

# DRAFT

## STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations  
of Environmental Conservation Law ("ECL")  
Articles 27, 17, and 25  
and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the  
State of New York ("6 NYCRR") Parts 360,  
751, and 661 by:

ORDER

ON

CONSENT

THE CITY OF NEW YORK

(Department of Sanitation  
125 Worth Street  
New York, NY 10013)

DEC CASE #  
D2-9001-89-03  
(Fresh Kills)

Respondent.

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### **WHEREAS:**

1. Respondent, the City of New York ("Respondent," or the "City"), owns the Fresh Kills Landfill (the "Landfill") on Staten Island, New York, which is closed to further receipt of solid waste. The City and the New York State Department of Environmental Conservation ("DEC," or the "Department") executed the original Fresh Kills Order on April 24, 1990 (the "1990 Order"). The 1990 Order was later modified to reflect new and relevant information about the Landfill (much of it produced by the City through investigations required under the 1990 Order), on September 21, 1990, April 22, 1992, November 18, 1993, July 15, 1994, July 26, 1995, October 20, 1998, April 27, 2000, and January 17, 2002.

### **Closure of Section 6/7**

2. The 1990 Order, as modified in April 2000 by Modification #7, provided a schedule of activities (Compliance Schedule A-15), which the Respondent has since successfully implemented, to advance the closure and post-closure care of the Landfill. Appendix A-15, Subject 1 required the City to initiate final cover construction of Section 6/7 by July 1, 2000 (Subject 1 Milestone Date). In advance of the requirement of Subject 1, the City initiated final cover construction of Section 6/7 on May 15, 2000.

3. Appendix A-15 activities included Respondent's preparation of "Final Cover Design Reports for Sections 1/9 and 6/7," which reports were to contain the detail of the remaining construction work for the closure of each landfill unit, including "a closure construction schedule." In addition, according to Modification # 7 the City was required to submit a "Draft Section 6/7 Final Cover Design Report" by September 1, 2000 (Subject 2 Milestone). The City timely submitted the Draft Section 6/7 Final Cover Design Report on September 1, 2000. Furthermore, a "Final Acceptable Section 6/7 Final Cover Design Report" was to be submitted to DEC by the Respondent within 90 days after the City's receipt of the Department's comments on the September 1, 2000 draft submittal (Subject 4 Milestone). The City timely submitted the "Final Acceptable Section 6/7 Final Cover Design Report" in January 2001.
4. The Respondent, by the City Department of Sanitation ("DSNY"), submitted modified engineering drawings, specifications and bid documents to DEC in 2006, in regard to the "Final Acceptable Section 6/7 Final Cover Design Report." The bid documents contained a date for the conclusion of closure construction at Section 6/7, which was November 30, 2010.
5. In May 2008, the Respondent, by the City of New York Department of Parks and Recreation ("DPR") as the Lead Agency for the City Environmental Quality Review, issued the notice of completion for the Draft Generic Environmental Impact Statement ("DGEIS") for Fresh Kills Park. Fresh Kills Park is a 30-year project to transform the Fresh Kills Landfill into a world class park. This would require, among other things, modification of the Fresh Kills Landfill end use plan to accommodate active, passive, and waterfront recreation, an extensive habitat restoration program and public access to and through the site.
6. Among the projects analyzed in the Fresh Kills Park DGEIS were two traverse roads through Section 6/7 of the Landfill. The Reasonable Worst Case Scenario analyzed in the DGEIS for construction of the roads presumed that the roads would be constructed after the closure construction at Section 6/7.
7. After issuance of the DGEIS, the City proposed that the potential impacts of removing final cover could be largely avoided, and the project facilitated, if the roadbed construction was integrated into the closure construction at Section 6/7. The City had determined that altering the approved final cover design would result in fewer and smaller impacts than first closing Section 6/7 in accordance with the approved design and subsequently removing the final cover in order to construct the road base.
8. As a result, in 2008 the Respondent asked for DEC authorization to alter its approved plan for the placement of final cover at Section 6/7, to include the construction of road base for two roads which would traverse Section 6/7 from the west to the east.
9. The Department determined that the road bed construction work proposed by the City could not be done before Respondent's production of a Supplemental Environmental Impact Statement ("SEIS"), which more specifically analyzed the potential

environmental impacts of the road construction than did the City's Generic Environmental Impact Statement ("GEIS") for the Fresh Kills Park.

10. As a result of the City's request to initiate road bed construction at Section 6/7 and the Department's determination that such construction requires the prior production of a SEIS, Respondent cannot complete placement of final cover at Section 6/7 by November 30, 2010. DPR initiated the SEIS process by producing a draft scoping document on February 24, 2009.
11. Therefore, Respondent has asked to extend the completion date for the placement of final cover at Section 6/7 until December 31, 2011.
12. In accordance with Paragraph XXVI of the 1990 Order, which was added by Modification #1 on September 21, 1990, public notice of this modification was published in the Environmental Notice Bulletin on September 23, 2009, with a comment deadline of October 23, 2009.
13. The Department has concluded that Respondent's request may be granted, provided that its construction activities comply with requirements of this modified Order, as well as the Environmental Conservation Law ("ECL") and DEC's Regulations.

#### **Closure of Section 1/9**

14. As stated in Paragraph 3 above, Compliance Schedule Appendix A-15 activities included Respondent's preparation of "Final Cover Design Reports for Sections 1/9 and 6/7," which reports were to contain "a closure construction schedule."
15. The City was required to submit by May 1, 2001, a "Draft Section 1/9 Final Cover Design Report" (Subject 5 Milestone) to provide the detail of the remaining construction work for the closure of the landfill unit. The City timely submitted the "Draft Section 1/9 Final Cover Design Report," which was received by DEC on April 30, 2001.
16. The original due date for the "Final Acceptable Section 1/9 Final Cover Design Report" (Subject 6 Milestone) was in November 2001, 90 days after the City's receipt of DEC's comments on the April 30, 2001 submittal.
17. A component of the closure design presented in the Draft Section 1/9 Final Cover Design Report included a consolidation of the landfill footprint, which would remove and relocate more than three million cubic yards of waste from approximately 60 acres of the landfill unit, and use the excavated waste to complete the minimum closure grades as required under the Part 360 regulations.
18. On September 11, 2001, a terrorist attack destroyed the World Trade Center in New York City. Modification # 8 of the 1990 Order, issued as an emergency modification, provided that materials from the site of the World Trade Center could be accepted and possibly

permanently placed at the Landfill, beyond its mandated January 1, 2002 closing date. Modification # 8 further provided that "Respondent may request an extension of a Milestone Date for Appendix A-15 Subjects number 9 through 14 by:

- i. Requesting, in writing, the extension at least two (2) weeks before the applicable Milestone Date;
- ii. Communicating the request to the Regional Solid Engineer; and,
- iii. Stating the reason and basis for the extension.

The Regional Solid Materials Engineer may extend the Milestone Dates for the noted subjects up to two months upon his/her discretion based upon a reasonable showing by the Respondent, and such extension shall not be unreasonably withheld. The extended date shall become the new Milestone Date for the specific Subject. Modifications beyond two months of the noted Subjects are governed by the provisions of Paragraph XXIV of the Order."

19. Following implementation of the World Trade Center investigation and recovery efforts at the Fresh Kills Landfill, the Respondent notified the Department on October 1, 2001 that the magnitude of the operation would require significant changes to the final grading plan for Section 1/9, and would thereby require additional modification to the "Section 1/9 Final Cover Design Report." In order to assess these impacts and incorporate the necessary changes, the Respondent requested a two month extension of time, pursuant to the extension provision in Modification # 8, for the preparation and submittal of the "Final Acceptable Section 1/9 Final Cover Design Report." The Regional Solid and Hazardous Materials Engineer granted the Respondent's extension request and the Respondent timely submitted the "Final Acceptable Section 1/9 Final Cover Design Report," which was received by DEC on January 7, 2002.
20. In October 2002, the Respondent proceeded to solicit bids from contractors to initiate the footprint consolidation construction activities for the closure of Section 1/9. However, following an outcry of public objections that this work would bury the World Trade Center materials under and adjacent to millions of cubic yards of garbage, the Respondent cancelled the bid solicitation, and proposed to develop an alternate closure plan. After consultations with DEC, the Respondent submitted an alternate Section 1/9 Final Cover Design Report to the Department on September 23, 2004. On November 15, 2006, the Department approved the alternate Section 1/9 Final Cover Design Report.
21. Also pursuant to the extension procedure provided in Modification #8, on January 11, 2002 DSNY requested a two month extension of the February 1, 2002 date for the initiation of final cover construction at Section 1/9 (Appendix A-15, Subject 10 Milestone Date).
22. DSNY timely initiated construction of final cover at Section 1/9 in mid-March 2002. A total of approximately 1.5 million tons of material from the World Trade Center was delivered to the Landfill through mid-2002, and, after examination, the majority of it was placed in Section 1/9 of the Landfill, generally following the sequence of construction for

final cover sub-base grading set forth in the “Draft Section 1/9 Final Cover Design Report.”

23. In August, 2005 an action was commenced in United States District Court, Southern District of New York, captioned *World Trade Center Families for Proper Burial, Inc., et al. v. The City of New York, et al.* (05 cv 7243). The WTC Families group and other individually named plaintiffs sought declaratory and injunctive relief relating to the placement of the WTC material placed in Section 1/9, and specifically sought to enjoin the New York City Department of Sanitation (“DSNY”) from proceeding further with the closure and redevelopment plans for Fresh Kills. Additionally, the plaintiffs sought to compel the City to excavate, resift and relocate the WTC material. In June, 2006, the plaintiffs amended their complaint to allege that the WTC material was not properly searched at Fresh Kills and that human remains of WTC victims were left interspersed among the WTC material. In October, 2006 the City moved to dismiss plaintiffs' amended complaint. The District Court granted the City's motion on July 7, 2008. Plaintiffs have appealed the District Court's decision to the Second Circuit, and an oral argument date is pending. Closure work at Section 1/9 has been limited pending the resolution of this litigation. In addition, WTC material retrieved from locations in lower Manhattan since the commencement of the WTC Families lawsuit is being stored at Fresh Kills. Placement of this material in Sections 1/9 or elsewhere is being deferred pending resolution of the lawsuit.
24. As a result the City has requested the extension of the completion date for the placement of final cover at Section 1/9 of the Landfill until December 31, 2018, contingent upon the following:
  - a. The WTC Families litigation is timely resolved;
  - b. The outcome of the litigation will not necessitate major design changes;
  - c. No major design changes will be required by changes in NYSDEC's regulations or changes in permit requirements;
  - d. Completion of final cover is dependent on several permit actions, to wit:
    - i. As presented in the Section 1/9 Final Cover Design Report, stormwater drainage on the western side slopes of the landfill section will require construction of several stormwater outfalls into the Arthur Kills;
    - ii. These outfalls will require modification to the State Pollutant Discharge Elimination System (“SPDES”) permit for the Fresh Kills Landfill leachate treatment plant and stormwater basins as well as a Tidal Wetlands permit;
    - iii. In addition, Part 360 and Title V permits for the Section 1/9 Landfill Gas Processing Plant will need to be modified.
- A The Department shall endeavor to respond concerning the administrative completeness or incompleteness of any permit application submitted by Respondent within 60 days of receipt of each such submission.

- B The Department shall endeavor to complete its review of any administratively complete permit application, issue a draft permit, and determine whether or not a public hearing shall be held within 60 days of the issuance of the notice of complete application.
- C The Department shall endeavor to issue a final permit within 90 days of the completion of the permit application, unless the Department decides that a public hearing should be held. In addition, for Title V facility permits the US Environmental Protection Agency (“EPA”) must be provided 45 additional days to review the proposed final permit.

To the extent that:

- i the Department’s response to any permit application does not provide a description of all deficiencies and a listing of all areas of incompleteness of such permit application within such 60 day period, or
- ii the Department does not complete its review of an administratively complete permit application, issue a draft permit and determine whether to hold a public hearing within 60 days of the issuance of the notice of complete application, or
- iii the Department fails to issue a final permit within 90 days of the completion of the permit application,

the Department shall favorably consider and not unreasonably withhold approval of request(s) for extension(s) of the date for complete placement of final cover at Section 1/9; provided that no such extension shall be required to be granted if the delay is due to Respondent’s conduct in not meeting its obligations under this Order.

- 25. In accordance with Paragraph XXVI of the 1990 Order, which was added by Modification #1 on September 21, 1990, public notice of this modification was published in the Environmental Notice Bulletin on September 23, 2009, with a comment deadline of October 23, 2009.
- 26. The Department has concluded that Respondent’s request may be granted, provided that site conditions and construction activities comply with requirements of this modified Order, as well as the Environmental Conservation Law (“ECL”) and DEC’s Regulations.

**NOW, THEREFORE, IT IS ORDERED THAT:**

A. The following revised provisions are hereby incorporated into the April 24, 1990 Consent Order, as previously revised on September 21, 1990, April 22, 1992, November 18, 1993, July 15, 1994, July 26, 1995, October 20, 1998, April 27, 2000 and January 17, 2002:

- 1. Appendix A-15 of Modification # 7 of the Order is amended such that the “closure construction schedule” for the complete placement of final cover at Section 6/7 provides that such work must be accomplished no later than December 31, 2011.

2. The City must maintain compliance with the Landfill's DEC Air, Solid Waste and Water Permits during any construction of road beds at Section 6/7. In addition, the City must remain in compliance with its approved closure plans and corrective measures. Furthermore, the City must comply with any mitigation measures that are required in the SEIS to mitigate significant environmental impacts from such road bed construction, including the potential escape of methane and other gases through the uncapped areas, the potential additional leachate build-up in these areas, and the increased potential for erosion.
3. The City must conclude the SEIS process with the release of a Statement of Findings by October 30, 2009, except Respondent may request extension(s) of the October 30, 2009 date by:
  - i. Requesting, in writing, the extension by no later than October 16, 2009;
  - ii. Communicating the request to the Regional Director; and,
  - iii. Stating the reason and basis for the extension.

The Regional Director may upon her discretion extend the October 30, 2009 date for up to two months (to no later than December 31, 2009). The Regional Director shall, based upon a reasonable showing by Respondent, favorably consider and not unreasonably withhold extension(s) of the October 30, 2009 date.

4. Appendix A-15 of Modification #7 of the Order, is amended such that the "closure construction schedule" for the complete placement of final cover at Section 1/9 provides that such work must be accomplished no later than December 31, 2018 with the contingencies and provisions set forth in paragraph 24 of this Modification #9.
5. This modification shall be effective immediately.

DATED: Long Island City, NY  
\_\_\_\_\_, 2009

Alexander B. Grannis, Commissioner  
New York State Department of  
Environmental Conservation

By:

\_\_\_\_\_

Suzanne Y. Mattei, Regional Director  
New York State Department of  
Environmental Conservation

**CONSENT BY RESPONDENT**  
**DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK**

Respondent hereby consents to the issuing and entering of the aforementioned Modification #9 to the Fresh Kills Consent Order (DEC File No. D2-9001-89-03), waives its right to a hearing as provided by law, and agrees to be bound by the provisions, terms and conditions contained therein.

By: \_\_\_\_\_  
(Print Name)

Title: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**ACKNOWLEDGMENT**

State of New York    )  
County of            ) ss.:

On the    day of           , 2009 before me personally came \_\_\_\_\_  
to me known, who being by me duly sworn did depose and say that s/he maintains an office at  
125 Worth Street in the County of New York and that s/he was duly authorized to execute the  
foregoing instrument and did so on behalf of the City of New York.

\_\_\_\_\_  
Notary Public