

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

---

Civil Action No.  
05-01270 (DNH - RFT)

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF  
SUBMISSION REQUESTING ENTRY OF CONSENT DECREE**

## TABLE OF CONTENTS

I. BACKGROUND .....	3
A.    The Statute .....	3
B.    The Site and the Settling Defendant .....	5
C.    Environmental History .....	7
D.    The 2002 Record of Decision .....	9
E.    Post-ROD, Pre-Consent Decree Agreements .....	11
II. TERMS OF THE CONSENT DECREE .....	13
A.    Reimbursement of Response Costs .....	13
B.    Performance of Work .....	15
C.    Covenants and Reservations of Rights .....	16
D.    Peer Review .....	18
E.    Stipulated Penalties .....	19
III. ARGUMENT .....	19
A.    This Court’s Standard of Review is Deferential .....	20
B.    The Consent Decree Is Reasonable .....	23
1.    The Work to be Performed is Technically Adequate .....	23
2.    The Consent Decree Satisfactorily Compensates the Public for Response Costs .....	26
3.    The Consent Decree Properly Accounts for the Risks and Delays Inherent in Litigation .....	27
C.    The Consent Decree is “Fair” .....	29
1.    The Settlement is Procedurally Fair .....	30
a.    There is No Need for the Attorney General to Review	

the Negotiation Process .....	31
b. The Consent Decree Was Negotiated in Good Faith .....	32
2. The Settlement is Substantively Fair .....	34
D. The Consent Decree Is Consistent With CERCLA's Goals and in the Public Interest .....	35
1. GE's Commitment Only to Performance of Phase 1 Does Not Undercut EPA's Chosen Remedy .....	36
2. The Opt-in Provisions Violate No Policy Regarding Covenants .....	39
3. It is Appropriate to Exclude Certain Costs From the Phase 1 Non-Capped Costs Definition .....	40
4. The Stipulated Penalties are Adequate .....	41
5. The Decree Properly Waives Local Permitting Requirements .....	44
6. There is No Requirement that the Consent Decree Provide Compensation for Local Communities .....	49
CONCLUSION .....	51

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

<u>Arizona v. Motorola, Inc.</u> , 139 F.R.D. 141 (D. Ariz. 1991) .....	28
<u>Aro Corp. v. Allied Witan Co.</u> , 531 F.2d 1368 (6th Cir. 1976) .....	21
<u>B.F. Goodrich Co. v. Murtha</u> , 958 F.2d 1192 (2d Cir. 1992) .....	4
<u>B.F. Goodrich v. Betkoski</u> , 99 F.3d 505 (2d Cir. 1996) .....	passim
<u>City of New York v. Exxon Corp.</u> , 697 F. Supp. 677 (S.D.N.Y. 1988) .....	21, 28, 30
<u>Consolidated Edison Co. of New York v. UGI Utilities, Inc.</u> , 423 F.3d 90 (2d Cir. 2005) .....	3
<u>Dedham Water Co. v. Cumberland Farm Dairy, Inc.</u> , 805 F.2d 1074 (1st Cir. 1986) .....	28
<u>Dedham Water Co. v. Cumberland Farms Dairy, Inc.</u> , 889 F.2d 1146 (1st Cir. 1989) .....	5
<u>Doubleday Broadcasting Co. v. F.C.C.</u> , 655 F.2d 417 (D.C. Cir. 1981) .....	48
<u>Gambale v. Deutsche Bank AG</u> , 377 F.3d 133 (2d Cir. 2004) .....	21
<u>General Electric Co. v. Johnson</u> , 362 F. Supp. 2d 327 (D.D.C. 2005) .....	33
<u>General Electric Co. v. Johnson</u> , 360 F.3d 188 (D.C. Cir. 2004) .....	33
<u>In re Cuyahoga Equip. Corp.</u> , 980 F.2d 110 (2d Cir. 1992) .....	4, 19, 21, 23, 28
<u>In re Tutu Water Wells</u> , 326 F.3d 201 (3d Cir.), <u>cert. denied</u> , <u>Gal v. Plaskett</u> , 540 U.S. 984 (2003) .....	30, 31
<u>In Re: Tamoxifen Citrate Antitrust Litigation</u> , 429 F.3d 370 (2d Cir. 2005) .....	21
<u>Key Tronic Corp. v. United States</u> , 511 U.S. 809 (1994) .....	3
<u>55 Motor Avenue Co. v. Liberty Industrial Finishing Corp.</u> , 332 F. Supp. 2d 525 (E.D. N.Y. 2004) .....	19
<u>New York v. Moulds Holding Corp.</u> , 196 F. Supp. 2d 210 (N.D.N.Y. 2002) .....	4, 5
<u>New York v. Shore Realty Corp.</u> , 759 F.2d 1032 (2d Cir.1985) .....	3, 5

<u>Officers for Justice v. Civil Service Commission</u> , 688 F.2d 615 (9th Cir. 1982) .....	23
<u>Patterson v. Newspaper and Mail Deliverer' Union</u> , 514 F.2d 767 (2d Cir. 1975) .....	21, 23
<u>Pennsylvania v. Union Gas Co.</u> , 491 U.S. 1 (1989) .....	3
<u>Seminole Tribe of Fla. v. Florida</u> , 517 U.S. 44 (1996) .....	4
<u>State of Ohio v. EPA</u> , 997 F. 2d 1520 (D.C. Cir. 1993) .....	47
<u>Thrift Investment Plan v. Magnuson</u> , 409 F. Supp. 2d 136 (N.D.N.Y. 2005) .....	21
<u>United States v. Akzo Coatings of America, Inc.</u> , 949 F.2d 1409 (6th Cir. 1991) ..	22, 23, 35, 49
<u>United States v. Bechtel Corp.</u> , 648 F.2d 660 (9th Cir.1981) .....	22
<u>United States v. Bestfoods</u> , 524 U.S. 51 (1998) .....	3
<u>United States v. Cannons Engineering Corp.</u> , 720 F. Supp. 1027 (D. Mass. 1989) .....	22, 30
<u>United States v. Cannons Engineering Corp.</u> , 899 F.2d 79 (1st Cir. 1990) .....	passim
<u>United States v. Charles George Trucking, Inc.</u> , 34 F.3d 1081 (1st Cir.1994) .....	3, 19, 21, 34
<u>United States v. City of New York</u> , 30 F. Supp. 2d. 325 (E.D.N.Y. 1998) .....	22
<u>United States v. DiBiase</u> , 45 F.3d 541 (1st Cir. 1995) .....	19, 34
<u>United States v. Glens Falls Newspapers, Inc.</u> , 160 F.3d 853 (2d Cir. 1998) .....	21
<u>United States v. Hooker Chemicals &amp; Plastics Corp.</u> , 776 F.2d 410 (2d Cir. 1985) .....	21
<u>United States v. Hooker Chemicals and Plastics Corp.</u> , 540 F. Supp. 1067 (W.D.N.Y. 1982), <u>aff'd</u> , 749 F.2d 968 (2d Cir. 1984) .....	23, 28, 30
<u>United States v. Kayser-Roth Corp.</u> , 910 F.2d 24 (1st Cir. 1990) .....	5
<u>United States v. McGraw-Edison Co.</u> , 718 F. Supp. 154 (W.D.N.Y. 1989) .....	28
<u>United States v. Rohm &amp; Haas Co.</u> , 721 F. Supp. 666 (D. N.J. 1989) .....	22, 28, 30
<u>United States. v. Alcan Aluminum Corp.</u> , 315 F.3d 179 (2d Cir. 2003) .....	5

STATE CASE

McGrath v. Town Board of Town of North Greenbush, 254 A.D. 2d 614, 678 N.Y.S.2d 834  
(3d Dept. 1998) ..... 47

FEDERAL STATUTES, LEGISLATIVE HISTORY, AND REGULATIONS

15 U.S.C. §§ 2601-2692 ..... 6

26 U.S.C. § 9507 ..... 4

42 U.S.C. §§ 9601-9675 ..... 2

42 U.S.C. § 9604(a) ..... 3

42 U.S.C. § 9606(a) ..... 38, 39, 42

42 U.S.C. § 9606(b) ..... 42

42 U.S.C. § 9607(a) ..... 5, 27

42 U.S.C. § 9607(a)(4)(c) ..... 17

42 U.S.C. § 9621(c) ..... 8, 16

42 U.S.C. § 9621(e) ..... 46

42 U.S.C. § 9622(a) ..... 4, 29

42 U.S.C. § 9622(d)(2) ..... 29

Pub. L. No. 99-499, 100 Stat. 1613 ..... 3

S. Rep. No. 96-848, 96th Cong. 2d Sess. (1980) ..... 4

28 C.F.R. § 0.160 ..... 32

28 C.F.R. § 0.161 ..... 32

40 C.F.R. § 300.400(e) ..... 46

40 C.F.R. § 300.5 ..... 36

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF  
SUBMISSION REQUESTING ENTRY OF CONSENT DECREE**

Plaintiff, the United States of America, respectfully provides this Memorandum in Support of Submission Requesting Entry of Consent Decree. The Consent Decree, lodged with this Court on October 6, 2005, simultaneously with the United States' filing of its Complaint in this matter, will resolve certain liabilities of the Defendant General Electric Company ("GE" or "Settling Defendant") to the United States with respect to the Hudson River PCBs Superfund Site ("Site"). The Site extends from the Fenimore Bridge in Hudson Falls to the Battery in New York City, a distance of nearly 200 miles. GE has agreed not to oppose entry of or to challenge any provision of the Decree. Consent Decree, ¶ 137.<sup>1/</sup>

This Consent Decree represents the culmination of more than 25 years of research, study, and action by the United States devoted to the cleanup of one of America's scenic and historic treasures, the Hudson River. For a period of 30 years, the River became heavily contaminated by polychlorinated biphenyls ("PCBs") emanating from GE capacitor plants in Hudson Falls and Fort Edward, New York. The progress toward the goal of the cleanup over this period has not always been swift and the issues surrounding the nature and extent of the remediation have

---

<sup>1/</sup> Notice of the Consent Decree was published in the Federal Register on October 13, 2005. 70 Fed. Reg. 59771. The public comment period has ended, and the United States has received approximately 20,000 comments regarding the settlement. The United States received comments from the following: U.S. Rep. Sue W. Kelly; U.S. Reps. Nita Lowey and Maurice D. Hinchey; Eliot Spitzer, Attorney General of the State of New York; Denise M. Sheehan, Commissioner, State of New York Department of Environmental Conservation; Town of Fort Edward (and associated entities); Friends of a Clean Hudson ("FOCH"); and Scenic Hudson, Inc. Copies of these comments are attached as Exhibits ("Ex.") 1 - 7 to this Memorandum. Almost all of the additional comments were in the form of, one page letters, most identical or virtually so, from individual members of the public. We have also attached representative samples of the letters as Ex. 8.

sparked controversy. EPA's own approach to the River has changed over the years, reflecting changes in technology, science and its understanding of the river system and its habitat. In 2002, EPA issued the most significant step forward in the march toward ridding the River of its contamination with PCBs when it determined that the dredging of the River was a necessary step. While GE, and many others, for many years had strongly resisted this approach, it is now in place and EPA remains firmly committed to it.

Now, the parties have succeeded in negotiating the next hugely significant step. The proposed Consent Decree represents *GE's* commitment to the dredging remedy and to the cleanup of the Hudson River. This dedication to the remediation, as memorialized in the body of this Decree, and in the hundreds of pages of technical attachments that will help guide GE's performance of the work and the United States' careful oversight of it, is nothing short of historic. Perhaps above all, the Consent Decree succeeds in assuring that the actual remediation of the River *will* begin. This is a settlement that will provide highly important environmental benefits, will well serve the public interest, and will significantly advance the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), pursuant to which the Decree was lodged.

After full and fair consideration of the comments, and for the reasons discussed below, the United States has determined that the Consent Decree is reasonable, fair, and consistent with the goals of CERCLA. Accordingly, the United States respectfully requests that this Court enter the Consent Decree so that the long-awaited remediation of the Hudson River may begin.

## I. BACKGROUND

### A. The Statute

Congress enacted CERCLA in 1980, in response to serious environmental problems posed by improper handling, treatment, and disposal of hazardous substances. See e.g., United States v. Bestfoods, 524 U.S. 51, 55 (1998) (“enacted in response to the serious environmental and health risks posed by industrial pollution”); New York v. Shore Realty Corp., 759 F.2d 1032, 1039-40 (2d Cir.1985). CERCLA provides the United States with a powerful array of tools to promptly clean up sites where hazardous substances have come to be located, including Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), which authorizes the government to respond to releases or threatened releases of hazardous substances into the environment.

The courts have recognized two primary purposes of CERCLA: to provide for efficient responses to releases of hazardous substances and to place the costs for remedying the same on responsible parties. Consolidated Edison Co. of New York v. UGI Utilities, Inc., 423 F.3d 90, 94 (2d Cir. 2005); B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996); see United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1086 (1st Cir.1994) (overarching goals of CERCLA include accountability, desirability of unsullied environment, and prompt response activities). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), Pub. L. No. 99-499, 100 Stat. 1613, “grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.” Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). It “provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination.” Pennsylvania v. Union Gas Co., 491 U.S.

1,7 (1989), overruled on other grounds by, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

CERCLA also created a Hazardous Substance Superfund, known simply as the Superfund, to finance federal response actions undertaken pursuant to Section 104(a) of CERCLA. 26 U.S.C. § 9507. Although CERCLA authorizes cleanup of hazardous waste sites using money provided by the Superfund, the Fund is a limited source and cannot finance cleanup of all of the many hazardous waste sites nationwide. See S. Rep. No. 96-848, 96th Cong., 2d Sess. at 17-18 (1980), reprinted in 1 Sen. Comm. on Env't & Pub. Works, Legislative History of CERCLA 305, 324-25 (1983). Thus, the United States is tasked with seeking to ensure that the limited Superfund monies expended by the federal government in response to a release or threatened release of hazardous substances are recovered through the liability scheme set forth in Section 107 of CERCLA wherever possible. See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (a statutory purpose to hold responsible parties liable for the costs of the cleanup).

Finally, it is well recognized that settlement of CERCLA cases is the approach favored by Congress:

Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

42 U.S.C. § 9622(a); see Betkoski, 99 F.3d at 514 (statutory purpose of “encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation”); In re Cuyahoga Equip. Corp., 980 F.2d 110, 119 (2d Cir. 1992) (one purpose of CERCLA is to encourage settlements); New York v. Moulds Holding Corp., 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002)

(same).<sup>2/</sup>

B. The Site and the Settling Defendant

The Hudson River PCBs Site includes a nearly 200 river-mile stretch of the Hudson River in eastern New York State. The Site has traditionally been divided into Upper Hudson River and Lower Hudson River segments based on physical and chemical characteristics such as river hydrology and PCB inventory. The Upper Hudson River portion of the Site extends from the Fenimore Bridge in Hudson Falls to the Federal Dam at Troy, a distance of just over 43 river miles. The Lower Hudson River extends from the Federal Dam to the southern tip of Manhattan at the Battery in New York City.

During an approximate 30-year period ending in 1977, GE used PCBs in its capacitor manufacturing operations at its Hudson Falls and Fort Edward, New York plants, both located along the Upper Hudson. PCB oils were discharged both directly and indirectly from these

---

<sup>2/</sup> To establish liability in a cost recovery action filed under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the government need only establish that the site at issue is a “facility” (see 42 U.S.C. § 9601(9) (“any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located”)); that there was a “release” or “threatened release” of a “hazardous substance” there; that such release or threatened release caused the United States to incur response costs; and that a defendant falls into one of four categories of responsible parties set out in Section 107(a)(1)-(4). Betkoski, 99 F.3d at 514; see Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989). These four categories of responsible parties are: (1) the current owner and operator of a facility; (2) the owner or operator at the time a hazardous substance was disposed of at the facility; (3) a person who “arranged for disposal or treatment” of a hazardous substance or who “arranged with a transporter for transport for disposal or treatment” of hazardous substances; and (4) a person who accepted a hazardous substance for transport to a disposal or treatment facility selected by such person. 42 U.S.C. § 9607(a). The standard of liability under Section 107(a) of CERCLA is joint and several among liable parties and strict in that liability is imposed without fault. See e.g., Betkoski, 99 F.3d at 514; United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (strict, joint and several liability); Shore Realty, 759 F.2d at 1042; Moulds Holding Corp., 196 F. Supp. 2d at 214. Liability is also retroactive. United States v. Alcan Aluminum Corp., 315 F.3d 179, 188-90 (2d Cir. 2003).

plants into the Hudson River.<sup>3/</sup> Estimates of the total quantity of PCBs discharged directly from the two plants into the river from the 1940s to 1977 are as high as 1,330,000 pounds.

Many of the PCBs discharged to the river adhered to sediments and accumulated with the sediments as they settled in an impounded pool behind the Fort Edward Dam, as well as other depositional areas farther downstream. The removal of the dam in 1973 resulted in a remobilization and downstream distribution of PCBs that had accumulated behind the dam. Historically, the highest PCB sediment concentrations have been detected in the cohesive sediments (fine grained sands, silts and clays) within the Upper Hudson River. River scouring/erosion and other mechanisms have mobilized PCB-contaminated sediments from the extensive cohesive deposits, redepositing them farther downstream all the way to New York Harbor. The preponderance of data indicate that burial of contaminated sediment by cleaner materials is not universally or uniformly occurring. Data also indicate that contaminated sediments continue to serve as the major source of PCBs to the water column and fish within the Upper Hudson River.

---

<sup>3/</sup> EPA has classified PCBs as probable human carcinogens. PCBs are also linked to serious non-cancer adverse health effects based on studies among workers exposed to higher levels of PCBs who developed severe skin rashes, in animals including rhesus monkeys, and in ongoing epidemiological studies of human populations. In 1977, the manufacture and sale of PCBs within the United States were generally prohibited under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692. Although commercial uses of PCBs then ceased, PCBs from GE's Fort Edward and Hudson Falls plants continued to contaminate the Hudson River, due partly to releases of PCBs via bedrock fractures from the GE Hudson Falls plant.

C. Environmental History<sup>4/</sup>

Once introduced into a river, PCBs adhere to sediments, with some fraction being carried in the water column. Physical, chemical and biological release mechanisms allow PCBs in the sediment to be available for redistribution and be a source of PCB contamination to the water column and, ultimately, to fish. High levels of PCBs in fish, in turn, pose a risk to human health.<sup>5/</sup> The sediments of the Upper Hudson River were surveyed by the New York State Department of Environmental Conservation (“NYSDEC”) in 1976-1978 and 1984. Areas with average total PCB concentrations of 50 parts per million (“ppm”) or greater were identified and are known as the NYSDEC-defined PCB “hot spots.” There were 40 such hot spots located in the Upper Hudson. Legal action brought by NYSDEC against GE in 1975 resulted in a \$7 million program for the investigation of PCBs and the development of methods to reduce or remove the threat of PCB contamination. In 1976, NYSDEC issued a ban on all fishing in the Upper Hudson River due to the potential risks from consuming PCB-contaminated fish. ROD at 4. A ban on most commercial fishing, including commercial fishing of striped bass, was issued for the Lower Hudson River. Id. Various such restrictions continue to this day. Id.

In 1984, EPA issued a Record of Decision (“1984 ROD”) for the Site. 2002 ROD at 5. EPA recognized that PCB contamination in the Upper Hudson River sediments was a problem,

---

<sup>4/</sup> Many of the facts set forth in this section of, and elsewhere in, this Memorandum are taken from the Record of Decision for the Site issued by EPA in 2002 (hereinafter, “2002 ROD” or simply “ROD”). The 2002 ROD is attached to the Consent Decree as Appendix A and, therefore, is not attached as an exhibit to this Memorandum.

<sup>5/</sup> EPA performed an assessment of risks posed by the PCB-contaminated sediments in the Hudson and determined that exposure by fish, and through fish, to humans, was the primary health concern posed by the PCBs. Direct contact by humans to such sediments, however, was not found to be a concern.

