

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation
of a Remedial Program for an
Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13,
and Article 71, Title 27 of the
Environmental Conservation Law
of the State of New York by

ORDER
ON
CONSENT

INDEX # B9-0354-94-05

Essex Specialty Products, Inc.

Respondent.

Site Code # 9-07-015

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites." This Order is entered into pursuant to the Department's authority under ECL Article 27, Title 13 and ECL 3-0301.

2. Essex Specialty Products, Inc., ("Respondent") is a corporation organized and existing under the laws of the State of ^{New Jersey} ~~Delaware~~. Respondent formerly owned and operated a facility at 125 Blackstone Avenue in Jamestown, New York (the "Site"). A

map of the Site is included in Appendix "A" to this Order.

3. The Department has asserted jurisdiction over the Site and alleges that the Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2, and that the Site presents a significant threat to the public health and the environment. The Site has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 9-07-015. The Department has classified the Site as a Classification "2" pursuant to ECL 27-1305.4.b.

4. Following a period of public comment, the Department selected a final remedial alternative for the Site in a Record of Decision ("ROD"). The ROD, dated March 1994 is attached to this Order as Appendix "A" and is incorporated as an enforceable part of this Order.

5. A. Pursuant to ECL 27-1313.3.a, whenever the Commissioner of Environmental Conservation (the "Commissioner") "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the department, at such site, and (ii) to implement such program within

reasonable time limits specified in the order."

B. Any person under order pursuant to ECL 27-1313.3.a. has a duty imposed by ECL Article 27, Title 13 to carry out the remedial program committed to under order. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

6. The Department and Respondent agree that the goal of this Order is for Respondent to develop and implement, in accordance with the ROD, an inactive hazardous waste disposal site remedial program ("Remedial Program") for the Site that shall include design and implementation, and operation, maintenance and monitoring of the remedial alternative selected by the Department in the ROD.

7. Respondent, as a responsible corporate citizen with a desire to further the public interest in remediating the Site, has agreed to implement the Remedial Program at the Site in accordance with the terms of this Order. Respondent does not admit or acknowledge any liability, fault, or wrongdoing, or violation of any law, regulation or permit of any kind

whatsoever in any way related to the Site or the environmental conditions at the Site.

8. Respondent, having waived its right to a hearing herein as provided by law with respect to implementing the Remedial Program for the Site, and having consented to the issuance and entry of this Order, agrees to be bound by its terms. Respondent, however, reserves its right to a hearing and any other process to which it may be entitled by law, including, but not limited to, any hearing or other process to enforce this Order. Further, Respondent reserves its right to oppose any action the State of New York, the Department, or any person may undertake with regard to the Site or the environmental conditions thereat.

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

I. Remedial Design Contents

A. Respondent has submitted a work plan for the development and implementation of the remedial alternative selected in the ROD for this Site (the "Work Plan") to the Department for review and approval. The Work Plan, as approved by the Department, shall be attached to this Order as Appendix "B" and shall be incorporated in and become an enforceable part hereof.

B. The Remedial Design shall include the following:

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

a. the construction and operation of any structures;

b. the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other on-Site materials contaminated thereby;

c. the collection, destruction, treatment, and/or disposal of contaminated groundwater, leachate, and air;

d. physical security and posting of the Site;

e. health and safety of persons living and/or working at or in the vicinity of the Site;

f. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Design; and

g. monitoring relative to the implementation of the remedial alternative in the ROD.

2. Plans and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

3. A time schedule to implement the Remedial Design, including a schedule for periodic work-in-progress reports;

4. 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;

5. A description of operation, maintenance, and monitoring activities to be undertaken after the Department has approved construction of the Remedial Design, including the number of years during which such activities will be performed;

6. 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 C.F.R. 1910 by a certified health and safety professional; and

7. A citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen

Participation Plan," dated August 30, 1988, any subsequent revisions thereto, and 6 NYCRR Part 375.

II. Remedial Design Construction and Reporting

A. Within the schedule included in the Work Plan as approved by the Department, Respondent shall commence construction of the Remedial Design.

B. Respondent shall implement the Remedial Design in accordance with the Work Plan.

C. During implementation of all construction activities identified in the Remedial Design, Respondent and/or its consultant shall have on-Site a full-time representative who is qualified to inspect the work.

D. Within 90 days after completion of the construction activities identified in the Remedial Design, Respondent shall submit to the Department "as-built" drawings and a final engineering report (each including all changes made to the Remedial Design during construction) and a certification by a professional engineer that the Remedial Design was implemented and all construction activities were completed in accordance with the Department-approved Remedial Design (a Remedial Construction Close-out Report) and a detailed post-remedial operation and maintenance plan ("O & M Plan"). The O & M Plan and the Remedial Construction Close-out Report must be

signed and sealed by a professional engineer.

E. Upon the Department's approval of the O & M Plan, Respondent shall implement the O & M Plan.

F. Within 60 days after receipt of the Remedial Construction Close-out Report, the Department shall notify Respondent in writing whether the Department is satisfied that all construction activities have been completed in compliance with the approved Remedial Design.

G. Within 60 days after the Department has notified Respondent pursuant to subparagraph II. F. of this Order, if the Department concludes, after reviewing technically valid data attributable to and impacted by the Site, and any other relevant facts, that any element of the Remedial Program fails to achieve its objectives or otherwise fails to protect human health or the environment, the Department may require a modification and/or an amplification and expansion of the Remedial Program to satisfy those objectives.

III. Progress Reports

Respondent shall submit to the parties identified in Subparagraph XI.B. 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 all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent;

(iii) identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month;

(iv) describe all actions, including, but not limited to, data collection and implementation of work plans that 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 Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays;

(vi) include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved; 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.

Respondent shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Order.

Respondent also shall allow the Department to attend, and shall provide the Department at least seven days advance notice of, any of the following: pre-bid meetings, job progress meetings, substantial completion meetings and inspections, and final meetings and inspections.

IV. Review of Submittals

A. (1) The Department shall review each of the submittals Respondent 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. The Department shall notify Respondent in writing of its approval or disapproval of the submittals, except for the submittal discussed in Subparagraph I.B.(6). All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(2) (a) If the Department disapproves a submittal, it shall so notify Respondent in writing and shall

specify the reasons for its disapproval. Within 30 days after receiving written notice that Respondent's submittal has been disapproved, or such longer period as may be allowed in the notice, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

(b) After receipt and review of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law unless Respondent requests an opportunity to respond to the Department's objections pursuant to Paragraph XI. B., below.

B. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department 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.

V. Penalties

A. (1) Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

(2) If, after an opportunity for a hearing, Respondent is found to be in violation of this Order, Respondent shall be liable for payment to the Department of the sums set forth by statute as penalties for each day or part thereof that the Respondent is in violation of the terms of this Order. All penalties begin to accrue on the first day Respondent is in violation of the terms of this Order and continue to accrue through the final day of correction of any violation.

B. Respondent 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. Respondent shall, within ten days of when it obtains knowledge of any such condition, notify the Department in writing. Respondent shall include in such notice the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such ten-day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have

the burden of proving that an event is a defense to compliance with this Order pursuant to this subparagraph V.B.

VI. Entry upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency at reasonable times for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order. Such representatives of the State shall identify themselves to Respondent's representative on the Site or to the plant manager or his representative, and shall be accompanied by such representative of Respondent, if available, while on the Site, and shall comply with the Site's health and safety procedures applicable to any activities while on Site. Respondent shall provide the Department with access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Order and to job meetings.

VII. Payment of State Costs

Within 60 days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's

expenses including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for work performed at the Site to date, as well as for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order. Such payment shall be made by certified check payable to the Department of Environmental Conservation. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, NY 12233-7010. Itemization of the costs shall include an accounting of personal services indicating the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. This information shall be documented by quarterly reports of Direct Personal Service. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by the New York State Office of the State Comptroller's quarterly expenditure reports.

VIII. Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's civil, criminal, administrative, or equitable rights or authorities.

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

C. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of Respondent's rights to bring any action or proceedings against the Department or any agent of the State of New York to the extent permissible by law to challenge the Department's actions, to contest Respondent's obligations to take any action or perform activities not mandated by this Order, to petition the Department to remove the Site from the Registry or for reclassification of the Site, to commence any action or proceedings against any other party, or to appropriately defend itself in any action or proceedings brought against it.

IX. Indemnification

A. Respondent shall indemnify and hold the Department, 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 acts or omissions in the fulfillment or attempted fulfillment of this Order by Respondent, and/or Respondent's directors, officers, employees, servants, agents, successors, and assigns. Respondent shall not be required to indemnify and hold the Department, the State of New York, their representatives and employees harmless for claims, suits, actions, damages and costs arising out of or resulting from any unlawful, willful, or malicious acts or omissions on the part of the State, State agencies, or their officers, employees or agents.

B. Respondent expressly reserves any and all rights of contribution and/or indemnification it has against any and all other potentially responsible parties and against other persons not signatories to this Order for costs Respondent has incurred, and will incur in the future, to conduct work regarding the Site, including but not limited to work contemplated by this Order.

X. Public Notice

A. Within 30 days after the effective date of this Order, Respondent shall use its best efforts to require the owner of the Site to file a Declaration of Covenants and

Restrictions with the Clerk of Chautauqua County to give all parties who may acquire any interest in the Site notice of this Order.

B. If Respondent learns that the owner proposes to convey the whole or any part of its ownership interest in the Site, Respondent shall, as soon as possible before the date of conveyance, notify the Department 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 Department, of the applicability of this Order.

XI. Dispute Resolution

A. The Department and Respondent shall attempt to resolve expeditiously and informally any disagreements concerning implementation of this Order or any work required under this Order.

B. 1. In the event any dispute arising pursuant to Subparagraph II. G., Subparagraph IV. A. (2) or IV. B., or Paragraph VII. of this Order is not resolved through informal means, either party may request formal dispute resolution under this Subparagraph XI. B. The dispute resolution procedure shall be invoked by transmission of a written notice by the initiating party which identifies the issues in dispute.

2. Within 10 days of the written notice which

identifies the issues in dispute which are subject to resolution pursuant to this procedure, the initiating party shall request a meeting with the Director of the Division of Hazardous Waste Remediation (the "Director") to discuss the issues in dispute. At this meeting, Respondent shall be given an opportunity to express its position regarding the issues in dispute, and the Director shall have the authority to modify and/or withdraw the Department's position regarding the issues. The Respondent and the Department shall be bound by the decision of the Director, and the Director shall specify the period of time within which the actions resolving the dispute must be taken. If Respondent fails to comply with the Director's decision, Respondent shall be in violation of this Order and the ECL.

3. The invocation of formal dispute resolution procedures pursuant to this Subparagraph XI. B. shall not of itself extend, postpone or affect in any way any of Respondent's obligations under this Order, except as specified by the Director. The invocation of these procedures shall constitute an election of remedies, and such election of this remedy shall constitute a waiver of any and all other remedies which may otherwise have been available regarding the issues raised.

XII. Communications

A. All written communications required by this Order

shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

Communication from Respondent shall be sent to:

Gregory P. Sutton, P.E.
Division of Hazardous Waste Remediation
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, New York 14203-2999

with copies thereof sent to:

G. Anders Carlson, Ph.D., Director
Bureau of Environmental Exposure
Investigations
New York State Department of Health
2 University Place
Albany, New York 12203

Chief, Bureau of Western Remedial Action
Division of Hazardous Waste Remediation
50 Wolf Road
Albany, New York 12233-7010

Glen R. Bailey, Senior Attorney
Division of Environmental Enforcement
270 Michigan Avenue
Buffalo, New York 14203-2999

B. Copies of work plans and reports shall be submitted as follows:

1. Four copies (one unbound) to Gregory P. Sutton, Division of Hazardous Waste Remediation.
2. Two copies to the Director, Bureau of Environmental Exposure Investigation.
3. One copy to the Chief, Bureau of Western

Remedial Action.

4. One copy to Glen R. Bailey, Senior Attorney.

C. Communication to be made from the Department to Respondent shall be sent to:

Ben F. Baker
Project Manager
The Dow Chemical Company
Environmental Remediation - 6th Floor
2030 Dow Center
Midland, MI 48674-2030

with copies sent to:

Michael T. Kay, Esq.
The Dow Chemical Company
Legal Department - 8th Floor
2030 Dow Center
Midland, MI 48674-2030

and:

~~R. W. Zollinger, P.E.~~ JOE KASPER
Dow Environmental Inc.
Penn Center West
Building III, Suite 300
Pittsburgh, PA 15276

JJK
7/7/95

D. The Department and Respondent reserve the right to designate additional or different addressees for communication on written notice to the other.

XIII. Miscellaneous

A. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous wastes at the Site in accordance with the ROD.

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

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent, and the Department also shall have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data generated by Respondent with respect to implementation of this Order and shall submit these results in the progress reports required by this Order. The Department shall make available to Respondent the results of all sampling and/or tests or other data generated or obtained by the Department for inclusion in Respondent's reports.

D. Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondent shall use its best efforts to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order.

F. Respondent and Respondent's officers, directors, agents, servants, employees, successors, and assigns shall be bound by this Order. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent's responsibilities under this Order. Respondent'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 Respondent.

G. Respondent shall make available a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondent 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.

Respondent or Respondent's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

H. 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 State Education Law.

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

J. The section headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

K. (1) The terms of this Order shall constitute the complete and entire Order between Respondent and the Department 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 party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal,

plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

(2) If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Gregory P. Sutton and to Glen R. Bailey.

L. The effective date of this Order shall be the date it is signed by the Commissioner or his designee.

DATED: 7/28 , New York
, 1995 ,

MICHAEL D. ZAGATA
Commissioner
New York State Department of
Environmental Conservation


Michael J. O'Toole, Jr.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

Essex Specialty Products, Inc.

Jerry L. Spradling

By: Jerry L. Spradling
(TYPE NAME OF SIGNER)

Title: V.P. of Manufacturing & Technology

Date: July 7, 1995

STATE OF NEW YORK)

COUNTY OF) s.s.:

On this 10TH day of JULY, 1995, before me personally came JERRY L. SPRADLING, to me known, who being duly sworn, did depose and say that he resides in FRANKENMUTT, MICHIGAN; that he is the VICE PRESIDENT OF MANUFACTURING & TECHNOLOGY of Essex Specialty Products, Inc., the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Linda J. Lauzon
Notary Public

LINDA J. LAUZON
Notary Public, Oakland County, Michigan
My Commission Expires November 2, 1999