

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK and JOHN P. CAHILL,  
as Acting Commissioner of the New York State  
Department of Environmental Conservation  
and Trustee of the Natural Resources,

Civil Action No.  
94-CV-0400E(H)

Plaintiffs,

-against-

Judge Elfvin

PANEX INDUSTRIES, INC.; PANEX INDUSTRIES  
LIQUIDATING TRUST; DANIEL ROSENBLOOM and  
PAUL LAZARE, as Trustees of Panex  
Industries, Inc. Liquidating Trust; ALPINE  
GROUP, INC.; ROCHESTER BUTTON COMPANY, INC.;  
TURBODYNE ELECTRIC POWER CORPORATION;  
MCGRAW-EDISON COMPANY, INC.; DRESSER-RAND  
COMPANY; ABB AIR PREHEATER, INC.; and  
VILLAGE OF WELLSVILLE,

Defendants.

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CONSENT DECREE

The State of New York and John P. Cahill, as Acting  
Commissioner of the New York State Department of Environmental  
Conservation and Trustee of the Natural Resources (hereinafter  
collectively "New York" or the "State") and the Village of  
Wellsville (the "Village"), and the Town of Wellsville (the  
"Town") agree as follows:

RECITATIONS

WHEREAS, the State alleges that the Village purchased  
certain property in February 1964 located on Snyder Road in the  
Towns of Wellsville and Andover in Allegany County, New York (the  
"Site"), and operated the Site as a municipal and industrial  
landfill from 1964 through 1983, and continues to own the Site;  
and

WHEREAS, the State filed a complaint in this action on May 25, 1994 relating to activities and conditions at the Site, against the Village and other defendants, asserting claims under the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act ("CERCLA"), 42 U.S.C. § 9601 et seq.; New York's common law of public nuisance, and the New York Real Property Actions and Proceedings Law; and

WHEREAS, the Village filed an answer to the above complaint on or about September 14, 1994, inter alia, denying liability; and

WHEREAS, the State alleges that the Rochester Button Company, Panex Industries, Inc., Turbodyne Electric Power Corporation and ABB Air Preheater, Inc., and their predecessors, successors and/or alter egos, generated and disposed, or arranged for the disposal of hazardous substances and other waste materials at the Site; and

WHEREAS, the State alleges that there has been a release of hazardous substances from the Site and there is a threat of a release of hazardous substances from the Site in the future; and

WHEREAS, the State seeks judgment, inter alia, for all response costs incurred or to be incurred by the State in responding to the release and threat of release of hazardous substances from the Site; and

WHEREAS, on March 23, 1994, the New York State Department of Environmental Conservation (the "DEC") issued a Record of

Decision ("ROD"), following public notice and an opportunity for public comment, setting forth the selected remedy (the "Remedy") for the Site; and

WHEREAS, the DEC estimates, based on currently available information, that the total cost incurred and to be incurred by the State in responding to the release and threat of release of hazardous substances from the Site is approximately \$10.9 million; and

WHEREAS, the Village wishes to settle any liability it may have to the State for matters raised in this action in accordance with 42 U.S.C. § 9613 and other applicable federal and state law; and

WHEREAS, the Village asserts that it generated and disposed of only ordinary municipal solid waste, i.e., household, commercial, demolition and construction wastes, at the Site; and

WHEREAS, the Village asserts that it owned and operated the Site as a public service, and the Village did not profit from its operation; and

WHEREAS, the Village has cooperated with the State in the construction and operation of the Remedy, for example, the Village has agreed to voluntarily upgraded its waste water treatment facility so that it could accept and treat the leachate being generated at the Site, and has transported and treated such leachate; and

WHEREAS, the Village's voluntary cooperation, as described above, has permitted the State to construct and implement the Remedy at a substantial savings in public funds; and

WHEREAS, the Village represents that it incorporates a rural area with a population of approximately 5,241 people with a limited commercial and industrial base, such that it does not have the resources, over and above those committed hereunder, to pay for response costs incurred or to be incurred by the State at the Site; and

WHEREAS, in consideration of the above factors, and in order to avoid the uncertainties of costly and protracted litigation against the Village, the State has determined that a settlement with the Village pursuant to which it would provide twenty to twenty-five percent of the remediation costs is fair and reasonable, and in the public interest; and

WHEREAS, the State has asserted no claims against the Town arising from the release or threat of release of hazardous substances from the Site; and

WHEREAS, the defendants in this action have not asserted any third-party claims against the Town arising from the release or threat of release of hazardous substances from the Site; and

WHEREAS, the Town wishes to settle any claims that the State may have against it arising from the release or threat of release of hazardous substances from the Site in accordance with 42 U.S.C. § 9613 and other applicable federal and state law, and the Town consents to the jurisdiction of this Court; and

WHEREAS, the State, the Village and the Town (collectively the "settling parties") have agreed to the terms and conditions for settling any claims that the State may have against the Village and Town, including the specific obligations to be undertaken by the Village and the Town, as set forth herein; and

WHEREAS, the State has determined that the value of the obligations undertaken by the Village is approximately \$2.46 million; and

WHEREAS, the State has determined that the value of the obligations undertaken by the Town is approximately \$318 thousand; and

WHEREAS, DEC awarded a contract for construction to implement the Remedy at the Site to the IT Corporation, and issued a notice to proceed on March 21, 1996; and

WHEREAS, the State, the Village and the Town have consented to the entry of this Consent Decree pursuant to CERCLA, 42 U.S.C. § 9613 (f)(2); and

WHEREAS, the State recognizes that the portions of the Remedy to be implemented by the Village and the Town pursuant to this Consent Decree have and will continue to enable the State to avoid substantial additional costs that would have been incurred to transport and treat the leachate at an alternate waste water treatment facility; and

WHEREAS, the settling parties recognize, and the Court finds, that this settlement has been negotiated in good faith, and implementation of the settlement will both expedite the

implementation of the Remedy and will avoid substantial additional costs that would otherwise be incurred if the State were to transport and treat the leachate at an alternate waste water treatment facility and it will result in the Village and Town implementing a portion of the selected remedy in lieu of the State, and will avoid prolonged and complicated litigation between the settling parties, and the terms of settlement are fair, reasonable, and in the public interest.

NOW THEREFORE, it is hereby ORDERED and DECREED as follows:

JURISDICTION

1. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613 and has jurisdiction over the parties to this Consent Decree.

2. This Consent Decree shall apply to and be binding upon the parties hereto, their successors and assigns. The undersigned representative of each party certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind the party to its terms.

THE VILLAGE'S OBLIGATIONS

3. The Village shall, at its own expense, implement and/or conduct the following:

(A) Upgrade the Village of Wellsville's Wastewater Treatment Plant ("WWTP") so that it will be capable of treating the approximately 35 million gallons of leachate and/or contaminated groundwater (hereinafter collectively "leachate")

generated at or migrating from the Site during the remedy construction period, which is anticipated to take up to 18 months from start to finish. Upgrading shall include, without limitation, the following,

- (i) Increase leachate storage capacity with the addition of a 20,000 gallon underground storage tank and pump station,

- (ii) Install a flow meter on the sludge return line,

- (iii) Winterize the pole barn housing the sludge filter press,

- (iv) Construct a truck unloading station, and

- (v) Erect gates to facilitate 24-hour leachate unloading;

- (B) During the construction of the selected remedy, the Village shall accept for treatment and treat at the WWTP all leachate generated at and collected from the Site, and dispose of all waste water and sludge generated by such treatment in accordance with applicable law and DEC's determination dated April 4, 1996, subject to the limitations stated in this Consent Decree. The Village shall continue to transport and treat approximately eight million (8,000,000) gallons of leachate per year (a total of twelve million (12,000,000) gallons in the eighteen-month construction period), subject to a weekly maximum of one hundred-fifty thousand (150,000) gallons and a daily maximum of thirty thousand (30,000) gallons and, in addition, will accept for treatment approximately twenty-three million (23,000,000) gallons of leachate to be transported by the contractor for the remedy construction during the estimated

eighteen-month remedy construction period. The Village shall accept leachate in amounts greater than twenty-three million (23,000,000) gallons from the contractor, provided that acceptance of the additional leachate does not cause a violation of the Village's SPDES Permit. The Village shall accept a total amount not to exceed thirty-three thousand six hundred (33,600) gallons of leachate in any four-hour period.

(C) Upon the completion of the remedy construction and any shake-down period, the Village and the Town, as set forth below, shall be jointly and severally responsible for the long-term operation and maintenance of the Site. The Village and Town's responsibilities shall be set forth in an operations and maintenance plan ("O&M Plan") to be developed by DEC consistent with the ROD and the design documents for the remedial plan which may include, without limitation, the following elements:

(i) Leachate collection and disposal,

(ii) Inspection, maintenance and repair of the landfill cover and all other elements of the remedy as constructed; notwithstanding the foregoing, the Village and Town shall not be obligated to perform work which entails implementing a material change to the design/as-built documents approved by DEC,

(iii) Environmental (groundwater, surface water, sediment, leachate) monitoring and reporting, and

(iv) Residential potable water monitoring and reporting.



#### TOWN'S OBLIGATIONS

4. The Town shall, at its own expense, undertake the following activities and obligations:

(A) Replace or upgrade, and thereafter repair, as necessary, the bridges and culverts on Duffy Hollow Road between State Route 417 and Snyder Road so as to maintain AASHTO loading capacities of HS-20 or greater. All work shall be performed in compliance with all applicable regulations and permit requirements.

(B) Upon the completion of the remedy construction and any shake-down period, the Town and Village shall be jointly and severally responsible for the long-term operation and maintenance of the Site, as more specifically set forth in paragraph 3(C).

#### RESOLUTION OF LIABILITY AND COVENANT NOT TO SUE

5. In consideration of the obligations undertaken by the Village and the Town pursuant to this Consent Decree, the State covenants not to sue and agrees not to assert any claims for relief or any causes of action against the Village or the Town pursuant to Section 107(a) or Section 113 of CERCLA, 42 U.S.C. § 9607(a) or § 9613, or under any other statute, regulation or ordinance, or the common law of public nuisance, relating to environmental conditions at the Site. This covenant not to sue extends only to the Village, the Town and their successors and does not extend to any other person or entity.

6. The Village and the Town hereby covenant not to sue and agree not to assert any claims or causes of action against the State with respect to the Site, including, but not limited to, any claim under CERCLA, 42 U.S.C. § 9601, et seq., or any other provision of statutory or common law, arising out of environmental conditions or response activities at the Site.

7. In the event that the Court does not judicially approve the terms of this settlement in haec verba, then in that event, the obligations and covenants of each settling party shall be deemed null and void and this Consent Decree shall be null and void.

8. The Village and the Town shall not be liable for claims for contribution in accordance with CERCLA, Section 113 (f) (2), 42 U.S.C. § 9613 (f) (2). The matters addressed in this Consent Decree include any and all claims against the Village and Town for past and future damages and response costs concerning or relating to or arising from the Site. All claims of non-settling parties against the Village or the Town which have or could have been brought against the Village or the Town, including claims under CERCLA, Sections 107(a) and 113(f) (2), 42 U.S.C. §§ 9607(a) and 9613 (f) (2), are hereby dismissed with prejudice and without costs. Upon the filing of any further amended pleadings, non-settling parties in this action shall not plead for contribution or common law indemnification against the Village or the Town.

9. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person

not a party to this settlement. Each of the settling parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person or entity not a party hereto.

#### JUDICIAL APPROVAL OF CONSENT DECREE

10. The proposed Consent Decree is not binding upon, and is without prejudice to, the parties if the Court does not grant judicial approval in accordance with 42 U.S.C. § 9613. In that event, the Decree shall not be construed as an admission of liability or of any fact in the pending action.

11. In the event judicial approval of the Decree is denied by the Court, the Village must perform all of the obligations set forth in Paragraphs 3(A) and (B) and the Town must perform all of the obligations set forth in Paragraph 4(A). However, the Town and Village may, within 20 days after the Court's decision or order denying judicial approval of this Decree, elect to terminate their obligations to perform the long-term operation and maintenance of the Site referred to in Paragraphs 3(C) and 4(B) of this Decree. Such election must be in writing and delivered by certified mail to counsel for the State. The State shall credit the Village and Town with the value, defined in terms of actual costs, of all capital costs and in-kind contributions provided as described in this Decree against any

subsequent judgment or verdict that may be rendered against either the Village or the Town.

INDEMNIFICATION

12. The Village and the Town shall indemnify and hold the State, and its representatives and employees harmless from all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of their respective obligations under this Consent Decree.

CONTINUING JURISDICTION OF THE COURT

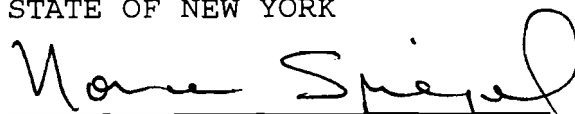
13. The Court shall retain jurisdiction over this Consent Decree in order to enforce compliance with its terms.

SO AGREED:

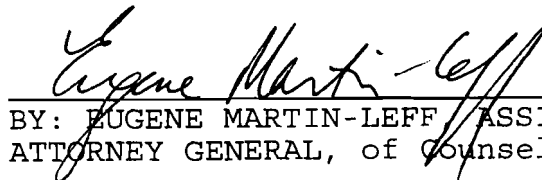
STATE OF NEW YORK

DATED: January 3, 1997

DENNIS C. VACCO  
ATTORNEY GENERAL OF THE  
STATE OF NEW YORK



BY: NORMAN SPIEGEL, ASSISTANT  
ATTORNEY GENERAL, of Counsel



BY: EUGENE MARTIN-LEFF, ASSISTANT  
ATTORNEY GENERAL, of Counsel

Attorney for  
STATE OF NEW YORK AND THE COMMISSIONER  
OF ENVIRONMENTAL CONSERVATION

DATED: January , 1997

JOHN P. CAHILL, ACTING COMMISSIONER OF  
ENVIRONMENTAL CONSERVATION

BY:



DATED: April 24 , 1997

VILLAGE OF WELLSVILLE

BY: SUSAN C. GOETSCHUS

MAYOR OF THE VILLAGE OF WELLSVILLE

BY: RICHARD A. PALUMBO

BOYLAN, BROWN, CODE, FOWLER,  
VIGDOR & WILSON, LLP  
ATTORNEY FOR VILLAGE

DATED: March 12 , 1997

TOWN OF WELLSVILLE

BY: MICHAEL T. BALDWIN

SUPERVISOR OF TOWN OF WELLSVILLE

BY: KEITH A. SLEP

HASPER, PARKER & SLEP  
ATTORNEY FOR TOWN

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 1997

\_\_\_\_\_  
U.S.D.J.