

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

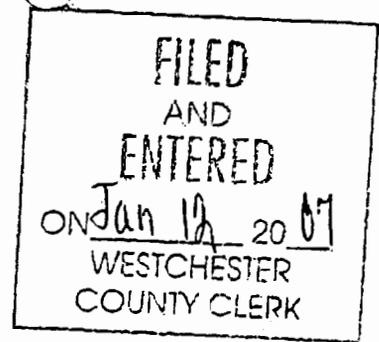
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STATE OF NEW YORK, DENISE M.
SHEEHAN, as Commissioner of the
New York State Department of Environmental
Conservation, and NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Plaintiffs,

- against -

CITY OF YONKERS,

Defendant.
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Index No. 02-21081
(Justice Nicolai)

**CONSENT
JUDGMENT**

WHEREAS on February 22, 2005 an Order and Judgment Granting Motion for Summary Judgment and Other Relief (Judgment) was filed and entered in the Westchester County Clerk's Office, granting summary judgment to Plaintiff State of New York¹ on the State's claims for a permanent injunction against Defendant City of Yonkers (the City or Yonkers) arising from discharges of raw sewage into the Bronx River from City owned and/or operated storm sewers in violation of Article 17 of the New York Environmental Conservation Law (ECL) and its implementing regulations, and in violation of the common law of public nuisance;

WHEREAS pursuant to the Judgment, among other things, Yonkers was required to investigate and abate these raw sewage discharges pursuant to a prompt schedule, submit quarterly remedial reports to the State detailing the City's progress in abating such discharges, and reimburse the State for inspection, sampling, and laboratory analysis costs incurred by the

¹ Subsequently, the caption was modified to add other State of New York plaintiffs. In this Consent Judgment, all plaintiffs shall be referred to collectively as the State.

State in this action;

WHEREAS the City filed a Notice of Appeal of the Judgment on or about March 29, 2005; the State moved before the Appellate Division, Second Department (Second Department) to vacate any automatic stay of the Judgment that might apply pursuant to CPLR § 5519(a)(1); on May 16, 2005 the Second Department issued an order granting the State's motion to vacate any stay that might apply; and on December 19, 2006, the Second Department entered a Decision and Order affirming the Judgment with costs in State of New York v. City of Yonkers,

__ N.Y.S.2d __, 2006 WL 3733287, 2006 N.Y. Slip Op. 09603 (2d Dep't December 19, 2006);

WHEREAS the City has failed to comply with the Judgment and, on November 3, 2006, the Court issued an Order and Judgment (Order and Judgment) holding Yonkers liable for \$802,386.42 in penalties and interest for violating the Judgment by failing to: (i) eliminate (and certify elimination of) sewage discharges to the Bronx River from the McLean Avenue, Glen Road, and Raybrook Road outfalls by November 1, 2005, (ii) timely submit its first quarterly remedial report to the State, and (iii) timely reimburse the State for its inspection, sampling, and laboratory analysis costs;

WHEREAS pursuant to the Judgment the City was required to eliminate, and certify elimination of, all of its discharges of raw sewage into the Bronx River from its storm sewers during dry weather by July 1, 2006. The City has failed to meet this requirement and, in violation of the Judgment, large volumes of raw sewage continue to be discharged into the Bronx River from Yonkers storm sewers each day; and

WHEREAS the parties agree that the Judgment should be restructured to ensure that the raw sewage discharges from Yonkers' storm sewers into the Bronx River are more effectively

and efficiently investigated and promptly eliminated, and the State should take over performance of the investigation of the sources of the pollution with funds provided by the City to accomplish these objectives.

**NOW THEREFORE IT IS ORDERED, ADJUDGED, AND
DECREED THAT THE JUDGMENT IS MODIFIED ON
CONSENT OF THE PARTIES AS FOLLOWS:**

I. Injunction:

1. Yonkers is permanently enjoined from allowing untreated sewage or any pollutant other than storm water to discharge into the Bronx River from its storm sewers and storm sewer outfalls.

2. Yonkers is ordered and enjoined to implement the following Remedial Program to abate promptly the discharges of untreated sewage from the City's storm sewers.

II. Remedial Program:

3. Definitions: The following definitions shall apply in this Consent Judgment:

a. *Yonkers Storm Sewer Outfalls* means all outfalls to the Bronx River owned or operated by the City.

b. *Polluting Yonkers Storm Sewer Outfalls* means the following outfalls shown to be discharging effluent in Dry Weather with fecal coliform concentrations exceeding the applicable water quality standard of 200 fecal coliforms/100 ml based on sampling performed by Long Island Analytical Laboratories, Inc. (LIAL) during 2003, other outfalls if found to be discharging fecal coliform into the Bronx River in Dry Weather at such concentrations during the course of the Remedial Program, and outfalls otherwise included in quarterly Remedial Program Progress Reports submitted by the City pursuant to the Judgment

through December 11, 2006:

| | Outfall Name | LIAL ID | Latitude | | | Longitude | | |
|----|------------------------|---------|----------|------|------|-----------|------|------|
| | | | Deg. | Min. | Sec. | Deg. | Min. | Sec. |
| 1 | McLean Avenue | McLean | 40 | 54 | 3 | -73 | 51 | 37 |
| 2 | Glen Road | D6 | 40 | 54 | 25 | -73 | 51 | 21 |
| 3 | Raybrook Avenue | D10 | 40 | 54 | 35 | -73 | 51 | 13 |
| 4 | <i>Not Named</i> | D11 | N/A | N/A | N/A | N/A | N/A | N/A |
| 5 | Yonkers Avenue | D11a | 40 | 54 | 47 | -73 | 51 | 3 |
| 6 | Sherwood Avenue | D13 | 40 | 54 | 57 | -73 | 50 | 55 |
| 7 | Mile Square Road | D14 | 40 | 55 | 3 | -73 | 50 | 3 |
| 8 | Springer Road I | D15 | 40 | 55 | 22 | -73 | 50 | 60 |
| 9 | Springer Road II | D16 | 40 | 55 | 26 | -73 | 50 | 55 |
| 10 | Midland Avenue I | D18 | 40 | 55 | 36 | -73 | 50 | 40 |
| 11 | Midland Avenue II | D19 | 40 | 55 | 38 | -73 | 50 | 30 |
| 12 | Broad Street | D20 | 40 | 55 | 42 | -73 | 50 | 27 |
| 13 | Georgia Street | D23 | 40 | 55 | 47 | -73 | 50 | 22 |
| 14 | Grassy Sprain Brook I | D30 | 40 | 56 | 12 | -73 | 50 | 17 |
| 15 | Grassy Sprain Brook II | D31 | 40 | 56 | 10 | -73 | 50 | 9 |
| 16 | Pondfield Road | D45 | 40 | 56 | 35 | -73 | 50 | 23 |
| 17 | Tuckahoe Road | D58 | 40 | 56 | 57 | -73 | 50 | 0 |
| 18 | Thompson Street | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| 19 | Cambridge Avenue | D63-64 | 40 | 58 | 31 | -73 | 48 | 52 |
| 20 | Alta Vista Drive* | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| 21 | Roxbury Drive* | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| 22 | Fort Hill Road* | N/A | N/A | N/A | N/A | N/A | N/A | N/A |

* To Bronx River via Troublesome Brook

c. *Drainage Area* means the geographic area encompassing all sources of discharges from a Yonkers Storm Sewer Outfall into the Bronx River. In this Consent Judgment, each Drainage Area will be identified by the Yonkers Storm Sewer Outfall to which such area drains.

d. *Dry Weather* means a condition in Yonkers in which: (i) there is currently no precipitation or snow melt within the outfall's Drainage Area and, (ii) there has been no such precipitation or snow melt greater than .1 inches of rain or its snow melt equivalent during the

previous 48 hours.

e. *Wet Weather* means a condition in Yonkers that is not Dry Weather.

f. *Cross-Connection* means a condition in which sewage from a sanitary sewer pipe owned or operated by the City can be transmitted to a storm sewer pipe owned or operated by the City as a result of a direct or indirect connection between these pipes.

g. *Private Connection* means a condition in which sewage from a property owner other than Yonkers can be transmitted to a storm sewer pipe owned or operated by the City as a result of a direct connection between a sanitary sewer pipe owned or operated by such property owner and the City's storm sewer pipe, or as a result of an indirect connection between these pipes.

h. *Abatement Work* means the elimination of sources of sewage and other pollutants that have been discharging into the Bronx River from Polluting Yonkers Storm Sewer Outfalls.

4. Investigation and Monitoring

a. Within 30 days of the Effective Date of this Consent Judgment, Yonkers shall submit to the State a check in the amount of \$2,200,000 to fund an investigation within the Drainage Areas of Polluting Yonkers Storm Sewer Outfalls to identify all Cross-Connections, Private Connections, and other possible sources of sewage discharges to the Bronx River (the Investigation), and to monitor, evaluate, and report to the State concerning Abatement Work to be undertaken by Yonkers (Monitoring). The State shall hold the money received from the City in an escrow account (Escrow Account) and shall disburse such funds from time to time to a State-selected contractor (Contractor) to complete the Investigation and Monitoring. Any funds

remaining in the Escrow Account after completion of all Investigation, Monitoring, and Abatement Work under this Consent Judgment shall be returned by the State to Yonkers.

b. In December 2006 the State, through its Office of General Services (OGS), published advertisements in the New York State Contract Reporter and on the OGS website at www3.ogs.state.ny.us/dnc/contractorConsultant/esb/ESBConsultantOps.asp?oppType=1 seeking letters of interest from qualified engineering firms to perform the Investigation and Monitoring. By March 1, 2007, the State, in the exercise of its sole discretion after considering comments provided by Yonkers, shall select the Contractor. Thereafter, the State shall use its best efforts promptly to enter into a contract with the Contractor to perform the Investigation and Monitoring and to commence such work.

c. Yonkers shall at all times cooperate with the Contractor and the State to facilitate the Investigation and Monitoring. Upon request, the City shall promptly provide to the Contractor and to the State access to Yonkers' municipal infrastructure including, without limitation, storm and sanitary sewage pipes, manholes, catch basins, and related infrastructure within the Bronx River drainage basin. The City shall, upon request by the Contractor or the State, promptly: (i) make available City employees, agents, and contractors to provide relevant information concerning the Investigation and the City's Abatement Work, and (ii) submit copies of documents to assist in completion of the Investigation and Monitoring.

d. The City shall hire a project manager (Project Manager) to act as the City Engineering Department's liaison to the Contractor, other State contractors, and State scientific and engineering staff to ensure Yonkers' compliance with paragraphs 4.c and 7 of this Consent Judgment. The Project Manager shall also oversee and monitor the City's abatement work to be

performed pursuant to paragraph 5 below and compile data and maintain records concerning the progress of such work.

5. Abatement Work

a. Within 120 days of the Effective Date, the City shall: (i) eliminate all Private Connections previously disclosed in the quarterly Remedial Program Progress Reports submitted by Yonkers to the State through December 11, 2006, and (ii) submit to the State in tabular form a report showing the addresses of such Private Connections and the dates they were eliminated.

b. The Contractor will provide Yonkers a weekly report (Weekly Report) of Private Connections, Cross-Connections, and other sources of sewage discharges to the Bronx River from Yonkers storm sewers which the Contractor has learned of during the Investigation and shall specify the appropriate actions to eliminate such discharges. Within seven days of receiving a Weekly Report from the Contractor identifying any Private Connection, the City shall provide notice to the property owner of the connection (with a copy to the Contractor) and the City shall eliminate such connection and provide written certification to the Contractor that it has done so within 60 days of such notice. Where the Weekly Report identifies any Cross-Connection or source of sewage other than a Private Connection, the City shall eliminate such connection or source and provide written certification to the Contractor that it has done so within 60 days of receiving such report unless Yonkers requests in writing to the State before this period lapses that it be given more than 60 days to perform the work and provide the certification and the State grants the request. The State shall resolve the request by serving the City with a State Determination (as defined in paragraph 11 below) granting Yonkers additional time to complete the work if, and to the extent that, the State determines this to be reasonable and appropriate, or

otherwise denying the request.

c. In the event that Yonkers breaches any of its obligations under this Consent Judgment relating to the Investigation and Abatement Work including, without limitation, its obligations under paragraphs 5.a and 5.b above, the State may issue a State Determination (as defined in paragraph 12 below) finding such breach, taking over performance of some or all of the Abatement Work required under this Consent Judgment, and securing funds for such work by drawing on monies remaining in the Escrow Account or requiring Yonkers to pay to the State additional funds into the Escrow Account to perform the work by State contractors.

6. Survey and Sampling Program: For each Drainage Area of the Yonkers Storm Sewer Outfalls, the State (and its outside contractors) will conduct a Survey and Sampling Program. The purpose of this program is to assess the effectiveness of Yonkers' actions to eliminate sources of sewage discharges from Polluting Yonkers Storm Sewer Outfalls and to prevent new discharges from such outfalls and to determine whether discharges, if any, from Yonkers Storm Sewer Outfalls that have not been designated as Polluting continue to have concentrations of fecal coliform less than 200 fecal coliforms/100ml. This program shall repeat from time to time all the components of the State's investigation of pollution discharges into the Bronx River along the River's eight-mile stretch bordered by, or within, Yonkers, as carried out by LIAL in 2003. Within 30 days after a written demand is made by the State, Yonkers shall reimburse the State for costs incurred by the State for Survey and Sampling Program work conducted after 2003.

7. Preventing New Illegal Sanitary Sewer Connections: Yonkers shall not approve, permit, or allow any new sanitary sewer connection (or any repair to an existing sanitary sewer

connection) to any building or improvement within all Bronx River Drainage Areas, and shall not issue any certificate of occupancy for such building or improvement unless and until the City conducts a dye test demonstrating that sanitary wastes from the building or improvement discharge to a municipal sanitary sewer and not to a storm sewer. The City shall submit to the State documentation of all dye test results for such new sanitary sewer connections or repairs of existing sanitary sewer connections every 180 days following the Effective Date of this Consent Judgment.

8. Service of Invoices: Every 180 days after the Effective Date, the State will serve upon Yonkers copies of all invoices paid by the State during that period for the services of the Contractor performing the Investigation and Monitoring, and for other contractors, if any, performing Survey and Sampling Program work under paragraph 6 above, or Abatement Work under subparagraph 5.c above (collectively, Invoices).

III. Enforcement of Consent Judgment

9. To ensure its prompt compliance with this Consent Judgment and subject to provisions concerning dispute resolution described below, in the event Yonkers fails to perform any obligation required under this Consent Judgment, the City will pay penalties to the State in the amounts set forth in paragraph 10 below for each day that elapses until Yonkers' failure to perform the obligation is cured. A failure to perform an obligation required under this Consent Judgment is defined, without limitation, to include a failure to make a timely submittal of funds, reports, certifications, or documents to the State or to the Contractor in accordance with this Consent Judgment or with a State Determination under paragraph 12 below, or a failure to take any action (or to refrain from taking any action) required by this Consent Judgment or by a State

Determination under paragraph 12 below. Notwithstanding the forgoing, the City shall not be liable for penalties for failing to perform Abatement Work consisting of eliminating Private Connections, Direct Connections, and other sources of sewage discharges to the Bronx River from Yonkers storm sewers in accordance with subparagraphs 5.a. and 5.b if it complies with a State Determination issued pursuant to subparagraph 5.c above requiring Yonkers to submit to the State additional monies into the Escrow Account to fund performance of such Abatement Work by State contractors.

10. For each failure to perform an obligation, Yonkers shall be liable for penalties to the State as follows:

| <u>Length of Violation</u> | <u>Stipulated Penalty</u> |
|----------------------------|---------------------------|
| Day 1 through 30 | \$100/day |
| Day 31 through 60 | \$500/day |
| Day 61 and thereafter | \$1,000/day |

11. Nothing herein may be construed to affect in any way the State's obtaining additional or alternative remedies relating to any violations of this Consent Judgment, including without limitation, the remedies of injunctive relief, criminal and civil contempt.

IV. State Determinations

12. The State may issue determinations (State Determinations) assessing penalties pursuant to paragraphs 9 and 10 above; resolving requests by the City for additional time to eliminate connections and sources of sewage pursuant to paragraph 5.b above; taking over performance of some or all of the Abatement Work required under this Consent Judgment and securing funds for such work by drawing on monies remaining in the Escrow Account or

requiring Yonkers to submit to the State additional funds to perform the work by State factors pursuant to paragraph 5.c above; requiring Yonkers to submit to the State additional funds to perform the Investigation and Monitoring if the State determines that such funding is required; or otherwise relating to the Investigation and Abatement Work under this Consent Judgment. A State Determination is final and binding upon Yonkers subject to the City's right to dispute such determination under paragraphs 13 and 14 below.

V. Dispute Resolution

13. The City may seek to dispute any State Determination or Invoices by serving upon the State, and filing with the Court, a timely petition to annul or modify such determination or, in the case of a challenge to Invoices, a timely petition seeking to annul or modify Invoices and seeking reimbursement of amounts allegedly billed to and paid by the State for work not performed. To be timely, a petition must be served and filed within 30 days of service of the determination being challenged or, in the case of a challenge to Invoices, within 30 days of service of the Invoices. If Yonkers fails to timely serve and file such petition, the Determination or Invoices shall be final and binding upon the City.

14. The procedures and standards applicable to a proceeding under Article 78 of the CPLR shall apply to any petition by Yonkers seeking dispute resolution and shall be Yonkers' sole judicial remedy for any dispute between the parties arising from a State Determination or Invoices. Yonkers shall have the burden of proof in any petition challenging a State Determination or Invoices. In such dispute, the State Determination or Invoices shall not be set aside by the Court except upon a finding that the Determination, or the State's decision to pay Invoices for work allegedly not performed, is arbitrary, capricious, contrary to law, or

consistent with this Consent Judgment. Notwithstanding the forgoing, in any petition seeking to challenge a State Determination or Invoices, or appeal of the Court's decision on such petition, Yonkers may not seek a stay or injunction of: (i) the Survey and Sampling Program, Investigation, Monitoring, or Abatement Work undertaken by the Contractor, the State, or other State contractors, or (ii) the City's obligation to submit funds to the State for Investigation, Monitoring, or Abatement Work or to reimburse the State for Survey and Sampling Program work.

VI. Force Majeure

15. If any event arising from causes beyond the reasonable control and best efforts of Yonkers or its agents delays or prevents the performance of any of the City's obligations under this Consent Judgment despite Yonkers' best efforts and due diligence to fulfill the obligation (hereinafter, a Force Majeure Event), then any such obligations will be suspended for the duration of the Force Majeure Event; provided, however, that the City: (i) notifies the State of the Force Majeure Event in full compliance with paragraph 16 below, and (ii) undertakes best efforts and due diligence to minimize the duration and impact of the Force Majeure Event.

16. Initial notification of the Force Majeure Event must be provided to the State orally as soon as possible (but by no later than 10 business days after the City or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur) by contacting the Office of the Attorney General's Environmental Protection Bureau at (518) 474-7178. Written notice shall be provided no later than 20 business days after the City or any of its agents becomes aware that circumstances constituting the Force Majeure event have occurred or will occur. Written notice shall be accompanied by all available documentation and

tain the following: (i) a description of the circumstances constituting the Force Majeure event; (ii) the actions (including pertinent dates) that the City has taken and plans to take to minimize the delay, and (iii) the date Yonkers expects to complete the delayed obligation.

Yonkers' failure to comply with these notification requirements will deprive it of an extension of time to the City's obligations and foreclose a defense based upon force majeure to a State Determination assessing penalties.

VII. Resolution of Litigation Concerning Prior Judgments

17. Yonkers agrees not take, or seek permission for, an appeal to the New York Court of Appeals from the Decision and Order of the Second Department in State of New York v. City of Yonkers, __ N.Y.S.2d __, 2006 WL 3733287, 2006 N.Y. Slip Op. 09603 (2d Dep't December 19, 2006).

18. The City shall comply with the Order and Judgment entered by the Court on November 3, 2006. The City shall pay the State \$802,386.42 in penalties and interest in accordance with the Order and Judgment, agrees not to seek relief from this Court to modify or vacate the Order and Judgment, and shall not take an appeal or seek permission to appeal the Order and Judgment.

19. The State releases all claims against Yonkers for penalties and interest arising under paragraphs 10 through 12 of the Judgment, other than the claims resolved by the Order and Judgment, through the Effective Date.

VIII. Claims for Statutory Penalties Preserved

20. This Consent Judgment resolves the State's claims for injunctive relief only. The legal claims alleged in the State's Amended Complaint herein for statutory penalties under ECL

929 are preserved, and this Consent Judgment does not prejudice such claims or Yonkers' assertion of defenses to such claims.

IX. Notices; Effective Date; Indemnity; State Delay

21. All written communications, notices, reports, or other documents from Yonkers to the State shall be served upon Philip Bein, Assistant Attorney General, Office of the Attorney General, Environmental Protection Bureau, The Capitol, Albany, New York 12224, and upon Scott Crisafulli, Chief of the Bureau of Enforcement, Compliance, and Assurance, DEC, 625 Broadway – 14th floor, Albany, New York 12233. All written communications, notices, reports, or other documents from the State to the City shall be served upon Office of the Corporation Counsel, City of Yonkers, City Hall, Room 300, Yonkers, NY 10701-3883 (Attn: Mark Blanchard). Service may be made by facsimile transmission or e-mail.

22. The Effective Date of this Consent Judgment is the date when Yonkers receives notice that the Court has entered the Consent Judgment.

23. Yonkers shall indemnify and hold harmless the State (including its Department of Environmental Conservation, Office of the Attorney General, and its other departments and agencies) and State representatives, employees, agents and contractors for all claims, suits, actions, damages and costs of every name and description arising from conduct by the City taken in an effort to comply with its obligations under this Consent Judgment.

24. Any delay by the State in performing any act required under this Consent Judgment shall not be deemed a breach of the Consent Judgment.

ED AND AGREED TO BY:

SPITZER
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Attorneys for Plaintiffs
New York State Department of Law
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By: Philip Bein
Philip Bein
Assistant Attorney General

Dated: 12/29/06

FRANK J. RUBINO
Corporation Counsel for the City of Yonkers
Attorney for Defendant
City of Yonkers
City Hall, Room 300
Yonkers, NY 10701-3883

Frank J. Rubino

Dated: 12/28/06

Dated:

JAN. 11, 2007

So Ordered and Enter:

JA Mueller

Acting Justice, New York State Supreme Court