

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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)
IN THE MATTER OF ACCESS TO REAL)
PROPERTY IN SARATOGA COUNTY,)
NEW YORK, OWNED BY:)
)
THE TOWN OF HALFMOON, NEW YORK,) Index No.
) CERCLA-02-2008-2032
Respondent.)
)
)
Proceeding under Section 104(e) of the)
Comprehensive Environmental Response,)
Compensation, and Liability Act of 1980,)
as amended, 42 U.S.C. Section 9604(e).)
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ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS

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I. JURISDICTION

1. This Administrative Order (“Order”) is issued to the Town of Halfmoon, New York (hereinafter, “Respondent”), pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency (“EPA”) on January 23, 1987, by Executive Order No. 12580, redelegated to the Regional Administrators of EPA on May 11, 1994 by EPA Delegation No. 14-6, and, within EPA Region 2, further redelegated to the Director of the Emergency and Remedial Response Division on November 23, 2004.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives entry and access to the properties described more fully below for the purpose of taking a response action in connection with the Hudson River PCBs Superfund Site (“Site”). This Order further requires Respondent to refrain from interfering with access to such properties by EPA and its authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

3. During an approximate 30-year period ending in 1977, manufacturing processes at two General Electric Company (“GE”) facilities, one in Fort Edward, New York, and the other in Hudson Falls, New York, used polychlorinated biphenyls (“PCBs”) in the manufacture of electrical capacitors. PCBs from both facilities were discharged into the Hudson River.
4. In September 1984, EPA placed the Site on the National Priorities List, established pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and set forth at 40 C.F.R. Part 300, Appendix B.
5. Beginning in 1990, EPA conducted a Reassessment Remedial Investigation and Feasibility Study (“FS”) which included, *inter alia*, analyses of the fate, transport, and human health and environmental risks associated with PCB contamination at the Site.
6. In December 2000, EPA issued the Reassessment FS in which the Agency evaluated potential remedial alternatives to address PCB contamination at the Site. Concurrently with the Reassessment FS, EPA issued a Proposed Plan in which EPA identified its preferred remedial alternative for the Site. EPA held a public comment period on the

Proposed Plan and supporting information from December 12, 2000 through April 17, 2001.

7. On February 1, 2002, EPA issued a Record of Decision (“ROD”) in which EPA selected a remedial action for the Site. The remedy selected in the ROD (hereinafter, the “Remedial Action”) includes, *inter alia*, the targeted dredging and off-site disposal of PCB-contaminated sediment from the Upper Hudson River. In the ROD, EPA estimated that the Remedial Action will remove approximately 2.65 million cubic yards of such sediment from the Upper Hudson River. The ROD calls for the dewatering and, if necessary, stabilization of dredged sediments at a sediment processing/transfer facility prior to those sediments being transported for disposal at an off-site disposal facility. The State of New York concurred on the remedy selected in the ROD.
8. On November 2, 2006, the United States District Court for the Northern District of New York approved a Consent Decree (“Consent Decree”) between the United States and GE under which GE will, *inter alia*, construct the sediment transfer/processing facility needed for the project and perform the first phase of the dredging (“Phase 1”) according to an EPA-approved design, and in accordance with work plans and other documents to be submitted by GE, and approved by EPA, under the Consent Decree. GE’s construction of the sediment transfer/processing facility is underway.
9. Following GE’s completion of the Phase 1 dredging, the dredging-to-date will be evaluated by an independent peer review panel, which will consider possible changes to the engineering performance standards that were established by EPA. EPA will consider the conclusions of the peer review panel and determine whether changes to the performance standards should be made and will inform GE of any modifications that would be required during Phase 2 of the dredging program. GE is then to notify EPA as to whether it will implement Phase 2 of the dredging pursuant to the Consent Decree. If the company agrees to perform Phase 2, the work will be carried out under the terms of the Consent Decree. EPA has reserved all of its enforcement authorities to compel GE to perform Phase 2 if the company does not agree to do Phase 2 under the Consent Decree. The Phase 2 dredging is expected to take five years.
10. Respondent Town of Halfmoon, New York, is located immediately north of Waterford on the western bank of the Hudson River. Halfmoon, which also supplies drinking water to the Mechanicville school district, currently obtains its drinking water from the Hudson River.
11. EPA intends to construct a water supply line to supply Respondent and the Town of Waterford (collectively, the “Towns”) with drinking water from the City of Troy, New York, in order to provide the Towns with an alternate source of potable water that will be available if dredging-related PCBs in the Upper Hudson River threaten to adversely affect the Waterford and Halfmoon water supplies. Although EPA considered a number

of options for ensuring that the Towns receive potable water during the dredging, construction of the water line was requested by the Towns as their preferred alternative. In selecting this alternative and discussing the design and operation of the water line, EPA held meetings with Respondent on February 22, 2008, May 12, 2008 and July 8, 2008 and corresponded with Respondent on September 14, 2006, September 25, 2006, May 7, 2007, January 3, 2008, June 11, 2008, July 9, 2008 and July 23, 2008.

12. Construction of the water line, which will be approximately four and one-half miles long, is expected to take approximately six months, although unforeseen events and unfavorable weather conditions may result in the construction taking more than six months.
13. The water line will be one of several factors that will protect the Towns' water supplies during the dredging. As a protective measure, EPA has established the requirement for the dredging to stop if dredging-related PCBs at established monitoring locations in the Upper Hudson River exceed the federal and state maximum contaminant level of 500 parts per trillion. In addition, the first phase (the first year) of the dredging and at least the first two years of phase two (the remainder of the dredging) will occur more than 30 miles away from the Waterford and Halfmoon intakes. Over this distance, any PCBs that are resuspended during the dredging will be diluted with river water from other tributaries, which will substantially reduce the concentrations of PCBs in river water that could potentially reach the Halfmoon and Waterford intakes.
14. Construction of the water line will include, among other activities, excavation, installation of the new water line pipe below the ground, connection of the new water line to the existing Halfmoon water distribution system, restoration of property after the new water line is installed, and any activities needed to maintain and/or repair the water line after it is constructed. All of the water line will be built within 4,500 feet of the Upper Hudson River.
15. EPA has finalized the design of the water line. By the week of September 1, 2008 or shortly thereafter, EPA expects to select a contractor to build the water line.
16. EPA needs to begin construction of the water line by mid-September, 2008, in order to help ensure that the water line will be completed prior to the start of Phase 1 dredging in the late spring of 2009.
17. Based on information available to EPA, including tax maps and/or other indicia of Respondent's ownership, Respondent owns or controls several properties on which the water line will be built. These properties (collectively, the "Properties") are as follows:

Halfmoon Water Treatment Plant, as depicted in Exhibit 1;
Halfmoon water line utility easement located on lands of CJ & JJ Realty Co., as

depicted in Exhibit 2; and
Halfmoon water line utility easement located on lands of Arthur Boyajian, *et al.*,
as depicted in Exhibit 3.

On December 12, 2007, EPA requested access to the Properties from Respondent for the purpose of conducting fieldwork necessary to design the water line. Such access was granted by Respondent on January 15, 2008. Thereafter, EPA requested access to the Properties from Respondent for the purposes of constructing the water line. EPA's requests for access were made via meetings, correspondence, emails and phone calls with Respondent and its attorneys. EPA's requests occurred on May 15, 2008, May 29, 2008, June 3, 2008, June 9, 2008, June 19, 2008, June 20, 2008, June 26, 2008, July 8, 2008, July 23, 2008, August 5, 2008 and August 20, 2008. Respondent has repeatedly declined to grant EPA unconditional access. Respondent's refusal to grant access has been communicated via meetings, phone calls and correspondence with EPA which occurred on July 8, 2008, July 10, 2008, July 11, 2008, July 29, 2008, August 8, 2008, August 14, 2008, August 20, 2008 and August 26, 2008. In particular, Respondent has stated to EPA that it would not provide EPA with the requested access without a guarantee that the water line would be completed prior to the start of the dredging. Although it is EPA's goal to complete the water line in advance of the dredging, EPA has declined to guarantee such completion in view of the need to commence dredging and the existence of other protective measures.

18. It is necessary for EPA to obtain access to approximately thirty separate properties in order to construct the water line. As of the date of the issuance of this Order, the owners of almost all of those properties have either voluntarily agreed to provide EPA with access, or are working cooperatively with EPA toward providing such access. Respondent is an exception. The property owners that have voluntarily granted access include the City of Mechanicville, the Waterford Industrial Development Agency, the Town and Village of Waterford, New York, and National Grid, PLC.
19. Respondent's failure to provide EPA with the requested access to the Properties threatens to interfere with EPA's ability to build the water line connection to Halfmoon before Phase 1 dredging begins in the late spring of 2009. This Order is being issued in order to help ensure that the water line connection to Halfmoon can be constructed before the dredging begins.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

20. Respondent is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
21. PCBs are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

22. Releases of hazardous substances have occurred into the environment at the Site, within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1), as the terms “environment” and “release” are respectively defined in Sections 101(8) and 101(22) of CERCLA, 42 U.S.C. §§ 9601(8) and 9601(22). Such releases include, but are not limited to, PCBs that were discharged to the Hudson River from GE’s Hudson Falls and Fort Edward facilities.
23. The Properties are establishments, places or properties where entry is needed to effectuate a response action within the meaning of Section 104(e)(3) of CERCLA, 42 U.S.C. § 9604(e)(3).
24. Entry to the Properties by the agents, contractors, or other representatives of the United States is needed for the purposes of taking a response action within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).
25. Respondent has not, to date, granted its consent to EPA having access to the Properties for the purposes described in Paragraph 14, above.

V. ORDER

26. Based on the Findings of Fact and Conclusions of Law and Determinations set forth above, and on the Administrative Record, Respondent is hereby ordered, to provide EPA and its officers, employees, agents, contractors, and other representatives full and unrestricted access to the Properties for the purpose of constructing, operating and maintaining the water line and conducting the other tasks referred to in Paragraph 14, above. Respondent shall provide such access to the Properties continuously from the effective date of this Order until such time as EPA informs Respondent in writing that the access is no longer needed in connection with the Remedial Action. EPA currently anticipates that this access will be needed for approximately eight years.
27. Respondent shall not interfere with EPA's exercise of its access authorities pursuant to 42 U.S.C. § 9604(e) and 40 C.F.R. § 300.400(d), and shall not interfere with or otherwise limit any activity conducted at any of the Properties pursuant to this Order by EPA, its officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this Order.
28. Nothing herein limits or otherwise affects any right of entry or access held by the United States pursuant to applicable laws, regulations, or permits.
29. This Order shall apply to and be binding upon the Respondent and its successors and assigns, and each and every agent of Respondent and upon all other persons and entities who are under the direct or indirect control of Respondent, including any and all lessees

of Respondent.

30. In the event of any conveyance by the Respondent or its agents, successors or assigns, of any interest in any of the Properties, Respondent and its agents, successors, or assigns shall not convey the interest in any manner which would have the effect of hindering or otherwise limiting continued access by EPA and its representatives to the Properties for the purpose of carrying out the activities pursuant to this Order. Any such conveyance shall restrict the use of the Properties so that the use will not interfere with activities undertaken or to be undertaken by EPA and its representatives, including but not limited to the construction of the water line and the operation and maintenance of the water line after it is constructed. Respondent, or Respondent's agents, successors or assigns, shall notify EPA in writing at least thirty (30) calendar days prior to the conveyance of any interest in any of the Properties, and shall include in such notice the name and address of the party to whom such interest will be conveyed; and Respondent shall, at least thirty (30) days prior to the transfer, notify the other parties involved in the conveyance of the provisions of this Order.

VI. ENFORCEMENT

31. Compliance with this Order shall be enforceable pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). A court may impose on Respondent civil penalties of up to \$32,500 per violation per day (or such higher amount as may be established pursuant to the Debt Collection and Improvement Act of 1996 ("DCIA")), as provided in Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), and the DCIA (see Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7,121 (February 13, 2004)), for each day that Respondent unreasonably fails to comply with this Order. In addition, any person who is liable for a release or threat of release of a hazardous substance or pollutant or contaminant and who fails to comply with this Order may be liable for punitive damages in an amount up to three times the amount of any costs incurred by the United States as a result of such failure, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Nothing herein shall preclude EPA from taking any additional enforcement actions, and/or other actions it may deem necessary for any purpose, including the prevention or abatement of a threat to the public health, welfare, or the environment arising from conditions at the Site, and recovery of the costs thereof.
32. Nothing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which EPA has now or may have in the future against Respondent, or against any entity which is not a party to this Order.
33. Nothing in this Order shall affect in any manner the right of EPA to issue any other orders to or take any other administrative or civil action against Respondent or any other parties under CERCLA which relate to the Site or any other site.

34. Nothing in this Order constitutes a decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

VII. ADMINISTRATIVE RECORD

35. EPA has established an Administrative Record which contains the documents that form the basis for the need for access and the issuance of this Order. The Administrative Record is available for review on weekdays between the hours of 9:00 a.m. and 5:00 p.m. at the following address:

United States Environmental Protection Agency, Region 2
290 Broadway, 18th Floor
New York, New York 10007-1866

Respondent should contact Brian Carr, Esq. of EPA's Office of Regional Counsel at (212) 637-3170, if it wishes to schedule an appointment to review the Administrative Record.

VIII. OPPORTUNITY TO CONFER

36. Within three business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than two business days after Respondent's request, on any matter pertinent to this Order, including its applicability, the factual findings and the determinations upon which it is based, the appropriateness of any actions Respondent is ordered to take, or any other relevant and material issues or contentions which Respondent may have regarding this Order. Respondent may appear in person or by an attorney or other representative at the conference. Respondent may also submit written comments or statements of position on any matter pertinent to this Order no later than the time of the conference, or at least two business days before the effective date of this Order if Respondent does not request a conference. EPA will deem Respondent to have waived its right to the conference or to submit written comments if it fails to request the conference or submit comments within the specified time period(s). Any request for a conference or written comments or statements should be submitted to:

Brian Carr
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866
(212) 637-3170
(212) 637-3104 (fax)
Carr.brian@EPA.gov

IX. EFFECTIVE DATE; COMPUTATION OF TIME

37. This Order shall be effective four business days after its receipt by Respondent or Respondent's designated representative unless a conference is timely requested as provided above. If a conference is timely requested, then at the conclusion of the conference or after the conference, if EPA determines that no modification to the Order is necessary, the Order shall become effective immediately upon notification by EPA of such determination. If modification of the Order is determined by EPA to be necessary, the Order shall become effective upon notification by EPA of such modification. Any EPA notification under this paragraph may, at EPA's discretion, be provided to Respondent by facsimile, electronic mail, or oral communication; provided that if EPA does use such a form of notification, it will also confirm such notification by first class, certified or expedited mail to Respondent or its legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.
38. For purposes of this Order, the term "day" shall mean a calendar day unless expressly stated to be a business day. "Business day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. When computing any period of time under this Order, if the last day would fall on a Saturday, Sunday, or federal legal holiday, the period shall run until the next business day.

X. NOTICE OF INTENTION TO COMPLY

39. Within one business day after the effective date of this Order, Respondent shall notify EPA in writing whether Respondent will comply with the terms of this Order. Such written notice shall be sent to Brian Carr at the address set forth in Paragraph 36, above. Respondent's failure to timely notify EPA of its unconditional intent to fully comply with this Order shall be 1) construed as a denial of EPA's request for access, and 2) treated as a violation of the Order.

XI. TERMINATION

40. This Order and all of its terms and provisions shall remain in effect until the Director of the Emergency and Remedial Response Division, EPA Region 2, or his designee, notifies Respondent in writing that access to the Properties is no longer needed for the Remedial Action.

SO ORDERED.



George Pavlou, Acting Director
Emergency and Remedial Response
Division
U.S. Environmental Protection Agency, Region 2

9/5/08

Date of Issuance