bank Superfund Site is a PRP site. The site is a ten-acre former scrap metal reclamation facility located along the Delaware River in northeastern Philadelphia. It was added to the Superfund National Priorities List in 1983 after EPA and the U.S. Coast Guard documented releases of PCB-contaminated oil from the site to the Delaware River. Orange and Rockland is a member of a PRP steering committee comprised of electric utilities that shipped scrap transformers to the site during the late 1960s and 1970s. In 1998, EPA issued Unilateral Administrative Orders compelling Orange and Rockland, most of the other steering committee members, and the current and former owners and operators of the site to design and implement the remedy EPA selected in December 1997 for the site and the PCB-contaminated sediment in the area of the Delaware River along the site's waterfront. EPA's selected remedy was challenged by the current and former site owners and operators in the U.S. District Court for the Northern District of Pennsylvania. The members of the steering committee also sought contribution from the current and former site owners and operators. After years of negotiations, settlements resolving all claims and consent decrees embodying the requirements of the settlements were approved and entered by the district court in 2006. Under their consent decree with the government, the steering committee members were required to design and implement the required remediation work for the site and Delaware River sediment affected by the site's contamination, and were entitled to receive contribution of approximately $4.1 million from the principals of the metal reclamation company that contaminated the site with PCBs while salvaging scrap transformers. The steering committee members were also entitled to seek reimbursement of their remediation work-related costs from the $13.2 million trust fund established as part of the settlement of their claims against the bankruptcy estate of the corporate parent of the current site owners and operators. The implementation of the remedy was started in early 2008 and was completed in 2010. As required under their consent decree with the government, the members of the steering committee are currently implementing monitoring activities to ensure that the long-term protectiveness of the site's completed remedy.

During 2013, state and federal natural resource trustees provided the PRP steering committee and other site PRPs with a copy of their Natural Resource Damage Assessment and Restoration Options Report ("DAROR") that assessed natural resource damages ("NRD") purportedly caused by releases of hazardous substances at the site. The natural resource trustees for the

Metal Bank site include the National Oceanic and Atmospheric Administration ("NOAA"), the United States Department of the Interior, the national Fish and Wildlife Service, and various Pennsylvania agencies. The DAROR focuses on losses to soil, sediment, and fish resulting from releases of PCBs from the site and habitat losses caused by the EPA's required site remedial construction activities. Such losses are estimated by comparing PCB concentrations in site soils, Delaware River sediment, and fish tissue to literature-based adverse effects thresholds. The PRP steering committee has assessed the DAROR and submitted comments to the trustees questioning the extent, if any, of NRD by the site. Negotiations with the trustees regarding NRD issues are expected to continue during the upcoming reporting period.

Orange and Rockland's share of estimated total liability for this site is 4.58%.

Because this site is a PRP site, the remaining sections of this site specific report are not applicable.

5.1 General Site Information

Site Name: NEWARK BAY

Site Location: Newark Bay, New Jersey

Remediation Program: New Jersey Spill Act Program (PRP Site)

Site Identification No.: Not Applicable.

Additional Information:

The Newark Bay Complex is a PRP site. The site is a system of waterways including Newark Bay, the Arthur Kill, the Kill Van Kull and lower portions of the Passaic and Hackensack Rivers. Approximately 300 parties, including Orange and Rockland (which was served with a third-party complaint in June 2009), were sued as third-party defendants by Tierra Solutions, Inc. ("Tierra") and Maxus Energy Corporation ("Maxus"), successors to the Occidental Chemical Corporation and Diamond Shamrock Chemical Company, pursuant to the New Jersey Spill Compensation and Control Act ("Spill Act"). Tierra and Maxus were themselves sued in 2005 by the New Jersey Department of Environmental Protection ("NJDEP") and others for removal and cleanup costs, punitive damages, penalties and economic losses allegedly arising from the dioxin contamination their predecessors' pesticide/herbicide plant allegedly released into the Complex. Tierra and Maxus are seeking equitable contribution from third-party defendants for their response costs, as well as damages, penalties and losses. As to Orange and Rockland, Tierra and Maxus alleged that in the mid-1970s the company sent shipments of waste oil from a generating plant in Haverstraw, New York, to the Borne Chemical Company site in Elizabeth, New Jersey, and that the Borne Chemical Company site was a source of petroleum discharges to the Arthur Kill. For further details on Orange and Rockland's connection to the Borne site, please see the Borne site specific report. In 2013, Tierra and Maxus settled its claims against Orange and Rockland in this matter for a nominal settlement payment and released all state law claims as to the Borne site.

Because this site is a PRP site, the remaining sections of this site specific report are not applicable.

5.1 General Site Information

Site Name: WEST NYACK

Site Location: 180 West Nyack Road, West Nyack, New York

Remediation Program: DEC Superfund

Site Identification No.: DEC Site # 3-44-014

5.2 Site Background (Non-PRP Sites Only)

The West Nyack site is an approximately 3-acre parcel bounded by the Hackensack River to the north and east, Old Nyack Turnpike (also called West Nyack Road) to the south and Consolidated Rail Corporation (Conrail) rail tracks and Yaboo Fence Company, Inc. to the west. The West Nyack Operating Center ("WNOC") facility is currently used by Orange and Rockland as a satellite service center for Orange and Rockland line crews as well as for office space. Investigation of contamination on the property was triggered by a leaking underground storage tank and concerns regarding possible polychlorinated biphenyl ("PCB") contamination. Orange and Rockland investigated the site pursuant to two DEC Consent Orders (Order # W3-0508-91-02 and Order # W3-0508-93-12) and remediated the site pursuant to DEC Consent Order # W3-0508-97-10.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued the Record of Decision ("ROD") for the WNOC in 1997 and required excavation of PCB and petroleum contaminated soil. The ROD did not include a groundwater remediation component because there was evidence that an offsite source of contamination was contributing to the groundwater impacts on the WNOC property. Quarterly groundwater monitoring was required until these impacts were more fully investigated.

Scope of Site SIR Work:

The site was remediated in accordance with a DEC-approved Remedial Action Work Plan ("RAWP") dated September, 1997. PCB and petroleum contaminated soils were excavated and removed from the site and an asphalt soil cover system was installed Quarterly groundwater monitoring and annual soil vapor intrusion evaluations were conducted through 2012. A Site Management Plan ("SMP") was finalized and approved by the DEC in 2012.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the ROD and the SMP.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, the site has been remediated. The DEC-required SMP for the site has been finalized and is being implemented. A deed restriction for the DEC-required institutional controls for the site was executed and recorded in July 2012. The SMP requires annual inspection and certification that the engineering controls are in place.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No**.**

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $10,000 in total SIR costs for the reporting period for this site. Actual SIR costs incurred during the reporting period totaled $9,407 for the annual SMP inspection and certification that engineering controls are in place and for DEC/DOH oversight costs. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR cost totaling approximately $30,000 for the annual

engineering inspection and required documentation stipulated in the SMP, repairs to the asphalt cover system and DEC/DOH oversight costs.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

No.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: West Nyack **SITE TYPE: Superfund**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs					5,000	$4,031	5,000	4,031
Other Cost*					5,000	$5,376	5,000	5,376
Total Costs	0	0	0	0	10,000	9,407	10,000	9,407

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) 2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs			25,000	25,000
Other Cost*			5,000	5,000
Total Costs	0	0	30,000	30,000

* "Other Costs" include DEC oversight costs.

UST SITE

5.1 General Site Information

Site Name: SPRING VALLEY OPERATING CENTER UST

Site Location: 390 West Route 59, Spring Valley, New York

Remediation Program: DEC UST

Site Identification No.: DEC Spill # 08-07165 and #13-03197

5.2 Site Background (Non-PRP Sites Only)

Orange and Rockland maintains a fueling island for company vehicles at the Spring Valley Operating Center consisting of three fuel dispensers: two dispensing gasoline and one dispenser for diesel fuel. Three 10,000-gallon underground storage tanks ("USTs"), two storing gasoline and one storing diesel fuel, are connected to the fuel dispensers via underground piping. In February 2009 Miller Environmental Group, Inc. ("MEG") conducted a subsurface investigation at the Spring Valley Operations Center in response to a UST line leak identified during tightness testing conducted on September 25, 2008. Results of the investigation revealed gasoline contaminated soil and groundwater in the area of the line leak and the fuel island.

Record of Decision (ROD)/Decision Document (DD) Requirements:

Not applicable. A ROD or other final Decision Document has not been issued for this site.

Scope of Site SIR Work:

Several rounds of investigation were conducted to delineate the vertical and horizontal extent of the petroleum contamination.

Status of Compliance with ROD/DD:

Not Applicable. Orange and Rockland is in compliance with all applicable DEC SIR program requirements for the site.

5.3 Status of Site Investigation and Remediation (Non-PRP Sites Only)

Briefly summarize status, with reference to Table 2.

As discussed above and indicated in Table 2, a closure plan to remove the USTs and the impacted soil ("Closure Plan") was submitted to the DEC and the Rockland County Department of Health. The Closure Plan was approved by both the DEC and the Rockland County Department of Health. Bid documents were prepared in 2012 to conduct the remediation in conjunction with installation of a new tank system. In connection with the tank removal and soil remediation that was completed in 2013 in accordance with the Closure Plan, Con Edison Construction Management acted as the general contractor for the project, with responsibility for hiring the construction contractor, overseeing the performance of the work and paying the bills. Groundwater monitoring required by the Closure Plan will be conducted in 2014.

Have deviations from the approved remediation plan occurred or are such deviations anticipated?

No**.**

Does Table 2 indicate a variation from the projected status?

No.

5.4 Project Procurement Exceptions (Non-PRP Sites Only)

Were any contracts awarded for this site without following the Company's standard procurement process?

No.

5.5 Project Costs (Non-PRP Sites Only)

With reference to Table 3, briefly summarize anticipated and actual SIR costs for the reporting period and projected costs for the upcoming reporting period.

As indicated in Table 3, Orange and Rockland anticipated that it would incur $750,000 in total SIR costs during the reporting period at this site. Actual SIR costs incurred during the reporting period totaled $187,841 for consultant oversight and confirmatory sampling costs related to removal of the underground storage tanks and contaminated soil in accordance with the approved Closure Plan. During the upcoming reporting period, Orange and Rockland projects that it will incur SIR costs totaling approximately $1,370,000 to cover the intercompany billing for the UST

removal and soil remediation, implementation of the Closure Report and groundwater monitoring to assess the effectiveness of the remedy.

For the reporting period, did the actual cost differ from the forecasted cost by more than 10% or $100,000, whichever is greater?

Yes. The total SIR costs for this remediation were actually higher than anticipated due to work scope changes identified during the field program and discovery of additional soil contamination requiring remediation. However, due to a delay in receipt of invoices for work on this project, the 2013 costs are lower than what was projected for 2013. The unbilled costs will be reflected in the 2014 expenditures.

Did measures taken to minimize SIR costs for this site deviate from standard practices?

No.

Table 3 - Site-Specific SIR Costs Incurred (non-PRP Sites)

SITE NAME: Spring Valley Operating Center UST **SITE TYPE: UST**

REPORTING PERIOD COSTS ($) 2013

Cost Element	Site Investigation		Site Remediation & Restoration		Site Operation, Maintenance and Monitoring		Total SIR Costs	
	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual	Anticipated	Actual
Consultant and Contractor Costs			657,000	145,897			657,000	145,897
Other Cost*			93,000	41,944			93,000	41,944
Total Costs	0	0	750,000	187,841	0	0	750,000	187,841

PROJECTED COSTS FOR UPCOMING REPORTING PERIOD ($) (2014

Cost Element	Site Investigation	Site Remediation & Restoration	Site Operation, Maintenance and Monitoring	Total SIR Costs
Consultant and Contractor Costs		1,100,000	20,000	1,120,000
Other Cost*		250,000		250,000
Total Costs	0	1,350,000	20,000	1,370,000

* "Other Costs" include internal costs.

Table 1

Site #	Site Name	Total SIR Costs Through 2013 ($)	Anticipated Total SIR Costs for 2013 ($0)	Actual Total SIR Costs for 2013 ($)	Total Projected SIR Costs for 2014 ($0)
SECTION I. ACTIVE SITES WITH CURRENT AND/OR FUTURE ANTICIPATED SIR COSTS					
MGP Sites					
	Clove and Maple Avenue	1,605,447	525,000	84,549	625,000
	Fulton Street MGP	1,322,622	170,000	2,949	170,000
	Genung Street	988,926	103,000	311	150,000
	93B Maple Avenue	9,525,510	105,000	70,384	125,000
	Nyack	14,856,333	1,364,000	233,421	9,345,000
	Port Jervis MGP	12,576,625	4,645,000	3,941,187	485,000
	Suffern	4,478,920	127,000	74,382	325,000
	MGP Common Expenses[4]	8,330,768	800,000	425,534	297,000
	Subtotal MGP	**53,685,151**	**7,839,000**	**4,832,717**	**11,522,000**
Superfund Sites					
	Borne Chemical	208,149	52,000	13,272	0
	Ellis Road/American Electric Corp.	18,526	0	0	0
	Metal Bank	573,405	14,000	20,617	10,000
	Newark Bay	153,199	50,000	27,092	0
	West Nyack	1,846,720	10,000	9,407	30,000
	Subtotal Superfund	**2,799,999**	**126,000**	**70,388**	**40,000**
Underground Storage Tank (UST) Sites					
	Spring Valley Operating Center UST	247,912	750,000	187,841	1,370,000
	Subtotal UST	**247,912**	**750,000**	**187,841**	**1,370,000**
Total SIR Program Active Sites		**56,733,062**	**8,715,000**	**5,090,946**	**12,932,000**
SECTION II. INACTIVE SITES WITH NO CURRENT OR FUTURE ANTICIPATED SIR COSTS					
Superfund Sites					
	Clarkstown Landfill	103,972	N/A	N/A	N/A
	Frontier Chemical	4,000	N/A	N/A	N/A
	Helen Kramer Landfill Site	5,000	N/A	N/A	N/A
	Mercury Refining Superfund Site	421	N/A	N/A	N/A
	Orange County Landfill	148,485	N/A	N/A	N/A
	Ramapo Landfill	99,014	N/A	N/A	N/A
	Tidewater Baling	-	N/A	N/A	N/A
Total SIR Program Inactive Sites	**Subtotal**	**360,892**	**N/A**	**N/A**	**N/A**
Total SIR Program Active & Inactive Sites		**57,093,954**	**8,715,000**	**5,767,955**	**12,932,000**
Notes					

1. Section I of Table 1 includes active sites for which SIR costs were incurred during the reporting period and/or costs are projected to be incurred after the reporting period. Section II of Table 1 includes sites with no current or anticipated future SIR costs.
2. All projected activities and costs were based on information available at the time they were developed and on anticipated actions of others such as approval by the DEC, access provided by property owners and property owners' development plans.
3. As of December 31, 2013, the accrued liability for O&R's SIR programs was $105,085,177. In 2013, O&R estimated that its aggregate undiscounted potential liability for MGP sites could range up to $167 million.
4. "MGP Common Expenses" includes costs of litigation involving insurance coverage for MGP contamination stemming from the Company's operations at its seven former MGP sites.

Table 2

Table 2 - Status of Active SIR Program (Non-PRP Sites)
By Orange and Rockland Utilities, Inc.

Site #	Site Name	Current Status (as of 12/31/13)	Reporting Year 1Q13	2Q13	3Q13	4Q13	Variation from Projection? (Y or N)	Projected Year 1Q134	2Q14	3Q14	4Q14
MGP Sites											
	Clove & Maple Avenue	Remedial Design Work Plan and Pre Design Investigation Work Plan for off site properties (OU2) developed and approved by NYSDEC.	RP	RP	RP	RP	N	RP	RP	RP	RP
	Fulton Street MGP	Feasibility Study submitted to NYSDEC. NYSDEC requested additional field investigation that is on hold pending access agreements and road opening permit.	RP	RP	RP	RP	N	RP	RP	RP	RP
	Genung Street	Remedial design in progress. Supplemental pre design investigation on hold pending receipt of access agreement from railroad.	RP	RP	RP	RP	N	RP	RP	RP	RP
	93B Maple Avenue	Remediation completed. Site Management Plan drafted	OMM	OMM	OMM	OMM	N	OMM	OMM	OMM	OMM
	Nyack	Remedial design completed and contractor procurement in progress. Remedial Action delayed until 1st qtr. 2014.	RP	RP	RP	RP	Y	RA	RA	RA	RA
	Port Jervis	Excavation phase of remediation completed. Pilot study for NAPL recovery wells completed and remedial design for recovery wells is ongoing.	RP/RA	RP/RA	RP/ RA	RP/RA	N	RP	RP	RA	RA
	Suffern MGP	Feasibility Study finalized and approved by NYSDEC. Quarterly groundwater monitoring program continued.	RP	RP	RP	RP	N	RP	RP	RP	RP
Superfund Sites											
	West Nyack	Annual SMP inspection and certification completed in 2013.	OMM	OMM	OMM	OMM	N	OMM	OMM	OMM	OMM
Underground Storage Tank (UST) Site											
	Spring Valley Operating Center UST	Additional delineation sampling completed prior to remedial action. UST removal and soil remediation completed.	RP	RA	RA	RA	N	OMM	OMM	OMM	OMM

Site Charaterization	SC	**From work plan preparation through report approval**
Remedial Investigation	RI	**From work plan preparation through report approval**
Remedial Planning	RP	**From AAR/FS/RAWP preparation through remedial design and procurement**
Remedial Action	RA	**From contractor submittals, through remediation and report approval**
Operation, Monitoring and Maintenance	OMM	
No Further Action Required	NFA	

Notes

1. All projected activities and costs were based on information available at the time they were developed and on anticipated actions of others such as approval by NYSDEC, access provided by property owners and property owners' development plans.
2. If multiple activities are projected for a site during a quarter, then all such activites are listed and separated by slashes with no fill color used.

Exhibit A

NEW YORK STATE PUBLIC

SERVICE COMMISSION

Case 11-M-0034- Proceeding on Motion of the Commission to Commence Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs

Inventory of Best Practices for Utility SIR Programs

Pursuant to the November 28, 2012, Order Concerning Costs for Site Investigation and Remediation issued in the above-referenced proceeding, the State's electric and gas utilities that appeared in this proceeding[1] (the "Utilities"), submit the following inventory of best practices for their SIR programs:

1. Operate the SIR program with knowledgeable staff, including site-specific project managers

2. Operate the SIR program using experienced, company-approved SIR program consultants and remediation contractors, and update approved contractor lists, as needed

3. Operate the SIR program using competitive bidding for individual projects or to establish competitive rates for qualified remedial consultants and contractors, except in unique situations such as time sensitive projects, which would not allow sufficient time for implementation of a competitive bidding process, or projects involving specialized services, such as expert legal or technical consultants with specialized expertise or contractors that specialize in a particular technology

4. Operate the SIR program using procurement procedures for construction contracts that include detailed design and contract terms that help bidders understand the scope of work

[1] The following companies comprise all the Utilities that appeared in this proceeding: Consolidated Edison Company of New York, Inc. ("Con Edison"), Orange and Rockland Utilities, Inc. ("Orange and Rockland"), Central Hudson Gas & Electric Corporation ("Central Hudson"), The Brooklyn Union Gas Company D/B/A National Grid NY ("KEDNY"), KeySpan Gas East Corporation D/B/A National Grid ("KEDLI"); National Fuel Gas Distribution Corporation ("National Fuel"); Niagara Mohawk Power Corporation D/B/A National Grid ("Niagara Mohawk"), New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E").

5. Solicit bids from qualified contractors and evaluate whether the low bidder understands the requirements of the project and the bid specification and that the low bid is reasonable compared with other bids

6. Operate the SIR program using contract management and oversight processes that include change order and invoice review and approval processes

7. Pursue cost-effective remedies based on the current use and contemplated use or re-use of properties and their zoning

8. Use cost-effective waste management practices at remedial sites that minimize overall costs and liabilities, such as the re-use of excavated soils on site, to the extent feasible, and subject to government, property owner and facility requirements and environment, health and safety considerations

9. Work with other utilities to share the costs of research evaluating remedial technologies and risks from MGP contamination and other contaminants

10. Monitor and comment on proposed regulations that would significantly affect the SIR program

11. Evaluate the use of innovative and cost-effective techniques to investigate and remediate sites where appropriate.

12. Only use waste disposal facilities that have been pre-approved by the utility to minimize the potential for creating new liabilities

13. Conduct environmental due diligence reviews prior to purchasing or selling property

14. Perform on-going review of long-term post-construction monitoring programs to identify possible scope reduction and, where possible, site closure and cessation of monitoring

15. Pursue third party cost sharing opportunities, either as shared liability or by coordinating construction and remedial construction activities with property developers, where possible and appropriate

16. Pursue opportunities for insurance reimbursement of SIR costs, where appropriate

17. Maintain on-going communication and coordination with applicable regulatory agencies to ensure compliance with all permits and orders to avoid potential additional costs resulting from non-compliance.

Dated: March 28, 2013

ORANGE AND ROCKLAND UTILITIES, INC.
1 BLUE HILL PLAZA
PEARL RIVER, NY 10965

July 2014

PROJECT EXECUTION MANUAL

Contents

1 PURPOSE

To provide a standard guideline for the development, planning, implementation, closeout and management of Orange and Rockland (O&R) capital projects and programs. The Manual is intended to be a general guidance document for the management of projects not a project specific document. The Manual is intended to be used in concert with the Project Management Institute's (PMI) Project Management Body of Knowledge (PMBOK). The attachments and references in this document are intended to be the templates and tools used to build the detailed project documentation. As with any guidance, this document contemplates the most common project scenarios; however it cannot address all possible situations or project scenarios. It is always up to the discretion of the Project Manager (PM) and the Project Team to ensure the appropriate level of project management rigor is being applied. This document is intended to be "evergreen". As changes to O&R's project delivery model occur and new best practices are developed they will be incorporated into this document.

2 APPLICATION

To ensure successful project/program management, project teams implementing large or complex projects/programs should follow the applicable guidelines described herein. This manual is primarily intended to be applied to projects in excess of $5M constructed cost or any projects managed directly by the O&R Project Management Department (PMD). This manual is to be used in combination with the associated attachments and other external third party documents as appropriate to form the project management plan (PMP).

3 DEFINITIONS

Allocation – Process whereby the Capital Budgeting Prioritization Committee (CBPC) manages the release of capital funding within the authorized capital amounts approved by the BOD.

Appropriation Estimate – Cost estimate that is used to allocate money for a specific project as part of project funding. It includes all direct and indirect costs of the project such as: labor, equipment, material, corporate overheads, escalation, contingency and the associated expenses and retirement costs.

Authorization – The approved spending limit of a specific project. The Board of Directors (BOD) approves the annual Capital Budget (i.e., products, including multi-year capital expenditures, plans and programs). Changes in planning, scope or expenditures and new projects arising during a budget year are addressed in the Delegation of Authority (DOA). Under no circumstances should an authorization be

overspent. Managers may establish or increase authorization levels in accordance with their approval levels as specified in the Delegation of Authority (DOA).

Budget Forecast - Cost forecast used for initial and long lead project authorization. The Budget Forecast can be used for the 5 year Capital Budget. It is an estimate based on preliminary engineering information at project initiation. Its purpose is to provide a screening of feasibility of project costs to decide whether to proceed with the design of the project or to evaluate other alternatives. This forecast is based on the Scope of Work in the Project Charter at the inception of the project. The Budget Forecast should not to be utilized for appropriation.

Change Track – Form used to track and approve a change outside of the original scope of work that impacts project financials, schedules and resources. (See Attachment 17)

Construction Manager (CM) - The individual assigned responsibility for managing the construction and equipment installation for the project. The Construction Manager is a member of the Project Team and has authority over construction contractors and/or Orange & Rockland personnel assigned to perform construction tasks or manage construction work for the project.

Construction Specialists – Supervises the activities of General Contractors and Specialty Contractors working on assigned projects such as substations, transmissions lines, commercial buildings, distribution lines, environmental projects and other projects requiring Project Specialist oversight.

Control Center – The group that accepts all functional testing of new or modified equipment to ensure proper and safe operations of the local electric system and unit substations.

Current Working Estimate (CWE) – The Current Working Estimate (CWE) is the most up to date estimate for the entire project including all Material, Contractor and Company costs. Depending on the status of the project the Current Working Estimate (CWE) can be the Appropriation Estimate that is being used to track and control project engineering and design costs. All changes to scope that impact the CWE should be documented in the Project Charter. The CWE develops from the Budget Forecast.

Discipline Engineer (DE) – Provide discipline specific expertise to the Project Engineer for specific tasks.

Financial Analyst – The individual assigned to track/monitor monthly expenditutes. The Analyst monitors the CWE and advises of variations and potential overruns.

Lead Department - Department responsible for the management and execution of a given project. If department other than the Lead Department initiates and appropriates a project and another department is going to manage and execute the project, a formal project transition meeting must occur. Prior to this meeting, the accepting department must be given sufficient documentation and time to review the details of the project scope, schedule and budget. Any concerns with the project should be noted and addressed at this point.

Lead/Discipline Estimator - The individual that develops and coordinates the assembly of a given estimate from the budget to current working estimate with input and support from the Discipline Engineer. The Estimator shall maintain and update the unit cost, hourly rate and the percentage of contingency and escalation to be applied to a specific project estimate. The Estimator documents and controls the assumptions associated with the project estimate.

Prioritization - The ranking for projects to facilitate the release of funding. Prioritization is completed at two primary stages of the funding process. The first is during the development of the yearly capital budget and the subsequent board authorization process. This prioritization is completed by the Department requesting the budget in consultation with the appropriate Vice President and O&R's President. The second is during the appropriation process.

Programs - Generally defined as groups of projects that are being managed together for either a common purpose (e.g. install 30 DOE Smart Grid reclosers and tie in DSCADA) or for administrative efficiencies (e.g. perform 9 different shoreline stabilization projects in 3 different states). The terms projects and programs are used interchangeably through this document except where differences are noted.

The following are the elements or characteristics typically found in Projects/Programs:

A) A defined scope
B) Schedule (duration)
C) Estimate (cost)
D) Financial authorization and budgeting
E) Subject to performance evaluation

Project - Work that has a specific scope and defined time period for execution. Projects are generally defined with a single scope (i.e. permit, design, and construction) and may be composed of multiple related sub-projects (e.g. substation, transmission and distribution).

Project Charter – A document that formally authorizes the existence of a project, and provides the PM with the authority to organize and coordinate the organizational resources required for the project. (See Attachment 2)

Project Controls Group – This group consists of the Estimators, Lead Estimators, Schedulers and Cost Analysts. The Project Controls Group is responsible for the tools, documents and methods used to measure success as it pertains to time and cost.

Project Engineer (PE) - Lead engineer or technical expert is responsible for coordination of all discipline specific engineering responsibilities typically reporting to the PM. The Project Engineer can be the PM for smaller capital projects.

Project File – The electronic and paper record of the project. The file should be comprehensive from the initiation of the project through closeout and include all final financial, technical and administrative documents. With limited exceptions the Project Team should endeavor to ensure that the Project File is electronic while accounting for company archival standards at the completion of the project.

Project Manager (PM) – The individual with the overall functional responsibility for planning, execution and closure of a project. The PM's responsibilities may be assigned to a qualified individual such as a discipline engineer or planner. Regardless of the administrative title of an individual, the person assigned responsibility for the management and execution of the project is the PM.

Project Scope – The work that must be performed to deliver a product, service, or result with the specified features and functions.

Project Status Review – The review of key project details with Senior Management on a regular and consistent basis during the project life cycle. (See Attachment 16)

Project Team - The group of individuals specifically selected to support a project. Project Team members bring special expertise to the project. The Project Team is selected by the PM in consultation with the appropriate Department Managers, Subject Matter Experts, etc.

Risk Matrix – A tool used to proactively manage project risks by reducing the susceptibility to losses incurred during a course of action, which leaves an auditable trail of changes. The process focuses project resources on reducing vulnerability, providing early visibility of potential problem areas and creating mitigation actions. (See Attachment 8)

Scheduler – Create(s) and maintains schedule reports; closely monitors and coordinates schedule updates that impact more than one project schedule. The Scheduler acts as a Subject Matter Expert and resource to PMs, providing guidance and direction related to managing links between schedules and task prioritization. The individual identifies, monitors and reports on projects' critical path and milestone tasks. Advises and updates the PM about emerging risks to key milestones. The

individual develops and implements strategies to introduce scheduling best practices, including metrics; as well as provides schedule snapshots upon request

Sponsoring Organization - The Department that has the overall financial responsibility and funding for the project.

Stakeholders - Those with a particularly significant interest in the project's outcome, including those providing funding or right of way for the project and property owners who are affected by the project. Stakeholders are unique for each project. The Project Manager or designee shall fill out Attachment 8 and transmit to the Public Affairs Department early in the project planning process.

Support Department - Departments with supporting responsibilities within/to a given project.

4 PROCESS GROUPS

The O&R Project Management model incorporates the Project Management Institute (PMI) Project Management Body of Knowledge (PMBOK) and its defined process groups as an approach for management of projects. The Project Management Process Groups include initiating processes, planning processes, executing processes, monitoring and controlling processes and closing processes. This manual is not intended to restate the PMI process, but rather facilitate the use of PMI principals and provide tools/specifics for the management of O&R projects.

5 PROJECT INITIATION

Project initiation defines and authorizes the project or a project phase. During the initiation phase, the Project Charter and scope documents are developed that contain a description of the business need, the desired deliverables and a formal approval to proceed by the appropriate management.

Projects are initiated as a result of the following business drivers: new business, public improvement, system reinforcement, load relief, environmental programs, regulatory requirements, or as other needs arise (user organization).

The sponsoring organization or lead department requests a PM from the Project Management Department (PMD) or assigns a PM from their own department at the discretion of the appropriate department's director.

For projects that are intended to be managed by the PMD, the lead department is encouraged to involve the PMD at project inception or as early as practical. Transition of a project from one PM to another should be a formal process with a formal review and acceptance of the scope, schedule and budget by the receiving PM. A project transition meeting checklist is included as Attachment 1.

Initiation activities undertaken by the PM or at the direction of the PM are:

A) Designate a project name and create a project file in the capital project directory. I:\Capital Projects\Projects or other appropriate electronic storage location.
B) Initiate the Project Charter process. The Project Charter template is included as Attachment 2.
C) Request from project control group the development of the preliminary budget forecast. Cost estimating guidelines are included in Attachment 3 and the estimate request form is included as Attachment 4.
D) Initiate the project funding process. The details of the project funding process are provided in Financial Services Procedure CB-1.
E) Develop a project team in consultation with appropriate departments.
F) Ensure a Property Record ruling is obtained, if necessary.
G) Ensure project records (i.e. engineering correspondence, design documents, project reviews, evaluations and inspections) are retained in the project file.
H) Start the permitting process.
I) Engage Financial Services and Property Record to ensure the appropriate setup of project numbers and financials.
J) Development and review of the project roles and responsibilities matrix included as Attachment 5.
K) PM holds initial kickoff meeting with Sponsoring Organization.
L) Other initiation activities as appropriate.

6 PLANNING

This process group is where the project team plans time, cost, resources and risk to manage the work during project execution.

PM finalizes project team and notifies project team of the project. PM maintains a project assignment list including all project staff and engineers assigned to each project. Individual projects are evaluated based on available resources. Consultants/contractors are hired on a case-by-case basis if staff or subject matter experts are not available. Contractor oversight resources are coordinated with the construction manager on a project specific basis.

PM develops/finalizes project roles and responsibilities matrix (Attachment 5).

PM holds initial project kickoff meeting with project team.

PM establishes communication protocol and initiates periodic project meetings as appropriate.

The PM conducts a field walk of the project.

The estimator develops and coordinates the assembly of a given estimate from the budget to current working estimate (CWE) with input and support from the discipline engineer(s). The estimator shall maintain and update the unit cost, hourly rate and the percentage of contingency and escalation to be applied to a specific project estimate. The estimator documents and controls the assumptions associated with the project estimate. PM coordinates the flow of information to the estimator to ensure that the project estimate is represents the current Project Charter.

A Communications Plan is developed and managed consistent with Attachment 6.

If applicable, PM coordinates with Public Affairs representative to develop a plan to identify and mitigate potential community concerns and impacts. The PM completes and returns the Community Impact Assessment (Attachment 7) to Public Affairs.

PM develops a risk matrix with the project controls group to identify and manage the risks associated with the project. The risk matrix should include a methodical process by which the team identifies scores and ranks the various risks. Every effort will be made to proactively identify the risk in advance to establish a mitigation strategy from the project's onset. The most likely and highest impact risks are to be added to the project estimate and schedule. A variety of formats maybe utilized, however an example is included as Attachment 8.

Other planning and design processes as appropriate.

7 EXECUTING

During the Executing process group the actual project is developed. For the majority of projects covered by this manual this means the design, permitting, procurement and construction of the planned work. As a practical matter Planner and Executing phases will likely overlap.

Design

Design is accomplished by company engineers, subcontractors or a combination. This manual is not intended to lay out the design process other than some of the specific elements discussed below. In general the assigned Project Engineer is responsible for managing all elements of the design process including drafting. The PM should be involved in all matters pertaining to changes in scope, schedule or budget.

The PM and Project Engineer should work with Departmental Management to establish the priority of projects where resource conflicts occur.

PM is responsible to schedule Constructability Reviews of the project design at appropriate intervals. The PM will coordinate with the Construction Manager directly. The Constructability Review is focused on ensuring that all designs can be safely, reliably and economically constructed with the outage constraints. Additional details regarding Constructability Reviews can be found in the O&R Construction Administration Guide as Attachment 9.

The PM, Project Engineer and Construction Manager work together to prepare contractor bid packages, contract drawings and specifications. The Project Engineer ensures that drawings, specifications, and applicable spreadsheets are prepared, approved, and released in accordance with O&R design requirements and policies. The PM and Construction Manager develop the project specification and bid package. The Project Team should endeavor to utilize the company's standard specifications where applicable and available.

All risks in the bid package shall be identified internally and appropriate analysis of the cost and allocation should be undertaken.

Permitting

The permitting process should be undertaken early in the project. Due to the nature of the projects undertaken by O&R and the timeframes necessary for some approvals and permits, permitting may often be started in the initiation phases of a project (Attachment 10).

Procurement

The PM will provide oversight and management for all procurement activities under this project. The PM will work with the project team to identify all items to be procured for the successful completion of the project. The Purchasing Department will review the procurement items and begin the vendor selection, purchasing and contracting process.

Purchasing will forward all necessary pricing documentation to Con Edison bid check when required. Procurement over $500,000 and change orders over $25,000 go to bid check. Always review latest procedures for revisions to this process.

All requisitions should include documentation of appropriate details to the approval chain to facilitate approval of the requisition. Changes to purchase orders should be similarly documented. The Requisition/GOI Change Request Form is included as Attachment 11.

The PM shall request requisition cost estimates from the Estimator (Attachment 4) or another appropriate source. The requisition cost estimate shall be provided by the Estimator after a review of the approved documents associated with the requisition.

The PM should work with purchasing to expedite all purchase orders.

Construction

Construction work is generally accomplished by either Company Forces or Contractors.

Work to be completed by Company Forces is governed by the appropriate departments policies and procedures. The PM coordinates with the appropriate Manager or Supervisor; however they do not direct the company workforce.

The Construction Manager and Project Specialists lead the construction contractors in accordance with the Construction Administration Guide (CAG). The Project Specialists will coordinate and communicate with PM and Project Engineer throughout this process. The CAG is included as Attachment 9.

8 MONITORING AND CONTROLLING

This process is where the project performance is captured and measured on a regular basis to determine any variances from the Project Management Plan in terms of the project performance baseline (scope, schedule and budget).

The PM shall:

A) Conduct regularly scheduled meetings applicable to project schedule/progression (i.e. monthly, bi-monthly, weekly).
B) Document all meetings according to meeting minutes template (Attachment 12).
C) Monitor budget, reviewing monthly the Jean Sheet to verify actual spending vs. projected budget.
D) Update Living Budget monthly in accordance with project progression.
E) Ensure the funding for the project is kept consistent with the project needs and company budget cycle (See Attachment 3).
F) Monitor scheduling process (See Attachment 13).
G) Update Project Controls in accordance with project progression. Scheduler to maintain project record and update project file with most current Project Schedule.
H) Make appropriate adjustments to the project.

The PM shall confirm that all required documentation (i.e. timesheets, invoices, contractor oversight results) are obtained and posted in Project File. The Department's Contract Management Checklist and Invoice Verification and Routing Form are included as Attachments 14 and 15, respectively.

Budget shall be monitored and controlled using existing O&R financial tools, such as the Jean sheet. Additional cost tracking tools being developed by PM. PM to review monthly after cost analyst has updated appropriate documents. PM to report and forecast costs to affected department heads and provide information required for monthly Project Status Reports (PSRs) using the PSR example included as Attachment 16.

All changes to scope that impact the CWE should be documented in the Project Charter. The CWE develops from the budget forecast. Capital funding authorization(s), appropriations(s), partial appropriation(s) and re-appropriation(s) shall be prepared as necessary by the PM based on changes to the CWE.

Proposed scope changes may be initiated by the PM, stakeholders or any member of the project team after the finalization of the Charter. All change requests will be submitted to the PM utilizing the Project Change Request Form, Attachment 17. The PM will then evaluate the requested scope change. Upon acceptance of the scope change request, the PM will submit the scope change request to appropriate approver for acceptance. Upon approval of scope changes by the project sponsor the PM will

update all project documents and communicate the scope change to all stakeholders. Based on feedback and input from the PM and stakeholders, the project sponsor is responsible for the acceptance of the final project deliverables and project scope.

Schedule to be developed in Microsoft Project or Primavera. Task descriptions, durations and dependencies shall be provided to scheduler by involved departments. Once schedule is approved it will be benchmarked. Changes to schedule shall be approved by PM and justified by affected department. If required, recovery schedule shall be developed to create the most practical and efficient path back to original timeline. Prior to construction, individual contract schedules will be incorporated into master schedule updates.

The scheduler creates and maintains schedule reports, and closely monitors and coordinates schedule updates that impact more than one project schedule. The scheduler acts as a subject matter expert and resource to PMs, providing guidance and direction related to managing links between schedules and task prioritization. The individual identifies, monitors and reports on projects' critical path and milestone tasks. They also advise and update the PM about emerging risks to key milestones. The individual develops and implements strategies to introduce scheduling best practices, including metrics, as well as provides schedule snapshots upon request.

An example Risk Management Plan is included as Attachment 8. It requires review from affected Departments, stakeholders and decision makers. Each identified risk is ranked and impacts to cost and schedule are quantified and represented in the project estimate and schedule as actual line items or contingency factors. PM will perform this review initially and expand review team as required.

The PM shall monitor risk matrix as established in the planning (Section 6) phase to ensure successful project progression or for implementation of mitigation strategy. The PM shall consult with project controls to confirm or modify risks as previously identified within the estimate and schedule. The risk matrix will be evaluated upon project close-out (Section 9) to identify future process enhancements.

The PM shall communicate with the Construction Manager on a predetermined timeframe (applicable to project progression) for continued project status updates.

The PM shall confirm that all required documentation (i.e. timesheets, invoices, contractor oversight results) are obtained and posted in Project File.

The PM shall communicate/consult with Public Affairs representative to ensure all requirements are adhered to and public satisfaction is maintained when applicable.

The PM shall prepare monthly, a PSR to be presented at the monthly Executive Project Review Meetings, as requested (refer to Attachment 16). The PSR may

determine any variances from the Project Management Plan in terms of the project performance baseline.

9 PROJECT CLOSE-OUT

This process group incorporates all of the necessary activities to close a project.

The project engineer ensures that operating and maintenance instructions have been developed and issued, when required, and the following completed:

A) Equipment databases of record reflect the installation of new equipment.
B) Spare parts lists, warranties and preventive maintenance recommendations have been issued to the user organization.
C) Ensures that the end users in O&R Operations (including the Control Center) are satisfied with the functionality of the new or modified system/equipment.
D) Constructor completes all component and system integrity tests in accordance with specifications, codes and engineering standards. Constructor completes outage work and system and equipment tie-ins, in accordance with applicable drawings and instructions.
E) User group completes functional testing and commissioning of equipment with assistance from the PM.
F) PM coordinates meeting with all applicable organizations to review procedures, establish in-service requirements, and work sequence for physical tie-in to the existing systems.

PM ensures that the project team leaders prepare punch lists of pending construction items, and performs the following:

A) Consolidates punch lists into a master punch list.
B) Assigns responsibilities for resolving the punch list items.
C) Ensures that all items are resolved.
D) Ensures as-built drawings are submitted to Engineering.

Project engineer/PM/operating group performs a field inspection of facilities/installation.

PM conducts post-construction project review and ensures lessons learned are published and any resulting actions are assigned to a responsible individual and tracked until completion as required (Attachment 18).

PM ensures a Notice of Completion is submitted to Property Record for project closeout. The project should be booked in service as soon as it has been energized, placed in service or tested and ready for service. The booking can be completed before items unrelated to the electrical or gas delivery have been completed. For example, once a substation has been energized it can be booked even if landscaping has not been completed. An example Property Record email is included as Attachment 19.

10 PROCEDURAL RESPONSIBILITY

The Department Manager, O&R Project Management is responsible for this guidance document.

11 ATTACHMENTS

To ensure quality control, all applicable links will go through the Project Management Intranet Site.

1. Project Transition Checklist
2. Project Charter Template
3. Cost Estimating Guidelines
4. Estimate Request Form
5. Project Roles and Responsibilities
6. Communications Plan
7. Community Impact Assessment Form
8. Risk Management Plan
9. Construction Administration Guide
10. Permitting and Approval Process
11. Requisition/GOI Change Request Form
12. Meeting Minutes Template
13. Scheduling Process
14. Contract Management Checklist
15. Invoice Verification and Routing Form
16. Example PSRs
17. Project Change Request Form
18. ConEdison Enterprise Project Lessons Learned Process
19. Property Records Email Example

12 REVISION HISTORY

Name	Date	Version
Working Draft	06/12/12	0.0
Issued Final	12/31/12	1.0
Revision 2	01/25/13	2.0
Revision 3	03/07/13	3.0
Revision 4	12/2/13	4.0
Revision 5	04/10/14	5.0
Revision 6	07/24/14	6.0

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

STANDARD TERMS AND CONDITIONS

FOR

CONSTRUCTION CONTRACTS

October 15, 2014

TABLE OF CONTENTS

STANDARD TERMS AND CONDITIONS FOR CONSTRUCTION CONTRACTS

1. Definitions. The following terms as used herein shall have the meanings stated:

"Con Edison" - Consolidated Edison Company of New York, Inc., the entity entering into the Contract and issuing any purchase orders applicable to the Contract, for work to be performed for Con Edison or its affiliate Orange and Rockland Utilities, Inc. ("O&R").

"Contractor" - The contractor who is a party to the Contract with Con Edison .

"Contract" - The contract between Con Edison and Contractor consisting of: (a) a Blanket Purchase Agreement ("BPA") or Contract Purchase Agreement ("CPA") and/or a Con Edison Standard Purchase Order ("purchase order"); (b) the relevant Con Edison request for quotation; (c) these Standard Terms and Conditions; and (d) any documents or portions thereof incorporated by reference in (a), (b) or (c) above, including, but not limited to, special conditions, specifications, performance requirements, plans and drawings. The words "hereof," "herein," "hereto" and "hereunder" as used in these Standard Terms and Conditions shall be deemed to refer to the Contract.

"Work" - The project contemplated by the Contract and all labor and supervision; construction materials, equipment, tools and other aids to construction; equipment, materials and structures to be installed; and other things of any nature necessary or proper for the completion of the project, whether or not expressly specified herein.

"Subcontractor" - Any company or person, other than an employee of Contractor, that furnishes any of the Work on behalf of Contractor.

2. Contract Formation. A legally enforceable agreement shall arise upon the signing or acknowledgement electronically by Contractor of the Contract in Oracle E-Business Suite iSupplier (the "Procurement System") or, if Contractor is not enabled in the Procurement System, upon the mailing or delivery by other means of the Contract or another writing manifesting acceptance of Contractor's offer; provided, however, that if Contractor's offer contains terms additional to or different from the terms on which quotations were requested by Con Edison which are not accepted in writing by Con Edison, a legally enforceable agreement shall not arise until the signing or acknowledgement electronically by Contractor of the Contract in the Procurement System or, if Contractor is not enabled in the Procurement System, by the signing by Contractor of the Contract or a copy of the Contract or such other writing as may be issued by Con Edison (or another document expressing Contractor's acceptance thereof), or Contractor's commencement or continuation of the Work following its receipt of the Contract or such other writing, such Work signifying Contractor's acceptance of the terms thereof.

3. Specifications, Plans, and Drawings.

A. The Work shall be performed in strict accordance with the Contract specifications, plans, and drawings. No deviation is permitted unless approved in advance in writing by Con Edison. The specifications, plans, and drawings and all other documents which are part of the Contract are supplementary to each other. Anything called for by any one of such documents shall be required to the same extent as if called for by all of them, and the Work shall be completed in every detail whether or not every item is specifically mentioned. If there should be a conflict between the drawings and the writings that comprise the plans and specifications, the writings shall govern unless upon notice thereof Con Edison directs otherwise in writing.

Contractor shall carefully review all of the contract documents. Contractor shall promptly submit in writing to Con Edison whenever discovered, whether before or after award, any inconsistency, ambiguity, or error between documents or within a document. Contractor shall abide by the written direction of Con Edison's authorized representative with respect to such matters, which direction shall be final and binding.

Contractor waives any claim for extra compensation based on an inconsistency, ambiguity, or error which Contractor could have discovered by reasonable diligence and prudence.

B. Con Edison may furnish to Contractor any additional plans, drawings, specifications or other documents which it considers necessary to illustrate or explain the Work in further detail, and Contractor shall comply with the requirements of all such documents.

C. Contractor shall, throughout the time during which the Work is being performed, keep at the work site available for inspection by Con Edison one complete and current set of the Contract documents, including, but not limited to, the Contract plans, specifications, and drawings, any additional documents furnished by Con Edison, and all shop and work drawings approved by Con Edison.

D. Where required by the Contract, Contractor shall submit designated documents, such as drawings and process procedures, for review and approval by or on behalf of Con Edison. All proposed changes to or deviations from such documents after they have been approved shall also be submitted to Con Edison for such review and approval prior to their implementation.

4. Price and Payment.

A. Unless expressly stated to the contrary herein, all prices are firm and not subject to increase. All payment periods, including discount periods, shall

begin upon receipt of proper invoices by Con Edison's Accounts Payable Department. Unless otherwise specified in the Contract, payment shall be made within thirty (30) days of receipt of each invoice. Payments by mail shall be deemed made when deposited in the mail. Notwithstanding anything to the contrary herein, no invoice submitted for a partial or progress payment shall be processed unless and until Contractor furnishes to Con Edison a Contractor Affidavit – Partial Release And Waiver of Lien and for each subcontractor, a Subcontractor Affidavit – Partial Release of Lien, duly executed and delivered by Contractor and its Subcontractors at issue, as applicable. Such documents shall, among other things, state that each statement set forth in paragraph (H) of this Article is true and correct concerning the invoice and the amount requested therein, and, with respect to Work covered by or included within the invoice, waive, release and discharge claims and liens, contain a covenant to pay and release of record, or otherwise discharge of record, all liens and contain a covenant to defend, indemnify and hold harmless Con Edison and its affiliates (including, but not limited to, O&R), and any owner of the real property on which the project is situated), from and against such claims and liens and any related costs and expenses. Such documents shall be in a form reasonably satisfactory to Con Edison and shall in all respects be read and interpreted consistent with Section 34 of the New York Lien Law (or its successor).

No invoice submitted for a final payment shall be processed unless and until: (i) Contractor has fully performed all the Work to Con Edison's satisfaction; (ii) Contractor has delivered to Con Edison all warranties, manuals, operating instructions, drawings, and all other documents required by the Contract; and (iii) Contractor has submitted documents sufficient to satisfy Con Edison that all the Work has been properly performed, that payment is due to Contractor, and that all Subcontractors who performed or furnished labor, materials, supplies, or equipment for the Work have been fully paid, or that they will be paid promptly from monies received from the final payment. The documents required together with the invoice for final payment shall include a Contractor Affidavit – Final Full Release And Waiver of Lien document and, for each Subcontractor, a Subcontractor Affidavit – Final Full Release And Waiver of Lien document, duly executed and delivered by Contractor and its Subcontractors, as applicable. Such documents shall, among other things, state that each statement set forth in paragraph (H) of this Article is true and correct concerning the invoice and the amount requested therein and, with respect to the Work, waive, release, and discharge all claims and liens to the extent permitted by law, contain a covenant to pay and release of record, or otherwise discharge of record, all liens, and contain a covenant to defend, indemnify, and hold harmless Con Edison and its affiliates (including, but not limited to, O&R) and any owner of the real property on which the project is situated from and against all such claims and liens and related costs and expenses. Such documents shall be in a form reasonably satisfactory to Con Edison and shall in all respects be

read and interpreted to be consistent with Section 34 of the New York Lien Law (or its successor).

B. Unless otherwise provided in the Contract, for unit price Work involving layouts, Contractor shall submit invoices upon completion of layouts or layout parts. For other unit price Work, invoices shall be submitted monthly. For all unit price Work, the judgment of Con Edison as to the quantity of Work completed and whether or not it is acceptable shall be conclusive.

C. For lump sum Work, Contractor shall render progress payment invoices monthly unless stated otherwise in the purchase order. Each invoice shall be based on an estimate, certified by Contractor and approved by Con Edison, of the physical Work performed during the period stated in the purchase order or, if none is stated, during the preceding calendar month. In preparing estimates, Contractor shall include up to 75% of the cost of conforming materials delivered onto the site but not yet physically incorporated into the Work. As additional security for the proper performance of the Contract, Con Edison will retain ten percent (10%) of the amount of each invoice until fifty percent (50%) of the Work is completed. Thereafter, if the Work is progressing satisfactorily and on schedule and Contractor is in compliance with all of its obligations hereunder, Con Edison shall pay the remaining invoices for progress payments in full. The amount previously retained will be paid to Contractor following completion and acceptance of the entire Work. The judgment of Con Edison as to the value of the Work completed, whether it is on schedule and whether it is acceptable shall be conclusive.

D. Con Edison shall have the right at any time to withhold from any payment which may be or become due under the Contract such amount as may reasonably appear necessary to it to compensate Con Edison for any actual or prospective loss due to Work which is defective or does not conform to Contract requirements, actual or prospective failure of Contractor to complete performance of the Work, or any other failure of Contractor to perform any of its obligations under the Contract or when it reasonably appears to Con Edison that Contractor has previously been overpaid. Con Edison shall be entitled to retain any and all amounts so withheld until Contractor has, in Con Edison's judgment, either performed the obligation or obligations in question or furnished security which Con Edison deems adequate for such performance or, in the case of withholding for overpayment, until an audit of Contractor's work or documentation is completed and the proper payment is determined.

E. Con Edison at any time may, after notifying Contractor in writing, pay directly any unpaid claims against Contractor based on the Work, and in so doing Con Edison shall be conclusively deemed to be acting as Contractor's agent. Any payment made by Con Edison to discharge a claim against Contractor shall be treated as a payment made under the Contract from Con Edison to Contractor.

F. Con Edison shall not be liable to Contractor for interest on any late payments unless expressly provided for herein. If for any reason Con Edison is in arrears in payment(s) hereunder, payment(s) made shall be applied by Contractor to any and all principal sum(s) due before being applied to any interest that may be due thereon pursuant to any express provision therefor in the Contract or otherwise.

G. Except to the extent specified in a written reservation of rights, the acceptance by Contractor of final payment shall be and shall operate as a release of all claims against Con Edison and of all liability of Con Edison to Contractor for things done or furnished in connection with the Work and for every act and neglect of Con Edison and others for whom Con Edison may be responsible relating to or arising out of the Work. However, no payment, final or otherwise, shall operate to release Contractor or its sureties from the obligations under this Contract or any performance or payment bond.

H. Contractor shall submit invoices in a form reasonably acceptable to Con Edison. Each invoice shall constitute a representation by Contractor that (i) the payment requested therein reflects Work performed and costs incurred by Contractor on account of such Work, (ii) the materials, supplies and equipment for which such invoice is being submitted have been installed or incorporated in the Work or have been stored at the project site or at such off-site storage locations as shall have been approved in writing by Con Edison; provided, however, that Con Edison shall not be obligated to pay or advance monies for materials stored off-site, unless approved in advance and in writing by Con Edison, (iii) the materials, supplies and equipment, if stored off-site, have been properly insured and stored in a “bonded” warehouse and are insured in accordance with this Contract and, if stored at the project site, are insured in accordance with the provisions of this Contract, (iv) the materials, supplies and equipment are not subject to any liens or encumbrances, (v) no mechanic’s, laborer’s, vendor’s, materialman’s or other liens or payment bond claims have been filed in connection with the Work for any of the labor, materials, supplies or equipment incorporated therein or purchased in connection therewith, (vi) all Subcontractors who performed or furnished labor, materials, supplies, or equipment for the Work for which payment is requested or for prior Work have been fully paid, or that they will be paid promptly from monies received from such invoice, (vii) the Work which is the subject of such invoice has been performed in strict accordance with the Contract documents and all applicable legal requirements, and (viii) the amount of the partial payment for which the invoice is submitted, when added to the sum of all previous payments made under prior invoices, does not exceed that portion of the price under the Contract which is allocable to the portion of the Work that has actually been completed on or before the date of such invoice and that the remainder of the price under the Contract (as the same may have been adjusted hereunder) is sufficient to pay in full the costs necessary to

perform and complete the Work. Upon Con Edison's request and as a condition precedent to payment, Contractor shall provide supporting documentation that is satisfactory to Con Edison to substantiate the representations set forth in this paragraph.

5. Time for Completion. TIME IS OF THE ESSENCE OF THE CONTRACT and of each and every portion thereof for which a certain length of time is fixed for performance. Unless otherwise specified, Contractor shall start the Work at the construction site within ten (10) days after it receives a written Notice to Proceed from Con Edison and shall complete the Work and the various parts thereof within the time or times specified in the Contract schedule. Contractor shall prosecute the Work regularly, diligently and without interruption at such rate of progress as will ensure completion within the specified time, and shall furnish properly skilled workmen and materials, tools, and equipment in numbers and amounts sufficient to accomplish this. Contractor agrees that the time or times specified for completion of the Work and of any part thereof are reasonable, taking into consideration all facts and circumstances. Work specified by the Contract to be performed after regular hours or on Saturdays, Sundays or legal holidays and Work performed at such times as a result of conditions in a permit or because of local regulations or to adhere to or regain the rate of progress required by Con Edison shall be performed without additional expense to Con Edison. If, in the opinion of Con Edison, Contractor falls behind schedule, Con Edison shall have the right to require contractor, at no additional cost to Con Edison, to increase its labor force or days or hours of work, to work overtime or increase the number of shifts, to use additional equipment or other construction aids, or to take such other steps as may be necessary to ensure completion of the Work on schedule. Receipt and acceptance by Con Edison of revised schedules from Contractor during the Work shall not be deemed a waiver of the schedule initially approved.

6. Excusable Delay. Contractor shall be excused any delay in completion of the Work arising from a cause beyond its control which it could not with the exercise of due diligence have either foreseen or avoided, including act of governmental authority, act of God, extraordinary weather conditions, flood, accident such as fire or explosion not due to the negligence of Contractor, strike which is not the result of an unfair labor practice or other unlawful activity by Contractor, riot, failure of public transportation facilities, inability of Con Edison to provide access due to plant malfunctions, and inability to perform caused solely by Con Edison's act or failure to act in breach of an express obligation under the Contract. Delay in Contractor's receipt of subcontracted supplies or services for reasons beyond the control of the Subcontractor shall not be excusable delay hereunder to the extent that the supplies or services are available to Contractor from another source. The unavailability of sufficient, qualified labor to perform the Work shall not be excusable delay hereunder unless the unavailability is caused by a strike which is not the result of an unfair labor practice or other unlawful activity by Contractor. Contractor shall give written notice and full particulars of the cause of any delay within 48 hours after its occurrence and thereafter shall update Con Edison on a bi-weekly basis. The time for performance in any such instance shall be extended by a period equal to the time lost by reason of the excusable delay. Such extension shall be Contractor's sole and exclusive remedy for such delay and Con Edison shall not be liable for any damages or additional costs incurred as a result of such delay.

7. Safeguards in Work.

A. Contractor shall provide and maintain at its own expense safe and sufficient entrance and exit ways, walkways, platforms, barricades, warning lights, scaffolds, ladders, runways for concrete carriers, hoists and all equipment, apparatus and appliances necessary or proper for carrying on the Work safely; shall not load any of the foregoing items or any part of any structure or equipment with a weight that will make it unsafe; shall make and keep the place of Work and the ways and approaches thereto well lighted, safe and free from avoidable danger, taking into account, without limitation, local conditions; and shall mark any faulty items "unsafe" until repaired or replaced.

B. Contractor shall provide all permanent and temporary shoring, anchoring and bracing required by the nature of the Work to make all parts absolutely stable and rigid, even when such shoring, anchoring and bracing are not explicitly called for. Contractor shall support and protect all buildings, bridges, roadways, conduits, wires, water pipes, gas pipes, sewers, pavements, curbing, sidewalks, fixtures and other public or private property that may be encountered or endangered in the prosecution of the Work.

C. In accordance with the rest of this Article 7 and without limitation thereof, Contractor shall test all areas, excavations, openings, manholes, vaults and boxes, for an adequate supply of oxygen and for any and all toxic, harmful or combustible gases or fumes or other dangerous substances before and during the course of the Work and shall provide all the necessary equipment, including, but not limited to, all oxygen deficiency and gas testing apparatus required for such tests.

D. Contractor shall strictly observe safety requirements of applicable federal, state and municipal laws and regulations, including, without limitation, the Federal Occupational Safety and Health Act. Contractor shall cause all equipment and structures, the place of Work and the ways and approaches thereto to meet the requirements of all public authorities. Contractor shall comply with the requirements of and recommendations in the latest edition of the "Manual of Accident Prevention in Construction," published by The Associated General Contractors of America, to the extent that such provisions are not inconsistent with other provisions of the Contract or applicable laws or regulations. Contractor shall maintain an accurate record of all cases of death, occupational disease or injury requiring medical attention or causing loss of time from work arising in connection with performance of the Work.

E. If in the opinion of Con Edison’s authorized representative, Contractor’s work practices or conditions created by Contractor are unsafe or fail to comply with applicable laws or regulations, Con Edison may halt the work until such practices and conditions are corrected. Contractor shall not be

entitled to any additional costs or time for performance due to such work stoppage. If, when the Con Edison authorized representative is not present at the site, a Con Edison employee (or O&R employee for Work ordered for O&R) directs Contractor to discontinue an operation because it may be unsafe or illegal, Contractor shall immediately halt the questioned operation and, if the Contractor disagrees with the employee, shall contact the Con Edison authorized representative for instructions. Contractor shall obtain the employee's name and employee identification number and report this information to the Con Edison authorized representative.

F. Contractor shall be responsible for any failure or neglect on its or its Subcontractor's part to perform the obligations contained in this article, and shall defend and indemnify Con Edison and its affiliates (including, but not limited to, O&R) against any loss, liability, damage or expense resulting in whole or in part from such failure or neglect.

G. If the Work involves pipeline facilities for the transportation of gas, hazardous liquids or carbon dioxide or a liquefied natural gas facility subject to Part 192, 193 or 195 of Title 49 of the Code of Federal Regulations (CFR), Contractor shall comply, and shall require its employees to comply, with the drug and alcohol testing requirements of 49 CFR Part 199. Contractor shall maintain and follow written anti-drug and alcohol misuse plans and shall provide the testing, education, and training required by the Regulations. Contractor shall allow access to its property and records concerning the plans and their implementation to Con Edison, O&R and their representatives, to the Department of Transportation Administrator, and to representatives of federal or state authorities having jurisdiction for the purposes of monitoring compliance with these requirements.

8. Knowledge of Work Conditions and Requirements. Contractor represents that it has visited and examined the site of the Work and satisfied itself as to the general and local conditions, particularly those relating to transportation, handling and storage of materials, availability of labor, water, drainage, power, roads, weather, ground and other physical conditions at the site, and as to all other matters which could affect the Work or the cost thereof. Contractor also acknowledges that it has examined the specifications, drawings, and other Contract documents and has satisfied itself as to the requirements of the Work, and has seen or had an opportunity to ask about all conditions which may affect the Work, including equipment or structures in place or to be in place, or work being or to be performed, which could interfere with the uninterrupted performance of the Work. Contractor agrees that its entry into the Contract has not been induced either wholly or in part by any promises, representations or statements on behalf of Con Edison other than those set forth in the Contract, and that any failure of Contractor to examine the Work site, Contract documents or all other available information shall be at its own risk. Contractor further represents that the price set forth in the Contract has been determined with due regard by Contractor to all such conditions and requirements affecting the Work, as well as the difficulties and delays incident to work of the nature contemplated hereby, and agrees that no claim for any increase in such price shall be made except as specifically provided in the Contract.

9. Contractor's Performance.

A. Contractor shall perform in good workmanlike manner and in accordance with best accepted practices in the industry all the Work specified or reasonably implied in the Contract, in accordance with its terms and the directions of Con Edison and its authorized representatives as any may be given from time to time. Contractor's performance shall include, except as otherwise specifically stated in the Contract, everything requisite and necessary to complete the Work properly, notwithstanding the fact that not every item involved is specifically mentioned, including, but not limited to all materials, labor, tools, equipment, apparatus, water, lighting, heating, power, transportation, superintendence, temporary construction, site security and all other services and facilities of every nature necessary or appropriate for the execution of the Work on schedule. Details which are not specified in the Contract shall be performed by Contractor at no extra cost if such details are within the general description of the Work.

B. When work is performed outside of Contractor’s own premises, Contractor must provide at all times an on-site representative with full authority to act for Contractor. The representative must be able to read, write, and thoroughly understand both English and any other languages spoken by persons performing work for Contractor and must be able to effectively communicate with those persons in their own language or languages. In addition, Contractor’s representative must ensure that labeling, log book entries, completion of forms and all other tasks requiring a proficiency in English are performed clearly and correctly. The continuation of the individual selected by Contractor in this role shall be subject to the continuing approval of Con Edison.

C. Contractor shall perform the Work in accordance with the following:

(i) All equipment, tools, other construction aids and materials utilized by Contractor shall be of high quality and in good working order. Contractor shall submit material safety data sheets (MSDS) for all chemical and hazardous substances used in the Work. If, in the opinion of Con Edison, any of Contractor's equipment, supplies, tools, other construction aids or materials are unsafe or inadequate, Contractor shall remove such items from the site immediately and replace them with safe and adequate substitutes at Contractor's expense. Contractor shall be fully and solely responsible for and shall safeguard its equipment, tools, supplies, other construction aids and materials at all times. Contractor shall provide adequate storage for all such items used in connection with the Work.

(ii) The use of public roadways and properties for the parking of employee vehicles, construction equipment, receiving and placement shall be in accordance with the applicable laws and ordinances. Access to all underground facilities, as for example through Con

Edison, municipal and telephone company manholes, shall be maintained and allowed during the entire performance of the Work. Adjacent private properties shall not be entered or used for any such purpose without the written consent of the property owners.

(iii) Fire hydrants and stop valves adjacent to the Work shall be kept clear and readily accessible to fire apparatus, and no material or other obstruction shall be placed, parked or stored within fifteen (15) feet of any hydrant or stop valve (or a greater distance if required by local law, rule or regulation). Contractor shall comply fully with all local rules and regulations relative to fire protection, shall keep the structure and premises free from burnable trash and debris, and shall exercise every precaution against fire. This shall include, but not be limited to, posting a fire watch, with appropriate fire fighting equipment, during all welding, burning, stress relief and other heating operations. Contractor shall assure that the fire watch is informed of the site fire control procedures and remains posted during breakfast, lunch and dinner periods and until one hour after such heating operations have stopped.

10. Con Edison Authority

A. Con Edison shall have the authority to decide any and all questions which arise in connection with the Work, and Con Edison's decisions shall be conclusive and final. Con Edison shall be the final judge of the meaning and intent of the Contract and all provisions thereof. Con Edison shall have the authority to conclusively resolve any disagreements which may arise between Contractor and any other contractor.

B. Con Edison shall have the right to maintain a representative at the construction site. Such representative may, on request, give Contractor reasonable assistance in interpreting the Contract drawings, specifications and plans, but such assistance shall not relieve Contractor of any duties (including, without limitation, those of giving notice to or securing the approval of Con Edison) arising under the Contract.

11. Estimated Quantities. Whenever estimated quantities of Work to be done on a unit-price basis are shown in the Contract, differences between the actual number of units of Work encountered and the estimated quantities of units shall not result in an increase or decrease in the unit prices or provide the basis for any claim against Con Edison or O&R by Contractor.

12. Warranties.

A. Contractor warrants the Work for a period of three (3) years from the date of completion and acceptance of all Work, unless a longer period is specified elsewhere in the Contract or in an applicable municipal code or regulation, in which case the longer period shall apply:

(i) as to services, that they shall be rendered competently and by qualified personnel in accordance with the best accepted practices in the industry and comply strictly with all specifications and performance requirements contained in the Contract; and

(ii) as to materials, equipment, structures and other things, that they shall be new and free from defects in title, material, workmanship and design, conform strictly to all applicable specifications, and be suitable for their intended use. Contractor further warrants that the Work shall meet any and all tests and comply strictly with all specifications and performance requirements contained in the Contract. The warranty of good title shall be unlimited in time.

B. In the event any part or all of the Work fails to satisfy any of these warranties, upon written notice thereof from Con Edison, Contractor shall, at no cost to Con Edison, promptly repair, replace, or reperform the defective Work, as directed by Con Edison, and do whatever else is necessary to cause the Work to satisfy all of the aforesaid warranties. All work repaired, replaced or reperformed under the provisions of this Article shall be subject anew to this Article with the warranty period commencing upon completion of the repair, replacement, or reperformance. If Contractor fails to correct any defective Work as aforesaid promptly after being notified thereof by Con Edison, then Con Edison may, at its option, either correct the defective work and charge Contractor for the costs and expenses it incurs in so doing or secure an equitable reduction in the Contract price based on its retention of the defective Work. Any defective parts removed in connection with repair or replacement shall be disposed of by Contractor at its expense.

C. In addition to making the foregoing warranties, Contractor agrees to obtain, for the benefit of Con Edison, from any and all Subcontractors hereunder, the same warranties as those required of Contractor under this Article and not to accept any warranties which are inferior in any respect to those required under this Article.

D. All warranties made or obtained hereunder are made to, and for the benefit of, Con Edison and O&R and may be enforced by or on behalf of either or both of Con Edison and O&R.

13. Changes (Including Extra Work).

A. Con Edison shall have the right at any time, by written notice (electronically or in print form) to Contractor and without notice to any of Contractor's sureties, to direct changes in the Work, including direction to do extra work or work outside of normal hours (when such work is not already the responsibility of Contractor under the Contract) or to delete part of the Work. If any such change causes an increase or decrease in the cost or time required for performance hereunder, an equitable adjustment shall be made

in the Contract price or schedule, or both, as follows: If the change involves work of the kind for which unit prices are contained in the Contract, such work shall be paid for at those prices unless Con Edison at its discretion determines not to use such unit prices and so notifies Contractor prior to the start of the changed work. For work for which no unit price is established or for which Con Edison has determined not to apply the unit prices, the parties shall endeavor to agree on a lump sum price for the change. If the change is not defined well enough for a fixed price, or if there is not enough time to negotiate one, or if the parties do not agree on one, Contractor shall perform the change on a time-and-materials ("T&M") basis at rates for labor, equipment and materials approved by Con Edison. In the case of deletion of any portion of the work for which no unit price is established, the Contract price shall be reduced by the decrease in Contractor's cost of performance and profit thereon.

B. The following rates are approved by Con Edison for Work performed on a T&M basis:

(i) Labor

Contractor will be compensated for each hour performed at the straight and premium time rates (as applicable) specified in the applicable schedule of rates. With respect to Work ordered for Con Edison, the applicable schedule of rates will be the Con Edison schedule of rates entitled "New York City and Westchester County Labor Rates for Time and Materials Work" or "Maintenance Agreement Labor Rates -- New York City and Westchester County," as applicable, in effect at the time the Work is performed, except that an additional 10% will be paid for the straight time portion of labor performed by one approved Subcontractor. With respect to Work ordered for O&R, the applicable rates will be the rates agreed to in the Contract. The labor of superintendents, non-working foremen, timekeepers and clerical employees is not compensable. This paragraph shall not be construed to affect Contractor's obligations to pay its employees in accordance with applicable law and the requirements of the Contract.

(ii) Materials

Contractor will be compensated for all materials used for the Work at the actual net cost plus 10%. Contractor shall furnish Con Edison with the invoices evidencing the purchase of such materials (and any other back-up documentation).

(iii) Equipment

Contractor will be compensated for equipment employed in the Work at 70% of the rates, including operating costs, in effect at the time the Work is performed, in the "Rental Rate Blue Book for Construction Equipment" or

the "Rental Rate Blue Book for Older Construction Equipment," whichever is applicable.

All rates are based on 8 hours per day, 40 hours per week, 176 hours per month and 22 working days per 30 day period. The rate resulting in the lowest cost to Con Edison for the employment of the equipment in the Work will be used. Operating costs will only be paid for hours during which equipment is actually being used in the performance of the Work.

Each unit of equipment or tool with a value at the time of use of less than $500 will be considered included in the labor rate and will not be separately compensable.

C. Contractor shall not perform any changes in the Work, including extra work, except pursuant to written direction from Con Edison's representative authorized to make changes expressly and unmistakably indicating his intention to change the Work. In the event adjustments for such changes are not agreed upon promptly, Contractor shall nevertheless proceed diligently to effect the changes at the time it is directed to do so by Con Edison.

D. In the absence of a written direction described in the preceding paragraph C, if Contractor deems any directive, whether oral or written, by Con Edison's authorized representative to be a change in the Work, Contractor shall nevertheless comply therewith but shall within five days give written notice as described in Article 16, Claims, and comply with the requirements thereof.

E. Any price increase or decrease or extension or acceleration of time for performance shall not be binding on Con Edison unless evidenced by a Contract modification or change order signed and issued by Con Edison. Contractor shall not have the right to make changes in the Work without the prior written approval of Con Edison.

F. Prices agreed upon for, or applicable to, changes (including extra work), include all impacts of the changes on the Work, including, but not limited to, delay, loss of productivity, demobilization, remobilization and idle time, and Contractor shall have no other claim for other effects on the Work due to such changes.

14. Labor.

A. Contractor shall, unless otherwise specifically stated herein, provide all labor required to fully complete the Work. This shall include all specialized workers that are required by the nature of the Work. Unless otherwise specifically provided herein, the costs of all labor are included in the Contract price. With respect to Work ordered for Con Edison, unless otherwise agreed to by Con Edison, Contractor shall employ on Work at the

construction site only union labor from building trades locals (affiliated with the Building & Construction Trades Council of Greater New York) having jurisdiction over the Work to the extent such labor is available. Where Contractor employs workers on sites where a permit to use or open a street (including excavating the street) is required and New York City Administrative Code Section 19-142, or its successor, (or a similar law, regulation, or code pertaining to sites located outside of New York City ("Similar Local Law")) is applicable, Contractor agrees that, pursuant to and in furtherance of the requirements of New York City Administrative Code Section 19-142, or its successor, (or the requirements of the Similar Local Law) and the terms and conditions of the permit: none but competent workers, skilled in the work required of them, shall be employed thereon; the prevailing scale of union wages shall be the prevailing wage for similar titles as established by the Comptroller of the City of New York pursuant to Section 220 of the New York State Labor Law (or as established by such other fiscal officer, as specified in Section 220 of the New York State Labor Law, for workers on permitted sites located outside of New York City to which a Similar Local Law applies), paid to those so employed, and Contractor shall pay that prevailing wage to workers so employed. These obligations of Contractor shall apply even though Con Edison may have obtained the permit. Contractor agrees to defend, save harmless and indemnify Con Edison, and its affiliates (including, but not limited to, O&R) and their respective trustees, directors, officers, employees, agents, representatives, successors and assigns from and against any and all liability arising in any way out of Contractor's failure to comply with the foregoing provisions of this paragraph. Whenever Contractor knows or believes that any actual or potential labor dispute is delaying or threatening to delay the timely performance of the Work, Contractor shall immediately give Con Edison notice of the dispute, including all relevant information concerning the dispute. If such notice is given orally, Contractor shall confirm it in writing within 24 hours. In the event that any labor dispute adversely affects the timely and efficient performance of the Work, Contractor shall exercise all rights and utilize all remedies available under applicable collective bargaining agreements and applicable federal and state laws to resolve the dispute and end the adverse effect on the Work, including but not limited to, seeking an injunction and filing an unfair labor practice charge.

B. The Immigration Reform and Control Act of 1986 Pub. L. No. 99-603 (the "Act") makes it illegal for an employer to hire or employ an illegal alien. The Act also makes it a legal requirement for employers to establish an employment verification system which includes the employer's checking specified documents to establish both an individual's identity and legal authorization to work. Contractor represents and covenants that Contractor has complied and will comply with all the requirements of the Act with respect to all persons assigned or employed by Contractor in the performance of the Work. Contractor agrees to defend, save harmless and indemnify Con Edison and its affiliates (including, but not limited to, O&R)

and their respective trustees, directors, officers, employees, agents, representatives, successors and assigns from and against any and all liability under the Act arising in any way out of services performed by, or Con Edison's use of, persons furnished by Contractor.

C. Contractor shall not employ any Con Edison or O&R employee to perform any Work without the prior written permission of Con Edison.

D. Further, neither Contractor nor any of its permitted subcontractors shall utilize or otherwise permit any former employee of Con Edison or O&R to render any services hereunder of any nature for or on behalf of Contractor or the permitted subcontractors (as an employee or consultant or otherwise) within five years of such former employee's separation from Con Edison or O&R if such former employee was engaged or involved in the solicitation, negotiation, procurement, placement or administration of any contract, agreement or purchase order for or on behalf of Con Edison or O&R at any time during the three-year period immediately preceding the employee's separation from Con Edison or O&R. For purposes of the preceding sentence, "administration of any contract, agreement or purchase order" shall mean engaging in any activity relating to oversight or management of any contract between Con Edison or O&R and Contractor including, but not limited to, the review, approval or payment of any invoices relating to any such contract, agreement or purchase order or the supervision of employees engaged in such activities. Engaging in or supervising employees engaged in purely clerical functions such as filing, data entry or processing previously approved invoices for payment shall not be deemed "administration of any contract, agreement or purchase order".

15. Time and Material and Cost Reimbursable Work.

A. Con Edison shall have the right to generally supervise, direct, control and approve the extent and character of Work done on a T&M or other cost reimbursable basis.

B. Work performed on a T&M basis shall not be performed either in whole or in part on a premium time basis (including overtime, Saturdays, Sundays and holidays) unless Contractor obtains the prior written consent of Con Edison's duly authorized representative.

If Contractor should perform work on a premium time basis without obtaining such consent then all cost relating to the premium time portion shall be borne solely by Contractor without recourse to Con Edison.

C. For Work performed on a T&M basis, Contractor shall submit reports which shall list the time and trades used, material consumed and types of equipment used on site and operating hours indicated. The reports shall be submitted by the end of the next working day for each shift worked. These reports are to be submitted to the Con Edison site representative for

approval (subject to future audit and adjustment if found to be in error). Con Edison shall make payment within 30 days after receipt of a proper invoice with required supporting documentation.

D. All work performed on a T&M basis shall be subject to Article 12 (Warranties) above.

E. The hourly rates for time and material and cost reimbursable contracts include profit and all indirect costs such as, but not limited to, field overhead, home office costs, engineering and all other off-site costs.

F. Whenever the Contractor or any permitted subcontractor performs Work hereunder its employees and consultants are required to have available for review by Con Edison a Contractor (or a subcontractor) or government issued name and photo identification.

G. No obligation of Con Edison to pay any agreed upon labor rates to Contractor for any time and material or cost reimbursable work shall be construed to affect Contractor's obligations to pay its employees in accordance with applicable law and the requirements of the Contract.

16. Claims.

A. The only claims that may be made by Contractor are claims for (i) providing services or materials beyond the scope of the Contract that are not covered by a written and signed change order (hereafter "Non-Contract Work"), and (ii) the increased cost of performing Contract Work caused by Con Edison's breach of the Contract (hereafter "Increased Costs"), except that, as set forth in Article 6, no claims for damages or additional costs on account of delay shall be permitted.

B. For each claim for Non-Contract Work, as defined in (A)(i) of this Article, Contractor must give written notice to Con Edison's designated representative within five (5) days of when Contractor began to perform such work. The notice must identify such work with particularity, the date such work was begun, the reason such work was performed, the estimated cost and duration of the work, the anticipated schedule impact, and the name of any Con Edison representative alleged to have ordered such work. For each claim for Increased Costs, as defined in (A)(ii) of this Article, Contractor must give written notice to Con Edison's designated representative within 5 days of Contractor's discovery of Con Edison's breach. The notice must identify the breach with the following particularity: for an act of Con Edison identify the act, the location of the act, the individual who performed the act, and the date of the act; for an omission by Con Edison, identify the specific action Contractor believes Con Edison should have taken, the date the action should have been taken, and the date the action was taken, if ever; for a misrepresentation by Con Edison, identify the representation alleged to be incorrect by document, page,

section, and clause, describe the fact or condition misrepresented, and provide the date Contractor learned of the misrepresentation.

C. For claims for which Contractor has given timely notice, Contractor must segregate and maintain, on a weekly basis, all costs associated with the claim. Documentation of all such costs shall be maintained and be made available to Con Edison upon request. Ten days after submitting the notice required by paragraph (B) of this Article, Contractor must begin submitting weekly detailed itemizations of such costs to Con Edison.

(i) For each claim for Non-Contract Work, as defined in (A)(i) of this Article, these detailed records shall include:

(a) The name, title, trade local, and number of each worker employed in such work, the dates and hours each worker was employed in such work, and the tasks performed; and

(b) The nature and quantity of any materials, plant and equipment furnished or used in connection with the performance of such work and from whom purchased or rented.

(ii) For each claim for Increased Costs, as defined in (A)(ii) of this Article, these detailed records must include:

(a) The date the Increased Costs were incurred;

(b) The name, title, trade local, and number of the workers who performed the work whose costs were increased;

(c) The price in Contractor's bid for the performance of the work that had its cost increased, the actual cost to Contractor to perform such work, and the amount of the Increased Costs for which Contractor claims Con Edison is responsible; and

(d) The nature and quantity of any materials, plant, and equipment whose cost was increased by Con Edison's act, omission, or misrepresentation.

D. If any part of any claim permitted by this Article is based upon delay, impact, interference, interruption, disruption, loss of productivity or any other time- or schedule-related impact of any nature for which Contractor asserts Con Edison is responsible (“Alleged Delay”), then Contractor, in addition to its other obligations under this Article, shall, on projects in which any form of a critical path method (“CPM”) schedule is required by the Contract, provide to Con Edison a reasonably detailed written narrative description of the Alleged Delay and its alleged time and costs impacts, a CPM schedule

"fragnet" or similar document illustrating the schedule impact, if any, on the actual project schedule, and other records and documents, if any, explaining the alleged cost impact (collectively, an "Impact Analysis"). (As used herein, a "fragnet" means a sequence of new activities and/or activity revisions that are proposed to be added to the existing schedule and that demonstrate the influence or impact of delay and the method for incorporating delays and impacts into the schedule as they are encountered). Each Impact Analysis shall be submitted to Con Edison within ten (10) days of the after the start of the Alleged Delay to which it relates. Each Impact Analysis shall demonstrate the estimated time impact based on the claimed events of the Alleged Delay, the date the Alleged Delay began, the status of the project at that point in time, and show how the project schedule critical path was impacted by the Alleged Delay.

E. Contractor shall make all books, records and accounts relating to the claims permitted by this Article, including, but not limited to, the documentation of costs required by paragraph (C) of this Article and the Impact Analysis required by paragraph (D) of this Article, available for inspection and audit by Con Edison and its representatives at all times, including after the termination or expiration of the Contract. Contractor's failure to provide timely notice of a claim, as required by paragraph (B) of this Article, or to collect, segregate, maintain, and make available for inspection and audit by Con Edison and its representatives all books, records and accounts relating to the claims permitted by this Article 16, including, but not limited to, the documentation of all costs sought in the claim, as required in paragraph (C) of this Article, or to timely submit such costs on a weekly basis, as required by paragraph (C) of this Article, or to timely submit the Impact Analysis to the extent required by paragraph (D) of this Article shall be deemed a conclusive and binding determination by Contractor that neither the Contractor nor any of its subcontractors have provided any services or materials beyond the scope of the Contract not covered by a written and signed change order and that neither Contractor nor any of its subcontractors have had their costs increased by a breach of the Contract by Con Edison, and such failure shall be deemed a waiver of the claim.
Strict compliance with the applicable requirements of this Article 16 is an express condition precedent to Contractor's right to assert any claim permitted by this Article 16.

F. Contractor's failure to provide timely notice of a claim, as required by paragraph (B) of this Article, or to collect, segregate, maintain, and make available to Con Edison documentation of all costs sought in the claim, as required in paragraph (C) of this Article, or to timely submit such costs on a weekly basis, as required by paragraph (C) of this Article, shall be deemed a conclusive and binding determination by the Contractor that neither the Contractor nor any Subcontractor has provided any services or materials beyond the scope of the Contract not covered by a written and signed change order and that neither the Contractor nor any Subcontractor has

had its costs increased by a breach of the Contract by Con Edison, and such failure shall be deemed a waiver of the claim.

17. Permits, Codes, Laws and Regulations. Contractor shall obtain and pay for all permits and licenses required for the Work except those which can be obtained only by Con Edison or O&R and those which the Contract specifically requires Con Edison or O&R to obtain. Contractor shall comply with all federal, state, and local laws, executive orders, regulations, ordinances, rules, and safety codes insofar as they relate to the Work (including but not limited to the giving of notices and the payment of fees) and shall defend, save harmless and indemnify Con Edison and its affiliates (including, but not limited to, O&R) and their respective, trustees, directors, officers, agents, representatives and employees against all liability arising out of Contractor's failure to do so. Contractor shall promptly examine all Contract documents and notify Con Edison in writing if it appears that any of them may fail to conform to any such code, law, ordinance, rule or regulation. Contractor shall provide Con Edison with the original or a copy of permits, certificates, receipts and other evidence establishing its compliance with the obligations imposed by this Article, including, but not limited to, the signed, sworn, payrolls or transcripts thereof setting forth the name and address of each workman, laborer or mechanic, the occupations worked, the hourly wage paid, and the supplements paid or provided, to the extent required by Section 220(3-a)(e) of the New York State Labor Law and the provisions it references, and a copy of any payment bond required by Section 137 of the New York State Finance Law. Without limiting the generality of the foregoing, Contractor agrees to comply with the Fair Labor Standards Act and, as applicable, with the provisions contained in Appendix A hereto, a copy of which has been furnished or made available to Contractor, which is incorporated in these Standard Terms and Conditions as if fully set forth herein. It contains clauses applicable to, and certifications required to be provided by, subcontractors to contractors to the Federal Government.

18. Quality Assurance/Quality Control. Contractor shall establish and maintain a quality assurance/quality control program which shall include procedures for continuous control of all construction and comprehensive inspection and testing of all items of Work, including any Work performed by Subcontractors, so as to ensure complete conformance to the Contract with respect to materials, workmanship, construction, finish, functional performance, and identification. The program established by Contractor shall comply with any quality assurance/quality control requirements incorporated in the Contract.

19. Protection of Persons, Work and Property.

A. The risk of loss or damage to the Work prior to full completion of all Work hereunder and final acceptance thereof by Con Edison shall be borne by Contractor.

B. In the course of performing the Contract, Contractor shall at all times exercise every reasonable precaution to protect persons and property and items of Work. Contractor shall at its own expense design, furnish, and erect such barricades, fences and railings, give such warnings, display such lights, signals and signs, exercise such precautions against fire, adopt and enforce such rules and regulations, and take such other precautions as may

be necessary, desirable or proper, or as may be directed by Con Edison. Contractor shall provide and maintain in good working order at all times an adequate, approved system for promptly extinguishing fires. Fire alarms, extinguishing equipment and water lines shall be continually inspected by Contractor and shall at all times be accessible and ready for immediate use.

C. Contractor shall, while on or about the site of Work, observe and comply with all fire, safety, hazard, "No Smoking", and all other rules and regulations heretofore or hereafter prescribed by Con Edison. Safety hats shall be worn at all times in the Work area by Contractor's employees. Whenever the Contractor or any permitted subcontractor performs Work hereunder, its employees and consultants are required to have available for review by Con Edison a Contractor (or a subcontractor) or government-issued name and photo identification.

D. Contractor shall, at no additional cost to Con Edison, comply with all reasonable requests of Con Edison to enclose or specially protect Work, property or persons. If Con Edison determines that Work, property or persons are not adequately protected after any such requests, then it may, without prejudice to any other rights it may have hereunder or under applicable law, order an immediate suspension of the Work or take such steps as it deems necessary to protect Work, property or persons. The cost of such steps shall be charged to Contractor and may be deducted from any payments due Contractor, and Contractor shall not be entitled to be compensated for any costs of its own arising from such suspension.

E. Contractor shall promptly report in writing to Con Edison all accidents whatsoever arising out of or in connection with the performance of the Contract, whether on or adjacent to the construction site, which result in death, injury or property damage, giving full details and statements of witnesses. In addition, if death or serious injury or serious damage is caused, Contractor shall immediately report the accident by telephone to Con Edison.

F. Contractor shall provide at the construction site such equipment and medical facilities as are necessary to supply first aid service to any persons who may be injured in the course of performance of the Work and shall have standing arrangements for the removal and hospital treatment of such persons. If any claim is made by any person against Contractor or any other contractor on account of any accident, Contractor shall promptly report it in writing to Con Edison, giving full details of the claim.

G. Contractor will not be permitted to perform any field work until it has submitted to Con Edison and received approval of a site-specific health, safety, and environmental plan, which shall address all hazards that may be encountered and shall conform to any and all requirements stated in the Contract.

H. If in the reasonable opinion of Contractor greater precautions than those required herein or directed by Con Edison are advisable, Contractor shall implement such precautions and advise Con Edison thereof. In the event of an emergency threatening injury to persons or damage to property Contractor shall take all necessary action immediately and shall promptly notify Con Edison thereof.

20. Vehicle Spills. Contractor is required to assure that all vehicles, including those of Subcontractors and suppliers, used in the performance of work for Con Edison are maintained in good working condition and are not leaking any fluids. Particular attention is to be paid, without limitation, to hydraulic systems on each vehicle.

The driver must immediately notify a Con Edison authorized representative in the event of a leak or spill from a vehicle or container carried on a vehicle while at the job site. The driver must wait for instructions before moving the vehicle unless field conditions require it, and then, only to the nearest safe point.

The driver will be required to eliminate the leak or spill before leaving the job site. Contractor shall be required to reimburse Con Edison and O&R for all costs associated with the cleanup of leaks and spills.

21. Maintenance of Work Site. Contractor shall, at its own expense, store its apparatus, material, supplies and equipment in such orderly fashion as will not interfere with the progress of the Work or the work of any other contractors; clean up and remove on a daily basis and more frequently if directed by the Con Edison representative all refuse, rubbish, scrap materials, and debris so that at all times the Work site shall present a neat, orderly and workmanlike appearance; and, before final payment, remove all surplus material, falsework, and temporary structures, including any foundations thereof. If, in the opinion of Con Edison, Contractor has failed to comply with any provisions of this Article, Con Edison may order any or all of the Work suspended until the condition is corrected, and all costs associated therewith shall be borne by Contractor.

22. Subsurface Conditions Found Different. Con Edison shall not be obliged to show any subsurface conditions on any drawing, plans or specifications it furnishes Contractor, and if none are shown that is not to be interpreted as indicating that there are none of significance to the Work. Should Contractor encounter subsurface conditions at the site materially different from any of the subsurface conditions that are shown on the drawings, plans or specifications, it shall immediately give notice to Con Edison of such conditions before the conditions are disturbed. Con Edison will thereupon promptly investigate the conditions, and if it finds that they materially differ from those shown on the plans or indicated in the specifications it will make any changes necessary. Any increase or decrease in the cost of or time required for performance resulting from such changes shall be dealt with in accordance with the provisions of Article 13 (Changes (Including Extra Work)) and Article 6 (Excusable Delay).

23. Inspection and Tests and Correction of Defects.

A. Con Edison shall have the right to inspect any and all records of Contractor

or its Subcontractors whenever Con Edison believes that this is necessary to assure it that the Work is proceeding and will proceed in full accordance with the requirements of the Contract and on schedule. In addition, all parts of the Work shall, throughout the time of performance of the Contract, be subject to inspection by Con Edison. Con Edison shall be the final judge of the quality and acceptability of the Work, the materials used therein, and the processes of manufacture and methods of construction employed in connection therewith. Contractor shall provide Con Edison's representatives with safe and proper facilities for access to and inspection of the Work, both at the construction site and at any plant or other source of supply where any equipment, material, or part may be located. Con Edison shall have the right to witness any test Contractor, or any third party acting on behalf of Contractor, conducts relating to the Work, and Contractor shall give Con Edison advance written notice thereof. Con Edison shall have the right to require Contractor to perform additional tests at reasonable times and places. The cost of any additional tests required by Con Edison shall be borne by Con Edison unless they disclose a defect or nonconformity in the Work, in which case the cost shall be borne by Contractor.

B. No inspection, failure to inspect, or waiver of inspection on the part of Con Edison or anyone acting on its behalf shall relieve Contractor of its duty to complete the Work in full accordance with the requirements of the Contract.

C. Should it appear to Con Edison at any time prior to the completion and acceptance of the entire Work, whether as a result of the aforementioned inspections and tests or otherwise, that any part of the Work is not suitable or of good quality or fails to conform to Contract requirements, Con Edison shall have the option to:

(i) halt the continuation of such Work; and

(ii) require Contractor, at Contractor's sole expense and within such reasonable time as may be fixed by Con Edison, to reconstruct, replace or correct the applicable Work and remedy any damage to property of Con Edison and others occasioned by such Work or the materials, methods or processes employed in connection therewith; or

(iii) perform or have performed by another all tasks stated in subparagraph (ii) above and withhold or recover the cost thereof from Contractor; or

(iv) accept the unsuitable or nonconforming Work and reduce the Contract price by an amount Con Edison deems equitable.

In any event, Contractor shall reimburse Con Edison for all costs attributable to delays in the Work or additional work performed by other contractors to the extent they arise from Contractor's unacceptable Work.

24. Effect of Con Edison Approval. Contractor's obligations under this Contract shall not be affected by the grant to, or the exercise or non-exercise by, Con Edison of rights to inspect, test, review or approve Contractor's performance of the Work, including, without limitation, documents such as drawings, written procedures or daily reports. Any approval by Con Edison of any materials, workmanship, equipment, documents or other acts or things done or furnished or proposed by Contractor shall be construed merely as indicating that at the time of the approval Con Edison was not aware of any reason for objecting, and no such approval shall release Contractor from full responsibility for the accurate and complete performance of the Contract in accordance with its terms. Any failure of a Con Edison representative to object to any failure by Contractor to comply with any or all of the requirements of the Contract, even if apparent or discoverable, shall not be effective as a waiver of such requirements or as an acceptance of the non-compliance.

25. Subcontracting.

A. Contractor shall not subcontract all or any portion of the performance to be rendered hereunder without the express written approval of Con Edison as to the tasks to be subcontracted and the Subcontractor; provided, however, that this limitation shall not apply to the purchase of standard commercial supplies or raw materials. Contractor may utilize the services of specialty Subcontractors if they are customarily used in the industry on the work subcontracted, provided Con Edison has first approved the proposed Subcontractor. Contractor shall, as soon as practicable after execution of the Contract, notify Con Edison in writing of any Subcontractor proposed to be employed on the Work. Contractor shall not be relieved of any obligations hereunder by reason of any such approved subcontracting.

B. Contractor, shall, notwithstanding Con Edison's approval, be as fully responsible for the acts and omissions of its Subcontractors and their agents and representatives as it is for its own acts and omission. Should any approved Subcontractor fail to perform to the satisfaction of Con Edison, Con Edison shall have the right to rescind its approval and to require the Work subcontracted to be performed by Contractor or by another approved Subcontractor. Nothing contained herein shall create any contractual rights in any Subcontractor against Con Edison. Contractor shall cause all subcontracts applicable to the Work to contain provisions which require the Subcontractor to provide the same insurance coverage as is required of Contractor, and comply with the other requirements relating to insurance as are required of Contractor hereunder, including, but not limited to, naming Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Consolidated Edison, Inc. and Contractor as additional insureds. Subcontracts shall provide for Contractor the same rights against the Subcontractor as Con Edison or O&R has hereunder against Contractor and shall expressly state that such provisions shall also be for the benefit of Con Edison and O&R.

C. If the Contract is on a cost-plus or T&M basis and is in an amount exceeding $100,000 and Contractor enters into a subcontract with a Subcontractor to whom Contractor is subcontracting all or any portion of the performance to be rendered hereunder on a cost-plus or T&M basis in an amount exceeding $5,000, immediately after Contractor enters into such subcontract, Contractor shall send a copy of such subcontract to:

Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, N.Y. 10003
Attention: Purchasing Department
Section Manager,
Technology and Strategic Initiatives

26. Title to Materials and Completed Work. Contractor shall obtain and maintain title to all materials, equipment and structures to be installed by it in the Work, free from all liens, claims and encumbrances. Title to all Work completed or in the course of construction and to all materials, equipment and structures as to which any payment has been made by Con Edison shall be in Con Edison, but this shall not affect Con Edison's right to require the correction of defective or non-conforming Work nor relieve Contractor of any other obligation arising under the Contract.

27. Investigation and Audit. Contractor hereby agrees to cooperate fully with any investigation, audit, or inquiry conducted by Con Edison or O&R or any federal, state or local government agency or authority relating to any aspect of this Contract or the Work, and the Contractor shall make all of its books, records, and accounts available for inspection and audit in connection therewith. Moreover, in the event the Contract now provides or in the future is revised to provide that the Work or any part thereof shall be done on a cost-reimbursable basis (whether or not a fee has, in addition, been fixed by the parties), T&M basis or similar basis, or if payment on such basis is to be made under Article 32 (Suspension), or Article 33 (Termination for Convenience) of these Standard Terms and Conditions), Contractor shall maintain, and in the event there are subcontracts on any of such bases shall cause the Subcontractor(s) to maintain, detailed books, records and accounts covering costs incurred in connection with such Work or, as applicable, time spent and materials used. Contractor shall make or cause to be made said books, records and accounts available for inspection and audit by Con Edison, O&R, the investigating governmental agency or authority and their respective authorized representatives during the term of this Contract and for a period of six (6) years after final payment hereunder. If an investigation, audit, or inquiry discloses that Con Edison has paid Contractor for any costs which were not in fact incurred or for any time spent or materials used which were not in fact spent or used or for any costs that were improperly charged, Contractor shall refund to Con Edison an amount equal to such payment.

28. Con Edison's Performance. Con Edison shall perform any action required of it by the Contract in order to enable Contractor to perform hereunder. Failure by Con Edison to substantially perform any such obligation shall not give rise to an action for damages by Contractor, in contract or in tort, or entitle Contractor to cancel or rescind the Contract or abandon performance hereunder. Unexcused nonperformance by Con Edison shall,

however, relieve Contractor of its obligation to perform hereunder to the extent that it prevents Contractor from performing. Nonperformance by Con Edison shall be excused where caused by an act or omission of Contractor.

29. Liens. To the fullest extent permitted by law, Contractor shall defend, save harmless and indemnify Con Edison and its affiliates (including, but not limited to, O&R), and as any owner of the real property on which the project is situated, from and against all claims, liens or attachments growing out of the demands of Subcontractors, mechanics, workmen, materialmen and furnishers of machinery, equipment, tools, or supplies, including commissary, in connection with the Work, including all losses, liabilities, fees, costs and expenses (including attorneys' fees and legal costs) arising out of or in connection therewith. Contractor shall deliver the Work to Con Edison free and clear of all liens, claims, and encumbrances, and shall furnish Con Edison a certificate to that effect upon request. Contractor shall furnish Con Edison with a Contractor Affidavit – Final Full Release And Waiver of Lien document and, for each Subcontractor, a Subcontractor Affidavit – Final Full Release And Waiver of Lien document, duly executed and delivered by Contractor and its Subcontractors, as applicable, with the presentation of Contractor's final invoice for payment. Such documents shall, among other things, waive, release and discharge all claims and liens relating to the Work, the project or the Contract and defend, indemnify and hold harmless Con Edison and its affiliates (including, but not limited to, O&R), and any owner of the real property on which the project is situated, from and against such claims and liens and any related losses, liabilities, fees, costs and expenses. Such documents shall be in a form reasonably satisfactory to Con Edison and shall in all respects be read and interpreted consistent with Section 34 of the New York Lien Law (or its successor). Neither the final payment, nor payment of any part of the retained percentage shall become due until Contractor furnishes such documents. Con Edison may withhold from payment an amount sufficient to protect Con Edison against any claims, liens or attachments. Any liens arising from Contractor's Subcontractors, mechanics, workmen, materialmen and furnishers of machinery, equipment, tools, or supplies, including commissary, must be fully bonded or otherwise discharged by Contractor in accordance with applicable law, within five (5) days of the filing of the lien. If Contractor fails to bond or otherwise discharge such lien, Con Edison may take any action it deems appropriate to discharge or remove such lien, including, but not limited to, payment directly to the lienor (in which case the payment to the lienor shall be deemed payment to Contractor under the Contract), or discharge of such lien by depositing monies into court or filing of a lien discharge bond, and withhold or deduct the amount of such deposit(s) and all other applicable costs and expenses from any payment otherwise due to Contractor or, if no payment is due, Contractor shall pay to Con Edison all losses, liability, damages, costs, fees and expenses incurred by Con Edison as a result of the Contractor's failure to discharge such a lien, including, but not limited to, any premiums for a discharge bond and attorneys' fees. If any lien remains unsatisfied after final payment has been made to Contractor, Contractor shall refund to Con Edison all monies that Con Edison may be compelled to pay in discharging such lien, including all costs and attorneys' fees.

30. Bonds. Contractor shall furnish performance or payment bonds, or both, that may be required by law or requested at any time by Con Edison (including, but not limited to, any payment bonds that are required by Section 137 of the New York State Finance Law

when a municipality issues a permit that is subject to Section 220 of the Labor Law). Any and all such bonds shall be in a form and in an amount, and shall have a surety or sureties, acceptable to any governmental authority having jurisdiction and to Con Edison. The premiums for all such bonds which are required by law (including, but not limited to, any payment bonds required by Section 137 of the New York State Finance Law) or which have been requested by Con Edison prior to the time of the execution of the Contract or which are required by the Contract itself shall be deemed to be included in the Contract price, and no additional compensation shall be payable to Contractor with respect to such bonds. If a bond is required by Con Edison after the Contract is executed, Contractor shall be reimbursed for the cost thereof, without any markup if it has been previously approved by Con Edison, upon submission by Contractor of satisfactory evidence of payment therefor. No change order, extension of the time for completion, failure to enforce any rights arising under the Contract, or other act or forbearance of Con Edison shall operate to release or discharge any surety or sureties under any such bonds, and such bonds shall so provide.

31. Other Contractors.

A. Contractor shall fully cooperate with other contractors and any Con Edison or O&R employees at or near the site of the Work and carefully coordinate its own work with that performed by them. Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Con Edison or O&R.

B. If any other contractor or any Subcontractor shall suffer loss or damage through acts or neglect on the part of Contractor, Contractor shall use its best efforts to settle the matter with such other contractor or Subcontractor. If such other contractor or Subcontractor asserts any claim against Con Edison or any of its affiliates (including, but not limited to, O&R) based on such loss or damage, Con Edison shall notify Contractor, and Contractor shall indemnify and save Con Edison and its affiliates (including, but not limited to, O&R) harmless from and against any such claim and any loss, liability, damage or expense arising therefrom or in connection therewith (including attorneys' fees and legal costs).

C. Contractor and its Subcontractors shall keep informed of the progress and the details of work of other Con Edison contractors at the Work site (and of Con Edison or O&R) and shall notify Con Edison (or O&R, for Work ordered by O&R) immediately of lack of progress or defective workmanship on the part of any of them (or of Con Edison or O&R). Failure by Contractor to keep informed of other work in progress at the site or to give notice of lack of progress or defective workmanship by others shall be deemed an acceptance by Contractor of such other work insofar as it relates to or affects its own Work.

32. Suspension. Con Edison shall have the right, for its convenience, to suspend all or part of Contractor's performance hereunder at any time by written notice. Contractor shall, as soon as possible, resume any suspended Work when so directed by Con Edison. The time for performance shall be extended for a period equal to the delay

caused by such suspension. If such suspension continues beyond a reasonable period, Contractor shall be entitled to be reimbursed for any out-of-pocket costs (exclusive of field and home office overhead or costs resulting from loss of efficiency or Work done out of sequence) which it establishes to the reasonable satisfaction of Con Edison (obtained through audit if required by Con Edison) were incurred by it thereafter solely by reason of such suspension, provided, however, that such entitlement is conditioned upon Contractor's notifying Con Edison in writing within fifteen (15) days after the beginning of such suspension that additional costs will or may be incurred thereby and upon Contractor's making claim therefor in writing within thirty (30) days after Con Edison's notice to resume work. In no event shall Contractor be entitled to a profit on such costs.

33. Termination for Convenience.

A. Con Edison may, for any reason whatsoever, including its own convenience, terminate the Contract, in whole or in part, upon ten (10) days' written notice to Contractor without liability except as expressly stated in this Article. Upon receipt of such termination notice, Contractor shall: (1) cease performance of the Work to the extent specified by Con Edison in the notice of termination and thereafter do only such Work with respect to the terminated portion of the Contract as may be necessary to preserve and protect Work already performed or in progress; (2) place no further orders or subcontracts for services, materials or equipment, except as may be necessary for completion of such portion of the Work as is not terminated; and (3) procure cancellation of all existing orders and subcontracts to the extent they relate to the performance of Work terminated (except to the extent that Con Edison requests that any such order or subcontract be assigned to Con Edison, in which case Contractor shall assign such designated orders and subcontracts to Con Edison without additional cost or expense to Con Edison). Upon Con Edison’s request, Contractor shall promptly provide Con Edison with Contractor’s sworn statement stating, for each order and subcontract (i) the original price of the order and subcontract and the price of each change order thereunder together with a description of the change order, (ii) the amount that Contractor paid under the order and subcontract and each change order thereunder, and (iii) the amount of retention held by Contractor under the order and subcontract and each change order thereunder.

B. In the event of such termination, Con Edison shall, in full discharge of all its obligations to Contractor, pay termination charges as follows: With respect to lump sum contracts, a percentage of the Contract price reflecting the percentage of Work performed prior to the effective date of the termination; with respect to cost reimbursable contracts, allowable costs incurred prior to the effective date of termination plus an equitable portion of any fixed fee provided for in the Contract; with respect to time-and-materials contracts, for time expended and materials purchased and paid for prior to the effective date of the termination at the Contract rates; and with respect to unit price contracts, for units of Work completed prior to the effective date of termination at Contract rates. In addition, regardless of the type of contract,

Con Edison shall reimburse Contractor for any unavoidable out-of-pocket costs of cancellation payments to Subcontractors resulting directly from the termination which Con Edison agrees in writing were not taken account of in the aforementioned payments. Upon Con Edison's request, Contractor shall promptly provide Con Edison with a sworn statement itemizing these cancellation costs and promptly furnish to Con Edison all applicable contractual documents to which the cancellation costs relate or under which the cancellation costs arise. Contractor shall not be entitled to be compensated for any other costs arising from the termination, direct or indirect (including, without limitation, field and home office overhead and accountants' or attorneys' fees), whether or not based on Work performed prior to the effective date of termination. All termination payments shall be less (a) prior amounts paid on account of the Contract price and (b) the value of any salvage available to Contractor with respect to any material, structures or equipment purchased or manufactured prior to cancellation. Contractor shall use its best efforts to minimize termination charges. All termination charges shall be subject to audit by Con Edison.

C. If payments on account of the Contract price made prior to the effective date of termination exceed the above termination charges, the excess shall be refunded promptly to Con Edison. Except as agreed in writing, termination shall not relieve either party of any obligation which may arise out of Work performed prior to termination, including, but not limited to, Contractor's obligation to correct defective work and all warranty obligations. In no event shall Con Edison be liable to Contractor for damages of any kind whatsoever arising out of the termination, whether based on lost profit, unrecovered or increased home office or other overhead resulting from termination-related reductions in workload or in direct costs, lost opportunities to obtain other jobs, or otherwise.

34. Confidentiality. All reports, specifications, software, drawings, photographs, technical information, information regarding locations of facilities, and other information furnished by Con Edison or O&R or originally furnished or prepared by Contractor or its subcontractors in connection with the Work shall, except to the extent indicated in writing by Con Edison (or O&R, with respect to Work ordered for O&R), be held confidential and not disclosed to any third parties, be used only in connection with the performance of the Work, and be delivered or returned to Con Edison upon completion of such performance. Contractor shall not use Con Edison's or O&R's name, or otherwise identify Con Edison or O&R, in connection with any advertisement or any announcement regarding the Work or for any other purpose without obtaining Con Edison's prior written permission or, with respect to O&R, O&R's prior written permission. Contractor acknowledges that its violation of the provisions of this article may result in irreparable harm to Con Edison and O&R, the amount of which would be difficult to ascertain and which would not be adequately compensated for by monetary damages. Accordingly, Contractor agrees that either or both of Con Edison and O&R will be entitled to injunctive relief to enforce the terms of this article, in addition to their remedies at law.

35. Infringement. If Contractor, in performing this Contract employs, constructs or

provides any design, process, material, tool or equipment covered by a patent, copyright, trademark or other proprietary right, Contractor shall, if it does not itself own such right, at its own expense secure permission prior to its use hereunder by securing a suitable agreement from the owner of such right. Contractor shall indemnify and hold Con Edison and its affiliates (including, but not limited to, O&R) and their respective trustees, directors, officers, employees, agents, representatives, successors and assigns harmless from and against any claim, suit or proceeding for infringement of any patent, copyright, trademark or other proprietary right brought against Con Edison, and any loss, liability, damage or expense or relating thereto, resulting from the use or manufacture of any designs, processes, materials, tools or equipment provided to Con Edison or O&R or employed in the performance of the Work. Contractor shall provide for the defense of any such claim, suit or proceeding, and shall pay all costs and expenses in connection therewith, including compensation of experts and counsel, and all damages and costs awarded against an indemnified party. Con Edison shall notify Contractor of any such claim, suit or proceeding in writing and give Contractor authority, information and assistance (at Contractor's expense) for the defense thereof. In the event that the use of anything furnished or constructed hereunder is enjoined, Contractor shall promptly, at its own expense and at its option, either (a) procure for Con Edison (or O&R with respect to Work performed for O&R) the right to continue using it or (b) with the approval of Con Edison, (i) replace it with a noninfringing equivalent or (ii) modify it so it becomes noninfringing.

36. Indemnification. To the fullest extent allowed by law, Contractor agrees to defend, indemnify and hold harmless Con Edison and its affiliates (including, but not limited to, O&R) and their respective trustees, directors, officers, employees, agents, representatives, successors and assigns from and against all claims, damage, loss and liability, including costs and expenses, legal and otherwise, for injury to or the death of persons, or damage to property, including the property of Con Edison or O&R, and statutory or administrative fines, penalties or forfeitures resulting in whole or in part from, or connected with, the performance of the Work by Contractor any subcontractor or their respective agents, servants, employees or representatives, and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison or non-parties to the Contract (including, but not limited to, O&R). Contractor expressly agrees that Con Edison and O&R may pursue claims for contribution and indemnification against Contractor in connection with claims against Con Edison or O&R for injury and/or death to Contractor’s employees notwithstanding the provisions of Section 11 of the Workers’ Compensation Law limiting such claims for contribution and indemnification against employers, and Contractor hereby waives the limitations on contribution and indemnity claims against employers provided in Section 11 of the Workers’ Compensation Law insofar as such claims are asserted by Con Edison or O&R against Contractor.

37. Insurance. Contractor shall procure and maintain the following insurance (and such other limits and additional insurance as may be required by the Contract) at its own expense until completion and acceptance of performance hereunder, and thereafter to the extent stated below, with not less than the monetary limits specified. The insurance shall be placed with insurance companies acceptable to Con Edison.

A. Employment related insurance.

(i) Workers' Compensation Insurance as required by law.

(ii) Employer's Liability Insurance, including accidents (with a limit of not less than $1,000,000 per accident) and occupation diseases (with a limit of not less than $1,000,000 per employee).

(iii) Where applicable, insurance required by the United States Longshoremen's and harbor Workers' Act, the Federal Employers' Liability Act, and the Jones Act.

B. Commercial General Liability Insurance, including Contractual Liability, with limits of not less than $7,500,000 per occurrence for bodily injury or death and not less than $5,000,000 per occurrence for property damage or a combined single limit of not less than $7,500,000 per occurrence and, for at least three (3) years after completion of performance hereunder, Products/Completed Operations Liability Insurance with similar but separate and independent limits. The required limits may be met with a combination of primary and excess liability policies. The insurance shall be in policy forms which contain an “occurrence” and not a “claims made” determinant of coverage. There shall be no policy deductibles without Con Edison’s prior written approval. The insurance shall contain no exclusions for explosion, collapse of a building or structure, or underground hazards. The insurance policy or policies shall name Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Consolidated Edison, Inc. as additional insureds with respect to the Work and completed operations. There shall be no exclusion for claims by Contractor’s or any Subcontractor’s employees against Con Edison or O&R based on injury to Contractor’s or any Subcontractor’s employees. To the extent any Work is in or related to public streets, roadways, walkways, or similar areas and is being performed under a New York State, City of New York, or other municipal permit, the insurance policy or policies shall also name the State of New York, the City of New York or such other municipality as additional insureds. At Con Edison’s request, and without any additional cost to Con Edison, the insurance policy or policies shall also name the owners of adjoining properties as additional insureds where any portion of the Work hereunder involves or impacts such adjoining properties.

C. Commercial Automobile Liability Insurance, covering all owned, non-owned and hired automobiles used by Contractor or any subcontractors, with a combined single limit of not less than $1,000,000 per accident for bodily injury or death and property damage.

D. Where the Work involves the use of aircraft, Aircraft Liability Insurance, covering all owned, non-owned and hired aircraft, including helicopters, used by Contractor or any Subcontractors, with a combined single limit of not less than $7,500,000 for bodily injury or death and property damage.

The insurance policy shall name Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Consolidated Edison, Inc. as additional insureds.

E. For the asbestos abatement portion and the lead abatement portion of the Work, Asbestos Abatement General Liability Insurance and Lead Abatement Liability Insurance, as applicable, each with a combined single limit of not less than $7,500,000 for bodily injury or death and property damage. Each insurance policy shall name Con Edison, O&R and Consolidated Edison, Inc. as additional insureds. Where the abatement work is to be performed by a subcontractor, Contractor shall require the subcontractor to name Contractor, Con Edison, O&R and Consolidated Edison, Inc. as additional insureds and to submit copies of the policies to Con Edison.

F. In the event the Work includes any architectural, engineering, design, or other professional services, Professional Liability Insurance in the amount of not less than $3,000,000 per occurrence for the duration of the Contract and for at least three years following final completion and acceptance of the Work.

Contractor shall, and shall cause any subcontractor to, furnish Con Edison with written notice at least ten (10) days prior to the effective date of cancellation of the insurance or of any changes in policy limits or scope of coverage. All coverage of additional insureds required hereunder shall be primary coverage and non-contributory as to the additional insureds. All insurance required hereunder shall contain a waiver of subrogation in favor of the additional insureds.

At least three days prior to commencing Work, Contractor shall furnish Con Edison with copies of the policies specified in paragraphs B and E of this Article and Certificate(s) of Insurance covering all required insurance and signed by the insurer or its authorized representative certifying that the required insurance has been obtained. Such certificates shall state that the policies have been issued and are effective, show their expiration dates, and state that Con Edison is an additional insured with respect to all coverages enumerated in paragraphs B, D and E of this Article. Con Edison shall have the right, upon request, to require Contractor to furnish Con Edison, with a copy of the insurance policy or policies required under paragraphs A. C, D and F of this Article.

To the fullest extent allowed by law, Contractor agrees that this is an insured contract and that the insurance required herein is intended to cover each of Con Edison and O&R for its own liability for negligence or any other cause of action in any claim or lawsuit for bodily injury or property damage arising out of the Work.

For purposes of interpretation or determination of coverage of any policy of insurance or endorsement thereto, Contractor shall be deemed to have assumed tort liability for any injury to any employee of Contractor or Con Edison arising out of the performance of the Work, including injury caused by the partial or sole negligence of Con

Edison and notwithstanding any statutory prohibition or limitation of Contractor's contractual obligations hereunder.

In the event of any bodily injury, death, property damage, or other accident or harm arising out of, relating to, or in any way connected with, the Work, Contractor, in accordance with the provisions of the Commercial General Liability Insurance policies, shall promptly and in writing notify the insurer(s) issuing such policies, regardless of the employment status of the person who sustains or on whose behalf the injury, death, damage, accident or harm is alleged. Such notice shall inform such insurer(s) that the notice is being provided on behalf of Contractor and on behalf of Con Edison, O&R and Consolidated Edison, Inc. and that it is intended to invoke the coverage of the policies to protect the interests and preserve the rights of Contractor, Con Edison, O&R and Consolidated Edison, Inc. under the policies in the event that any claim, allegation, suit, or action is made against Contractor, Con Edison, O&R and/or Consolidated Edison, Inc.. In addition, in the event of any bodily injury, death, and property damage, or other accident or harm that is in any way connected with the Work and arises out of, relates to, or is in any way connected with, the use, operation, alteration, repair, or maintenance (including, without limitation, cleaning or painting) of (i) an automobile, truck, or any other kind of land-based vehicle, or (ii) a ship, vessel, boat, barge or other water craft, Contractor, in accordance with the provisions of its Comprehensive Automobile Liability Insurance policies and/or its marine liability insurance (including, but not limited to, Protection and Indemnity Insurance), as applicable, shall promptly and in writing notify the insurer(s) issuing such policies of the same regardless of the employment status of the person who sustains or on whose behalf the injury, death or damage, accident or harm is alleged. Such notice shall inform such insurer(s) that the notice is being provided on behalf of Contractor and on behalf of Con Edison, O&R and Consolidated Edison, Inc. and that it is intended to invoke the coverage of the policies to protect the interests and preserve the rights of Contractor, Con Edison, O&R and Consolidated Edison, Inc. under the policies in the event of any claim, allegation, suit, or action against Contractor, Con Edison, O&R and/or Consolidated Edison, Inc. The notices required by this paragraph shall be in addition to notices that Contractor provides to its insurers issuing policies of Workers' Compensation Insurance, Employer's Liability Insurance, or coverage required by the United States Longshoremen's and Harbor Workers' Act, the Federal Liability Act, or the Jones Act. Simultaneously with providing the written notice required by this paragraph to the applicable insurers, Contractor shall provide a copy of such written notice (including a copy of any incident or accident report and, if applicable, the form C-2 ("Employer's Report Of Work-Related Injury/Illness")), as follows: if the accident or incident occurs in connection with Work for Con Edison, copies shall be sent to : Consolidated Edison Company of New York, Inc., Law Department, 4 Irving Place, New York, N.Y. 10003, Attention: General Litigation-Insurance Specialist, Room 1840; and if the accident or incident occurs in connection with Work for O&R, copies shall be sent to: Orange and Rockland Utilities, Inc., One Bluehill Plaza, Pearl River, NY 10965, Attention: Legal Services, 4th Floor.

Certificates of Insurance identifying the Contract shall be sent to:

Consolidated Edison Company of New York, Inc.
4 Irving Place, 17th Floor
New York, N.Y. 10003

Attention: Purchasing Department
Supplier Management Group (SMG)

38. Taxes. Except as may be expressly provided to the contrary elsewhere in the Contract (and notwithstanding the provisions of Article 47 (Conflicting Documents; Headings"), the Contract price includes all federal, state and local sales, use, excise, occupational, franchise, property, gross receipts, privilege and other taxes that may be applicable to the Work, and all federal, state and local taxes, contributions, and premiums imposed upon or measured by Contractor's and any Subcontractor's payrolls.

39. Amendments. No revision or modification of or amendment to the Contract shall be valid or binding unless in writing and signed by an authorized representative of Con Edison.

40. Assignment. Contractor shall not assign the Contract or any or all of its rights under the Contract without the written consent of Con Edison, and any assignment made without such consent shall be void. In the event of an assignment of the Contract, Contractor shall not be relieved of its obligations under the Contract, but shall be jointly and severally liable with the assignee for all of the Contractor's obligations under the Contract. If Contractor assigns all or any part of any monies due or to become due under this Contract, the instrument of assignment shall contain a clause to the effect that the right of the assignee to any monies due or to become due to Contractor shall be subject to any and all claims based on services rendered or omitted or materials supplied or not supplied in the performance of the Work.

41. Cancellation for Default. In the event Contractor is in default of any of its obligations under the Contract, Con Edison shall have the right, on written notice to Contractor and any sureties, to cancel the Contract for default. Contractor shall be deemed to be in default hereunder if it is in default of any of its obligations under the Contract or makes any statement or performs any act indicating that it will not perform one or more of such obligations (whether or not the time has yet arrived for performance thereof) or rejects the Contract under the United States Bankruptcy Code or ceases to pay its debts promptly or becomes insolvent or commences or has commenced against it any insolvency proceeding or finds its affairs placed in the hands of a receiver, trustee, or assignee for the benefit of creditors. In the event of cancellation for default hereunder, Article 33 (Termination for Convenience), shall not apply, and Con Edison shall have all rights and remedies provided by law and the Contract. Without intending to limit the generality of the foregoing, it is specifically understood and agreed that Con Edison shall have the right, at its election and without prejudice to any other remedies, (i) to exclude Contractor from the construction site, or any portion of the construction site, (ii) to complete or employ a third party to complete the Work or any portion of the Work, and hold Contractor liable for any additional cost occasioned thereby, (iii) to take possession of any or all materials, tools, equipment and appliances at the construction site for the purpose of completing the Work or any portion of the Work, (iv) to compel Contractor to

assign any or all subcontracts with Subcontractors to Con Edison without additional cost or expense to Con Edison, and/or (v) to negotiate new contractual arrangements with Subcontractors for such Subcontractors to complete all or any portion of the work on terms agreeable to Con Edison. Upon Con Edison's request, Contractor shall promptly provide Con Edison with Contractor's sworn statement stating, for each subcontract with each Subcontractor (i) the original price of the subcontract and the price of each change order thereunder together with a description of each such change order, (ii) the amount that Contractor paid under the subcontract and each change order thereunder, and (iii) the amount of retention held by Contractor under the subcontract and each change order thereunder. Following cancellation of the Contract for default, Contractor shall not be entitled to any further payment until the work has been fully completed and accepted, and Con Edison may retain from any money otherwise due Contractor for services rendered prior to cancellation an amount which Con Edison determines is adequate to cover all damage resulting from Contractor's default. If such costs and damages exceed the unpaid balance, Contractor shall pay the difference to Con Edison. Upon cancellation for default of the Contract under this Article, Con Edison shall be entitled to cancel for default any or all other contracts between the Contractor and Con Edison, and such cancellation shall be governed by this Article. Also, a cancellation for default of any other contract between Contractor and Con Edison shall entitle Con Edison to cancel for default the Contract under this Article. In the event that Contractor demonstrates that a cancellation of the Contract and any other contract cancelled for default is erroneous, the cancellation shall, at Con Edison's option, be withdrawn or be deemed to have been issued as a termination for convenience pursuant to Article 33, and the rights and obligations of the parties hereto shall in such event be governed accordingly.

42. Ownership of Documents and Materials; Ownership of Intangible Property

A. With respect to all documents and materials, including, but not limited to, drawings, plans, specifications, reports, books, photographs, films, tapes, recordings, models, computer programs and source code created or otherwise prepared by Contractor in connection with Work ordered for Con Edison (hereinafter, "Con Edison Materials"), regardless of any statements thereon or therewith purporting to make them confidential or to limit the use Con Edison may make of them, shall be the sole and exclusive property of Con Edison. To the extent that any of the Con Edison Materials comprises copyrightable subject matter, such Materials and the copyrights relating thereto shall be considered "works made for hire" under the copyright law of the United States, and the equivalent of works made for hire as recognized under the copyright laws of other countries. To the extent that any of the Con Edison Materials is not deemed a work made for hire, Contractor hereby assigns to Con Edison such Con Edison Materials, without any requirement of further consideration, all right, title, and interest in and to such Con Edison Materials and the copyrights relating thereto. To the extent that any of the Con Edison Materials does not comprise copyrightable subject matter, Contractor hereby assigns to Con Edison, without any requirement of further consideration, all right, title, and interest in and to all such Con Edison Materials and all intellectual property rights related thereto. Upon the request of Con Edison, Contractor shall execute

any documents that Con Edison deems necessary to effectuate such assignments.

B. With respect to all documents and materials, including, but not limited to, drawings, plans, specifications, reports, books, photographs, films, tapes, recordings, models, computer programs and source code created or otherwise prepared by Contractor in connection with Work ordered for O&R (hereinafter “O&R Materials”), regardless of any statements thereon or therewith purporting to make them confidential or to limit the use O&R may make of them, shall be the sole and exclusive property of O&R. To the extent that any of the O&R Materials comprises copyrightable subject matter, such O&R Materials and the copyrights relating thereto shall be considered “works made for hire” under the copyright law of the United States, and the equivalent of works made for hire as recognized under the copyright laws of other countries. To the extent that any of the O&R Materials is not deemed a work made for hire, Contractor hereby assigns to O&R such O&R Materials, without any requirement of further consideration, all right, title, and interest in and to such O&R Materials and the copyrights relating thereto. To the extent that any of the O&R Materials does not comprise copyrightable subject matter, Contractor hereby assigns to O&R, without any requirement of further consideration, all right, title, and interest in and to all such O&R Materials and all intellectual property rights related thereto. Upon the request of O&R, Contractor shall execute any documents that O&R deems necessary to effectuate such assignments.

C. All inventions, concepts, techniques, processes, improvements, discoveries and ideas, whether patentable or not, conceived by Contractor, its officers, employees, agents or subcontractors in connection with any services ordered or performed for Con Edison (collectively, the "Con Edison Work Product") shall belong solely to Con Edison. Contractor shall disclose immediately to Con Edison all Con Edison Work Product upon its conception. Contractor hereby assigns to Con Edison, at the time of conception of the Con Edison Work Product and without any requirement of further consideration, all right, title and interest in and to all such Con Edison Work Product and all intellectual property rights related thereto. Upon the request of Con Edison, Contractor shall execute any and all documents that Con Edison deems necessary to effectuate and confirm such assignment. Notwithstanding the foregoing, in the event Contractor has incorporated into the Con Edison Work Product any intellectual property that was created prior to the effective date of the Contract that is not owned by Con Edison or O&R (“Prior Work”) and such Prior Work is specifically identified in writing to Con Edison, then such Prior Work shall remain the property of Contractor, and Contractor hereby grants to Con Edison, a non-exclusive, royalty-free, perpetual worldwide license to use, copy, reproduce, publish, disclose and distribute the Prior Work to the extent it is incorporated into the Con Edison Work Product, and to make modifications thereto. Contractor shall not cause or permit the disclosure to any third party of any material information concerning the Con Edison Work Product without the

express prior written consent of Con Edison, which consent may be withheld in the sole and unfettered discretion of Con Edison.

D. All inventions, concepts, techniques, processes, improvements, discoveries and ideas, whether patentable or not, conceived by Contractor, its officers, employees, agents or subcontractors in connection with services ordered or performed for O&R, (collectively, the "O&R Work Product") shall belong solely to O&R. Contractor shall disclose immediately to O&R all O&R Work Product upon its conception. Contractor hereby assigns to O&R, at the time of conception of the O&R Work Product and without any requirement of further consideration, all right, title and interest in and to all such O&R Work Product and all intellectual property rights related thereto. Upon the request of O&R, Contractor shall execute any and all documents that O&R deems necessary to effectuate and confirm such assignment. Notwithstanding the foregoing, in the event Contractor has incorporated any Prior Work into the O&R Work Product and such Prior Work is specifically identified in writing to O&R, then such Prior Work shall remain the property of Contractor, and Contractor hereby grants to O&R, a non-exclusive, royalty-free, perpetual worldwide license to use, copy, reproduce, publish, disclose and distribute the Prior Work to the extent it is incorporated into the O&R Work Product, and to make modifications thereto. Contractor shall not cause or permit the disclosure to any third party of any material information concerning the O&R Work Product without the express prior written consent of O&R which consent may be withheld in the sole and unfettered discretion of O&R.

43. Relationship of Parties. Contractor shall be an independent contractor in the performance of the Work. No right of supervision, requirement of approval or other provision of the Contract and no conduct of the parties shall be construed to create a relationship of principal and agent, partners or joint venturers between the parties, or joint employers of Contractor's employees.

44. Third Party Rights. O&R is a third party beneficiary of the Contract and may enforce the Contract. Con Edison’s affiliates and other non-parties referenced in Articles 4, 7, 14, 17, 19, 25, 27, 29, 31, 35, 36, 37, 44 and 56 are third party beneficiaries and may enforce those Articles and any other articles in which the affiliates or non-parties are specifically referenced. There are no other third party beneficiaries of the Contract.

45. Waiver. Neither the acceptance of the Work or any part thereof nor any payment therefor nor any order or certificate issued under the Contract nor any performance by Con Edison of any of Contractor's duties or obligations nor any failure by Con Edison to insist on strict performance by Contractor of any of the Contract terms or to otherwise assert its rights shall be deemed to be a waiver of any provision of the Contract or of any rights or remedies to which Con Edison may be entitled because of any breach hereof. No cancellation or rescission hereof in whole or as to any part of the Work because of breach hereof shall be deemed a waiver of any money damages to which Con Edison may be entitled because of such breach. No waiver shall be effective against Con Edison unless in writing and signed by Con Edison's authorized representative, and any such

waiver shall be effective only with respect to the particular event to which it specifically refers.

46. Set-Off. Con Edison shall have the right to set off against any sums due Contractor under the Contract or any other contract between Con Edison and the Contractor or otherwise, any claims Con Edison may have against Contractor under the Contract or any other contract between Con Edison and Contractor or otherwise, without prejudice to the rights of the parties in respect of such claims.

47. Conflicting Documents; Headings. To the extent, if any, that the specifications, plans, drawings and other documents that may be incorporated herein conflict with any typewritten provision of the BPA, CPA or purchase order form or the Standard Terms and Conditions of which this Article is a part, the typewritten provision of the BPA, CPA or purchase order form and these Standard Terms and Conditions shall take precedence and govern. In any instance where there is a conflict or inconsistency between a typewritten provision of the BPA, CPA or purchase order form and these Standard Terms and Conditions, the Standard Terms and Conditions shall take precedence and govern unless the typewritten provision of the BPA, CPA, purchase order form or any special conditions incorporated by reference therein expressly refers by number and title to the conflicting or inconsistent provision in these Standard Terms and Conditions and states that such provision does not apply, in which case the conflicting or inconsistent typewritten provision of the BPA, CPA, purchase order form or any special conditions incorporated by reference therein shall take precedence and govern. In the event that Contractor's offer is referred to in the Contract, in any instance where any provisions of the offer are in conflict or inconsistent with other provisions of the Contract, unless there is a clear statement to the contrary in the Contract, such other provisions of the Contract shall take precedence and govern. All rights and remedies provided by the Contract shall, unless otherwise specified herein, be deemed to be cumulative so as to exist in addition to one another and to any other rights and remedies provided by law. The headings of the articles, sections and paragraphs of the Contract are for convenience only and shall not be construed to limit or qualify the meaning of any such article, section or paragraph.

48. Notices. All notices required or permitted to be given under the Contract shall be in writing and given by either party by personal delivery, by reputable overnight courier or certified mail, return receipt requested, addressed to the other at the address shown in the Contract. The address of either party may be changed by written notice to the other.

49. Entire Agreement. The Contract, as it may be amended in accordance with Article 39 (Amendments) of these Standard Terms and Conditions, contains the entire agreement between Con Edison and Contractor with respect to its subject matter. If any provision of the Contract is or becomes legally invalid or unenforceable, the remainder of the Contract shall not be affected thereby. Any prior or contemporaneous oral or written understandings or agreements relating to the subject matter of the Contract are merged herein.

50. Governing Law. The Contract shall be interpreted and the rights and liabilities of the parties hereto determined in accordance with the laws of the State of New York, applicable to agreements made and to be performed in that state.

51. Waiver of Trial by Jury. Contractor hereby waives trial by jury in any action, proceeding or counterclaim brought by either party against the other on all matters whatsoever arising out of or in any way connected with the Contract or any claim of damage resulting from any act or omission of the parties in any way connected with the Contract.

52. Submission to Jurisdiction/Choice of Forum.

A. Contractor hereby irrevocably submits to the jurisdiction of the state and federal courts situated in the City of New York or in Westchester or Rockland County with regard to any controversy arising out of or relating to the Contract. Contractor agrees that service of process on Contractor in relation to such jurisdiction may be made, at the option of Con Edison, either by registered or certified mail addressed to Contractor at the address shown in the Contract or at the address of any office actually maintained by Contractor, or by actual personal delivery to Contractor. Such service shall be deemed to be sufficient when jurisdiction would not lie because of the lack of a basis to serve process in the manner otherwise provided by law. In any case, however, process may be served as stated above whether or not it may be properly served in a different manner.

B. Contractor consents to the selection of the state and federal courts situated in the City of New York or in Rockland or Westchester County as the exclusive forums for any legal proceeding arising out of or relating to the Contract. Contractor also agrees that all discovery in any proceeding will take place in the City of New York or in Westchester or Rockland County.

53. Limitation on Time to Sue. No action shall be brought by Contractor based on any controversy or claim arising out of or related to the Contract, or any breach thereof, more than two years after accrual of the cause of action.

54. Performance of Work During Pendency of Disputes. If any claim or dispute shall arise under or relating to the Contract or the Work, Contractor shall continue, during the pendency of such claim or dispute, to perform the Work and comply with all other obligations under the Contract as though no such claim or dispute had arisen. Except as otherwise provided in the Contract, during the pendency of any such claim or dispute, Contractor shall be entitled to receive payments from Con Edison only with respect to non-disputed items or matters, and payments, if any, with respect to disputed items or matters shall be deferred until final resolution of the claim or dispute. Nothing in this Article 54 shall be construed to affect the provisions of Article 16.

55. Enablement in the Procurement System. In the event Contractor is not presently enabled in the Procurement System (Oracle E-Business Suite iSupplier) to transact business electronically with Con Edison (which includes receiving requests for quotation, submitting bids, receiving orders and submitting invoices), Contractor shall promptly become enabled.

56. Gift Policy and Unlawful Conduct. Contractor is advised that it is a strict Con Edison policy that neither employees of Con Edison nor their family members, agents, or designees, shall accept gifts, whether in the form of a payment, gratuity, service, loan, thing, promise, or any other form (collectively "Gift"), from contractors, sellers, or others transacting or seeking to transact any business with Con Edison. Accordingly, Contractor, its employees, agents and Subcontractors are strictly prohibited from offering or giving any Gift to any employee of Con Edison or O&R or any employee's family member, agent, or designee, whether or not made with intent to obtain special consideration or treatment and whether or not the employee is involved in the Work to be performed under the Contract. Furthermore, Contractor is prohibited from engaging in fraudulent or unlawful conduct in the negotiation, procurement, or performance of any contract between Con Edison and the Contractor or any work performed for or on behalf of Con Edison, or in any other dealings relating to Con Edison. Contractor represents, warrants, and covenants that Contractor, its agents, employees, representatives and Subcontractors have not engaged and will not engage in any of the acts prohibited under this Article. Upon a breach of any these representations, warranties, or covenants and/or the commission of any act prohibited under this Article, Contractor shall be in default under the Contract and all other contracts between Con Edison and Contractor and (a) Con Edison may, in its sole discretion, cancel for default the Contract and any other contract between Con Edison and Contractor, (b) Con Edison may, in its sole discretion, remove Contractor from Con Edison's list of qualified bidders, (c) Contractor shall have forfeited all rights it has under the Contract and any other contracts between Con Edison and Contractor (including, but not limited to, the right to payments for work performed or goods furnished), and (d) Con Edison shall have no further obligations to Contractor relating to such contracts. In addition, Contractor shall be liable to Con Edison for all damages caused to, and costs incurred by, Con Edison as a result of any violation of this Article, including the costs and expenses of internal and external attorneys and investigations. Whenever Con Edison has a good faith reason to believe that Contractor may have violated this Article, and conducts an investigation into such potential violation, then, to the fullest extent permitted by law, no payments shall be due Contractor under the Contract or any other contract between Con Edison and Contractor during the pendency of such investigation. The remedies set forth in this Article are non-exclusive, and Con Edison expressly reserves all rights and remedies under such contracts, and in law and equity. For the purposes of this Article, the term "Con Edison" shall include all of Con Edison's affiliates (including, but not limited to, O&R). Contractor shall promptly report any alleged violation of this Article to the Vice President of Purchasing or to the Ethics Helpline at 1-855-FOR-ETHX (1-855-367-3849).

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 12/19/2014
Responding Witness: Maribeth McCormick

Question No. : 270

SIR Program Audits

1. Has O&R performed any internal or external audits of its SIR program, or any of its SIR sites, within the past five years? If yes, describe the audit and provide documentation of the results.
2. Does O&R have any ongoing or planned internal or external audits of its SIR program or any of its SIR sites?
3. Describe what conditions or events would trigger O&R to initiate an internal or external audit of the Company's SIR program or any of its SIR sites.
4. Indicate whether O&R performs internal or external audits of its SIR program, or any of its SIR sites, on an interval basis. If yes, how often are such audits performed?
5. State whether O&R plans to implement an internal or external audit of its SIR program's conformance with the "Inventory of Best Practices for SIR Programs," filed jointly on behalf of the State's electric and gas utilities on March 28, 2013, in Case 11-M-0034.

Response

1. In accordance with long-standing practice intended to encourage utilities to conduct self-critical audits in order to improve operations, the Company declines to provide the requested information as doing so in this proceeding would be inimical to the performance of future audits. In addition, the Company objects to this request because it seeks information outside the scope of this proceeding.

2. The Company has a robust audit program with a highly experience audit staff. Audits are conducted by a team of auditors whose task it is to assess project and cost management controls, contractor oversight, compliance with safety requirements, and compliance with relevant Company policies and procedures in connection with remediation projects. The Company's Environmental Health & Safety Section also conducts audits each year focused specifically on compliance with applicable environmental, health and safety laws and regulations as well as company policies and procedures. Typically audits of the Company's SIR program would be conducted by the Company's internal auditing department

which has the requisite knowledge and resources to assess the Company's project and cost management controls, contractor oversight, and compliance with relevant Company policies and procedures. Should a situation arise where the Company lacked the appropriate resources or expertise to conduct the audit, the advisability of using an external consultant would be evaluated.

3. Please see the Company's response to 2 above.

4. Please see the Company's response to 2 above.

5. The Inventory of Best Practices for SIR Practices sets forth certain recommended practices covering such areas as project and cost management, contractor oversight, compliance with environmental and safety laws and regulations, and compliance with relevant Company policies and procedures in connection with remediation projects. These are all areas that the Company's auditing department reviews on a regular basis.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-38
Date of Response: 02/25/2015
Responding Witness: Maribeth McCormick

Question No. : 515

Subject: Service Contracts and Invoices Procedures Reviews -

Identify any internal reviews, performed by O&R within past 5 years, of its procedures for verifying and processing service contracts and invoices for its site investigation and remediation program. For each internal review:

1. Describe the date(s), scope and findings, including a summary of any deficiencies and recommendations identified.

2. Describe any actions taken by O&R in response to the findings of the review and provide copies of any procedure documents developed in response to the findings.

3. Describe the scope and summarize the results and findings of any follow-up evaluations O&R performed to assess the effectiveness of actions taken to address deficiencies and recommendations identified in the internal review.

Response

1. In an internal review conducted in 2011, the Company identified various control deficiencies related to paying service contractor invoices, including contractors performing environmental consulting services for the O&R former manufactured gas plant sites. These deficiencies included lack of a formal procedure for monitoring and paying invoices. As a result of this internal review, several recommendations were made, including development and implementation of a formal contract management procedure and additional training for Company personnel involved in invoice verification and payment.

2. In response to the deficiencies identified in subpart 1, the Company implemented several recommendations, including developing in 2011 a formal procedure for contract management. The current version of this procedure is attached (DPS38-515 Att-1).

3. Follow-up evaluations performed by the Company have demonstrated that all applicable recommendations resulting from the 2011 internal review have been implemented and identified deficiencies have been addressed.

1.0 Purpose

The Contract Management Procedure defines the roles and responsibilities associated with contract management and provides standards and guidelines to:

- Initiate contracts for construction, services, and/or non-stock material.
- Monitor vendor progress.
- Enforce contractual requirements.
- Manage vendor performance and productivity.
- Review and process vendor invoices for payment.
- Accrue for service provided for which payment has not been made.
- Modify or expand a contract.
- Document the completion of work.
- Finalize the contract when the vendor's contractual obligations are complete.

2.0 Applicability

This procedure applies to all company organizations that administer contracts or oversee contractors.

3.0 Definitions

This section defines terms used in this procedure and generally in the procure-to-pay process.

3.1 Contract – A legally enforceable agreement between two or more parties with mutual obligations. A vendor may be issued a contract to perform construction (e.g. build a substation); provide services (e.g. engineering design, computer programming, or landscaping); or supply material (e.g. meters or utility poles). The entire contract consists of the Standard Terms and Conditions (ST&C), Special Conditions, specifications and all other documents incorporated into the contract by reference. While a variety of contract initiation mechanisms exist in Oracle (i.e. Standard Purchase Orders (spot buy), Blanket Purchase Agreements, Contract Purchase Agreements and complex service agreements) all of them ultimately result in a contract.

At a minimum, a contract will specify:

- Location and Scope of Work (SOW).
- Contact information for the company and the vendor.
- Term of the contract or projected date of completion.
- Definition of the contract type and payment terms.
- Terms and conditions governing the business to be transacted.

3.2 Contract Request – A properly approved request that provides Purchasing with specific information concerning the services or commodities needed, the estimated cost, and authorizes Purchasing to proceed with the procurement. Contract requests are initiated by either a contract request form or a non-catalog purchase requisition, both of which are accessible through the Procurement system.

3.3 Types of Contract – based on the contract request, Purchasing will determine the appropriate contract type.

A. Blanket Purchase Agreement ("BPA") – An agreement with a supplier for specific goods and/or services at a defined, pre-negotiated price. BPAs can be used subject to approval as detailed in the Delegation of Authorities ("DOA") by any approved requisitioner. BPAs will include contract start/end dates, prices, terms and conditions, total maximum dollar limit and specific line items. BPAs may include an agreed amount, which represents the level of spend the Company commits to making. Approved requisitions against a BPA will be converted into a Standard Purchase Order ("SPO").

B. Contract Purchase Agreement ("CPA") – An agreement with a supplier for unspecified goods or services. Requisitions issued pursuant to a CPA will be routed through Purchasing for placement of an SPO based upon the provisions of the applicable CPA. CPAs include contract start/end dates and terms and conditions. CPA's do not include specific goods and services defined at pre-negotiated prices.

C. Standard Purchase Order ("SPO") – An agreement that authorizes the purchase of goods and/or services. Purchase orders will only be generated based on an approved requisition. Purchase orders may be generated on a stand-alone basis (spot buy) or they may be issued pursuant to the provisions of a specific BPA or CPA.

D. Complex Service Order – An agreement typically used for the purchase of services that require a negotiated contract with complex terms and payment arrangements related to contract financing and progress payments, tracking of work against an agreed schedule, and processing of payment requests. It is designed for fixed price contracts with either interim progress payments based on cost or milestones.

3.4 Contract Administrator – The company or contract employee(s) who ensures that the company and the vendor adhere to the administrative obligations of the contract and the internal processes and system transactions are performed as required. In general, the Contract Administrator reports to the Contract Manager who has overall

responsibility for contract administration. Examples of the Contract Administrator's responsibilities include, but are not limited to:

- Verify acceptable completion of work in accordance with the contract and coordination with other company resources as needed.
- Review reports that document the work completed and/or material received.
- Issue work receipts, work confirmations or General Office Invoices ("GOI") after work is inspected, monitored, and properly documented.
- Address performance or other contractual issues with appropriate departments, as required.
- Retain appropriate documentation to support the payment or the withholding of payment for interim and final invoices.

3.5 Contract Manager – The company employee who has overall responsibility to ensure that the company and the vendor satisfactorily perform all technical and administrative obligations required under the contract. Their responsibilities include, but are not limited to:

- Develop the Scope of Work (SOW).
- Ensure proper requisitioning and receipting of goods and services.
- Manage the work schedule.
- Resolve contractual issues and ensure efficient execution of the contract.
- Oversee contractor performance and contract compliance.
- Ensure proper accrual of payments and maintenance of current working estimates.
- Manage reporting and justify variation from budget or scope.

3.6 Contractor Oversight System (COS) – An intranet application used to track and report contractor work performance. This information is used by Purchasing to factor a contractor's prior performance in procurement decisions. Contractor performance ratings are based on environmental, health and safety performance, quality of deliverables, timeliness, invoicing, conduct of work, and other administrative issues.

3.7 Non-Competitive Procurement – A contract or purchase order that could be awarded competitively but will be awarded to a specifically selected supplier for explicit reasons with the appropriate justification (i.e., replacement parts).

3.8 Sole-Source Procurement – A contract or purchase order awarded to a specific supplier because products or services are available from only that one source. The appropriate justification is required.

3.9 Environment Health and Safety Plan (eHASP) – Prepared by a vendor to document their emergency procedures, site control, job hazard analysis and control, hazard evaluation, housekeeping, training, hazard communication, environmental management, and waste disposal method associated with a specific project or task. The eHASP must be accepted by the Company prior to the start of any work on a contract or if conditions change due to a modification of the contract.

3.10 Inspector – An employee or third-party contractor who is competent to oversee work activities. Based on the nature of the contract, the Inspector is responsible for conducting and documenting inspections (e.g. continuous, daily, periodic, or random) and monitoring the contractor's work wherever it is being performed (e.g. company location, work site, contractor's premises).

3.11 Requesting Organization – The department that prepares the requisition and develops a protocol for the inspection of the services and/or commodity provided by the contractor; evaluation of the contractor's performance; and approval of payments to the vendor.

3.12 Requisition – The request for goods or services against a contract, approved in accordance with Policy 1.12 - *Delegation of Authorities*, which creates a purchase order for the vendor to fulfill the request.

3.13 Scope of Work (SOW) – A detailed description of the services/work to be performed or material to be supplied under the contract. It may include technical specifications and reference other documents.

3.14 Special Conditions – Prepared by the requesting organization outlining any requirements not contained in the SOW and the ST&C.

3.15 Standard Terms and Conditions (ST&C) – A set of binding provisions imposed on a vendor conducting business with the company.

4.0 Segregation of Duties

Segregation of duties is an important component of a proper control environment. The assignment of various duties to separate employees serves to prevent or detect fraud or unintentional errors. The following examples demonstrate how segregation of duties exists in the procure-to-pay process:

4.1 Contract requests and requisitions will be prepared by an employee in the requesting organization and approved by the Contract Manager or higher-level manager, in accordance with Policy 1.12 - *Delegation of Authorities*. The requesting organization will not engage in price negotiations with prospective vendors.

4.2 Purchasing, with assistance from the requesting organization, prequalifies vendors; promotes supplier diversity; facilitates the bid process; establishes pricing, and issues the contract to the chosen vendor.

4.3 The Inspector monitors and documents the vendor's performance.

4.4 The Contract Administrator or the authorized individual verifies a two-way match between the PO and the documentation prepared by an Inspector and/or submitted by the vendor.

4.5 Accounts Payable, Corporate Accounting, issues payment to the vendor.

5.0 Planning the Work

Effective contract management is predicated on a well-defined plan for every aspect of the job, before, during and after the actual work is performed.

5.1 Develop a Work Plan – The requesting organization will develop a site/job-specific SOW, Special Conditions, and an estimate of cost.

5.2 The SOW, combined with the Special Conditions, will define:

- The work to be performed and the work schedule.
- Performance and quality requirements.
- Technical specifications.
- All contract deliverables. Deliverables will be verifiable and measurable. For example, on a lump sum contract, the deliverables can be set as milestones based on percentage of completion.
- Environmental, health and safety requirements, developed in consultation with EH&S, including eHASP requirements, safety regulations, environmental criteria, quality assurance, site support, and other documentation required to be submitted by the vendor.
- Schedule of progress meetings.
- Submittals and documentation to support requests for payment (See 5.5 F below).
- Departmental procedures, local operating conditions and site specific laws, rules, and regulations.
- Contract change or modification process if not already specified in the applicable ST&C.

5.3 Estimate of Cost for Construction Contracts - The requesting organization will develop a reasonable estimate of the anticipated costs to perform the SOW. For requisitions less than $500,000 this estimate will be used by Purchasing to gauge the reasonableness of the bids and the requesting

organization to compare to the vendor's payment requests. For requisitions greater than $500,000 Purchasing will request a Bid Check Estimate in accordance with Purchasing Operating Procedure (OP) OP-3 - *Competitive Sourcing Decisions*.

5.4 Determine Contract Payment Terms – The requesting organization may consult with Purchasing, if necessary, to determine the optimal payment terms for the work to be performed and the resources available to oversee the vendor.

A. Lump Sum/Fixed Price – The vendor performs the primary SOW for a single fixed price. Administering this type of contract requires a comprehensive SOW and effective management of vendor performance in terms of quality and specification compliance. Lump sum contracts may also have Unit Price and Time & Equipment components for a portion of the supply or service.

B. Unit Price – The vendor provides specific prices for each unit of material supplied or service performed for a specific time period. The number of units supplied or performed multiplied by the unit price for each item is the total remuneration the vendor will receive. Unit price contracts are particularly suited for standard goods and services where definite specifications are available, competition exists, and cost can be predicted with reasonable certainty.

C. Time and Equipment (T&E) (also known as Time and Material (T&M), Time and Expense (T&E), or Cost Plus) – The vendor charges daily or hourly labor rates, equipment rates, and a cost for the material used to perform the work, plus an agreed-upon percentage for overhead and profit. These rates and costs will be clearly identified in the contract. T&E contracts require the most resources to inspect and monitor the vendor's performance.

D. Variable Scope and Project Task/Account Issues – In situations where variable scopes and/or multiple Project Task/Accounts exist, it is recommended that the requesting organization consider requisitioning practices such as non-payable line items, "accrue but do not pay," and re-requisitioning/ replacement to facilitate effective contract management.

5.5 Bid Considerations

A. Competitive bidding is an important aspect of the procurement process. Allowing multiple vendors to vie for our business generally results in lower costs.

B. The requesting organization will work with Purchasing to develop a comprehensive list of bidders qualified by Purchasing and capable of performing the work. Consideration will be given to each contractor's past performance based on COS entries. Purchasing has final authority for determination of the bidders list.

C. If the Requesting Organization has used third parties to develop any or all parts of the bid documentation, the Requesting Organization will issue a formal blackout notification to all involved design vendors detailing the start of competitive bidding, the appropriate communication chain for bid information/questions (i.e. all questions and communications should be routed through Purchasing, no communications on project specifics with third parties), and the applicability of the blackout to all of the vendor's subcontractors.

D. When the only practical option is to bid the work to a single vendor, the requesting organization will attach a non-competitive/sole source request to the contract request, explaining the reasons for and economic benefit of the non-competitive/sole source purchase (See Purchasing OP-2 - *Non-Competitive and Sole Source Procurements*).

E. Technical Bid Evaluation – The requesting organization may conduct a technical evaluation of the unpriced bids to provide feedback on the bidder's proposals and ensure the proposals meet the project requirements.

F. Method of performance verification – The requesting organization will determine the required vendor submissions and documentation for the contract and define them in the bid documents. All documentation will be retained in the contract file. Examples of documents to verify performance include:

1. Documentation for material supply may include manifests, bills of lading, or similar documentation signed and dated by an appropriate company employee(s) who received and inspected the material. If the material has critical attributes such as material certifications, the receiving organization must establish further criteria to confirm the material meets those criteria.

2. Documentation for service contracts may include timesheets, work tickets, photographs, daily logs, on-site inspection reports, or other verifiable records to document the work performed. Documentation will be reviewed by a company representative.

3. T&E contracts generally require daily inspection by an Inspector and the documentation should include independent verification of

the hours worked, the equipment used, and the material consumed. Daily or weekly timesheets must be signed by an authorized representative of the vendor. Vendor timesheets will document the name, title, start/end times for the individuals on the job, material and equipment used, and a summary of the work completed during that period.

6.0 Contract Request

The procurement process begins with a contract request.

6.1 The contract request is prepared by the requesting organization and will include:

- The SOW and Special Conditions.
- An estimate of the cost as appropriate.
- Term of the contract or projected date of completion.
- Contract type and payment terms.
- EH&S Hazard Analysis as applicable.
- Contact information for the Contract Manager and Contract Administrator
- Recommended bidders, if known.
- Non-competitive justification with the supplier's proposal, if applicable.
- Documentation that is required to support requests for payment.

6.2 Timing – Contract requests will be submitted to Purchasing with sufficient lead time for Purchasing to develop the bid package, bid the work, and establish a contract with the chosen vendor. The amount of time needed to establish a contract will depend on the scope and estimate of the request and the SOW.

6.3 Submission and Approval – Contract requests will be submitted for approval in accordance with the Policy 1.12 - *Delegation of Authorities*.

7.0 Vendor Selection Process

This process is administered by Purchasing, but the requesting organization may request or be asked to participate in these processes.

7.1 Pre-bid Meetings – Based on the nature and complexity of the contract, Purchasing may arrange a pre-bid meeting or a field visit with relevant personnel from the project team and the prospective bidders. The purpose of the meeting is to review the SOW, EH&S considerations, eHASP development and site conditions; clarify any ambiguities; and highlight any special considerations or requirements. In the case of field

visits, prospective bidders shall be escorted around the project site so they may become familiar with field conditions. All contractor questions will be directed to Purchasing. Purchasing, working with the requesting organization, will provide written responses to all bidders.

7.2 Pre-Award Meeting – Based on the nature and complexity of the work, Purchasing may arrange a pre-award meeting with the requesting organization, the presumptive awardee, and EH&S to address administrative details and clarify work schedules before the contract is issued.

7.3 Contract Award and Notice to Proceed – Purchasing will award the contract which includes the most current Standard Terms and Conditions. For contracts that have a physical component requiring an eHASP, the appropriate EH&S representatives must review the eHASP. Once the eHASP and WorkPlan/Schedule are found to be acceptable the Contract Manager or designee will issue a "Notice to Proceed" to the contractor. For most other service contracts, the issuance of the purchase order will constitute the Notice to Proceed.

8.0 Requisitioning Work

In general, work will not proceed until an approved contract is issued to the contractor.

8.1 For work covered under an existing contract, the Contract Administrator or designee shall submit a requisition which contains line items corresponding to the SOW. All requisitions will be submitted for approval in accordance with the purchase authorization level specified in Policy 1.12 - *Delegation of Authorities*.

8.2 If work must proceed immediately on an existing contract, i.e. emergency, storm, system contingency, environmental issue, etc., the Contract Manager may obtain approval in accordance with Policy 1.12 - *Delegation of Authorities* and authorize the contractor to perform the work. The Contract Administrator will initiate a contract request or a requisition within one business day after the work has begun.

9.0 Contract Changes or Modifications

When it is necessary to modify or expand the scope of the work, including units, the funding level and/or the period of performance, the requesting organization will submit the appropriate request to Purchasing to change or modify a contract.

9.1 The contractor will not be permitted to perform any work related to the change until the contract modification is issued by Purchasing. However, if

the Contract Manager determines that the work must proceed immediately, i.e. emergency, storm, system contingency, environmental issue, etc., the Contract Manager will obtain approval in accordance with Policy 1.12 - *Delegation of Authorities* and authorize the contractor to perform the work. The Contract Administrator will initiate the contract modification process within one business day or reasonable time period after the incident has ended.

9.2 Contract changes must be related to the original scope of the contract, or a natural extension of the work, schedule, and conditions that are representative of that contract. Changes may be required in the contract because of unforeseen engineering modifications, field conditions, user requests, environmental/ licensing requirements, etc.

9.3 Where changes modify the level of effort or price of the contract, the requesting organization will ask Purchasing to modify the contract to include the additional work, or consider other methods of resolution, such as renegotiation or competitive bidding of the changes.

9.4 All requests for contract modifications must be approved in accordance with Policy 1.12 - *Delegation of Authorities* based on the total cost of the amended contract and will include a justification and appropriate supporting documentation including, but not limited to, an estimate of cost and/or a not-to-exceed limitation.

10.0 Performance Verification

The requesting organization will ensure the work performed or material received is inspected and complies with the contract (refer to Section 5.5 F). Company representatives will maintain documentation to support the inspection and verification of the work performed in the contract file.

10.1 On-site Inspection – The Contract Manager will assess the SOW, the associated costs, and the perceived risk of each contract and determine appropriate level of on-site inspection, i.e. continuous, daily, periodic, or random.

10.2 When using third-party inspection contractors, company employees will verify and document their performance in the same manner as other contracts.

10.3 Progress Meetings – Based on the nature of the contract, regular progress meetings with the contractor may be held.

11.0 Payment Authorization

Unless the contract is established as “accrue but do not pay” (see 5.4 D), payment will be issued to the vendor by Accounts Payable if an invoice received contains the quantities of work receipted by the requesting organization and the prices defined in the contract (a.k.a. three-way match).

11.1 The Contract Administrator or the person receiving the product or service is responsible for verifying the quantity and quality and receipting the work in the system. Records of performance verification will be detailed enough to validate them against the provisions of the contract. Discrepancies will be resolved with the vendor prior to payment. Goods received and services performed will be receipted in the system prior to the end of the month. The system will establish an accrual for any receipted work that is not paid, whether an invoice is received or not.

11.2 The Contract Manager will ensure that a free-form accrual is submitted before month-end to Financial Services for any goods received or services performed that have yet to be receipted in the system. Free-form accruals should be issued on a limited basis.

11.3 When the company will be reimbursed by a third party for the vendor’s costs, e.g. insurance claims, the Contract Administrator will notify Corporate Accounts Receivable and Billing (CARB), Corporate Accounting that third party billing needs to occur and all supporting documentation will be forwarded to CARB in a timely manner.

12.0 Document Management

Every organization involved in this process will maintain appropriate records to support the procurement, work performed, services received, and payments made in connection with the contract. O&R organizations will comply with Policy 5.14 - *Records Management and Retention Policy*.

12.1 The Contract Manager is responsible to ensure performance and payment verification documentation is maintained for the life of the contract.

12.2 After payment of the final invoice, the department’s Records Coordinator will identify, consolidate, inventory, and submit the required records and/or documentation associated with the contract in accordance with the department’s Record Retention Schedule.

13.0 Performance Evaluation and Reporting

The performance of vendors, contractors and material suppliers must be assessed on a regular basis.

13.1 The assessment must include regular entries in COS as well as regular meetings with the vendor and feedback.

13.2 The following are minimum standards for entries in COS. COS may be used more actively if the project and department procedures dictate.

A. Contractor Field Observation Report (CFOR) – A record of an observation of a contractor's work prepared by an Inspector, Contract Administrator or Contract Manager. A CFOR will be entered a minimum of once per six months, while work is being performed. CFORs for materials are only required for exceptions. The CFOR will relate sufficient detail about the work to support a conclusion that the observed work was satisfactorily or not satisfactorily performed.

B. Infraction Report – Used to document minor infractions.

C. Action Line – Used to document serious infractions and/or repeated infractions.

D. Contractor Evaluation Report (CER) – At a minimum, the Contract Manager or delegate will complete an evaluation of the contractor semi-annually, at the conclusion of each spot buy specific contract, or on an interim basis at any time during the course of the project, as needed.

E. Serious violations of the contract, the Vendor Code of Conduct, or allegations of unsatisfactory performance will be referred to the Ethics Helpline to comply with Corporate Policy Statement 100-2 – *Contractor Vendor Compliance Committee*.

14.0 Contract Completion

When all physical work and contract punch list items, if any, are completed according to specifications, and all contract deliverables including, but not limited to, final CER, “as constructed” drawings, manuals, training, final test results, or warranties have been provided.

15.0 Final Payment

The last payment issued on a completed contract for the amount due on original contract work, retention, extra work, claims, or any combination thereof. Final Payment will be approved by the Contract Manager only after Contract Completion, as described in Section 13.0 above.

16.0 Post Contract Review

16.1 The Contract Manager will submit a final CER into COS. The final CER will be reflective of all prior CFORs, CERs, Infraction Reports, and Action Lines during the contract period.

16.2 The Contract Administrator should provide this feedback to the contractor about their performance during the contract period.

17.0 Training

Administrative Training – Contract Managers will determine which of the following eLearning courses are appropriate for themselves and their Inspectors and Contract Administrators:

- KWL0062 – Purchasing Process Overview
- ONL0010 – Contract Administration & Field Inspection Training
- ONL0088 – Contractor Evaluation Report
- ONL0085 – Contractor Field Observation Report
- ONL0087 – Contractor Oversight System-Action Line
- ONL0086 – Contractor Oversight-Infraction Report
- ONL0103 – Project One: IPROCUREMENT
- ONL0107 – Project One: General Office Invoice

Contract Managers will determine any additional technical, EH&S, or other training courses that must be taken by their employees to effectively monitor the work.

18.0 Advice & Counsel

The Vice Presidents of Operations and Customer Service will provide advice and counsel on this procedure.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 12/19/2014
Responding Witness: Maribeth McCormick

Question No. : 269

SIR Transfer of Environmental Liability. Page 37 of the testimony of Company Witness Maribeth McCormick states, "Orange and Rockland attempts, where possible, to transfer environmental liability for future remediation costs in agreements with third-parties in connection with the purchase or sale of real property or other assets and seeks indemnities for such future liabilities."

Provide specific examples where O&R has successfully achieved such a transfer of environmental liability.

Response

As a preliminary matter, Orange and Rockland would note that it does not often transfer real property or other assets to third parties, or purchase real property from third parties. Orange and Rockland successfully achieved a transfer of environmental liability when it sold its Lovett and Bowline electric generating facilities to Southern Energy in 1999. Orange and Rockland also transferred environmental liability when it sold the former Warwick substation property to Warwick Valley 13 Forester, LLC in 2014.

As to the purchase of property, particularly for future electric substations, given the scarcity of available parcels that meet the Company's operational requirements, the Company lacks the negotiating leverage to transfer environmental liability to the seller. The Company does perform Phase 1 site assessments and Phase II investigations prior to purchase. For example, the Company recently purchased vacant land in Blooming Grove for future substation use. As part of its due diligence prior to the purchase, the Company performed Phase I and II site assessments, as well as Cultural Resources Phase 1A and 1B, a Habitat Assessment (including Indiana Bat and Bog Turtle), and received a Wetland Delineation from NYSDEC.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-XXXX; 14-G-XXXX

Response to DPS Interrogatories – Set DPS-1
Date of Response: 11/14/2014
Responding Witness: Maribeth McCormick

Question No. : 204

Provide the following information addressing site investigation and remediation (SIR) expense: (a) recent SIR expenditures by year; (b) the status of SIR-related deferrals; (c) whether there are any existing or anticipated insurance proceeds or third-party contributions available to offset SIR expense; (d) the status of any SIR-related litigation; and, (e) descriptions of the existing SIR projects and how the rate year costs associated with each such project were calculated.

RESPONSE:

(a) Recent SIR Expenditures by Year:

Year	Expenditures
2011	$3,975,646
2012	$4,282,000
2013	$5,090,946

(b) The Company continues to maintain SIR-related deferrals. As of June 30, 2014 O&R gas has a positive net deferral balance of $2,210,000 while O&R electric has a positive net deferral balance of $1,586,000. The variation in the status of the gas and electric deferral balances is due primarily to when gas and electric rates were last reset.

(c) Third-party contributions: In 2011, O&R along with other potentially responsible parties entered into a consent decree with New York State and the Town of Clarkstown to settle response cost claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") relating to the disposal of hazardous materials at the Clarkstown Landfill Site which had been designated as a State Superfund site by the New York State Department of Environmental Conservation. Under the consent decree, O&R paid approximately $83,000 in full settlement of its share of the State's and the Town's past and future response costs for the site. O&R and other settling potentially responsible parties ("PRPs") retained counsel to pursue recoveries from non-settling responsible parties. Litigation is on-going. These efforts have, to date, resulted in refunds to O&R of settlement payments totaling $44,586.

(d) Insurance Coverage Litigation: O&R is engaged in a dispute in New York State Court with The Travelers Indemnity Company ("Travelers") based on Travelers' denial of claims under third-party liability policies for the costs of investigating and cleaning up environmental contamination from the seven manufactured gas plants owned and operated by O&R and its predecessors. In 2012, Travelers moved for summary judgment with respect to six of O&R's former Manufactured Gas Plant ("MGP") sites on the ground that O&R"s notice of claim was late. The trial court granted summary judgment to Travelers. The Company is appealing.

(e) Descriptions of Existing SIR Projects and Explanation of Rate Year Cost Estimates: O&R's current SIR projects include seven MGP sites, four Superfund sites, and one Underground Storage Tank site. Site specific descriptions, based on information in the 2013 SIR Report submitted to the PSC on April 30, 2014, are attached to this response as DPS1-204 Att-1. Rate year costs by site are provided in DPS1-204 Att-2.

The rate year costs associated with the MGP projects are calculated by cost loading the projected schedules for each of the MGP sites to generate project/program cost forecasts. The rate year costs for West Nyack and the Spring Valley UST are estimated annual monitoring costs. The rate year costs for the PRP Superfund sites are based on estimates of O&R's share of PRP group costs.

Exhibit 1

MGP Sites

Site Name: CLOVE AND MAPLE AVENUE

Site Location: 120 Maple Avenue, Haverstraw, New York

Remediation Program: DE**C** MGP Consent Order

Site Identification No.: DEC Site #3-44-049

Site Background:

The Clove and Maple Avenue MGP encompasses the approximately one-acre grounds of the former MGP that Orange and Rockland's predecessor companies operated from 1887 through 1935 at 120 Maple Avenue in a mixed residential/commercial section of Haverstraw, New York. The site is bounded by residential properties to the northwest, an apartment building complex and former pond area to the northeast, Clove Avenue to the southwest, and Maple Avenue to the southeast. After the MGP was closed, Orange and Rockland, which continues to own the site, operated it as a natural gas regulator station until 2007, when that facility was retired from service and decommissioned. The site is currently zoned for light industrial uses and is vacant except for piping associated with the former gas regulator station. The DEC has divided the site into three Operable Units ("OUs"): OU1 consists of the grounds of the former MGP; OU2 consists of residential properties, including a five-building apartment complex and several single family residential properties with MGP contamination, and OU3 consists of MGP-contaminated sediment in an embayment area of the adjacent Hudson River. Orange and Rockland investigated the site and off-site OU2 and OU3 areas pursuant to DEC Consent Order D3-0002-94, dated January 8, 1996, and DEC Consent Order D3-0001-98-03, dated September 29, 1998, and is obligated to implement the DEC's required remedy for the MGP contamination present on those areas under DEC Consent Order D3-0001-99-01, dated March 11, 1999, which superseded DEC Consent Orders D3-0002-94 and D3-0001-98-03, and which applies to six of Orange and Rockland's former MGP locations, including the site (the "DEC Multi-Site Order").

Record of Decision (ROD):

The DEC issued a Record of Decision ("ROD") for OU1 of the site in March 2011, and issued a ROD for OU2 of the site in March 2012. Both RODs require the excavation of contaminated soil and the installation of clean soil cover systems and implementation of institutional controls and a Site Management Plan ("SMP") for areas with soils or groundwater that contain residual concentrations of MGP-related contaminants. The DEC has not yet issued a ROD for OU3 of the site.

Scope of Site SIR Work:

DEC-approved Remedial Investigations ("RIs") have been completed for all operable units of the site. Site-related MGP soil and groundwater contamination have been identified on portions of OU1 and OU2 of the site. Site-related MGP contamination has been identified in the sediments of the OU3 Hudson River embayment area. DEC-approved Feasibility Studies ("FSs") were completed for OU1 and OU2. Orange and Rockland prepared a Pre Design Investigation Work Plan for OU2 in 2013. However, due to the sale of the apartment complex in 2014 and potential development plans for that parcel, the commencement of the PDI has been deferred. Remedial design activities will be initiated for OU1 instead.

Status of Compliance with ROD: Orange and Rockland is in compliance with the RODs for OU1 and OU2.

Site Name: FULTON STREET MGP

Site Location: Fulton Street, Middletown, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC 3-36-030

Site Background:

The Fulton Street MGP site is located in a mixed use commercial/industrial/residential area of Middletown, New York. The site is owned by a third party and is occupied by an automotive repair and body shop. Numerous investigations have been conducted on the MGP site itself and on several off-site properties. Most of the site and the adjoining properties are covered by paved parking areas, roadways and buildings. The section of Fulton Street fronting the site is a four lane New York State highway with a large storm water culvert in the median. Impacts from the MGP site have migrated under Fulton Street and onto down gradient properties, including a United States Postal Service office and sorting/distribution facility. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and off-site properties with site-related MGP impacts pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD):

The DEC has not yet issued a ROD or other final Decision Document for this site.

Scope of Site SIR Work:

Orange and Rockland has implemented DEC-approved investigation work plans for the site and off-site properties discussed above. MGP impacts have been found in soil and groundwater on the site, under Fulton Street, and portions of the off-site properties owned by the United States Postal Service and Associated Supermarket. A draft Feasibility Study ("FS") Report has been prepared and submitted to the DEC. Following review of the FS Report in 2011, the DEC requested additional investigation within Fulton Street to assess impacts under the roadway and adjacent to the storm culvert. A supplemental FS work plan to conduct this investigation was developed in 2012. Efforts to obtain the necessary access agreements/road opening permits have been unsuccessful to date, but will continue during 2014.

Status of Compliance:

Orange and Rockland is in compliance with all applicable DEC SIR program requirements for the site.

Site Name: GENUNG STREET

Site Location: Genung Street, Middletown, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site#3-36-050

Site Background:

The Genung Street site is comprised of four parcels located along the intersection of Genung, Palmer and Phillips Streets in a multifamily residential (apartment/townhouse) and industrial area of the City of Middletown. The four parcels total approximately 2.6 acres and are vacant with the exception of an Orange and Rockland gas regulator station on Parcel 3. All parcels are owned by Orange and Rockland. Manufactured gas production was conducted on Parcel 1 which is the location of the most significant MGP contamination. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD):

The DEC issued a ROD for this site in February 2005. The ROD requires excavation of MGP contaminated soils and MGP subsurface structures on Parcels 1 and 2; the installation of a clean soil or pavement cap on all site parcels; and the implementation of institutional controls and a Site Management Plan ("SMP").

Scope of Site SIR Work:

MGP impacts were identified in soil and groundwater on Parcel 1 and Parcel 2 during the remedial investigation. A DEC-required predesign investigation has been conducted at the site. A supplemental pre-design investigation ("PDI") of an adjacent railroad embankment is required in order to complete the design and delineate more fully the extent of contamination caused by former MGP operations. Efforts to obtain access from the railroad have been unsuccessful to date but will continue during 2014.

Status of Compliance with ROD:

Orange and Rockland is in compliance with the ROD.

Site Name: 93B MAPLE AVENUE

Site Location: 93B Maple Avenue, Haverstraw, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site #3-44-044

Site Background:

The 93B Maple Avenue MGP Site is located in a predominately residential section of the Village of Haverstraw, New York. The site consists of flat, rectangular-shaped parcel that encompasses , an area of approximately 0.21 acres. The site is bounded by residential lots on Maple Avenue to the southwest, residential lots on Tor Avenue to the northwest, an alley to the northeast, and residential lots to the southeast. The site is zoned for light industrial usage. Haverstraw Bay of the Hudson River is located approximately 800 feet to the east of the site. OU1 of the site consists of the parcel on which the former MGP was located and adjacent off-site lots on which MGP impacts were successfully remediated through the implementation of DEC-approved remedial excavation activities. The site is not owned by Orange and Rockland and the implementation of the DEC-approved remedial excavation work necessitated the relocation of the current site owner's construction business. OU2 of the site consists of a concrete block building located at 93B Maple Avenue and the contaminated former stream channel that extends through the backyards of the residential homes located at 95, 99 and 103 Maple Avenue. Orange and Rockland investigated and remediated the site and affected off-site properties pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD)/Decision Document (DD) Requirements:

The DEC issued two RODs for the site. The DEC's ROD for OU1 was issued in 2005 and required the excavation of subsurface soils and MGP structures. The DEC's ROD for OU2 was issued in 2006 and required the excavation of contaminated subsurface soil within portions of the former stream channel located down-gradient of the site, in situ chemical oxidation of subsurface soils under the building located at 93B Maple Avenue, and the implementation of intuitional controls and an SMP for those site areas that could not be remediated to the DEC's "unrestricted residential use" cleanup levels.

Scope of Site SIR Work:

A manufactured gas holder foundation and contaminated subsurface soils were identified on the site during the site's DEC-approved remedial investigation. In the course of conducting DEC-approved remediation on OU1, additional MGP-related contamination was identified along the former stream channel that extends through the backyards of the downgradient residential properties discussed above. MGP-impacted soils were excavated from these properties in accordance with the RODs and in situ chemical oxidation was conducted in an attempt to address the residual MGP contamination under the 93B Maple Avenue building. The DEC-approved remedial action has been completed. Orange and Rockland developed the SMP for the two parcels where DEC's unrestricted residential use cleanup standards could not be achieved because of the presence of the building. The SMP has been approved by the DEC and Orange

and Rockland will be entering into discussion with the property owner to negotiate a formal agreement relative to the requirements in the SMP.

Status of Compliance with ROD: Orange and Rockland is in compliance with the RODs.

Site Name: NYACK

Site Location: Gedney Street, Nyack, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-44-046

Site Background:

The Nyack site is a vacant third-party owned property located along the west bank of the Hudson River in the downtown area of Nyack, New York. The site consists of an upper terrace at the elevation of Gedney Street and a lower terrace along the Hudson River. The entire site is currently landscaped to the rip/rap shoreline. The area of Nyack in the vicinity of the sites consists of a blend of residential and commercial properties, including a marina immediately to the north and a multi-unit residential complex immediately to the south of the site. The site is zoned "waterfront," which is intended to encourage uses along and near the Hudson River related to, and appropriate for, a waterfront area. The DEC has divided the site into two operable units. OU1 is comprised of the upland portion of the site, while OU2 includes the site's shoreline area and MGP-contaminated sediment in the section of the Hudson River along the site. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site pursuant to DEC Consent Order D#-0001-98-08.

Record of Decision (ROD):

The DEC's RODs include the excavation of subsurface MGP structures and contaminated soils, in situ solidification of impacted soils for which excavation is not practicable, the dredging of impacted Hudson River sediment, the installation of a clean soil cover over the site, and the implementation of institutional controls and a Site Management Plan ("SMP"). The DEC issued its ROD for OU1 in March 2004 and its ROD for OU2 in March 2011.

Scope of Site SIR Work:

DEC-required remediation of OU1, the portion of the site above the 100 year flood line, is complete. A large scale excavation was completed in the western portion of OU1 during 2006. Contaminated soils in two other areas to the south and east were treated with an in-situ solidification process in 2006 and 2007. OU1 was then covered with clean topsoil and restored to a park-like setting. DEC-approved remedial design and permitting for the required OU2 remedy were completed in 2013. DEC-required remedial construction including sediment dredging and shoreline in situ solidification ("ISS") will be conducted during 2014.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the RODs for OU1 and OU2.

Site Name: PORT JERVIS MGP

Site Location: 16 Pike Street, Port Jervis, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-36-049

Site Background:

The Port Jervis MGP site is located at 16 Pike Street in a residential/commercial section of the City of Port Jervis, New York. The site itself is zoned for commercial and industrial purposes. The site is located immediately north of the State Route 209 bridge across the Delaware River. The site is generally bordered by Brown Street to the north, Water Street to the west, King Street to the east and Pike Street to the south. The Delaware River is located approximately 160 feet to the southwest of the site. This stretch of the Delaware River is a Class A water body. The site consists of approximately 1.2 acres of land owned by Orange and Rockland, which was utilized for equipment storage, utility service and customer service. The site is fenced and primarily covered with a gravel/asphalt surface and the multiple-use service building. Site-related MGP contamination migrated to an off-site commercial property located adjacent to the site and commercial and residential properties located along the southern side of Pike Street. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and off-site properties with site-related MGP impacts pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD):

The DEC issued the ROD for this site in December 2007 and requires excavation and removal of former MGP structures and their contents and excavation of source area soils to a maximum depth of 20 ft. on site. The ROD also requires the installation of NAPL collection wells on and off site to address contamination that will not be removed during the excavation phase. In addition, the installation of a soil cover system (pavement) on site and the implementation of institutional controls and the development of a Site Management Plan ("SMP") are required for the site and impacted off-site commercial properties.

Scope of Site SIR Work:

The DEC-required remedial excavation activities for the site and adjoining off-site commercial property were initiated in 2012 and completed in 2013. In addition, a pilot test was conducted to evaluate well construction and drilling methods to optimize collection of dense non aqueous phase liquid ("NAPL"). Following completion of the pilot study for the NAPL collection wells, a conceptual remedial design was developed. Following receipt of the DEC's comments on the conceptual design, the engineering design for the recovery wells was completed in 2014 and the recovery wells were installed in August 2014. Monitoring of the recovery wells is ongoing.

Status of Compliance with ROD/DD:

Orange and Rockland is in compliance with the ROD.

Site Name: SUFFERN

Site Location: Pat Malone Drive, Suffern, New York

Remediation Program: DEC MGP Consent Order

Site Identification No.: DEC Site# 3-44-045

Site Background:

The Suffern MGP Site is located on Pat Malone Drive in the Village of Suffern, New York, in close proximity to the Village's municipal water supply well field. After the site was sold, it was redeveloped as a school bus fabrication facility. Subsurface MGP structures and MGP-impacted soils were identified under the school bus fabrication facility's main building during the DEC-approved remedial investigation that Orange and Rockland conducted for the site. Orange and Rockland acquired and subsequently demolished the facility to facilitate remediation. MGP impacts have been identified in the soil and groundwater on the site and on an adjacent off-site property that is a right of way for an active New Jersey Transit rail line. Orange and Rockland investigated the site and is obligated to implement the DEC's required remedy for the site and affected off-site property pursuant to the DEC Multi-Site Consent Order.

Record of Decision (ROD):

The DEC issued the ROD for this site in March 2014. The ROD requires excavation of subsurface structures and impacted soils; in situ solidification of impacted soils below the water table to a maximum depth of 35 ft. and development of a Public Water Supply Protection and Mitigation Plan.

Scope of Site SIR Work:

An extensive multi-year, DEC-required remedial investigation has been completed for the site. Orange and Rockland's Feasibility Study for the site and impacted off-site New Jersey Transit property was approved by the DEC in October 2013. The Remedial Design process was initiated in 2014. Due to proximity of this site to the Suffern Village drinking water supply wells, quarterly groundwater monitoring is being conducted and will continue to be conducted until the DEC-required site remediation program is implemented.

Status of Compliance:

Orange and Rockland is in compliance with the ROD.

Superfund Sites

Site Name: BORNE CHEMICAL

Site Location: 632 South Front Street, Elizabeth, New Jersey

Remediation Program: New Jersey Spill Act Program (PRP Site)

Site Identification No.: NJDEP Site #NJD002167237

The Borne Chemical site is a state superfund site. The site was a 14-acre former petrochemical packaging/waste oil recycling facility located along the Arthur Kill waterway in Elizabeth, New Jersey. The site was abandoned in 1985 when its owner went bankrupt. The site is being investigated and remediated by a group of potentially responsible parties ("PRPs") in compliance with administrative directives issued by the New Jersey Department of Environmental Protection ("NJDEP") pursuant to the New Jersey Spill Compensation and Control Act ("Spill Act"). Orange and Rockland joined the PRP steering committee as part of the settlement it entered into with the members of the steering committee. As directed by the NJDEP, the PRP steering committee has investigated the site and completed a $10 million NJDEP-approved program to clean out the site's oil and chemical storage tanks and piping systems. The PRP Group is now implementing an NJDEP-approved remediation plan to collect the free-phase oil present beneath portions of the site and to excavate and cap contaminated soils on the site. The NJDEP is evaluating, but has not yet approved, a remediation plan for the site's contaminated groundwater.

Orange and Rockland's share of estimated total liability for this site is 2.27%.

Site Name: **ELLIS ROAD/AMERICAN ELECTRIC CORPORATION**

Site Location: Jacksonville, Duval County, Florida

Remediation Program: EPA Superfund (PRP Site)

Site Identification No.: 04-2010-3768

The Ellis Road/American Electric Corporation site is a PRP site. The site is a former polychlorinated biphenyl ("PCB") waste consolidation, storage and treatment facility that was operated by the now defunct American Electric Corporation ("AEC") from 1979 until 1984. In 1984, the warehouse building that AEC used at the site for the processing and storage of regulated PCB equipment and materials was destroyed by a fire that resulted in PCBs being released to the environment. EPA performed an emergency response action and a series of initial removal actions to secure the site and to prevent further releases of PCBs. EPA subsequently identified AEC's former customers and demanded that they fund an additional removal action for the site. Orange and Rockland was designated a Superfund PRP for the site because it shipped 440 gallons of PCB-contaminated waste water to the site for treatment. Approximately 200 of AEC's former customers, including Orange and Rockland, joined together in 1988 to form a PRP Group. In 1989, the members of the PRP Group entered into an EPA administrative order on consent ("Consent Order") that obligated the group to perform EPA's required site removal action. Between 1990 and 1991, the PRP Group performed the required removal action and excavated PCB-contaminated surface soil, disposed of about 20,000 gallons of PCB-contaminated liquid waste, and emptied and decontaminated the above ground storage tanks that EPA installed at the site as part of its initial emergency response and removal actions. However, because the site is located near residential properties and more recent soil and groundwater sampling detected PCBs at concentrations that exceeded EPA's residential PCB cleanup standards, at the end of 2011 EPA notified all presently existing site PRPs of the need for a new removal action and demanded that they enter into another Consent Order under which the group would reimburse EPA for site oversight costs, and either implement or fund the implementation of the required removal action. In March 2012 Orange and Rockland entered into an agreement with the other PRP Group members regarding allocation of costs to be incurred pursuant to the proposed Consent Order. Orange and Rockland signed the Consent Order with EPA in July 2012. The total cost of cleanup for the site is currently estimated to be $5.4 million.

Orange and Rockland's share of estimated total liability for this site is 0.24%.

Site Name: **METAL BANK**

Site Location: 7301 Milnor Street, Philadelphia, Pennsylvania

Remediation Program: EPA Superfund (PRP Site)

Site Identification No.: EPA PAD046557096

The Metal Bank Superfund Site is on the site of a ten-acre former scrap metal reclamation facility located along the Delaware River in northeastern Philadelphia. It was added to the Superfund National Priorities List in 1983 after EPA and the U.S. Coast Guard documented releases of PCB-contaminated oil from the site to the Delaware River. Orange and Rockland is a member of a PRP steering committee comprised of electric utilities that shipped scrap transformers to the site during the late 1960s and 1970s. In 1998, EPA issued Unilateral Administrative Orders compelling Orange and Rockland, most of the other steering committee members, and the current and former owners and operators of the site to design and implement the remedy EPA selected in December 1997 for the site and the PCB-contaminated sediment in the area of the Delaware River along the site's waterfront. EPA's selected remedy was challenged by the current and former site owners and operators in the U.S. District Court for the Northern District of Pennsylvania. After years of negotiations, settlements resolving all claims and consent decrees embodying the requirements of the settlements were approved and entered by the district court in 2006. Under their consent decree with the government, the steering committee members were required to design and implement the required remediation work for the site and Delaware River sediment affected by the site's contamination. The implementation of the remedy was started in early 2008 and was completed in 2010. As required under their consent decree with the government, the members of the steering committee are currently implementing monitoring activities to ensure that the long-term protectiveness of the site's completed remedy.

During 2013, state and federal natural resource trustees provided the PRP steering committee and other site PRPs with a copy of their Natural Resource Damage Assessment and Restoration Options Report ("DAROR") that assessed natural resource damages ("NRD") purportedly caused by releases of hazardous substances at the site. The natural resource trustees for the Metal Bank site include the National Oceanic and Atmospheric Administration ("NOAA"), the United States Department of the Interior, the national Fish and Wildlife Service, and various Pennsylvania agencies. The DAROR focuses on losses to soil, sediment, and fish resulting from releases of PCBs from the site and habitat losses caused by the EPA's required site remedial construction activities. Such losses are estimated by comparing PCB concentrations in site soils, Delaware River sediment, and fish tissue to literature-based adverse effects thresholds. The PRP steering committee has assessed the DAROR and submitted comments to the trustees questioning the extent, if any, of NRD by the site. Negotiations with the trustees regarding NRD issues are expected to continue during the linking period and rate year.

Orange and Rockland's share of estimated total liability for this site is 4.58%.

Site Name: WEST NYACK

Site Location: 180 West Nyack Road, West Nyack, New York

Remediation Program: DEC Superfund

Site Identification No.: DEC Site # 3-44-014

Site Background:

The West Nyack site is an approximately 3-acre parcel bounded by the Hackensack River to the north and east, Old Nyack Turnpike (also called West Nyack Road) to the south and Consolidated Rail Corporation (Conrail) rail tracks and Yaboo Fence Company, Inc. to the west. The West Nyack Operating Center ("WNOC") facility is currently used by Orange and Rockland as a satellite service center for Orange and Rockland line crews as well as for office space. Investigation of contamination on the property was triggered by a leaking underground storage tank and concerns regarding possible polychlorinated biphenyl ("PCB") contamination. Orange and Rockland investigated the site pursuant to two DEC Consent Orders (Order # W3-0508-91-02 and Order # W3-0508-93-12) and remediated the site pursuant to DEC Consent Order # W3-0508-97-10.

Record of Decision (ROD):

The DEC issued the ROD for the WNOC in 1997 and required excavation of PCB and petroleum contaminated soil. The ROD did not include a groundwater remediation component because there was evidence that an offsite source of contamination was contributing to the groundwater impacts on the WNOC property. Quarterly groundwater monitoring was required until these impacts were more fully investigated.

Scope of Site SIR Work:

The site was remediated in accordance with a DEC-approved Remedial Action Work Plan ("RAWP") dated September, 1997. PCB and petroleum contaminated soils were excavated and removed from the site and an asphalt soil cover system was installed Quarterly groundwater monitoring and annual soil vapor intrusion evaluations were conducted through 2012. A Site Management Plan ("SMP") was finalized and approved by the DEC in 2012. A deed restriction for the DEC-required institutional controls for the site was executed and recorded in July 2012. The SMP requires annual inspection and certification that the engineering controls are in place.

Status of Compliance with ROD:

Orange and Rockland is in compliance with the ROD and the SMP.

UST SITE

Site Name: SPRING VALLEY OPERATING CENTER UST

Site Location: 390 West Route 59, Spring Valley, New York

Remediation Program: DEC UST

Site Identification No.: DEC Spill # 08-07165 and #13-03197

Site Background

Orange and Rockland maintains a fueling island for company vehicles at the Spring Valley Operating Center consisting of three fuel dispensers: two dispensing gasoline and one dispenser for diesel fuel. Three 10,000-gallon underground storage tanks ("USTs"), two storing gasoline and one storing diesel fuel, are connected to the fuel dispensers via underground piping. In February 2009 Miller Environmental Group, Inc. ("MEG") conducted a subsurface investigation at the Spring Valley Operations Center in response to a UST line leak identified during tightness testing conducted on September 25, 2008. Results of the investigation revealed gasoline contaminated soil and groundwater in the area of the line leak and the fuel island.

Record of Decision (ROD):

No ROD or other final Decision Document has been issued for this site.

Scope of Site SIR Work:

Several rounds of investigation were conducted to delineate the vertical and horizontal extent of the petroleum contamination. A closure plan to remove the USTs and the impacted soil ("Closure Plan") was submitted to the DEC and the Rockland County Department of Health. The Closure Plan was approved by both the DEC and the Rockland County Department of Health. Bid documents were prepared in 2012 to conduct the remediation in conjunction with installation of a new tank system. In connection with the tank removal and soil remediation that was completed in 2013 in accordance with the Closure Plan, Con Edison Construction Management acted as the general contractor for the project, with responsibility for hiring the construction contractor, overseeing the performance of the work and paying the bills. Groundwater monitoring required by the Closure Plan will be conducted in 2014.

Status of Compliance:

Orange and Rockland is in compliance with all applicable DEC SIR program requirements for the site.

Exhibit 2

O&R SIR Projects		
Site Name	**Rate Year Projected Costs**	**Rate Year Projected Activities**
Nyack MGP	$104,524	Development of site management plan. Periodic site inspection and report regarding compliance with institutional controls.
Port Jervis MGP	$25,008	Monitoring of NAPL collection wells. Periodic site inspection and report regarding compliance with institutional controls.
Suffern MGP	$8,879,386	Remedial action/construction. Ongoing quarterly groundwater monitoring
Clove and Maple Ave., Haverstraw MGP	$590,183	Remedial Design and Planning
93B Maple Ave., Haverstraw MGP	$2,500	Periodic site inspection and report regarding compliance with institutional controls.
Genung St. MGP	$0.00	No activity or costs projected for this site during rate year
Fulton St. MGP	$458,014	Remedial Design and Planning
MGP Common Expenses	$549,960	Program wide litigation/NYSDEC Oversight
Spring Valley UST	$2,000	Groundwater monitoring, reporting
West Nyack Operating Center	$10,000	Periodic site inspection and report regarding compliance with institutional controls.
Borne Chemical	$3,405	PRP Group Costs
Metal Bank/Cottman Ave.	$20,000	PRP Group Costs
Ellis Road	$0.00	No costs projected for this site during the rate year
TOTAL	**10,609,575**	

Note: All projected activities and costs were based on information available at the time they were developed and on anticipated actions of others such as approval by the DEC, access provided by property owners, and property owners' development plans. The projected activities, schedules and estimated costs are subject to change based upon design and construction-related contingencies, which may include regulatory review, approval schedules, permitting processes, access and cooperation issues with property owners, results of site investigations, unanticipated field conditions and/or force majeure events. Delays in a project may result in acceleration or substitution of other projects.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 12/29/2014
Responding Witness: Maribeth McCormick

Question No. : 282

According to O&R's response to IR DPS-204, part (d), the Travelers Indemnity Company (Travelers) denied claims made by O&R under third-party liability policies for SIR costs from the seven MGP sites owned and operated by O&R and its predecessors, and a trial court granted summary judgment to Travelers with respect to six of the MGP sites on the ground that O&R's notice of claim was late.

1. Was a notice of claim made by O&R for the seventh MGP site? If yes, what is the status of the claim for this site?
2. What was the deadline date for the notice of claim with respect to each of the seven MGP sites?
3. On what date was each of the seven notices of claim filed?
4. What was the reason for the late filing of the claim in each of the six instances?
5. What were the amounts of each of the seven claims?
6. Describe the status of O&R's appeal of the trial court's ruling.

Response

1. Yes. In response to a draft consent order received from the New York State Department of Environmental Conservation ("DEC") in January 1995, which for the first time sought to require O&R to conduct onsite and offsite preliminary assessments of environmental contamination at all its MGP sites, O&R provided notice of claims to Travelers as to all its MGP sites in April 1995. Travelers disclaimed coverage on May 1, 1995 on the ground that no claim had yet accrued and that the DEC had merely requested that O&R "gather and provide data". It was not until 2002, seven years after receiving notice, that Travelers first disclaimed coverage based on late notice, and sued O&R for declaratory relief on that basis as to all seven sites. O&R moved for partial summary judgment declaring that Travelers could not assert late notice as a bar to coverage. The parties agreed to limit their arguments in the first round of motions to one of the seven sites, i.e., the Nyack site. The trial court granted O&R partial summary judgment finding as a matter of law that O&R's notice was not late as to the Nyack site. An appellate court later reversed in 2010. No further appeal of the Nyack ruling may be taken until

there is a final adjudication on the merits as to other six MGP sites. As discussed in O&R's response to DPS-204(d), in 2012, Travelers moved for summary judgment with respect to the remaining six O&R MGP sites on the grounds of late notice, the trial court granted the motion and the Company appealed. (See the Company's response to subpart (6) below.)

2. This is under dispute and was the subject of the Nyack appeal and is also the subject of the current appeal as to the Company's six MGP sites. There is no set deadline date for filing notices of claims. Under New York law a party is required to provide notice of claim when it has an "awareness of a reasonable possibility that the policy will be implicated." It is O&R's position that it had no such awareness and that no claim arose until after receipt of the draft consent order from the DEC in January 1995, and that therefore the notice made on April 14, 1995 was timely.

3. Notice of claim as to all O&R MGPs was filed on April 14, 1995.

4. It is O&R's position that the filing was not late and the Company is aggressively pursuing its right to insurance coverage.

5. A claim was made for coverage with respect to all of the Company's MGP sites. The Company is seeking the maximum amount under the policies (at least $15 million) and attorneys' fees to the extent permitted by law.

6. The current appeal relating to the six MGP sites has been fully briefed and was argued in December 2014. The Company is awaiting the Court's decision.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-11
Date of Response: 02/11/2015
Responding Witness:

Question No. : 282 Supp

According to O&R's response to IR DPS-204, part (d), the Travelers Indemnity Company (Travelers) denied claims made by O&R under third-party liability policies for SIR costs from the seven MGP sites owned and operated by O&R and its predecessors, and a trial court granted summary judgment to Travelers with respect to six of the MGP sites on the ground that O&R's notice of claim was late.

1. Was a notice of claim made by O&R for the seventh MGP site? If yes, what is the status of the claim for this site?
2. What was the deadline date for the notice of claim with respect to each of the seven MGP sites?
3. On what date was each of the seven notices of claim filed?
4. What was the reason for the late filing of the claim in each of the six instances?
5. What were the amounts of each of the seven claims?
6. Describe the status of O&R's appeal of the trial court's ruling.

Response

6. In January 2015, a New York appeals court upheld the trial court decision finding that Travelers Indemnity Co. is not required to pay for state-mandated environmental remediation at O&R manufactured gas plants.

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-43
Date of Response: 03/06/2015
Responding Witness:

Question No. : 536

Subject: Travelers Insurance Claims Litigation

In response to IR DPS-500, Company witness Maribeth McCormick stated, "O&R intends to seek leave to appeal to the New York Court of Appeals with regard to the order of the Appellate Division, First Department, entered on January 8, 2015, as well as that Court's earlier order regarding the Nyack site entered on May 20, 2010."

1. Has O&R previously sought leave to appeal from the Appellate Division, First Department Order, entered May 20, 2010, regarding the Nyack site? If yes,
   a. When did O&R make the motion for leave to appeal?
   b. What was the outcome of the motion? Provide a copy of the motion and the decision.
   c. In its action on the motion, did the Court of Appeals specifically provide that O&R could renew (or resubmit) its motion for leave to appeal the May 20, 2010 Order? If so, explain. If not, explain why O&R believes that the Court of Appeals will entertain a motion for leave to appeal the May 20, 2010 Order, given the amount of time that has passed.

2. Provide copies of the notices of entry for both the May 20, 2010 and January 8, 2015 Orders.

3. When available, provide a copy of O&R's motion(s) seeking leave to appeal the May 20, 2010 and January 8, 2015 Orders.

Response

1.a. O&R moved for leave to appeal the May 20, 2010 order of the Appellate Division, First Department on June 28, 2010.

1.b. The Court of Appeals dismissed the motion on September 16, 2010 on the grounds that the May 20, 2010 order was a non-final order, stating that "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." A copy of the motion papers and the Court of Appeals' order are attached.

1.c. The Court of Appeals' order was a dismissal based on lack of finality and was not a denial on the merits. Pursuant to CPLR 5602(a)(1), O&R will make a motion to the Appellate Division, First Department for leave to appeal to the Court of Appeals from the final order entered on January 8, 2015. This motion, if granted, will bring up for review any prior, non-final order that necessarily affected the final order of January 8, 2015. O&R will have 30 days from any denial of this motion by the Appellate Division, First Department to make a motion for leave to appeal directly to the Court of Appeals. While granting leave to appeal is discretionary, nothing in the Court of Appeals' order of September 16, 2010 would preclude it or the Appellate Division from granting review of the January 8, 2015 order or the May 20, 2010 order that necessarily affected it.

2. Copies of the requested notices of entry are attached.

3. Copies of O&R's motion(s) will be provided when available.

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February 4, 2015

VIA OVERNIGHT MAIL

Clerk
New York Supreme Court, New York County
New York County Courthouse
60 Centre Street, Room 161
New York, New York 10007

Re: The Travelers Indemnity Company v. Orange & Rockland Utilities, Inc.
Index No.: 603601/02
Motion Sequence Nos.: 018, 019, 020, 021, 022, 023

Dear Clerk:

On behalf of Plaintiff The Travelers Indemnity Company ("Travelers") in the above-referenced matter, enclosed please find an original and one (1) copy of the following documents for filing with the Court:

1. Notice of Entry attaching Decision and Order of the New York Appellate Division, First Department, entered January 8, 2015; and

2. Affirmation of Service

Please file the original documents and return the additional copy stamped "FILED" in the enclosed prepaid envelope. Thank you for your attention to this matter.

Sincerely,

CLYDE & CO US LLP

MATTHEW I. GENNARO

Enclosures

cc: All Counsel Of Record (via overnight mail and email w/encl.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff, - against - ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100, Defendants.	**Index No. 603601/02** **Hon. Eileen Bransten** **Motion Sequence Nos. 018, 019, 020, 021, 022, 023** **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached is a true and accurate copy of a Decision and Order of the Supreme Court, Appellate Division, First Department, dated and entered January 8, 2015.

Dated: February 4, 2015
New York, New York

Respectfully submitted,

Daren S. McNally
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Roger E. Warin
Molly Woodson Poag
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TO: John E. Failla
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Attorneys for Defendant
Orange & Rockland Utilities, Inc.

Sweeny, J.P., Andrias, Richter, Clark, JJ.

13918-
13919-
13920-
13921-
13922-
13923 The Travelers Indemnity Company,
Plaintiff-Respondent,

-against-

Orange and Rockland Utilities,
Inc., et al.,
Defendant-Appellant,

John Doe Corporations 1-100,
Defendants.

Index 603601/02

Proskauer Rose LLP, New York (John E. Failla of counsel), for appellant.

Steptoe & Johnson LLP, Washington, DC (Roger E. Warin of the bar of the District of Colombia, admitted pro hac vice, of counsel), for respondent.

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered July 18, 2013, which granted plaintiff Travelers Indemnity Company's (Travelers) motion for summary judgment seeking a declaration that it is not required to provide coverage to defendant Orange and Rockland Utilities (ORU), based on ORU's failure to provide timely notice of the occurrences for which it sought coverage, and denied ORU's motions for partial summary judgment seeking a declaration that Travelers breached its duty

to defend ORU with respect to the clean up of hazardous waste sites, unanimously modified, on the law, to declare that Travelers is not required to provide coverage to ORU and has no duty to defend ORU with respect to the hazardous waste sites at issue, and otherwise affirmed, without costs.

As this Court has already noted in connection with another site owned by defendant, defendant did not give timely notice under the policies, which was a requirement for coverage (*see* 73 AD3d 576 [1st Dept 2010], *lv dismissed* 15 NY3d 834 [2010]). Defendant's argument that it never had actual notice of any pollution was insufficient. The record abounds with documents demonstrating that pollution likely existed at each of the sites considered herein. These documents, along with repeated interactions with both state and federal regulators, were sufficient to place defendant on notice. Moreover, defendant's willful failure to investigate, i.e., its apparent strategy of waiting to be directed by the appropriate regulatory agencies to investigate the sites and remediate pollution, despite the overwhelming evidence of potential contamination, negates its

contention of a lack of awareness of the pollution (*id.* at 576-577).

We have considered the remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 8, 2015

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff, - against - ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100, Defendants.	**Index No. 603601/02** **Hon. Eileen Bransten** **Motion Sequence Nos. 013, 014, 015** **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached is a true and accurate copy of a Decision and Order of the Supreme Court, Appellate Division, First Department, dated and entered May 20, 2010.

Dated: May 27, 2010
New York, New York

Respectfully submitted,

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Attorneys for Plaintiff,
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Attorneys for Defendant
Orange & Rockland Utilities, Inc.

Gonzalez, P.J., Friedman, DeGrasse, Manzanet-Daniels, Román, JJ.

2843 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Respondent,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Appellant,

John Doe Corporations 1-100,
Defendants.

- - - - -

2844 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Appellant,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Respondent,

John Doe Corporations 1-100,
Defendants.

Dickstein Shapiro LLP, New York (David L. Elkind of counsel) and Dickstein Shapiro LLP, Washington, DC (Selena J. Linde of the Bar of the State of Maryland, admitted pro hac vice, of counsel), for Orange and Rockland Utilities, Inc., appellant/respondent.

Steptoe & Johnson LLP, Washington, D.C., (Roger E. Warin of Bar of the District of Columbia, admitted pro hac vice) and Clyde & Co US LLP, New York (Daren S. McNally of counsel), for The Travelers Indemnity Company, respondent/appellant.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 19, 2009, which granted defendant insured's motion for partial summary judgment on the issue of late notice and denied plaintiff insurer's motion for partial summary judgment, unanimously reversed, on the law, without costs, defendant's

motion denied, and plaintiff's motion granted to declare denial of coverage on the basis of untimely notice. Order (same court, Justice and entry date), which granted plaintiff's motion for partial summary judgment to exclude certain coverage based on the pollution exclusion in the policy, unanimously modified, on the law, the motion denied as to the 1970 policy and sites other than Nyack, and otherwise affirmed, without costs.

Defendant did not give timely notice under the policy, which is a requirement for coverage (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]). Defendant's ongoing contacts with environmental regulators about the Nyack site dated back to 1981, and there was even a site inspection by the Environmental Protection Agency in 1985, yet defendant never provided any notice to its insurer of these contacts or the questions they raised until 1995. Defendant's argument that it never had actual notice of any pollution was insufficient. The many reports, including internal reports of a likelihood of contamination at the subject site, as well as inquiries from regulators, placed it on notice. Its willful failure to investigate negates any lack of awareness of an occurrence of pollution (*see Technicon Elecs. Corp. of N.Y. v American Home Assur. Co.*, 74 NY2d 66, 75 [1989]). The court mistakenly held defendant to the much more lenient standard for the timing of

notice applicable in excess insurance cases. The standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated (*Paramount*, 293 AD2d at 239-240).

Similarly, the court erred in holding that plaintiff waived its right to disclaim for late notice simply as a result of the passage of time. Contrary to the court's assumption, Insurance Law § 3420 applies only to claims for death and bodily injury (*Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581, 582 [1999]), and not to pollution insurance.

Between 1971 and 1982, a provision of the Insurance Law then in effect (former § 46) excluded liability coverage for pollution other than claims based on "sudden and accidental" discharges. The court properly applied that exclusion for all policies issued during that period (*see Maryland Cas. Co. v Continental Cas. Co.*, 332 F3d 145, 159-160 [2d Cir 2003]). We do not find persuasive defendant's argument that plaintiff waived the "benefit" of the statute by issuing policies in contravention of its terms. Section 46 did not confer any benefit or right on insurers, but rather was intended to impose a penalty on polluters like the insured herein. The court correctly concluded that defendant failed to meet its burden of establishing that the pollution complained of was caused by "sudden and accidental" discharges

(*Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 31 [1992], *lv denied* 80 NY2d 753 [1992]). While its longtime employee testified that there were many accidental spills during routine operations, this was not sufficiently definite as to quantity, nature or effect of these spills to prove they fell outside the exclusion.

However, the court erred in applying the § 46 exclusion to the policy issued in 1970, prior to enactment of the short-lived statute, since a contract generally incorporates the state of the law in existence at the time of its formation (*see People ex rel. Platt v Wemple*, 117 NY 136, 148-149 [1889], *appeal dismissed* 140 US 694 [1890]). It also erred in granting plaintiff summary declaratory relief as to other sites,[1] in light of plaintiff's concession that the court's ruling on the issue of the statutory pollution exclusion be limited to the Nyack site.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 20, 2010

CLERK

[1]Seven are enumerated in the court's order and plaintiff's show cause order, although only six of them are listed in the complaint.

New York County Clerk's Index No. 603601/2002

Court of Appeals

STATE OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff-Appellee,

—against—

ORANGE AND ROCKLAND UTILITIES, INC,

Defendant-Appellant,

—and—

JOHN DOES CORPORATIONS 1-100,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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Attorneys for Plaintiff-Appellee

Date: July 9, 2010

COURT OF APPEALS
OF THE STATE OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff-Appellee, - against - ORANGE AND ROCKLAND UTILITIES, INC., Defendant-Appellant, and JOHN DOE CORPORATIONS 1-100, Defendants.	N.Y. County Index No. 603601/02 **AFFILIATION STATEMENT PURSUANT TO RULE 500.1(f)**

Pursuant to Rule 500.1(f), Plaintiff-Appellee The Travelers Indemnity Company ("Travelers") hereby states:

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a public company whose stock is traded on the New York Stock Exchange.

Dated: July 9, 2010
New York, New York

Respectfully submitted,

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Attorneys for Plaintiff,
The Travelers Indemnity Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Plaintiff-Appellee The Travelers Indemnity Company ("Travelers") respectfully submits this Memorandum of Law in Opposition to the Motion for Leave to Appeal to the Court of Appeals ("Motion") of Defendant-Appellant Orange & Rockland Utilities, Inc. ("Defendant" or "Orange & Rockland"), which seeks to appeal a unanimous decision of the Appellate Division, First Department ("Order") granting Travelers motion for partial summary judgment and denying Orange & Rockland's competing motion for partial summary judgment on the ground of late notice.

PRELIMINARY STATEMENT

This Court should deny Defendant's Motion for several reasons. First, contrary to Defendant's assertion, this Court is without jurisdiction to hear this interlocutory appeal under CPLR 5602(a)(1)(i). The First Department's Order at issue did *not* finally determine this action, but merely determined the issue of late notice with respect to one of the seven environmentally-contaminated sites at issue in this case (the "Nyack Site"). In fact, the parties expressly agreed and represented to the trial court that the motion below would relate to only one of the seven sites. Because coverage issues remain to be addressed with respect to the remaining six sites, the Order is not "final" and this Court does not have jurisdiction to hear this appeal.

Second, this appeal does not present any issues that are novel or of public importance, or involve a conflict with prior decisions of the Court of Appeals or among the departments of the Appellate Division. See 22 N.Y.C.R.R. § 500.22. Rather, the decision of the First Department properly applied well-settled New York law to the unique set of facts in this case.

Defendant argues that the First Department's Order is in conflict with other decisions by this Court and by other departments of the Appellate Division, but that is clearly not true. In fact, the First Department relied upon well-settled New York law governing when notice is late under primary insurance policies, and specifically held that the trial court incorrectly relied upon the vastly different notice standard applied to excess policies. Moreover, the cases that Defendant argues conflict with the Order actually apply the same blackletter notice standard that the First Department applied here - - that notice is due, when, under all the circumstances known to it at the time, Defendant could have gleaned the reasonable possibility of potential environmental liability implicating the primary Travelers Policies.

Defendant contends that it lacked adequate knowledge of potential third-party claims until state regulatory authorities proposed a consent decree in December 1994 and, thus, no notice was due to Travelers before that time. The record is, however, replete with unrebutted evidence establishing that the pollution

problems at the Nyack Site would likely affect properties adjacent to the Nyack Site, including the nearby Hudson River, and that such information was well known to Defendant long before its notice to Travelers. Moreover, the undisputed facts also show and Defendant admits, that it chose not to investigate despite extensive information about site contamination that it received over many years. In light of the totality of the circumstances known to Defendant from the undisputed facts of this case, the First Department unanimously and properly applied the correct notice standard, a standard established through settled New York law, to find that Defendant's notice was woefully late and that coverage is barred on the basis of that untimely notice.

Finally, Defendant raises a baseless challenge to the First Department's conclusion that Travelers properly reserved its right to assert the defense of late notice. Defendant identifies no conflict among lower courts on this issue. The First Department correctly rejected Defendant's argument below that Travelers had waived its late notice defense despite its clear reservations of rights. That ruling is consistent with cases recognizing that a reservation of rights preserves an insurer's defenses. Under the appropriate common law standard for waiver, Defendant's waiver claim easily fails here, and the First Department's waiver ruling does not merit review by this Court.

At bottom, Defendant is merely dissatisfied with the First Department's unanimous Order, which granted Travelers motion for partial summary judgment based on Defendant's extraordinarily late notice. This is not an appropriate justification for review by the Court of Appeals.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves a single aspect of an ongoing, multi-layered insurance coverage dispute between Orange & Rockland and its insurer Travelers over environmental liability relating to its operation of several manufactured gas plant ("MGP") facilities located throughout the State of New York ("MGP Sites"). Travelers instituted this action seeking a declaration that it did not owe insurance coverage for environmental pollution at the MGP Sites under primary liability policies issued (or allegedly issued) to Orange & Rockland for the years 1955 through 1978. The parties agreed, however, to focus summary judgment motions on the late notice issue on one MGP facility located in Nyack, New York. On appeal of the trial court's rulings on late notice with respect to that site only, the First Department reversed the trial court and granted summary judgment to Travelers on the ground that Orange & Rockland failed to give timely notice of an occurrence under the relevant policies. Orange & Rockland seeks to appeal that ruling to this Court.

I. THE TRAVELERS POLICIES REQUIRE PROMPT NOTICE

Orange & Rockland seeks coverage for its alleged liabilities at the Nyack Site under primary policies issued and/or allegedly issued by Travelers to Orange & Rockland from January 1, 1955 through February 15, 1978 (the "Travelers Policies"). The Travelers Policies are clear with respect to Orange & Rockland's notice obligations. Though the precise formulation varies from policy to policy, all of the policies require, as a condition precedent to coverage, that Orange & Rockland provide written notice of an accident or occurrence "as soon as practicable" and notice of a claim or suit "immediately" to Travelers. (R503-R504; R555; R557; R560; R562; R564; R566; R568; R570; R572; R574; R576; R579; R581; R584)[1]

II. ORANGE & ROCKLAND'S MGP POLLUTION AT NYACK

A. MGPs And Their Environmental Effects

MGPs operated during the "Gaslight Era," the period between 1830 and 1915, although some plants continued to operate into the 1960s. MGPs brought gas from the plants themselves into residential homes and businesses through a network of underground pipes. As a byproduct of the MGP process, MGPs produced vast quantities of coal tar and other residuals, which caused contamination at a large number of sites located throughout the country.

[1] Citations to the Record on Appeal to the First Department are denominated by a Capital "R" followed by a number.

B. Orange & Rockland's Historical Pollution Of The Nyack Site

Orange & Rockland operated the Nyack Site from 1852 through 1965 (R539) and engaged in activities during this period that polluted the Nyack Site. As early as 1917, a "large amount of tar" was "being deposited in the Hudson River adjacent to the gas plant," which was causing complaints from yacht and boat owners in the vicinity. (R1538) In 1919, Orange & Rockland continued to discharge 12,000 gallons of "coal tar and oil wastes" *per day* into the Hudson River from the Nyack Site. (R1537) Moreover, its own expert admits that Orange & Rockland also disposed of coal tar wastes into unlined pits at the Nyack Site, near the banks of the Hudson River. (R1270; see also R1535, R1540)

At the time operations were on-going, it was well-known within the industry and by Orange & Rockland that such operations would result in pollution problems. One of Orange & Rockland's own employees, Leon J. Willien, published multiple trade articles in the 1920s describing pollution problems associated with MGP processes and waste handling practices. (R658; R659-R673; R1541-R1544; R1545-R1550) Willien noted in particular that the MGP manufacturing processes "lead to the production of quantities of peculiar waste materials that are discharged into streams, many of which in concentrated forms are poisons, and cause trouble." (R1541)

III. ORANGE & ROCKLAND WAS AWARE OF MGP POLLUTION AT NYACK AND OTHER SITES LONG BEFORE IT NOTIFIED TRAVELERS

A. 1981: The EPA Pollution Notification

Orange & Rockland was aware of its potential liability for its MGP byproduct waste at the Nyack Site at least as early as June 9, 1981. On that date, Orange & Rockland's Senior Attorney notified the United States Environmental Protection Agency ("EPA") that the Nyack Site, as well as two other MGP Sites, contained "[p]ossible residual from utility gas manufacturing" allegedly stemming from "[s]pillage during normal operations and closure." (R585-R587)

B. 1985: The Middletown-Fulton MGP Site Pollution

Orange & Rockland became aware of further MGP pollution problems in 1985, when it discovered MGP contamination at a site in Middletown, New York (the "Middletown-Fulton Site"). In September 1985, during construction activities at that site, a subsequent owner discovered underground structures containing thousands of gallons of a "black viscous liquid tar-like substance." (R594; R596; R600) During the clean-up, it was noted that coal tar contamination had "extensively migrated through the soil throughout the site and beyond." (R595)

After conducting only partial remediation at the Middletown-Fulton Site, Orange & Rockland obtained consent from the New York State Department of Environmental Conservation (the "NYSDEC") to backfill additional known

contamination, knowing that the NYSDEC was "preparing a consent order concerning additional cleanup and further studies at the site." (R595) The NYSDEC also placed the Middletown-Fulton Site on its list of known hazardous waste sites in New York at that time. (R602)

In a letter dated November 14, 1985, Orange & Rockland asked its broker to notify its primary insurance carrier at the time - - AEGIS - - of the activities at the Middletown-Fulton Site and seek coverage for the investigation and remediation costs. (R603) In response, AEGIS noted that the MGP contamination appeared to be the result of historical operations, and twice requested that Orange & Rockland place its historical insurance carriers (including Travelers) on notice:

> We think that there are exposure years wherein we were not the insurer. *We believe other insurers should also respond for this loss.*

(R606) (emphasis added); see also R607-R608. AEGIS noted that Orange & Rockland had expressly stated that no leakage was found when the underground structures were first discovered, and that later investigations confirmed that there was widespread MGP contamination, indicating that the contamination and migration had occurred over a long period of time. (Id.; see also R594-R595; R603)

C. The Dalland Memorandum

The discovery of environmental issues at the Middletown-Fulton Site caused Orange & Rockland to examine potential exposure at other MGP Sites that it owned or previously owned, including the Nyack Site. On October 24, 1985, Orange & Rockland's Administrator of Loss Prevention and Insurance, Raymond Dalland (R623 at 92:2-92:6), circulated a memorandum (the "Dalland Memorandum") alerting high-level management to the MGP pollution problems facing the company. The memorandum - - titled "*Environmental Pollution*" - - warned that "*the buried tar and other residue may be coming back to haunt us.*" (R624) (emphasis added) It expressly noted the likelihood of MGP-related contamination at the other MGP Sites, including the Nyack Site, warning that *"[o]ur company had been making gas at [the Nyack Site] for 100 years and it is likely that this soil also contains tar and other pollutants.*" (Id.) (emphasis added).

D. 1986-1990: Additional Regulatory Investigation And Scrutiny At The Nyack Site And Other MGP Sites

In the late 1980s, Orange & Rockland continued to receive information indicating a likelihood of pollution problems at all of its MGP Sites. In early 1988, it received from the American Gas Association an October 1987 EPA Report describing the dangerous nature of MGP byproducts and wastes and the systematic and widespread environmental pollution they caused. (R640-R652) The EPA Report described EPA's systematic effort to investigate and remediate, where

necessary, all of the former MGP plants throughout the country and noted that the investigation and remediation of former MGP Sites "should increase markedly over the next few years." (R1508; R1505-R1512)

An EPA environmental investigation took place immediately at the Nyack Site, beginning in 1988. (R639) Orange & Rockland apparently made no effort to obtain a copy of the report of the results of this investigation. (R693; R726; Motion at 31)

This investigation of the Nyack Site took place during the same period as additional regulatory investigations of other Orange & Rockland MGP Sites that revealed MGP pollution at those sites. For example, in 1986 and 1987, the NYSDEC informed Orange & Rockland that it was undertaking a remedial investigation of contamination of a wellfield in Suffern, New York, located adjacent to a gas works formerly operated by Orange & Rockland (the "Suffern Site"). The NYSDEC indicated that it would "investigate the potential for contamination of the Suffern wellfield from tar wastes which were presumably deposited near the wellfield as a result of the operation" of the Suffern Site. (R626) A July 1987 environmental report issued during the investigation concluded that "[c]oal tars have possibly existed at the site since the 1930s" (R637) and "[t]he [chemical pollutants] are the result of releases of such compounds into

the shallow environment presumably from coal tars buried near the former gas works facility." (R638)

Also in 1987, NUS Corporation, acting on behalf of the EPA, conducted a full preliminary site investigation at a second Orange & Rockland MGP Site in Middletown, New York (the "Middletown-Genung Site"). NUS's final report found MGP soil contamination and a "strong potential" for groundwater contamination. (R677) In addition, another NYSDEC investigation of the Middletown-Fulton Site was conducted in June 1988. (R682) The report concluded: "[a]s site contamination does exist, and given the proximity of the site to [a nearby brook]...there continues to exist the potential for off-site migration of contaminants." (R689)

The NYSDEC subsequently began to seek additional waste handling information from Orange & Rockland concerning all of its former MGP Sites. On September 15, 1988, the NYSDEC requested a "detailed summary" of Orange & Rockland's "MGP site information." (R691 at ¶10.6.) In response, Orange & Rockland's Director of Environmental and Administrative Services forwarded a "listing and description of former coal gasification plant sites of which Orange and Rockland is aware." (R692) This letter listed the Nyack Site among those plant sites, and it included reference to the EPA investigation of that site. (R693)

E. 1991-1993: Orange & Rockland Is Required To Explain Its MGP Pollution Activities To The NYSDEC And Received A Demand To Clean Additional Pollution At The Middletown-Fulton Site

In April 1991, NYSDEC requested that Orange and Rockland "explain[] the coal tar site activities of your company...for all of your company's sites listed in the Registry (see attached) as well as any unlisted and potential sites." (R694) This letter listed the Nyack Site and the Middletown-Genung Site. (R696)

Orange & Rockland responded in May 1991, submitting detailed reports of the history and operations of *all* of its MGP Sites. (R697-R730) The reports listed the 1985 discovery of coal tar at the Middletown-Fulton Site (R698-R699), the 1987 investigation of the Middletown-Genung Site (R705), the 1987 investigation of the Suffern Site (R710), and the 1988 investigation of the Nyack Site (R726).

In 1993, Orange & Rockland was informed - - by two separate property owners on two different occasions - - that the cleanup of additional MGP pollution was required at the Middletown-Fulton Site. (R731; R735) One such letter noted that Orange & Rockland's previous cleanup of the site "was incomplete and that further contamination, which was caused from the coal gasification process utilized by [Orange & Rockland] at the site, remains on the property." (R735) That letter informed Orange & Rockland that, "among other things, coal tar wastes, which are classified as hazardous substances under CERCLA, remain on the site" and

demanded that it "finish the cleanup that it started in 1985 and remove all contamination located on the site." (Id.)

F. 1994-1995: Orange & Rockland Negotiates A Consent Order To Remediate The MGP Pollution At All Of The MGP Sites, Including The Nyack Site

Shortly after the correspondence from property owners demanding additional cleanup of the Middletown-Fulton Site, Orange & Rockland sought "direction from NYSDEC in developing an appropriate response strategy." (R736) In the discussions that followed, the NYSDEC made clear that it would require a comprehensive response by Orange & Rockland to its MGP pollution problems.

On August 8, 1994, the NYSDEC sent Orange & Rockland samples of multisite consent orders, as part of the ongoing discussions concerning the development of a consent order for Orange & Rockland's MGP Sites. (R737) On August 10, 1994, Orange & Rockland wrote to the NYSDEC, confirming receipt of the sample consent orders and the intent to address all of Orange & Rockland's MGP Sites (including the Nyack Site) in the continued dealings with the NYSDEC. (Id.) An initial draft of a consent order was prepared at that time. (R1410; R960-R961 at 785:21-786:3)

In a September 6, 1994 meeting in Albany, New York, the NYSDEC confirmed to Orange & Rockland that it "would have to address all of the MGP sites under a single Consent Order." (R691 at ¶9). By letter dated September 20,

1994, Orange & Rockland acknowledged that the consent order would address all of the MGP Sites, including the Nyack Site. (R738-R739) Orange & Rockland stated its preference to address remedial activity in a separate consent order, but the prospect of remedial activity was already under discussion. (Id.)

On December 13, 1994, Staff Counsel for the State of New York Department of Public Service ("NYDPS") requested further information, within 10 days, on all of the MGP Sites "to assist Staff's completion of its investigation and report to the Commission regarding utility coal tar Site Investigation and Remediation (SIR) costs." (R740) In its response, Orange & Rockland provided detailed historical information relating to each of the MGP Sites, including discussion of the various investigations described above and communications with the NYSDEC regarding the MGP Sites dating back to 1985. (R744-R753)

Orange & Rockland's responses admitted that it had identified historical primary insurance coverage for its MGP Sites, but had not put those insurers on notice. (R751) Significantly, Orange & Rockland expressly added that, despite not having previously given notice, it now would be putting its insurers on notice, "in light of the company's recent discussions with the NYSDEC, and anticipated future activity at these sites." (Id.)

As a follow-up on the ongoing discussions with Orange & Rockland, the NYSDEC next forwarded a revised draft Consent Order addressing the MGP Sites for Orange & Rockland's review in a letter dated December 27, 1994. (R754)

IV. ORANGE & ROCKLAND'S NOTICE TO TRAVELERS AND TRAVELERS RESERVATION OF RIGHTS

A. Orange & Rockland's First Purported Notice To Travelers

Notwithstanding its representation to the NYDPS that it would be putting its insurers on notice, and despite its long-standing awareness of its MGP pollution problems beginning in at least 1981, Orange & Rockland did not send a purported notice letter to Travelers until April 14, 1995. (R762) That letter informed Travelers of Orange & Rockland's known MGP liabilities, including the Nyack Site, and enclosed a list of allegedly applicable Travelers policies and a copy of what Orange & Rockland described as "an initial draft" of a Consent Order received from the NYSDEC. (Id.) The letter failed to disclose Orange & Rockland's long history of dealings with regulatory agencies regarding the pollution problems at the MGP Sites, including the Nyack Site. (Id.)

B. Travelers Reservations Of Rights And Requests For Information

Travelers acknowledged receipt of Orange & Rockland's April 14, 1995 letter and fully reserved all of its rights in a May 1, 1995 letter. (R1150-R1151) The letter advised Orange & Rockland "that The Travelers fully reserves its rights

in this matter and that neither this acknowledgment nor any future communication or investigation shall be deemed or construed as a waiver of any of the rights and defenses available to The Travelers, including those rights and defenses provided under its contract(s) of insurance." (Id.)

The May 1, 1995 letter further confirmed Travelers understanding, based upon the limited information provided by Orange & Rockland, that Orange & Rockland's discussions with regulatory agencies concerning its MGP Sites had only just begun, and it asked Orange & Rockland to continue to provide information as it became available so that Travelers could make a coverage assessment. (R1221 at 43:1-22)

Thereafter, throughout the entire subsequent period in which Travelers sought information from Orange & Rockland, Travelers repeatedly, consistently and fully reserved all of its rights, including the right to disclaim on the basis of late notice, while conducting its investigation. (R1255; R1258; R1222-R1225 at 56:23-59:17)

By letter dated March 18, 1996, Travelers provided additional information regarding its policy research to Orange & Rockland, fully reserving its rights and specifically reserving its right to assert that *"[c]overage does not apply if the insured fails to provide notice to The Travelers in accordance with the conditions of the policies.*" (R1258) (emphasis added) In addition, this letter listed

comprehensive requests for information from Orange & Rockland that were essential for Travelers investigation, including information regarding MGP operations and waste disposal practices and information regarding "how and by whom contamination at the sites was discovered." (R1259; R1235-R1236 at 80:25-81:22) Orange & Rockland initially responded by claiming not to possess the information sought by Travelers and incorrectly asserted that it "*has not discovered contamination at the sites resulting from its operations*." (R1262) (emphasis added)

Later, in a letter dated April 25, 1996, Orange & Rockland provided what it claimed was information "address[ing] the location of each site, the period of ownership or occupancy and the date the sites operated as gas manufacturing plants." (R1263-R1266) This letter, however, contained no reference to any of the previous notifications to regulatory authorities, investigations and/or remediations at any of the MGP Sites, including the Nyack Site - - information that Orange & Rockland had shared with the NYSDEC *nearly ten years* before. (R692-R693) Orange & Rockland also again claimed that "[b]ased upon the information currently available to us we do not believe that the sites were used for on-site disposal." (R1263)

Thereafter, Travelers continually sought information from Orange & Rockland, and specifically and fully reserved its all of its rights on at least *nine*

subsequent occasions by letters dated May 22, 1996, March 27, 1997, August 18, 1997, July 28, 1999, October 28, 1999, January 5, 2000, May 5, 2000, August 9, 2000 and January 25, 2002. (R1271-R1272; R1273-R1274; R1275-R1276; R1281-R1282; R1283-R1284; R1285-R1286; R1289-R1290; R1292-R1293; R1297-R1300)

Orange & Rockland continued to tell Travelers that it would provide updated information regarding all of the MGP Sites as the information became available. (R1277) Orange & Rockland, however, continued to provide little, if any, information responsive to Travelers information requests, particularly with regard to the Nyack Site. (R1226-R1228 at 60:14-62:12; R1229-R1231 at 65:19-67:24; R1232-R1238 at 77:20-83:1; R1239-R1242 at 91:16-94:8; R1243-R1244 at 96:14-97:17)

Simultaneously, Orange & Rockland indicated to Travelers that "the MGP...sites *were not ripe for discussions on resolving coverage issues*...." (R1279) (emphasis added) Travelers responded that it would nonetheless continue its investigation subject to a full reservation of rights. It also noted that it *still had not received any information related to the Nyack Site.* (Id.) In a letter dated October 13, 1998, Orange & Rockland confirmed that it had not provided Travelers with information on the Nyack Site. (R1280)

In a July 28, 1999 letter, Travelers confirmed Orange & Rockland's continued position that it was not ready to discuss any resolution of the coverage issues involving the MGP Sites. (R1281) Travelers noted that it would continue further review of these matters and, by letter dated October 28, 1999, Travelers again requested that Orange & Rockland provide it with updates regarding the status of these matters and continued fully to reserve its rights. (R1283-R1284) Travelers received no response to these requests, and in January of 2000 *again* requested an update on the status of the MGP Sites. (R1285-R1286) In reply, Orange & Rockland simply "reserve[d] [its] rights" and stated that its "law department will contact you on the status [of] this case." (R1287)

Later, in a letter dated April 13, 2000, Orange & Rockland's law department informed Travelers that "O&R has recently completed investigations of five of the sites and expects soon to complete the investigations of the remaining sites." (R1288) Travelers promptly requested these reports and continued fully to reserve its rights. (R1289-R1290)

In response, Orange & Rockland forwarded only certain reports - - dated from 1997 through 1999 - - to Travelers under cover dated July 31, 2000. (R1291) None of these reports related to the Nyack Site, and the letter in fact noted that a Remedial Investigation Report for the Nyack Site would be forwarded under separate cover. (Id.) On August 9, 2000, Travelers responded, including to note

that most of the reports did not provide new information, as they had previously been produced by Orange & Rockland. That letter also confirmed Orange & Rockland's representation that the report for the Nyack Site had been completed and would be produced soon. (R1292-R1293) Travelers once again also fully reserved all of its rights. (Id.)

In a letter dated March 21, 2001, Orange & Rockland's counsel informed Travelers that it was still "in the process of gathering and reviewing information pertaining to the Sites, as well as O[range] & R[ockland]'s insurance policies." (R1294)

Still later, in a letter dated January 15, 2002 - - nearly seven years after its first purported notice in this matter - - Orange & Rockland stated that it wished to begin discussions "towards resolving" the MGP Site claims, and that, "[i]n furtherance of this goal, we are prepared to send you recent documentation concerning remediation costs, as well as other information regarding these claims." (R1296) Orange & Rockland requested that Travelers sign a confidentiality agreement before receiving this information. (Id.) Travelers did so and, once again, continued to reserve all of its rights. (R1297-R1300)

Orange & Rockland responded by providing only limited information through its outside counsel. (R1301-R1306) This information included a summary that simply discussed the extent of contamination at the MGP Sites and

the projected remediation costs. (Id.) Indeed, Orange & Rockland *never* produced actual site investigation or remediation reports to Travelers on the Nyack Site prior to productions made in the coverage litigation. Importantly, Orange & Rockland provided no documents that put Travelers on notice of its longstanding awareness of regulatory investigations and its potential MGP liabilities at the Nyack Site.

V. THE TRAVELERS COVERAGE ACTION

Travelers initiated this coverage action on October 2, 2002, to establish its rights under the Travelers Policies. (R410-R421) In its Answer, Orange & Rockland asserted a claim for coverage with respect to environmental liabilities at the MGP Sites. (R519-R527)

Through formal discovery, Travelers obtained for the first time documents, detailed above, demonstrating Orange & Rockland's egregious delay in providing notice to Travelers. These included documents from Orange & Rockland's own files - - such as the Dalland Memorandum - - that clearly establish Orange & Rockland's awareness by 1985 of its MGP pollution problems at the MGP Sites, especially the Nyack Site.

On October 8, 2008, after the completion of discovery, Travelers moved before the trial court for summary judgment that Orange & Rockland's late notice of its MGP liabilities vitiates coverage under the Travelers Policies. (R813-R848) At the same time, Defendant moved for summary judgment that Travelers

allegedly waived the defense of late notice. (R461-R476) Shortly after the parties filed their motions, they agreed that the Travelers motion would seek relief only as to the Nyack Site. Travelers and Orange & Rockland provided a joint submission to the trial court confirming that agreement and further noting that "the parties agree that they reserve the right to seek, in the future, a late notice determination with respect to sites other than Nyack." (R1147-R1148)

In a Memorandum Decision and Order entered on August 19, 2009, the trial court denied Travelers motion and granted Orange & Rockland's motion. (R9-R21) Travelers filed a timely Notice of Appeal of the trial court's order on October 7, 2009. (R29) The Appeal was fully briefed by March 12, 2010 and the First Department heard oral argument on April 29, 2010.

On May 20, 2010, the First Department issued a Decision and Order unanimously reversing the trial court's decisions on the parties' motions for summary judgment and holding that Travelers did not waive the late notice defense and was entitled to a declaration of no coverage as to the Nyack Site on the basis of Defendant's untimely notice.

The First Department held that, because of Orange & Rockland's "ongoing contacts" with various environmental regulators about pollution at the Nyack Site, Orange & Rockland had an obligation to give notice to Travelers pursuant to the terms and conditions of the policies and New York law. (Attachment 1 to

Defendant's Motion ("Att. 1") at 14) The fact that Orange & Rockland disclaimed any actual knowledge of the extent of the pollution at the Nyack Site did not absolve it of its obligation to provide notice, since "internal reports of a likelihood of contamination at the [Nyack] site, as well as inquiries from regulators placed [Orange & Rockland] on notice." (Id.) The First Department also held that because the undisputed evidence demonstrated that Orange & Rockland had willfully failed to investigate the nature and extent of the pollution at the Nyack Site, it could not claim lack of awareness of a pollution occurrence under the Travelers Policies. (Id.)

The First Department further held that the trial court applied the wrong standard in considering whether Orange & Rockland had given timely notice: "[t]he court [below] mistakenly held defendant to the much more lenient standard for the timing of notice applicable to excess insurance carriers." (Att. 1 at 14-15) The First Department noted that the correct standard with regard to primary policies such as the Travelers Policies is "simply awareness of a reasonable possibility that the policy will be implicated." Citing Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235, 239-240, 743 N.Y.S.2d 59, 62-63 (1st Dep't 2002). (Att. 1 at 15)

Finally, the First Department held that the trial court likewise applied an improper legal standard with regard to waiver and that Travelers had not waived its right to disclaim coverage based on Defendant's untimely notice. (Id.)

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO GRANT PERMISSION TO APPEAL BECAUSE THE DECISION, WHICH EXPRESSLY HOLDS THAT ISSUES REMAIN TO BE LITIGATED IN THE TRIAL COURT, IS NOT FINAL

Defendant seeks to appeal what amounts to an interlocutory order granting *partial* summary judgment to Travelers. But this Court lacks jurisdiction over the nonfinal Order at issue here. CPLR 5602(a)(1)(i) provides that this Court may grant permission to appeal only from an order of the Appellate Division that finally determines the action. An Appellate Division order is deemed final when it "disposes of all the issues in the action." CPLR 5611. Defendant asserts without citation or argument that this Court has jurisdiction to hear an appeal of the Order of the Appellate Division below because it is a "final" order granting *partial* summary judgment. This is plainly wrong. This Court is without jurisdiction to hear an appeal of the Order below because it does not fully and finally resolve the issues before the trial court.

This Court has declared that "a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters."

Burke v. Crosson, 85 N.Y.2d 10, 15, 647 N.E.2d 736, 739, 623 N.Y.S.2d 524, 527 (1995). "An order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a counterclaim or affirmative defense *but leaves other causes of action between the same parties for resolution in further judicial proceedings.*" Id. (emphasis added).

In Burke, this Court expressly stated that "an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same contract or contracts were left pending." Burke at 16. This is the exact scenario here. The Decision and Order of the First Department is clearly nonfinal because the Order resolved the question of insurance coverage for the Nyack Site, but claims remain pending before the trial court with respect to the remaining six MGP Sites. Defendant has itself repeatedly stressed that the scope of the late notice motion below was, by agreement of the parties, limited to the Nyack Site and knows full well that coverage issues with respect to the remaining sites have yet to be resolved. (Motion at 21 n.1)

The case law is clear that a final determination of some but not all issues does not constitute a final judgment as to which appeal is available to this Court, which is precisely the case here. See, e.g., Iseman v. Iseman, 37 N.Y.2d 918, 340 N.E.2d 748, 378 N.Y.S.2d 388 (1975) (dismissing motion for leave to appeal where the Appellate Division order had granted a motion for partial summary judgment but had remitted case for assessment of reasonable attorneys' fees). Indeed, this Court has held that orders far more "final" than the decision at issue here are not final for purposes of this Court's jurisdiction. Thus, for example, where summary judgment is granted on all issues of liability, but damages remain undetermined, the order is not considered final. McAlister v. Chin Lee Co., 266 N.Y. 603, 195 N.E. 220 (1935); see also City of Buffalo v. Wysocki, 68 N.Y.2d 980, 503 N.E.2d 119, 510 N.Y.S.2d 563 (1986) (Appellate Division order was non-final despite a "final" determination as to liability because "the relief sought as to the method and terms of payment [had] not been determined."); Mandel v. Adler, 701 N.Y.S.2d 18, 267 A.D.2d 150 (1st Dep't 1999) (dismissal of action against all but one defendant did not finally determine the action and Court of Appeals would not have jurisdiction to hear the appeal).

Pursuant to the express agreement of the parties and the trial court, the First Department's Order resolved coverage issues with respect to the Nyack Site. But before final judgment can be entered for either party, the trial court must resolve

similar coverage issues with respect to the remaining MGP Sites. (R1147-R1148) In the absence of a final judgment resolving those issues, this Court lacks jurisdiction to hear Defendant's appeal, and Defendant's Motion should be denied accordingly.

II. THE APPELLATE DIVISION PROPERLY DETERMINED THAT ORANGE & ROCKLAND'S NOTICE WAS UNTIMELY UNDER NEW YORK LAW AND IS NOT IN CONFLICT WITH THIS COURT OR OTHER NEW YORK COURTS

Even if this Court had jurisdiction, there is no basis to grant leave to appeal here. Permission to appeal to the Court of Appeals should be granted only in exceptional cases, where the questions presented are "novel or of public importance, present a conflict with prior decisions [of the Court of Appeals] or [involve] a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22. There are no such questions presented in this case. Instead, this case presents the application of settled law to the unique facts of this case - - a circumstance that hardly warrants intervention by this Court.

The First Department correctly and unanimously held, "on the law," that the trial court erred in finding that Defendant had provided timely notice to Travelers with respect to the Nyack Site and that it failed to apply the correct legal standard to determine timely notice under primary policies such as the Travelers Policies. (Att. 1 at 13; 14-15) Under the proper standard applicable to primary liability policies, Defendant was required to provide notice to Travelers when, under the

circumstances known to it at the time, it "could glean the reasonable possibility" that the Travelers Policies may be implicated. The First Department properly held that, under this correct notice standard, the undisputed facts of this case prove that Defendant's notice was late, thus vitiating coverage. Id.

Defendant raises various issues that it claims warrants this Court's review of the decision below, namely that: (1) the First Department's Order conflicts with established law that a insured's duty of notice to a primary insurer arises only upon knowledge of a covered occurrence; and (2) the First Department's ruling is in conflict with the Second and Third Departments concerning when notice is required for environmental claims. Neither argument is correct, and Defendant has not identified any real conflict among the lower courts.

A. The First Department Correctly Held That Defendant's Notice Was Late Under The Travelers Policies And Blackletter New York Law

Defendant claims that the First Department's Order "is contrary to accepted principles of insurance law and the precedents of this Court and the Second and Third Departments, and warrants this Court's review." (Motion at 38) Yet, at the same time, Defendant admits that the principal case cited by the First Department, Paramount Ins. Co., 293 A.D.2d 235, 743 N.Y.S.2d 59, "does not depart from the precedents cited [by Defendants]" and, indeed, relied on some of the same cases. (Motion at 41) In other words, Defendants admit that the law is settled in this area

and merely dispute the application of that law to the facts of this case, which is not grounds for this Court's review. The First Department rightly held that Defendant's notice was late under this well-settled New York law, and this Court's review is not warranted here.

As this Court has made clear, an insured has an obligation to give prompt written notice to its insurer of any occurrence under the policy. Am. Home Assurance Co. v. Int'l Ins. Co., 90 N.Y.2d 433, 440, 684 N.E.2d 14, 16, 661 N.Y.S.2d 584, 586 (1997); White by White v. City of New York, 81 N.Y.2d 955, 957, 615 N.E.2d 216, 217, 598 N.Y.S.2d 759, 760 (1993). The Travelers Policies at issue here confirm this obligation, expressly requiring Orange & Rockland to provide written notice of an accident or occurrence "as soon as practicable" and notice of a claim or suit "immediately." (R503-R504; R555; R557; R560; R562; R564; R566; R568; R570; R572; R574; R576; R579; R581; R584)

In applying notice provisions identical to those at issue here, this Court has unambiguously required that notice must be given "within a reasonable time under all the circumstances." Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 293 N.E.2d 76, 79, 340 N.Y.S.2d 902, 906 (1972); Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 N.Y.3d 742, 743, 833 N.E.2d 1196, 1197, 800 N.Y.S.2d 521, 522 (2005) ("Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be

accorded the carrier within a reasonable period of time."). That is, notice is required when, from the circumstances known at the time, "an insured could glean a *reasonable possibility* of the policy's involvement." Paramount Ins. Co., 293 A.D.2d at 239-40, 743 N.Y.S.2d at 62 (emphasis added) (citing Security Mut. Ins. Co., supra); Figueroa v. Utica National Ins. Group, 16 A.D.3d 616, 616-17, 792 N.Y.S.2d 556, 557 (2d Dep't), motion for leave to appeal denied, 5 N.Y.3d 709 (2005). Notice is a condition precedent to coverage and, thus, no coverage is available under the policies if this condition is not satisfied. Security Mut. Ins. Co., 31 N.Y.2d at 440, 293 N.E.2d at 78, 340 N.Y.S.2d at 905.

The First Department properly applied this standard to the facts at hand. It correctly held that Defendant's ongoing contacts with environmental regulators dating back to at least 1981, EPA site inspections, internal reports warning of a likelihood of contamination at the Nyack Site, as well as inquiries from regulators, clearly placed Defendant on notice of the potential for liability at the Nyack Site and required notice to Travelers years earlier than 1995. (Att. 1 at 14)

Defendant incorrectly claims that the judgment is based on Defendant's "general knowledge of the possibility of contamination on its own property," rather than knowledge of possible liability from damage to third-party property. (Motion at 20) Defendant's claim, however, is little more than an attempt to re-litigate the First Department's review of the undisputed facts in this case, which, when

properly viewed in their entirety, clearly demonstrate that Defendant had sufficient knowledge of potential liability to third parties to trigger its notice obligations well before it purported to give notice.

In fact, Defendant's undeniable knowledge of its historical polluting activities, coupled with years of investigations by regulatory authorities, both at Nyack and at its other MGP Sites, implicated Defendant's notice obligations at least 15 years before its actual notice to Travelers. Defendant had knowledge of its potential liability by at least 1981, when it acknowledged to the EPA that there had been spillage and the possible release of MGP residuals at the Nyack Site. (R586-R587) Indeed, Defendant admits that beginning in the 1980s it "had contact with federal and state regulators about possible coal tar pollution at its former" MGPs, including the Nyack Site. (Motion at 19)

Notably, from early in its operations at the Nyack Site, the facts within its control demonstrated a sufficient likelihood of damage to third party property to implicate its notice obligations, including (without limitation) knowledge showing:

- Its discharge of 12,000 gallons of "coal tar and oil wastes" *per day* into the Hudson River. (R1537)
- Its disposal of coal tar wastes into unlined pits. (R1270)
- Its construction of a tar separator and filter, "necessitated by the large amount of tar now being deposited in the Hudson River adjacent to the gas plant and causing complaint from yacht and boat owners in the vicinity...." (R1538)

Whatever the degree of its knowledge at the time of the EPA notice, the risk of liability to third parties for pollution caused by Defendant's MGP operations became even clearer when pollution was discovered at the Middletown-Fulton Site in 1985 - - an event conspicuously absent from Defendant's Motion. This is not surprising, given that the extensive off-site migration of the pollutants at the Middletown-Fulton Site (R595) is directly relevant to Defendant's late notice at the Nyack Site, since discovery of that widespread pollution caused Defendant to review its potential liability at the other MGP Sites and resulted in the determination that similar pollution problems and the potential for third party liability likely existed at all of the sites - - *especially* the Nyack Site.[2]

Indeed, the discovery of MGP pollution at the Middletown-Fulton Site and Defendant's subsequent review of its potential liability at other sites, including the Nyack Site, resulted in a memorandum drafted by the Defendant's Administrator of Loss Prevention and Insurance in October 1985 that unambiguously warned Defendant's senior management that "*the buried tar and other residue may be coming back to haunt us*" and that "*[o]ur company had been making gas at*

[2] In fact, Defendant's own captive insurer, AEGIS, pointed out the historical nature of Defendant's MGP liability and specifically advised Defendant to place its historical insurers on notice. (R606; R608)

[the Nyack Site] for 100 years and it is likely that this soil also contains tar and other pollutants." (R624) (emphasis added). Yet Defendant did not provide notice of this *likely* liability for another ten years.[3]

Defendant similarly chose to look the other way when presented with mounting *additional* evidence confirming the existence of pollution problems at all of its MGP Sites, including the Nyack Site. For example:

- The EPA's 1988 environmental investigation of the Nyack Site. (R639) (Which defendant dismisses by claiming that it "never saw" the resulting report.) (Motion at 31)

- The EPA's confirmation in 1988 of the risk of pollution from MGP operations, as well as the its establishment of a regulatory framework to address all of the MGP sites around the country. (R640-R652; R1505-R1512)

- The EPA's 1987 investigation finding the "strong potential" for groundwater contamination at the Middletown-Genung Site. (R677)

- Requests throughout the late 1980s and early 1990s from the NYSDEC requesting detailed information on all of O&R's MGP Sites - - which Defendant provided to the NYSDEC, but not to Travelers. (R692-R730)

[3] Defendant admits that the Dalland Memorandum addressed "possible contamination at Nyack," but feebly attempts to characterize Mr. Dalland's views as mere "speculation. " (Motion at 30) This is disingenuous, as Mr. Dalland was well-known as the company "Historian" and "got around to all the sites" - - making him uniquely qualified to investigate and report concerns regarding Defendant's potential historical liabilities to Defendant's management (who had authority to act on those concerns). (R1521-R1523 at 367:2-369:10; R1525-R1530 at 57:1-62:1; R1501-R1502 at 199:10-200:6) In any event, the key consideration is how Defendant's management reacted to *actually* being placed on notice of the possibility of environmental liability at the Nyack Site a decade before Defendant saw fit to provide its purported notice to Travelers.

- Additional cleanup demands by third parties at the Middletown-Fulton Site. (R731; R735)

Even after Defendant allegedly provided notice to Travelers in 1995, it continued to withhold vital information. It enclosed a draft consent order from the NYSDEC, dated December 27, 1994, describing it as "an initial draft" (R762). But in fact, the initial draft had been prepared several months earlier, as acknowledged by Defendant's corporate designee. (R1410; R960-R961 at 785:21-786:3) Defendant failed to inform Travelers that its negotiations with the NYSDEC - - which included correspondence, face-to-face meetings and the exchange of drafts - - had been ongoing for many months before notice. (R1410; R960-R961 at 785:16-786:3; R691 ¶ 9; R737; R738-R739; R740-R743; R744-R753; R754-R761) Nor did Defendant reveal that it had admitted to the NYDPS in 1994 that it had identified historical primary insurance coverage potentially applicable to the MGP Sites, but had, to that point, chosen not to notify its insurers of the MGP pollution problems. (R751)

In light of the totality of these circumstances, Defendant - - a highly sophisticated corporate entity - - cannot credibly argue that it was not aware of the reasonable possibility of potential environmental liability to third parties at the Nyack Site and the potential involvement of the Travelers Policies long before its purported notice to Travelers. The First Department applied the proper standard to the facts before it, and correctly held that Orange & Rockland's "willful failure to

investigate" negates any claim that it was unaware of the pollution problems. (Att. 1 at 14) Its decision does not warrant review here.

B. There Is No Conflict Between The First Department's Order And Blackletter New York Law Regarding When Notice Must Be Provided To A Primary Insurer Such As Travelers In This Case

Notwithstanding the First Department's proper application of well-settled law, Defendant claims that the First Department's Order is an "aberrant ruling which casts uncertainty into the law of notice." (Motion at 42) Defendant claims instead that it was the trial court that "applied the proper standard" in reaching its decision. (Id. at 36) The Defendant is wrong, and the First Department correctly held that the trial court's application of the incorrect standard was reversible error.

In denying Travelers motion for summary judgment, the trial court erroneously relied upon on wholly distinguishable cases which apply the notice standard under *excess* policies. (R18) This distinction is critical, because unlike the Travelers *primary* insurance policies which may be implicated at the first dollar of liability, an excess insurance policy is only implicated after its primary coverage has been exhausted and does not require immediate notice of potential liability. Thus, where notice to an excess insurer is at issue, "the focus is on whether the insured reasonably should have known that the claim against it *would likely exhaust its primary insurance coverage and trigger its excess coverage*...." National Union Fire Ins. Co. v. Connecticut Indem. Co., 52 A.D.3d 274, 276, 860

N.Y.S.2d 35, 38 (1st Dep't 2008) (emphasis added); American Home Assurance Co., 90 N.Y.2d at 443, 684 N.E.2d at 18, 661 N.Y.S.2d at 588.[4]

The First Department correctly held that the trial court's application of the improper notice standard was in error, and unanimously reversed "on the law." (Att. 1 at 13-14):

> The [trial court] mistakenly held defendant to the much more lenient standard for the timing of notice applicable in excess insurance cases. *The standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated.*

(Id. at 14-15) (emphasis added). Accordingly, contrary to Defendant's contention, the First Department's Order does not create a conflict within New York notice law, but instead follows established case law. The application of different standards to demonstrably different insurance coverage - - primary and excess - - according to the plain terms of such insurance contracts does not create a conflict warranting this Court's review.

[4] Defendant's counsel has previously recognized that nearly identical notice provisions to those in the Travelers primary policies require a "*vastly different standard*" than the notice requirements under excess policies, which "by contrast do not...provide first-dollar coverage for losses suffered by the policyholder." Long Island Lighting Co. v. Allianz Underwriters Ins. Co., No. 5216, 2004 WL 5369009, at *3, *26 (N.Y. App. Div 1st Dep't Oct. 25, 2004).

C. The First Department Correctly Held That Defendant Failed To Meet Its Burden To Prove Its Delay In Providing Notice Was Reasonable

Defendant's Motion downplays one of the significant factual wrinkles in this case that distinguishes it from many of the cases it cites - - what the First Department correctly deemed Defendant's "willful failure to investigate," which "negates any lack of awareness of pollution." (Att. 1 at 14) Defendant attempts to sidestep this holding by claiming that it is an improper "finding[] of fact" for which "there was no basis." (Motion at 41) But the First Department's holding is well supported in the undisputed facts and the law.

As this Court has held, although an insured's good faith belief in non-liability or non-coverage may excuse a delay in providing notice to an insurer, such belief must be reasonable and the *insured* has the burden of proof thereon. Security Mut. Ins. Co., 31 N.Y.2d at 441, 293 N.E.2d at 78-79, 340 N.Y.S.2d at 905-06; Great Canal Realty Corp., 5 N.Y.3d at 744, 833 N.E.2d at 1196, 800 N.Y.S.2d at 522 (noting that "the insured bears the burden of establishing the reasonableness of the proffered excuse"). Indeed, an insured has an *obligation* to exercise reasonable care and due diligence to keep itself informed of circumstances relating to its potential liability. See Security Mut. Ins. Co., 31 N.Y.2d at 441, 293 N.E.2d at 78, 340 N.Y.S.2d at 906.

Defendant cannot claim that it was excused from any obligation to inquire into the likelihood of contamination at the Nyack Site to determine whether to provide notice to its insurer when it found it necessary to inform the EPA of that same possible contamination in its 1981 notice. In fact, even a basic review of its own documents at the time would have given lie to its representation to the EPA that there were no "known, suspected or likely releases to the environment" at the Nyack Site. (R587) Defendant's failure of due diligence is further highlighted by its representation to the NYDPS in 1994 that it still had absolutely no information relative to whether there was any contamination at the Nyack Site. (R1069-1070) It similarly took no action to investigate potential MGP contamination at the Nyack Site after being warned by its loss prevention administrator that the Nyack Site was "likely" contaminated with tar and other pollutants. (R624)

At every given point along the way, Defendant received more information that implicated its legal duty to investigate the possibility of contamination at the Nyack Site but, by its own admission, it chose not to do so. The First Department properly held that, consistent with established case law, Defendant should not be rewarded for its deliberate inaction. Its failure to investigate further distinguishes this case from those relied on by Defendants.

III. THERE IS NO CONFLICT BETWEEN THE FIRST DEPARTMENT'S ORDER AND DECISIONS OF THE SECOND AND THIRD DEPARTMENT REGARDING AN INSURED'S OBLIGATION TO GIVE NOTICE TO ITS LIABILITY INSURER

Defendant asserts that the First Department's Order "directly conflicts" with decisions of the Second and Third Departments regarding when an insured is required to provide notice under a liability insurance policy. In particular, Defendant claims that the holdings in Chama Holding Corp. v. Generali-US Branch, 22 A.D.3d 443, 802 N.Y.S.2d 461 (2d Dep't 2005), and Reynolds Metal Co. v. Aetna Casualty & Surety Co., 259 A.D.2d 195, 696 N.Y.S.2d 563 (3d Dep't 1999), compel a different result than reached by the First Department below. A review of those cases, however, plainly shows otherwise. In fact, both the Second and Third Departments apply the same notice standard cited by the First Department in this case and rely on the same line of cases in support thereof. Further, the facts of the cases relied upon by Defendant are entirely distinguishable from this case and do not compel a different result here. Accordingly, there is no conflict between the departments of the Appellate Division for this Court to resolve.

Both the Second and Third Departments apply the same notice standard - - reasonableness under all the circumstances - - as the First Department properly applied in this case, which standard is based on this Court's prior holdings. For example, the Second Department in Figueroa v. Utica National Ins. Group, 16

A.D.3d at 616-17, 792 N.Y.S.2d at 557 (2d Dep't.), motion for leave to appeal denied, 5 N.Y.3d 709 (2005), articulated the precise standard used by the First Department below and even cited to the Paramount Insurance case of the First Department as authority, which was also cited in the Order below. Id. In Paramount Insurance, the First Department confirmed that the requirement to give notice "as soon as practicable of an occurrence that may result in a claim is measured by the yardstick of reasonableness," and that "a duty to give an insurer notice arises when, from the information available relative to the accident, an insured could glean the reasonably possibility of the policy's involvement." Paramount Insurance, 293 A.D.2d at 239-40, 743 N.Y.S.2d at 62. See also C.C.R Realty of Dutchess, Inc. v. New York Central Mut. Fire Ins. Co., 1 A.D.3d 304, 305, 766 N.Y.S.2d 856, 857 (2d Dep't 2003) (citing Paramount Insurance and Security Mut. Ins. Co., supra). There is, therefore, no disagreement between the First and Second Departments with respect to the correct standard to be applied to late notice cases.

The Third Department likewise employs the same reasonableness standard for late notice set forth by the Court of Appeals and the other departments of the Appellate Division. See Preferred Mutual Ins. Co. v. Sullivan, 199 A.D.2d 719, 720, 605 N.Y.S.2d 450, 451 (3d Dep't 1993) (Insured must give notice to insurance company "within a reasonable time under all the circumstances.") (citing Security

Mut. Ins. Co., supra); Aetna Casualty & Surety Co. v. Penn. Manufacturers Association Ins. Co., 57 A.D.2d 982, 983, 394 N.Y.S.2d 330, 333 (3d Dep't 1977) ("An insurance policy requirement that notice be given 'as soon as practicable' requires that notice be given within a reasonable time under all the circumstances, and a failure to give such notice, it is well settled, 'vitiates that contract....'") (citing Deso v. London & Lancashire Indem. Co. of Am., 3 N.Y.2d 127, 143 N.E.2d 889 (1957)). Similarly, Reynolds Metal cites to controlling Court of Appeals cases such as Security Mut. Ins. Co., confirming that the same standard applies to late notice in the liability insurance context among the departments of the Appellate Division. 259 A.D.2d at 199, 696 N.Y.S.2d at 566-67. Accordingly, there is no conflict among the Appellate Departments, and Defendant's claim to the contrary is without merit.

Defendant's claim of a conflict is really little more than a difference in factual circumstances presented by the relevant cases. Contrary to Defendant's assertion, Chama Holding would not compel a different result in this case. That case merely held that a single order to abate a nuisance from a municipal authority is insufficient to trigger an insurance obligation to notify a carrier of a potential claim by a third party. The facts of this case, however, bear no resemblance to Chama Holding. As set forth in detail above, Defendant's interaction with the environmental regulatory agencies, including the EPA and NYSDEC, were

numerous and began in 1981 at *Defendant's initiation.* Clearly from that point on there remained a reasonable probability that such regulatory agencies would commence action against Defendant related to pollution on Defendant's sites or property adjacent to those sites.

The case of Reynolds Metal likewise does not compel a different result. With regard to the issue of notice to primary carriers, the court in Reynolds Metal simply found that the insured "made a sufficient evidentiary showing to establish the existence of material triable issues of fact," precluding summary judgment for the insurer on the issue of late notice. 259 A.D.2d at 203, 696 N.Y.S.2d at 569. In so ruling, the court relied on exculpatory evidence supporting the insured's claim that it affirmatively did not expect to be required to remediate the site, namely, evidence showing that no contamination was confirmed at the site in question, that plaintiff's own studies did not reveal contamination, and that the state environmental agency had classified the site "as not posing significant threats to the public health or to the environment...." 259 A.D.2d at 202-203, 696 N.Y.S.2d at 569. There is no such exculpatory evidence in this case. To the contrary, by 1981 - - fifteen years before its purported notice, Defendant was aware of, and reported to the EPA, possible MGP pollution at the Nyack Site, among others. In addition, Defendant's own internal investigation in 1985 concluded that its MGP pollution was likely "coming back to haunt" it, in particular at the Nyack Site - - a

warning confirmed by the ensuing years of federal and state regulatory involvement at all of the MGP Sites and, ultimately, the Consent Order to remediate the pollution at those sites. (R585-R587; R624)

Moreover, contrary to Defendant's argument, Reynolds Metal cannot be read to draw a bright line excusing late notice in the absence of remediation requirements. Indeed, New York law does not articulate any such standard, and with good reason: it would allow an insured, as here, to ignore otherwise obvious occurrences of pollution in instances where a definitive cleanup plan had not yet been imposed. As set forth above, New York law does not allow an insured to avoid clear notice requirements where it is aware of potential environmental contamination that implicates its insurance policy.

IV. THE APPELLATE DIVISION PROPERLY DETERMINED THAT TRAVELERS DID NOT WAIVE ITS RIGHT TO THE DEFENSE OF LATE NOTICE

Defendant's argument that Travelers waived its defense of late notice does not warrant review by this Court. Defendant does not identify any conflict in the decisions of New York courts, and the straightforward application of the common law of waiver by the First Department does not warrant this Court's review.

The trial court's granting of Defendant's summary judgment motion erroneously relied upon the statutory waiver standard promulgated in New York Insurance Law § 3420(d) and cases applying that statute. (R19-R20). By its

express terms, however, Section 3420(d) applies only to personal injury claims; the First Department's holding that it cannot be applied to the property damage claims at issue here is fully consistent with New York Law. New York Insurance Law § 3420(d)(2) (Supp. 2010). See Att. 1 at 15 (citing Fairmont Funding v. Utica Mut. Ins. Co., 264 A.D2d 582, 582, 694 N.Y.S2d. 389, 390 (1st Dep't 1999)).

Nevertheless, Defendant now claims that the First Department did not address its *common law* waiver arguments. (Motion at 52) This claim is particularly dubious, given the fact that *nowhere* in its briefing to the trial court, the First Department or this Court has Defendant ever set forth the proper common law waiver standard. Unlike the statutory standard misapplied by the trial court, common law waiver requires Defendant to demonstrate the "voluntary and intentional relinquishment of a known right," Albert J. Schiff Assocs., Inc. v. Flack, 51 N.Y.2d 692, 698, 417 N.E.2d 84, 87, 435 N.Y.S.2d 972, 975 (1980), and cannot be found unless there was "full knowledge of all the facts upon which the existence of the right depends." S&E Motor Hire Corp. v. New York Indem. Co., 255 N.Y. 69, 72, 174 N.E. 65, 66 (1930). Defendant never argued that Travelers *voluntarily* and *intentionally* relinquished its right to raise a *known* defense of late notice.

Nor could it, since the record clearly demonstrates the repeated reservation of rights by Travelers. In its initial response and throughout the entire period in

which it sought information from Defendant, Travelers repeatedly, consistently and fully reserved all of its rights while conducting its investigation, including the right to disclaim on the basis of late notice. (R1256-R1260; R1271-R1272; R1273-R1274; R1275-R1276; R1281-R1282; R1283-R1284; R1285-R1286; R1289-R1290; R1292-R1293; R1297-R1300) Such reservation of rights letters negate any intent to relinquish a right and, as Defendant concedes, are effective against the defense of common law waiver. Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 269, 265 N.E.2d 736, 739, 317 N.Y.S.2d 309, 314 (1970); (Motion at 52).[5]

Moreover, contrary to the picture Defendant attempts to paint now, it never provided meaningful information to Travelers prior to this litigation. That information, which conclusively proves that Defendant's notice was late, was only surrendered by Defendant when it was forced to do so in discovery.[6]

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[5] Contrary to Defendant's self-serving mischaracterization of Travelers initial response to Defendant's April 14, 1995 letter, Travelers did not state that Defendant's purported notice "was premature." (Motion at 53) Rather, Travelers responded by indicating that the limited information provided by Defendant at that time appeared to indicate that environmental regulatory activity at Defendant's MGP Sites had only just begun, and that Defendant should continue to provide information as it became available so that Travelers could provide a coverage opinion. (R1221 at 43:6-22) Of course, at the time it provided this response, Travelers was unaware of the extent of Defendant's knowledge of environmental problems at the site.

[6] Indeed, Defendant's claims that it "had no information to give Travelers" about potential liability or contamination at any of its MGP Sites, including the Nyack Site, is belied by the extensive documents in the record produced by Defendant in this case. For example, in 1996 Defendant forwarded a letter to Travelers purportedly detailing the history of its MGP Sites. (R101-R104) This

Travelers thus could not - - and did not - - knowingly waive its late notice defense as required under common law.

Nevertheless, in a final attempt to shift blame for its own untimely notice, Defendant claims that Travelers waived its late notice defense because it purportedly "offers no explanation for its seven-year delay in disclaiming coverage based on late notice." (Motion at 53) First, and tellingly, Defendant does not - - because it cannot - - cite to a single case holding that a purported delay due to an insurer's investigation waives the late notice defense in the fact of continuous and repeated reservation of rights letters. Second, and as Defendant well knows, Travelers investigation was deliberately stymied by Defendant. The record is clear that Travelers did not learn of the grounds for disclaimer of liability until long after notice was given and did not receive some of the most relevant documents establishing that notice was late - - such as the Dalland Memorandum - - until the discovery phase of this litigation, when Defendant was forced to disclose such information.

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letter was nearly identical to a letter sent to the NYSDEC in 1988 which was only obtained by Travelers during discovery in this litigation. (R692-R694) Scrubbed from the 1996 version sent to Travelers, however, were any and all references to the various dealings with state and federal regulators, site inspections and site cleanups that had taken place to that point at all of the MGP Sites, including the Nyack Site - - references that were contained in the 1988 letter to the NYSDEC.

Accordingly, Defendant's contention that Travelers waived its defense of late notice is, as with its other arguments in its Motion, without merit. The First Department was correct to find that Travelers did not waive its right to disclaim for Defendant's untimely notice, and this unexceptional ruling does not warrant review here.

CONCLUSION

For the foregoing reasons, Travelers respectfully requests that the Court deny Defendant's Motion for Leave to Appeal.

Dated: New York, New York
July 9, 2010

Respectfully submitted,

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COURT OF APPEALS
OF THE STATE OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff-Appellee, —against— ORANGE AND ROCKLAND UTILITIES, INC, Defendant-Appellant, and JOHN DOE CORPORATIONS 1-100, Defendants.	N.Y. County Index No. 603601/2002 **NOTICE OF MOTION FOR LEAVE TO APPEAL**

PLEASE TAKE NOTICE, that upon the record on appeal and all briefs submitted in the Appellate Division, First Department from the Order of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on August 19, 2009, denying Plaintiff-Appellee The Travelers Indemnity Company's ("Travelers") motion for partial summary judgment on the grounds of late notice, and granting partial summary judgment to Defendant-Appellant Orange & Rockland Utilities, Inc. ("Orange & Rockland") on the ground of waiver of the defense of late notice; the unanimous Order of the Appellate Division, First Department, vacating and reversing the lower court's Order, filed in

the office of the Clerk of the Appellate Division, First Department, on May 20, 2010 (the "First Department Order"); the notice of entry thereof; and upon all prior proceedings heretofore had herein; the undersigned will move this Court, at Court of Appeals Hall, in the City of Albany, State of New York, on the 6th day of July, 2010, for an Order allowing an appeal to be taken by Defendant-Appellant to this Court from so much of the First Department's Order as granted Plaintiff-Appellee's motion for partial summary judgment on the ground of late notice, and denied Defendant-Appellant's motion for partial summary judgment on the ground of waiver the defense of late notice, pursuant to CPLR 5602 (a)(1), together with such other and further relief as the Court may deem just and proper.

The grounds upon which leave is requested are set forth in detail in the attached memorandum, which is made a part hereof.

Dated: June 28, 2010

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STATEMENT OF PROCEDURAL HISTORY

Orange & Rockland respectfully requests permission to appeal from the unanimous order of the Appellate Division, First Department, dated and entered May 20, 2010 (the "First Department's Order"). Attachment 1. Orange & Rockland was served with a copy, with notice of entry, of the First Department's Order by Travelers , by hand on May 27, 2010. *Id.* Orange & Rockland served Travelers with a Notice of Motion of this motion for permission to appeal by hand on June 28, 2010. Thus, Orange & Rockland's motion is timely pursuant to CPLR 5516 and Section 500.21(b) of the Rules of Practice of the Court of Appeals (22 N.Y.C.R.R. 500.21(b)).

The First Department's Order reversed in all material respects the August 18, 2009 Order of Justice Eileen Bransten in Supreme Court, New York County ("Trial Court Order"). Attachment 2; R. at 8-21. The Trial Court Order was entered on August 19, 2009, and Orange & Rockland served Travelers with a copy, with notice of entry, on September 3, 2009. Att. 2 at 1-2; R. at 6-7. In relevant part, the Trial Court Order denied partial summary judgment to Travelers, finding that Orange & Rockland's notification to Travelers under its third-party liability insurance policies was timely; and granted partial summary judgment to Orange & Rockland, finding that Travelers had waived the right to assert a late notice defense. Att. 2 (Decision) at 10-11, 13; R. at 18-19, 21. The First Department's

Order unanimously reversed, denied Orange & Rockland's partial motion for summary judgment and granted Travelers' motion for partial summary judgment. Att. 1 at 14.

Orange and Rockland raised the questions presented on this appeal (1) first in the trial court in memoranda in support of its motion for partial summary judgment on the ground of waiver of the defense of late notice and in opposition to Travelers' motion for summary judgment on the ground of late notice; and (2) in its respondent's brief in the First Department, arguing that the trial court's rulings should be affirmed. Att. 2 (Decision) at 6-9; R. at 14-17, 19, 21; Att. 1 at 14.

Orange & Rockland now seeks permission to appeal from the First Department's Order reversing the Supreme Court's denial of Travelers' motion for partial summary judgment on the grounds of late notice and its granting of Orange & Rockland's motion for partial summary judgment on the ground of waiver of the defense of late notice.

JURISDICTION OF THIS COURT TO ENTERTAIN APPEAL

This Court has jurisdiction pursuant to CPLR 5602(a)(1)(i), because the First Department's Order granted partial summary judgment to Travelers on the ground of late notice. The First Department's Order was therefore final, and was entered in this action, which originated in New York Supreme Court, New York County.

COURT OF APPEALS
OF THE STATE OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff-Appellee, —against— ORANGE AND ROCKLAND UTILITIES, INC, Defendant-Appellant, and JOHN DOE CORPORATIONS 1-100, Defendants.	N.Y. County Index No. 603601/2002 **AFFILIATION STATEMENT PURSUANT TO RULE 500.1(f)**

Pursuant to Rules 500.1(f) and 500.22(b)(5), Defendant-Appellant Orange and Rockland Utilities, Inc. ("Orange & Rockland") states that it is a wholly owned subsidiary of its parent, Consolidated Edison, Inc.

The following are subsidiaries of Orange & Rockland:

Clove Development Corporation

O&R Development, Inc.

Pike County Light & Power Company

Rockland Electric Company (of which Rockland Electric Company Transition Funding LLC is a subsidiary)

The following are subsidiaries of Orange & Rockland's parent, Consolidated Edison, Inc.:

Consolidated Edison Company of New York, Inc.

Consolidated Edison Development, Inc.

Consolidated Edison Energy, Inc.

Consolidated Edison, Inc. (Delaware)

Consolidated Edison Solutions, Inc.

The following are subsidiaries of Consolidated Edison Company of New York, Inc.:

Davids Island Development Corp.

D.C.K. Management Corp

Honeoye Storage Corporation

Steam House Leasing, LLC

The following are subsidiaries of Consolidated Edison Development, Inc.:

Consolidated Edison Leasing, LLC

Con Edison Leasing, LLC

CED Ada, Inc.

CED/SCS/Newington, LLC

CED Generation

CEDST, LLC (of which CED 42, LLC is a subsidiary)

CED Wind Power, LLC

Flemington Solar, LLC

Murray Hill Solar, LLC

Newton Solar, LLC

Pilesgrove Solar, LLC

The following is a subsidiary of Consolidated Edison Energy, Inc.:

Competitive Shared Services, Inc.

The following are subsidiaries of Consolidated Edison Solutions, Inc.:

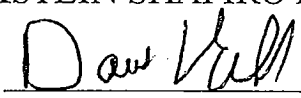
CES/AEI/OLF Cogeneration, LLC

BGA, Inc.

Custom Energy Services, LLC

Dated: June 28, 2010

DICKSTEIN SHAPIRO LLP

By: 

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COURT OF APPEALS
OF THE STATE OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff-Appellee, —against— ORANGE AND ROCKLAND UTILITIES, INC, Defendant-Appellant, and JOHN DOE CORPORATIONS 1-100, Defendants.	N.Y. County Index No. 603601/2002

MEMORANDUM OF DEFENDANT-APPELLANT ORANGE AND ROCKLAND UTILITIES, INC. IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Orange and Rockland Utilities, Inc. ("Orange & Rockland") and its predecessors formerly operated gas manufacturing plants on a site in Nyack, New York, as well as other sites. Orange & Rockland sold the Nyack property in the 1960s. Beginning in the 1980s, Orange & Rockland had contact with federal and state regulators about possible coal tar pollution at its former gas manufacturing sites. In December 1994, the New York State Department of Environmental Conservation proposed a consent order for Orange & Rockland to investigate and, if necessary, clean up all of its sites. As a result, in 1995 Orange & Rockland gave notice to The Travelers Indemnity Company ("Travelers") of a possible "occurrence" potentially covered under third-party liability policies, purchased between 1956 and 1978 with aggregate limits of $20.9 million, that covered damage to the property of third parties. At no time prior did Orange & Rockland have any knowledge of any damage to third-party property from any pollution at the Nyack site that would have constituted an "occurrence" under the policies. In 2002, Travelers disclaimed coverage on the basis of late notice, resulting in forfeiture of all of these policies. The First Department, in conflict with the precedents of this Court and the Second and Third Departments, nonetheless held that because, beginning in the 1980s, Orange & Rockland had general knowledge

of the possibility of contamination on its own property, it forfeited its third-party liability coverage by failing to give notice to Travelers at that time.

The questions presented are:

(1) Under a third-party liability policy that requires notice to the insurer in the event of a covered occurrence, does an insured breach its duty of notice when it has no knowledge of an occurrence potentially covered by the policy (here, damage to third-party property caused by pollution from the insured's property), much less any threatened claim?

(2) Does an insurer, which repeatedly claimed that the notice it received was premature, waive any right to assert a late notice defense when it delays for seven years in making a determination whether notice is untimely, in breach of its duty to make an expeditious disclaimer determination on the policy?

STATEMENT OF FACTS

I. THE POLICIES AT ISSUE

This case stems from The Travelers Indemnity Company's ("Travelers") denial of claims by Orange & Rockland Utilities, Inc. ("Orange & Rockland") under primary, comprehensive general liability policies for the costs of investigating and cleaning up off-site environmental contamination from a manufactured gas plant ("MGP") site in Nyack, New York that was formerly owned and operated by Orange & Rockland and its predecessors.[1] Travelers had sold the policies to Orange & Rockland from 1956 until 1978, R. at 482-83, with aggregate limits of $20.9 million. The Nyack MGP produced gas from approximately 1852 to 1964. R. at 922. Orange & Rockland sold the property during the 1960s. R. at 624.

A. The Travelers' Policies at Issue Only Cover Damage to Third-Party Property

The Travelers' policies at issue on this appeal are primary, comprehensive general liability policies that contain the duty to defend Orange & Rockland in addition to the duty to pay for Orange & Rockland's liability. R. at 885. As third-party liability insurance policies, Travelers' policies exclude coverage for damage

[1] The Nyack site was one of seven separate MGP sites covered by the policies. In the litigation, the parties agreed to use the Nyack site as a "test site" for trial, and, as a result, it is the only site at issue on this appeal. Att. 2 (Decision) at 2; R. at 10.

solely to Orange & Rockland's own property.[2] The policies contain an "owned property" exclusion which provides that: "This insurance does not apply . . . to property damage to property owned or occupied by or rented to the insured." R. at 885. Contamination found on Orange & Rockland's own property that does not threaten the property of a third party would be insured under Orange & Rockland's separate first-party property insurance, not by the third-party liability insurance policies at issue here. R. at 882, 885.

B. The Damage Must Be Caused By an Occurrence

In addition to affecting third-party property, the property damage liability covered by the policies has to be "caused by [an] occurrence." R. at 885.[3] An "occurrence" under the policies is "an accident, including injurious exposure to conditions, which results during the policy period in . . . property damage neither expected nor intended from the standpoint of the insured." R. at 882.[4] Thus, the policies only apply to liability if damage happened during the 1956-1978 Travelers' policy periods. R. at 482-83, 882, 885.

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[2]The language of the policies varies slightly throughout the course of coverage. For illustrative purposes, Orange and Rockland's T-RKSLG-910302-67 policy serves to represent fairly the relevant language in all other policy years. Copies of the relevant pages of Policy T-RKSLG-910302-67 appear at R. 880-920, and the relevant policy provisions are reproduced in the accompanying Policy Language Addendum.

[3] Travelers' early policies sold to Orange & Rockland were accident-based policies, rather than occurrence-based. By 1967, Travelers' policies provided coverage for both occurrences and accidents. The definition of "occurrence" includes the term "accident," and the terms are interchangeable for the purposes of the issues present in this motion. Both types of policies contain virtually identical notice provisions.

[4] The earlier policies do not define the term "accident."

C. The Policies' Notice Provisions

Under Travelers' policy language, Orange & Rockland is only required to give notice "within a reasonable time under all the circumstances" after Orange & Rockland learns of an "accident" or "occurrence" that would implicate Travelers' policies. R. at 883.

II. ORANGE & ROCKLAND'S NOTICE TO TRAVELERS IN 1995

As noted above, the Travelers' policies provided coverage only for liability arising from damage to property owned by others caused by contamination at the Nyack site that occurred during the 1956-1978 policy periods. In this case, notice must be given only if (i) Orange and Rockland had knowledge of contamination to off-site property; and (ii) Orange and Rockland faced a threat of liability for such off-site contamination.

Prior to the time that Orange & Rockland gave notice to Travelers under the third-party liability policies, it had not owned the property since the 1960s, had no knowledge of damage to off-site property, and it had faced no threat of liability from either a regulator or a private third party for any such off-site contamination. R. at 624, 958-59, 1020.

The New York State Department of Environmental Conservation ("DEC") is the governmental entity with primary authority for overseeing former MGP sites in New York. Prior to the time that Orange & Rockland gave notice to Travelers in

1995, the DEC never required any investigation at, let alone clean-up of, the Nyack site, and the DEC never did or said anything with respect to off-site contamination. R. at 1022-23.

To the contrary, in 1991 the DEC told all New York utilities that it had no enforcement authority with respect to former MGP sites, because coal tar, the main contaminant at MGP sites, was not a "hazardous waste" under New York law, and thus DEC's ability to regulate MGPs would need to await a change in the law. R. at 1022, 1033-36. The New York Power Pool held the same view as late as 1993. R. at 1022.

No regulatory authority, at any level, advised Orange & Rockland that it could be liable for clean-up of on-site contamination at the Nyack site until the DEC sent Orange & Rockland a December 27, 1994 draft consent order that addressed investigation, and possible remediation, of all of Orange & Rockland's MGP sites. R. at 1023. In August 1994, Orange & Rockland had voluntarily approached the DEC to discuss beginning an investigation at another MGP site. R. at 956-57. The DEC, however, stated that its preference was for Orange & Rockland to include all of its MGP sites in the investigation process. *Id.* No remedial activities were discussed at that time. R. at 960-61.

In a September 20, 1994 letter to the DEC, Orange & Rockland proposed a schedule for investigating each of its MGP sites beginning in 1995. The Nyack

site was placed at the very end of the list, with investigations to begin in 1999, because it and one other site were considered "the ones least likely to require remediation." R. at 739.

As discussed above, the draft of the consent order, prepared by the DEC and forwarded to Orange & Rockland on December 27, 1994, provided for multi-site investigation and, if necessary, remediation of sites that were found to be contaminated. R. at 1077-98. Negotiations over the scope of the draft consent order continued with the DEC until a final consent order was signed in January 1996 requiring investigation and, if necessary, remediation of all the sites, including Nyack. R. at 762-63, 1024.

Although the consent order was still being negotiated and the final consent order would not be signed for another nine months, Orange & Rockland gave notice to Travelers on April 14, 1995, attaching the draft consent order. R. at 45.

III. TRAVELERS CHARACTERIZES ORANGE & ROCKLAND'S NOTICE AS PREMATURE AND REFUSES TO ACCEPT NOTICE OR COVERAGE ON MULTIPLE OCCASIONS

In its April 14, 1995 notice letter, Orange & Rockland informed Travelers of the draft consent order sent to Orange & Rockland by the DEC that would require Orange & Rockland to investigate and, if necessary, remediate its sites. R. at 45-68.

Travelers' response to Orange & Rockland's notice, on May 1, 1995, stated that the notice was premature:

> A review of the material submitted with your letter indicates that no claim for damages arising out of **property damage** has been asserted against [Orange & Rockland]. Rather, the NYDEC has merely requested that [Orange & Rockland] "gather and provide data." The Travelers is therefore under no obligation to determine its defense and/or indemnity obligations until such time as a claim for damages arising out of **property damage** is presented.

R. at 69 (emphasis in original).[5]

On May 26, 1995, Orange & Rockland responded to Travelers, explaining that the DEC consent order required more from Orange & Rockland than to "'merely . . . 'gather and provide data,'" and that Travelers had a duty to defend and to provide coverage. R. at 71. Upon finalization of the consent order in January 1996, Orange & Rockland sent a copy to Travelers for its review and again made a request for coverage. R. at 73-91.

On March 18, 1996, Travelers again responded that notice was premature. R. at 92-96. Travelers repeated its position that since "no party has initiated any litigation against [Orange & Rockland] . . . Travelers will not, and has no duty to, pay for or reimburse legal fees or expenses incurred or to be incurred by [Orange & Rockland] in this matter unless and until a suit is filed and served on [Orange &

[5] "Property damage" is defined in the policies as "injury to or destruction of tangible property." R. at 882.

Rockland]." R. at 93. Travelers stated that it would continue its investigation and consideration of the claim under a complete reservation of rights, enumerating fifteen potential reasons why it might disclaim coverage in the future. R. at 93-95.

From 1996 until Travelers filed this action, Orange & Rockland continued regularly to send information regarding the Nyack site to Travelers and provided all the information that it could locate regarding the policies that it purchased from Travelers. *See, e.g.* R. at 99-100, 101-04, 107-17, 120, 121.

Upon receiving this additional information, Travelers kept sending letters that continued to merely "reserve its rights," refuse to provide any substantive comments on Orange & Rockland's claim or to make a final coverage determination. *See, e.g.*, R. at 105-06, 118-19, 122-23.

None of the claims handlers assigned by Travelers to Orange & Rockland's MGP claims performed any substantive investigation into the claims. R. at 384-85, 391-93, 398.

On February 4, 2002, Orange & Rockland sent Travelers a settlement proposal, seeking to reach a final resolution on coverage for all seven MGP sites. R. at 400-05. Seven months later, and nearly seven and one-half years after receiving notice, Travelers responded on September 20, 2002, by rejecting the settlement proposal, and for the first time disclaimed coverage for Orange & Rockland's MGP claims on the basis of late notice. R. at 406-09.

Two weeks after denying coverage for the first time, Travelers filed the present declaratory judgment action alleging that coverage was not owed under its policies for any costs associated with property damage at Orange & Rockland's MGP sites because Orange & Rockland did not give "timely notice" as required by the policies of the environmental claims at its MGP sites, including Nyack. R. at 416, 410-21.

IV. TRAVELERS' MOTION FOR SUMMARY JUDGMENT

After the conclusion of discovery in September 2008, Travelers moved for summary judgment on its claim that Orange & Rockland's notice to Travelers of the Nyack site was untimely.

In support of its allegations that Orange & Rockland's notice was untimely and that Orange & Rockland had prior knowledge of contamination at the Nyack site as early as 1981, Travelers' motion relied on general information about contamination found at MGP sites other than the Nyack site, information on MGP wastes from public sources, as well as general requests for information by regulatory agencies that did not require Orange & Rockland to take any significant action with respect to the Nyack site. *See, e.g.*, Att. 2 (Decision) at 10; R. at 18, 592-93, 594-95, 596-97, 598, 599-601, 625, 626, 627-32, 633-38, 640-52, 690-91, 694-96.

In opposition to Travelers' motion, Orange & Rockland submitted documents and affidavits which showed that (i) Orange & Rockland had no knowledge of contamination at the Nyack site that had impacted a covered third-party site; and (ii) that no regulator had required Orange & Rockland to investigate or remediate the Nyack site prior to the time that it gave notice to Travelers of the draft consent order. *See, e.g.*, Att. 2 (Decision) at 10-11; R. at 18-19, 1020-25, 1026-28, 1033-36, 1068-69.

A. The 1981 Submission to EPA

Traveler's motion initially relied on the fact that in 1981, in response to a statutory notification requirement under the newly enacted 1980 Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), Orange & Rockland returned a form to the United States Environmental Protection Agency ("EPA") that listed the former MGP sites that Orange & Rockland was aware of in 1981, including Nyack. The form did not request, and Orange & Rockland did not have or provide, any information about contamination off-site. R. at 585-87, 1021. The cover letter advised EPA that Orange & Rockland did "not have sufficient knowledge to form a belief" as to whether Nyack had hazardous wastes, and the form further noted that Orange & Rockland was unaware of any "releases to the environment," a prerequisite for CERCLA liability. R. at 585, 1021. After Orange & Rockland notified EPA of the existence of the former MGP sites, EPA did not

demand that Orange & Rockland take any action with respect to these sites. R. at 1021.

B. Internal Orange & Rockland Documents Contain No Discussion of Off-site Contamination

1. The 1985 Dalland Memorandum

A one-page memorandum, authored by Orange & Rockland employee Raymond Dalland in 1985, discusses the possibility of contamination at the Nyack site. R. at 624. The memorandum contains no discussion of possible off-site contamination from the Nyack site. *Id.* Mr. Dalland reported that the Nyack property had been sold in the 1960s. He speculated that, because Orange & Rockland "had been making gas at [Nyack] for 100 years," it was "likely" that contamination existed in "this soil." R. at 624. Mr. Dalland's speculation about possible contamination at Nyack was not based on any study or any specific facts about the Nyack site other than that gas had been manufactured there. Mr. Dalland specifically testified that he was "not aware" of any environmental contamination at any of Orange & Rockland's sites, much less any potential liability for such contamination. R. at 945-46.

2. The November 1985 Internal Report on the Status of Regulatory Activities Involving the Nyack Site

In November 1985, Orange & Rockland's Manager for Environmental Services prepared a report which listed (i) sites with potential waste materials; (ii)

the date of notification to a regulatory agency; and (iii) the status of any follow-up agency action. R. at 1531. With respect to the Nyack site, the Environmental Services Manager reported that Orange & Rockland had completed the June 1981 EPA notification form and that there had been "No Regulatory Agency Follow-up To Date." *Id.*

C. Communications with Regulators Prior to 1995

Communications with regulators show that Orange & Rockland had no knowledge of off-site contamination and that regulators were not requiring Orange & Rockland to conduct any investigation or remediation of the Nyack site prior to 1994.

1. EPA's January 1988 Letter

The EPA wrote a letter dated January 18, 1988, to Orange & Rockland stating that the EPA planned to send NUS Corporation ("NUS") to perform a preliminary onsite investigation at Nyack. R. at 639.[6] Orange & Rockland never saw an NUS report, and the EPA took no further action at Nyack. R. at 1021.

2. Orange & Rockland's December 1988 and May 1991 Letters to the DEC

In a December 1988 letter to the DEC, Roger Metzger, Orange & Rockland's Director - Environmental and Administrative Services, reported to the

[6] The First Department mistakenly thought this occurred in 1985 (*see* Attachment 1 at 14).

DEC that with respect to the Nyack site, "it is believed at this time that coal tar residuals were removed from the site when the plant was dismantled." R. 693.

Similarly, in May 1991, Orange & Rockland reported to the DEC that "[a]t this time, no records have been found relative to the ultimate disposal of residues" and that "O&R has never received any report relative to the [EPA] investigation of the [Nyack] property. R. at 697, 726.

3. Orange & Rockland's Response to 1994 PSC Staff Information Requests

In December 1994, the New York State Public Service Commission ("PSC") asked all New York utilities for information about "utility practices regarding investigation and remediation of MGP sites across the state." R. at 740-43. Orange & Rockland reported that "no records have been found relative to the ultimate disposal of residues" and that "[t]he nature, location and [migration] of contaminants, if any, at [Nyack] have not yet been determined." R. at 1069. Orange & Rockland further responded that "O&R has never received any report relative to the [EPA] investigation of the [Nyack] property" and that "[t]o date, no investigation and/or remediation has been undertaken by O&R at the [Nyack] facility." R. at 1071. With respect to possible off-site migration, Orange & Rockland stated: "At the present time, there are no indications at [the Nyack site] that contamination has migrated from the site. Until O&R completes investigation

of [the Nyack site], the type and extent of the contamination, if any, as well as the need for preventative measures and remediation, remains unknown." R. at 1076.

D. Orange & Rockland Submitted Deposition Testimony Regarding Its Lack of Knowledge of Contamination at the Nyack Site

In deposition testimony provided January 6, 2006, Maribeth McCormick, the Technical Manager of Environmental Services at Orange & Rockland responded as follows regarding Orange & Rockland's knowledge of contamination:

> Q. Was Orange and Rockland aware of the potential for required remediation at the remainder of the former MGP sites that are at issue in this litigation from roughly 1988 through 1994?
>
> ****
>
> A. Those sites had not been investigated, and we had absolutely no information relative to whether there was any contamination on those sites or not.

R. at 958-59, 1020.

V. THE TRIAL COURT'S DECISION

In its Memorandum Decision dated August 18, 2009, the lower court denied Travelers' motion, and found that Orange & Rockland's notice was timely. The court separately found that Travelers had waived the right to disclaim coverage on late notice grounds. Att. 2 (Decision) at 12-13; R. at 20-21.

With respect to its notice decision, the court noted that "'The duty to give notice arises when, from the information available relative to the accident, an

insured could glean a reasonable possibility of the policy's involvement.'" Att. 2 (Decision) at 8; R. at 16, quoting *Tower Ins. Co. of New York v. Lin Hsin Long Co.*, 50 A.D. 3d 305, 307 (1st Dep't 2008) (other citations omitted). In order to "trigger the notice requirement in the environmental context," the court found that "New York cases require some realistic or certain action from a regulatory agency or third party showing some possibility of liability." Att. 2 (Decision) at 9; R. at 17 (citations omitted). The court cited several decisions for this point, including a decision involving excess liability insurance policies, but noted the distinction between the two types of policies' notice requirements: "While the standard is not identical in the excess insurance context, the case provides useful guidance." Att. 2 (Decision) at 10; R. at 18.

The trial court found that Orange & Rockland's notice was timely:

> Here, the record supports the conclusion that [Orange & Rockland] disclosed pertinent facts pertaining to the Nyack MGP in a timely manner, and that its April 14, 1995 notice was reasonable under the circumstances. In order to bolster its conclusions, Travelers simply culls together general reports and events, some of which transpired at separate MGPs, as well as non-definitive steps by regulatory agencies that did not mandate any significant action. . . . . Furthermore, despite Travelers' sweeping accusations of concerted action by [Orange & Rockland] to cover up pertinent facts, there is no evidence of any material nondisclosure. Instead the evidence supports the conclusion that [Orange & Rockland] did not have any concrete knowledge that the Nyack site was contaminated at any level necessitating regulatory action before giving notice to Travelers.

Att. 2 (Decision) at 10-11; R. at 18-19.

With respect to waiver, the court found that Travelers' failure to disclaim coverage for more than seven years after receiving notice waived the right to disclaim coverage. Att. 2 (Decision) at 12-13; R. at 20-21. The court relied on cases that applied Insurance Law § 3420[d], which applies to bodily injury claims, Att. 2 (Decision) at 11-12; R. at 19-20 (citations omitted), and a case involving common law waiver for property damage liability claims. Att. 2 (Decision) at 12-13; R. at 20-21, citing *Kutsher's Country Club v. Lincoln Ins. Corp.*, 119 Misc. 2d 889, 894 (Sup. Ct. Sullivan County 1983).

VI. THE FIRST DEPARTMENT'S DECISION

By decision entered May 20, 2010, the First Department reversed the lower court, and granted Travelers' motion for partial summary judgment that Orange & Rockland's notice at Nyack was late as a matter of law.[7]

Notwithstanding the fact that no regulator had sought to require Orange & Rockland to do anything at Nyack until just before notice was given, the First Department cited Orange & Rockland's "ongoing contacts with environmental regulators about the Nyack site dated back to 1981," and "a site inspection by the

[7] The First Department separately affirmed the trial court's ruling on Travelers' separate motion concerning the inclusion of a statutory pollution exclusion into Travelers' policies for 1973-1978. That ruling is not at issue in this motion.

Environmental Protection Agency in 1985" [sic], to find as a matter of law that Orange & Rockland's notice was untimely:

> "Defendant's ongoing contacts with environmental regulators about the Nyack site dated back to 1981, and there was even a site inspection by the Environmental Protection Agency in 1985, yet defendant never provided any notice to its insurer of these contacts or the questions they raised until 1995. Defendant's argument that it never had actual knowledge of any pollution was insufficient. The many reports, including internal reports of a likelihood of contamination at the subject site, as well as inquiries from regulators, placed it on notice. Its willful failure to investigate negates any lack of awareness of an occurrence of pollution (see Technicon Elecs. Corp. of N.Y. v. American Home Assur. Co., 74 NY2d 66, 75 [1989]).

Att. 1 at 14.

Although the trial court applied the notice standard for primary policies, the First Department held that:

> The court mistakenly held defendant to the much more lenient standard for the timing of notice applicable in excess insurance cases. The standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated (Paramount, 293 AD2d at 239-240).

Att. 1 at 14-15.

Finally, on the waiver issue, Orange & Rockland's appellate brief relied only on common law property damage liability cases, including the recent First Department decision in *Estee Lauder, Inc. v. OneBeacon Ins. Group, LLC*, 62 A.D.3d 33 (1st Dep't 2009). The First Department nonetheless reversed the lower

court by rejecting an argument Orange & Rockland did not make to the Appellate Division:

> Similarly, the court erred in holding that plaintiff waived its right to disclaim for late notice simply as a result of the passage of time. Contrary to the court's assumption, Insurance Law § 3420 applies only to claims for death and bodily injury (Fairmont Funding v. Utica Mut. Ins. Co., 264 AD2d 581, 582 [1999]), and not to pollution insurance.

Att. 1 at 15.

ARGUMENT

I. THE FIRST DEPARTMENT'S NOTICE HOLDING CREATES A CONFLICT AMONG THE INTERMEDIATE COURTS AND RAISES A NOVEL LEGAL QUESTION OF PUBLIC IMPORTANCE

A. The First Department's Ruling Conflicts With Established Law That An Insured's Duty Of Notice Arises With Knowledge Of A Covered Occurrence

Under a third-party liability policy, the insurer is liable to pay a third party's claim for a covered occurrence, which is damage to the third party's property that is caused by an accident for which the insured is liable. The First Department's decision below, requiring an insured under a third-party liability policy to notify the insurer prior to the time the insured has knowledge of a covered occurrence (much less a possible claim), is contrary to accepted principles of insurance law and the precedents of this Court and the Second and Third Departments, and warrants this Court's review.

"Provisions requiring the insured to give notice or furnish proofs of loss do not apply until the insured has knowledge of the loss. Thus, notice under a liability policy need not be given until after the insured has knowledge that an accident has occurred." *N.Y. Jur. 2d Insurance* § 1989 (citations omitted); *Melcher v. Ocean Accident & Guar. Corp.*, 226 N.Y. 51, 56 (1919) ("If no apparent injury occurred from the mishap, and there was no reasonable ground for believing at the time that bodily injury would result from the accident, there was no duty upon the assured to notify the insurer.") (citation omitted) (internal quotation marks omitted);

Woolverton v. Fid. & Cas. Co. of New York, 190 N.Y. 41, 48 (1907) (insured complies with the notice requirement if, having exercised due care, it gives notice upon acquiring information of a covered occurrence); *accord Holyoke Mut. Ins. Co. v. B.T.B. Realty Corp.*, 83 A.D.2d 603, 605-06 (2d Dep't 1981); *Hermance v. Globe Indem. Co.*, 221 A.D. 394, 395-96 (3d Dep't 1927); *Huertero v. Blue Ridge Ins. Co.*, 13 A.D.3d 486, 487 (2d Dep't 2004) (no duty of notice when no knowledge of covered occurrence). Indeed, even knowledge of a potentially covered occurrence may not be enough to trigger the insured's notice obligation, if the insured had no grounds to believe that a known occurrence would result in policy liability. *Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 441 (1972).

At issue here is a claim for coverage at a single site (the Nyack site) under a *third-party liability* policy. An "occurrence" under the policy is defined as "an accident, including injurious exposure to conditions, which results during the policy period, in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the insured." R. at 882 (emphasis in original). The owner's own property is excluded from the policy, so that the only covered occurrence is one in which a third party suffers bodily injury or property damage resulting from an accident. R. at 885. The notice provisions of the policies in turn provide that "in the event of an *occurrence*, written notice . . . shall be given by or for the

insured as soon as reasonably practicable." R. at 883 (emphasis in original); *see also* R. at 426, 432, 555, 1320, 1322. Thus, under the plain terms of the policy and established New York law, there must have been an occurrence that may implicate the policy (actual property damage of a third party resulting from an accident) before notice must be given, and Orange & Rockland's duty to notify would have arisen upon acquiring knowledge of that occurrence.

In the context of liability to the New York DEC for investigating and remediating hazardous-substance contamination, the policies would only entitle Orange & Rockland to indemnification for the costs of cleaning up the sites of *third parties* (or the clean-up of Orange & Rockland's site to prevent future damage of third-party property by migratory pollutants). There is no evidence of any third-party property damage in the record, much less evidence of any knowledge of Orange & Rockland of such property damage (*i.e.,* no knowledge of any covered accident or occurrence under the policy) prior to its giving notice in 1995. Indeed, the first time Orange & Rockland acquired knowledge of possible liability for such damage was in December 1994 when the DEC proposed a consent decree that would require Orange & Rockland to pay costs to investigate and, if necessary, remediate all of Orange & Rockland's former gas manufacturing sites.

The First Department here found that Orange & Rockland's duty to notify the insurer of a possible claim arose once it had "actual notice of *any pollution*," noting that Orange & Rockland "had ongoing contacts with environmental regulators dat[ing] back to 1981" and the site was inspected in 1985. Att. 1 at 14 (emphasis added). The First Department further found that Orange & Rockland's "willful failure to investigate negates any lack of awareness of *an occurrence of pollution*." *Id.* (emphasis added).[8]

But knowledge of an unspecified amount of "pollution" is not knowledge of an "accident" or an "occurrence" within the meaning of this (or any other) third-party liability policy (*i.e.*, an accident *resulting in third-party property damage*). An occurrence triggering notice under the policy is an accident *resulting in third-party property damage*. That is simply absent from this record.

The First Department relied on *Paramount Insurance Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235 (1st Dep't 2002), which holds that "the duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement." *Id.* at 239-40 (citations omitted). But *Paramount* does not depart from the precedents cited above (and indeed, it relied on this Court's decisions in *Woolverton* and

[8] There was no basis for the First Department to make appellate findings of fact, as a matter of law on summary judgment, that Orange & Rockland willfully failed to investigate known contamination at the Nyack site—a site which it had not owned since the 1960s. R. at 624.

Security Mutual). *Paramount* simply reaffirmed the rule that the insured's belief "'that a particular occurrence may not in the end result in a ripened claim does not relieve the insured from advising the carrier of that event.'" *Id.* at 240 (citing *Heydt Contr. Corp. v Am. Home Assur. Co.*, 146 A.D.2d 497, 499 (1st Dep't 1989), *lv dismissed*, 74 N.Y.2d 651 (1989)). In *Paramount*, the insured (unlike Orange & Rockland here) "had immediate notice of the [plaintiff's] *accident and injury* [a slip-and-fall in the insured's building] and failed to report the accident promptly to Paramount." *Id.* at 242 (emphasis added). The insured claimed that it should be relieved of notice since it believed that it would not be liable for the injury, but the court found that none of the "extenuating circumstances that have led the courts to conclude that the insured acted reasonably in believing that liability would not result are present here." *Id.* *Paramount* does not justify the holding below, which requires notice when an insured has no knowledge of any covered occurrence at all.

This Court's review is imperative to resolve the conflict of authority generated by the First Department's aberrant ruling, which casts uncertainty into the law of notice.

B. The First Department's Notice Ruling Conflicts With Decisions Of The Second And Third Departments Regarding Liability For Environmental Damage

Not only is the decision below contrary to general precedent on an insured's notice obligations under a third-party liability policy, but it directly conflicts with the decisions of the Second and Third Departments on environmental contamination liability.

1. The Third Department has adopted a contrary rule on notice of potential environmental remediation liability

The decision below brings the First Department into irreconcilable conflict with the Third Department on the duty of insureds to give notice to a liability insurer for potential environmental remediation claims. *Reynolds Metal Co. v. Aetna Cas. & Sur. Co.*, 259 A.D. 2d 195 (3rd Dep't 1999), like this case, involved a late notice defense to coverage for environmental liabilities. There, as here, the primary property damage liability policies (1) required liability to a third party; (2) contained standard language that excluded coverage for damage to the policyholder's own property caused by on-site environmental contamination (known as the "owned property exclusion"); and (3) only covered liabilities for off-site damage to the property of others. 259 A.D.2d at 197-98 & n.1, 200. In contrast to the First Department here, however, the Third Department adopted a standard in *Reynolds Metal* that incorporates a requirement of an actual threat of

liability for, and knowledge of, off-site contamination to trigger an insured's obligation to give notice.

Reynolds Metal gave notice in 1987, 1988, and 1995 of three environmental actions involving its plant in Massena, New York, next to the St. Lawrence River: a suit by the NYDEC involving groundwater, surface water, and soil at the Massena site; an EPA action involving contamination of the adjacent St. Lawrence River; and litigation brought by a Native American tribe, the United States, and the State of New York involving natural resources they owned in or near the river. 259 A.D. 2d at 203-04.

The insurers defended against coverage on the grounds that the notice was late. *Id.* at 198. They argued that Reynolds Metal's duty of notice arose with letters the DEC had sent Reynolds Metal in 1983 and 1984, and negotiations between DEC and Reynolds Metal that began in 1985 and culminated in a 1987 Consent Order. *Id.* at 198-99. The letters and negotiations all concerned potential on-site contamination, but the insurers contended that (as a matter of law) those letters triggered Reynolds Metal's obligation to give notice about potential *off-site contamination* covered by the policy (*i.e.*, the St. Lawrence River and neighboring property of third parties) no later than 1986. The trial court agreed. *Id.* at 201-02.

In a decision diametrically opposed to the First Department's decision below, the Third Department rejected the insurer's proposed standard. The court

noted that neither of the DEC letters made any "reference to damage to the St. Lawrence River or property of third parties," but only to the Reynolds site. *Id.* at 199. And, although "earlier drafts of the consent order referred to the need for development of a remedial program and noted the presence of PCB contaminated sediments in the St. Lawrence River in the vicinity of the Massena plant, DEC dropped that language from the final [1987] consent order." *Id.* at 202. Accordingly, "no remediation was specifically ordered and there was no requirement for an investigation of the river." *Id.* at 203.

The Third Department rejected the insurers' late notice defense because an insured's knowledge of *on-site* contamination alone did not constitute knowledge of an occurrence in a policy that covered only liabilities arising from *off-site* contamination of third-party property; therefore, contrary to the insurers' contention, the insured had no duty of notification under the policy no later than 1986. The insurer's defense would only have been viable if Reynolds Metal had "knowledge of on-site contamination *causing third-party property damage that was subject to insurance coverage* prior to the service of its notices to defendants" in 1987 and 1988, and Reynolds Metal had no such knowledge. *Id.* at 203 (emphasis added).[9] In *Reynolds Metal,* lack of any knowledge of a covered

[9] The Third Department held that the insured did not have such knowledge until 1989, when it received two notices of intent-to-sue letters from third parties, and an EPA Order concerning such damage. 259 A.D.2d at 204.

occurrence of third-party property damage supported the insured's good-faith belief of noncoverage and nonliability, and thus the insured did not have a duty to notify the insurer. *Id.*; *see also Merchants Mut. Ins. Co. v. Hoffman,* 56 N.Y.2d 799, 801 (1982) (holding that when the facts "are such that an insured acting in good faith would not reasonably believe that liability on his part will result," notice of an occurrence is given "'as soon as practicable' if given promptly after the insured receives notice that a claim against him will in fact be made.").[10]

The Third Department's rule, which accords with the general principle that an insured has no duty of notice without knowledge of a potentially covered occurrence, is the proper rule. Orange & Rockland would have prevailed under a standard even stricter than the *Reynolds Metal* rule. As set forth above, Orange & Rockland *never* received a demand or claim from a governmental agency that mandated that it do anything with respect to the Nyack site, on-site or off-site, until just before it gave notice to Travelers, and never received information from *any* source *ever* that would put it on notice of potential *off-site* damage to the property of others caused by contamination on-site. The First Department's rule – which holds that the insured's duty of notice is triggered by information only about

[10] Because the policyholder in *Reynolds Metal* was aware of a claim for contamination of its own property, the Third Department focused on the policyholder's belief of non-liability and non-coverage. 259 A.D.2d at 199-200. Here, Orange & Rockland had no knowledge of an occurrence (only the knowledge of *potential* contamination of its own property), much less any basis for believing that it had liability to another for damage to their property. *See Security Mutual*, 31 N.Y.2d at 442.

possible on-site contamination that the insurance policy does not cover, without evidence of any occurrence that may give rise to liability – is in irreconcilable conflict with *Reynolds Metal*. This Court should grant leave to appeal to resolve the conflict.

2. The Second Department likewise does not require notice if the insured has knowledge only of an environmental hazard, but no knowledge of a covered occurrence

The First Department's ruling also conflicts with the Second Department's decision in *Chama Holding Corp. v. Generali-US Branch*, 22 A.D.3d 443 (2d Dep't 2005). In *Chama*, a landlord received an order to abate a lead-paint nuisance from the department of health that described high levels of lead in a child's blood. The Second Department held that the abatement order did not trigger the landlord's duty to notify the insurer of a possible claim, where the landlord had no knowledge that the child had suffered injury or that the reported high levels of lead in the child's blood were caused by his exposure at the residence. *Id.* at 444-45. Therefore, the landlord did not have knowledge of an occurrence under the policy, and thus no duty to notify the insurer. *Id.*; *Huertero*, 13 A.D.3d at 487 (same).

Like *Reynolds Metal, Chama* recognizes the core principle that the First Department disregarded here: that an insured must have knowledge of a potentially covered occurrence (i.e., injury to a third party resulting from the contamination) before it has any duty to notify the insurer. Under the First Department's

approach, *Chama* would have been decided differently. The landlord would have had a notice duty simply upon learning of the lead-paint contamination. It is untenable for such fundamental principles of insurance law to vary among the Departments.

3. The question of when an insured has the duty to give notice of long-tail environmental claims is a recurring question of importance

Even aside from the clear conflicts of authority, the question of when an insured must give notice to an insurer of potential long-tail environmental or toxic tort liability is one of surpassing importance in this state. Tens of thousands of claims involving bodily injury and property damage resulting from long-term effects of products (such as asbestos) and environmental contamination (such as coal tar) continue to wend their way through the New York courts. As to the latter, New York State has 883 Superfund sites, 320 Brownfield Cleanup sites, and 238 active Voluntary Cleanup sites.[11] The rule established by the First Department will govern not only this generation of environmental or hazardous-substance liability coverage issues, but future claims for coverage of tomorrow's hazards.

[11] *See* Department of Environmental Conservation, *Environmental Remediation 2009/2010 Annual Report*, State Superfund Program - 2009/2010 Progress and Statistics, *available at* http://www.dec.ny.gov/about/53303.html (State Superfund Program - 2009/2010 Progress and Statistics); http://www.dec.ny.gov/about/53247.html (Brownfield Cleanup Program - 2009/2010 Progress and Statistics); http://www.dec.ny.gov/about/53308.html (Voluntary Cleanup Program - 2009/2010 Progress and Statistics).

In the case of underground property contamination, the First Department's rule is both unworkable and substantially unjust. Long-tail environmental damage typically is unknown at first, slow to increase, and unseen on the property of the policyholder (in the case of underground property contamination). Even where an insured learns that its own property has been contaminated, the insured will typically have no way to learn of an occurrence within the scope of the policy (*i.e.*, damage to third-party off-site property that is caused by the on-site contamination). The fact and timing of any off-site migration often is not known even when insured knows of damage to its own property. There is generally no reasonable means for an insured to determine third-party injury without an environmental investigation, and such voluntary investigatory costs would not be typically be compensated by an insurer absent a liability claim. The inability of an insured to investigate third-party property damage is heightened in this circumstance, when Orange & Rockland no longer owned the property by the 1960s, R. at 624, and could not undertake any environmental assessment on its accord even of the property it once owned. Finally, no third party would welcome such investigation, since the property owner's operation could be disrupted by such an investigation and it would typically be liable even for discovered pollution it did not itself cause. *See, e.g.*, *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (discussing "strict liability" under federal environmental cleanup statutes

and noting that "Potentially responsible parties are not limited to parties who were the cause in fact of the contamination") (citation omitted). [12]

The First Department's ruling exacerbates that uncertainty. The court below suggested that initial contacts with environmental regulators about possible *on-site* pollution are enough to trigger a notice obligation under a third-party liability policy that does not cover *on-site* contamination of the owner's property. Att. 1 at 14. This will operate as a trap for the unwary, since it departs so far from the norms of insurance law and common sense. It also will force insureds who are aware of the rule to provide futile notice to the insurer at the very first sign of a hazardous-substance issue, many years before such notice would have any true utility to the insurer in the absence of a known, covered occurrence. Nothing commends the First Department's rule.

[12] Although knowledge of an occurrence is the predicate for any duty of notice, an insured cannot fail to exercise reasonable care to ascertain accidents occurring in his business. *see Woolverton,* 190 N.Y. at 48. No court, however, has ever imposed a duty upon an insured (upon pain of forfeiture of coverage) to investigate third-party damage from long-tail environmental hazards. In any event, Travelers adduced no evidence that Orange & Rockland's failure prior to 1995 to determine whether any damage was done to the property of third parties constituted a breach of a duty of reasonable care. Summary judgment is thus properly awarded to Orange & Rockland, but at a minimum that is a jury question on remand. The First Department's "finding" that Orange & Rockland was guilty of a "willful failure to investigate," and that such failure "negates any lack of awareness of an occurrence of pollution" is irrelevant, because (1) the only relevant evidence concerned investigation of its own property and (2) it was manifestly improper for the First Department to resolve contested issues of fact against the non-moving party in a summary judgment appeal. It is well settled under New York law that the reasonableness of a delay, where mitigating circumstances such as lack of knowledge of the occurrence are present, is usually a matter for the jury. *See, e.g.*, *Melcher*, 226 N.Y. at 55-56.

Clarification of an insured's notice obligations is particularly important because New York law governing these policies did not require Travelers to show that it was prejudiced by late notice to avoid coverage. *Security Mutual*, 31 N.Y.2d at 440. Travelers of course is not prejudiced in its investigation by the lack of any notice in 1981 or the years prior to 1995, when there was no evidence of any covered occurrence at the Nyack site, much less any potential claim. The 1995 notice was more than timely; indeed, Travelers insisted for years that it was premature and that it had no duty to defend a claim that had not ripened. *See, e.g.*, R. at 69, 93. The First Department's ruling below will result in an enormous windfall for liability insurers who have collected *substantial* premiums for this coverage and yet now escape an obligation to pay, at the ultimate expense of insureds, including, in this case, the hard-pressed utility customers who will now have to bear the uninsured cleanup costs.

Whether an insurance company can compel a policyholder to forfeit its insurance coverage should not turn on which Department of the Appellate Division happens to have jurisdiction over the policyholder's site. Moreover, if a policy covers liability at sites in different locations in New York, like the ones at issue here, insurance companies will have the incentive to forum-shop among the four Departments in bringing declaratory judgment actions alleging forfeiture. All policyholders, including Orange & Rockland and Reynolds Metal, should have the

same trigger of notice standard regardless of whether the site and the third-party property damage occur in St. Lawrence County (as in *Reynolds Metal*), in Rockland County (as here), or anywhere else in New York.

II. THIS COURT SHOULD REVIEW WHETHER AN INSURER CAN AVOID WAIVER OF ITS LATE NOTICE DEFENSE BY SERIATIM RESERVATION OF RIGHTS LETTERS

In the trial court, Orange & Rockland alternatively contended that, under the common law of waiver, Travelers waived its late notice defense by failing to investigate the defense for seven years, and that Travelers could not inoculate itself forever from a waiver finding by the simple expedient of repeated boilerplate "reservation of rights" letters. The trial court agreed and granted summary judgment on this point to Orange & Rockland. R. at 19-21. The First Department interpreted the trial court to have improperly relied upon Insurance Law § 3420(d), which applies only to claims for death and bodily injury), and held that waiver does not occur "simply as a result of the passage of time." Att. 1 at 15. The First Department never addressed the arguments in Orange & Rockland's brief that summary judgment was proper under the common law of waiver.

As a general matter, an insurer can protect itself against waiver by reserving its rights as to a late notice defense, *see Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 269 (1970), and Orange & Rockland has no objection to Travelers' initial reservation of rights to investigate a late notice defense. However, under New

York law, Travelers had a duty to conduct a "prompt investigation" of Orange & Rockland's claim, and to give Orange & Rockland notice of its denial of coverage on late notice grounds "as soon as is reasonably possible." *Estee Lauder, Inc. v. OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 35 (1st Dep't 2009) ("*Estee Lauder*") (citation omitted); *see also* N.Y. Ins. Law § 2601(a)(3) (stating that an insurer has the duty to conduct a "prompt investigation of claims arising under its policies).[13] Travelers offers no explanation for its seven-year delay in disclaiming coverage based on late notice. The only possible explanation is that it believed that there was no evidence of possible coverage under a third-party liability policy, and that there was no reason for Orange & Rockland or Travelers to investigate. The policy only covered liability for off-site property damage. But Orange & Rockland concededly had no information to give Travelers about such liability or contamination. This explains why, when Orange & Rockland gave Travelers notice, Travelers told Orange & Rockland that such notice was *premature* under the policies and that it had no duty to defend at that time. *See supra* at 25-28. In *Estee Lauder*, the court held that a reservation of rights letter could not indefinitely and "unilaterally absolve" the insurer's duties to "disclaim promptly and specifically." 62 A.D.3d at 35. The same result should obtain here.

[13] Insurance Law § 2601, of course, does not provide a private right of action, but an insurance company's failure to comply with the duties articulated in that statute is evidence of its waiver.

CONCLUSION

For the reasons stated above, Orange & Rockland respectfully requests that this Court grant its motion for leave to appeal.

Dated: June 28, 2010

DICKSTEIN SHAPIRO LLP

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POLICY LANGUAGE ADDENDUM

Travelers' policies are third-party liability insurance policies that contain the following provisions:

Coverage Grant

> I. Coverage A—Bodily Injury Liability
>
> Coverage B—Property Damage Liability
>
> The company will pay on behalf of the *insured* all sums which the insured shall become legally obligated to pay as *damages* because of
>
> Coverage A. *bodily injury* or
>
> Coverage B. *property damage*
>
> to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient; but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

R. at 885 (emphasis in original).

Notice Provision

> Insured's Duties in the Event of Occurrence, Claim or Suit.
>
> (a) In the event of an *occurrence*, written notice containing particulars sufficient to identify the *insured* and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the

> *insured* to the company or any of its authorized agents as soon as practicable. The *named insured* shall promptly take at his expense all reasonable steps to prevent other *bodily injury* or *property damage* from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.
>
> (b) If claim is made or suit is brought against the *insured*, the *insured* shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
>
> (c) The *insured* shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the *insured* because of *bodily injury* or *property damage* with respect to which insurance is afforded under this policy; and the *insured* shall attend hearings and trial and assist in securing and giving evidence and obtaining the attendance of witnesses. The *insured* shall not, except at his own cost, voluntarily may any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

R. at 883 (emphasis in original).

Definition of "Property Damage"

> "property damage" means injury to or destruction of tangible property.

R. at 882.

Definition of "Occurrence"[14]

> "occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily*

[14] Travelers' early policies sold to Orange & Rockland were accident-based policies, rather than occurrence-based. By 1967, Travelers' policies provided coverage for both occurrences and accidents.

injury or property damage neither expected nor intended from the standpoint of the *insured*.

R. at 882 (emphasis in original).

"Owned property" Exclusion

This insurance does not apply

* * *

(i) to *property damage* to

(1) property owned or occupied by or rented to the *insured*.

(2) property used by the *insured*, or

(3) property in the care, custody or control of the *insured* or as to which the *insured* is for any purpose exercising physical control . . .

R. at 885 (emphasis in original).

ATTACHMENT 1

Travelers Indem. Co. v. Orange & Rockland Utils., Inc.,

Index No. 603601/02 (1st Dep't May 20, 2010)

with notice of entry dated May 27, 2010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff, - against - ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100, Defendants.	**Index No. 603601/02** **Hon. Eileen Bransten** **Motion Sequence Nos. 013, 014, 015** **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached is a true and accurate copy of a Decision and Order of the Supreme Court, Appellate Division, First Department, dated and entered May 20, 2010.

Dated: May 27, 2010
New York, New York

Respectfully submitted,

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Gonzalez, P.J., Friedman, DeGrasse, Manzanet-Daniels, Román, JJ.

2843 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Respondent,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Appellant,

John Doe Corporations 1-100,
Defendants.

- - - - -

2844 The Travelers Indemnity Company, Index 603601/02
Plaintiff-Appellant,

-against-

Orange and Rockland Utilities, Inc.,
Defendant-Respondent,

John Doe Corporations 1-100,
Defendants.

Dickstein Shapiro LLP, New York (David L. Elkind of counsel) and Dickstein Shapiro LLP, Washington, DC (Selena J. Linde of the Bar of the State of Maryland, admitted pro hac vice, of counsel), for Orange and Rockland Utilities, Inc., appellant/respondent.

Steptoe & Johnson LLP, Washington, D.C., (Roger E. Warin of Bar of the District of Columbia, admitted pro hac vice) and Clyde & Co US LLP, New York (Daren S. McNally of counsel), for The Travelers Indemnity Company, respondent/appellant.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 19, 2009, which granted defendant insured's motion for partial summary judgment on the issue of late notice and denied plaintiff insurer's motion for partial summary judgment, unanimously reversed, on the law, without costs, defendant's

motion denied, and plaintiff's motion granted to declare denial of coverage on the basis of untimely notice. Order (same court, Justice and entry date), which granted plaintiff's motion for partial summary judgment to exclude certain coverage based on the pollution exclusion in the policy, unanimously modified, on the law, the motion denied as to the 1970 policy and sites other than Nyack, and otherwise affirmed, without costs.

Defendant did not give timely notice under the policy, which is a requirement for coverage (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]). Defendant's ongoing contacts with environmental regulators about the Nyack site dated back to 1981, and there was even a site inspection by the Environmental Protection Agency in 1985, yet defendant never provided any notice to its insurer of these contacts or the questions they raised until 1995. Defendant's argument that it never had actual notice of any pollution was insufficient. The many reports, including internal reports of a likelihood of contamination at the subject site, as well as inquiries from regulators, placed it on notice. Its willful failure to investigate negates any lack of awareness of an occurrence of pollution (*see Technicon Elecs. Corp. of N.Y. v American Home Assur. Co.*, 74 NY2d 66, 75 [1989]). The court mistakenly held defendant to the much more lenient standard for the timing of

notice applicable in excess insurance cases. The standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated (*Paramount*, 293 AD2d at 239-240).

Similarly, the court erred in holding that plaintiff waived its right to disclaim for late notice simply as a result of the passage of time. Contrary to the court's assumption, Insurance Law § 3420 applies only to claims for death and bodily injury (*Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581, 582 [1999]), and not to pollution insurance.

Between 1971 and 1982, a provision of the Insurance Law then in effect (former § 46) excluded liability coverage for pollution other than claims based on "sudden and accidental" discharges. The court properly applied that exclusion for all policies issued during that period (*see Maryland Cas. Co. v Continental Cas. Co.*, 332 F3d 145, 159-160 [2d Cir 2003]). We do not find persuasive defendant's argument that plaintiff waived the "benefit" of the statute by issuing policies in contravention of its terms. Section 46 did not confer any benefit or right on insurers, but rather was intended to impose a penalty on polluters like the insured herein. The court correctly concluded that defendant failed to meet its burden of establishing that the pollution complained of was caused by "sudden and accidental" discharges

(*Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 31 [1992], *lv denied* 80 NY2d 753 [1992]). While its longtime employee testified that there were many accidental spills during routine operations, this was not sufficiently definite as to quantity, nature or effect of these spills to prove they fell outside the exclusion.

However, the court erred in applying the § 46 exclusion to the policy issued in 1970, prior to enactment of the short-lived statute, since a contract generally incorporates the state of the law in existence at the time of its formation (*see People ex rel. Platt v Wemple*, 117 NY 136, 148-149 [1889], *appeal dismissed* 140 US 694 [1890]). It also erred in granting plaintiff summary declaratory relief as to other sites,[1] in light of plaintiff's concession that the court's ruling on the issue of the statutory pollution exclusion be limited to the Nyack site.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 20, 2010

CLERK

[1]Seven are enumerated in the court's order and plaintiff's show cause order, although only six of them are listed in the complaint.

ATTACHMENT 2

Travelers Indem. Co. v. Orange & Rockland Utils., Inc.,

Index No. 603601/02 (Sup. Ct. N.Y. County Aug. 19, 2009)

with notice of entry dated Sept. 3, 2009

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
COMMERCIAL DIVISION

OFFICE COPY

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THE TRAVELERS INDEMNITY COMPANY,

Plaintiff,

v.

ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100,

Defendants.

----------x

Index No: 603601/02

Hon. Eileen Bransten

Motion Sequence 014, 015

SIRS:

PLEASE TAKE NOTICE that the attached is a true copy of a Memorandum Decision and Order issued by Justice Eileen Bransten dated August 18, 2009 and filed and entered in the Office of the Clerk of the County of New York on August 19, 2009.

Dated: Washington, District of Columbia
September 3, 2009

By: _____

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

The Travelers Indemnity Company

- v -

ORANGE AND ROCKLAND UTILITIES, INC. AND JOE DOE CORPORATIONS 1-100

INDEX NO. 603601/2002

MOTION DATE 1/26/09

MOTION SEQ. NO. 014

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
AUG 19 2009
JAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8-18-09

J.S.C.
HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

THE TRAVELERS INDEMNITY COMPANY,
Plaintiff,

-against-

ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100,
Defendants.

----------X

Index No. 603601/02
Motion Date: 1/26/09
Motion Seq. Nos.: 014, 015

BRANSTEN, J.:

In this declaratory judgment action, plaintiff The Travelers Indemnity Company ("Travelers") seeks an order declaring that it is not liable under certain insurance policies issued by it or its predecessors to defendant Orange and Rockland Utilities, Inc. ("ORU") in connection with ORU's costs for investigation and/or remediation of pollution/contaminants at seven former Manufactured Gas Plants ("MGPs") owned or previously owned by ORU. The primary policies under which ORU seeks coverage were issued by Travelers or its predecessors between 1955 and 1978.

MGPs operated primarily between the years 1830 and 1915 during what has been referred to as the "Gaslight Era." At that time, MGPs delivered gas into residential homes and businesses through a network of underground pipes. Each town generally had its own gas plant(s). While some plants survived well beyond the advent of electricity, generally, the availability of natural gas via interstate pipelines eventually brought the MGPs to an end during the mid-20th century.

In motion sequence number 014, Travelers moves for an order granting partial summary judgment, pursuant to CPLR 3212, declaring that coverage is excluded under any comprehensive general liability insurance policies issued by Travelers to ORU for any and all costs and/or losses associated with the investigation and remediation of pollution at the subject MGP sites on the ground that ORU failed to provide timely notice of its claims to Travelers.

In motion sequence number 015, ORU moves for an order granting partial summary judgment in its favor declaring that Travelers may not assert a late notice of claim defense on the ground that Travelers waived, or is otherwise estopped from asserting said defense.

Travelers and ORU have designated the MGP located on Gedney Street in Nyack, New York, as a "test" site for purposes of this motion and limit arguments to that site alone.

BACKGROUND

During various periods from approximately 1852 until 1965, ORU (or its predecessors) owned and operated MGPs in Orange County and Rockland County, New York.* The Nyack site was operated by ORU from approximately 1852 until 1964. It

* The MGPs were located at: (1) Fulton and Canal Streets, Middletown, NY; (2) Genung and Phillip Streets, Middletown, NY; (3) Pike and King Streets, Port Jervis, NY; (4) Gedney Street, Nyack, NY; (5) Chestnut Street, Ramapo Avenue and Pat Malone Drive, Suffern, NY; (6) 93B Maple Avenue, Haverstraw, NY; (7) Clove and Maple Avenue, Haverstraw, NY; and (8) McVeigh Road, Middletown, NY.

initially produced coal gas, then carbureted water gas, and then high British thermal units ("BTU") oil gas.

On April 14, 1995, ORU notified Travelers of potential environmental liabilities at certain MGPs, including Nyack. In its letter, ORU informed Travelers that the New York State Department of Environmental Conservation ("DEC") intended to require ORU to investigate, and, if necessary, remediate any contamination that may be found to exist at any of its MGP sites. Together with the notice, ORU sent Travelers a draft consent order from the DEC, requiring ORU to conduct a preliminary investigation for each MGP site. The purpose of the preliminary investigation was to enable the DEC to determine the presence of any hazardous substances at the MGP sites, and to develop and implement a remediation plan with respect to any of the sites that the DEC determined required more comprehensive action.

On May 1, 1995, Travelers acknowledged receipt of ORU's notice. Travelers made no determination of coverage, reserving its rights to do so at a later time.

In January 1996, ORU sent a finalized copy of the DEC consent order to Travelers and, again requested coverage. What followed, for years, were a series of letters from ORU to Travelers. ORU continued to send Travelers information regarding its MGP sites, including Nyack and continued to provide updates with respect to any pertinent facts, such as developments with the DEC and/or reports regarding environmental investigations at the

MGP sites. Travelers answered with vague responses, each letter closing with boilerplate reservation of rights language. None of the evidence indicates that Travelers conducted a substantive investigation into the environmental claims or issues.

On February 4, 2002, ORU sent Travelers a settlement proposal, seeking to reach a final resolution on coverage for all of the subject MGPs. On September 20, 2002, seven years after the April 14, 1995 notice, Travelers rejected the settlement proposal, and, for the first time, disclaimed coverage for the MGP sites because, among other reasons, "Orange & Rockland failed to provide written notice of any accident or occurrence giving rise to a claim for damage as soon as practicable as required by the express terms of the policies."

Two weeks later, Travelers commenced the instant declaratory judgment action asserting that it owes no coverage under the subject policies for any costs associated with property damage at the MGP sites. One of the grounds asserted by Travelers is that ORU did not give timely notice of its claims as required by the policies.

The Insurance Policies, and Pertinent Facts Surrounding ORU's Claims

The Travelers Policies generally require that ORU provide notice of an accident or occurrence "as soon as practicable" and notice of a claim or suit "immediately" to Travelers.

According to Travelers, ORU was sufficiently aware of its potential liability at the MGP sites dating back to at least 1981. Travelers contends that, despite ORU's obligation to provide prompt notification of accidents, occurrences and/or claims, it waited 14 years before providing such notice to Travelers. Travelers points out that: (a) on June 9, 1981, ORU forwarded correspondence to the Environmental Protection Agency (EPA), notifying the EPA that three of its MGPs, including the Nyack site, contained "[p]ossible residual from utility gas manufacturing" stemming from "[s]pillage during normal operations and closure;" (b) in 1984, an investigation for a planned waterfront development of the property adjacent to the Nyack MGP noted the presence of "'fuel oil type odors' . . . 'in subsurface soil;'" (c) in September 1985, ORU was required to and did investigate and remediate coal tar contamination at the MGP site known as the Middletown Fulton MGP; (d) in 1987, the EPA began an environmental investigation of the Nyack site; (e) in 1988, the American Gas Association inquired about MGP byproducts; and (f) in April 1991, the DEC requested that ORU submit data "explaining the coal tar site activities of your company. . . for all of your company's sites listed in the Registry. . . as well as any unlisted and potential sites," and ORU responded to the DEC by letter, dated May 10, 1991, which attached reports of the history and operations of all of the MGP sites.

Travelers contends that, pursuant to the terms of the insurance policies, ORU was required to give notice of the likely pollution liability at the MGP sites, including the need

to conduct investigations and remediations at the subject MGPs, approximately 14 years before it was finally given. Travelers asserts that, for the 14 years during which it was delinquent, ORU continued to be actively aware of the pollution problems at the MGPs. Travelers contends that the evidence, including an internal memorandum drafted by an ORU employee, which warned that "the buried tar and other residue may be coming back to haunt us," confirms ORU's knowledge of the grave environmental problems at the MGPs and that notice should have been furnished years earlier.

ORU counters that its April 14, 1995 notice was timely and fully complied with the policies' notice requirements. ORU explains that, prior to giving notice, in 1994, it had discussions with the DEC regarding an investigation of the MGP located in Middletown, New York, but that the DEC indicated that it wanted to broaden the scope of the investigation to encompass all of ORU's MGPs. ORU claims that, even at this point, no remedial activities were discussed, and that the DEC's first draft of a consent order required nothing more than investigations of the MGPs. A later draft consent order that DEC prepared and forwarded to ORU on December 27, 1994, provided for investigation, and, if necessary, remediation of sites that were found to be contaminated. This, ORU contends, was the first time it was apprised of a potential remediation obligation with respect to the Nyack site in the event a pollution problem was found to exist. In its February 8, 1995 response to the draft consent order, ORU objected to the inclusion of all of its MGPs in the

investigation, and suggested that the consent order be limited to the Middletown site. ORU then notified Travelers, on April 14, 1995, of the possibility of liability at the MGP sites, nine months before a final consent order was signed requiring the investigation of the MGPs.

ORU maintains that Travelers cannot demonstrate that it was obligated to give notice related to the Nyack site at any time prior to April 14, 1995. ORU submits that it had no obligation to investigate, let alone clean up the Nyack site, until 1995. It contends that it promptly gave notice to Travelers after appreciating that it potentially would face liability with respect to the Nyack site.

Thus, ORU claims that, prior to giving notice to Travelers in 1995, it had no knowledge that contamination had occurred at Nyack, and that, as soon as it was aware that there was potential liability, it notified Travelers. ORU further contends that Travelers failed to either investigate or to provide a prompt coverage determination, and instead repeatedly sent letters containing boilerplate reservation of rights language. Travelers attributes its delay in reaching a coverage determination to ORU, maintaining that any delay was caused by ORU's failure to provide full disclosure of information.

ANALYSIS

Travelers' Claim of Late Notice by ORU

As explained by the Appellate Division, First Department:

> "Where a liability insurance policy requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within

> a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]). 'The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement' (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [1st Dept 2002]). "'[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court,' rather than an issue for the trier of fact" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998], quoting *Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 313 [1st Dept 1984])"

(*Tower Ins. Co. of New York v Lin Hsin Long Co.*, 50 AD3d 305, 307 [1st Dept 2008]; *see also St. Nicholas Cathedral of the Russian Orthodox Church in North America v Travelers Property Cas. Ins. Co.*, 45 AD3d 411 [1st Dept 2007]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1st Dept 1998]).

Therefore, Travelers must show that ORU failed to give notice "within a reasonable time under all the circumstances" once notice was due (*see Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]).

Travelers contends that, under the applicable standard, ORU was required to give notice of its claim many years prior to the time when it actually gave notice because, at least ten years prior to the time of notice, "from the information available . . . [ORU] could glean a reasonable possibility of the policy's involvement" (see *Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 239-240 [1st Dept 2002]).

ORU counters that: (a) Travelers' motion is built upon disparate events relating to sites other than the Nyack site; and (b) no regulatory authority, at any level, advised ORU that it could be liable for cleanup of contamination at the Nyack MGP site, in any concrete manner, until the DEC sent the December 27, 1994 draft consent order that potentially required an investigation and possible remediation at the MGP sites. Although ORU objected to the draft consent order, it gave Travelers notice in April 1995.

To trigger the notice requirement in the environmental context, New York cases require some realistic and certain action from a regulatory agency or third party showing some reasonable possibility of liability (*see e.g., Consolidated Edison Co. of New York v American Home Assurance Co.*, Index No. 600527/01 [July 18, 2006]). Thus, as a general matter, "[k]nowledge of an insured's potential general liability is insufficient to give notice of an occurrence to an insurance carrier" (*Stone & Webster Mgmt. Consultants, Inc. v Travelers Indem. Co.*, 1996 WL 180025 *18 [SD NY April 16, 1996]). Similarly, in *Reynolds Metal Co. v Aetna Cas. & Sur. Co.* (259 AD2d 195, 203 [3d Dept 1999]), the Third Department refused to find that a consent order required the insured to give notice, because the order did not specifically mandate any remediation. Here, as in *Reynolds*, the consent order was in its early stage, it called only for an investigation of the site; not remediation.

In *Century Indem. Co. v Brooklyn Union Gas Co.* (58 AD3d 573 [1st Dept 2009]), the Appellate Division, First Department unanimously affirmed Supreme Court's determination

that an issue of fact existed as to whether the insured's duty to give notice to an excess insurer had arisen before the City of New York advised it that it intended to bring an action with respect to one of the insured's MGPs. While the standard is not identical in the excess insurance context, the case provides useful guidance. The First Department concluded that giving "the insured the benefit of the inferences as opponent of the motion, it cannot be determined . . . that the insured's duty to provide notice had arisen from its knowledge of consultant reports, which were not definitive as to the extent of the contamination, the degree of remediation needed or the actual rather than the generalized projected remediation costs, and the regulatory agency involvement that did not mandate any significant action" (*Century Indem. Co. v Brooklyn Union Gas Co.*, 58 AD3d at 574 [citation omitted]).

Here, the record supports the conclusion that ORU disclosed pertinent facts pertaining to the Nyack MGP in a timely manner, and that its April 14, 1995 notice was reasonable under the circumstances. In order to bolster its conclusions, Travelers simply culls together general reports and events, some of which transpired at separate MGPs, as well as non-definitive steps by regulatory agencies that did not mandate any significant action. Travelers' assertions are not supported by the evidence (*Century Indem. Co. v Brooklyn Union Gas Co., supra)*. Furthermore, despite Travelers' sweeping accusations of concerted action by ORU to cover up pertinent facts, there is no evidence of any material nondisclosure. Instead, the evidence supports the conclusion that ORU did not have any concrete knowledge that the

Nyack site was contaminated at any level necessitating regulatory action before giving notice to Travelers.

Accordingly, Travelers' motion for partial summary judgment on the late notice ground is denied.

ORU's Claim of Late Denial of Coverage by Travelers

ORU contends that Travelers failed to meet its obligation to promptly investigate and timely respond to its claim for coverage of costs related to the Nyack site. It submits that the repeated transmission of boilerplate reservation of rights letters by Travelers, without even a cursory investigation, does not satisfy its obligations as a matter of law, and thus, that Travelers should not be permitted to assert a late-notice defense. ORU urges, among other things, that Travelers waived its right to assert a late-notice defense by failing to deny coverage for more than seven years after receipt of ORU's notice, failing to conduct a timely investigation and failing to make a final coverage determination in a reasonable period of time, all of which prejudiced ORU.

As explained by the Appellate Division, First Department:

> "'An insurer must serve written notice on the insured of its intent to disclaim coverage under its policy "as soon as is reasonably possible' (Insurance Law 3420 [d]). The reasonableness of the timing of a disclaimer is measured from the date when the insurer knew or should have known that grounds for the disclaimer existed (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64,

> 68-69 [2003]). If such grounds were, or should have been, 'readily apparent' to the insurer when it first learned of the claim, any subsequent delay in issuing the disclaimer is unreasonable as a matter of law (*id.* at 69). If it is not readily apparent, the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted *(see id.; see also Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12 [1st Dept 2007]; *Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998]; *Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 278 [1st Dept 1986])"

(*Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 2-3 [1st Dept 2007]).

Moreover, failure to timely disclaim coverage on specific grounds waives the insurer's defense on those grounds (*see Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 1029 [1979]).

Here, during the more than seven years between ORU's notice and Travelers' disclaimer of coverage, Travelers failed to make a coverage determination. Instead, it responded to ORU's requests for coverage by promising to investigate the claims and then enumerating numerous possible grounds upon which it might opt to disclaim coverage at a later time.

Travelers did not disclaim on late-notice grounds until 2002, although it had sufficient information to do so for many years. Instead, it sent only boilerplate reservation of rights letters to ORU. These letters were legally insufficient and did not relieve Travelers of the a duty to make a prompt investigation and disclaimer of coverage (*id.; see also Kutsher's Country Club Corp. v Lincoln Ins. Corp.*, 119 Misc 2d 889, 894 [Sup Ct, Sullivan County,

1983]). Travelers did not meet its obligations to investigate and timely respond to ORU's claim with respect to the Nyack site, and, accordingly, waived its right to disclaim coverage.

Travelers' claims that it lacked relevant information to disclaim coverage earlier and that the reason it did not disclaim sooner was attributable to ORU's refusal to provide Travelers with historical information regarding the pollution at the MGPs are rejected. The arguments are unsupported by the evidence. To the contrary, the record demonstrates that, with respect to the Nyack MGP, ORU regularly sent information to Travelers, including any new developments. Clearly, Travelers had sufficient information to make a coverage determination with respect to the timeliness of ORU's notice long before it finally disclaimed coverage on that ground. Its disclaimer was woefully and inexcusably late.

ORU's motion for partial summary judgment on the ground of late denial of coverage by Travelers is granted.

Accordingly, it is ORDERED that the motion by The Travelers Indemnity Company for partial summary judgment on the ground of late notice with respect to the Nyack MGP is denied; and it is further

ORDERED that the motion by Orange and Rockland Utilities, Inc. for partial summary judgment declaring that plaintiff waived its right to assert a late notice of claim defense with respect to the Nyack MGP is granted.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 18, 2009

ENTER:

Hon. Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE TRAVELERS INDEMNITY COMPANY, Plaintiff, v. ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100, Defendants.	Index No: 603601/02 Hon. Eileen Bransten **AFFIDAVIT OF SERVICE**

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

ROBERT A. ANDERSON, being duly sworn, deposes and says:

I. I am not a party to this action, am over the age of 18, and reside in Fairfax County, Virginia.

II. On September 3, 2009, I served true and correct copies of Orange & Rockland's Notice of Notice of Entry by causing true and correct copies of same to be sent by first-class mail addressed to:

Daren McNally
Jonathan McHenry
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068

Roger Warin
Mary Woodson Poag
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Robert Anderson
ROBERT A. ANDERSON

Sworn to before me this
3rd day of September, 2009

Lynda Jenkins
Notary Public

LYNDA JENKINS
Notary Public, District of Columbia
My Commission Expires Feb. 14, 2012

DICKSTEINSHAPIRO LLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

July 16, 2010

VIA FEDERAL EXPRESS

Stuart M. Cohen, Esq.
Clerk of the Court
State of New York State Court of Appeals
Clerk's Office
20 Eagle Street
Albany, NY 12207-1095

Re: **The Travelers Indemnity Co. v. Orange and Rockland Utilities, Inc., et al.,**
New York County Clerk's Index No. 603601/2002: Motion for Leave to Appeal

Dear Mr. Cohen:

We write on behalf of Defendant-Appellant Orange and Rockland Utilities, Inc. ("Orange and Rockland") in response to the suggestion of Plaintiff-Appellee The Travelers Indemnity Company ("Travelers") that Orange and Rockland's motion for leave to appeal[1] be dismissed because the order appealed

[1] Orange and Rockland's June 28, 2010 Motion For Leave To Appeal ("Motion For Leave").

from is not final.[2] The order of the First Department being appealed from granted Travelers' partial summary judgment motion in the above-referenced action and dismissed all claims for general liability insurance coverage with respect to a single contaminated site previously owned by Orange and Rockland (the "Order"). As we discuss below, the Order appealed from is final; thus, this Court has jurisdiction. Because the issue raised by Travelers is jurisdictional, we ask the Court to accept this letter.

FACTUAL BACKGROUND

A. Travelers' Complaint Seeks To Disclaim Coverage at Seven Separate Sites

In a declaratory judgment action commenced on October 2, 2002, Travelers sought an order declaring that no coverage was owed to Orange and Rockland for environmental clean-up costs at seven separate manufactured gas plant sites in New York – including one at Nyack, New York – under various third-party liability policies issued by Travelers to Orange and Rockland between 1955 and 1978. R. at 9-10. Each individual site, to the extent known, was listed

[2] Travelers' July 9, 2010 Brief In Opposition To Motion For Leave To Appeal To the New York State Court Of Appeals ("Travelers' Br."), at 24-27.

separately, and 29 defenses to coverage, including the defense of late notice, were included in the complaint. R. at 412-19.

B. The Parties Request and the Trial Court Agrees to Sever All Claims Relating to the Nyack Site

As counsel for Travelers explained to the trial court on several occasions, resolution of coverage claims at each of the seven different sites was going to be difficult because the facts related to each site were so different. Each site had different operations, operated during different time periods, under different conditions, and with different waste handling practices. See R. at 1144; R. at 18-19 (trial court decision; finding facts about non-Nyack sites irrelevant to notice issue); R. at 964-66 (discussing generally the different byproducts resulting from different manufacturing processes at these types of sites). In order to manage the complexities involved in the trial of seven different sites, the parties and the trial court ultimately decided to sever one site, the Nyack site, for trial and for dispositive motions.[3]

[3] Encompassed in that decision was Travelers' motion for summary judgment on the grounds of late notice, which the First Department granted and which is the subject of this motion for leave to appeal.

1. Traveler's May 30, 2008 Request For Seven Separate Trials

In a letter to the trial court dated May 30, 2008, counsel for Travelers reported to the trial court, among other things, that to avoid jury confusion because of factual differences, each of the seven sites needed to be tried separately:

> The parties are in agreement that all seven sites should not be addressed in a single trial. Reasons supporting this recommendation include the fact that a seven-site trial would be extremely time-consuming and would likely result in jury confusion. Travelers believes that the best approach - for the parties, the Court and the jury - is to try one site at a time, seriatim.

R. at 1146.

2. The Trial Court Agrees to Sever Claims Relating to One Representative Site For Purposes of the Summary Judgment Motion and for Appeal to the Court of Appeals

At a court conference held on June 2, 2008, the parties discussed their preference to address only one site in connection with Travelers' motion for summary judgment on the issue of late notice. Recognizing that the issues raised by Travelers' motion would not be definitively decided by the trial court, the trial court agreed that severance of all claims relating to one site was necessary to allow the issues raised in Travelers' summary judgment motion to be resolved by the

Court of Appeals. Pending decision by the Court of Appeals, the trial court stayed all proceedings with regard to the other sites:

> [L]et's say the Court goes one way or the other way, it will not be resolved by the trial Court despite the trial Court's brilliance.
>
> I do see that the Appellate Division and Court of Appeals being very interested in this issue and ultimately going to the Court of Appeals. I can see it happening, even if there's unanimity at the Appellate Division level. I can't imagine it being resolved at the Appellate Division level.
>
> So you choose one site, the Court decides, it then goes to the Appellate Division. I think it's on a stay basis because *you're not going to go forward with anything else [besides Nyack] until after the Court of Appeals has really resolved the issue or addressed the issue.*

R. at 878-879 (emphasis added).

3. Travelers Informs the Court That Its Summary Judgment Motion With Regard to Late Notice Will Be Limited to the Nyack Site

On October 7, 2008, Travelers filed a summary judgment motion disclaiming coverage on the basis of late notice. In a letter to the trial court dated October 29, 2008, counsel for Travelers confirmed the parties' agreement that "the scope of the relief sought in the Travelers late notice motion will be limited to a

single site, namely the Nyack site (as the parties have agreed that the initial trial in this matter will focus on that site)." R. at 1147.

C. Consistent With the Decision to Sever All Claims Relating to the Nyack Site From the Rest of the Case, the Trial Court and the First Department Decisions Address the Merits of Travelers' Coverage Claim Only As to the Nyack Site

As previously decided by the trial court and the parties, all coverage claims as to the Nyack site were severed for purposes of Travelers' motion for summary judgment on the potentially dispositive issue of late notice. R. at 878-879. In a decision and order dated August 18, 2009, the trial court denied Travelers' motion (R. at 9-21), and as anticipated, Travelers took an immediate appeal to the Appellate Division, First Department. R. at 4, 29.

In a decision and order entered May 20, 2010, the First Department reversed the trial court and granted Travelers' summary judgment motion seeking a declaration of denial of coverage as to the Nyack site on the basis of untimely notice. Motion For Leave, Attachment 1 at 13-14. This ruling by the First Department was dispositive of all coverage claims as to the Nyack site, leaving no further action be taken by the court.

D. Orange and Rockland Files Motion for Leave to Appeal and Travelers Concedes that All Claims As to the Nyack Site Have Been Finally Resolved

As contemplated by the trial court and the parties at the June 2, 2008 conference, upon receipt of notice of entry of the First Department's decision and order resolving all coverage claims raised in the complaint as to the Nyack site, Orange and Rockland timely filed the current motion for leave to appeal to the Court of Appeals. In its opposition to the motion for leave to appeal, Travelers concedes that:

> Pursuant to the express agreement of the parties and the trial court, the First Department's Order resolved coverage issues with respect to the Nyack site.

Travelers' Br. at 26.

Travelers now argues that even though the First Department's Order resulted in dismissal of Orange and Rockland's claim as to the Nyack site in its entirety, it is not a final order because issues remain as to the other six sites. Travelers' Br. at 24-27.

ARGUMENT

A. This Court has Jurisdiction to Consider This Appeal Because the First Department's Order Meets the Requirements of Two Recognized Exceptions to the General Rule of Finality -- Express and Implied Severance

The Court of Appeals has jurisdiction over final orders and judgments. N.Y. Const. art. VI, §§ 3(b)(1), (2), (4), (6); CPLR 5601(a), (b), (d); CPLR 5602(a)(1). While, in general, a final order is one that disposes of all causes of action between the parties and leaves nothing for further judicial intervention apart from mere ministerial matters, two recognized exceptions to the general requirement of finality provide that a final order regarding a single cause of action shall meet the requirement of finality if it is expressly or impliedly severed from the remaining, unresolved causes of action. Burke v. Crosson, 85 N.Y.2d 10, 15-18 (1995); see generally, Arthur Karger, Powers of the New York Court of Appeals, §§ 4:1 at 48, 5:4 at 111-12 (3d ed. 2005); Cohen, McCoy & Reed, New York Court of Appeals Civil Jurisdiction and Practice Outline, Section VI (2007), available at http://www.nycourts.gov/ctapps/forms/civilpractice_05.htm.

Because the First Department's Order is a final determination on the merits with respect to the separate and distinct Nyack site, and because that site has

been severed from the litigation involving the other six sites, both expressly and impliedly, it meets the requirement of finality for purposes of appeal to the Court of Appeals.

1. The First Department's Order Is A Final Order

The First Department's Order granting Travelers summary judgment is dispositive of all coverage claims as to the Nyack site and leaves nothing with respect to that cause of action for further judicial intervention. See generally Motion For Leave, Att. 1. As such it is a final order.

2. The Nyack Cause of Action Was Severed From the Other Causes of Action

a. All Coverage Claims Involving the Nyack Site Were Expressly Severed

An order which expressly severs a pending cause of action will generally be deemed final by the Court of Appeals. See, Cohen, McCoy & Reed, Section VI. C. However, to be effective, a complete cause of action must be severed since items of relief within one cause of action cannot be severed. Burke at 18 n.5; Karger § 5:6 at 116-17. As discussed above, the trial court, at the behest of the

parties, expressly severed[4] all the Nyack coverage claims from the rest of the lawsuit so that dispositive motions could be made and appealed to the Court of Appeals. R. at 878-879; R. at 1147.

b. All Coverage Claims Involving the Nyack Site Were Impliedly Severed

As explained by the Court of Appeals in the leading case on implied severance, Burke v. Crosson, supra, an order that disposes of some but not all of the causes of action asserted in a litigation between the parties may be deemed final under the doctrine of implied severance if the cause of action it does resolve does not arise out of "the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action. 85 N.Y.2d at 16-17.

The First Department's Order meets the requirements for implied severance. First, the cause of action resolved here involves different occurrences and many significant differences in facts than those in the unresolved causes of action. While, the Court suggested that, in general, claims under the same contract are not usually impliedly severable (id. at 17), a different rule must apply where, as here, the claims involve liability policies for several disparate sites, each with its

[4] While the trial court did not use the word "sever", that is exactly what it did.

own occurrences and set of facts. In such cases, disputes involving separate occurrences and separate sites are essentially separate cases, which is exactly how the trial court treated the claims raised here. Under the general liability insurance policies at issue here, covered contamination at each site is a separate "occurrence"[5] (and may even involve multiple occurrences within a single site) involving completely distinct factual circumstances, separate in time and place. Even where several sites are covered under a single policy, the ultimate determination of coverage depends on the independent facts associated with each occurrence and each site.

As discussed above, there is no question that Travelers' complaint seeking coverage determinations under its general liability insurance policies for seven different sites involves different facts and occurrences. Indeed, the risk of jury confusion for a seven-site trial was so great that Travelers went so far as to recommend as "the best approach - for the parties, the Court and the jury" that the case be tried "one site at a time, seriatim." R. at 1146.

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[5] Travelers' policies define an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury or property damage* neither expected nor intended from the standpoint of the *insured*." R. at 882 (emphasis in original). The policies' limits of liability are listed on a "per occurrence" basis, making clear that one policy can cover multiple occurrences. R. at 880.

Second, the Court in Burke indicated that implied severance would not be available where a "cause of action has been dismissed but there remain other claims for relief based on the same transaction or transactions . . . even though the underlying legal theories may be very different." 85 N.Y.2d at 16-17. This example is clearly not applicable here.

Finally, the Court in Burke indicated that implied severance would not be available where the order "divid[es] a single cause of action" by deciding part of the cause action while leaving other parts of the cause of action, such as the amount of damages, unresolved. 85 N.Y.2d at 16-17. This case does not involve the splitting of a cause of action. The First Department Order is dispositive of all coverage claims with respect to a single cause of action, leaving no further action to be taken by the court as to that cause of action – a fact even Travelers concedes. R. at 1146; Travelers Br. at 26. What remains in this case are separate claims regarding six different sites with different facts.[6]

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[6] The cases cited by Travelers all involved situations where the courts' orders left open aspects of a single claim, such as the computation of damages, for future determination, essentially "splitting a cause of action." For example, in three of them, liability had been finally determined, but not the amount of damages or attorneys' fees. City of Buffalo v. Wysocki, 68 N.Y.2d 980, 980 (1986) ("method and terms of payment" not determined); Iseman v. Iseman, 37 N.Y.2d 918, 918 (1975) (attorneys' fees yet to be determined); McAlister v. Chin Lee Co., 266 N.Y. 603, 603 (1935) (assessment of damages). These cases have no application to the Nyack

B. An Appeal At This Time From the Order of the First Department with Respect to the Severed Claims Relating to the Nyack Site is Consistent with the Intent of the Court and the Parties and Will Conserve Scarce Judicial Resources

Underlying the finality requirement is the need to conserve judicial resources and avoid piecemeal appeals. Karger, § 3:1 at 34. However, "where an appeal is taken from so much of an otherwise nonfinal order as finally determines a discrete portion of the litigation . . . . allowance of an immediate appeal in such a case may itself result in conserving judicial resources by rendering subsequent proceedings unnecessary." Id. With respect to summary judgment motions, the finality of an order granting such a motion "depends on whether that order completely disposes of the particular action or of a severable part thereof, or whether it comes within some other exception to the finality requirement. Karger, § 4:4 at 57.

As discussed above, the First Department's Order finally determined that portion of the litigation relating to the Nyack site. The Nyack site was expressly

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claim--there are no damages or fees to determine. The remaining case, Mandel v. Adler, 267 A.D.2d 150, 150-51 (1st Dep't 1999), is also inapposite, as that case dealt with a situation where, unlike here, all but one defendant was dismissed.

severed by the trial court, and the rest of the action was stayed, to allow immediate appeal to the Court of Appeals of critical questions as to the proper standard for notice in primary general liability insurance coverage cases. R. at 878-879. By deciding at this juncture the conflict between the judicial departments as to the proper standards for notice in third-party liability insurance coverage cases, the Court will conserve scarce judicial resources by avoiding seriatim trials or the making of dispositive motions with respect to six other separate and distinct sites under a possibly wrong standard.

Respectfully submitted,

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July 26, 2010

VIA FEDERAL EXPRESS

Stuart M. Cohen, Esq.
Clerk of the Court
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: The Travelers Indemnity Company v. Orange and Rockland Utilities, Inc., et al.
New York County Clerk's Index No. 603601/2002

Dear Mr. Cohen:

We write on behalf of Plaintiff-Appellee The Travelers Indemnity Company ("Travelers") in response to the letter, dated July 16, 2010, of Defendant-Appellant Orange & Rockland Utilities, Inc. ("O&R") related to O&R's Motion For Leave To Appeal currently pending before this Court ("O&R Letter").

As an initial matter, we note that O&R's submission is improper and in direct violation of the express Rules of this Court, which specifically state that "[t]he Court's motion practice does not permit the filing of reply briefs and

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memoranda." 22 N.Y.C.R.R. 500.21(c). Rather, this Court's Rules require O&R to first request permission to file a post-briefing submission, which it did not do. Id. at 500.7. In addition, this Court's Rules require that O&R's initial motion for permission to appeal include a "showing that this Court has jurisdiction of the motion and of the proposed appeal, including that the order or judgment sought to be appealed is a final determination." Id. at 500.22(b)(3). In other words, the arguments that O&R makes in its after-the-fact submission should have been made in its original Motion. Accordingly, Travelers respectfully requests that the Court disregard O&R's improper submission and strike it in its entirety. To the extent that the Court considers O&R's submission, however, Travelers respectfully requests that it also consider the following short response.

As detailed in Travelers Opposition to O&R's Motion For Leave To Appeal, this Court is without jurisdiction to hear this interlocutory appeal because it is not "a 'final' order or judgment...that disposes of all of the causes of action between the parties in the action or proceeding...." Burke v. Crosson, 85 N.Y.2d 10, 15, 647 N.E.2d 736, 739, 623 N.Y.S.2d 524, 527 (1995). See also CPLR 5611 (an Appellate Division order is deemed final when it "disposes of all the issues in the action"). In fact, the parties in this case expressly agreed that the "scope of the

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relief sought" in Travelers summary judgment motion before the trial court would relate only to the Nyack Site and that questions of insurance coverage with respect to the remaining six MGP Sites would still need to be decided by the trial court. (R1147) Thus, while the First Department properly granted Travelers motion that O&R's notice was impermissibly late at the Nyack Site (Attachment 1 to O&R's Motion ("Att. 1")), the parties in this case still need to litigate the issue of coverage with respect to the remaining sites.

Despite the existence of multiple claims remaining in this case, O&R nevertheless argues that the First Department's Order granting *partial* summary judgment to Travelers is somehow a final order meriting this Court's review. O&R misstates the facts of this case and the applicable law. O&R claims that this Court has jurisdiction because the trial court "expressly severed" the claims related to the Nyack Site "to allow immediate appeal to the Court of Appeals of critical questions as to the proper standard for notice in primary general liability cases" and to resolve a conflict among the judicial departments regarding that standard. O&R Letter at 9-10; 13-14. There is absolutely no support in the record for this fabricated argument.

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First, the trial court did not expressly sever the Nyack Site from the rest of this case, and O&R tellingly does not - - because it cannot - - cite to any trial court order, ruling or decision evidencing such an alleged severing. In fact, O&R admits that the trial court never used the word "sever" in any order or even oral statement from the bench, a critical concession O&R tries to minimize in a footnote. O&R Letter at 10, n.4. Instead, the parties and the trial court merely agreed - - for case management purposes alone - - to try each of the seven MGP Sites at issue in this case individually on a seriatim basis, as opposed to trying all seven sites together at one time in a single and large, unwieldy trial. (R1147) Thus, as demonstrated in Travelers Opposition, the parties' express understanding, as well as that of the trial court, was that coverage issues at each of the other six sites would be addressed after the trial court resolved the Nyack Site.

Second, the trial court did not discuss any purported conflict in the law regarding the notice standard during the conference referenced by O&R, nor did it point to any conflict among the departments of the Appellate Division in its decision denying Travelers motion. (R878-R879; R1147; R9-R21) To the contrary, as unanimously held by the First Department and admitted by O&R in its Motion, there is *no* question or conflict regarding the proper notice standard to be

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applied in this case. (Att. 1 at 15; O&R Motion at 41-42) Rather, the trial court merely applied the wrong standard. Under the proper late notice standard, O&R's egregiously late notice with regard to the Nyack Site precludes coverage, as correctly found by the First Department. Id. at 14-15.

Next, O&R implies that the trial court below somehow bestowed jurisdiction upon this Court *sua sponte* during conversations with counsel for Travelers and O&R more than two years ago, *prior to the motions being submitted*, and by virtue of it entering a stay of the trial court proceedings pending appeals. This suggestion is both legally and factually incorrect. First, the trial court is without any authority to confer jurisdiction on this Court. See Mandel v. Adler, 267 A.D.2d 150, 701 N.Y.S.2d 18 (1st Dep't 1999) (IAS court was wrong in assuming plaintiff could appeal a non-final order and should not have denied defendants' motion as premature). Accordingly, any suggestion to the contrary has no legal support whatsoever under New York law.

Second, during the conference referenced by O&R, the trial court simply offered its belief that the unsuccessful party would likely appeal its decision, which Travelers did, and which decision was unanimously overturned by the First Department. This conference, however, occurred prior to the submission of the

motions, and therefore the trial court could have no idea: (1) what the bases of the summary judgment motions would be; (2) whether it would grant or deny the motions; or (3) whether the First Department would affirm or reverse the trial court's decision. (R878-R879) Since the trial court could not possibly have known the posture of the case after consideration by the First Department, it likewise had no way of knowing whether the result would be appealable to this Court.

Third, with respect to the stay, the fact that the trial court suggested a stay of the proceedings pending resolution of the Nyack Site appeal is not evidence of any formal severance of that claim from the rest of this case, nor is it evidence that the trial court attempted to confer appellate jurisdiction on this Court. Instead, the issuance of the stay pending appeals of the decision on the Nyack Site was merely an efficient case management technique utilized by the trial court and the parties to avoid proceeding with a costly and time-consuming trial on the Nyack Site in the event there was a judicial determination on appeal of no coverage. In any event, the Nyack Site was never "severed" from the rest of this case.

Recognizing that the trial court never actually severed the Nyack Site, O&R also asserts in the alternative that the trial court "impliedly severed" that site from the rest of this case. O&R Letter at 10-12. Again, O&R is wrong. In Burke, this

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Court expressly stated that "an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where other claims or counterclaims derived from the same contract or contracts were left pending." 85 N.Y.2d at 16, 647 N.E.2d 740, 623 N.Y.S.2d 528. This is the exact situation here, where - - as O&R admits - - coverage issues with respect to the remaining sites under the Travelers Policies at issue have yet to be resolved. O&R Motion at 21 n.1. Indeed, O&R does not - - because it cannot - - cite a single case in support of its allegation that multiple claims arising out of the same series of contracts, as here, may be impliedly severed. O&R Letter at 10-12. Instead, O&R mischaracterizes Burke as only "suggesting" that claims under the same contract are not impliedly severable. Id. at 10-11. To the contrary, as quoted above, in Burke this Court set forth the concrete rule that claims under the same contract - - such as the Travelers Policies here - - cannot be impliedly severed. See also Cohen, McCoy & Reed, "The New York Court of Appeals Civil Jurisdiction and Practice Outline," Section VI(C)(2) (2007) (noting that "Burke *holds*" that claims arising out of the same contract or series of factually related contracts cannot be impliedly severed) (emphasis added).

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O&R further claims, without any factual or legal support, that in any case "a different rule must apply here" because the sites in this matter "are essentially separate cases." Id. at 10-11. There are no facts or law supporting such a proposition. As O&R well knows, this case involves numerous claims regarding multiple MGP Sites arising out of the same series of contracts - - the Travelers Policies. Under blackletter New York law, the Nyack Site was not, and cannot be, impliedly severed from the rest of the case.

Finally, O&R incredibly claims that an appeal of the First Department's Order will "conserve scarce judicial resources." O&R Letter at 13. This suggestion is nonsensical. If this Court followed O&R's logic, every site, issue and claim in this case that is resolved by summary judgment immediately can and must become separately appealable to this Court regardless of how many additional related claims stemming from the same series of contracts remain pending before the trial court. There is simply no merit to the suggestion that such a scenario would result in increased judicial efficiency. Indeed, this Court has expressly noted "the strong public policy against piecemeal appeals in a single litigation." Cohen, McCoy & Reed at Section VII(A).

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In short, the First Department's Order granting partial summary judgment is not a final order over which this Court has jurisdiction to hear an appeal. In addition, as set forth in detail in Travelers Opposition, this case presents no novel issues of law and no conflict among the Appellate Departments. Rather, in the end, O&R is simply dissatisfied with the First Department's unanimous Order, which granted Travelers motion for partial summary judgment based on O&R's unreasonably late notice. O&R's desire to avoid the consequences of its late notice under blackletter New York law is not an appropriate justification for review by this Court.

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Respectfully submitted,

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cc: All Counsel of Record

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207

Decided September 16, 2010

Mo. No. 2010-828

The Travelers Indemnity Company,
Respondent,
v.
Orange and Rockland Utilities, Inc.,
Appellant,
John Doe Corporations 1-100,
Defendants.

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September, 2010

Present, HON. JONATHAN LIPPMAN, *Chief Judge, **presiding.***

Mo. No. 2010-828
The Travelers Indemnity Company,
Respondent,
v.
Orange and Rockland Utilities, Inc.,
Appellant,
John Doe Corporations 1-100,
Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Stuart M. Cohen
Clerk of the Court

Company Name: O and R Utilities, Inc.
Case Description: Orange and Rockland Electric and Gas Filing 2014
Case: 14-E-0493; 14-G-0494

Response to DPS Interrogatories – Set DPS-36
Date of Response: 02/23/2015
Responding Witness: Maribeth McCormick

Question No. : 500

Subject: Insurance Claims Litigation Status

As stated in the Company's response to IR DPS-282Supp, provided on February 11, 2015, the Supreme Court of New York, Appellate Division, First Department, found that Travelers Indemnity Company's (Travelers) is not required to pay for state-mandated environmental remediation at O&R manufactured gas plants.

1. State whether O&R has filed a notice of appeal in this case. If not, state whether O&R intends to appeal the Appellate Division's Decision and Order, and by when notice of such an appeal would need to be filed.

2. State whether O&R intends to pursue any other actions against Travelers with respect to the denial of the claims made by O&R for coverage of environmental remediation costs at the seven MGP sites.

Response

1. O&R intends to seek leave to appeal to the New York Court of Appeals with regard to the order of the Appellate Division, First Department, entered on January 8, 2015, as well as that Court's earlier order regarding the Nyack site entered on May 20, 2010. O&R intends to submit its motion seeking leave to appeal by no later than March 9, 2015.
2. O&R has no plans at present to pursue any other actions against Travelers with respect to the denial of the claims made by O&R for coverage of environmental remediation costs at the seven MGP sites.