

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 WATER COMMISSIONERS OF THE)
TOWN OF WATERFORD, NEW YORK,) Index No.
) CERCLA-02-2008-2034
)
Respondents.)
)
)
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 Water Commissioners of the Town of Waterford, New York (hereinafter, “Respondents”), 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 Respondents 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 Respondents 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. Respondents own and/or operate the municipal water supply system for the Town of Waterford, New York.
11. EPA intends to construct a water supply line to supply the Town of Waterford and the Town of Halfmoon (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.

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 the measures that will protect the Towns' water supplies during the dredging. Another protective measure in place is a 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 Waterford water plant has a treatment system that effectively removes PCBs from raw water entering the plant. It also should be noted that 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 water supply 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, directional drilling, installation of the new water line pipe below the ground, connection of the new water line to the existing Waterford water supply 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 Respondents' ownership, Respondents own or control several properties on which the water line will be built. These properties (collectively, the "Properties") are as follows:
 - a. Real property located at and/or adjacent to 127 Second Street in Waterford, New York (Tax Map Parcel 291.64-1-15) (this property is depicted at Exhibit 1);
 - b. 127 Second Street, Waterford, New York (this property, identified as Tax Map Parcel 291.63-1-3, is depicted at Exhibit 2);

- c. The pressure-reducing valve vault on Bells Lane, the portions of the existing water line located within that vault, and the easement on Bells Lane that is owned by Respondents (a depiction of this easement and the location of the valve vault is attached hereto as Exhibit 3).
18. On June 11, 2008, EPA provided Mr. Ed M. Hernandez, P.E. (Delaware Engineering P.C.), a project manager for Respondents, and Mr. Ron Bova (Bova Engineering PLLC), the Town of Waterford engineer, with those parts of the 95% design for the water line that address the portions of the water line that will be located in the Town of Waterford.
19. By letter dated June 30, 2008, Mr. Hernandez asked EPA to provide Respondents and the Town of Waterford with a complete set of plans for the water line, and with 60 days to complete their review of the water line design.
20. EPA provided Mr. Hernandez with a complete set of water line plans under cover of a letter dated July 9, 2008. EPA's letter informed Mr. Hernandez that the water line construction is "under a very tight schedule" and that EPA expected to obtain contractor bids for the project in August and to begin building the water line in late August or early September. EPA therefore requested Mr. Hernandez's comments on the design by July 31, 2008. After EPA sent its July 9, 2008, letter, EPA revised the construction schedule so that construction of the water line is now scheduled to begin in mid-September, 2008.
21. By letter dated July 23, 2008, EPA provided Mr. Hernandez with the draft final plans and specifications for the water line and again stated that the water line project is on a "very tight schedule as we wish to begin construction in September."
22. On July 28, 2008, Mr. Hernandez provided EPA with comments on the water line design. EPA included several of the Mr. Hernandez's comments in the design.
23. In an August 8, 2008, meeting with EPA, Mr. Hernandez objected to the portions of the water line design which call for the water line to cross the former Town of Waterford sanitary landfill. Mr. Hernandez believed that the water line pipe should instead cross a right of way owned by the electric utility National Grid, PLC and thereby avoid crossing the landfill. He also requested that EPA use a Class 52 ductile iron pipe ("DIP") for the water line, which is of a heavier grade than the Class 300 DIP that was called for in the 95% design documents. At the meeting, EPA explained that the Class 300 DIP is an industry standard for such water lines, but that EPA would evaluate the costs of using the Class 52 DIP. EPA also explained that it had decided to place the pipe on the landfill after National Grid, PLC raised safety concerns about the water line passing near its high voltage transmission lines.
24. In an August 22, 2008, letter to EPA, Mr. Hernandez again indicated his objection to the portions of the water line design which call for the water line to cross the former Town of

Waterford sanitary landfill.

25. In an August 22, 2008, letter to EPA, Respondents stated that EPA had adequately addressed most of the comments that Mr. Hernandez had raised at the August 8, 2008, meeting with EPA, although Respondents objected to a “standard installation” of the water line on the landfill, and also requested that EPA use the Class 52 DIP.
26. By letter dated August 22, 2008, EPA responded to Respondents’ July 28, 2008, comments on the water line design. EPA’s letter explained, among other things, the reasons for why Class 300 DIP is appropriate for the water line. EPA’s letter indicated that EPA would obtain separate prices for using Class 300 DIP and Class 52 DIP, and would then make a decision about which pipe to use. EPA’s August 22, 2008, letter also addressed Respondents’ comments about the pipe crossing the landfill, including the fact that the water line will be installed on top of the landfill cap and would not be subject to contamination by the underlying waste material. EPA’s August 22, 2008, letter also noted that the Town of Waterford already has a 10 inch diameter water main which crosses the landfill.
27. By letter dated July 25, 2008, EPA asked Respondents to provide EPA with access to the two properties identified in subparagraphs 17.a and 17.a, above, for purposes of constructing the water line and connecting it to the Town of Waterford’s water supply system. EPA’s letter requested that Respondents sign the Consent for Access to Property that was enclosed with EPA’s letter, and return the signed form to EPA by August 1, 2008. Respondents did not provide EPA with a signed consent form.
28. In an August 8, 2008, telephone conversation with Douglas Fischer (EPA Region 2 Office of Regional Counsel), Respondents’ counsel, James Glavin, expressed concern that the Consent for Access to Property did not indicate that the water line could be transferred to a non-government entity such as Respondents after the water line is no longer needed as an alternate water source during the dredging.
29. In an August 18, 2008, telephone call with Mr. Fischer, Mr. Glavin indicated that Respondents are in favor of the water line being constructed, and that on August 19 he would provide EPA with a few proposed changes to the Consent for Access to Property. During the August 18, 2008, telephone call, Mr. Fischer indicated that EPA also would need to obtain access to an easement owned by Respondents on Bells Lane in Waterford, New York. Mr. Fischer followed up this discussion with an August 18 e-mail message to Mr. Glavin which included a diagram of the Bells Lane easement to which EPA requested access. In his email message, Mr. Fischer indicated that it is important for the access consent form to be finalized by August 22, 2008. Respondents did not provide EPA with comments on the access consent form on August 19.
30. On August 21, 2008, Mr. Fischer left a voice mail message for Mr. Glavin asking Mr.

Glavin to provide EPA with Respondents' comments on the Consent for Access to Property, and stating that it is important to resolve any issues regarding the access consent form by August 22. In a subsequent August 21, 2008, telephone conversation, Mr. Glavin indicated to Mr. Fischer that Respondents do not have any major comments on the Consent for Access to Property, other than adding a provision that would provide for the water line or portions thereof to be transferred to Respondents after it is no longer needed as an alternate water supply during the dredging. Mr. Glavin indicated that he would provide EPA with his written comments on the consent form as soon as he received approval to do so by Respondents.

31. In an August 26, 2008, e-mail message, Mr. Fischer provided Mr. Glavin with proposed modifications to the Consent for Access to Property that would provide EPA with access to Respondents' easement and other property on Bells Lane.
32. On August 27, 2008, Mr. Glavin indicated to Mr. Fischer that his client did not object to providing EPA with the requested access, provided that the consent form reflected the fact that the portions of the water line on property owned by Respondents would be given to Respondents after the water line is no longer needed as an alternate water source during the dredging. Mr. Fischer indicated that, if Respondents agree to provide EPA with the requested access, it would be necessary for Respondents to sign the Consent for Access to Property by August 29, 2008. Mr. Fischer further explained that EPA needed to receive the necessary access by the time it selects a contractor for the work during the week of September 1.
33. By letter to dated August 28, 2008, Respondents identified four issues which Respondents "insist[ed]" on being resolved before Respondents would grant the access requested by EPA. Among other things, Respondents' August 28, 2008, letter sought an assurance from EPA that EPA would transfer to Respondents the ownership of the water line after the line is no longer needed to provide the Towns with a contingency water supply during the dredging, an assurance that EPA would be responsible for repairing any damages to any facility, land, roadway or property caused by a failure of the water line, and written documentation from the New York State Department of Environmental Conservation and New York State Department of Health "concurring with" EPA's analyses regarding the water line's crossing over the landfill, the inability to obtain "proper distances" between the water line and existing utilities, and the use of Class 300 DIP.
34. By letter to Mr. Hernandez dated September 4, 2008, EPA informed Respondents that, among other things, it would use Class 52 DIP for the water line, and that it is premature for EPA to determine which entity(ies) will receive the water line after it is no longer needed as an alternate water supply during the dredging. EPA's letter also informed Respondents that, if Respondents chose to provide EPA with the requested access, they needed to sign the access consent form by September 5, 2008.

35. By letter to EPA dated September 5, 2008, Respondents informed EPA that they would not sign the access consent form unless EPA first agreed that the parts of the water line located within the Town of Waterford would be owned by Respondents after the completion of dredging. As of the date of issuance of this Order, Respondents have not agreed to provide EPA with access to the Properties.
36. 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. Respondents are 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.
37. Respondents' failure to provide EPA with the requested access to the Properties in a timely manner threatens to delay the start of construction of the water line, and such a delay is increasing the risk that the water line will not be completed before Phase 1 dredging begins in the late spring of 2009. This Order is being issued in order that such a delay can be avoided.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

38. Respondents are "persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
39. PCBs are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
40. 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.
41. 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).
42. 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).

43. Respondents have not, to date, granted their consent to EPA having access to the Properties for the purposes described in Paragraph 14, above.

V. ORDER

44. Based on the Findings of Fact and Conclusions of Law and Determinations set forth above, and on the Administrative Record, Respondents are 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. Respondents shall provide such access to the Properties continuously from the effective date of this Order until such time as EPA informs Respondents 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 8 years.
45. Respondents 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.
46. Nothing herein limits or otherwise affects any right of entry or access held by the United States pursuant to applicable laws, regulations, or permits.
47. This Order shall apply to and be binding upon the Respondents and their successors and assigns, and each and every agent of Respondents and upon all other persons and entities who are under the direct or indirect control of Respondents, including any and all lessees of Respondents.
48. In the event of any conveyance by the Respondents or their agents, successors or assigns, of any interest in any of the Properties, Respondents and their 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. Respondents, or Respondents' 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 Respondents

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

49. 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.
50. 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 Respondents, or against any entity which is not a party to this Order.
51. 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 Respondents or any other parties under CERCLA which relate to the Site or any other site.
52. 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

53. 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

Respondents should contact Douglas Fischer, Esq. of EPA's Office of Regional Counsel at (212) 637-3180, if they wish to schedule an appointment to review the Administrative Record.

VIII. OPPORTUNITY TO CONFER

54. Within three business days after receipt of this Order by Respondents, Respondents may request a conference with EPA, to be held no later than two business days after Respondents' 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 Respondents are ordered to take, or any other relevant and material issues or contentions which Respondents may have regarding this Order. Respondents may appear in person or by an attorney or other representative at the conference. Respondents 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 Respondents do not request a conference. EPA will deem Respondents to have waived their right to the conference or to submit written comments if they fail 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:

Douglas Fischer
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866
(212) 637-3180

IX. EFFECTIVE DATE; COMPUTATION OF TIME

55. This Order shall be effective four business days after its receipt by Respondents or Respondents' 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 Respondents 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 Respondents or their legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.

56. 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

57. Within one business day after the effective date of this Order, Respondents shall notify EPA in writing whether Respondents will comply with the terms of this Order. Such written notice shall be sent to Douglas Fischer at the address set forth in Paragraph 54, above. Respondents' 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.

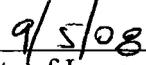
XI. TERMINATION

58. 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



Date of Issuance