

IN THE COURT OF COMMON PLEAS  
TUSCARAWAS COUNTY, OHIO

2006 MAY 18 P 3: 27

STATE OF OHIO, ex rel.

JIM PETRO

ATTORNEY GENERAL OF OHIO,

ROCKNE W. J., CASE NO. 2004 CV 02 0068  
CLERK OF COURT

: JUDGE EMMITT O'FARRELL

Plaintiff,

v.

: CONSENT ORDER AND  
: PERMANENT INJUNCTION

VILLAGE OF NEWCOMERSTOWN

Defendant.

WHEREAS, Plaintiff State of Ohio, on relation of Jim Petro, Attorney General of Ohio, at the written request of the Director of the Ohio Environmental Protection Agency ("Ohio EPA"), filed a complaint commencing this action against Defendant Village of Newcomerstown ("Defendant") to enforce the provisions of Ohio's solid waste laws set forth in Ohio Revised Code Chapter 3734 and the rules adopted pursuant to that chapter, and to pursue other legal and equitable relief;

WHEREAS, Plaintiff and Defendant consent to the entry of this Consent Order and Permanent Injunction ("Consent Order") without trial of any issue of fact or law, and upon consent of the Parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

**I. JURISDICTION AND VENUE**

1 This Court has jurisdiction over the parties and the subject matter of this action pursuant to Chapter 3734 of the Ohio Revised Code. Venue is proper in this Court. The Complaint states a claim upon which relief can be granted against Defendant.

## **II. PARTIES BOUND**

2. The provisions of this Consent Order shall apply to and be binding upon Defendant, its successors in interest and assigns, and others to the extent provided by Civil Rule 65(D).

3. Defendant shall provide a copy of this Consent Order to each general contractor, subcontractor, consultant, agent, employee, and person hired by or who will provide work or services related to this Consent Order on behalf of Defendant.

4. Nothing herein shall be construed to relieve Defendant of its obligation to comply with all applicable federal, state, or local statutes, regulations, or ordinances including but not limited to applicable permit requirements.

## **III. DEFINITIONS**

5. The terms used in this Consent Order shall have the same meaning as used in R.C. Chapter 3734 and the regulations promulgated thereunder.

6. "Landfill" is the sanitary landfill facility located on South College Street, Newcomerstown, Tuscarawas County.

## **IV. SATISFACTION OF LAWSUIT AND EFFECT OF ORDER**

7. The State has alleged that Defendant has violated R.C. Chapter 3734, and Ohio Adm. Code Chapter 3745-27. Defendant denies all such allegations by entering into this Consent Order, and makes no admission of fact, law or liability with respect to the State's allegations.

8. Except as otherwise provided in Paragraph 9 of this Consent Order, compliance with the terms of this Consent Order shall constitute full satisfaction of any civil and administrative liability (including injunctive relief, civil penalties and investigative or other costs

or expenses) of Defendant and its successors in interest and assigns, for the claims alleged in the State's Complaint, and the violations alleged in the Ohio Environmental Protection Agency's ("Ohio EPA") correspondence identifying noncompliance through the date of this Consent Order.

9 Nothing in this Consent Order shall be construed to limit the authority of the State to seek relief from Defendant for claims or violations not referenced in this Consent Order, any violations arising out of acts or omissions first occurring after the entry date of this Consent Order; or claims or violations under the Comprehensive Environmental Response Compensation and Liability Act, as amended, 42 U.S.C. § 9601 et. seq. or R.C. 3734.20 through 3734.27, for any emergency, removal, remedial, or corrective actions. Notwithstanding any provision in this Consent Order to the contrary, Defendant retains all rights, defenses, and/or claims it may legally raise to the extent that the State seeks further relief from the Defendant in the future, or in any action brought to enforce the terms of this Consent Order.

#### **V. INJUNCTIVE RELIEF AND COMPLIANCE SCHEDULE**

10. Defendant is ordered and enjoined to comply with R.C. Chapters 3734 and the rules adopted thereunder.

11. Defendant is ordered and enjoined to block, by locked gates, fencing, or other sturdy obstacles, all entrances and access roads to the Landfill to prevent unauthorized access during the final closure and post-closure period.

12. Defendant agrees and is ordered and enjoined to submit a final closure/post-closure plan for approval to the Ohio EPA, Southeast District Office (SEDO") within one hundred twenty (120) days after the effective date of these Orders. Defendant's final closure/post-closure plan shall contain the following, at a minimum:

- a. The name and location of the Landfill included in the final closure/post-closure plan.
- b. Any variances or exemptions from the requirements of rules 3745-27-11 and 3745-27-14 of the Administrative Code or any alternative schedule for completing final closure activities.
- c. The name, address, and telephone number of the person or office to contact regarding the Landfill during the final closure and post-closure care periods.
- d. Schedule of installation of any explosive gas control systems.
- e. Plan drawings of the horizontal limits and top elevations of waste and the cap system and surface water control including ditches to control run-on and runoff.
- f. Establish a grid system with northings and eastings not more than five hundred feet apart.
- g. Detail drawings of the cap system including but not limited to the key trenches and any penetrations.
- h. Detail drawings of surface water run-on and runoff controls.
- i. Financial assurance information in accordance with Ohio Adm. Code 3745-27-15 and 3745-27-16.
- j. General description of availability and suitability of cap material (the actual source will be pre-qualified during the bidding process).
- k. Quality assurance/quality control plan for cap system construction.
  - l. Description of anticipated measures to control erosion.
- m. Contingency plans for leachate, fire, and differential settling.
- n. Final closure and post-closure cost estimates.

13. If Ohio EPA notifies the Defendant in writing that Defendant's final closure/post-closure plan requires modifications prior to its approval, the Parties agree that Defendant shall be afforded ninety calendar days to make the necessary corrections and resubmit the final closure/post-closure plan for approval. If after review of the corrections to the final closure/post-closure plan, Ohio EPA again notifies the Defendant in writing that Defendant's final closure/post-closure plan requires modifications prior to its approval, the Parties agree that Defendant shall be afforded forty-five (45) calendar days to make the necessary corrections and again resubmit the final closure/post-closure plan for approval. In the event Defendant again fails to make the necessary corrections to the final closure/post-closure plan to address the requirements set out in Paragraph 12 of this Consent Order, Defendant agrees that the Director of Ohio EPA may conditionally approve or modify any portion of the final closure/post-closure plan and that Defendant waives its right to appeal the Director's determination..

14. Defendants shall install a cap at the Landfill in accordance with the following:

A. Material specifications:

The following material specifications shall apply to the material intended for use in cap construction. A representative sample of the material shall be evaluated at a frequency not less than once for every 3,000 cubic yards.

(i). 100% of the material particles shall pass a 10-inch screen, with no more than two (2) particles from a 50-cubic-foot sample retained on a 6-inch screen;

(ii) At least 95% of the material, by weight, shall pass a 3-inch screen;

(iii) At least 70% of the material, by weight, shall pass the Number 10 sieve;

(iv) The material that passes the Number 10 sieve (sand, silt, and clay fractions) shall be classified using the USDA textural classification chart as loam, sandy loam, silty loam, clay loam, silty clay, or sandy clay, or an acceptable alternative soil type.

B. Construction Specifications:

(i) The cap system shall consist of at least two (2) feet of well compacted soil material that meets the specifications contained in Paragraph 14(A) of this Order and at least six (6) inches of soil material that will support a dense vegetative cover.

(ii) The cap system shall maintain final slopes of no less than two (2) percent and no greater than twenty-five (25) percent.

(i) The material shall be compacted to at least 95% of the maximum Standard Proctor Density (ASTM D-698) or 90% of the maximum Modified Proctor Density (ASTM D-1557) and not less than two (2) percent below the optimum moisture content.

(ii) The material shall be compacted using loose lifts, no greater than eight (8) inches thick prior to compaction.

C. Testing Specifications:

(i) The suitability of the soils shall be determined prior to their intended use in cap construction. The following tests shall be performed on representative soil samples at least once for every 3,000 cubic yards of material intended for use.

(a) Sieve and hydrometer testing (ASTM D-422) for particle size gradation; and

(b) Moisture/density relationship using either Standard Proctor (ASTM D-698) or Modified Proctor (ASTM D-1557) method.

Prior to testing, the samples shall be screened to remove any particles larger than three (3) inches. Written results of this testing shall be submitted to Ohio EPA, SEDO not later than seven (7) days prior to its intended use in cap construction.

(ii) During construction of the cap, compaction shall be monitored to ensure that the proper specifications are met. This can be accomplished by a number of methods, including nuclear densimeter (ASTM D-2922), sand cone (ASTM D-1556), and rubber balloon (ASTM D-2167). The nuclear densimeter test, if used, shall be performed at least five (5) times per acre per lift. The sand cone or rubber balloon methods shall be performed at least three (3) times per acre per lift. The sampling rate for other methods shall be determined on an individual basis with concurrence from Ohio EPA..

(iii) Any penetrations into the cap layer resulting from compaction testing shall be repaired using bentonite or a bentonite/soil mixture.

(iv) Final elevations of top of waste, top of cap, and top of vegetative soil layer shall be surveyed on a grid system with survey points no more than one hundred (100) feet apart.

15. Defendant is ordered and enjoined to complete final closure of the Landfill pursuant to the schedules established in the final closure/post-closure plan to be submitted in accordance with Paragraph 12 above.

16. Defendant agrees and is ordered and enjoined to submit a revised Explosive Gas Management Plan (“EGMP”) for approval to the Ohio EPA, SEDO within ninety (90) days after the effective date of these Orders. Defendant's revised EGMP shall contain the following, at a minimum:

a. The frequency for the monitoring of explosive gas shall be quarterly for a minimum of five (5) years. Monitoring frequencies may be decreased to semiannually after the fifth year, upon approval by the Director, if a demonstration can be made that semiannual monitoring will detect off-site migration of explosive gases and is protective of the environment.

b. The plan shall include the location of all currently installed vapor wells and any planned vapor wells.

c. The plan shall include such measures necessary to abate or minimize the formation or migration of explosive gas. Specifically, Defendant may install and maintain explosive gas control structures, such as a gas venting system. Construction of any explosive gas control structures shall not compromise the integrity of the cap system.

d. If the Defendant installs an explosive gas venting system, then the frequency for the monitoring of explosive gas shall be quarterly for a minimum of two (2) years after completion. Monitoring frequencies may be decreased to semiannually after the second year post completion, upon approval by the Director, if a demonstration can be made that semiannual monitoring will detect off-site migration of explosive gases and is protective of human health, safety and the environment. Any time after the fifth year post completion, off-site explosive gas monitoring may be eliminated, upon approval by the Director, upon demonstration that this is protective of human health, safety and the environment.

The Defendant shall exercise all reasonable efforts to secure access to property necessary for the implementation of the EGMP. In the event that Defendant is unable to secure access to property necessary for the implementation of the EGMP, within ninety (90) days of being unable to secure access Defendant shall notify Ohio EPA of Defendant's efforts to secure access. Ohio EPA may assist Defendant in securing access.

17. If Ohio EPA notifies the Defendant in writing that Defendant's revised EGMP requires modifications, the Parties agree that Defendant shall be afforded ninety (90) calendar days to make the necessary corrections and resubmit the EGMP for review.. In the event Defendant fails to adequately address the modifications of the EGMP necessary to comply with Ohio Adm. Code 3745-27-12 and the provisions outlined in Paragraph Numbers 16 (a), (b) and (c), Defendant agrees that the Director of Ohio EPA may conditionally approve or modify any portion of the EGMP and that Defendant waives it right to appeal the Director's determination.

18. Defendant is ordered and enjoined to comply with the applicable provisions of Ohio Adm. Code 3745-27-10. Defendant is enjoined and ordered to submit and implement

revisions to the ground water monitoring program ("GWMP") and the ground water quality assessment plan ("GWQAP") as well as implement and comply with their schedule for the implementation of the assessment monitoring program in accordance with the following schedule:

a. Within ninety (90) days of the effective date of these orders, Defendant is enjoined and ordered to submit to Ohio EPA revisions to the ground water monitoring program as defined in Ohio **Adm. Code 3745-27-10(A)(2)**.

b. Within ninety (90) days of the effective date of these orders, Defendant is enjoined and ordered to submit to Ohio EPA revisions to the ground water quality assessment plan as defined in Ohio **Adm. Code 3745-27-10(A)(3)**.

c. Within ninety (90) days of the effective date of these orders, Defendant is enjoined and ordered to implement and comply with their schedule for implementation of the ground water assessment plan revised in August of 2004

d. Within ninety (90) days of the effective date of these orders, Defendant is ordered and enjoined to revise and update their sampling and analysis plan ("SAP") in accordance with Ohio **Adm. Code 3745-27-10(C)(2)**.

e. Within ninety (90) days of the effective date of these orders, Defendant is ordered and enjoined to revise their GWQAP and SAP to include the sampling of all necessary parameters as identified in Ohio **Adm. Code 3745-27-10(E)(5)(b)**.

19. Not later than ninety (90) days after the completion of final closure activities, Defendants are ordered and enjoined to submit a written final closure certification to the Ohio EPA in accordance with Ohio **Adm Code 3745-27-11(J)**

20. Conduct post-closure monitoring at the Landfill in accordance with Ohio Adm. Code 3745-27-14 for twenty-one (21) years, beginning upon Ohio EPA's written concurrence of the certification report as required by Paragraph 18 of this Consent Order.

21. After five (5) years of substantial compliance with Paragraph 20 of this Consent Order, Defendant may submit a written request to Ohio EPA to be released from the requirements of Paragraph 20 of this Consent Order. Post-closure monitoring pursuant to Paragraph 20 of this Consent Order may be eliminated, upon approval by the Director, upon a demonstration that it is protective of human health, safety, and the environment.

22. In the event Ohio EPA notifies Defendant that the plat and closure certification report submitted to achieve compliance with this Consent Order are unsatisfactory in whole or in part, within thirty (30) days after receipt of such notification, Defendant shall amend and submit to Ohio EPA a revised document or documents.

23. Beginning June 30, 2006, and semiannually thereafter (i.e. June 30 and December 31 each year), Defendant shall submit status reports to Ohio EPA, which shall describe the closure activities completed during the previous six months and the effort to obtain financing or other funding to accomplish closure of the facility. Defendant shall continue submitting status reports until the final closure certification has been submitted to Ohio EPA.

24. Within sixty (60) days after the effective date of this Consent Order, Defendant is ordered and enjoined to restrict access and secure proper signage, to achieve compliance with Ohio Adm. Code 3745-27-11(H)(6) and (7).

25. Within one hundred and twenty (120) days after completion of final closure, or ninety (90) days prior to the sale of all or any portion of the Landfill property, whichever occurs first, Defendant is ordered and enjoined to record a notation on the deed to the Landfill property,

or on some other instrument which is normally examined during title search, that will in perpetuity notify any potential purchaser of the property that the land has been used as a sanitary landfill facility. The notation shall include information describing the acreage, location, depth, volume, and nature of solid waste deposited in the Landfill.

#### **VI. STIPULATED PENALTIES**

26. In the event that Defendant fails to comply with any of the requirements of Section V of this Consent Order with the exception of Paragraph 11, Defendant shall, immediately and automatically, be liable for and shall pay a stipulated penalty in accordance with the following schedule:

- a. Defendant shall pay ~~fifty~~ dollars (\$50) per day for each day any requirement of this Consent Order is violated up to thirty (30) days;
- b. After thirty (30) days, Defendants shall pay one hundred dollars (\$100) per day;
- c. After ninety (90) days, Defendant shall pay one hundred fifty dollars (\$150) per day

Stipulated penalties due under this Consent Order shall be paid by certified check or money order, payable to "Treasurer, State of Ohio" and mailed to Merle Pratt or his successor, Administrative Assistant, Office of the Attorney General, Environmental Enforcement Section, 30 East Broad St., 25<sup>th</sup> Floor, Columbus, Ohio 43215-3428, within ten (10) days of the occurrence of the failure to comply with this Order as described above.

#### **VII. STAY OF INJUNCTIVE RELIEF**

27 Defendant has represented to Ohio EPA that it lacks the financial ability to perform capping and post closure care of the Landfill required by this Consent Order. Upon

examination of all the documents requested by Plaintiff and produced by Defendant in this case, Ohio EPA is satisfied that Defendant currently lacks the financial ability to perform capping and Post Closure care of the Landfill required by this Consent Order. Defendant's obligations under Section V, Numbers 14, 15, 19, and 20 of this Consent Order are stayed, at the discretion of Ohio EPA, as long as Ohio EPA finds that Defendant continues to demonstrate a financial inability to comply with Section V, Numbers 14, 15, 19, and 20.

**28.** Within sixty (60) days of the effective date of this Consent Order, Defendant shall submit the most recent five (5) years audited comprehensive annual financial reports including sewer, water or landfill fund statements. (Unaudited reports may be accepted when audited reports do not exist.) In addition, Defendant shall submit its comprehensive annual financial reports including sewer, water or landfill fund statements to Ohio EPA by May 31st of each year.

**29.** In the event that Defendant fails to submit the financial information listed in Paragraph 28 above, or if Ohio EPA determines that Defendant no longer demonstrates a financial inability to comply, Ohio EPA will give notice by certified mail to Defendant. .

**30.** If Ohio EPA determines that Defendant does not demonstrate a financial inability to comply with Section V, Paragraphs Number 14, 15, 19 and 20, the stay of Section V, Paragraphs Number 14, 19 and 20 is automatically lifted and Defendant shall comply immediately with the schedule of injunctive relief as outlined in Section V, Paragraphs Number 14, 15, 19 and 20 of this Consent Order. If the Defendant does not submit the financial information listed in Paragraph 28 above within thirty (30) days of its receipt of such notice, the stay Section V, Paragraphs Number 14, 15, 19 and 20 is automatically lifted and Defendants shall comply immediately with the schedule of injunctive relief as outlined in Section V, Paragraphs Number 14, 15, 19 and, 20 of this Consent Order.

## VIII. DISPUTE RESOLUTION

31. The procedures described within this Section shall apply to the provisions contained in the following Sections of this Consent Order: Injunctive Relief, Section V; Stay of Injunctive Relief, Section VII and include, but are not limited to Paragraphs Number 13, 16, 17 and 21.

32. Defendant and Ohio EPA shall make reasonable efforts to informally resolve any good faith dispute regarding this Consent Order within thirty (30) days following the occurrence of the actions or circumstances giving rise to the dispute. If resolution cannot be achieved informally, Ohio EPA or Defendant may elevate the dispute for resolution pursuant to this Section. If Defendant does not submit a written notification of dispute to Ohio EPA within thirty (30) days following the occurrence of the actions or circumstances giving rise to the dispute, Defendants shall be deemed to have accepted the position of Ohio EPA.

33. To initiate formal dispute resolution, Ohio EPA or Defendant shall submit to the other a written notification of any good faith dispute related to the Sections of the Consent Order noted above. The written notification of dispute shall specify the nature of the dispute, the Paragraphs of the Consent Order affected by the dispute, the disputing party's position with respect to the dispute and the information the disputing party is relying upon to support its position. Ohio EPA and Defendant shall attempt to resolve such dispute within thirty (30) days of written notification of the dispute.

34. If Ohio EPA and Defendant are unable to resolve such dispute, Defendant may petition the Court for dispute resolution. The Court shall affirm Ohio EPA's resolution of the dispute unless Defendant demonstrates that the resolution was unlawful or unreasonable within the meaning of R.C. Chapter 3745 or inconsistent with this Consent Order..

35. Except as provided in this Section, Defendant shall maintain compliance with this Consent Order. However, if Ohio EPA agrees that there is a good faith dispute, Ohio EPA may extend the time period for completion of work affected by dispute for a period of time not to exceed the actual time taken to resolve such good faith dispute in accordance with this Section.

36. Unless a dispute is elevated to the Court, Defendant shall incorporate the resolution and final decision of Ohio EPA into the appropriate plan, schedule or procedure and shall proceed with implementation within thirty (30) days of such resolution and final decision.

#### **IX. UNAVOIDABLE DELAY**

37. Defendant shall cause all work to be performed in accordance with applicable schedules and time frames unless any such performance is prevented or delayed by an event which constitutes an unavoidable delay. For purposes of this Consent Order, an "unavoidable delay" shall mean an event beyond the control of Defendant which prevents or delays performance of any obligation required by the Consent Order and which could not be overcome by due diligence on the part of Defendant. ~~Increased~~ cost of compliance shall not be considered an event beyond the control of Defendant.

38 Defendant shall notify Ohio EPA in writing within five (5) days after the occurrence of an event which Defendant contends is an unavoidable delay. Such written notification shall describe the anticipated length of the delay, the cause or causes of the delay, the measures taken and to be taken by Defendant to minimize the delay, and the timetable under which these measures will be implemented. Defendant shall have the burden of demonstrating that the event constitutes unavoidable delay.

39 If Ohio EPA does not agree that the delay has been caused by an unavoidable delay, Ohio EPA will notify the Defendant in writing. If Ohio EPA agrees that the delay is

attributable to an unavoidable delay, Ohio EPA will notify Defendant in writing of the length of the extension for the performance of the obligations affected by the unavoidable delay.

#### **X. NOTICES**

40. All documents required to be submitted under this Consent Order shall be submitted to the following, or their successors:

As to the Plaintiff  
Ohio Environmental Protection Agency  
Southeast District Office  
Solid Waste Supervisor  
2195 Front Street  
Logan, Ohio 43138

As to Defendant:  
Village of Newcomerstown  
Office of the Mayor  
124 West Church Street  
Newcomerstown, Ohio 43832

with a copy to:  
Joseph M. Reidy  
Schottenstein, Zox & Dunn Co., LPA  
250 West Street  
P.O. Box 165020  
Columbus, OH 43215

41. Either Party may change the name and/or address of its contact person(s) by sending written notice to the other Party.

#### **XI. COSTS**

42. Defendant is hereby ordered to pay the court costs of this action.

#### **XII. RETENTION OF JURISDICTION**

43. This Court shall retain jurisdiction of this action for the purposes of making any order or decree which it deems appropriate to carry out this Consent Order.

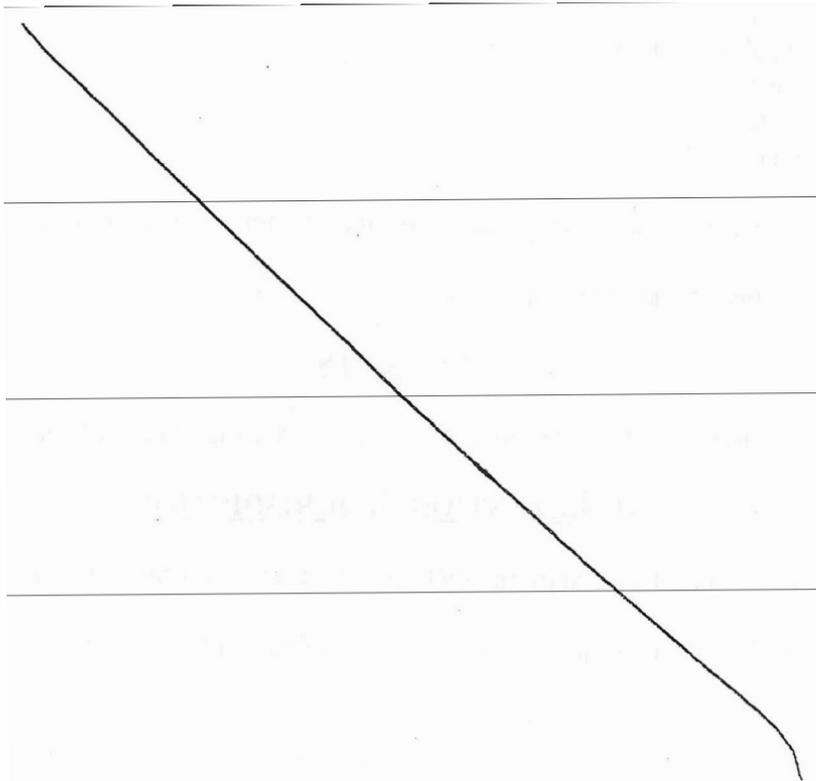
**XIII. SIGNATORIES**

44. Each of the undersigned representatives for the Parties represents that he/she is fully authorized to enter into the terms and conditions of this Consent Order and legally bind the respective Party to this document.

**XIV. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK**

45. Upon the signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three (3) days of entering the judgment upon the journal, the clerk is hereby directed to serve upon all Parties notice of judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

46. *Close case file. Remove from pending case docket.*



IT IS SO ORDERED.

  
Emmitt O'Farrell, Judge

Date: 5/18/2006

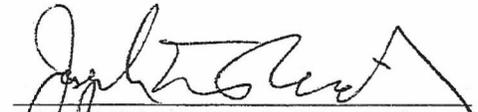
TUSCARAWAS COUNTY  
COURT OF COMMON PLEAS

APPROVED BY:

STATE OF OHIO, ex rel.  
JIM PETRO  
ATTORNEY GENERAL OF OHIO

  
JOHN F. CAYTON (0072736)  
Assistant Attorney General  
Environmental Enforcement Section  
One Government Center, Suite 1340  
Columbus, OH 43215  
Telephone: (614) 466-2766  
Facsimile: (614) 644-1926

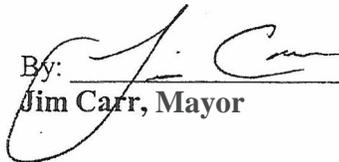
Attorney for State of Ohio

  
JOSEPH M. REIDY (0030346)  
Schottenstein, Zox & Dunn Co., LPA  
250 West Street  
P.O. Box 165020  
Columbus, Ohio 43215  
Telephone: (614) 462-2207  
Facsimile: (614) 462-5315

Attorney for Village of Newcomerstown

cc: Court Admin. Office  
Att. Cayton  
Atty. Reidy

VILLAGE OF NEWCOMERSTOWN

By:   
Jim Carr, Mayor

