

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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THE STATE OF NEW YORK,

Plaintiff,

-against-

THE CITY OF JOHNSTOWN, et al.,

Defendants.

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SECOND INTERIM CONSENT  
ORDER

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Index No. CV-87-489  
Judge Cholakis

U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

DEC 19 1994

AT O'CLOCK  
GEORGE A. RAY, Clerk  
ALBANY

PLAINTIFF AND THE CITY OF JOHNSTOWN AGREE AS FOLLOWS:

RECITATIONS

R-1. This is an action brought by the State of New York ("State") alleging environmental harm arising out of the disposal of hazardous substances at, and their subsequent migration and threat of migration from, a landfill owned and formerly operated by the City of Johnstown in the Town of Johnstown, Fulton County, New York (the "Site"). Relying on the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 et seq., as amended, and New York's common law of public nuisance and restitution, the State seeks judgment requiring the defendants to assess, abate and remediate the pollution at and emanating from the Site; to reimburse plaintiff for its costs in responding to such pollution; and, to compensate for damages to the natural resources of the State of New York.

U.S. DISTRICT COURT  
N.D. OF N.Y.  
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GEORGE A. RAY, Clerk  
ALBANY

R-2. The Site is registered as an inactive hazardous waste disposal site, as that term is defined in New York Environmental Conservation Law ("ECL") § 27-1301(2). The State has determined, pursuant to ECL § 27-1305, that the Site constitutes a significant threat to the environment.

R-3. In June 1986, the U.S. Environmental Protection Agency ("EPA") placed the Site on the National Priorities List pursuant to 42 USC § 9605, thereby designating the site as one of the priorities among the nation's known hazardous waste sites.

R-4. The State and defendant City of Johnstown ("the Municipality") entered into an Interim Consent Order ("ICO") which was approved by Judge Con. G. Cholakis on October 3, 1988. Under the ICO, the Municipality committed to develop and implement a Remedial Investigation/Feasibility Study ("RI/FS"), designed to gather sufficient data to analyze the feasibility of remedial alternatives for the Site.

R-5. The Municipality further committed in the ICO to participate in the development and implementation of a remedial program for the Site after the RI/FS had been performed.

R-6. The Municipality agreed to the ICO in order to be eligible for financial assistance under ECL § 27-1313(5)(g) and implementing regulations towards development and implementation of the RI/FS.

R-7. In March 1989, the New York State Department of Environmental Conservation ("DEC") and the Municipality entered into a State Assistance Contract pursuant to ECL Article 52,

whereby the Municipality committed to comply with the requirements for State assistance to municipalities established under ECL § 27-1313(5)(g) in conducting the RI/FS. In exchange, DEC agreed to reimburse the Municipality on a periodic basis for 75% of its eligible costs (as defined in the Contract) in conducting the RI/FS.

R-8. By letter dated November 13, 1992, DEC advised the Municipality that both DEC and the New York State Department of Health ("DOH") had determined that the Remedial Investigation and Feasibility Study reports submitted by the Municipality were acceptable and were being used by the State and EPA to develop a proposed remedial action plan ("PRAP") for public review and comment.

R-9. EPA and the State issued a PRAP in January 1993 which described the remedial alternatives considered for the Site, identified the preferred remedial alternative, and provided the rationale for this preference. The PRAP solicited public comments pertaining to all of the remedial alternatives evaluated, as well as the preferred alternative.

R-10. After holding a public hearing on the PRAP in Johnstown in February 1993 and receiving other comments on the PRAP, EPA and the State issued a Record of Decision ("ROD") for the Site on March 31, 1993. The remedial program set forth in the ROD calls for the following:

- Excavation of the LaGrange gravel pit sediments and placing the excavated materials on the existing landfill.
- Construction of a multi-layer cap over the landfill mound and excavated sediments in accordance with 6 NYCRR Part 360 to isolate the wastes from rainfall and human contact.
- Extension of city water to individual users to replace existing private potable supply wells potentially impacted by the landfill.
- Erection of a security fence around the landfill mound.
- Institution of land-use restrictions.
- Environmental monitoring to determine the effectiveness of the remedial program which will include long-term monitoring of ground water, surface water, and sediments.

R-11. Moreover, in the event that ground water and surface water quality is not restored to acceptable levels through natural attenuation as a result of reduced leachate generation, the ROD states that ground water remediation will be re-evaluated and may be implemented. If ground water remediation is implemented in the future, it would include the extraction of ground water using wells and submersible pumps with on-site treatment to remove inorganic and volatile organic contaminants,

with discharge of the treated water to the aquifer or to a stream.

R-12. The decision of the Municipality to enter into this Order and any action or submission under or by reason of the terms and conditions of this Order shall not be construed in any way as an admission of liability or responsibility for the conditions present at or in the area of the Site.

R-13. The Municipality agrees to this Order as a precondition to eligibility for additional financial assistance under ECL § 27-1313(5)(g), ECL Article 52 and implementing regulations, in order to carry out its remedial obligations under this Order.

R-14. During many of the years in which the Municipality operated its landfill, it had comprehensive general liability insurance in varying amounts through various companies. When the State instituted this action alleging environmental harm arising out of the operation of that landfill, Johnstown initiated suits against all of the companies which afforded CGL coverage to it during the applicable time periods, some in federal court and some in state court. During the life of that litigation, many of the insurance carriers, particularly the companies that had written coverage in the early years when the dollar amounts of coverage were relatively small and the pollution exclusion clause included in the policies was very favorable to the insured, chose to settle with the Municipality rather than litigate the issue. Settlements totaling approximately \$300,000 were negotiated and

effectuated by the Municipality's counsel. However, other companies which wrote policies in later years providing larger amounts of coverage and at a time when a pollution exclusion clause more favorable to the insurer was involved, chose to continue the litigation and ultimately prevailed. All insurance-related litigation is now at an end.

NOW, having considered this matter and being duly advised,  
IT IS ORDERED THAT:

**Remedial Design Contents**

1. Within 30 days after the effective date of this order, the Municipality shall submit to DEC a detailed work plan describing the scope, estimated cost and schedule of work to be undertaken during the remedial design and construction of the remedial design.

2. Within 180 days after acceptance of the work plan, the Municipality shall submit to DEC a remedial design to implement the remedial alternative for the Site selected in the ROD (the "Remedial Design"). The Remedial Design shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Remedial Design was prepared in accordance with this Order.

3. The Remedial Design shall include the following:

A. A detailed description of the remedial objectives and the means by which each element of the selected remedial alternative will be implemented to achieve those objectives, including, but not limited to:

1. the construction and operation of any structures;
2. the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;
3. the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;
4. physical security and posting of the Site;
5. health and safety of persons living and/or working at or in the vicinity of the Site;
6. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Design;
7. monitoring which integrates needs which are present on-Site and off-Site during implementation of the selected remedial alternative; and
8. the use of alternative grading materials.

B. "Biddable Quality" documents for the Remedial Design including, but not limited to, documents and specifications prepared, signed, and sealed by a professional

engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

C. A time schedule to implement the Remedial Design;

D. The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including a schedule for periodic sampling of groundwater monitoring wells on-Site and off-Site;

E. A citizen participation plan which incorporates appropriate activities outlined in DEC's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto, and 6 NYCRR Part 375.

4. The Municipality will maintain the Site in accordance with the provisions of 6 NYCRR Part 360 to the extent the DEC determines practicable.

5. The Municipality shall establish a segregated account for the receipt of all tipping fees generated at the Site. The municipality shall not withdraw from this account except as is necessary and required to fund remedial investigation, remedial design and remedial action plans at or around the Site which are approved by the State of New York.

#### Remedial Design Construction and Reporting

6. Within 60 days of the DEC's approval of the Remedial Design, the Municipality shall prepare a health and safety plan for the protection of persons at and in the vicinity of the Site



during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional.

7. Within 120 days of DEC's approval of the Remedial Design, the Municipality shall commence construction of the Remedial Design.

8. The Municipality shall implement the Remedial Design in accordance with the DEC-approved Remedial Design.

9. During implementation of all construction activities identified in the Remedial Design, the Municipality shall have on-site a full-time representative who is qualified to supervise the work done.

10. Within 45 days after completion of the construction activities identified in the Remedial Design, the Municipality shall submit to DEC a detailed post-remedial operation and maintenance plan ("O & M Plan"); "as-built" drawings and a final engineering report (each including all changes made to the Remedial Design during construction); a contingency plan to be implemented if any element of the Remedial Design fails to achieve any of its objectives or otherwise fails to protect human health or the environment; and a certification by a professional engineer that the Remedial Design was implemented and all construction activities were completed in accordance with the DEC-approved Remedial Design. The O & M Plan, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

11. Upon DEC's approval of the O & M Plan, the Municipality shall implement the O & M Plan in accordance with the requirements of the DEC-approved O & M Plan.

12. After receipt of the "as-built" drawings, final engineering report, and certification, DEC shall notify the Municipality in writing whether the DEC is satisfied that all construction activities have been completed in compliance with the approved Remedial Design.

13. If DEC concludes that any element of the Remedial Program fails to achieve its objectives or otherwise fails to protect human health or the environment, the Municipality shall take whatever action DEC determines necessary to achieve those objectives or to ensure that the Remedial Program otherwise protects human health and the environment.

#### Progress Reports

14. The Municipality shall submit to the parties identified in paragraph 23 in the numbers specified therein copies of written monthly progress reports that: (i) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (ii) include a summary of all results of sampling and tests and all other data received or generated by the Municipality or the Municipality's contractors or agents in the previous month whether conducted pursuant to this Order or conducted independently by the Municipality; (iii) identify all work plans, reports, and other deliverables required by this

Order which were completed and submitted during the previous month; (iv) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next month and provide other information relating to the progress at the Site; (v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Municipality's obligations under the Order, and description of efforts made to mitigate those delays or anticipated delays; (vi) include any modifications to any work plans that the Municipality has proposed to DEC or that have been approved by DEC; and (vii) describe all activities undertaken in support of the Citizen Participation Plan during the previous month and those to be undertaken in the next month. The Municipality shall submit these progress reports to DEC by the tenth day of every month following the effective date of this Order.

15. The Municipality also shall allow DEC to attend, and shall provide DEC at least seven days advance notice of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

### Review of Submittals

16. (a) DEC shall review each of the submittals the Municipality makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. DEC shall notify the Municipality in writing of its approval or disapproval of the submittal, except for the health and safety plan. All DEC-approved submittals shall be incorporated into and become an enforceable part of this Order.

(b) If DEC disapproves a submittal, it shall so notify the Municipality in writing and shall specify the reasons for its disapproval. Within 14 days after receiving written notice that the Municipality's submittal has been disapproved, the Municipality shall make a revised submittal to DEC that addresses and resolves all of DEC's stated reasons for disapproving the first submittal.

(c) After receipt of the revised submittal, DEC shall notify the Municipality in writing of its approval or disapproval. If DEC disapproves the revised submittal, the Municipality shall be in violation of this Order. If DEC approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

17. DEC may require the Municipality to modify and/or amplify and expand a submittal if DEC determines, as a result of reviewing data generated by an activity required under this Order

or as a result of reviewing any other data or facts, that further work is necessary.

### Violations

18. The Municipality's failure to comply with any term of this Order constitutes a violation of this Order.

19. The Municipality shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of war, riot, or an unforeseeable disaster arising exclusively from natural causes which the exercise of ordinary human prudence could not have prevented. The Municipality shall, within five days of when it obtains knowledge of any such condition, notify DEC in writing. The Municipality shall include in such notice the measures taken and to be taken by the Municipality to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. The Municipality shall have the burden of proving that an event is a defense to compliance with this Order.

### Entry Upon Site

20. The Municipality hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Municipality by any duly designated employee, consultant, contractor, or agent of DEC or any State agency for

purposes of inspection, sampling, and testing and to ensure the Municipality's compliance with this Order. During implementation of the Remedial Design, the Municipality shall provide DEC with suitable office space at the Site, including access to a telephone, and shall permit DEC full access to all records and job meetings.

**New York State's Reservation of Rights**

21. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of Plaintiff's rights including, but not limited to nor exemplified by, the following:

(a) the State's right to bring any action or proceeding against anyone other than the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors, and assigns;

(b) the State's right to enforce this Order against the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors, and assigns in the event the Municipality fails to satisfy any of the terms of this Order;

(c) the State's right to bring any action or proceeding against the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous

substances or constituents at or from the Site or areas in the vicinity of the Site;

(d) the State's right to bring any criminal action against the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors, and assigns;

(e) the State's right to require the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors and assigns to develop and implement IRMs for the Site; and

(f) the State's right to gather information and enter and inspect property and premises.

22. Nothing contained in this Order shall be construed to prohibit the DEC Commissioner or his duly authorized representative from exercising any summary abatement powers.

### Indemnification

23. The Municipality shall indemnify and hold DEC, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by the Municipality, and/or the Municipality's directors, officers, employees, servants, agents, successors and assigns.

**Public Notice**

24. Within 30 days after the effective date of this Order, the Municipality shall file a Declaration of Covenants and Restrictions with the Fulton County Clerk to give all parties who may acquire any interest in the Site notice of this Order.

25. If the Municipality proposes to convey the whole or any part of the Municipality's ownership interest in the Site, the Municipality shall, not fewer than 60 days before the date of conveyance, notify the State in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the State, of the applicability of this Order.

**Communications**

26. All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

(a) Communication from the Municipality shall be sent to:

1. Robert Cozy, Chief, Municipal Projects Section,  
Division of Hazardous Waste Remediation,  
New York State Department of Environmental  
Conservation, 50 Wolf Road, Albany, New York  
12233-7010



2. Director, Bureau of Environmental Exposure Investigation, New York State Department of Health, 2 University Place, Albany, New York 12203
  3. Regional Director, New York State Department of Environmental Conservation, Route 86, P.O. Box 296, Ray Brook, NY 12977
  4. Michael J. Lesser, Esq., Division of Environmental Enforcement, New York State Department of Environmental Conservation, Central Field Unit, 1150 North Westcott Road, Schenectady, NY 12306
  5. New York State Department of Law, Environmental Protection Bureau, The Capitol, Albany, New York 12224, Attn: David A. Munro
- B. Copies of work plans and reports shall be submitted

as follows:

1. Four copies (one unbound) to Robert Cozy, Chief, Municipal Projects Section, Division of Hazardous Waste Remediation, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233-7010.
2. Two copies to the Director, Bureau of Environmental Exposure Investigation, New York State Department of Health, 2 University Place, Albany, New York 12203

3. One copy to Regional Director, New York State Department of Environmental Conservation, Route 86, P.O. Box 296, Ray Brook, NY 12977.
4. One copy to Michael J. Lesser, Esq., Division of Environmental Enforcement, New York State Department of Environmental Conservation, Central Field Unit, 1150 North Westcott Road, Schenectady, NY 12306
5. One copy to New York State Department of Law, Environmental Protection Bureau, The Capitol, Albany, New York 12224, Attn: David A. Munro.

27. Within 30 days of DEC's approval of any report submitted pursuant to this Order, the Municipality shall submit to Robert Cozzy, Chief, Municipal Projects Section, Division of Hazardous Waste Remediation, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233-7010, a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format.

28. Communication to be made from the State to the Municipality shall be sent to:

Charles R. Ackerbauer  
City Engineer  
33-41 East Main Street  
Johnstown, New York 12095-2696

29. The State and the Municipality reserve the right to designate additional or different addressees for communication or written notice to the other.

**Miscellaneous**

30. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous substances at the Site.

31. The Municipality shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to DEC to perform the technical, engineering, and analytical obligations required by this Order. The experience, capabilities, and qualifications of the firms or individuals selected by the Municipality shall be submitted to DEC within 30 days after the effective date of this Order. DEC's approval of these firms or individuals shall be obtained before the start of any activities for which the Municipality and such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by the Municipality shall rest solely with the Municipality.

32. The DEC shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the Municipality, and DEC also shall have the right to take its own samples. The Municipality shall make available to the DEC the results of all sampling and/or tests or other data

generated by the Municipality with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

33. The Municipality's consultant shall be equally accessible to the Plaintiff and the Municipality. All of the consultant's work product associated with the work plan, including preliminary drafts, notes, opinions, field logs and notes, written rationales, raw data and chemical analysis, shall be available to the Plaintiff and the Municipality. The parties shall give prompt notice to each other of any request for disclosure of any product generated by the consultant during implementation of the Approved Work Plan. No signatory to this Order shall unreasonably interfere with the consultant's completion of the Approved Work Plan.

34. The Municipality shall notify DEC at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

35. The Municipality shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform the Municipality's obligations under this Order.

36. The Municipality and the Municipality's officers, directors, agents, servants, employees, successors, and assigns shall be bound by this Order. Any change in ownership or corporate status of the Municipality including, but not limited to, any transfer of assets or real or personal property shall in

no way alter the Municipality's responsibilities under this Order. The Municipality's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of the Municipality.

37. The Municipality shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing the Municipality with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. The Municipality or the Municipality's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. The Municipality shall nonetheless be responsible for ensuring that the Municipality's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

38. All references to "professional engineer" in this Order are to an individual registered as a professional engineer in accordance with Article 145 of the New York Plaintiff Education Law.

39. All references to "days" in this Order are to calendar days unless otherwise specified.

40. The terms of this Order shall constitute the complete and entire Order between the Municipality and the State concerning the Site. No term, condition, understanding, or

agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the State to be bound. No informal advice, guidance, suggestion, or comment by the State regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving the Municipality of the Municipality's obligation to obtain such formal approvals as may be required by this Order.

41. If the Municipality desires that any provision of this Order be changed, the Municipality shall make timely written application, signed by the Municipality, to the State setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Assistant Attorney General David A. Munro, Michael Lesser, Esq., Division of Environmental Enforcement, New York State Department of Environmental Conservation, and to Robert Cozzy, Chief, Municipal Projects Section, Division of Hazardous Waste Remediation, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233-7010, 50 Wolf Road, Albany, NY 12233.

42. The effective date of this Order shall be the date it is entered by the Clerk of the Court.

G. OLIVER KOPPELL  
Attorney General of the State  
of New York  
Attorney for Plaintiff

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DAVID A. MUNRO  
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(518) 474-8481  
Bar Roll No. 102968

Langdon Marsh  
LANGDON MARSH  
Commissioner  
New York State Department of  
Environmental Conservation

Robert J. Valeriani  
JOHNSTOWN MAYOR, ET AL.

SO ORDERED.

Con. J. Cholakis  
U.S.D.J.

Date: December 19, 1994  
Albany, New York

johnstow.n\or826joh.sto