



MEMORANDUM
DEPARTMENT OF TRANSPORTATION

TO: W.P. Moody, Soil Mechanics Bureau, 7-102
Attention: J. Reagan

FROM: ^{arkley} B.H. Berry, Highway Maintenance Division, 5-217 *RAB*

SUBJECT: CANAL PCB's - BUOY SITE 212 AND SPECIAL AREA 13

DATE: April 19, 1994

Attached for your information and appropriate action is an executed copy of the Consent Decree concerning the subject PCB sites. Please continue the necessary steps to comply with this decree and issue the required annual report as you have in the past.

If you have any questions or comments concerning this matter, please contact Bob Sack or me at 457-6435.

Thank you.


BHB/RLS
Attachment

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HMD

MEMORANDUM
DEPARTMENT OF TRANSPORTATION

TO: K. W. Shiatte, Office of Operations, 503-5
B. Berry, Highway Maintenance, 217-5

FROM: W. S. MacTiernan, Office of Legal Affairs, 509-5 

SUBJECT: BUOY SITE 212, SPECIAL AREA 13
CONSENT DECREE

DATE: April 4, 1994

Attached for your information and appropriate action is the fully executed Consent Decree in the litigation in which EPA sued New York State DOT regarding Buoy Site 212 and Special Area 13. I know that you have seen copies of this Consent Decree prior to this transmittal. However, this is the first time I have a fully executed copy for you.

Please remember, even though the Thruway Authority may be performing all of the ordinary and continuous maintenance at these sites, DOT remains responsible to the Court and EPA for compliance with the terms and conditions of this Consent Decree. We should be paying particular attention to the required annual reports.

Should you have any questions concerning the attached, please call me.

WSM:cb
WSM0713/15.3

Attachment

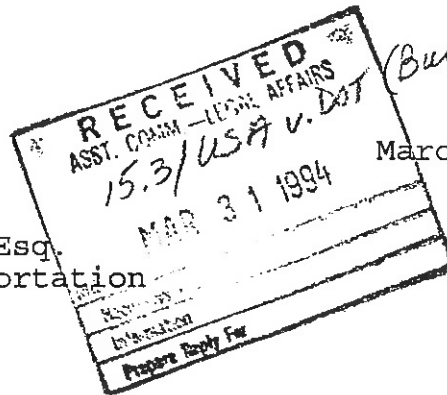


STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N.Y. 10271

G. OLIVER KOPPELL
Attorney General

JAMES SEVINSKY
Bureau Chief
Environmental Protection Bureau

(212) 416-8448



March 25, 1994

William MacTiernan, Esq.
Department of Transportation
State Office Campus
Counsel's Office
Albany, NY 12232

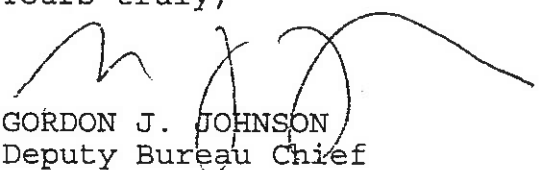
Re: EPA v. DOT

Dear Bill:

Enclosed is a copy of the entered consent decree. I trust that the Department has been instructed to comply with its requirements and perform the periodic duties so required.

Thank you for your assistance in this case. Without it, the result would have been far different, and unfortunate.

Yours truly,


GORDON J. JOHNSON
Deputy Bureau Chief

Encl.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

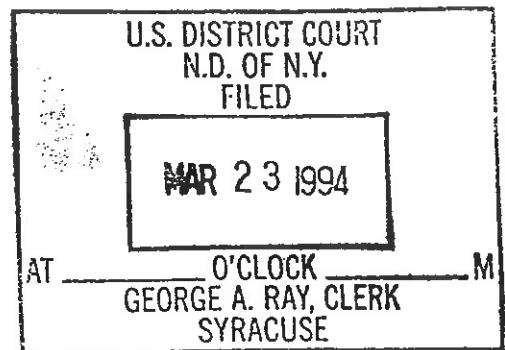
UNITED STATES OF AMERICA

Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF
TRANSPORTATION,

Defendant.



89-CV-319
Judge McCurn

COPY

CONSENT DECREE

WHEREAS, the United States of America ("United States") on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint ("Complaint") on March 24, 1989, against Defendant New York State Department of Transportation ("NYSDOT" or "Defendant"), under Section 17 of the Toxic Substances Control Act ("TSCA" or the "Act"), 15 U.S.C. § 2616, seeking to compel cleanup of polychlorinated biphenyls ("PCBs") and to enjoin permanently the Defendant's alleged ongoing violations of Sections 6(e), 15 and 17 of TSCA, 15 U.S.C. §§ 2605(e), 2614 & 2616, and TSCA's implementing regulations codified at 40 C.F.R. Part 761 ("PCB regulations"), at two facilities known as the Buoy 212 and Special Area 13 dredge disposal sites ("the Sites") located in Fort Edward and Moreau, New York;

WHEREAS, the Defendant is an Agency of the State of New York created by the New York State Legislature to exercise overall responsibility for transportation policy and planning;

WHEREAS, General Electric Corporation ("GE") discharged large quantities of PCBs into the Hudson River in the course of discharging contaminated waste waters into the river at least until 1977;

WHEREAS, in July, 1979, NYSDOT requested permission from the Regional Administrator of EPA Region II to dispose of material dredged from the Hudson River containing in excess of 50 parts per million of PCBs at the Sites, NYSDOT having determined that such dredging was necessary to maintain safe navigation of the river channel;

WHEREAS, in September, 1979, the Regional Administrator of EPA Region II granted NYSDOT's application for temporary disposal, subject to a number of limitations (the "1979 TSCA Approval");

WHEREAS, in September, 1983, EPA Region II issued an administrative complaint and notice of opportunity for a hearing to NYSDOT, alleging that NYSDOT failed to comply with the limitations imposed by the 1979 TSCA Approval;

WHEREAS, in March, 1986, NYSDOT entered into an Administrative Consent Agreement and Final Order ("1986 Consent Order") with EPA in which NYSDOT agreed to undertake a compliance program to ensure it would comply with the limitations contained in the 1979 TSCA Approval;

WHEREAS, the Sites are contaminated with PCBs, which PCBs were contained in material dredged by the Defendant from the bed of the Hudson River;

WHEREAS, the Complaint in this action alleges that the Defendant has failed to comply with the requirements of 40 C.F.R. Part 761, the 1979 TSCA Approval, and the 1986 Consent Order;

WHEREAS, the Defendant has agreed to perform the requirements of this Consent Decree and to perform interim remedial work with respect to the PCBs located at the Sites as specified herein;

WHEREAS, both the Plaintiff and the Defendant agree that permanent remediation of the PCBs at the Sites is desirable;

WHEREAS, the interim remedial work set forth hereafter is being performed in order to comply with the requirements of TSCA pending exploration of permanent disposal options; and

WHEREAS, the parties to this action, having agreed that settlement of this action and entry of this Consent Decree without trial or further adjudication is the most appropriate means of resolving this action, hereby stipulate that this Consent Decree should be entered,

NOW, THEREFORE, it is hereby ORDERED as follows:

ARTICLE I -- JURISDICTION

1. This Court has jurisdiction of the subject matter of this action pursuant to Section 17(a) of the Act, 15 U.S.C. § 2616(a), and 28 U.S.C. §§ 1331 and 1345. The parties to this Consent Decree consent to this Court's jurisdiction for the purposes of this action.

ARTICLE II -- BINDING EFFECT

2. This Consent Decree shall apply to and be binding on the United States and the Defendant and on their officers, agents, employees, successors, and assigns. Subject to the terms of Article XVI, below, each undersigned representative of the parties certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and to legally bind such party to it. The Defendant shall provide a copy of this Decree to each person, including all contractors and subcontractors, retained to perform the work contemplated by this Consent Decree. The terms of any contract for such work shall be consistent with the terms of this Consent Decree.

3. No conveyance by New York State of title, easement or other interest in the Sites shall be consummated without a provision binding and obligating all parties who acquire any interest in the Sites to submit to the jurisdiction of this Court and requiring compliance with all requirements and provisions of this Consent Decree. At least 60 days prior to any conveyance, the Defendant shall notify EPA by certified mail of its intent to convey any interest in the property and of the steps taken to comply with the provisions of this paragraph. No such conveyance shall relieve the Defendant from its obligations to perform under this Decree absent agreement by the United States and further order of this Court.

ARTICLE III -- DEFINITIONS

4. Unless otherwise defined herein, terms used in this Consent Decree shall have the meaning given to those terms in 40 C.F.R. Part 761.3.

a. "Buoy 212 Site" means those portions of the facility known as Buoy 212, located in the Town of Fort Edward, Washington County, New York, onto which PCB-contaminated dredge material was disposed, as indicated on the Record Plans dated April 22, 1991, on file with the parties, which consist of "as-built" drawings of the caps and fences referred to in Paragraph 12, below.

b. "Special Area 13 Site" means those portions of the facility known as Special Area 13, located in the Town of Moreau, Saratoga County, New York, onto which PCB-contaminated dredge material was disposed, as indicated in said Record Plans.

ARTICLE IV -- ACTIONS FOR COMPLIANCE

5. All actions enumerated in this Article shall be or have been done in accordance with the attached Addenda, or with other documents identified herein, which are incorporated herein by reference and made a part of this Consent Decree.

6. The Defendant certifies that it installed a permanent gate at the Saratoga Co. Rt. 29 entrance to Special Area 13.

7. The Defendant certifies that it installed new groundwater monitoring wells as specified by Section VII of the draft report entitled "Results of Subsurface Exploration Program

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for Monitoring Well Placement at Hudson River Dredge Disposal Sites: Special Area 13 and Buoy 212," dated August 1990, on file with the parties.

8. The Defendant shall continue to collect and analyze groundwater samples from the newly-installed wells in accordance with the provisions of Addendum A, which the parties have determined, based on available scientific knowledge and data, will yield sufficient information to determine potential and actual migration of PCBs from the Sites.

9. a. The Defendant shall prepare an Interim Site Characterization and Construction Report ("Interim Report") which shall include, but not be limited to, copies of all data gathered during the groundwater collection and analysis up to June 1992 from the newly installed wells, including quality assurance/quality control for sampling and analyses, well installation logs, and other data previously collected and not heretofore reported. The Interim Report shall analyze information so gathered and shall determine and state the interim conclusions of the Defendant, and its consultants if any, concerning the areal and vertical extent of PCB contamination at the Sites, geologic strata and the groundwater regime underlying the Sites, and the potential for and actual migration of PCBs from the Sites based on the Sites' characteristics as determined in the course of the studies. Such report was delivered to EPA before December 31, 1992.

b. As provided in Addendum A, the Defendant shall continue to collect and analyze groundwater samples from the newly-installed wells on a quarterly basis through the mid- to late-winter 1993-94 sample, weather permitting. The Defendant shall prepare a Final Site Characterization Study Report ("Final Report") based on the data, analyses, and conclusions of the Interim Report and the additional sampling, and taking into consideration any EPA comments on the Interim Report. The Final Report shall determine and state the conclusions of the Defendant, and its consultants, if any, as to the continued scientific validity of the Defendant's Interim Report based on the additional sampling. If the results of the additional sampling cause the Defendant to question or alter its previous conclusions, the Defendant shall so state, discuss any issues that may have arisen based on its reevaluation, and state its revised conclusions. The Final Report shall be submitted to EPA within six (6) months following collection of the mid- to late-winter sample to be collected by February 28, 1994.

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c. The Defendant shall continue groundwater sampling and analysis in accordance with Addendum A on a semi-annual basis thereafter.

d. The Defendant shall submit the annual reports required under the 1979 TSCA Approval and the 1986 Consent Order in September of each year beginning 1993.

CONTACT
J. SWEENEY
ABOUT THIS
HE WROTE
1ST REPORT
IN '93

10. If EPA determines that either the Interim Report or the Final Report do not scientifically determine the areal and

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vertical extent of PCB contamination at the Sites and the potential and actual migration from the Sites, EPA shall state the basis for its conclusion that the study is insufficient and what additional sampling and testing, if any, is necessary to remedy any scientific deficiencies in the Report necessary to the Report's conclusions. Subject to Article VII (Dispute Resolution) below, the Defendant shall conduct the additional sampling and testing if determined to be necessary by EPA to determine the extent of PCB contamination at the Sites and migration from them. The Defendant shall correct the Report's deficiencies and submit any additional underlying data and documentation to EPA in an Amended Interim Report or Final Report within the later of forty-five (45) days after receiving results of all additional sampling and testing, or forty-five (45) days after determining which portions of the Report need to be revised.

11. The Defendant shall evaluate and assess the groundwater monitoring system at the Sites and perform groundwater monitoring on a continuing basis as set forth in Addendum A.

B. PHASE II--INTERIM REMEDIAL WORK

12. The Defendant certifies that it has built the fences and caps at the Sites as shown in the aforementioned Record Plans. *DONE*

13. The Defendant shall maintain the Sites on a continuing basis in accordance with Addendum B. *DONE*

C. MINIMUM QUALIFICATIONS FOR PERSONNEL

14. All work performed by the Defendant pursuant to this Consent Decree shall be under the direction and supervision of an individual who has demonstrated experience and expertise in hazardous waste and PCB investigations and remediations. Before any work is performed, the Defendant shall notify EPA in writing giving the name, title and qualifications of the supervisory personnel and contractors or subcontractors and their personnel to be used in carrying out the terms of this Consent Decree. In addition, the Defendant shall ensure that when necessary, when a license is required, it shall use licensed individuals for performing any work required by this Consent Decree.

D. QUALITY ASSURANCE/QUALITY CONTROL

15. Throughout all sampling, monitoring and analytic activities, the Defendant shall use EPA-approved quality assurance/quality control and chain of custody procedures, which procedures are a part of Addendum A. The Defendant shall:

- a. Consult with EPA in planning for field sampling and laboratory analysis, including a description of the chain of custody procedures to be followed;
- b. Inform the EPA Project Coordinator in advance which laboratories will be used by the Defendant and ensure that EPA personnel and EPA authorized representatives have reasonable access to the laboratories and personnel performing the analyses. In the event that EPA or its authorized representatives cannot satisfactorily obtain access to laboratories for, without limitation, the purpose of auditing protocols and technical proficiency, then EPA shall so inform the Defendant and the Defendant shall, within twenty-five (25) days thereafter, substitute another certified laboratory that provides reasonable EPA access;

c. Ensure that laboratories used by the Defendant for analyses perform such analyses according to the latest edition of "Test Methods for Evaluating Solid Waste (SW-846)", or other methods deemed satisfactory by EPA. If methods other than EPA methods are to be used, such methods may not be used until the Defendant submits all protocols to EPA and EPA approves such protocols and the use of any substituted methods; and

d. Ensure that laboratories used by the Defendant for analyses participate in a quality assurance/quality control program equivalent to that which is followed by EPA. As part of such a program, and upon request by EPA, such laboratories shall submit documentation on all laboratory quality assurance/quality control protocols, or shall perform analyses of a reasonable number of known samples provided by EPA to demonstrate the quality of the analytical data.

E. RECORD PRESERVATION

16. The Defendant agrees that it shall preserve, throughout the duration of this Consent Decree and for a minimum of ten years (10) after its termination, all data, records and documents in its possession, or in the possession of any officer, employee, agent, consultant, contractor (including independent and sub-contractors), successor, or assign, which data, records and documents relate in any way to this Consent Decree, to its implementation, or to the Sites. Ten (10) years after the termination of this Consent Decree, or when the documents are proposed to be destroyed, whichever is later, the Defendant shall give notice to EPA and, upon EPA request made within ninety (90) days thereafter, make such records available to EPA. The Defendant and its officers, employees, agents, consultants, contractors (including independent and sub-contractors), successors, or assigns may assert any claims of privilege with respect to any document, do not waive any such claims, and need

not make any privileged documents available to EPA. A claim of privilege shall not be made regarding any compilations of scientific data or descriptions of the manner in which such data was collected or analyzed, or other analytical data. Any documents that the defendant asserts are privileged must be identified, and the United States reserves its right to challenge any claim of privilege.

17. Subject to the provisions of paragraph 16 regarding privileged materials, the Defendant shall preserve all New York State documents pertaining to this Consent Decree in a centralized location or, upon request by EPA, shall provide EPA access to such documents at a centralized location, to afford ease of access by EPA and its representatives.

F. AVAILABILITY OF INFORMATION/NOTIFICATIONS

18. The Defendant shall give the EPA Project Coordinator five (5) business days notice before taking samples at monitoring wells pursuant to this Consent Decree. At the request of EPA, the Defendant shall provide or allow EPA or its authorized representative to take split samples of all samples collected by the Defendant pursuant to this Consent Decree.

19. Subject to the provisions of paragraph 16 regarding privileged materials, all data, information, and records concerning, created for or maintained by the Defendant in connection with this Consent Decree shall be made available to EPA upon request. All employees of the Defendant, all persons (including contractors and subcontractors) who engage in activity

under this Consent Decree and have scientific and engineering expertise, and the Defendant's Project Coordinator, shall be made available to and shall cooperate with EPA if information is sought.

20. All information, data, or records submitted to EPA by the Defendant may be made available to the public as provided by the Freedom of Information Act, 5 U.S.C. § 552, et seq., subject to any statutory privilege claims by New York State, which claims are not waived notwithstanding the provision of information, data or records by New York State to the United States.

ARTICLE V -- STIPULATED PENALTIES

21. If the Defendant fails to comply with any of the requirements of this Consent Decree, EPA shall give the Defendant written final notice stating the failure ("notice of failure") and providing the Defendant a reasonable time to cure such failure, which in any event shall not be less than ten (10) days. If the Defendant does not so correct such failure and disagrees with the stated basis for EPA's determination that it has failed to comply with the Consent Decree, the Defendant shall advise EPA in writing within ten (10) days of receipt of the written notice that it does not agree and the reasons for such disagreement. The parties shall attempt to reconcile their disagreement, but in the event that agreement cannot be reached within twenty (20) days after receipt by EPA of the Defendant's reply to EPA's notice (and any additional period of time to which parties agree

in any effort to resolve their differences), the Defendant may petition the Court to resolve the disagreement. In the absence of such petition, the Defendant shall accept EPA's determination and shall pay stipulated penalties for any non-compliance occurring after the deadline established by EPA for the Defendant to cure its failure to comply, which deadline may be extended by written agreement between the parties. If the Defendant files a petition, the Defendant shall bear the burden of proof. If the Defendant files a petition, unless agreed otherwise by the parties, no penalties shall be due pending resolution by the Court. In the event that the Court determines that the Defendant has failed to comply with this Consent Order (except to the degree that performance is excused pursuant to Article VI), the period of violation shall be considered to have commenced on the deadline established by EPA for the Defendant to cure, unless the Court finds that the Defendant's contesting of the notice of failure was in good faith, and was diligently pursued. If the Court so finds, the period of violation shall commence five days after the Court's determination. Stipulated penalties shall not accrue during the period starting ninety days after a dispute is submitted and ready for a decision by the Court and ending on the date of the Court's decision. The Defendant shall pay stipulated penalties as follows:

<u>Period of Failure to Comply</u>	<u>Penalty</u>
1st to 30th day	\$250 per day
31st to 60th day	\$500 per day
After 60 days	\$750 per day

21. The Defendant shall pay stipulated penalties by state government check payable to "Treasurer of the United States," and shall tender the payment to the United States Attorney for the Northern District of New York, 369 Federal Building, 100 Clinton Street, Syracuse, New York 13260, by the 15th day of the month following the month in which the violation was deemed to have begun, together with a letter referring to this case by caption and docket number and describing the basis for the penalties. The Defendant shall deliver a copy of the letter and the check to the Department of Justice and to EPA in accordance with Paragraph 49.

**ARTICLE VI
DELAYS OR IMPEDIMENTS TO PERFORMANCE (FORCE MAJEURE)**

22. If any event occurs that causes or is likely to cause the Defendant to violate any provision of this Consent Decree, the Defendant shall in writing notify the United States Attorney for the Northern District of New York, EPA and the Department of Justice in accord with Article XIV within five (5) days after determining that violation is reasonably likely. The notice shall specifically reference Article VI of this Consent Decree and describe in detail the anticipated length of time the violation is anticipated to persist, the precise cause or causes of the violation, the measures taken or to be taken by the Defendant to prevent or minimize the violation as well as to prevent future violations, and the timetable by which those measures will be implemented. The Defendant shall take all reasonable measures to avoid or minimize any such violation.

Failure by the Defendant to comply with this Article's notice requirements shall constitute a waiver of the Defendant's right to obtain an extension of time under this Article for its obligations based on such event.

23. If EPA agrees that the violation has been or will be caused by circumstances beyond the control of the Defendant or any entity controlled by the Defendant, including the Defendant's consultants and contractors, and that the Defendant could not have reasonably foreseen and prevented such violation, the time for performance of such requirement may be extended for a period not to exceed the actual period of delay resulting from such circumstances, and stipulated penalties shall not be due for that period of delay. If EPA does not so agree, EPA shall advise the Defendant in writing of its determination and the basis for it, and the Defendant may submit the matter for resolution pursuant to Article VII of this Consent Decree. If the Defendant submits the matter to the Court for resolution and the Court determines that the violation would not have occurred but for circumstances beyond the control of the Defendant or any entity controlled by the Defendant, including the Defendant's consultants or contractors, the Defendant shall be excused as to that violation, but only for the period of violation caused by such circumstances.

24. Unanticipated or increased costs or expenses associated with the implementation of this Consent Decree, or changed financial circumstances, shall not serve as a basis for

changes in this Consent Decree or extensions of time under this Consent Decree, unless the Defendant has used best efforts and has been unable to obtain enactment of approvals and/or necessary appropriations by the New York State Legislature in accordance with the laws of the State of New York.

25. An extension of one compliance date based on a particular incident shall not result in the extension of a subsequent compliance date or dates unless specifically authorized by EPA. The Defendant must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

26. The Defendant shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree would not have occurred but for circumstances beyond the control of the Defendant or any entity controlled by the Defendant, including the Defendant's consultants or contractors. The Defendant shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

ARTICLE VII -- DISPUTE RESOLUTION

27. If the parties do not agree on any plan, procedure, standard, requirement, or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of the requirements of this Consent Decree, the parties shall make reasonable efforts in good faith to resolve such disagreement or dispute before the United States

issues its notice of failure to comply pursuant to Article V, above, or if such notice is not applicable, before the Defendants invoke the dispute resolution procedures set forth in this Article VII. The position of the United States shall be binding on the Defendant unless the Defendant files a petition with the Court for resolution of the dispute within sixty (60) days of receipt of notice of the United States' final position. The petition shall set out the nature of the dispute with a proposal for its resolution. The United States shall have sixty (60) days to file a response. In any such dispute, the Defendant shall have the burden of proving that EPA's position is arbitrary and capricious or otherwise not in accordance with law.

28. Stipulated penalties as set forth in Article V of this Consent Decree shall continue to accrue during periods of dispute resolution, except as provided in Article V.

ARTICLE VIII -- RIGHT OF ENTRY

29. Until termination of this Consent Decree, EPA and its representatives, contractors, and consultants, and attorneys for the United States, shall have the authority to inspect the Sites and surrounding areas owned or occupied by the State of New York and covered by this Consent Decree at all times for the purposes of:

1. monitoring the progress of activities required by this Consent Decree;
2. verifying any data or information submitted to EPA in accordance with the terms of the Consent Decree;

3. obtaining samples, and, upon request, splits of any samples taken by the Defendant or its consultants; and
4. assessing the Defendant's compliance with this Consent Decree, any TSCA approval in effect, the PCB regulations, and TSCA.

The United States shall give the Defendant reasonable notice (which, in any event, shall be at least 48 hours) of such inspection unless such notice would prejudice EPA's ability to accomplish the purposes of subparagraphs 2-4 above.

Notwithstanding the foregoing, the United States' right of entry under this Consent Decree shall be in addition to, not in limitation of, all rights of entry available under federal or state law.

30. In addition to the plans, reports, and other documentation required to be provided to EPA by the Defendant under the terms of this Consent Decree, and subject to the provisions of paragraph 16 above regarding privileged materials, the Defendant shall also provide to EPA, upon EPA's request, any analytical data and any documents relating to the Sites in its possession that are, in EPA's judgment, necessary to evaluate proposals submitted by the Defendant, to review work performed or to be performed by the Defendant, or to determine the Defendant's compliance with the terms of this Consent Decree, the PCB regulations, any TSCA approval in effect, and TSCA.

ARTICLE IX -- LIABILITIES ARISING FROM THE WORK

31. The Defendant, not the United States, is liable to the extent provided by law for its acts or omissions in the

performance of the work contemplated by this Consent Decree, and for its failure to perform fully or to complete such work.

32. The work contemplated by this Consent Decree is intended to remedy the alleged violations of law that were the bases for the filing of the Complaint. The United States does not warrant and expressly disclaims any interpretation of this Consent Decree that the Defendant's compliance with the terms of this Consent Decree renders the Sites safe or appropriate for any particular future use.

33. During the course of the work contemplated by this Decree, the Defendant shall be responsible for promptly responding to any emergencies or releases at the Sites and notifying the proper governmental authorities as required by federal, state or local laws and regulations. In the event of an occurrence requiring any such notification, the Defendant shall, in addition to complying with applicable legal requirements, notify EPA in accordance with Article XIV immediately.

ARTICLE X -- WAIVER PROVISIONS

34. The Defendant shall not make any claims, directly or indirectly against the United States, for indemnification or contribution by the United States, or make any other claims against the United States, for expenses related to this case or this Consent Decree.

ARTICLE XI -- COMPLIANCE OBLIGATION

35. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that

the Defendant's complete compliance with this Consent Decree will result in compliance with the provisions of TSCA or the PCB regulations, or with the provisions of any other federal, state, or local law or regulation, except that the remedial work described in Paragraphs 12 and 13 was and will be performed in order to comply with the 1979 TSCA Approval for temporary disposal and the 1986 Consent Order.

36. Notwithstanding EPA's review and approval of any plans formulated pursuant to this Consent Decree, the Defendant shall remain solely responsible for compliance with the terms of the PCB regulations, TSCA, and this Consent Decree, and with the requirements of other federal, state, and local laws and regulations, except that compliance in full with this Consent Decree will render unnecessary performance of unperformed requirements of the 1979 TSCA Approval and 1986 Consent Decree relating to the installation, monitoring and sampling of groundwater monitoring wells, capping of the Sites, and submission of past years' annual reports to EPA, which were required to be performed before the date of entry of this Decree. Nothing contained in this Consent Decree shall be construed to prevent or limit the United States' rights to obtain penalties or injunctive relief under TSCA, the PCB regulations, or any other federal statute or regulation for any future violations or violations not the subject of the complaint herein. Notwithstanding any other provision in this paragraph, the Defendant shall submit the annual reports required under the 1979

TSCA Approval and the 1986 Consent Order in September of each year beginning 1993.

37. The work undertaken by the Defendant and its contractors or subcontractors pursuant to this Decree shall be performed in compliance with all applicable federal, state, and local laws and regulations. The Defendant shall obtain all federal, state, or local permits that are necessary for the work. This decree shall not be construed to be a permit issued pursuant to any federal statute or regulation.

ARTICLE XII -- NON-WAIVER PROVISIONS

38. This Consent Decree does not limit or affect the rights of the Defendant or of the United States as against any third parties.

39. This Consent Decree creates no rights in third parties.

40. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree.

41. The United States reserves the right to seek civil penalties for the violations alleged in the Complaint, including but not limited to the penalty set forth in the 1986 Consent Order. The Defendant reserves the right to oppose imposition of such penalties.

42. The United States reserves the right to pursue all remedies available to it and to sue the Defendant for all

violations of TSCA with respect to the Sites, except for those violations alleged in the Complaint.

43. Nothing herein shall be construed to limit the authority of the United States to undertake any action against any person, including Defendant, in response to conditions that may present an imminent and substantial endangerment to the public health, welfare or the environment, including the potential discharge of PCBs into the Hudson River or migration of PCBs off-site from either of the Sites.

44. Nothing in this Consent Decree constitutes a decision on preauthorization of funds under section 111(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9611(a)(2), or any authorization for the Defendants, their agents, contractors, assigns, or successors to assert any claim(s) against, or to request any reimbursement from, the Hazardous Substance Superfund, pursuant to section 111 or 112 of CERCLA, 42 U.S.C. § 9611 & 9612, or under any provision of CERCLA or based on common law, statutory or equitable grounds. The Defendant shall make no such claim(s).

45. Nothing in this Consent Decree shall constitute an approval or admission by the United States that the cap and fence that were constructed pursuant to this Consent Decree constitute an acceptable permanent method of disposal under applicable law and regulations, except that such cap and fence constitute an

appropriate response on an interim basis to address the presence of PCBs at the Sites.

46. Notwithstanding any other provision of this Consent Decree, the United States reserves its right to seek injunctive relief or take other action requiring the Defendant to remove the PCBs at the Sites and to permanently dispose of them at a different location in accordance with TSCA and the PCB regulations promulgated under TSCA and codified at 40 C.F.R. Part 761. Any decision by the United States to do so shall first be approved by the Regional Administrator of EPA Region II. The Defendant reserves its right to oppose the granting of such relief.

ARTICLE XIII -- COSTS OF SUIT

47. Each party shall bear its own costs and attorney's fees in this action.

ARTICLE XIV -- PROJECT COORDINATOR, INFORMATION, AND NOTICE

48. On or before the date of entry of this Consent Decree, EPA and the Defendant shall each designate a Project Coordinator and the name of at least one alternate who may function in the absence of the designated Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of technical work required by this Consent Decree.

49. All communications between the Defendant and EPA, and all documents, reports, approvals, and other correspondence concerning the activities performed under or pursuant to the terms and conditions of this Order, shall be directed to and

through the respective project coordinators. In addition, unless otherwise specified, a copy of each document, including but not limited to reports, correspondence, approvals, disapprovals, notices or other submissions relating to or required under this Consent Decree, shall be sent to:

As to the U.S. Department of Justice:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611 Ben Franklin Station
Washington, D.C. 20044
DOJ Ref. No. 90-5-1-1-3297

As to EPA:

Chief
Air, Waste and Toxic Substances Branch
Office of Regional Counsel
United States Environmental Protection
Agency, Region II
26 Federal Plaza
New York, New York 10278

Branch Chief
Hazardous Waste Facilities Branch
U.S. E.P.A. Region II
26 Federal Plaza
New York, New York 10278

Chief, Pesticides and Toxic Substances Branch
U.S. E.P.A. Region II
2890 Woodbridge Avenue
Edison, New Jersey 08837

As to the Defendant:

Director of the Office of Canals
200 Southern Boulevard
P.O. Box 189
Albany, New York 12201-0189

Assistant Commissioner for Legal Affairs
N.Y. State Department of Transportation
Building 5, State Office Campus
Albany, New York 12232

A party may change the persons to receive notice on its behalf upon written notice to the other party.

50. Unless otherwise specified herein, notifications or submissions of reports, approvals, and disapprovals to or from EPA or the United States shall be deemed made or submitted on the date they are postmarked, delivered to an overnight carrier for delivery to a party to this Consent Order, or delivered via facsimile transmission to a party to this Consent Order. In the event that ordinary mail is used, notice of its use shall be given to the Project Coordinator for each party by telephone or by facsimile transmission of a written notice.

ARTICLE XV -- MODIFICATION

51. Except as specifically provided for herein, there shall be no modification of this Consent Decree without written agreement of all of the parties to this Consent Decree and approval by the Court. Changes to the technical and schedule specifications for maintenance, sampling and analysis set forth in Addenda A and B hereto may be made without approval by the Court upon a written agreement between the Defendant and EPA.

ARTICLE XVI PUBLIC COMMENT AND ENTRY OF THIS DECREE BY THE COURT

52. The parties agree and acknowledge that final approval by the United States and entry of this Consent Decree by the Court are subject to the requirements of 28 C.F.R. § 50.7, which provides for notice in the Federal Register of the lodging of this Consent Decree with the Court, an opportunity for public comment, and consideration of any comments received.

53. Subject only to the preceding paragraph, the Defendant consents to entry of this Consent Decree by the Court without further notice.

ARTICLE XVII -- CONTINUING JURISDICTION

54. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

ARTICLE XVIII -- CERTIFICATION

55. Any report, data presentation, plan or specification submitted by the Defendant under or pursuant to this Consent Decree, for the purpose of demonstrating the Defendant's compliance with any requirement(s) of this Consent Decree shall be certified by a responsible official of the Defendant. The term responsible official shall mean an employee of the Defendant who has knowledge of the information being certified and who is authorized by the Defendant to issue such certification. If reasonable to do so, a responsible official may rely upon a certification of accuracy provided the Defendant by a laboratory or other consultant when issuing the certification required by this paragraph.

56. The certification of the responsible official shall be in the following form:

"I certify that the information contained in or accompanying this (type of submission) is true, accurate and complete to the best of my knowledge."

Signature
Name
Title
Date

ARTICLE XIX -- TERMINATION

57. This Consent Decree shall remain in full force and effect until the Defendant has completed all work, completed and submitted all reports, complied with all obligations, and made all payments of stipulated penalties required by or due under this decree. The Defendant may thereafter request the Court to terminate the Consent Decree. The United States may request termination of this Consent Decree at any time.

SO ORDERED THIS 18th DAY OF March, 1993.


Reed G. McCann
United States District Judge

Consent Decree in United States v.
New York State Department of Transportation

The undersigned parties enter into this Consent Decree:


FOR THE UNITED STATES OF AMERICA:

12/27/93
DATE



LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment & Natural Resources
Division
United States Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530


12/7/93
DATE



ROBERT E. MAHER, JR., Attorney
Environmental Enforcement Section
Environment & Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-4241

Consent Decree in United States v.
New York State Department of Transportation


1-3-94
DATE


STEVEN A. HERMAN
Assistant Administrator for
Enforcement
U.S. Environmental Protection
Agency
Washington, D.C. 20460

Consent Decree in United States v.
New York State Department of Transportation

FOR THE DEFENDANT:

8/12/93
DATE



GORDON J. JOHNSON
Deputy Bureau Chief
Environmental Protection Bureau
New York State Department of Law
120 Broadway
New York, New York 10271
(212) 416-8448

ADDENDUM A

GROUNDWATER SAMPLING PROTOCOL AND SCHEDULE

1. Sampling protocol.

Defendant shall collect groundwater samples from newly-installed wells and shall analyze the collected samples in accordance with the following requirements:

a. Each well shall have a dedicated tubing, composed of teflon tubing, that is continuous from the bottom to the top of the well. There shall also be a dedicated sampling tube for each well that shall be utilized by a peristaltic pump for purging and sampling.

b. The well shall be purged by evacuating three well volumes of water from the well, the volume determined by calculating the well's volume of water based on difference between (i) the length of the well from the top of the well casing to the well screen and (ii) the measurement of the distance from the top of the well casing to the water level. Purge water shall be discarded to the ground adjacent to the well. Should wells go dry during purging they will be allowed to recover 1/2 hour then purged to dryness a total of three times, or until the three well volumes, as measured above, are removed.

c. After purging is completed and well volume has returned to a level sufficient for the withdrawal of a sample, a sample shall be collected in a one quart jar or larger using the peristaltic pump. The jar shall be equipped with a teflon lid or teflon lid insert.

d. Each jar shall be labeled with the name of the site, well number, date and time of collection, and the name(s) of the sampler(s). After collection of the sample to the top of the jar, the jar shall be closed using the teflon lid or lid insert, packed in a cooler with ice and transported to a laboratory for analysis.

e. The samples shall be analyzed for PCBs. Analysis shall be in accordance with EPA methodology SW-846 or its equivalent, or by another methodology approved by EPA.

2. Sampling frequency.

Samples shall be collected and analyzed from each well in the fall, winter, spring, and summer, beginning in the fall of 1992 through the summer of 1994. Samples collected in the winter shall be collected weather-permitting, but no sooner than two months after the fall collection. The spring collection shall not be made until at least two months after the winter collection. After the summer sampling in 1994, samples shall be collected and analyzed twice a year in two seasons agreed upon by the parties as most appropriate to the monitoring program.

QUARTERLY

SEMI-ANNUAL

N.Y.S.D.O.T. CONTRACT D253840

ENCAPSULATION OF DREDGED SPOIL MATERIAL AT TWO LOCATIONS

- SPECIAL AREA 13, MOREAU, SARATOGA COUNTY
- BUOY 212, PORT EDWARD, WASHINGTON COUNTY

MAINTENANCE SCHEDULE

Buoy Site 212 and Special Area 13 (the sites), will be mowed on an "as needed" basis. Mowing will be done by trained qualified personnel; either DOT employees, NYS Canal Corporation employees or by contract. Mowing will keep the grass cover on the sites at a height of six inches or less.

Buoy Site 212 and Special Area 13 will be inspected on a quarterly basis. The inspector(s) will monitor the general condition of the sites and specifically will check and monitor the following conditions:

- * The inspector(s) will insure that the grass cover is being mowed and that it is being kept to a height of six inches or less.
- * The inspector(s) will insure the integrity of all fencing and gates at the site and insure that all required signs are in place and legible.

- * The inspector(s) will insure the integrity of all sampling wells at the site and insure that all caps are properly secured and locked.
- * The inspector(s) will insure the integrity of the impervious cap and cover material over the cap. The inspector(s) will examine the cover condition to determine whether or not any erosion has occurred in any area and specifically determine whether or not any burrowing animals are on the site(s) and have created a condition detrimental to the integrity of the site.

The inspector(s) will write a quarterly inspection report detailing each condition of the site(s) noted which requires correction. If there are no conditions requiring correction or repair, the quarterly inspection report shall so state. The quarterly inspection report shall also note whether or not a condition(s) previously reported has been corrected.

Does ANYONE
DO THIS?

Any deficiencies or problems noted in the quarterly inspection report will be corrected within sixty (60) days of the notice of the condition. Any conditions which require an emergency response will be corrected on an emergency basis.

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