

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violation of Article 27 of the
Environmental Conservation Law of the
State of New York and Part 360 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York,

ORDER ON CONSENT
No. R4-0469-87-06-M3

- by -

Towns of Petersburg and Berlin,

Respondents.

WHEREAS:

Jurisdiction

1. The New York State Department of Environmental Conservation ("DEC" or the "Department") is responsible for the administration and enforcement of environmental laws and regulations pursuant to Article 27, Titles 1 and 7, of the New York State Environmental Conservation Law ("ECL") and 6 NYCRR Part 360 et seq. ("Part 360") promulgated pursuant thereto. The Parties wish to enter into this Order on Consent in order to investigate the potential remedial alternatives and assess available remedies.

Respondents

2. The Town of Petersburg ("Petersburgh") and the Town of Berlin ("Berlin", together with Petersburg, the "Towns" or "Respondents") are each a municipality in the County of Rensselaer, State of New York, and each co-owns and jointly operated a solid waste management facility as that term is defined in Part 360.2(b)(251), located at Jones Hollow Road, Town of Petersburg (the "Landfill"). Respondents assert that the Landfill operated from on or about 1955 through the early 1990s.

Relevant Facts

3. The Towns entered into a Landfill Services Agreement with EAC Systems, Inc. ("EAC") dated July 31, 1990 ("Landfill Agreement") by which EAC agreed to operate the Landfill starting on August 1, 1990 and to retain an Engineer to prepare a closure plan and other information required by Part 360 ("Closure Plan").

4. The Landfill Agreement required EAC to perform all services necessary for the closure of the Landfill in accordance with the Closure Plan, except for any post-closing

monitoring, reporting or other post-closing activities required by the Closure Plan, which are to be performed by the Towns.

5. The Towns entered into an Order on Consent File No. R4-0469-87-06 dated June 1991, as modified on June 25, 1992 and July 23, 1993 (collectively, "1991 Order"), by which the Towns agreed to close the Landfill in strict compliance with a Department-approved Closure Plan and Part 360.

6. The 1991 Order and Part 360 require proper leachate collection to be constructed to control leachate outbreaks that can adversely affect the Landfill cover or threaten surface waters.

7. Section 8 of the July 1991 Final Closure Plan ("Final Closure Plan") prepared for EAC by Smith & Mahoney, P.C. required a three-phase contingency measure if significant leachate flow continued one year after final closure, including installation of a toe drain (Phase I); construction of an interceptor trench if leachate outbreaks continued after construction of Phase I (Phase II); and construction of a larger collection system and storage tank in the event flow rates were too high for the Phase II storage capacity. The Final Closure Plan required collection and proper disposal of the leachate regardless of which Phase of the final design was implemented.

8. By letter dated August 22, 1991 to Smith and Mahoney, P.C., the Department rejected the phased leachate collection system approach and required a leachate collection system that would collect and store the peak volume of 2900 gpd as projected in the Final Closure Plan. However, by letter dated September 30, 1991, the Department agreed to postpone the construction of the leachate collection system until May 1, 1992 under strict conditions, including the requirement that Smith & Mahoney, P.C. install a leachate collection system at the Landfill unless, in the Department's opinion, such a system is not warranted based on the performance of the final cover system, and that monitoring occur to ensure leachate is being controlled. The September 30, 1991 letter expressly stated that should significant uncontrolled leachate appear at any time in the future installation of the system or an appropriate alternative will be required.

9. By letter dated May 28, 1992 to EAC, the Department required the interim leachate control plan be implemented immediately as there was no evidence that monitoring of leachate flows was occurring and based on site observation at that time of continuing uncontrolled leachate from the Landfill.

10. In an attorney's letter dated July 3, 1992 to the Department, the Towns requested the installation of the leachate collection system be postponed pending additional work and installation of a clay cap, which the Towns asserted may possibly eliminate any leachate discharges. The Towns provided another attorney's letter dated September 25, 1992 stating that it appeared the issue of a leachate collection system could be addressed during the physical closure activities and suggested that no formal modification to the 1991 Ordered would be necessary.

11. The 1991 Order, the Final Closure Plan, subsequent communications by the Department, and Part 360 require control of leachate, including proper treatment and disposal for so long as leachate is capable of adversely impacting the environment, unless the Department waives this requirement when the owner demonstrates the leachate no longer poses a threat to human health or the environment. The Department has no written record and is not otherwise aware of ever providing such waiver to the Towns for the Landfill.

12. Smith & Mahoney P.C. prepared and filed with the Department a Construction Certification Report ("CCR") dated April 1997 stating that the Landfill was seeded in November 1995 and certified that to the best of their knowledge the Landfill substantially complies with approved plans, specifications and QA/QC plan. However, the CCR did not mention whether the Towns complied with Section 8.2 through 8.5 of the approved Final Closure Plan, nor did the Final Closure Plan provide any data or otherwise indicate that the flow of leachate was under control.

Violations

13. From 2016 to 2018, the Department, through its contractor URS Corporation, conducted a Site Characterization of the Landfill. The investigation included the installation and logging of 16 additional monitoring wells around the Landfill and multiple groundwater and surface water sampling events and elevation surveys. The investigation found elevated concentrations of per- and poly-fluoroalkyl substances (PFAS), including PFOA and PFOS, and metals in the groundwater emanating the Landfill, including in the leachate seep discharging from the western side of the Landfill and in the surface water downstream of the leachate seep. Elevated metals were also detected in the surface water sediment immediately downstream of the Landfill. The areas of uncontrolled leachate emanating from the Landfill are referred to herein as the "Leachate Seeps."

14. The continuing uncontrolled leachate from the Landfill observed in May 1992 and by URS in 2018 may have commenced as early as 1955 (when the landfill began operation) and has continued through closure and the post closure period. The URS investigation found that elevated concentrations of per- and poly-fluoroalkyl substances (PFAS), including PFOA and PFOS, and metals from the Leachate Seeps impacted the surface water and the surface water sediment immediately downstream of the Landfill.

15. From the beginning of operations of the Landfill and continuing thereafter, the Towns have failed to install, maintain and operate a leachate collection system resulting in elevated concentrations of hazardous substances in the stream and its sediment. A leachate collection system was required by the 1991 Order, Section 8 of the Final Closure Plan, Article 27 of the ECL, and regulations at Part 360. The Final Closure Plan approval by the Department required that the Towns clearly demonstrate that the flow of the leachate from the Landfill is under control and that a leachate collection system

be installed unless "in the Department's opinion such system is not warranted based on the performance of the final cover system." These conditions were not met and failure to meet these conditions constitute violations of the 1991 Order, Article 27 of the ECL, and regulations at Part 360.

Applicable Law

16. The 1991 Order requires the construction of a proper leachate collection system to control leachate that can adversely affect the Landfill cover or threaten surface waters.

17. The applicable Part 360 in effect at the time of closure and the Approved Closure Plan required post-closure leachate collection and management.

18. Pursuant to ECL Section 71-2703, any person who violates any provision of, or who fails to perform any duty imposed by Title 7 of Article 27, or any rule or regulations promulgated pursuant thereto, or any term or condition of any certification or permit issued pursuant thereto, shall be liable for a civil penalty not to exceed seven thousand five hundred dollars (\$7,500) for each violation and an additional penalty of not more than one thousand five hundred dollars (\$1,500) for each day during which such violations continues, and may also be subject to injunctive relief.

19. To expedite the resolution of this proceeding and minimize litigation resources, the Towns waive all rights to a hearing herein as provided by law, consent to the issuing and entering of this Order, and agree to be bound by the provisions, terms and conditions herein. Notwithstanding the foregoing, the existence of this Order and the Towns' compliance with it shall not give rise to any presumption of law or finding of fact, or create any rights, or grant any cause of action, inuring to the benefit of any third party. Notwithstanding anything contained herein to the contrary, all obligations and covenants of the Towns set forth in or arising from this Order shall be joint and several.

NOW, having considered this matter and being duly advised, it is **ORDERED**:

I. Suspended Penalty. Respondents are assessed a civil penalty in the amount of TWENTY THOUSAND and 00/100 DOLLARS (\$20,000.00), payment of which is fully suspended to guarantee compliance with the terms of this Order. The full suspended penalty, or any portion thereof, shall become payable solely in the event Respondents fail to comply with the terms or conditions of this Order within fifteen (15) calendar days after the date on which Respondents receive written notice from DEC of a violation of this Order. Payment of the penalty shall not in any way modify, condition, or affect Respondents' obligations to perform in accordance with this Order. The penalty assessed in this Order constitutes a debt owed to the State of New York when and if such penalty becomes due. Failure to pay the penalty, or any part thereof, when due in accordance with this Order may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of statutory interest to the extent imposed by applicable law) or referral to the New York State Department of

Taxation and Finance, which may offset any tax refund or other monies that may be owed to Respondents by the State of New York by the penalty amount.

II. Schedule of Compliance. Respondents shall fully comply with the provisions of the Schedule for Compliance attached to and made a part of this Order.

III. Entire Order; Modification. This Order constitutes the entire agreement between Respondents and DEC for the violations identified herein. Subject to Section VII.A., and provided that Respondents comply with the terms and conditions of this Order, the Department accepts this Order and the obligations contained herein in full satisfaction of any claims or penalties against Respondents for the violations identified herein. No modification to this Order shall be effective except as specifically set forth in writing and approved by the Commissioner or a duly authorized representative of DEC and approved in writing by Respondents.

IV. Indemnification. Respondents shall indemnify, release and hold harmless the Department, the State of New York, and their representatives and employees from and against all claims, damages, demands, injuries, liabilities, losses, costs and expenses arising from the acts and/or omissions of the Respondents in complying or attempting to comply with the provisions of this Order.

V. Binding Effect. The terms and conditions of this Order shall inure to the benefit of, and be binding upon, Respondents, the Department, and their respective successors and permitted assigns. Respondents shall not assign this Order without the Department's prior written consent in its sole discretion. Nothing in this Order creates personal liability for Respondents' supervisors, board members, employees or agents. Upon the Effective Date of this Order, the 1991 Order shall be deemed terminated.

VI. Access. For purpose of monitoring and determining compliance with this Order and any laws, rules or regulations under the jurisdiction of the Department, employees and agents of the Department shall be provided access to any facility, site or records owned, operated, controlled or maintained by Respondents at such times as may be desirable or necessary for the Department to inspect and/or perform tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility of the Department.

VII. Force Majeure.

A. Respondents shall not suffer any penalty or be subject to any proceeding or action in the event it cannot comply with the requirements of this Order as a result of any event arising from causes beyond the reasonable control of Respondents, of any entity controlled by Respondents, and of Respondents' contractors, that delays or prevents the performance of any obligation under this Order, despite Respondents' best efforts to fulfill the obligations ("Force Majeure Event"). The term "Force Majeure Event" includes any occurrence which is brought on as a result of fire, lightning, earthquake, flood, abnormal adverse weather conditions, strike, shortages of labor and materials, war,

riot, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Respondents' reasonable control. Except as otherwise expressly provided in this paragraph, the term "Force Majeure Event" does not include Respondents' economic inability to comply with any obligation, the failure of Respondents to make complete and timely application for any required permit or approval, or the non-attainment of the goals, standards, and requirements of this Order. With respect to Paragraphs 4 and 5 of the Schedule of Compliance, the term "Force Majeure Event" includes Respondents' economic inability to comply with those obligations, provided that Respondents exercise best efforts to comply. In the event Respondents are excused from complying with Paragraphs 4 and/or 5 of the Schedule of Compliance due to their economic inability to comply, then nothing contained in this Order (including but not limited to Section III) shall be deemed to waive, impair, or release any right, claim or remedy DEC now or hereafter may have pursuant to or arising under Title 12 and/or Title 13 of Article 27 of the ECL or the rules or regulations promulgated thereunder.

B. Each Respondent shall notify the Department in writing within fourteen (14) calendar days after it obtains, or should have obtained, knowledge of any Force Majeure Event. Respondents shall include in such notice the measures taken and to be taken to prevent or minimize any delay and shall request an appropriate extension or modification of this Order. Failure to give such notice within such fourteen (14) calendar day period shall constitute a waiver of any claim that a delay is not subject to penalties.

VIII. Communications

Upon execution by Respondents, the original executed and acknowledged Order shall be delivered to:

Department of Environmental Conservation
Region 4, Office of General Counsel
1130 North Westcott Road
Schenectady, NY 12306
Attn: Regional Attorney

After the Effective Date, all communications and submissions under this Order shall be made to the address set forth below:

Department of Environmental Conservation
Region 4, Environmental Quality
1130 North Westcott Road
Schenectady, New York 12306
Attn: Regional Engineer

IX. Review of Submittals

1. The Landfill Site Assessment Report, the Work Plan, and the Final

Certification (each as defined in the Schedule of Compliance) are subject to DEC's reasonable approval.

2. DEC will review each submittal from Respondents to determine whether it was prepared, and whether the work to generate the data and other information contained in the submitted was performed, in accordance with this Order and generally accepted technical and scientific principles. DEC will notify Respondents in writing of its approval or disapproval of the submittal. All submittals approved by the Department shall be deemed to be automatically incorporated into, and shall become an enforceable part of, this Order. Respondents shall implement such submittals in accordance with their schedules, terms, and conditions as approved by the Department.

3. A. If the Department disapproves a submittal, it shall so notify Respondents in writing and shall specify the reasons for disapproval. Within the time frame set forth in such written notification, Respondents shall make a revised submittal to the Department that addresses all of the Department's stated reasons for disapproving the first submittal.

B. After receipt of the revised submittal, the Department will notify Respondents in writing of its approval or disapproval. If the revised submittal is not approvable as submitted, the Department shall have the option to either disapprove it or approve it on condition that Respondents accept such modifications as may be specified by the Department to render the submittal approvable. If Respondents do not accept such modifications, the revised submittal shall be disapproved. If the Department disapproves the revised submittal, each party reserves their respective rights, claims, and defenses under law. If the Department approves the revised submittal, it shall automatically be deemed incorporated into, and shall become an enforceable part of, this Order.

X. Termination and Reservation of Rights.

A. This Order shall be deemed completely satisfied and shall terminate when Respondents have complied with all requirements of this Order.

B. Subject to Section III, the parties reserve all their legal, administrative and equitable rights and remedies arising at common law or as granted to it pursuant to statute or regulation, including but not limited to the right to assess and collect regulatory fees, as applicable. This Order shall not be construed to prohibit or impair the Commissioner or the Commissioner's designee from exercising any summary abatement powers, either at common law or under any laws, rules or regulations under the jurisdiction of the Department.

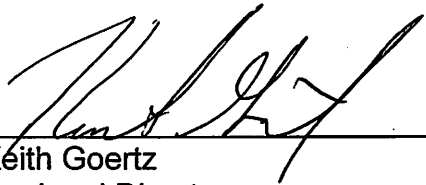
XI. Effective Date. The effective date of this Order shall be the date it is signed by the Commissioner or the Commissioner's designee (the "Effective Date").

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Dated: *April 24*, 2020
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:




Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Town of Berlin

Respondent hereby consents to the issuing and entering of this Order without further notice, waives its right to a hearing with respect to the subject matter of this Order as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

Town of Berlin

Signature: 
Print Name: ROBERT C JAEGER
Title: TOWN SUPERVISOR
Date: 03/12/2020

STATE OF New York)
) ss.:
COUNTY OF Rensselaer

On the 12th day of March in the year 2020 before me, the undersigned, a Notary Public in and for the State, personally appeared Robert C. Jaeger, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Anne M. Maxon
Notary Public

Qualified in the County of: Rensselaer
My Commission Expires: 11-16-2021

ANNE M. MAXON
Notary Public - State of New York
No. 01MA4913254
Qualified in Rensselaer County
My Commission Expires Nov. 16, 2021

SCHEDULE OF COMPLIANCE

All capitalized terms used in this Schedule of Compliance shall have the same definitions as set forth in the Order on Consent, unless otherwise expressly defined herein.

1. Within 90 calendar days after the Effective Date, Respondents shall complete an assessment performed by a licensed professional engineer of the overall condition of the Landfill, including site structures and features, the Leachate Seeps, and Landfill components (cover system, gas venting system, stream diversion system and any other closure related appurtenances).

2. Within 150 calendar days after the Effective Date, Respondents shall submit to the Department a report of the site assessment (the "Landfill Site Assessment Report") prepared by a licensed professional engineer. The Landfill Site Assessment Report must include an inventory of all site structures and features identified in the site assessment, including the Leachate Seeps, cover system, gas venting system, stream diversion system, and any other closure related appurtenances and groundwater monitoring wells. The report shall include the location and reasonable description of the function and condition of each identified item.

3. Within 180 calendar days after the Effective Date, Respondents shall submit to the Department a work plan of corrective measures needed to bring the Leachate Seeps, cover system, and stream diversion system into compliance with the Final Closure Plan, Article 27 of the ECL, and regulations at Part 360, including measures for the control, management, treatment and/or disposal of leachate from the Landfill (inclusive of all approved amendments or modifications thereto, the "Work Plan") in accordance with Section 8.0 of the Final Closure Plan as required under Part 360. The Work Plan shall include, but is not limited to:

- a. An assessment of the Leachate Seeps, including leachate quantities and qualities;
- b. An evaluation of collection, containment, and treatment options for the Leachate Seeps;
- c. A recommended selection for remediation of the Leachate Seeps;
- d. Identification of any other Landfill components relating to leachate requiring corrective measures, including, if necessary, but not limited to a stream diversion system along the southern side of the Landfill;
- e. A discussion of measures that will be taken to address items identified above, including improvements, repairs, and routine maintenance;

f. An updated draft post-closure Operation and Maintenance Plan relating to maintenance of the cap, stream diversion and leachate management.

g. A schedule for implementation and completion of the Work Plan.

4. Upon the Department's written approval of the Work Plan in accordance with Section IX of this Order, Respondents shall implement the Work Plan in accordance with the approved schedule for implementation and completion.

5. Within forty-five (45) calendar days after completion of all work in the approved Work Plan, Respondents shall submit a corrective measures and closure certification report to the Department, including a description of the work performed in order to address 3.a. through 3.e. above, results of any soil testing, ground water monitoring, and surface water monitoring, and documentation for the Work Plan activities performed (collectively, the "Final Certification").