

FILE COPY

DIARSENOL/KINGSLEY PK

1991

ORDER ON FILE 7 3085
CONSENT

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

THE CITY OF BUFFALO

Respondent

Site I.D. #915124
Index #B9-0326-90

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites".

2. The City of Buffalo ("Respondent"), is a municipality organized and existing under the laws of the State of New York which owns real property known as Kingsley Playground located in the City of Buffalo. At least a portion of Kingsley Playground includes property which had been used by the Diarsenol Company for the manufacture of arsenic-based pharmaceuticals prior to acquisition by the City. This area is known as the Diarsenol Co., Kingsley Park Site (the "Site"). The Diarsenol Company wastes have been found on the Kingsley Playground and in locations adjacent to the Playground. Soil samples collected at the Site have been found to exhibit the hazardous waste characteristic of extraction procedure toxicity for arsenic.

3. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301(2) and

presents a significant threat to the public health or environment. The site has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 915124. The Department has classified the Site as a Classification "2" pursuant to ECL Section 27-1305(4)(b).

4. The Department and Respondent agree that the goals of this Order shall be to establish the terms and conditions under which (a) the City shall reimburse the Department for any State funds expended in the development and implementation of a remedial program for the City-owned property at the Site, which may include a site investigation, a Remedial Investigation/Feasibility Study, Interim Remedial Program, and design and implementation of a remedial alternative, and (b) following completion of any remedial activities, the City shall assume responsibility for the continued operation and maintenance of the remedial program.

5. Respondent, having waived its right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agrees to be bound by its terms.

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

I. In accordance with the "Schedule of Payments" attached to and incorporated into this Order as Appendix "A", Respondent shall reimburse the Department for twenty-five percent (25%) of all costs the Department has and shall expend for the development and implementation of a remedial program on the

property owned by the City of Buffalo at this Site except the Respondent shall not reimburse the Department for the Department's administrative costs. Any twenty-five percent (25%) payment made by the Respondent for a specific cost which the Department incurred shall constitute the sole obligation of the Respondent to make payment to the Department for that specific cost.

II. Following completion by the Department or its consultants of any Remedial Program for the Site, Respondent shall operate, maintain and monitor all elements of the Remedial Program for the period of years set forth in the Remedial Design and implement the health and safety plan contained in the Remedial Design.

III. Within 90 days after the effective date of this Order, Respondent shall submit to the Department all data within its possession or control regarding environmental conditions on-Site and off-Site, and other information described below, unless such data has been previously provided to the Department. The data and other information shall include:

a. a brief history and description of the Site, including the types, quantities, physical state, location and dates of disposal of hazardous waste including methods of disposal and spillage of such wastes, if known;

b. a concise summary of information held by the Respondent and its attorneys with respect to all persons responsible for such disposal of hazardous wastes, including

but not limited to names, addresses, dates of disposal and any information or proof linking each such person responsible with hazardous wastes identified pursuant to the investigations herein;

c. a comprehensive list and copies of all existing relevant reports with titles, authors and subject matter, as well as a description of the results of all previous investigations of the Site and areas in the vicinity of the Site, including copies of all available topographic and property surveys, engineering studies and aerial photographs.

IV. Respondent shall permit any duly designated employee, consultant, contractor or agent of the Department or any State agency to enter upon the Site or areas in the vicinity of the Site which may be under the control of Respondent.

V. Respondent shall not suffer any penalty under this Order, or be subject to any proceeding or action, if it cannot comply with any requirements hereof because of an act of God, war or riot. Respondent shall immediately notify the Department in writing when it obtains knowledge of any such condition and request an appropriate extension or modification of this Order.

VI. The failure of the Respondent to comply with any term of this Order shall be a violation of this Order and the ECL.

VII. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any rights which the Department may have, including, but not limited to:

a. the Department's right to bring any action or proceeding against anyone other than Respondent, its directors, officers, employees, servants, agents, successors and assigns;

b. the Department's right to enforce this Order against Respondent, its directors, officers, employees, servants, agents, successors and assigns in the event that Respondent shall fail to satisfy any of the terms hereof;

c. the Department's right to bring any action or proceeding against Respondent, its 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 wastes or constituents at or from the Site or areas in the vicinity of the Site, and;

d. the Department's right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors and assigns with respect to hazardous substances that are present at the site or that have migrated from the site.

VIII. This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

IX. 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 the fulfillment or attempted fulfillment of this Order by

Respondent, its directors, officers, employees, servants, agents, successors or assigns.

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

XI. If Respondent desires that any provision of this Order be changed, it shall make timely written application to the Commissioner setting forth reasonable grounds for the relief sought. A copy of such written application shall be delivered or mailed to:

Michael DiPietro
Division of Hazardous Waste Remediation
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233

XII. If upon final audit of the Project by the Office of the State Comptroller, the Department discovers that overpayment by the Respondent above the amount due has occurred, the Department agrees that full payment of the overage will be made to the Respondent.

XIII. The State of New York ("State") and the Respondent reserves its right to legally pursue any responsible party to compel participation in the Remedial Program or to recover costs incurred by the State and/or City in connection with the site. Respondent shall retain twenty-five percent (25%) of any costs or damages recovered by Respondent from any responsible party pursuant to State or Federal law. The State of New York shall receive seventy-five percent (75%) of any costs or damages recovered by the City from any other responsible party.

until such time as the State of New York shall have recovered all costs incurred in connection with the site.

The State of New York shall retain any and all costs and damages which it recovers from any responsible party not a signatory to this Order until the State has recovered all costs and litigation expenses incurred in connection with the Site. The Respondent is entitled to join in any cost recovery litigation brought by the State.

XIV. In the event Respondent proposes to convey the whole or any part of its ownership interest in the Site, Respondent shall, not fewer than 60 days prior to the proposed conveyance, notify the Department in writing of the identity of the transferee and of the nature and date of the proposed conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

XV. Respondent shall cooperate with the Department in the development and implementation of a citizen participation program for the Site. The citizen participation program shall be consistent with the Department's publication entitled "New York State Inactive Hazardous Waste Site Citizen Participation Plan".

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

A. Communication from Respondent shall be made as follows:

1. Director, Division of Hazardous
Waste Remediation
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233
2. Division of Environmental Enforcement
New York State Department of
Environmental Conservation
600 Delaware Avenue
Buffalo, New York 14202-1073
3. Regional Director
New York State Department of
Environmental Conservation
600 Delaware Avenue
Buffalo, New York 14202-1073

B. Communication to be made from the Department to the
Respondent shall be made as follows:

1. Mayor, City of Buffalo
Executive Offices
201 City Hall
Buffalo, New York 14202
2. Corporation Counsel
Department of Law
1100 City Hall
Buffalo, New York 14202
3. Commissioner, Department of
Community Development
Room 920, City Hall
Buffalo, New York 14202
4. Buffalo Environmental
Management Commission
Room 428, City Hall
Buffalo, New York 14202

C. The Department and Respondent respectively reserve the
right to designate additional or different addresses for
communication or written notice to the other.

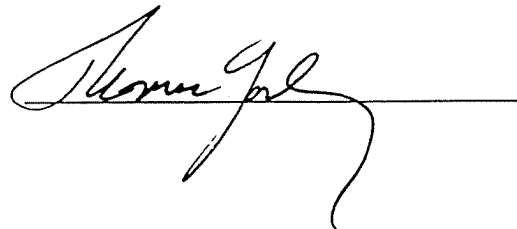
XVII. The Department and Respondent, its officers, directors, agents, servants, employees, successors and assigns shall be bound by this Order.

XVIII. The terms hereof shall constitute the complete and entire Order between Respondent and the Department concerning the Site. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestions or comments by the Department regarding reports, proposals, plans, specifications, schedules or any other submittals shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

DATED: *Albany*, New York

April 17, 1991

THOMAS C. JORLING
Commissioner
New York State Department of
Environmental Conservation

A handwritten signature in dark ink, appearing to read "Thomas Jorling", is written over a horizontal line.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, and agrees to be bound by this Order.

CITY OF BUFFALO

By:

James D. Griffin
James D. Griffin
Mayor

Date:

April 4, 1991

STATE OF NEW YORK)

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S.S.:

COUNTY OF ERIE)

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On this 4th day of April, 1991,
before me personally came James D. Griffin, to me
known, who being duly sworn, did depose and say that he resides
in the City of Buffalo, County of Erie and State of New York;
that he is the Mayor of THE CITY OF BUFFALO, the corporation
described in and which executed the within instrument; that he
knows the seal of said City; that the seal affixed to said
instrument is such corporate seal; that it was so affixed
pursuant to Section 518 of the Charter of the City of Buffalo,
and that he signed his name thereto by like authority and
pursuant to Item No. 117 duly passed by the Common Council on
November 10, 1987.

Caroline A. Scirri

Notary Public

CAROLINE A. SCIRRI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires June 30, 1991

APPENDIX "A"

SCHEDULE OF PAYMENTS

In accordance with Paragraph I of the Consent Order and following completion of each milestone of the remedial program as listed herein, Respondent shall pay by check payable to the Hazardous Waste Remedial Fund sent to the attention of the Bureau of Program Management as follows:

MILESTONES

I. Within 60 days after submission of a payment request from the Department following the completion of the site investigation by the Department or its consultants twenty-five percent of Department costs associated with property owned by the City.

II. Within 60 days after submission of a payment request from the Department following the completion of an Interim Remedial Program by the Department or its consultants twenty-five percent of Department costs associated with property owned by the City.

III. Within 60 days after submission of a payment request from the Department following the completion of the Final RI/FS Report by the Department or its consultants twenty-five percent of the Department costs associated with property owned by the City.

IV. Within 60 days after submission of a payment request from the Department following the completion of Final Design Specifications and Plans by the Department or its consultants

twenty-five percent of the Department costs associated with property owned by the City.

V. Within 60 days after submission of a payment request from the Department following completion of As-Built drawings by the Department or its consultants twenty-five percent of the Department costs associated with property owned by the City.