

# STATE OF COLORADO

Bill Ritter, Jr., Governor  
James B. Martin, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department  
of Public Health  
and Environment

December 11, 2008

Troy Mellon, Mayor  
Town of Johnstown  
P.O. Box 609  
Johnstown, CO 80534

**RE: Compliance Order on Consent, Number: MC-081211-2**

Dear Mr. Mellon:

Enclosed for Town of Johnstown records you will find your copy, with original signatures, of the recently executed Compliance Order on Consent.

Please remember that this agreement is subject to a thirty-day public comment period (paragraph 77). Upon initiation, if the Division receives any comments during this period we will contact your office to discuss. Also, please be advised that the first page of the Order was changed in order to place the assigned Order Number on the final document.

If you have any questions, please don't hesitate to contact Ginny Torrez at (303) 692-3612 or by electronic mail at [gabby.torrez@state.co.us](mailto:gabby.torrez@state.co.us).

Sincerely,

Kristi-Raye Beaudin, Legal Assistant  
Water Quality Protection Section  
WATER QUALITY CONTROL DIVISION

cc: Weld County Department of Public Health and Environment  
R. Russell Anston, Johnstown Attorney, P.O. Box 336155, Greeley, CO 80633  
MS-3 File

cc: Aaron Urdiales, EPA Region VIII  
Doug Camrud, Engineering Section, CDPHE  
Dick Parachini, Watershed Program, CDPHE  
Andrew Ross, Permits Unit, CDPHE  
Carolyn Schachterle, OPA

Enclosure(s)



**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT  
WATER QUALITY CONTROL DIVISION**

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**COMPLIANCE ORDER ON CONSENT**

**NUMBER: MC-081211-2**

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**IN THE MATTER OF:      TOWN OF JOHNSTOWN  
   LOW POINT WASTEWATER TREATMENT FACILITY  
   CDPS PERMIT NO. CO-0047058  
   WELD COUNTY, COLORADO**

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The Colorado Department of Public Health and Environment ("Department"), through the Water Quality Control Division ("Division"), issues this Compliance Order on Consent ("Consent Order"), pursuant to the Division's authority under §25-8-605, C.R.S. of the Colorado Water Quality Control Act ("the Act") §§ 25-8-101 to 703, C.R.S., and its implementing regulations, with the express consent of the Town of Johnstown ("Johnstown"). The Division and Johnstown may be referred to collectively as "the Parties."

**STATEMENT OF PURPOSE**

1. The mutual objective of the Parties in entering into this Consent Order is to resolve, without litigation, the civil penalties associated with the alleged violations cited herein and in the Notice of Violation and Cease and Desist Order (Number MO-061222-1) issued to Johnstown on December 22, 2006.

**DIVISION'S FINDINGS OF FACT AND DETERMINATION OF VIOLATIONS**

2. Based upon the Division's investigation into and review of the compliance issues identified herein, and in accordance with §25-8-602 and 605, C.R.S., the Division has made the following determinations regarding Johnstown, the Facility and Johnstown's compliance with the Act and its implementing regulations.
3. At all times relevant to the violations cited herein, Johnstown was a municipality as defined by §31-1-101(6), C.R.S.
4. Johnstown is a "person" as defined by the Water Quality Control Act, §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).

5. Johnstown owns and operates a wastewater treatment facility located in the Northwest ¼ of the Southwest ¼ of Section 24, Township 5 North, Range 68 West, 6th Principal Meridian, Weld County, Colorado [Latitude - 40°22'40"; Longitude - 105°57'30"W] (the "Facility").
6. The Facility is a "domestic wastewater treatment works" as defined by §25-8-103(5), C.R.S.
7. The Facility is the subject of Colorado Discharge Permit System Permit, Permit No. CO-0047058 (the "Permit") which became effective September 1, 2005 and is due to expire August 31, 2010.
8. The Summary of Rationale for the Permit describes the Facility as consisting of headworks, influent flow measurement, two sequencing batch reactors ("SBRs"), chlorination, dechlorination and an effluent flow measurement device.
9. The Permit specifies that Johnstown is authorized to discharge treated wastewater at Outfalls 001A and MON1 following chlorine disinfection into the Big Thompson River. The discharge is subject to the specific effluent limitations and other conditions of the Permit.
10. On July 20, 2006, representatives of the Division conducted an inspection of the Facility (the "Inspection").
11. During the Inspection, Division representatives observed a hose, approximately 2 inches in diameter, surfacing from a manhole located at the northeast end of the Facility site. The hose was laid through the fence surrounding the Facility with the exit end of the hose located approximately 10 feet from the edge of a pond located northeast of the Facility (the "NE Pond"). A second pond was observed to the West of the Facility (the "West Pond"). The NE Pond and the West Pond will collectively be referred to hereafter as "the Ponds". The Division's representatives observed liquid actively flowing from the end of the hose into the NE Pond. The rate of flow from the hose was estimated to be approximately 50 to 60 gallons per minute. Division representatives collected a sample of the liquid entering the NE Pond. The sample was subsequently analyzed by the Laboratory Services Division of the Colorado Department of Public Health and Environment and yielded the following results: >2,419/100ml of E. Coli. 50,000/100ml of Fecal Coliform; 10 mg/l BOD; 12 mg/l Suspended Solids; 2.4 mg/l Ammonia as N.
12. During the course of the Inspection, Division representatives determined that the water flowing into the NE Pond originated from SBR No. 1, a/k/a the South SBR, of the Facility and was pumped through the observed two-inch hose by an electric submersible pump installed in the last manhole in SBR No. 1's drain line. This drain line would normally convey water from the SBR No. 1 back to the headworks of the Facility.
13. During the course of the Inspection, Division representatives further determined that the water being discharged was a mix of old basin water, fire hose water, and screened raw wastewater which was entering SBR No. 1 through an improperly sealed weir gate. Division representatives determined that SBR No. 1 was being drained for the purpose of facilitating repair of the air diffusers that are located at the bottom of SBR No. 1.

14. As part of the Inspection, Division representatives reviewed the operational records for the Facility. These records indicated that both SBRs, SBR No. 1 and SBR No. 2 (a/k/a North SBR) had been drained multiple times over a several month period.
15. A representative of Johnstown informed Division representatives that the SBRs were drained into the Ponds due to the Facility's inability to meet the effluent limits contained in the Permit because the disinfection and dechlorination processes were not functioning due to the unfinished status of the chemical storage component of the Facility.
16. Via letter dated September 6, 2006, addressed to the Division, Johnstown reported the following releases from the SBRs to the Ponds:

<b>Dates of Discharge</b>	<b>Total Gallons Pumped</b>
March 6, 2006	140,765
April 1, 2006	17,970
May 1, 2006	46,422
May 2, 2006	79,367
June 28, 2006	59,900
June 29, 2006	8,985
June 30, 2006	4,492
July 19, 2006	67,387

17. Johnstown's letter of September 6, 2006 states that the West Pond is lined with 4 inches of compacted clay and that the NE Pond is unlined. The letter states that the ground water levels in the area of the Ponds vary between 5-8 feet below ground surface or about an elevation of 4,818.0 feet. The letter further states that, at this elevation, there is ground water flow into the Ponds.
18. The Division has determined that ground water flowing into the West Pond as reported by Johnstown is indicative that either the West Pond is not lined as alleged by Johnstown in its September 6, 2006 letter or that the existing liner has been compromised.
19. By virtue of the fact that there is a flow of ground water into the Ponds, a hydrologic connection between the Ponds and ground water is established demonstrating that water placed in the Ponds contacts and co-mingles with ground water.
20. Ground water is "state waters" as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2 (101).
21. E. Coli, Fecal Coliform, BOD, Suspended Solids and Ammonia as N. are "pollutants" as defined by §25-8-103(15) and its implementing permit regulation, 5 CCR 1002-61, §61.2(76).
22. The SBRs, the two-inch hose and the Ponds are each a "point source" as defined by §25-8-103(14) and its implementing permit regulation.
23. The Ponds are each an "impoundment" as defined by 5 CCR 1002-61, §61.2(43).

### **Discharging from an Impoundment Without a Permit**

24. 5 CCR 1002-61, §61.14(1)(a), states, “Pursuant to this section a permit shall be required for all land application discharges and for all discharges from all impoundments unless:
  - a. The discharge is exempted under section 61.14(1)(b);
  - b. The discharge is subject to regulation by one of the implementing agencies described in 61.14(2);
  - c. The impoundment has received a waiver from the Division pursuant to section 61.14(9)(a); or
  - d. The owner of a land application system can demonstrate that: (i) the design and operation of the system will result in complete evapotranspiration of the effluent; (ii) there is adequate storage provided for the effluent during periods of inclement weather or where the ground has been frozen unless the provisions of (i) above can be met during the entire year; and; (iii) any augmentation plan or substitute supply plan for the land application site does not provide a credit for return of the effluent to ground water.)”
25. The discharges, as described in paragraphs 10 through 19 above, do not meet any of the exemption criteria outlined in 5 CCR 1002-61, §61.14(1)(a), and therefore are subject to the impoundment discharge permit requirements.
26. The activities described in paragraphs 10 through 19 above, constitute the “discharge of pollutants” from an “impoundment” as defined by §25-8-103(3) and 5CCR 1002-61, §61.2(43).
27. Division records establish that Johnstown has not obtained any permits from the Division authorizing the discharges from the Ponds which are described in paragraphs 10 through 19 above.
28. The discharges described in paragraphs 10 through 19 above constitute violations of 5 CCR 1002-61, §61.14(1)(a).

### **Placing Materials in an Impoundment Without a Permit**

29. 5 CCR 1002-61, §61.14(10)(a), states in part, “The owner of any impoundment whose construction is commenced after July 1, 1993 and who has not received a waiver, pursuant to section 61.14(9)(a), is prohibited from placing any material, other than raw or potable water, in the impoundment prior to obtaining a discharge permit.”
30. Division records establish that Johnstown has not received a waiver, pursuant to §61.14(9)(a) nor has it obtained a discharge permit for the Ponds.
31. Placement of wastewater into the Ponds as described in paragraphs 10 through 19 above constitutes violation 5 CCR 1002-61, §61.14(10)(a).

### **Discharging to State Waters Without a Permit**

32. Section 25-8-501(1), C.R.S., states, “No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge, and no person shall discharge into a ditch or man-made conveyance for the purpose of evading the requirement to obtain a permit under this article.” CCR 1002-61, §61.3(1)(a), states in part, “No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the Division for such discharge...” and, “...nothing in this subsection shall exempt any point source discharger which generates wastewater effluent from the requirement of obtaining a permit pursuant to these regulations.”
33. Division records establish that Johnstown has not received a permit authorizing the discharge of pollutants into ground water, from the SBRs, the hose, or the Ponds as described in paragraphs 10 through 19 above.
34. The activities described in paragraphs 10 through 19 above, constitute the “discharge of pollutants” into state water from a point source without first having obtained a permit from the Division for such discharge.
35. The discharges described in paragraphs 10 through 19 above constitute violation of §25-8-501(1), C.R.S. and of CCR 1002-61, §61.3(1)(a).

### **Discharging from an Unauthorized Point Source**

36. Part II, Section A(6) of the Permit states, “Any discharge to the waters of the State from a point source other than specifically authorized herein is prohibited.”
37. Johnstown’s Permit does not authorize releases from the point sources associated with the discharges/releases described in paragraphs 10 through 19 above nor does Johnstown hold other permits authorizing such discharges/releases.
38. The discharges described in paragraphs 10 through 19 above constitute violations CDPS Permit Number CO-0047058, Part II, Section A.6.

### **Failure to Properly Operate and Maintain the Facility**

39. Part I, Section A.4 of the Permit states in part, “The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee as necessary to achieve compliance with the conditions of this permit.”
40. Johnstown failed to properly operate the Facility in a manner that would achieve compliance with the Permit by failing to ensure that all treatment components, the SBRs, the chlorination and the dechlorination systems, were functioning in a manner that would allow for proper treatment of the wastewater.

41. Johnstown failed to properly operate the Facility by allowing wastewater that was not fully treated to leave the Facility from SBR No. 1.
42. Failure to properly operate the Facility as described in paragraphs 40 and 41 above constitute violation of CDPS Permit Number CO-0047058, Part I, Section A.4.

#### **Failure to Submit Bypass Notifications**

43. Part I, Section D.3.a.iv. of the Permit defines a “bypass” as, “The intentional diversion of waste streams from any portion of a domestic wastewater treatment works.”
44. Part I, Section D.3.b.iv. of the Permit states in part, “If the permittee knows in advance of the need for a bypass, it shall submit written notification to the division of the need for such bypass at least ten days before the date of the contemplated bypass.”
45. By setting up a pumping mechanism to divert the wastewater from the SBRs to the Ponds as described in paragraphs 10 through 19 above, Johnstown knowingly created a bypass by diverting waste streams from the approved portions of the Facility including, but not limited to, disinfection, dechlorination and effluent flow monitoring.
46. Division records establish that Johnstown did not provide the written notification regarding the need for a bypass for the incidents described in paragraphs 10 through 19 above.
47. Failure to provide written notification regarding the need for a bypass as described in paragraph 45 and 46 above constitutes violation of CDPS Permit Number CO-0047058, Part I, Section D.3.b.iv.

#### **Failure to Submit Noncompliance Notifications**

48. Part I, Section D.3.i. of the Permit states, “If for any reason, the permittee does not comply with or will be unable to comply with any maximum discharge limitations, standards or conditions specified in this permit, the permittee shall, at a minimum, provide the Water Quality Control Division and EPA with the following information:
  1. A description of the discharge and the cause of noncompliance.
  2. The period of noncompliance, including exact dates and times and/or the anticipated time when the discharge will return to compliance; and
  3. Steps being taken to reduce, eliminate, and prevent recurrence of the noncomplying discharge.”
49. The September 6, 2006 response letter from Johnstown to the Division states that the low influent flow and issues with the chlorination/dechlorination systems prompted it to divert SBR effluent to the Ponds on multiple occasions rather than discharge from the permitted discharge point [because effluent limits could not be met].
50. Division records establish that at no time prior to discharging to the ponds during the period of March 6, 2006 through July 19, 2006 did Johnstown file a noncompliance notification with the Division prior to

the Inspection indicating that it would be discharging from an unauthorized point due to issues with chlorination/dechlorination.

51. The circumstances described in paragraphs 49 and 50 above constitute violations of CDPS Permit Number CO-0047058, Part I, Section D.3.i.

#### **Failure to Report Change in Discharge**

52. Part I, Section D.3.e. of the Permit states, "The permittee shall inform the Division (Permits Unit) in writing of any intent to construct, install, or alter any process, facility, or activity that is likely to result in a new or altered discharge either in terms of location or effluent quality prior to the occurrence of the new or altered discharge, and shall furnish the Division such plans and specification which the Division deems reasonably necessary to evaluate the effect on the discharge and receiving stream."
53. By diverting the wastewater from the SBRs to the Ponds as described in paragraphs 10 through 19 above, Johnstown altered the treatment process described in the Summary of Rationale for the Permit and approved by the Division and also altered the location of the discharge.
54. Division records establish that Johnstown did not provide the written notification regarding the new or altered discharge.
55. The circumstances described in paragraphs 53 and 54 above constitute violations of CDPS Permit CO-0047058, Part I, Section D.3.e.

#### **Failure to Monitor Influent Parameters**

56. Part I, Section B.1 of the permit states in part, "Regardless of whether or not an effluent discharge occurs and in order to obtain an indication of the current influent loading as compared to the approved capacity specified in Part I, Section A.2.; the permittee shall monitor influent parameters at the following required frequencies, the results to be reported on the Discharge Monitoring Report..."
57. Johnstown's letter of September 9, 2006 states wastewater flows from a hospital within Johnstown's service area were accepted at the Facility starting in November 2005.
58. During the period of November 2005 through September 2006, Johnstown failed to perform the required monitoring for influent BOD, TSS and flow. These failures are demonstrated by the Discharge Monitoring Reports submitted to the Division by Johnstown.
59. Failure to perform the required monitoring as described in paragraphs 57 through 58 above constitutes violations of CDPS Permit Number CO-0047058, Part I, Section B.1.
60. As of the date of this Consent Order, Johnstown has satisfied the injunctive requirement of the Notice of Violation and Cease and Desist Order (MO-061222-1) issued to Johnstown on December 22, 2006.

### **Johnstown's Position on Alleged Violations**

61. Johnstown denies that there has been any groundwater flow into the West Pond indicating that their letter of September 8, 2006, was incorrect in concluding that there was groundwater flow into the ponds.
62. The Division does not agree with or accept any of Johnstown's positions on the alleged violations described or referenced herein

### **ORDER AND AGREEMENT**

63. Based on the foregoing factual and legal determinations, pursuant to its authority under §25-8-602 and 605, C.R.S., and in satisfaction of the civil penalties associated with the alleged violations cited herein and in the Notice of Violation and Cease and Desist Order (Number MO-061222-1) issued to Johnstown on December 22, 2006, the Division orders Johnstown to comply with all provisions of this Consent Order, including all requirements set forth below.
64. Johnstown agrees to the terms and conditions of this Consent Order. Johnstown agrees that this Consent Order constitutes a notice of alleged violation and an order issued pursuant to §§ 25-8-602 and 605, C.R.S., and is an enforceable requirement of the Act. Johnstown also agrees not to challenge directly or collaterally, in any judicial or administrative proceeding brought by the Division or by Johnstown against the Division:
  - a. The issuance of this Consent Order;
  - b. The factual and legal determinations made by the Division herein; and
  - c. The Division's authority to bring, or the court's jurisdiction to hear, any action to enforce the terms of this Consent Order under the Act.
65. Notwithstanding the above, Johnstown does not admit to any of the factual or legal determinations made by the Division herein, and any action undertaken by Johnstown pursuant to this Consent Order shall not constitute evidence of fault by Johnstown with respect to the conditions of the Facility.

### **SUPPLEMENTAL ENVIRONMENTAL PROJECTS**

66. Based upon the application of the Division's Civil Penalty Policy (May 1, 1993), and consistent with Departmental policies for violations of the Act, the Division has determined that a penalty of Forty Five Thousand Seven Hundred Fifty Three Dollars (\$45,753.00) is appropriate for the violations cited herein and in the Notice of Violation and Cease and Desist (Number: MO-061222-1) issued to Johnstown on December 22, 2006.
67. Through the application of the criteria set forth in the Colorado Department of Public Health and Environment's Final Agency-Wide Policy on Settling Administrative and/or Civil Penalties Against Eligible Governmental Entities, the Division has determined that the entire penalty can be mitigated through the completion of a Supplemental Environmental Project ("SEP") identified by Johnstown and which is valued at Ninety One Thousand Five Hundred and Six Dollars (\$91,506.00).

68. In order to achieve settlement of this matter and in addition to all other funds necessary to comply with the requirements of this Consent Order, Johnstown shall pay Ninety One Thousand Five Hundred and Six Dollars (\$91,506.00) in the form of expenditures on a SEP which the Parties agree is intended to secure significant environmental or public health protection and improvements:

The project is a retrofit of the existing make-up air unit at the Facility into an energy recovery ventilator. The project will result in reduced pollutant emissions into the air through reduced fuel consumption due to the recovery of exhaust gas heat to be utilized to heat the Facility.

69. Johnstown shall not deduct the expenses associated with the implementation of the above-described SEP for any tax purpose or otherwise obtain any favorable tax treatment of such payment or project.
70. Johnstown hereby certifies that, as of the date of this Consent Order, it is not under any existing legal obligation to perform or develop the SEP. Johnstown further certifies that it has not received, and will not receive, credit in any other enforcement action for the SEP. In the event that Johnstown has, or will receive credit under any other legal obligation for the SEP, Johnstown shall pay Forty Five Thousand Seven Hundred Fifty Three Dollars (\$45,753.00) to the Division as a civil penalty within thirty (30) calendar days of receipt of a demand for payment by the Division. Method of payment shall be by certified or cashier's check drawn to the order of the "Colorado Department of Public Health and Environment," and delivered to:

Ms. Ginny Torrez  
Colorado Department of Public Health and Environment  
Water Quality Control Division  
Mail Code: WQCD-CADM-B2  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

71. All SEPs must be completed to the satisfaction of the Division, by May 31, 2009 and must be operated for the useful life of the SEP. In the event that Johnstown fails to comply with any of the terms or provisions of this Consent Order relating to the performance of the SEP, Johnstown shall be liable for penalties as follows:
- a. Payment of a penalty in the amount of Forty Five Thousand Seven Hundred Fifty Three Dollars (\$45,753.00). The Division, in its sole discretion, may elect to reduce this penalty for environmental benefits created by the partial performance of the SEP.
  - b. Johnstown shall pay this penalty within thirty (30) calendar days of receipt of written demand by the Division. Method of payment shall be as specified in paragraph 70 above.
72. Johnstown shall submit a SEP Completion Report to the Division by June 30, 2009. The SEP Completion Report shall contain the following information:
- a. A detailed description of the SEP as implemented;
  - b. A description of any operating problems encountered and the solutions thereto;
  - c. Itemized costs, documented by copies of purchase orders and receipts or canceled checks;

- d. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Order; and
  - e. A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
73. Failure to submit the SEP Completion Report with the required information, or any periodic report, shall be deemed a violation of this Consent Order.
74. Johnstown shall include the following language in any public statement, oral or written, making reference to the SEP: "This project was undertaken in connection with the settlement of an enforcement action taken by the Colorado Department of Public Health and Environment for violations of the Colorado Water Quality Control Act."

### **SCOPE AND EFFECT OF CONSENT ORDER**

75. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the civil penalties associated with the violations alleged herein and in the Notice of Violation and Cease and Desist Order (MO-061222-1) issued on December 22, 2006 to Johnstown.
76. The Parties agree and acknowledge that this Consent Order constitutes a full and final settlement of the violations cited herein and the civil penalties associated therewith.
77. This Consent Order is subject to the Division's "Public Notification of Administrative Enforcement Actions Policy," which includes a thirty-day public comment period. The Division and Johnstown each reserve the right to withdraw consent to this Consent Order if comments received during the thirty-day period result in any proposed modification to the Consent Order.
78. This Consent Order constitutes a final agency order or action upon a determination by the Division following the public comment period. Any violation of the provisions of this Consent Order by Johnstown, including any false certifications, shall be a violation of a final order or action of the Division for the purpose of §25-8-608, C.R.S., and may result in the assessment of civil penalties of up to ten thousand dollars per day for each day during which such violation occurs.
79. Notwithstanding paragraph 65 above, the violations described in this Consent Order will constitute part of Johnstown's compliance history for purposes where such history is relevant. This includes considering the violations described above in assessing a penalty for any subsequent violations against Johnstown. Johnstown agrees not to challenge the use of the cited violations for any such purpose.
80. This Consent Order does not relieve Johnstown from complying with all applicable Federal, State, and/or local laws in fulfillment of its obligations hereunder and shall obtain all necessary approvals and/or permits to conduct the activities required by this Consent Order. The Division makes no representation with respect to approvals and/or permits required by Federal, State, or local laws other than those specifically referred to herein.

## **LIMITATIONS, RELEASES AND RESERVATION OF RIGHTS AND LIABILITY**

81. Upon the effective date of this Consent Order, and during its term, this Consent Order shall stand in lieu of any other enforcement action by the Division with respect to civil penalties for the specific instances of violations cited herein and in the Notice of Violation and Cease and Desist Order (Number MO-061222-1) issued to Johnstown on December 22, 2006. The Division reserves the right to bring any action to enforce this Consent Order, including actions for penalties or the collection thereof, and/or injunctive relief.
82. This Consent Order does not grant any release of liability for any violations not specifically cited herein.
83. Nothing in this Consent Order shall preclude the Division from imposing additional requirements in the event that new information is discovered that indicates such requirements are necessary to protect human health or the environment.
84. Upon the effective date of this Consent Order, Johnstown releases and covenants not to sue the State of Colorado or its employees, agents or representatives as to all common law or statutory claims or counterclaims arising from, or relating to, the violations of the Act specifically addressed herein.
85. Johnstown shall not seek to hold the State of Colorado or its employees, agents or representatives liable for any injuries or damages to persons or property resulting from acts or omissions of Johnstown, or those acting for or on behalf of Johnstown, including its officers, employees, agents, successors, representatives, contractors, consultants or attorneys in carrying out activities pursuant to this Consent Order. Johnstown shall not hold out the State of Colorado or its employees, agents or representatives as a party to any contract entered into by Johnstown in carrying out activities pursuant to this Consent Order. Nothing in this Consent Order shall constitute an express or implied waiver of immunity otherwise applicable to the State of Colorado, its employees, agents or representatives.

## **SITE ACCESS**

86. The Division shall be permitted to oversee any and all work being performed under this Consent Order. The Division shall be permitted access to the Facility property at any time work is being conducted pursuant to this Consent Order, and during reasonable business hours during any period work is not being conducted, for the purposes of determining Johnstown's compliance with the Act, the Regulations, and this Consent Order. The Division shall be permitted to inspect work sites, operating and field logs, contracts, purchasing/shipping records, and other relevant records and documents relating to this Consent Order or any requirement under this Consent Order and to interview Johnstown personnel and contractors performing work required by this Consent Order. Nothing in this paragraph limits or impairs the Division's statutory authorities to enter and inspect the Facility.

## **FORCE MAJEURE**

87. Johnstown shall perform the requirements of this Consent Order within the schedules and time limits set forth herein and in any approved plan unless the performance is prevented or delayed by events that

constitute a force majeure. A force majeure is defined as any event arising from causes which are not reasonably foreseeable, which are beyond the control of Johnstown, and which cannot be overcome by due diligence.

88. Within seventy-two (72) hours of the time that Johnstown knows or has reason to know of the occurrence of any event which Johnstown has reason to believe may prevent Johnstown from timely compliance with any requirement under this Consent Order, Johnstown shall provide verbal notification to the Division. Within seven (7) calendar days of the time that Johnstown knows or has reason to know of the occurrence of such event, Johnstown shall submit to the Division a written description of the event causing the delay, the reasons for and the expected duration of the delay, and actions which will be taken to mitigate the duration of the delay.
89. The burden of proving that any delay was caused by a force majeure shall at all times rest with Johnstown. If the Division agrees that a force majeure has occurred, the Division will so notify Johnstown. The Division will also approve or disapprove of Johnstown's proposed actions for mitigating the delay. If the Division does not agree that a force majeure has occurred, or if the Division disapproves of Johnstown's proposed actions for mitigating the delay, it shall provide a written explanation of its determination to Johnstown. Within fifteen (15) calendar days of receipt of the explanation, Johnstown may file an objection.
90. Delay in the achievement of one requirement shall not necessarily justify or excuse delay in the achievement of subsequent requirements. In the event any performance under this Consent Order is found to have been delayed by a force majeure, Johnstown shall perform the requirements of this Consent Order that were delayed by the force majeure with all due diligence.

### NOTICES

91. Unless otherwise specified, any report, notice or other communication required under the Consent Order shall be sent to:

For the Division:

Colorado Department of Public Health and Environment  
Water Quality Control Division / WQCD-CADM-B2  
Attention: Ginny Torrez  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530  
Telephone: 303.692.3612  
E-mail: [ginny.torrez@state.co.us](mailto:ginny.torrez@state.co.us)

For Johnstown:

Troy Mellon, Mayor  
Town of Johnstown  
P.O. Box 609  
Johnstown, CO 80534

R. Russell Anson  
Johnstown Attorney  
P.O. Box 336155  
Greeley, CO 80633

### **MODIFICATIONS**

92. This Consent Order may be modified only upon mutual written agreement of the Parties.

### **COMPLETION OF REQUIRED ACTIONS**

93. Johnstown shall submit a Notice of Completion to the Division upon satisfactory completion of all requirements of this Consent Order. The Division shall either accept or reject Johnstown's Notice of Completion in writing within thirty (30) calendar days of receipt. If the Division rejects Johnstown's Notice of Completion, it shall include in its notice a statement identifying the requirements that the Division considers incomplete or not satisfactorily performed and a schedule for completion. Johnstown shall, within fifteen (15) calendar days of receipt of the Division's rejection, either:
- a. Submit a notice of acceptance of the determination; or
  - b. Submit a notice of dispute.

If Johnstown fails to submit either of the above notices within the specified time, it will be deemed to have accepted the Division's determination.

94. If Johnstown files any notice of dispute pursuant to paragraph 89 the notice shall specify the particular matters in the Division's determination that Johnstown seeks to dispute, and the basis for the dispute. Matters not identified in the notice of dispute shall be deemed accepted by Johnstown. The Division and Johnstown shall have thirty (30) calendar days from the receipt by the Division of the notification of dispute to reach an agreement. If agreement cannot be reached on all issues within this thirty (30) calendar day period, the Division shall confirm or modify its decision within an additional fourteen (14) calendar days, and the confirmed or modified decision shall be deemed effective and subject to appeal in accordance with the Act and the Colorado State Administrative Procedures Act, §§ 24-4-101 through 108, C.R.S.

### **NOTICE OF EFFECTIVE DATE**

95. This Consent Order shall be fully effective, enforceable and constitute a final agency action upon notice from the Division following the closure of the public comment period referenced in paragraph 77.

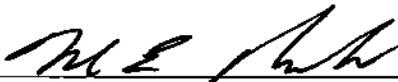
**BINDING EFFECT AND AUTHORIZATION TO SIGN**

96. This Consent Order is binding upon Johnstown and its elected officials, employees, agents, representatives, successors in interest, and assigns. The undersigned warrant that they are authorized to legally bind their respective principals to this Consent Order. Johnstown agrees to provide a copy of this Consent Order to any contractors and other agents performing work pursuant to this Consent Order and require such agents to comply with the requirements of this Consent Order. In the event that a party does not sign this Consent Order within thirty (30) calendar days of the other party's signature, this Consent Order becomes null and void. This Consent Order may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Consent Order.

**FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, WATER QUALITY CONTROL DIVISION:**

 Date: 12/10/08  
Lori M. Gerzina, Section Manager  
Compliance Assurance and Data Management Section  
WATER QUALITY CONTROL DIVISION

**FOR TOWN OF JOHNSTOWN**

 Date: 11/17/08  
Mark Romanowski, Mayor