

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Authorization for Operation,  
Implementation of Corrective Action and Closure and  
Post Closure Care for a Hazardous Waste  
Management Facility and Remedial Program  
for an Inactive Hazardous Waste Disposal Site.

**ORDER ON CONSENT AND  
ADMINISTRATIVE SETTLEMENT  
Index No.: CO 9-20140625-40**

**DEC Facility Name:** FMC Corporation  
**EPA RCRA ID No.:** NYD002126845  
**Associated with DEC Site No.:** 932014

**Facility Address:** 100 Niagara Street  
Middleport, New York 14105  
Niagara County

- By -

**FMC CORPORATION,**  
Respondent

-----X  
**WHEREAS:**

**Parties and Jurisdiction**

1. The New York State Department of Environmental Conservation (“Department”) is responsible for the implementation of the Resource Conservation and Recovery Act (“RCRA”) via the Industrial Hazardous Waste Management Program pursuant to Article 27, Title 9 of the Environmental Conservation Law (“ECL”) and Parts 370–374 and 376 of Title 6 of the Official Compilation of Codes, Rules and Regulations (“6 NYCRR”).
2. The Department is also responsible for the implementation of Inactive Hazardous Waste Disposal Site remedial programs pursuant to Article 27, Title 13, of the ECL and 6 NYCRR Part 375.
3. Consistent with the authority granted to the Commissioner, the Department may issue orders pursuant to, *inter alia*, ECL § 71-2727(3) and § 71-1929, and ECL Article 27, Titles 9 and 13, and ECL Article 17, requiring the payment of penalties and compliance, including operations, corrective action, closure, post closure care and implementation of a remedial program.
4. The Department is responsible for carrying out the policy of the State of New York to conserve, improve, and protect its natural resources and environment and control

water, land, and air pollution consistent with the authority granted to the Department and the Commissioner by Article 1, Title 3 of the ECL.

5. Respondent FMC Corporation (“Respondent”) is a foreign business corporation with an address for service of process listed with the New York State Department of State as C/O CT Corporation System, 28 Liberty Street, New York, New York, 10005.

6. Respondent owns, operates, and/or maintains a pesticide formulating and packaging facility located at 100 Niagara Street in Middleport, New York 14105 (“Site”). The Site has been assigned EPA RCRA ID # NYD002126845.

7. The Department has determined that the Site constitutes a treatment, storage, and disposal facility (“TSD”) as defined pursuant to ECL §§ 27-0901(2), (8), (10), as well as 6 NYCRR § 370.2(b)(199).

8. The Site has been listed as a Class 2 inactive hazardous waste disposal site, designated by the Department as site #932014.

9. Respondent is a person, owner, and operator as defined pursuant to 6 NYCRR Parts 370.2(b)(136), (137), (141).

#### **Applicable Law**

10. Respondent is subject to New York State laws, rules and regulations governing solid and hazardous waste.

11. This Order on Consent and Administrative Settlement (“Order”) is issued pursuant to the Department’s authority under, *inter alia*, ECL § 71-2727 and ECL Article 27, Titles 9 and 13.

#### **Facts**

12. The Department and Respondent are parties to an Administrative Order on Consent, Docket No. II RCRA-90-3008(h)-0209, with the United States Environmental Protection Agency (“EPA,” and collectively with the Department, the “Agencies”), dated June 18, 1991 (the “1991 AOC”). Section IV. of the 1991 AOC included the Agencies’ findings of facts associated with specific issues of concern. The 1991 AOC required Respondent to, in part, conduct a RCRA facility investigation (“RFI”) of the Site and certain off-Site areas; prepare a Corrective Measures Study (“CMS”) to evaluate possible final remedial actions, to the extent determined to be necessary; maintain and conduct interim corrective measures (“ICMs”) at the Site; and develop and implement a groundwater monitoring program for the Site in compliance with federal and state requirements. The AOC also postponed RCRA closure of the eastern and western surface impoundments (“ESI” and “WSI,” respectively)

located at the Site pending the outcome of the RFI and CMS for those areas, and authorized the use of the WSI as an ICM.

13. The Department and the Respondent are parties to a pending 6 NYCRR Part 373 Hazardous Waste Management Permit (“Part 373 Permit”) administrative proceeding for proposed Permit No. 9-2936-00017/02004. An Issues Conference was held on May 23, 2018, with further briefing having been required by the presiding Administrative Law Judge for a determination on potential adjudicable issues to be considered in any further adjudicatory hearing. The required briefing has been held in abeyance, at the request of the Department and Respondent, collectively.

14. Respondent’s activities at the Site have impacted the Site, and they have also impacted off-Site areas. The Site and certain off-Site impacted areas have been assigned operable unit (“OU”) numbers, as set forth in the attached Exhibit A, which contains a map that depicts the approximate location of each OU.

15. As set forth in Exhibit A, the Site and certain off-Site areas have been divided into eleven (11) OUs. The OUs are as follows: OU1—on-Site (all environmental media, except groundwater), not including the easternmost parcel (OU11); OU2—Air Deposition Area 1, south of Erie Canal (“Canal”) and west of the Niagara/Orleans County Line; OU3—Air Deposition Area 2, along both sides of the Canal and east of the Niagara/Orleans County Line; OU4—Royalton-Hartland School Property (“Roy-Hart School”) (within OU2); OU5—Culvert 105 and flood zone; OU6—Tributary One (South) stream and flood plain; OU7—Tributary One (North) stream and flood plain; OU8—Jeddo and Johnson Creeks and flood plain; OU9—Southwest Commercial Property (Former FMC Research & Development facility); OU10—Groundwater (on-Site and off-Site); OU11—The easternmost parcel of the Facility, referred to as the “Eastern Parcel.”

16. The Department issued a Final Statement of Basis dated May 24, 2013 (“OU 2/4/5 FSOB”), selecting remedial/corrective measures for OUs 2, 4, and 5. The OU 2/4/5 FSOB requires the implementation of several corrective and remedial measures, including the removal of soil with total arsenic concentrations exceeding 20 parts per million (“ppm”) with flexibility. The Department began implementing the OU 2/4/5 FSOB in 2015.

17. The remaining OUs are in various stages of investigation or evaluation. Previous work plans, reports, and other documents were submitted by Respondent to the Agencies for approval pursuant to the 1991 AOC, as well as, in certain other circumstances, under prior order and/or agreement with the Department. Pursuant to Section VII of this Order, and the

attached Exhibit E, all future work plans and reports for any of the OUs identified in Paragraphs 14 and 15 above will be submitted to the Department for its approval. A general status of investigation, remediation, or corrective actions for each of the OUs is included in Exhibit E to this Order.

18. Any additional areas of historical contamination from the Respondent's Site operations subsequently identified will be investigated, and to the extent necessary, remediated pursuant to the requirements of Exhibit E of this Order.

### **Violations**

19. The Department has alleged that Respondent's actions with regard to certain matters constituted various violations of the ECL and the implementing regulations promulgated pursuant thereto. This Order, and compliance with any requirements identified in this Order to address these alleged violations, addresses and fully resolves all alleged violations connected with the following matters:

1. The "contained-in" determinations issued by the Department for Site operations and all associated matters, up until the Effective Date (as defined in Section I.A. below) of this Order;

2. Respondent's activities associated with the demolition of the structure that was known as Building 21 at the Facility. An Order on Consent and Administrative Settlement, Index No. CO 9-20181011-79, dated October 11, 2018 ("Building 21 Order") has been executed by Respondent and the Department resolving non-civil penalty related requirements associated with this matter;

3. Respondent's activities associated with a repaving project that occurred between 2017 and 2018 at the Facility, which resulted in the generation and management of asphalt millings in various on-Site and off-Site locations;

4. Respondent's activities, and related circumstances associated with, WSI overflows that occurred at the Facility; and

5. A September 11-12, 2018 Waste Water Treatment Plant ("WWTP") event, as well as a subsequent release event on September 18, 2018, all of which resulted in the need to undertake certain remedial and compliance activities, and for which additional activities has been required by the Department pursuant to the attached Exhibit B.

20. Pursuant to ECL § 71-2705, any person who violates any of the provisions of, or who fails to perform any duty imposed by Article 27, Title 9, 11, or 13, or any rule or regulation promulgated thereto, shall be liable for penalties of up to \$37,500.00 per day per violation.

21. Pursuant to ECL § 71-1929, any person who violates any of the provisions of, or who fails to perform any duty imposed by Titles 1 through 11 inclusive, and Title 19 of Article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed \$37,500.00 per day for each violation.

### **Consent Order Objectives**

22. The objectives of this Order are to:

a. Resolve outstanding issues regarding the proposed Part 373 Permit by supplanting the requirement for the permit's issuance with this Order, which will govern Site hazardous waste management facility activities;

b. Replace the 1991 AOC as the enforceable document addressing investigation, evaluation, and as appropriate, corrective action for the Site and off-Site areas;

c. Resolve alleged violations of the ECL and the implementing regulations promulgated thereto by Respondent through the payment of civil penalties, and in the case of Exhibit B, performance of required compliance activities for such violations;

d. Reimburse for State costs that the Department has incurred—and will continue to incur—at the Site, and pay for ongoing oversight of activities to be conducted pursuant to this Order;

e. Establish the terms and conditions under which Respondent will complete the investigation, evaluation, and remediation, as appropriate, of all of the OUs and any additional areas of contamination subsequently identified that were caused by the Respondent's operations at the Site;

f. Provide financial assurance for corrective measures, closure, and post closure requirements for the Site, identified OUs, and any additional areas of contamination subsequently identified that were caused by the Respondent's operations at the Site;

g. Maintain and appropriately manage previously-implemented ICMs until such time as such ICMs are modified or terminated pursuant to this Order, and continue operation, maintenance, and monitoring ("OMM") measures at certain OUs.

23. Respondent consents to the issuance of this Order without: (i) an admission or finding of liability, fault, wrongdoing, or violation of any law, regulation, permit, order, requirement, or standard of care any kind whatsoever; (ii) an acknowledgment that there has been a release or threatened release of hazardous waste at or from the Site or to any specific off-Site areas; and/or (iii) an acknowledgment that a release or threatened release of hazardous waste at or from the Site constitutes a significant threat to the public health or environment.

24. Solely with regards to the matters set forth below, Respondent hereby waives any right to a hearing as may be provided by law, consents to the issuance and entry of this Order, and agrees to be bound by its terms. Respondent consents to, and agrees not to contest, the authority or jurisdiction of the Department to issue or enforce this Order and furthermore agrees not to contest the validity of this Order or its terms.

**NOW, THEREFORE, HAVING CONSIDERED THIS MATTER AND BEING DULY ADVISED, IT IS ORDERED THAT:**

**I. EFFECT OF ORDER**

A. The requirements of this Order shall supersede and replace the 1991 AOC and all other prior agreements between the Department and Respondent for the Site (except for the Building 21 Order) and off-Site areas, except as identified in Section I.C. of this Order. A stipulation, attached as Exhibit C, will be signed by the Agencies and the Respondent, which will result in the termination of the 1991 AOC, and include an acknowledgment by USEPA that this Order has met the requirements of Section XXII. of the 1991 AOC as being at least as stringent as the 1991 AOC. This Order shall govern all work contemplated by the 1991 AOC that occurs at the Site and off-Site areas as of its effective date, as identified in Section XXI.E. of this Order (the "Effective Date").

B. In addition, Respondent agrees that within ten (10) days of the Effective Date of this Order, Respondent shall withdraw its appeal with prejudice to the United States Court of Appeals for the Second Circuit (FMC v. EPA, Docket No. 18-2298).

C. This Order shall control in the event of any conflicts between this Order and any prior agreements between Respondent and the Department concerning the Site and off-Site areas, *provided, however*, that this Order shall not affect prior written approvals, authorizations, or determinations (excluding the previously-utilized Corrective Action

Objectives) provided jointly by the Agencies pursuant to the 1991 AOC. All activities required pursuant to the Order shall comply with state law, regulation, and guidance.

## **II. CIVIL PENALTY & ENVIRONMENTAL BENEFIT PROJECT (EBP) FOR HISTORICAL VIOLATIONS**

A. Respondent shall pay a penalty for the violations alleged in Paragraph 19 in the amount of two million four hundred thousand dollars (\$2,400,000.00).

B. Respondent must implement an Environmental Benefit Project (“EBP”) that complies with the Department's Environmental Benefit Projects Policy (CP-37), and must expend not less than one million dollars (\$1,000,000.00) in the implementation. Within sixty (60) calendar days of the effective date of this Order, unless the Department determines that additional time is warranted and grants an extension to Respondent in writing, Respondent shall submit to the Department a description of, and plan for, an EBP, which may comprise one or more qualified projects that complies with CP-37, and includes a schedule for implementation ("EBP Implementation Plan"), which is subject to the Department's review and approval. Such schedule for implementation shall not exceed two (2) years from the effective date of the Order. The EBP Implementation Plan shall not include any EBPs for work at the Site. Respondent shall make such changes to the EBP Implementation Plan as the Department may require, consistent with CP-37 and applicable regulatory requirements. If the Respondent fails to submit an EBP Implementation Plan in compliance with this Order, or fails to expend at least \$1,000,000.00 in fully completing the EBP in accordance with the approved plan, then the Respondent shall pay an amount which will total \$1,100,000.00, unless Respondent has documented qualified expenditures in furtherance of EBP Implementation Plan projects in excess of \$500,000.00, in which case, Respondent shall only be required to pay the difference between the amount expended and the \$1,100,000.00. Upon the Department's approval, the EBP Implementation Plan shall be an enforceable part of this Order.

C. The penalty identified in Section II.A. of this Order, implementation of an EBP as called for in Section II.B of this Order, and compliance with any activities called for in Exhibit B to this Order, shall settle and fully resolve all of the Department’s allegations regarding violations of the ECL and the implementing regulations promulgated pursuant thereto that are known, or should have been known, to the Department with regard to the following matters:

1. The “contained-in” determinations issued by the Department for Site

operations and all associated matters, up until the effective date of this Order;

2. Respondent's activities associated with the demolition of the structure that was known as Building 21 at the Facility;

3. Respondent's activities associated with a repaving project that occurred between 2017 and 2018 at the Facility, which resulted in the generation and management of asphalt millings in various on-Site and off-Site locations;

4. Respondent's activities, and related circumstances associated with, WSI overflows that occurred at the Facility, up until the effective date of this Order; and

5. A September 11-12, 2018 WWTP event, as well as a subsequent release event on September 18, 2018, all of which resulted in the need to undertake certain remedial and compliance activities.

D. The penalty for the WWTP violation is one hundred and five thousand dollars (\$105,000.00), which has been included in the total penalty calculation.

E. The civil penalty shall be paid within thirty (30) days<sup>1</sup> of the Effective Date of this Order, either by check made payable to the order of the "New York State Department of Environmental Conservation," with an invoice to be provided by the Department and the Case Number of this Order written in the memo section of the check, or by wire, at the election of Respondent, pursuant to wiring instructions provided by the Department. If such payment is made by check, it shall be sent to the Department of Environmental Conservation, Division of Management and Budget Services, 625 Broadway, 10<sup>th</sup> Floor, Albany, NY 12233-4900.

### **III. PAYMENT OF STATE COSTS**

A. Respondent shall pay to the Department past State costs in the amount of thirty-one million three hundred and thirty-eight thousand two hundred and one dollars (\$31,338,201.00). These costs include: (1) Twenty-eight million seven hundred and thirteen thousand two hundred and one dollars (\$28,713,201.00) for Department and New York State Department of Health ("DOH") costs incurred from January 1, 2015 to December 31, 2018; (2) Two million twenty-five thousand dollars (\$2,025,000.00) in pre-2015 Department and DOH costs; and (3) Six hundred thousand dollars (\$600,000.00) in interest for the period since

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<sup>1</sup> For purposes of this Order, should any date by which a payment, submission, and/or other requirement be due fall on a weekend day, or a State or Federal holiday, the deadline to submit such payment, submission, and/or other requirement will be extended to the next business day.



January 1, 2015 through the Effective Date of this Order. Documentation of these costs is set forth in Exhibit D.<sup>2</sup>

B. Respondent shall pay the thirty-one million three hundred and thirty-eight thousand two hundred and one dollars (\$31,338,201.00) in past State costs in three (3) equal payments of ten million four hundred and forty-six thousand sixty-seven dollars (\$10,446,067.00). The first payment shall be made within thirty (30) days of the Effective Date of this Order, the second shall be due exactly one year after the Effective Date of this Order, and the third shall be due exactly two years after the Effective Date of this Order. Such payments may be made by wire, at the election of Respondent, pursuant to wiring instructions to be provided by the Department upon request.

C. For purposes of this Order, State costs shall be as defined by 6 NYCRR 375-1.5(b)(3)(i).

D. Except for any Departmental contractual obligations that have not been paid for the time period between July 1, 2018 to December 31, 2018, the payment of the State costs identified in Section III.A. of this Order fully resolves and settles, and releases Respondent from, any claims, causes of action, or rights the State may or could have as it pertains to the right to payment of State costs by Respondent incurred prior to December 31, 2018. Furthermore, the Department, on behalf of the State, hereby waives any claims, causes of action, or rights to seek additional interest payments for outstanding State costs as of the Effective Date of this Order.

E. The Department will continue to undertake remedial work in certain portions of OUs 2<sup>3</sup>, 4, and 5 (south of the Canal only for OU5) consistent with the OU 2/4/5 FSOB (“Departmental Work”) for the next two (2) years through December 31, 2020. The Department will provide Respondent with itemized invoices of State costs, including all associated documentation, pursuant to 6 NYCRR 375-1.5(b)(3)(ii), for purposes of confirmation of the amount to be paid from the separate account required by Section IV.A. of this Order, and to ensure that such State costs are not inconsistent with the National Contingency Plan, and are associated with the work called for pursuant to this Order and the OU 2/4/5 FSOB. Assuming no objections to the State costs are lodged pursuant to Section III.I. of this Order, within sixty (60) days after receipt of an itemized invoice from the Department for State costs, Respondent shall authorize the disbursement from the separate

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<sup>2</sup> Respondent acknowledges that all past State Costs are not itemized on Exhibit D.

<sup>3</sup> Except parcels identified as SBL #s 0860170001072000; 0860170001073000; 0860170001076000; 0860170001074000; 0860170001075000; 0860000003003011; and, 0860000003003012.

account discussed in Section IV.A. of this Order, a sum of money, which shall represent reimbursement for undisputed State costs. Any disputed State costs shall be subject to the dispute resolution process included in Section III.I below. After 2020, Respondent will pay the undisputed State costs incurred for overseeing the remedies that will be implemented by Respondent, using the same invoicing procedure described herein, and Respondent will pay disputed State costs upon resolution of the dispute pursuant to the requirements of this Order. State costs incurred through 2020 will be subject to the annual segregated amount, as discussed in Sections IV.A. and IV.B. of this Order. State costs incurred after 2020 will not be paid from the annual segregated amount, as discussed in Sections IV.A. and IV.B. of this Order, *provided, however*, that any State costs attributed to the Department exercising its rights under Section VI.B.6. of this Order to challenge the rebuttable presumption shall not be chargeable to the Respondent, unless the Department is successful in such challenge.

F. Respondent is responsible for the payment of reasonable and nondiscriminatory hazardous waste program fees pursuant to ECL § 72-0402 and any other later-enacted fees associated with the hazardous waste program that would be applicable if a Part 373 Permit was issued and allowed by 42 U.S.C. § 6961.

G. The Department shall make best efforts to submit invoices on a semi-annual basis for State Costs, beginning in 2019. Invoices will be sent to:

Douglas Groux  
Director, EHS Remediation and Governance  
FMC Corporation  
2929 Walnut Street  
Philadelphia, Pennsylvania 19104  
Douglas.Groux@fmc.com

H. Each such payment for invoiced State costs (except for the fees referenced in Section III.F. above) shall be made payable to the Commissioner of NYSDEC and shall be sent to:

Director, Bureau of Program Management  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012

I. Any disputes over the amount of State costs shall first be discussed in an informal dispute resolution process, which will last no longer than sixty (60) days from Respondent's receipt of the invoice. After sixty (60) days, Respondent will pay all resolved costs, and within thirty (30) days of the end of such informal dispute resolution process, submit

in writing all costs objected to and identify the basis of the objection. The process for addressing any disputes over State costs after the informal dispute process has occurred will be governed by 6 NYCRR 375-1.5(b)(3)(vi).

J. The Parties shall provide written notification of any change in the foregoing addresses listed in Section III.G. and H. consistent with Section XIX of this Order.

K. All State costs shall be documented as provided by 6 NYCRR 375-1.5(b)(3)(ii).

L. In the event of non-payment of any invoice within the sixty (60) days provided herein, and if no objection has been lodged, the Department may seek enforcement of Respondent's obligations pursuant to this Section III, or the Department may commence an enforcement action for non-compliance.

M. Failure to timely pay any invoice will be subject to interest at a rate of 6% annually from the date the payment is due until the date the payment is made.

#### **IV. SEGREGATED FUNDS**

A. Within thirty (30) days of the Effective Date of this Order, Respondent will fund ten million dollars (\$10,000,000.00) into a separate FDIC-insured bank account. In subsequent years, by January 31<sup>st</sup> of each year, Respondent shall re-fund the separate account, subject to inflation (on the amount required as the Segregated Amount in the prior year<sup>4</sup>), in accordance with the requirements set forth this Order. The funds are to be used solely to fund off-Site investigation and remedial implementation and financial assurance obligations in accordance with the provisions of this Order (the "Segregated Amount"). The use of funding for off-Site investigation and remediation from the separate account will only include investigation and remediation that is required to address historical contamination from Respondent's Site operations (including all required financial assurance obligations pursuant to this Order), and will exclude all costs associated with formal dispute resolution processes described in Section XVIII. of this Order, or any subsequent litigation therefrom ("Off-Site Investigation and Remediation").

B. The Department anticipates that the Departmental Work will be completed by December 31, 2020. Such work is estimated to cost twenty-two million dollars (\$22,000,000.00). The Department will undertake, and Respondent will reimburse from the

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<sup>4</sup> The inflation rate will be the rate as set forth in 6 NYCRR 373-3.8.

Segregated Amount, the Department's State costs incurred for the Departmental Work. Within 2019 and 2020 only, the Department may exceed spending above the Segregated Amount in each year to perform work required by the OU 2/4/5 FSOB and not inconsistent with the National Contingency Plan, up to a maximum amount of fifteen million dollars (\$15,000,000.00) per year, to complete the Departmental Work. Accordingly, the total amount for calendar year 2019 and 2020 will be the Segregated Amount, subject to increase by up to an additional five million dollars (\$5,000,000.00) in each year, for which the Department will be reimbursed for actual costs incurred during such period. In order for the Segregated Amount in calendar years 2019 and 2020 to require increase, the Department will notify Respondent in writing, as soon as practicable (or for calendar year 2019, within 30 days of the Effective Date of this Order, whichever is later), once it has knowledge that spending over \$10,000,000.00 will occur, with such written notice to include: information as to what the Department projects the remaining cost of work to be during that year, how the figure provided to Respondent was calculated, and confirmation that such work is consistent with the OU 2/4/5 FSOB. Should Respondent have questions regarding the written request from the Department, it may, within fifteen (15) days from receipt of such written notification, request clarification in writing of the information contained in the Department's notice. FMC will then deposit, within twenty (20) days of the Department's response to such clarification, the additional contribution into the separate account, consistent with the final amount called for by the Department in its response. Should no written request for clarification be submitted by Respondent during the fifteen (15) day period, Respondent will add the requested money to the separate account within thirty (30) days from the date of the receipt of the Department's written notification. Any funds above the Segregated Amount that are deposited into the separate account during calendar year 2019 and 2020 pursuant to a request by the Department under this Section IV.B. that are not actually expended by the Department in such calendar year will be credited to the next subsequent year's Segregated Amount.

C. Beginning in 2021, all Off-Site Investigation and Remediation is limited to the Segregated Amount, less the cost of financial assurance as identified in Section IV.D. of this Order, and except as may be required by Section IV.E. or IV.G of this Order.

D. Up to one million dollars (\$1,000,000.00) of the Segregated Amount may be used to pay for the financial instruments required to maintain financial assurance for the initial three (3) year period of financial assurance being provided. After the three (3) year

period, up to one million dollars (\$1,000,000.00) of the Segregated Amount may be used to pay for the financial instruments required to maintain the portion of the financial assurance for any remaining off-Site remediation only.

E. At any point during the course of a calendar year where work is being performed by Respondent, the Department reserves the right to notify Respondent in writing that, based on newly-acquired or discovered information, or unforeseen circumstances experienced during remedial investigation or construction, that it has identified an off-Site area that threatens immediate harm to public health or the environment requiring expedited action, and that such threat is associated with Respondent's historical releases. To the extent Respondent agrees with the Department and elects to perform such work, Respondent will then prioritize utilizing the Segregated Amount for that calendar year then-remaining to address such action. Any costs incurred over the Segregated Amount would be credited against the subsequent year's funding obligation (e.g., if Respondent spends an additional two million (\$2,000,000.00) dollars in work in a given year, assuming the subsequent year's Segregated Amount funding obligation pursuant to Section IV.A. of this Order was ten million (\$10,000,000) dollars, then the funding obligation would be a total of eight million (\$8,000,000.00) dollars). In the event Respondent does not agree with the Department's determination, or elects to not perform such work, the Department reserves its right to perform such work, and to proceed with a cost recovery action. If the Department performs such work, the costs incurred shall not be subject to the Segregated Amount. In any cost recovery action, Respondent will not have waived any of its rights to contest the Department's right to file such action or seek such recovery, in whole or in part, and reserves all of its rights to challenge the appropriateness of such actions and proffer any defenses it has available to it.

F. Beginning in 2021, Respondent will exercise best efforts to spend the Segregated Amount (subject to any offset due to expenditures as set forth in Section IV.E of this Order, or any increase as set forth in Section IV.G. of this Order), less up to one million dollars (\$1,000,000.00) of the segregated funds, which may be used to pay for the financial instruments required to maintain the financial assurance. In furtherance of this requirement, at least ninety (90) days prior to the beginning of calendar year 2021, and then at least ninety (90) days prior to the beginning of each calendar year thereafter until completion of off-Site remediation, Respondent will submit, for the Department's review, prioritization, and approval, a work plan detailing the actions proposed to be taken during

such upcoming calendar year, with an anticipated budget for those actions of at least fifteen million dollars (\$15,000,000.00). The Department reserves the right to provide Respondent in writing with its prioritization of work for the following calendar year by July 1 of the prior year. Of that proposed work, Respondent will only be required to spend up to the Segregated Amount annually, less the cost of financial assurance up to \$1,000,000.00 of the segregated funds. In each case, the Respondent agrees that its expenditure of the Segregated Amount shall be undertaken in accordance with the Department's prioritization of work for such calendar year, as specified in its approval of the annual work plan submitted by Respondent pursuant to this Section IV.F. Respondent will submit to the Department, by March 31<sup>st</sup> of 2022, and then by such date of each subsequent calendar year, a summary and accounting of the deposits and expenditures for Off-Site Investigation and Remediation that it spent in the prior calendar year from the separate account.

G. In the event Respondent does not spend at least eight million dollars (\$8,000,000.00), increased annually by the inflation rate, and including the cost of maintaining qualified financial assurance of up to one million dollars (\$1,000,000.00), in a given calendar year starting in calendar year 2021, the difference between the amount spent and the Segregated Amount will be rolled over into the following calendar year's account. These funds will continue to roll over each successive year until an average of the required Segregated Amount has been spent each year, not including years where Respondent has spent within two million dollars (\$2,000,000.00) of the Segregated Amount, including the cost of maintaining qualified financial assurance of up to one million dollars (\$1,000,000.00). In no event shall the total amount in segregated funds exceed the estimated costs to complete the remaining off-Site remediation. In January of each year, the Department will calculate the estimated costs for remaining Off-Site Investigation and Remediation based on the data available to the Department at that time to confirm whether adjustment to the Segregated Amount needs to be made. Upon such an occurrence, the Department will notify the Respondent in writing that it may fund the separate account to an amount lower than the Segregated Amount.

## **V. FINANCIAL ASSURANCE**

A. Respondent will maintain eighty million dollars (\$80,000,000.00) of financial assurance for on-Site and off-Site remedial action through 2021. The financial assurance will be comprised of the following: (i) Segregated Amount, less any amounts used to pay for

the financial instruments required to maintain the financial assurance; (ii) maintenance of the letters of credit for on-Site closure of the applicable surface impoundments currently held by Respondent totaling approximately eight million dollars (\$8,000,000.00); and, (iii) obtaining additional financial assurance in the remaining amount necessary to total eighty million dollars (\$80,000,000.00).

B. Starting in 2022, the applicable financial assurance requirements will be reassessed based on the regulatory requirements of 6 NYCRR Part 373-2.6–2.8 and 2.11, including as may need to be adjusted pursuant to paragraph VI.C. of this Order, and shall conform to the requirements established in Exhibit E or as may otherwise be required by this Order.

## **VI. REMEDIATION SCOPE**

A. The scope of the Departmental Work conducted pursuant to this Order includes OU2 (Air Deposition Area 1),<sup>5</sup> OU4 (Roy-Hart School), and OU5 (Culvert 105), to the extent such areas are south of the Canal. For any areas encompassing the Departmental Work that are not completed by December 31, 2020, Respondent agrees that it will include such work in the scope of its 2021 work plan to be submitted pursuant to Section IV.F. of this Order, and identify such work as a priority item. The Department will provide an update to the Respondent as of June 30, 2020 as to the status of the Departmental Work, and any areas that the Department believes may be potentially subject to further action in calendar year 2021 for purposes of inclusion in Respondent’s work plan submission.

B. The Scope of the remedial work to be completed by Respondent is set forth in Exhibit E, except as may be otherwise indicated in Sections VI.A or B of this Order.

1. The area subject to Off-Site Investigation and Remediation in OU6, north of the Canal, which is to be addressed consistent with the requirements of a Final Statement of Basis to be issued by the Department pursuant to Exhibit E of this Order, is depicted in Exhibit F (specifically, pages F1-F3), unless expanded pursuant to Section VI.B.6. of this Order (the “OU6 North Remediation Area”).

2. The area subject to Off-Site Investigation and Remediation in OUs 7 and 8, which is to be addressed consistent with the requirements of a Final Statement of Basis to be issued by the Department pursuant to Exhibit E of this Order for such applicable OU, is only

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<sup>5</sup> Except parcels identified as SBL #s 0860170001072000; 0860170001073000; 0860170001076000; 0860170001074000; 0860170001075000; 0860000003003011; and, 0860000003003012.

within the 100-year flood plain to the Lyndonville Dam, which is depicted in Exhibit F (specifically, pages F4-F8), unless expanded or contracted pursuant to Section VI.B.6. of this Order (the “OU7 and 8 Remediation Area”).

3. Required remediation work within OU5, OU6, and the OU7 and 8 Remediation Area will proceed from upstream to downstream. Respondent shall use good faith efforts to gain access to properties identified by the Department as necessary for remediation work within any issued Final Statement of Basis for each applicable OU. With regard to remediation work in OU5, OU6, and the OU 7 and 8 Remediation Area outside of the streambed only, in the event that a substantial number of properties refuse to grant Respondent access, the Department will determine if it will either obtain access for Respondent to do such work, or allow the Respondent to revise any existing work plan or approved submittal to account for such a change in circumstance. In order for streambed remediation to proceed within OU5, OU6, and the OU 7 and 8 Remediation Area, work will need to proceed from upstream to downstream without any gaps due to access not being provided by a property owner, unless the Department determines in writing that failure to conduct remediation in those gaps will not materially impact the remainder of the remediation. Respondent reserves its right to present evidence to the Department, within forty-five (45) days of its receipt of a written determination by the Department, as to Respondent’s basis that the failure to conduct remediation in any such gap(s) will materially impact the remediation process in areas downstream from such gap(s). The Department will review the evidence provided by the Respondent and provide a written response within forty-five (45) days of Respondent’s submission with its final determination. As it pertains to any streambed area(s) where access has not been provided by the respective property owner, the Department will utilize, when needed, its regulatory authority to provide Respondent access to such location(s) in order for the remediation to proceed from upstream to downstream.

4. Within the OU6 North Remediation Area and the OU 7 and 8 Remediation Area, there will be a rebuttable presumption that Respondent’s Site activities are the source of the arsenic found in that area, and that it would be responsible for remediation of arsenic above 20 ppm with flexibility.

5. Beyond the OU6 North Remediation Area and the OU7 and 8 Remediation Area, there will be a rebuttable presumption that Respondent’s Site activities are not the source of the arsenic found in that area, and therefore, it is not responsible for remediation of arsenic.



6. Respondent will have the ability to challenge the rebuttable presumption within the OU 7 and 8 Remediation Area identified in Section VI.B.2. of this Order. Such challenge shall be submitted within two hundred and seventy (270) days from the date of receipt of the written approval or acceptance of the RFI report for the OU at issue, which receipt will be confirmed in writing by Respondent. This challenge will be done in the form of a separate submission prior to a CMS report being submitted for the subject OU. The Department will consider Respondent's submission, in good faith, and provide a written response within ninety (90) days of receipt listing challenges by the Respondent for which the Department has concurred and providing a detailed justification for any objections lodged in regard to specific challenges included in Respondent's submission. Respondent will then have forty-five (45) days to provide a written response to any objections lodged by the Department. Within thirty (30) days of the Department's receipt of Respondent's response, the Department will provide a final determination regarding the objections lodged by the Department. The Department will also have the ability to challenge the rebuttable presumption for the area outside of the OU6 North Remediation Area and the OU 7 and 8 Remediation Area that is depicted in Exhibit F by providing the Respondent with a detailed written submission identifying the legal and/or technical justification for liability to be assessed to Respondent. Any challenge to the OU6 North Remediation Area or OU 7 and 8 Remediation Area must be submitted within ninety (90) days of the Department's approval or acceptance of the pre-design investigation ("PDI") report for the OU at issue completed during the Corrective Measure Implementation ("CMI") process, or if a PDI work plan is not required during the CMI process, by the date such fact is confirmed by the Department. The Respondent will consider the Department's submission, in good faith, and provide a written response within ninety (90) days of receipt listing challenges by the Department for which the Respondent has concurred and providing a detailed justification for any objections lodged in regard to specific challenges included in the Department's submission. The Department will then have forty-five (45) days to provide a written response to any objections lodged by the Respondent, which shall, among other things, identify what, if any, objections by Respondent for which it has concurred. If the Department and Respondent still disagree on liability in any specific instance after following the process included in this Section VI.B.6., such challenging party may invoke formal dispute resolution. Formal dispute resolution shall be triggered by a written notice by the challenging party, which must be submitted with thirty (30) days of receipt of the final submission made by the challenged party pursuant to the processes included in this Section VI.B.6. Formal dispute

resolution will involve a third-party review by a Department Administrative Law Judge (“ALJ”). For purposes of this review, the ALJ will make his or her determination based on the record and the written submissions by the parties, and the ALJ should consider, among other factors, information about historical uses of the subject property and adjacent or nearly-adjacent property, potential for impact from land application of pesticides by airplane, equipment, or other means, historical stream flow and flood plain extent, including locations of road crossings, culverts, dams and historical ponding and wetland areas, and other materials related or pertinent to the source of contamination reflected in applicable sampling data.

C. Respondent will implement remedies at each of the OUs consistent with the remedies that will be selected pursuant to the requirements included in Section VIII. of this Order. Once Respondent has completed remediation at all properties that have agreed to remediation at each applicable off-Site OU, it will submit a Construction Completion Report (“CCR”) and an Interim Site Management Plan (“ISMP”) for that OU, which may include engineering or institutional controls, as appropriate. One year following the Department’s approval of the CCR and ISMP for the applicable off-site OU, and for the subsequent ten (10) year period, Respondent will be required to maintain financial assurance for thirty (30) percent of the estimated cost to remediate properties that: (1). are subject to remediation pursuant to the remedy selected by the Department; (2). refused access for remediation; and, (3). for which sufficient data/information is available to reasonably estimate the associated remediation cost for each applicable property consistent with the approved remedy (the “ISMP Properties”). After the initial ten (10) year period, and for the subsequent ten (10) year period, Respondent will be required to maintain financial assurance for twenty (20) percent of the ISMP Properties. After the second ten (10) year period, Respondent will be required to maintain financial assurance for fifteen (15) percent of the ISMP Properties. After thirty-one (31) years of Respondent having maintained financial assurance for the ISMP Properties consistent with Section VI.C. of this Order, Respondent will only be required to maintain financial assurance for ten (10) percent of the ISMP Properties.

D. For all properties that have refused remediation, Respondent will continue to offer, on an annual basis, to complete remediation at those properties consistent with the applicable Final Statement of Basis for a period of five (5) years after approval of the CCR, pursuant to the ISMP for that OU. Respondent will track any ownership changes on properties that have refused remediation after the five (5) year period on an annual basis until termination of this Order and will offer remediation to any new owner of the property. If a property owner

requests remediation in the future, the Respondent will address that request consistent with the ISMP for that OU area.

E. Should additional areas of contamination from the Respondent's Site operations be identified in the future, such areas will be addressed pursuant to the requirements of Exhibit E attached to this Order.

## **VII. REMEDATION SCHEDULE**

A. OUs 2, 4, and 5 (Air Deposition Area 1 / Roy-Hart School / Culvert 105)

1. The Department will complete the Departmental Work, as identified in Section III.E. of this Order.

2. OU2 (Air Deposition Area 1)

Respondent will remediate OU2 parcels identified as SBL #s:

0860170001072000; 0860170001073000; 0860170001076000; 0860170001074000; 0860170001075000; 0860000003003011; and 0860000003003012, in accordance with the priorities set by the Department pursuant to Section IV.F. of this Order, and consistent with the OU 2/4/5 FSOB.

3. Respondent will maintain any cover systems and any other engineering control responsibilities pursuant to a Department-approved ISMP for those properties within OUs 2, 4, and 5 subject to such plan, and pursuant to the requirements of Section VI.C. of this Order.

B. OU3 (Air Deposition Area 2)

1. The Department will accept, for technical completeness purposes, the CMS report submitted by Respondent in September 2015 for this OU and will use best efforts to issue a Draft Statement of Basis within ninety (90) days of the effective date of the Order. After public comment, the Department will then issue a Final Statement of Basis.

2. Subject to the Department's issuance of a Final Statement of Basis, Respondent will submit a Pre-Design Investigation ("PDI") work plan within three (3) months of that date. Respondent will implement such PDI field work upon approval of the PDI work plan by the Department, consistent with the schedule set forth therein, or as otherwise agreed to by Respondent and the Department.

C. OU5 (Culvert 105 North of Canal)

Respondent will submit a PDI work plan within six (6) months of the Effective Date of this Order. Respondent will implement such PDI field work upon approval of the

PDI work plan by the Department, and Respondent will then submit all other required design submittals. As it pertains only to the completion of the PDI work plan for OU5, such costs shall not be subject to the Segregated Amount limitation incurred by Respondent for Off-Site Investigation and Remediation, as stated in Section IV.A. of this Order.

D. OU6 (Tributary One [South])

1. Respondent will submit a revised version of the CMS report for OU6, dated November 1, 2017, consistent with comments previously received from the Agencies by letter, dated February 1, 2018, within six (6) months of the Effective Date of this Order. If dispute resolution has been invoked at the time of submission by Respondent pursuant to Section VII.D.2. of this Order, it may identify the dispute(s) in the revised CMS report and the properties subject to such dispute(s), but the disputed properties will be included in the report and fully evaluated for remediation. As it pertains only to the resubmission of the OU6 CMS report, such costs shall not be subject to the Segregated Amount limitation incurred by Respondent's Off-Site Investigation and Remediation, as stated in Section IV.A. of this Order. This CMS report shall include the additional sampling data discussed in Section VII.D.2 below, if available.

2. After the Effective Date of this Order, Respondent will undertake good faith efforts to seek access to certain properties located in OU6 (south of the Canal), as identified in Exhibit G (Properties BC7-10), in order to undertake additional sampling. The Department will utilize, when needed, its regulatory authority to provide Respondent access to such location(s) in order for the sampling activities to occur. Respondent shall, within twenty (20) days of its receipt of the analytical sampling data from all of the properties identified in Exhibit G for additional sampling, submit the data from the sampling to the Department. To the extent that FMC believes that it is not liable for any of the contamination at a property or properties identified in Exhibit G for additional sampling, Respondent may submit a report to the Department detailing its legal and technical position along with such analytical sampling data. The Department will then consider Respondent's submission, in good faith, and provide a written response within twenty (20) days of receipt as to its final determination on the Respondent's submission. If the Department and Respondent still disagree on liability in any specific instance after following the process included in this Section VII.D.2., or if Respondent is unable to access or analyze data prior to submittal of the CMS Report outlined in Section VI.D.1, Respondent may invoke formal dispute resolution within thirty (30) days of its receipt of the Department's final

determination by following the same dispute resolution process, which will include being subject to the same criteria, as set forth in Section VI.B.6. of this Order.

3. Subject to the Department's issuance of a Final Statement of Basis, Respondent will submit a PDI work plan and other required design submittals for OU6 south of the Canal, within two (2) years prior to the planned implementation of the OU6 remediation.

4. Respondent will submit PDI work plans for each subsequent section of OU6 at least two (2) years ahead of the planned construction of the respective OU6 section to ensure continuous remediation of OU6.

E. OU7

Respondent will complete the OU7 sampling activities scheduled for Spring 2019 pursuant to the 1991 AOC, and proceed with completing an RFI report within one hundred-twenty (120) days of the Department's written confirmation that the data is sufficient to complete the RFI. As it pertains only to the OU7 work discussed in this Section VII.E., such costs shall not be subject to the Segregated Amount limitation incurred by Respondent for Off-Site Investigation and Remediation, as stated in Section IV.A. of this Order.

F. OU8 (Jeddo and Johnson Creeks & Flood Plain):

Respondent will complete the OU8 sampling activities scheduled for Spring 2019 pursuant to the 1991 AOC, and proceed with completing a RFI report within one hundred-twenty (120) days of the Department's confirmation that the data is sufficient to complete the RFI. As it pertains only to the OU8 work discussed in this Section VII.F., such costs shall not be subject to the Segregated Amount limitation incurred by Respondent for Off-Site Investigation and Remediation, as stated in Section IV.A. of this Order.

G. OU11 (Eastern Parcel):

1. Respondent will revise the CMS work plan for OU11, dated December 29, 2017, to include the Department's potential remedial approach of grading the existing area and constructing a compliant cap and cover system, along with other alternatives required by the ECL (e.g., pre-release), within one hundred-twenty (120) days of the Effective Date of this Order. Respondent will provide the Department with a draft of an OU11 CMS report within six (6) months following Respondent's receipt of the Department's written approval of this CMS work plan.

2. ESI closure requirements will be satisfied by the implementation of the final remedy for OU11.

H. Consistent with the requirements of Section VII. of this Order, remedial investigation and related scoping activities may occur in more than one OU within a given year.

I. CMS reports required to be submitted by this Order will include, at a minimum, the following alternatives: a no further action remedy; a soil arsenic concentration of 20 ppm, with flexibility, clean-up standard remedy; and a pre-release remedy.

J. On March 7, 2019, Respondent submitted an ISMP for the Site for Department approval. This ISMP will be finalized pursuant to the requirements of Exhibit E to this Order.

K. Remediation and/or formal study of historical or inaccessible contamination will not be required on Site unless and until an area becomes available for further investigation, with the exception of the work called for by Section VII.G. of this Order, or any remedial work required pursuant to the Building 21 Order. For purposes of this Order, an area will become available when (1). current conditions at the Site change with respect to buildings or other physical barriers at the Site (excepting maintenance work pursuant to Department-approved plans), and; (2). where these changes may cause disruption or exposure to contamination or may increase direct human or environmental exposure (the temporary removal of part of a cap, in and of itself, does not meet this criterion). If an area will become available on-Site within OU1 or providing access to OU10, Respondent will follow the ISMP and Exhibit E to provide a work plan that details the proposed change or disruption, and measures that will be taken to address contamination (*i.e.*, demolition of a building; utility or infrastructure work; construction of a new foundation; etc.). Such work plan will require action to address contamination found in the immediate work area impacted during the change or disruption, and will indicate that all Site soils removed as a result of the activities undertaken will be characterized and managed pursuant to the Site ISMP, but that Respondent will not be required to remove, investigate, or conduct further remedial action outside such area unless any grossly-contaminated soil, free product, or drums of hazardous wastes are encountered (in which instance Respondent will appropriately address all of those issues). Such action shall not require a site-wide investigation and/or remediation, including as contemplated in Exhibit E to this Order, which will not be required until Respondent's manufacturing, formulating, or packaging operations

have ceased at the Site.

L. Respondent will maintain its current ICMs for the Site until such time as Respondent's manufacturing, formulating, or packaging operations have ceased at the Site, or final closure has been completed for a specific SWMU or AOC. Notwithstanding the foregoing, maintenance of the current ICMs for the Site will be subject to the following requirements: if the Department determines, based on relevant data or demonstrable evidence, that any of the ICMs are no longer protective of human health and the environment, it will provide notice to Respondent, in writing, identifying the cause of such determination, and Respondent and the Department will then meet to discuss, what, if any, action(s) may be necessary to address such issue(s) so that such ICM can continue to be utilized at the Site. This Section VII.L. shall be exclusive of any action(s) being addressed pursuant to the engineering plans called for by Exhibit E to this Order.

## **VIII. ISSUANCE OF DECISION DOCUMENTS**

Any remedy selection pursuant to this Order will consider ecological impacts, and whether the long-term benefits of remediation are outweighed by the adverse impacts on the environment as determined solely by the Department in accordance with 6 NYCRR Part 375 and Division of Environmental Remediation ("DER") -10 [Technical Guidance for Site Investigation and Remediation].

## **IX. ENVIRONMENTAL MONITOR**

A. Respondent will fund the costs of a part-time (50%) environmental monitor position, which will either be a Departmental employee or a third-party retained by the Department. The environmental monitor will oversee Respondent's remedial work conducted pursuant to this Order and the Respondent's RCRA operational compliance activities at the Site. Attached as Exhibit H is a map identifying the areas of the Site that the monitor will be able to access for purposes of assessing Respondent's RCRA operational compliance. The environmental monitor shall be subject to all general and site-specific environmental, health and safety training and operational policies and practices for the Site and its related operations. The environmental monitor will not be provided access to non-regulated areas of the Site, unless those areas: become RCRA regulated areas due to a change in Site operational activities; become subject to remedial work pursuant to this Order; are subject to a release or other reportable circumstance under the ECL, and in

such circumstance, only during the period of time that such release or reportable circumstance is still subject to ongoing Department oversight; or Respondent grants permission for the environmental monitor to be present, which permission shall be revocable, unless provided for otherwise in writing. Unless an independent regulatory basis or right exists, the environmental monitor shall not be provided access to any confidential business, operational, or production information. Notwithstanding anything to the foregoing, in no circumstance shall the environmental monitor be provided access to any privileged materials unless they are required to be provided by Respondent to the Department by law, regulation, or permit.

B. On April 1, 2021, the monitor position will be increased to full-time (100%) for two (2) years to account for an additional 50% of time to monitor FMC's implementation of off-site remediation. The monitor position will be re-evaluated on the two-year anniversary of the Effective Date of this Order, and every two (2) years thereafter, by the Department, who will consider any good-faith basis provided in writing by the Respondent as to why the monitor should either be reduced in time or completely removed.

C. Respondent will, on an annual basis on or around the Effective Date of this Order, be invoiced for the estimated costs associated with the environmental monitor position for the upcoming calendar year. Along with the invoice, Respondent shall be provided an accounting for the anticipated costs associated with the environmental monitor so that it can review and provide a request for adjustment, as may be appropriate, prior to tendering payment. Any request for adjustment to the invoiced total associated with the environmental monitor must be provided within thirty (30) days of receipt of the invoice and associated accounting information. If no objection is to be lodged, payment will be due within forty-five (45) days of receipt of the invoice and associated accounting information. Any objections under this paragraph will be subject to the dispute resolution provisions of 6 NYCRR Part 375-1.5(b)(3).

D. The Department will provide Respondent with the estimated costs associated with the environmental monitor's activities by January 31<sup>st</sup> of each year for the following calendar year's work. To the extent estimated costs for the environmental monitor for the prior calendar year exceed actual costs in a given year, Respondent will receive a credit for payment of such estimated costs in the subsequent year. To the extent estimated costs for the environmental monitor for the prior calendar year were less than actual costs in a given year, Respondent will make payment of the shortfall within thirty (30) days of notice.



**X. ENTRY UPON SITE**

A. Subject to the limitations placed on the environmental monitor in Section IX.A. of this Order, Respondent hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site and/or areas in the vicinity of the Site which may be under the control of Respondent by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to matters addressed pursuant to this Order, and by any agent, consultant, contractor, or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site, for inspecting, sampling, copying records related to the contamination at the Site, testing, and any other activities necessary to ensure Respondent' compliance with this Order. Upon request, Respondent shall permit the Department full access to all non-privileged records relating to matters addressed by this Order with reasonable notice. In the event Respondent is unable to obtain any authorization from third-party property owners necessary to perform its obligations under this Order, the Department may, consistent with its legal authority, assist in obtaining such authorizations.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Respondent shall each have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of any such sampling and scientific measurements available to Respondent.

**XI. INDEMNIFICATION**

Respondent shall indemnify and hold the Department, the State of New York, the Trustee of the State's natural resources, and their representatives and employees harmless from any claim, suit, or action for personal injury or property damage arising out of or resulting from the Respondent's fulfillment or attempted fulfillment of this Order, except for those claims, suits, actions and costs arising from the gross negligence or willful or intentional misconduct by the State of New York, and/or its representatives and employees during the course of any activities conducted pursuant to this Order. The Department shall provide written notice no less than thirty (30) days prior to commencing a lawsuit seeking indemnification from Respondent.

## **XII. CHANGE OF USE**

Respondent shall notify the Department at least sixty (60) days in advance of any change of use, which is proposed for the Site, in accordance with the provisions of 6 NYCRR Parts 375-1.11(d), 373-2.4(e) and 373-2.7(c)(3). For purposes of this Order, “change of use” shall be as defined in 6 NYCRR 375-2.2(a), and as applicable, consistent with the Department-approved Site ISMP.

## **XIII. INSTITUTIONAL & ENGINEERING CONTROLS**

A. If the remedial plan for the Site relies upon one or more institutional and/or engineering controls, Respondent (or the owner of the Site) shall submit to the Department for approval an environmental easement to run with the land in favor of the State which complies with the requirements of ECL Article 71, Title 36, and 6 NYCRR 375-1.8(h)(2). Upon acceptance of the environmental easement by the State, Respondent shall comply with the requirements of 6 NYCRR 375-1.8(h)(2).

B. If the remedial program provides for no action other than implementation of one or more institutional controls, Respondent shall cause an environmental easement to be recorded under the provisions of Section XIII.A. above.

C. The Department may allow, in its sole discretion, the Respondent to use institutional or engineering controls for on-Site and off-Site locations to fulfill obligations pursuant to this Order, including, without limitation, easements or restrictions, when the Department has determined such controls are protective of human health and the environment, provided that such controls are consistent with the final remedy determination made by the Department.

## **XIV. PROGRESS REPORTS AND COMMUNICATIONS**

A. In addition to any reports required by individual work plans approved pursuant to this Order, the Respondent shall provide monthly, quarterly, and annual reports to the Department regarding a summary of the activities performed pursuant to this Order during the prior quarter or year, respectively, consistent with its prior practice pursuant to the 1991 AOC. Each of the quarterly reports are due to be submitted within forty-five (45) days following the end of a quarter, with the annual report to be provided by March 1<sup>st</sup> of the subsequent calendar year. All monthly reports shall be submitted within twenty (20) days of the end of the month in question and shall list the work completed by Respondent pursuant

to this Order for the prior month, as well as all activities planned for the upcoming month. All quarterly and annual reports shall, at a minimum, include a description of the following: all actions taken in furtherance of this Order during the previous reporting period, and those anticipated for the next reporting period; all approved activity modifications (changes of work scope and/or schedule); all results of sampling and tests and all other data received or generated by or on behalf of Respondent in connection with work done pursuant to this Order in the previous reporting period, including quality assurance/quality control information; information regarding percentage of completion; unresolved delays encountered or anticipated that may affect the future schedule of work approved by this Order, and efforts made to mitigate such delays; and information regarding activities undertaken in support of the Citizen Participation Plan during the previous reporting period and those anticipated for the next reporting period.

B. Respondent and the Department shall also hold monthly telephone conferences (in lieu of a monthly written report required in Section XIV.A. of this Order, as determined by the Department), so long as the Department requests such calls to occur, to discuss Respondent's progress in meeting the requirements of this Order until termination, as contemplated by Section XVII. of this Order, unless a different frequency is set forth in a Department-approved work plan.

## **XV. RESERVATION OF RIGHTS**

A. Except as provided at 6 NYCRR 375-1.9, 6 NYCRR 375-2.9, or as otherwise provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights or authorities, including, but not limited to, the right to require performance of further investigations and/or response action(s), to recover natural resource damages, and/or to exercise any summary abatement powers with respect to any person, including Respondent.

B. Except as otherwise provided in this Order, Respondent specifically reserves all rights and defenses under applicable law respecting any Departmental claims, or actions taken, including, but not to limited to, any assertion of any remedial liability and/or natural resource damages against Respondent, and further reserves all rights respecting the enforcement of this Order, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Order or Respondent's compliance with it shall not be construed as an admission of liability, fault, wrongdoing, or breach of standard of care by

Respondent, and shall not give rise to any presumption of law or finding of fact, or create any rights, or grant any cause of action, which shall inure to the benefit of any third party. Further, Respondent reserves such rights as it may have to seek and obtain contribution, indemnification, and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers for past or future response and/or cleanup costs or such other costs or damages arising from the contamination at the Site as may be provided by law, including but not limited to rights of contribution under section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

C. In any dispute resolution proceeding pursuant to this Order, Respondent reserves the right to contend that it complied with the Order, or that the Department's determination was arbitrary or capricious, not necessary to protect human health and the environment, or not otherwise in accordance with State law or regulation.

D. In the event that the Department initiates a judicial action to enforce this Order or to seek further sanction or penalties pursuant to this Order, Respondent reserves the right to contend that it complied with the Order, that the Department's determination was arbitrary or capricious, not necessary to protect human health of the environment, or not otherwise in accordance with State law or regulation.

## **XVI. PENALTIES AND FORCE MAJEURE**

A. Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

B. Respondent shall not suffer any penalty or be subject to any proceeding or action in the event it cannot comply with any requirement of this Order as a result of any event arising from causes beyond the reasonable control of Respondent, of any entity controlled by Respondent, and of Respondent's contractors, that delays or prevents the performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation, such as where the failure is a result of acts of God, work stoppages due to labor disputes or strikes, fires, explosions, epidemics, riots, war, rebellion, sabotage or any other condition which was not caused by the negligence or willful misconduct of Respondent and which could not have been avoided by the Respondent through the exercise of due care ("Force Majeure Event"). The requirement that Respondent exercise best efforts to fulfill the obligation includes using best efforts to anticipate the potential Force Majeure Event, best efforts to address any such event as it is occurring, and best

efforts following the Force Majeure Event to minimize delay to the greatest extent possible. "Force Majeure" does not include Respondent's economic inability to comply with any obligation, or the failure of Respondent to make complete and timely application for any required approval or permit.

C. Respondent shall notify the Department in writing within fifteen (15) days after it obtains knowledge of any Force Majeure Event. Respondent shall, as applicable, include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Order, or any deadlines or obligations pursuant to such Order. Failure to give such notice within such fifteen (15) Day period constitutes a violation of the Order, but is not a waiver of any claim of Force Majeure. Respondent shall be deemed to know of any circumstance that it, any entity controlled by it, or its contractors knew or should have known.

D. Respondent shall have the burden of showing that (i) the delay or anticipated delay has been or will be caused by a Force Majeure Event; (ii) the duration of the delay or the extension sought warranted under the circumstances; (iii) best efforts were exercised to avoid and mitigate the effects of the delay; and (iv) Respondent complied with the requirements of Subsection XVI.C. of this Order regarding timely notification. If the Department agrees that the delay or anticipated delay is attributable to a Force Majeure Event, the time for performance of the obligations that are affected by the Force Majeure Event shall be extended for such time as is reasonably necessary to complete those obligations.

## **XVII. TERMINATION OF ORDER**

This Order will terminate upon the Department's written determination that the necessary remediation of all off-Site areas subject to this Order is complete, and closure of the Site is complete, unless the parties execute a separate document to replace this Order.

## **XVIII. DISPUTE RESOLUTION**

A. In the event disputes arise under this Order, the following procedures shall apply:

1. With respect to disputes relating to State costs and the costs of the environmental monitor, the provisions of 6 NYCRR Part 375-1.5(b)(3) and this Order shall apply.

2. With respect to any challenge involving a rebuttable presumption that Respondent is or is not the source of arsenic in or outside the OU6 North Remediation Area or OU 7 and 8 Remediation Area, the provisions of Section VI.B.6. of this Order shall apply.

3. With respect to any challenge regarding liability for remediation of an OU6 (South of the Canal) property or properties, as identified in Section VII.D.2. and Exhibit G of this Order, the provisions of Section VII.D.2. shall apply.

4. Except as set forth in Exhibit E, for all other dispute resolution matters under this Order, the provisions of 6 NYCRR Part 375-1.5(b)(2) shall apply.

5. Notwithstanding anything to the contrary in this Order, Respondent is not precluded from rearguing or advancing a position it made in a prior dispute resolution process with the Department solely on the basis that it did not prevail in such prior determination in any subsequent and new dispute resolution process, or in any judicial proceeding.

B. Nothing contained in this Order shall be construed to authorize Respondent to invoke dispute resolution with respect to the remedy selected by the Department in a Final Statement of Basis issued by the Department, or any element of such remedy, except as may be otherwise authorized by State law, nor to impair any right of Respondent to seek judicial review of the Department's selection of any other or further remedy affecting the Site.

## **XIX. COMMUNICATIONS**

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

(One (1) electronic copy, and hard copy, if requested)

1. Communication from Respondent shall be sent to:

Nathan Freeman  
NYS Department of Environmental Conservation  
Division of Environmental Remediation  
625 Broadway  
Albany, New York 12233  
Nathan.Freeman@dec.ny.gov

Joshua Vaccaro  
NYS Department of Environmental Conservation, Region 9  
Division of Environmental Remediation  
270 Michigan Avenue  
Buffalo, New York 14203  
joshua.vaccaro@dec.ny.gov

Lynn Winterberger  
Chief, RCRA Permitting Section  
NYS Department of Environmental Conservation  
Division of Materials Management  
625 Broadway  
Albany, New York 12233-7256  
Lynn.Winterberger@dec.ny.gov

With electronic copies to:

Andrew Guglielmi, Esq.  
NYS Department of Environmental Conservation  
Office of General Counsel  
625 Broadway  
Albany, New York 12233-1500  
andrew.guglielmi@dec.ny.gov

Christine Vooris  
Director, Bureau of Environmental Exposure Investigation  
New York State Department of Health  
Corning Tower  
Empire State Plaza  
Albany, New York 12237  
christine.vooris@health.ny.gov

All financial assurance documents shall be sent to:

Melissa Treers  
RCRA C Financial Assurance Coordinator  
Division of Materials Management  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-7260  
melissa.treers@dec.ny.gov

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

Douglas Groux  
Director, EHS Remediation and Governance  
FMC Corporation  
2929 Walnut Street  
Philadelphia, Pennsylvania 19104  
Douglas.Groux@fmc.com

Elizabeth Madara  
Remediation Project Manager  
FMC Corporation  
2929 Walnut Street  
Philadelphia, Pennsylvania 19104  
Elizabeth.Madara@fmc.com

With electronic copies to:

Victoria Hollinger, Esq.  
EHS Counsel  
FMC Corporation  
2929 Walnut Street  
Philadelphia, Pennsylvania 19104  
Victoria.Hollinger@fmc.com

Michael Hecker, Esq.  
Hodgson Russ LLP  
140 Pearl Street  
Buffalo, New York 14202  
MHecker@hodgsonruss.com

Steven Russo, Esq.  
Greenberg Traurig, LLP  
MetLife Building  
200 Park Avenue  
New York, New York 10166  
russos@gtlaw.com

B. The Department and Respondent reserve the right to designate additional or different addressees for communication on written notice to the other. Additionally, the Department reserves the right to request that the Respondent provide more than one paper copy of any work plan or report.

C. Each party shall notify the other within ninety (90) days after any change in the addresses listed in this paragraph.

D. The Department has implemented an Environmental Information Management System ("EIMS"). The EIMS requires that electronic data be provided in specific formats. In an effort to better manage environmental data, the Department is requiring that all data submissions be in a Department-approved Electronic Data Deliverable ("EDD") format. All work plans and reports (including all attachments and appendices) shall be submitted in print as well as in an electronic format that is acceptable to the Department.

## **XX. RECORDS RETENTION**

Respondent shall preserve or make arrangement for the preservation of, during the pendency of this Order, and for a minimum of six (6) years after its termination, all data, records, and documents in its possession or in the possession of its officers, directors, employees, agents, consultants, contractors (including subcontractors and independent



contractors) or successors and assigns which relate in any way to this Order, or to its implementation.

**XXI. MISCELLANEOUS**

A. Several standard provisions for Department Consent Orders are attached to this Order as Exhibit I and hereby made a part of this Order as if set forth fully herein.

B. Unless inconsistent with the terms of this Order, Respondent's RCRA-related operating requirements for future Site activities shall be governed by Exhibit E attached to this Order. The provisions of Exhibit E may be modified upon written consent by both parties without amendment to this Order. Exhibit E, as may be amended from time to time pursuant to this Section XXI.B. of this Order, is hereby made part of this Order as if set forth fully herein.

C. Unless this Order expressly provides otherwise, Respondent shall fully comply with all laws and regulations established in the ECL and 6 NYCRR.

D. In the event of a conflict between the terms of this Order (including any attachments thereto and amendments thereof) and the terms of Exhibit E or Exhibit I, the terms of this Order shall control.

E. After this Order is signed by authorized representatives of Respondent and the Commissioner, it shall take effect when the Stipulation attached as Exhibit C is signed by authorized representatives of all parties subject to the Stipulation. If the Stipulation is not signed within ten (10) days of the signing of this Order, this Order shall be automatically nullified.

F. This Order may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same instrument.

G. This Order is intended to be executed on separate signature pages, and electronic signature is acceptable.

Dated: Albany, New York  
May 31, 2019.

N.Y.S. Department of Environmental Conservation

By:   
Basil Seggos, Commissioner



**EXHIBIT "A"**

**OU MAP**



**EXHIBIT "B"**

**WWTP COMPLIANCE REQUIREMENTS**

## EXHIBIT B

### FMC WWTP REMEDIAL AND COMPLIANCE ACTIVITIES

In response to the September 11-12, 2018 and September 18, 2018 WWTP events, Respondent has completed near term corrective actions, including those discussed in the document titled "Root Cause Analysis, SPDES Permit Noncompliance Event, Water Treatment Plant," dated September 28, 2018 (the "RCA"). The following remaining longer-term corrective action items shall be completed by Respondent:

ITEM	DUE DATE
1. Submit an engineering report discussing all near term corrective actions, as outlined in the RCA, which have been completed at the WWTP by the Respondent. In addition, the Respondent must discuss the installation/construction of long-term corrective action items that were identified in the RCA, and present a schedule for installation/construction of such long-term corrective action items, including those already completed with Department concurrence.	30 days after the Effective Date of the Order.
2. The Respondent shall submit for Department approval a design report and engineering plans for the installation/construction of the long-term corrective actions, as discussed in Item 1, which have not already been completed. It is anticipated that construction of the long-term corrective action items will be made part of the overall Groundwater and Stormwater Upgrades ("GSU") project approved pursuant to the Facility's State Pollutant Discharge Elimination System ("SPDES") permit, and as specified in the Department-approved design documents and ongoing construction schedule. Progress of the GSU project will be discussed in Respondent's monthly construction progress report required by the approved Department plans.	90 days after the Effective Date of the Order.
3. Submittal of a revised WWTP operating manual, which will include standard operation procedures ("SOPs"), including as-built drawings associated with the GSU project, and 2018 revised/new SOPs that were prepared and implemented in response to the September 11-12, 2018 and September 18, 2018 WWTP events.	180 days after the completion of the GSU project construction.
4. Evaluation of the effectiveness of the completed corrective actions (including construction of the GSU project) to eliminate/reduce the frequency of overflows from the WSI and/or mitigate their potential impacts. This evaluation is the same as the compliance action Item # 2 in the Facility's SPDES permit - Schedule of Compliance and the engineering plan for optimizing the on-Site ICMs.	Pursuant to Item #1 of Condition D of Schedule 1 of Module I in Exhibit E to the Order.

**EXHIBIT "C"**

**STIPULATION TERMINATING THE 1991 AOC**



**STIPULATION OF AGREEMENT  
TERMINATING 1991 ADMINISTRATIVE ORDER ON CONSENT REGARDING  
FMC CORPORATION'S FACILITY IN MIDDLEPORT, NEW YORK  
DOCKET NO. II-RCRA-90-3008(h)-0209**

**WHEREAS**, Region 2 of the United States Environmental Protection Agency (EPA), the New York State Department of Environmental Conservation (DEC), and FMC Corporation (FMC) entered into an Administrative Order on Consent, Docket No. II-RCRA-90-3008(h)-0209, dated June 18, 1991 (AOC), regarding the FMC facility located at 100 Niagara Street in Middleport, New York (the Facility);

**WHEREAS**, the AOC was issued by EPA pursuant to Section 3008(h) of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. § 6928(h), and by DEC pursuant to Section 71-2727(3) of the New York State Environmental Conservation Law (ECL). The AOC required FMC to, at a minimum, perform Interim Corrective Measures (ICMs), conduct a RCRA Facility Investigation (RFI) to determine the nature and extent of any releases of hazardous waste and/or hazardous constituents from the Facility, and to the extent deemed necessary by EPA, conduct a Corrective Measure Study(ies) to develop and evaluate corrective measure alternatives, and to recommend a final corrective measure(s).

**WHEREAS**, subsequent to the issuance of the AOC, the State of New York received authorization from EPA to assume the lead role for the RCRA corrective action program in New York State;

**WHEREAS**, DEC and EPA have determined that the Facility constitutes a treatment, storage, and disposal facility (TSD), as defined pursuant to ECL and RCRA;

**WHEREAS**, DEC may, among other options, require the implementation of RCRA corrective action, closure and post-closure care at facilities it determines to qualify as a hazardous waste facility in New York through the issuance and oversight of an administrative order and/or a state hazardous waste permit;

**WHEREAS**, on May 31 2019, DEC and FMC executed an Order on Consent and Administrative Settlement, Index No.: CO 9-20140625-40 (DEC/FMC Consent Agreement), that, among other things, incorporates requirements intended to supplant the pending hazardous waste management permit for the Facility, and requires FMC to perform certain investigations, evaluations, and corrective action at the Facility, including the remediation of the release of hazardous waste and hazardous waste constituents at the Facility and in off-site contaminated areas caused by the Facility's operations;

**WHEREAS**, the DEC/FMC Consent Agreement shall become effective upon the signing by EPA, DEC, and FMC of this Stipulation of Agreement Terminating 1991 Administrative Order on Consent Regarding FMC Corporation's Facility in Middleport, New York (Stipulation);

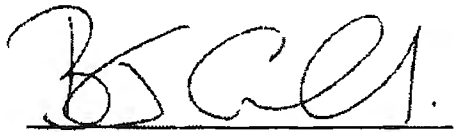
**WHEREAS**, DEC and FMC have represented to EPA, and EPA agrees, that the requirements of the DEC/FMC Consent Agreement are at least as stringent as those of the AOC; and,

**NOW, THEREFORE**, the Parties hereby agree:

1. The AOC shall terminate upon the signing of this Stipulation by EPA, DEC, and FMC.
2. FMC, by its signature below, hereby withdraws all Notices of Disputes previously filed under Section XXIX. (Dispute Resolution) of the AOC, and affirms it will not file any additional Notices of Dispute under the AOC.
3. FMC agrees not to contest DEC's authority to either issue or enforce the DEC/FMC Consent Agreement, including its terms.
4. Upon termination of the AOC, DEC will be the lead agency overseeing RCRA compliance at the Facility, including corrective action at the Facility and at contaminated off-site areas caused by the Facility's operations.
5. EPA and DEC reserve, without limitation, all of their statutory and regulatory powers, authorities and defenses, and this Stipulation shall not be construed as a covenant not to sue, or as a release, waiver or limitation of any rights, remedies, defenses, powers or authorities which EPA or DEC may have under RCRA, CERCLA, or any other statutory or regulatory authority.
6. Except as specifically set forth above, FMC reserves, without limitation, all rights and defenses under applicable law respecting any EPA or DEC claims, or actions taken, pursuant to the AOC, DEC/FMC Consent Agreement, or this Stipulation. As it pertains solely to the DEC, FMC's reservation of rights in this Stipulation shall not be interpreted to provide for greater rights than are provided for in the DEC/FMC Consent Agreement.
7. Each undersigned signatory to this Stipulation certifies that he/she is fully authorized to enter into the terms and conditions of the Stipulation on behalf of the entities represented below.
8. This Stipulation may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same instrument.
9. This Stipulation is intended to be executed on separate signature pages.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

It is so agreed:



Barry J. Crawford  
Vice President of Operations  
FMC Corporation

May 31, 2019

Date

It is so agreed:



Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

May 31, 2019

Date

It is so agreed:



Pat Evangelista, Acting Director  
Superfund and Emergency Management Division  
Region 2  
United States Environmental Protection Agency

6/6/19  
Date