

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ENVIRONMENTAL PROTECTION BUREAU

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In the Matter of

YONKERS RACING CORPORATION,

Respondent.

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**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)**

TABLE OF CONTENTS

I.	INVESTIGATION AND FINDINGS	1
A.	INTRODUCTION AND SUMMARY	1
B.	THE BRONX RIVER	3
C.	THE RACING CORPORATION'S DISCHARGES OF RAW SEWAGE INTO THE BRONX RIVER AT RAYBROOK ROAD	6
D.	THE RACING CORPORATION HAS LONG HAD NOTICE THAT POLLUTION OF THE BRONX RIVER IS ILLEGAL	11
E.	THE RACING CORPORATION'S LICENSE APPLICATIONS TO THE NEW YORK STATE RACING AND WAGERING BOARD	14
F.	VIOLATIONS OF LAW	16
II.	REMEDIAL PROGRAM	18
III.	CIVIL PENALTY AND PAYMENTS FOR ENVIRONMENTAL BENEFIT PROJECTS	21
IV.	ENFORCEMENT, STATE DETERMINATIONS, DISPUTE RESOLUTION, FORCE MAJEURE, COSTS	24
V.	RELEASES AND RESERVATIONS OF RIGHTS	27
VI.	MISCELLANEOUS	29

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Pursuant to the provisions of Executive Law § 63, Eliot Spitzer, Attorney General of the State of New York, caused an investigation (the Investigation) to be made into alleged illegal conduct by Yonkers Racing Corporation (the Racing Corporation) relating to the discharge from Yonkers Raceway of pollutants into the environment and into the Bronx River. The Racing Corporation has cooperated in good faith with the Attorney General in the Investigation and has agreed to resolve this matter, in accordance with Sections II through VI of this Assurance of Discontinuance (Assurance), without litigation and without admission of any liability or fact with respect to the Attorney General's findings set forth in Section I below.

I. INVESTIGATION AND FINDINGS

Based on the Investigation, the Attorney General has made the following findings:

A. INTRODUCTION AND SUMMARY

1. The Bronx River is a unique and valuable resource to the people of the State of New York, and especially to residents of Westchester and Bronx counties. However, the River's water quality and ecology have been harmed as a result of decades of pollutant discharges, development within the watershed, and physical alterations to the River's natural flow.

2. Many local, state, and federal agencies, including the Office of the New York Attorney General (OAG), the New York State Department of Environmental Conservation (DEC), and community-based organizations have recently joined in efforts to restore the Bronx River's environmental health, and large numbers of people (many of whom are children) use the River for boating, swimming, river restoration, and educational and research activities.

3. Pursuant to its Bronx River Watershed Initiative, OAG, on behalf of the State of New York (the State), has been investigating illegal discharges of raw sewage and other pollutants into the Bronx River, and has obtained Assurances of Discontinuance under Executive Law § 63(15) requiring the Bronx Zoo and the New York Botanical Gardens to abate their pollutant discharges into the River, and a judgment in State of New York v. City of Yonkers, Supreme Court of the State of New York, County of Westchester, Index No. 02-21081 (Justice Nicolai), requiring the City of Yonkers to eliminate raw sewage discharges from its storm sewers (Yonkers Storm Sewers) into the River in an action prosecuted by OAG on behalf of the State, DEC Commissioner Denise M. Sheehan, and DEC.

4. The Racing Corporation is a New York corporation with its principal place of business located at 810 Yonkers Avenue, Yonkers, New York 10704. On April 7, 2006, OAG formally commenced the Investigation by serving subpoenas upon the Racing Corporation. Various New York State agencies have cooperated in the Investigation, including DEC, the New York State Racing and Wagering Board, the New York State Division of the Lottery, and the New York State Department of Transportation. DEC has formally joined in the Investigation by referring this matter to OAG for enforcement, and has provided environmental technical and legal assistance to OAG to help resolve violations by the Racing Corporation of state and federal

water pollution control laws. The City of Yonkers has also assisted in the Investigation. The Racing Corporation has cooperated with the investigation in a good faith effort to ensure the protection of the Bronx River and compliance with all applicable environmental laws.

5. The Racing Corporation has violated Executive Law § 63(12) and other state and federal laws over a span of decades by, among other things, discharging from the Paddock and Backstretch Areas of the Raceway into the Bronx River (through Yonkers Storm Sewers) raw sewage from both humans and horses, hazardous substances, and hazardous wastes, thereby endangering public health and causing injury to the environment. To redress these violations of law, the Racing Corporation must implement a remedial program (Section II), pay a civil penalty to the State and fund environmental benefit projects to benefit the Bronx River (Section III), and comply with the remaining provisions of this Assurance (Sections IV through VI).

B. THE BRONX RIVER

6. The Bronx River is a navigable water of the State of New York with its principal headwaters in Davis Brook, located in Valhalla, New York, and its mouth 24 miles downstream at the East River in the Bronx. Over decades, the River's water quality and ecology have been degraded and its use for recreation and other lawful purposes has been impaired by discharges of raw sewage and other pollutants. Now, the River's environmental health is being restored with many public agencies and community-based organizations committing tens of millions of dollars in efforts to eliminate pollutant discharges, better manage and protect the watershed, provide open space, waterfront access, and park land along the River's banks, and restore the River's damaged natural resources.

7. With these improvements being implemented, hundreds of people engage in

boating and swimming in the River each year. In addition, public agencies and private groups regularly perform ecological restoration projects in and along the Bronx River and hundreds of schoolchildren and their teachers participate in educational and research activities in the River each year. Participants in the foregoing activities regularly come into contact with the River's water.

8. Discharges of raw sewage and other pollutants into the Bronx River pose significant risks to public health and have injured the environment. Diseases associated with exposure to sewage in water include mild to life-threatening gastroenteritis, hepatitis, skin infections, wound infections, conjunctivitis, respiratory infections and generalized infections. The health risks of contact with water contaminated by sewage are heightened in individuals whose immune systems are compromised, such as people with HIV, as well as children and pregnant women.

9. The concentration of fecal coliform bacteria measures sewage in a sample of water. Fecal coliform concentrations in Bronx River water within the River's stretch in Yonkers greatly exceed 200 fecal coliforms per 100 milliliters of water (200 fc per 100 ml) – the water quality standard established by DEC, based on studies by the United States Environmental Protection Agency (EPA), to protect the health of people having contact with the water.

10. Large volumes of raw sewage discharge into the Bronx River from Yonkers Storm Sewers at Raybrook Road within the City of Yonkers. Sampling by the State of discharges into the River from the Raybrook Road storm sewer outfall have disclosed fecal coliform concentrations greatly exceeding the water quality standard of 200 fc per 100 ml, as shown in the chart below:

Sewage Discharges Into the Bronx River At Raybrook Road

Date of Sampling	Fecal Coliform Concentration (fc per 100 ml)	Degree of Exceedence of State Water Quality Standard of 200 fc per 100 ml of water
January 15, 2003	5,000	25 times
March 18, 2003	50,000	250 times
January 27, 2006 January 27, 2006 ¹	50,000 5,000,000	250 times 25,000 times
August 7, 2006	240,000	1200 times

11. As a result of discharges of untreated sewage from multiple sources flowing from the Raybrook Road storm sewer outfall and from other Yonkers Storm Sewer outfalls, the Bronx River does not meet water quality standards within the River’s stretch in Yonkers or downstream in the Bronx. Sampling of River water in 2003 showed that sewage discharges – even when diluted with clean water entering the Bronx River from other sources – resulted in mean fecal coliform concentrations in the River’s water in Yonkers of between 1162 fc and 8615 fc per 100 ml, well above the regulatory limit of 200 fc per 100 ml. Similarly, sampling of River water between April and August of 2006 downstream of the Raybrook Road outfall near the Bronx-Yonkers border disclosed fecal coliform concentrations ranging between 3000 fc and 240,000 fc per 100 ml. Not only do the raw sewage discharges cause pollution of the Bronx River and pose health risks to people having contact with the contaminated water in the River; they also are adversely affecting the River’s ecology, including the ability of fish to reproduce there.

¹ Two samples were taken at different times on that date.

Macroinvertebrates are the insects, crustaceans, mollusks, and worms found in nearly every stream, and are widely used in State monitoring programs as indicators of the prevailing water quality in streams and rivers. An impaired macroinvertebrate community can have negative implications for all higher components of an aquatic food web, including amphibians, reptiles, fish, mammals, and birds. Recent macroinvertebrate studies of the Bronx River have shown that most of the Bronx River, including its stretch downstream of the Raybrook Road outfall, has poor water quality because raw sewage and other pollutants have impaired the size and diversity of macroinvertebrate populations.

12. As found by the court in State of New York v. City of Yonkers, Index No. 02-21081 (Sup. Ct. Westchester Cty. October 26, 2004 Decision, p. 19) (Nicolai, J.), discharges of raw sewage from Yonkers Storm Sewers, including storm sewers discharging from the Raybrook Road outfall, are illegal, constitute a public nuisance, and have rendered the Bronx River “unsafe for recreational purposes, dangerous to human health and detrimental to the propagation and maintenance of the fish population.”

C. THE RACING CORPORATION’S DISCHARGES OF RAW SEWAGE INTO THE BRONX RIVER AT RAYBROOK ROAD

13. For decades the Racing Corporation and its predecessors have operated a harness racing facility at 810 Yonkers Avenue, Yonkers, New York 10704 (the Raceway), uphill and approximately one-half mile from the Bronx River. The Raceway property lies within the drainage basin of Yonkers Storm Sewers which discharge into the River at Raybrook Road. For decades, the Racing Corporation and its predecessors have discharged raw sewage from humans and horses, generated at the Backstretch and Paddock areas of the Raceway, into the Bronx River

at Raybrook Road. The Raceway has neither sought nor received a State Pollutant Discharge Elimination System (SPDES) permit from DEC for these discharges. These discharges are a major component of the sewage polluting the River from the Raybrook Road storm sewer outfall.

14. Since 1972, when the Racing Corporation became owner of the Raceway, it has been responsible for the discharge of raw sewage into the River. From that time until 1992-93, when five of the nine horse stables at the Raceway were closed, the Raceway housed each year hundreds of horses, by arrangement between the Racing Corporation and the horse owners and trainers. Since then, the Racing Corporation has permitted horse owners and trainers to keep between 100 and 280 horses at the facility. Most of the horse waste generated at the Raceway is absorbed into bedding material which the Racing Corporation transports for proper off-site disposal by arrangement with outside firms. However, since acquiring the Raceway, the Racing Corporation has permitted trainers, horse owners, and groom workers at the Raceway to dispose of waste generated by cleaning horses and surfaces contaminated with horse manure, urine, and bedding materials, using hoses and other devices to direct wash waters into storm drains at the paddock building, the horse barns, and other locations, for discharge into the Bronx River.

15. For many years, the Racing Corporation has also been discharging raw human sewage into the Bronx River. Sources of human sewage include pipe connections from bathrooms and other sanitary facilities in the Paddock area, and in the Backstretch Area, where Raceway dormitories house “grooms,” workers responsible for taking care of the horses. Currently, approximately 35 grooms live in dormitories at the Raceway. In previous years, 80 or more grooms resided at the facility and, when the Raceway reopens after renovations, the groom population will increase. Other sources of the Racing Corporation’s discharges of raw human

sewage into the Bronx River within the Backstretch area include bathrooms and other sanitary facilities in the Veterinarians' Building, the Eastern, Northern, and Western Farrier (blacksmith) shops, and the Administration Building (including its prior use as a cafeteria/recreation facility for the grooms and horse trainers). The Remedial Program set forth in Section II below will help determine whether raw human sewage has also been discharging from other facilities at the Raceway, such as the Maintenance Building, and if so prevent any future discharges. The human sewage discharges into the Bronx River from the Backstretch area came from an underground sanitary line improperly connected to an on-site storm sewer line which then discharges into a municipal storm sewer on Yonkers Avenue.² The human sewage discharges into the Bronx River from the Paddock area also empty into a municipal storm sewer on Yonkers Avenue.

16. As with fecal coliform bacteria, the concentration of E. coli bacteria is used to measure sewage in a water sample and can demonstrate health risks for a broad variety of bacterial and viral infections. In addition, according to the federal Centers for Disease Control and Prevention, infection with some strains of E. coli, such as E. coli O157:H7, can be serious or fatal (especially in children), and can be contracted by contact with water contaminated with sewage.

17. In 1999, the Racing Corporation obtained the services of an environmental consultant, Earth Tech, to assess environmental conditions at the facility to further the Corporation's efforts to sell the Raceway site. Earth Tech inspected storm and sanitary sewers at the Raceway, sampled water and sediment found in these sewers, and reported its results to the

² OAG makes no determination whether this improper pipe connection was made by the Racing Corporation or by its predecessors and, accordingly, no determination when the Racing Corporation first learned of it.

Racing Corporation. During inspections on August 4, 1999, Earth Tech found “hay-like organic particles and horse manure” in a manhole in Storm Sewer 3 and that as an “[a]ttendant was hosing down horse’s leg, water was running into manhole.” Earth Tech observed and noted a “strong odor of horse urine” in this storm sewer manhole and at the manhole for Storm Sewer 2, both located on the Raceway site.

18. Earth Tech’s sampling results, based on sampling performed in March and August 1999, disclosed that the Racing Corporation had discharged into storm sewers at the Raceway site, which sewers empty into the Bronx River, the following contaminants: para-cresol, ortho-cresol, benzoic acid, diethylphthalate, phenol, naphthalene, arsenic, and mercury. EPA has classified these contaminants as hazardous substances and/or hazardous wastes pursuant to 40 C.F.R. §§ 261.31, 261.33, 302.4. When discharged into the Bronx River, these pollutants may pose health dangers to people swimming or boating there. Specifically, bodily contact with para-cresol, ortho-cresol, benzoic acid, diethylphthalate, phenol, arsenic, and mercury can cause acute injuries to skin, such as inflammation, blistering, irritation, and necrosis, and injury to eyes such as irritation, corneal damage, or blindness. Acute ingestion, such as from swallowing water, can cause other serious health problems. Mercury in sediments discharged into a waterbody is transformed by bacteria into methyl mercury and ingested by fish where it builds up in fish tissue. Human consumption of fish contaminated with methyl mercury can cause permanent damage to the brain, nervous system, and kidneys. Thus, consumption of Bronx River fish may pose significant health hazards.

19. Some of the contaminants discussed above have been discharged into the Bronx River from the Raceway’s storm sewers in the course of wash downs of horses and Raceway

surfaces contaminated with horse wastes. Cresols (such as para-cresol and ortho-cresol) are used in topical horse liniments and benzoic acid is used as a topical anti-fungal agent in preparations to treat thrush or other horse infections.

20. Naphthalene is commonly used in toilet deodorant blocks. It was found by Earth Tech in August 1999 at high concentration in sediment in the manhole in Storm Sewer 3 at the Raceway site as a result of the improper pipe connection of Backstretch toilets at the Raceway to the storm sewer system. Significantly, while Earth Tech found naphthalene in the storm sewer system at the Raceway where it did not belong, its sampling found no evidence of this substance in the Raceway's sanitary sewer system where toilet wastes should have been found.

21. Samples of the Racing Corporation's discharges into storm sewers connected to the Raybrook Road outfall on October 24, 2003 were analyzed for the presence of E. coli bacteria by a State certified laboratory, Long Island Analytical Laboratories, Inc., working on behalf of the City of Yonkers. The results disclosed that E. coli bacteria in high concentrations, between 110,000 and 500,000 per 100 milliliters of discharge, were being discharged from the Raceway into the Bronx River. Similar results were obtained from a sample of the Racing Corporation's discharge to storm sewers on May 5, 2005, analyzed for the City by another State certified laboratory, EcoTest Laboratories, Inc. In that sample, fecal coliform was found at a concentration of at least 1600 fecal coliforms per 100 milliliters -- the maximum concentration that could be discerned for the test method employed which was designed merely to test for the presence, but not precise concentration, of fecal coliform. The City of Yonkers did not inform the Racing Corporation of these test results.

22. During the course of construction and renovation of the Raceway to construct a

Video Lottery Terminals (VLT) facility there, in significant rainfall or snowmelt events the Racing Corporation has discharged contaminated stormwater into the brook located near the southeastern border of the Raceway which feeds the Bronx River via Yonkers Storm Sewers, and has also discharged such contaminated stormwater directly into Yonkers Storm Sewers. These discharges have occurred on January 27, 2006, February 3, 2006, April 24, 2006, and August 29, 2006, among other days. The stormwater discharges contained mud and sediment from the Raceway and have rendered water in the brook cloudy in contrast to its natural condition, a violation of ECL § 17-0501, applicable water quality standards and the SPDES General Permit for Stormwater Discharges from Construction Activities (GP-02-01). The Racing Corporation has also violated that permit by failing to: maintain properly sediment and erosion control measures, initiate stabilization measures in inactive areas, and comply with various substantive and procedural requirements for its stormwater pollution prevention plan.

D. THE RACING CORPORATION HAS LONG HAD NOTICE THAT POLLUTION OF THE BRONX RIVER IS ILLEGAL

23. In 1984-85, the Racing Corporation was informed about illegal discharges of pollutants into storm sewers discharging into the Bronx River from the Raceway. At that time, representatives of the Westchester County Department of Health (County Health Department) told the Racing Corporation that it had received a complaint that a ride operator at the Westchester County Fair being held at the Raceway was discharging “grey water or grease” into storm sewer manholes or into the brook near the southeastern border of the Raceway site. At the County Health Department’s request, the Racing Corporation conducted a prompt investigation and told the ride operator to halt the discharges, but did not take any action to halt its own

longstanding discharges of horse sewage and other pollutants into its storm sewers elsewhere at the site.

24. In 1999, Earth Tech informed the Racing Corporation that its inspections and sampling results found discharges into storm sewers at the Raceway of horse manure, horse urine, and various hazardous substances and hazardous wastes found in “veterinary preparations for topical use on horses.” In 1999, a report from AKRF, Inc. (AKRF), an environmental consultant working for Tishman Speyer Properties, a prospective purchaser of the Raceway site, also noted the presence of compounds used for application on horses in the Raceway’s sewer effluent.

25. The Earth Tech and AKRF reports were prepared to assess environmental conditions at the Raceway to determine if such conditions could affect the terms of a proposed sale of the site by the Racing Corporation to Tishman Speyer Properties. The reports were not audits of the Racing Corporation’s compliance with environmental laws, did not address the legality of environmental conditions at the site, including the legality of discharges of pollutants into Raceway storm sewers and the Bronx River, and did not purport to recommend further investigation or remediation of such discharges to achieve compliance with law. During the Investigation, Racing Corporation and Earth Tech personnel said they could not recall whether they discussed with each other the legal status of the Racing Corporation’s discharges into storm sewers or the need to abate the discharges. After receiving the report and sampling data from Earth Tech and the AKRF report, the Racing Corporation took no action to halt these discharges.

26. On May 29, 2002, the County Health Department informed the Racing Corporation that it had received a complaint about “illegal dumping of septage” into storm

sewers by an operator of portable toilets at the Westchester County Fair being held at the Raceway. The Racing Corporation promptly investigated and concluded that the complaint was unfounded, and the County Health Department concurred. However, the Racing Corporation did not take any action to halt its discharges of sewage into storm sewers.

27. In July 2005, Brown and Caldwell, environmental consultant for the Racing Corporation, discussed Earth Tech's 1999 sampling results in its "Phase I Site Assessment and Third Party Review" report. The report informed the Racing Corporation that naphthalene, which had been found in sediment discharged into storm sewers at the Raceway, is commonly used in "toilet deodorant blocks." As with the Earth Tech and AKRF reports, the Brown and Caldwell report was intended by the Racing Corporation to facilitate a transaction (here to obtain financing for the VLT facility), was not an audit of compliance with environmental laws, and did not purport to make recommendations concerning the Racing Corporation's pollutant discharges to storm sewers and the Bronx River to achieve such compliance. After receiving the Brown and Caldwell report, the Racing Corporation took no action to investigate or halt the discharge of human sewage from toilets discharging into the Bronx River from its on-site storm sewers.

28. The Racing Corporation has long been aware that its storm sewers empty into the Bronx River. The Raceway lies within the Bronx River valley and descends fairly steeply from its western border on Central Avenue eastward towards the River. For many years the Racing Corporation has experienced many large storms in which stormwater has collected at the site and caused flooding downhill on Yonkers Avenue and into neighborhoods east of the Raceway and towards the Bronx River. The Racing Corporation has worked with the City of Yonkers in good faith to address these problems.

29. On June 9, 2004, the Racing Corporation filed with DEC a Notice of Intent for Stormwater Discharges Associated with Construction Activity Under SPDES General Permit #GP-02-01 to obtain permit coverage for stormwater discharges during construction of the VLT facility at the site. In the Notice, the Racing Corporation “certified under penalty of law” that stormwater runoff from the site would enter storm sewers owned by the City of Yonkers and that the “Bronx River” is “the nearest surface water body into which the runoff will enter.” In addition, in 1997, Levine Fricke Recon Inc., an environmental consultant for the Chase Manhattan Bank, prepared a “Phase I Environmental Site Assessment of Yonkers Raceway” that was provided to the Racing Corporation by Earth Tech no later than July 2003. The report states that both the on-site storm sewers and the brook bordering the site drain toward the Bronx River.

E. THE RACING CORPORATION’S LICENSE APPLICATIONS TO THE NEW YORK STATE RACING AND WAGERING BOARD

30. The Racing Corporation filed annual racetrack license applications with the New York State Racing and Wagering Board (the Board) to obtain approval to conduct harness racing at the Raceway for calendar years 2004, 2005, and 2006. Question 18 on the application form asked whether the applicant was required to obtain a Concentrated Animal Feeding Operations (CAFO) permit under the federal Clean Water Act or state laws. In response to question 18 in each of its applications to the Board, the Racing Corporation stated that it did not need a CAFO permit because it had less than 500 horses at the Raceway.

31. However, state laws applicable in 2004, 2005, and 2006 provided for DEC issuance of CAFO permits for: (a) “Large CAFOs,” facilities having 500 or more horses, or (b) “Medium CAFOs,” facilities having more than 150 horses (but less than 500) if “pollutants are discharged

into waters of the State through a man-made ditch, flushing system, or other similar man-made device.” The Racing Corporation needed a CAFO permit because it was a Medium CAFO; it had more than 150 horses at its facility each year since DEC first issued CAFO permits in 1999 and was discharging pollutants into State waters by cleaning horses and surfaces contaminated with horse manure, urine, and bedding materials, and then directing wash waters into State waters using hoses through “man-made devices” – storm drains at the paddock building, the horse barns, and other locations, and the Yonkers Storm Sewers.

32. On December 22, 2005, the Racing Corporation submitted its application for a racetrack license for calendar year 2006 to the Board. Question 6.c. on the application form asked whether the Racing Corporation was the subject of an ongoing investigation by any law enforcement agency or authority. The Racing Corporation answered the question: “No.”

33. On April 7, 2006, OAG served subpoenas on the Racing Corporation in the Investigation. The subpoenas recited that “the subject of this investigation relates to the alleged discharge of pollutants from Yonkers Raceway into the environment and the Bronx River” and sought documents and testimony concerning pollutant discharges from “stable and paddock areas, the track, the practice track, and all other areas at Yonkers Raceway where horses, materials which come into contact with horses (such as hay), or wastes from horses, have been present.”

34. For many years, including for calendar year 2006, the first page of the Board’s racetrack license application has stated in bold italics that the applicant must submit an amended answer to any question if the applicant had previously supplied an answer that was no longer correct due to changed circumstances. After receiving the subpoenas from OAG on April 7,

2006, the Racing Corporation did not submit an amended answer to question 6.c concerning ongoing investigations. Nor did the Raceway at any time inform the Board about the OAG investigation in subsequent telephone conferences with the Board or in e-mails or other correspondence to the Board.

F. VIOLATIONS OF LAW

35. By discharging pollutants into the Bronx River from point sources, including raw human and horse sewage, fecal coliform and E. coli bacteria, and hazardous substances and/or hazardous wastes (consisting of para-cresol, ortho-cresol, benzoic acid, diethyl phthalate, naphthalene, phenol, arsenic, and mercury) without a National Pollutant Discharge Elimination System permit from EPA or SPDES permit from DEC authorizing such discharges, the Racing Corporation has violated Section 402(a) of the federal Clean Water Act, 33 U.S.C. § 1342(a), and New York Environmental Conservation Law (ECL) §§ 17-0505, 17-0701(1), 17-0803.

36. By discharging into the Bronx River para-cresol, ortho-cresol, diethyl phthalate, naphthalene, and phenol, contaminants listed as hazardous waste by EPA at 40 C.F.R. §§ 261.31 and 261.33, without a federal Resource Conservation and Recovery Act (RCRA) permit from EPA or an ECL Article 27, title 7 permit from DEC, the Racing Corporation has violated Section 3005 of RCRA, 42 U.S.C. § 6925, and ECL § 27-0913(1)(a).

37. By discharging into the Bronx River raw human and horse sewage, without treating the sewage to remove its harmful constituents, the Racing Corporation has violated ECL §17-0509(2), which sets “effective secondary treatment [as the] minimum degree of treatment required for the discharge of sanitary sewage into the surface waters of the state”

38. By discharging into the Bronx River pollutants, including raw human and horse

sewage, fecal coliform and E. coli bacteria, and hazardous substances and/or hazardous wastes consisting of para-cresol, ortho-cresol, benzoic acid, diethylphthalate, naphthalene, phenol, arsenic, and mercury, the Racing Corporation has violated ECL § 17-0501 by causing and contributing to the contravention of water quality standards for the Bronx River set forth in 6 New York Codes, Rules, and Regulations (NYCRR) §§ 701.1, 701.7, 701.8, 703.2, and 703.4(b). Specifically, these discharges, together with other pollutant discharges from the Raybrook Road storm sewer outfall and from other River outfalls, have rendered the Bronx River not suitable for “primary and secondary contact recreation [e.g., swimming and boating, respectively]” and not suitable for “fish propagation and survival,” the River’s best usages. 6 NYCRR §§ 701.1, 701.7, 701.8, 703.2. The Racing Corporation’s discharges of fecal coliform bacteria into the Bronx River in concentrations exceeding 200 fc per 100 ml have caused and contributed to violations of the numerical water quality standard for that pollutant in the Bronx River. 6 NYCRR § 703.4(b).

39. By discharging muddy and sediment-contaminated stormwater into the brook near the southeastern border of the Raceway causing a visible contrast to natural conditions in that waterbody, by discharging such polluted stormwater into the Bronx River via the Raybrook Road storm sewer outfall, and by violating SPDES General Permit GP-02-01, the Racing Corporation has violated Section 402(p) of the federal Clean Water Act, 33 U.S.C. § 1342(a), ECL §§ 17-0501, 17-0803, and 6 NYCRR § 703.2.

40. Together with other polluters of the Bronx River from the Raybrook Road storm sewer outfall and from other River outfalls, the Racing Corporation has caused, contributed to, and maintained a public nuisance by rendering the River unsafe for recreational purposes, dangerous to human health, and detrimental to the propagation and maintenance of the fish

population.

41. By polluting the Bronx River in violation of various state laws for three decades, the Racing Corporation has continuously violated the condition of its racetrack licenses, pursuant to 9 NYCRR § 4101.1, that it be in “compliance with the laws of the State of New York.”

42. By polluting the Bronx River for three decades in violation of numerous state and federal statutes and regulations, the common law of public nuisance, and conditions of its racetrack licenses, the Racing Corporation has violated Executive Law § 63(12).

43. The Racing Corporation asserts that it affirmatively disagrees with the accuracy of and denies the OAG’s aforesaid findings of fact and any liability therefor.

II. REMEDIAL PROGRAM

44. By no later than October 20, 2006, the Racing Corporation shall eliminate all discharges of human sewage from the Raceway to on-site and off-site storm sewers and submit certification to the State that it has done so. The Racing Corporation’s remedial work shall include, without limitation, slip-lining and/or replacing the approximately 196-foot section of the broken 8-inch sanitary line previously identified by the Racing Corporation, plugging the connection of that line to the 24-inch storm drain at the Raceway into which it has been emptying, and connecting the 8-inch sanitary line to the off-site municipal sanitary sewer on Yonkers Avenue. Until the aforesaid work is complete, the Racing Corporation shall ensure that Raceway bathrooms connected to the on-site storm sewer are not used, and shall provide portable bathrooms in their place.

45. By no later than November 30, 2006, the Racing Corporation shall: (a) eliminate all pipe connections to storm sewers in the vehicle maintenance building area and abandoned

stables, plug all storm and sanitary pipes in the abandoned stables area and other abandoned areas, and submit certification to the State that it has done so; (b) have performed dye tests for all drains in non-abandoned horse stables and floor drains in the vehicle maintenance building restroom and submit to the State the results of such tests; (c) submit to the State as-built maps of all sanitary and storm sewer lines on the Raceway property with details of connections at property boundaries (including documentation of completed connections to the off-site sanitary sewer line on Yonkers Avenue from all sanitary lines currently located on the Raceway site); and (d) submit to the State as-built documentation of disconnections by the Racing Corporation of all sanitary lines on the Raceway site previously connected to on-site and off-site storm sewers.

46. By no later than December 31, 2006, the Racing Corporation shall submit to the State: (a) the Comprehensive Nutrient Management Plan for the Raceway (CNMP) (including all engineering plans and specifications), in accordance with all prior DEC oral and written comments (including the CAFO Facility Inspection Report for the inspection conducted on September 6, 2006 and the October 4, 2006 comment letter from Jacqueline M. Lendrum, Ph.D., of DEC to the Racing Corporation); and (b) as-built documentation of completed connections to the off-site sanitary sewer line on Yonkers Avenue from all sanitary lines currently located on the Raceway site.

47. By no later than March 31, 2007, the Racing Corporation shall, in accordance with all applicable Natural Resources Conservation Service standards: (a) complete implementation of all best management practices required by the CNMP, as approved by DEC, to address process wastewater discharges from the CAFO production areas (including, but not limited to, horse washing in the paddock and stable areas, and manure storage and transfer areas);

(b) complete implementation of all best management practices required by the CNMP, as approved by DEC, to address discharges from the manure storage and transfer areas; (c) complete implementation of all best management practices required by the CNMP, as approved by DEC, to address stormwater diversions from the CAFO production areas (including, but not limited to, roof drainage systems for the stable, manure storage and handling, and paddock areas); and (d) submit to the State certifications by the Racing Corporation and its certified CNMP planner that it has completed the tasks set forth in subparagraphs (a), (b), and (c) above.

48. By no later than March 31, 2007, the Racing Corporation shall eliminate all discharges of muddy and sediment-contaminated stormwater causing a visible contrast to natural conditions within the on-site brook and where such contaminated stormwater enters Yonkers Storm Sewers for discharge into the Bronx River, and comply fully with SPDES General Permit GP-02-01, and submit certification to the State that it has done so.

49. By April 30, 2007, the Racing Corporation shall have: (a) performed an inspection and videotaping of the entire sanitary sewerage system at the Raceway site to determine its physical condition and submitted the videotapes and videotape logs to the State; (b) developed a Sewerage Repair Plan, subject to approval by the State, to repair or replace all broken or defective pipes, manholes, or related sanitary sewer infrastructure at the site disclosed during the inspection and videotaping; (c) submit certification to the State that all repair and replacement work set forth in the Sewerage Repair Plan, as approved by the State, has been completed.

III. CIVIL PENALTY AND PAYMENTS FOR ENVIRONMENTAL BENEFIT PROJECTS

50. The Racing Corporation shall make payments in the sum of \$9,000,000, consisting of \$2,000,000 as a Civil Penalty and \$7,000,000 for Environmental Benefit Projects to benefit the Bronx River. The Civil Penalty shall be paid by certified or bank checks made payable to the “State of New York” and shall be delivered to the New York State Attorney General’s Office, The Capitol, Albany, New York 12224, Attention: Philip M. Bein, Assistant Attorney General, Environmental Protection Bureau, in accordance with paragraph 53 below. Payments for Environmental Benefit Projects shall be made to an interest-bearing federally insured escrow account (Escrow Account) by delivering certified or bank checks made payable to “William P. Harrington, Esq., as Escrow Agent,” to William P. Harrington, Esq., Bleakley Platt & Schmidt, LLP, One North Lexington Avenue, White Plains, New York 10601, in accordance with paragraph 53 below. The Racing Corporation shall not obtain any tax deduction or other tax benefit from paying the Civil Penalty or funding the Environmental Benefit Projects.

51. At least \$6,000,000.00 from the Escrow Account will fund stormwater retrofit projects not otherwise required by law to be implemented within the Bronx River drainage basin. Such projects will not be constructed at the Raceway site without the written consent of the Racing Corporation. The purposes of the stormwater retrofit projects are to improve water quality and the River’s ecology, by reducing the concentrations and loadings of pollutants discharged into the River in stormwater and reducing the volumes and peak flows of stormwater discharges into the River. The stormwater retrofit projects shall be selected by OAG in consultation with DEC.

52. One million dollars from the Escrow Account will fund the Beczak Environmental Education Center, Inc. (Beczak), 35 Alexander Street, Yonkers, New York 10701, in order to develop and implement environmental education programs having a Bronx River component for young people in Yonkers.

53. Payments shall be made pursuant to the following schedule:

March 15, 2007:	Civil Penalty	\$500,000
	For Beczak	\$500,000
March 15, 2008:	Civil Penalty	\$1,500,000
	For Beczak	\$500,000
	For Stormwater Retrofits	\$1,000,000
March 15, 2009:	For Stormwater Retrofits	\$3,000,000
March 15, 2010:	For Stormwater Retrofits	\$2,000,000

Notwithstanding this schedule, in the event the Racing Corporation refinances its current bank financing for the VLT facility, any outstanding payments owed by it for a Civil Penalty or for Environmental Benefit Projects shall be paid by the Racing Corporation at the time of closing such refinancing.

54. William P. Harrington, Esq., as Escrow Agent, shall maintain the Escrow Account and disburse monies from it by check within 20 days of a written request by the State that he do

so and in accordance with the instructions set forth by the State in such a request. The Escrow Agent shall not take any fee from the Escrow Account for performing his services. Funds paid into the Escrow Account by the Racing Corporation and the interest income earned for that account shall be disbursed for the Environmental Benefit Projects described in paragraphs 51 and 52 above. Notwithstanding the foregoing, in the event that the State decides in the future that the Environmental Benefit Projects described in paragraphs 51 and 52 are infeasible, ineffective, impracticable, or less beneficial than alternative projects that would benefit the Bronx River or the public's safe use and enjoyment of the River, the State may issue a State Determination (as defined in paragraph 59 below) concerning that decision, and the Escrow Agent shall disburse funds from the Escrow Account to such other projects or to the State treasury as a civil penalty as specified in the State Determination.

55. The Escrow Agent shall have no duties or responsibilities except those set forth in this Assurance and shall incur no liability in acting upon any signature, notice, request, waiver, consent, receipt or other paper or document believed by the Escrow Agent to be genuine, and the Escrow Agent may assume that any person purporting to give it any notice on behalf of any party in accordance with the provisions hereof has been duly authorized to do so. The Escrow Agent shall be automatically released from all responsibility and liability under this Assurance upon the Escrow Agent's payment of all monies placed into the Escrow Fund in accordance with the provisions of this Assurance and submission of a written accounting to the parties of all deposits into and payments from the Escrow Fund. The Escrow Agent may be relieved and replaced with the written consent of both parties and the Escrow Agent may deliver the Escrow Fund in accordance with the order of any court of competent jurisdiction. The Escrow Agent may, at any

time, deliver the Escrow Fund to a court of competent jurisdiction, whether or not pursuant to an interpleader action, or apply to such court, upon notice to the parties, to obtain an order substituting an impartial party to hold the Escrow Fund and to terminate his duties as Escrow Agent.

**IV. ENFORCEMENT, STATE DETERMINATIONS,
DISPUTE RESOLUTION, FORCE MAJEURE, COSTS**

56. To ensure the Racing Corporation's prompt compliance with this Assurance and subject to provisions concerning dispute resolution described below, in the event the Racing Corporation fails to perform any obligation required under this Assurance, it will be liable for penalties to the State in the amounts set forth in paragraph 57 below for each day that elapses until the Racing Corporation's failure to perform the obligation is cured. A failure to perform an obligation required under this Assurance is defined to include a failure to make a timely submittal to the State (by failing to make a submittal to the State in accordance with any schedule set forth in this Assurance, in a submittal approved by the State, or in a State Determination), or a failure to take any action (or to refrain from taking any action) required by this Assurance or required by any submittal approved by the State or by a State Determination.

57. For each failure to perform an obligation, the Racing Corporation shall be liable for penalties to the State as follows:

<u>Length of Violation</u>	<u>Stipulated Penalty</u>
Days 1 through 30	\$200/day
Days 31 through 60	\$1,000/day
Days 61 and thereafter	\$2,000/day

58. Nothing herein may be construed to affect in any way the State's obtaining additional or alternative legal or equitable remedies relating to any violations of this Assurance.

59. The State may issue a written determination (State Determination): approving or disapproving any submittal; assessing stipulated penalties in accordance with paragraphs 56 and 57 above; seeking reimbursement for costs in accordance with paragraph 64 below; denying a request by the Racing Corporation for additional time to perform its obligations based on a claim of force majeure; or otherwise relating to the Remedial Program or Environmental Benefit Projects provided for in this Assurance. A State Determination is final and binding upon the Racing Corporation subject to its right to dispute such Determination under paragraphs 60 and 61 below.

60. The Racing Corporation may seek to dispute any State Determination by serving upon the State, and filing with New York State Supreme Court, Westchester County, Environmental Claims Part, in timely fashion, a petition or complaint to void, annul or modify such State Determination on the ground that the State Determination breaches the Assurance. To be timely, a petition/complaint must be served and filed within 30 days of service of the State Determination being challenged. If the Racing Corporation fails to timely serve and file such petition/complaint following a State Determination, such Determination shall be final and binding upon the Racing Corporation.

61. A State Determination will be deemed in breach of the Assurance only if such Determination is arbitrary, capricious, contrary to law, or inconsistent with the Assurance. The procedures and standards applicable to a proceeding under Article 78 of the CPLR shall apply to any petition/complaint by the Racing Corporation seeking dispute resolution. The Racing

Corporation shall have the burden of proof in any petition/complaint challenging a State Determination.

62. If any event arising from causes beyond the reasonable control and best efforts of the Racing Corporation or its agents, delays or prevents the performance of any of the Racing Corporation's obligations under this Assurance despite the Racing Corporation's best efforts and due diligence to fulfill the obligation (hereinafter, a Force Majeure Event), then any such obligations will be suspended for the duration of the Force Majeure Event; provided, however, that the Racing Corporation: (a) notifies the State of the Force Majeure Event in full compliance with paragraph 63 below, and (b) undertakes best efforts and due diligence to minimize the duration and impact of the Force Majeure Event.

63. Initial notification of the Force Majeure Event must be provided to the State orally as soon as possible (but by no later than 10 business days after the Racing Corporation or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur) by contacting the OAG's Environmental Protection Bureau at (518) 474-7178. Written notice shall be provided no later than 20 business days after the Racing Corporation or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur. Written notice shall be accompanied by all available documentation and shall contain the following: (a) a description of the circumstances constituting the Force Majeure Event; (b) the actions (including pertinent dates) that the Racing Corporation has taken and plans to take to minimize the delay, and (c) the date the Racing Corporation expects to complete the delayed obligation. The Racing Corporation's failure to comply with these notification requirements will deprive it of an extension of time to perform its obligations and foreclose a

defense based upon Force Majeure to a State Determination assessing penalties.

64. The Racing Corporation shall reimburse the State within 30 days of a State Determination seeking out-of-pocket costs paid by the State to outside contractors for inspection, surveying, sampling, laboratory analysis, and engineering review work to investigate and evaluate the Racing Corporation's compliance with this Assurance.

V. RELEASES AND RESERVATIONS OF RIGHTS

65. The Racing Corporation releases the State of New York and all its departments, agencies, employees, agents and contractors from all claims, cross-claims, and counterclaims arising from the facts, transactions, and violations of law in this Investigation. The Racing Corporation also withdraws with prejudice and releases the claims set forth in the Notices of Claim against the State of New York, the County of Westchester, and the City of Yonkers, verified September 5, 2006, and served by the Racing Corporation upon these government entities on or about September 12, 2006. However, the Racing Corporation reserves all rights and remedies against all other parties potentially responsible for the acts alleged in the aforesaid notices of claim.

66. The State releases the Racing Corporation, its Board of Directors, officers, employees, and agents from all claims found as violations of law in Section I.F. above for past civil penalties and for injunctive relief through the Effective Date of this Assurance arising from violations known by the State as of that date and resulting from the Racing Corporation's: (a) past discharges of human and horse sewage, hazardous substances and hazardous wastes, and other pollutants from the Raceway into the Bronx River through Yonkers Storm Sewers and discharges of muddy and sediment-contaminated stormwater into the brook at the southeastern

portion of the Raceway, (b) past violations of the condition of its racetrack licenses that it be in “compliance with the laws of the State of New York” to the extent that violations of such condition relate to the Raceway’s discharges of pollutants into the Bronx River, and (c) submission to the Board of racetrack license applications for 2004, 2005, and 2006, to the extent such applications relate to CAFO permitting or the OAG investigation of the Racing Corporation formally commenced by service upon it of subpoenas dated April 7, 2006. To the extent consistent with Executive Law § 63 and the dispute resolution provisions of this Assurance above, the State and the Racing Corporation reserve their respective rights to commence a judicial action to enforce the provisions of the Assurance. Any such action shall be brought in the Environmental Claims Part of New York State Supreme Court, Westchester County.

67. Notwithstanding anything in paragraph 66 above to the contrary, the State reserves all its rights and does not release any claims, through the Effective Date against the Racing Corporation, arising: (a) from discharges of pollutants, known by the Racing Corporation but not disclosed to OAG, from the Raceway into waters of the State of New York, or (b) under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., or ECL Article 27, title 13, or New York common law for cost recovery and natural resource damages relating to the Bronx River or any other waters of the State of New York.

VI. MISCELLANEOUS

68. The Effective date of this Assurance is October 6, 2006.

69. Neither the terms of this Assurance nor its execution shall be construed in any way as an admission of liability or wrongdoing of fact or law on the part of the Racing Corporation, its officers, directors, shareholders or employees, as to any of the matters or violations found by OAG in this Assurance. Nevertheless, the provisions of Executive Law § 63 shall control in determining the legal effect of this Assurance in any future proceeding or action commenced by the Attorney General relating to the matters resolved herein. Nothing in this Assurance may be deemed to undermine in any way its status as a settlement agreement as contemplated by Rule 408 of the Federal Rules of Civil Procedure or CPLR 4547 in any legal action or proceeding commenced by individuals or entities not party to the Assurance.

70. The Racing Corporation shall allow the State, its employees and agents reasonable access to the Raceway site to monitor the Racing Corporation's compliance with this Assurance. The Racing Corporation shall provide to the State within a reasonable time all information and documentation relating to the Remedial Program upon request by the State.

71. All written communications, notices, reports, or other documents from the Racing Corporation to the State shall be served upon Philip M. Bein, Assistant Attorney General, Office of the Attorney General, Environmental Protection Bureau, The Capitol, Albany, New York 12224, and upon Scott Crisafulli, Chief of the Bureau of Enforcement, Compliance, and Assurance, DEC, 625 Broadway – 14th floor, Albany, New York 12233. All written communications, notices, reports, or other documents from the State to the Racing Corporation or to the Escrow Agent shall be served upon William P. Harrington, Esq., Bleakley Platt &

Schmidt, LLP, One North Lexington Avenue, White Plains, New York 10601. Service may be made by facsimile transmission or by e-mail.

72. The Racing Corporation shall indemnify and hold harmless the State (including its departments, agencies, employees, agents and contractors) for all claims, suits, actions, damages and costs of every name and description arising from conduct by the Racing Corporation taken in an effort to comply with its obligations under this Assurance.

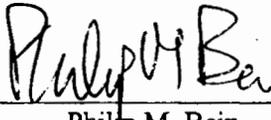
73. This Assurance may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Facsimile or e-mail signatures by the parties to this Assurance shall be binding upon the parties hereto.

74. The agreement of William P. Harrington, Esq., to act as Escrow Agent is an accommodation to the parties and shall not preclude either Mr. Harrington, or Bleakley, Platt & Schmidt, LLP, from representing the Racing Corporation, its officers, directors, employees or agents in any negotiations, proceeding or litigation concerning or arising from the Assurance or the factual or legal findings upon which it is based.

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For the Office of the Attorney General:

ELIOT SPITZER
Attorney General of the State of New York

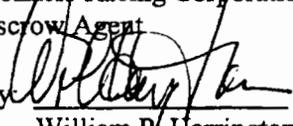
By:  Date: 10/6/06
Philip M. Bein
Assistant Attorney General
New York State Attorney General's Office
The Capitol
Albany, NY 12224
(518) 474-7178

Of Counsel:

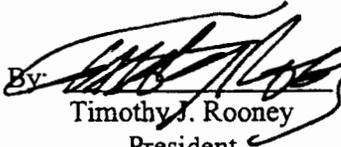
J. Jared Snyder
Peter H. Lehner
Assistant Attorneys General

For Respondent Yonkers Racing Corporation:

BLEAKLEY PLATT & SCHMIDT, LLP
Attorneys for Defendant
Yonkers Racing Corporation, and
Escrow Agent

By:  Date: 10/6/06
William P. Harrington
Member of the Firm
Bleakley Platt & Schmidt, LLP
One North Lexington Avenue
White Plains, New York 10601
(914) 949-2700

Yonkers Racing Corporation
810 Yonkers Avenue
Yonkers, New York 10704

By:  Date: 10/6/06
Timothy J. Rooney
President