

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

CAMILLUS CLEAN AIR COALITION, ROBERT AND COLLEEN BARTLETT, WILLIAM AND MICHELLE BARRINGTON III, KIM CLAVERASE, DANIEL and VERUSKA DANTUONO, DAVID and JULIETTE DEDO, TIMOTHY AND SALLY DELANY, BRIAN and TRACY DELLOW, RON GRZYIEC and BRENDA CARPENTER, DOUGLAS and CHARLENE HART, THOMAS and KIMBERLY KSHYNA, MICHAEL and ALPHA KSHYNA, MATTHEW and TRACY LICAMELI, JOHN and KATHLEEN MARINELLI, WILLIAM and STEPHANIE MATHEWSON, PETER and JENAFER MEDINA, BRYAN MIGNONE and ELAINE EVERITT, BRIAN and KIMBERLY MURPHY, SCOTT and JILL MUSEMECI, JERRY and KRISTINA PARZYCH, JONATHAN and MARGARET PATCH, TIMOTHY and SHARON PIEPER, FREDERICK and HEATHER PUCHTA, LYNORE and MARK DE LA ROSA, ROBERT and LORI SMITH, JOEY ST. LOUIS, ROBERT and MEGAN VERTUCCI, and MICHAEL and LYNDA WADE,

Plaintiffs,

v.

HONEYWELL INTERNATIONAL, INC.,

Defendant.

5:13-CV-365  
(FJS/DEP)

MEMORANDUM OF LAW OF THE STATE OF NEW YORK AS PROPOSED *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' INJUNCTION CLAIMS, AND IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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**INTEREST OF AMICUS CURIAE STATE OF NEW YORK**

In 1989 the State of New York and the Commissioner of its Department of Environmental Conservation (“DEC”) commenced an action under the CERCLA<sup>1</sup> to compel Honeywell’s corporate predecessor to remediate the industrial pollution left by its operations in and around Onondaga Lakes. In December, 1994, the United States Environmental Protection Agency (“EPA”) designated Onondaga Lake a federal Superfund site, making cleanup of the hazardous contamination in and around the Lake a national priority.

In 2004, after years of study by Honeywell and its experts, under a close review by DEC and EPA oversight, DEC issued a proposed plan for remediation of the site. The plan included, as a lynchpin, utilizing waste beds owned by Honeywell in the Town of Camillus as a “sediment consolidation area,” or “SCA,” where contaminated sediments to be dredged from the Lake would be dewatered, encased and disposed of. In July, 2005, DEC and EPA jointly issued a record of decision (the “ROD”) that selected the remedy detailed in the proposed plan as the remedy for the site. After further negotiations between the State and Honeywell, and extensive public notice, comment, and response by DEC, this Court entered a consent decree between the State and Honeywell (the “Consent Decree”) in January, 2007, directing Honeywell to implement the remedy selected in the ROD, as modified by an “Explanation of Significant Difference” dated December 14, 2006.<sup>2</sup>

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<sup>1</sup> The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et. seq.*

<sup>2</sup> In January, 2011, this Court approved a second consent decree between the State and Honeywell that requires the company to dredge or excavate approximately 117,000 cubic yards of contaminated soil and sediment from Ninemile Creek portion of the Geddes Brook/Ninemile Creek subsite. Under the current design approximately 20,000 to 50,000 cubic yards will be shipped to the SCA for treatment and disposal.

Pursuant to the Consent Decree, Honeywell then performed extensive design work that further refined how the remediation would be implemented. The final remedial design for the SCA includes engineering controls and procedures to keep emissions below health-based criteria determined by DEC and EPA, and also to control nuisance odors. In May, 2012 Honeywell and its consultants completed a “Community Health and Safety Plan,” which sets forth a number of potential mitigative measures that could be implemented, as appropriate, in the case of emissions, including reduction or temporary suspension of dredging and sediment processing operations while any problems are addressed.<sup>3</sup> The Community Health and Safety Plan establishes performance standards for noise, dust, total volatile organic compounds (“VOCs”), sulfides, mercury, and certain individual VOCs, and includes an extensive air monitoring program. The air monitoring program takes into consideration a human health risk assessment (“HHRA”) conducted by EPA in 2010 that analyzed potential risks posed to the local communities by the lake remediation project, and established health based criteria to determine whether air emissions posed any potential health risk. The Community Health and Safety Plan includes provisions for implementing mitigation measures to help maintain emissions below health-based criteria and control nuisance odors, such as identifying the source of exceedences, applying controls and counter measures, and restricting or stopping the operations that are causing the emissions.

In July, 2012, 24 years after the State commenced its CERCLA action, Honeywell began the full-scale dredging of contaminated sediments from the lake, and pumping them to the SCA for treatment and disposal – a lynchpin of the State’s effort to clean up the lake and restore it for the benefit of all who live in the Syracuse area.

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<sup>3</sup> See <[http://www.dec.ny.gov/docs/regions\\_pdf/Community Health and Safety Planfin.pdf](http://www.dec.ny.gov/docs/regions_pdf/Community_Health_and_Safety_Planfin.pdf)>.

The State of New York submits this proposed brief, *amicus curiae*, because of its deep interest in seeing the timely completion of the painstakingly negotiated, carefully designed plan to remediate Onondaga Lake. The remedy was developed and chosen in accordance with CERCLA, which mandates not only cleanup standards, but transparency and a thorough opportunity for public notice, comment and input. Superfund site cleanups are often long and complex, and the remediation of Onondaga Lake is no exception. As with many large-scale, long term public works projects that require construction and industrial activity, different interests are likely to be adversely impacted at different times. Many of the early Superfund cleanups were plagued by legal challenges to remedies approved by EPA, leading Congress to add Section 113(h) in 1986 to ensure that once a remedy has been selected in accordance with the statute, including its provisions for public notice, comment and input, that remedy could not be enjoined.

While the State has a deep interest in seeing the successful and timely completion of the remedy approved by EPA and DEC – an interest that also applies to other Superfund cleanups around the State – the State and its environmental agency are not solely concerned with finally removing or capping the contaminated sediments in the lake. The State is also concerned that the remediation be accomplished in a manner that protects public health and safety. That is why the remedial plan incorporates 24-hour, real time monitoring of the dewatering operations at the SCA. The resulting data are continuously checked against the site-specific health-based criteria contained in the approved Community Health and Safety Plan. If those standards are exceeded, mitigative measures (which might include changes to, or suspension of operations) will be implemented so that the work is performed in a manner that is protective of public health and safety. DEC has required numerous modifications and improvements, even though, contrary to

plaintiffs' hypothetical modeled data, the actual data to date show that the health-based criteria have never been exceeded.

The State is also concerned with odors, even if they are not associated with emission levels that exceed public health-based criteria. After full-scale dredging commenced in July, 2012, and the public complained of odors, dredging operations were suspended for approximately three weeks while several measures were implemented to address the problem. After dredging was stopped for the 2012-13 winter season, DEC and Honeywell undertook a focused evaluation of additional potential odor mitigation measures to further reduce potential off-site odors. As these deliberations progressed, specific mitigation measures were determined to be viable and likely effective. DEC authorized Honeywell to proceed with their construction and implementation.<sup>4</sup>

Now that dredging has recommenced, DEC frequently sends inspectors to investigate odor complaints as part of its continuing work to address not only potential exceedences of health-based standards, but also odor and other complaints from the public. DEC and the State are committed to continuing this course, but within the context of the remedial plan that took years to develop, and was ordered by this Court after extensive public notice and comment, all in accordance with CERCLA. The State opposes attempts by private parties to have the duly adopted remedial program enjoined or modified.

Lastly, the State has a strong interest in the Court receiving an accurate picture of the remedial plan that plaintiffs are seeking to preliminarily enjoin. Plaintiffs' central factual contention is that they are being exposed to toxic air emissions at levels injurious to their health

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<sup>4</sup> This effort is documented in the report entitled "Onondaga Lake Sediment Management Winter 2013 Additional Odor Mitigation Plan," prepared for Honeywell by its outside experts at Parsons and O'Brien & Gere, dated April 2013. The report is annexed to the accompanying affidavit of DEC's Donald Hesler, sworn to May 1, 2013 (the "Hesler Aff."), as Exhibit A.

because of the SCA was purportedly flawed in its construction and/or not being run in accordance with the Consent Decree. This contention is based on an air modeling report by the firm of Minnich & Scotto. Plaintiffs further contend that this situation is exacerbated by a lack of “real time” monitoring. However, not only are air emissions from the SCA monitored around the clock, and the resulting data available in “real time,” the actual data generated by that monitoring has shown not a single exceedence of the conservative health-based criteria established by DEC and EPA to ensure protection of public health. Moreover, contrary to plaintiffs’ contention, Honeywell’s ongoing remediation work is being conducted in compliance with the ROD, Consent Decree, and approved remedial design, including the Community Health and Safety Plan.

### **FACTUAL BACKGROUND**

#### **A. Evolution and Design of the SCA**

As more fully described in the accompanying Hesler Aff., the remedy for the Onondaga Lake Superfund site was selected after years of study and review by Honeywell, DEC, EPA and the New York State Department of Health, with DEC acting as lead agency.<sup>5</sup> As required by CERCLA, development of the remedy was subject to extensive, periodic public notice, comment, and response at different stages. By the time DEC and EPA issued the ROD in 2005, the agencies had chosen use of an SCA located on the wastebeds in Camillus for dewatering and

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<sup>5</sup> Pursuant to the National Contingency Plan, at 40 C.F.R. § 300.515, DEC may act as the lead agency for response actions at National Priority List sites pursuant to a cooperative agreement between EPA and DEC. Additionally, pursuant to New York Environmental Conservation Law § 27-1313, DEC has the authority to implement hazardous waste remedial programs at hazardous waste disposal sites. Together, these federal and state laws authorize DEC to oversee remedial investigations, consider proposed remedies, issue records of decision, oversee designs of remedies, monitor and evaluate implementation of remedies, and oversee long-term maintenance of remedial programs at thousands of sites across New York State.



disposal of dredged, contaminated sediments as a central component of the remedial plan. Hesler Aff., ¶¶ 4-6.

Regardless of where the dredged sediments would ultimately be disposed of, they had first to be dewatered before disposal, and the water generated from the dewatering operations treated in order to meet applicable discharge limits, whether the sediments are to be disposed on-site or off-site. Although DEC and EPA evaluated off-site disposal, on-site disposal was preferred for several reasons. Off-site disposal would require additional facilities and equipment for dewatering, staging, loading, and transport of dredged sediments. For example, even if all the dredged sediment were to be taken offsite, a significant dewatering facility would still have to be constructed near the lake. Transportation of sediment to the dewatering facility, storing it while dewatering was ongoing, and transportation of the material off-site would create additional potential public exposure and risks. There would also have been a greater potential to impact on the public due to nuisance odors and potential volatile emissions. *Id.*, ¶¶ 7-8.

The Consent Decree entered by this Court in January, 2007 required Honeywell to implement the remedial plan in the ROD. Years of extensive design work followed before the SCA was complete and ready to receive dredged material. The design incorporated various measures to monitor, and mitigate the possibility of off-site air emissions.

To protect public health, in 2010 EPA performed a Human Health Risk Assessment, which established conservative levels for potential air emissions from the SCA. *See* Honeywell's Memorandum of Law, Exhibit 6. The remedial design conducted by Honeywell included development of the Community Health and Safety Plan to help ensure that remedy would be implemented a manner that is protective of public health, and otherwise operated in a manner to minimize off-site impacts. The Community Health and Safety Plan included

mitigation measures to help maintain emissions below health-based criteria and control nuisance odors, such as identifying the source of exceedances, applying controls and/or counter measures, and restricting or stopping source operations. It also described the air monitoring program for the SCA, which included round the clock, real time data monitoring, which is available to the public. *Id.*, ¶¶ 12-14.

**B. SCA Operations and the Continuing Efforts to Refine and Improve Them**

Full-scale dredging of Onondaga Lake and treatment of the dredged sediments at the SCA began in July, 2010. Beginning on August 24, 2012, a number of citizen complaints about odors from the SCA were called in to the complaint “hot line” established by Honeywell. DEC and Honeywell responded to the complaints and determined that SCA operations were causing occasional perceptible odors in this neighborhood, especially during periods of southerly winds. Their inspectors and site air monitoring data did not show any exceedences of the Community Health and Safety Plan’s health-based numerical performance standards. However, with DEC approval Honeywell voluntarily shut down all sediment dredging operations for a three week period in September and October, and implemented a number of mitigation measures, including: (a) covering all inactive and active Geotubes; (b) temporarily shutting down one of two temporary water storage basins; (c) covering the active basin used to temporarily store water discharged from the geotubes prior to being conveyed to the on-site water treatment plant; (d) installing a misting system along the north, west and east geotube field; and (e) covering debris piles. Following resumption of dredging in October 2012, DEC observed that off-site odor impacts were reduced, but pushed Honeywell for additional improvements. *Id.*, ¶¶ 16-18.

After cessation of dredging activities for the winter, DEC and Honeywell undertook a focused evaluation of additional potential odor mitigation measures to further reduce the

potential for off-site odors. This effort is documented in the report entitled “Onondaga Lake Sediment Management Winter 2013 Additional Odor Mitigation Plan,” prepared for Honeywell by Parsons and O’Brien & Gere, April 2013, which is attached to the Hesler Aff. as Exhibit A. As described in the report, in advance of the 2013 dredging season Honeywell installed the following additional mitigation measures: (a) a 35-foot tall windscreen along the northern edge of the SCA and the north side of the East Basin spanning approximately 1,900 linear feet to reduce wind speeds and enhance the effectiveness of the misting system; (b) a vegetative barrier of willow trees planted in areas north of the SCA to disrupt wind flow and further reduce potential offsite migration of odors; (c) geotextile tube covers to reduce emissions related to dewatering; and (d) improvement and expansion of the odor control misting system to intercept potential odors. Additional planned measures include: (a) covering the SCA perimeter channel so that any water being conveyed is not in direct contact with the air; (b) deployment of orchard fans to determine efficacy (these are large fans typically used to protect fruit from frost.); and (c) reducing the area of actively dewatering geotubes. *Id.*, ¶¶ 19-21.

**C. Actual Air Monitoring Data Show No Exceedences of Health-Based Criteria**

On April 8, 2013, the firm of Minnich and Scotto Inc. issued a report entitled “Air Contaminant Exposure to Residents of the Town of Camillus from Honeywell’s Sediment Treatment and Containment Facility” (the “Minnich and Scotto Report”). At the request of the Town of Camillus, DEC reviewed the report, in coordination with environmental experts, engineers, and scientists within DEC, EPA, the New York State Department of Health and consultants retained by DEC. Based on this review, DEC found the Minnich and Scotto Report to be based on flawed assumptions and inaccurate information, and its allegation that the SCA is not being operated in a manner that is not protective of community health unsupported by the

available air monitoring data. *See* the letter by DEC to the Town of Camillus dated April 24, 2013, attached to Honeywell's Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction as Exhibit 12; Hesler Aff. ¶¶ 22.

DEC will continue to monitor the project and ensure that Honeywell adaptively manages the remedial process so that all available and appropriate steps to reduce odors are taken. Based on Honeywell's performance to date, is confident that its ongoing remediation work is being conducted in compliance with the ROD, Consent Decree, and approved remedial design, including the Community Health and Safety Plan. *Id.*, ¶ 24.

## **ARGUMENT**

### **POINT I**

#### **CERCLA SECTION 113(h) BARS PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF**

For reasons set forth in defendant Honeywell's Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, which will not be repeated at length here, CERCLA Section 113(h), 42 U.S.C. § 9613(h), makes clear that this Court does not have jurisdiction to grant the injunctive relief Plaintiffs seek. *See* Honeywell Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Point I. Congress specifically added Section 113(h) in 1986 to deprive district courts of jurisdiction to enjoin duly approved CERCLA remedies like the one at issue here from legal delay. As this Court has explained, Section 113(h) was intended "to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected." *FAIR v. U.S. Env'tl. Protection Agency*, 165 F. Supp. 2d 253, 258 (N.D.N.Y. 2001) (internal citation omitted).

Plaintiffs' attempt to avoid Section 113(h) by asserting that by seeking to stop and/or impose new conditions on operation of the SCA they are simply attempting to enforce the ROD

and Consent Decree fails, not change the remedy, fails. First, plaintiffs are not a party to the Consent Decree and have no standing to enforce it. Second, as shown in the accompanying affidavit by DEC's Donald Hesler, the sediment dewatering and disposal operation at the SCA is an essential component of the Onondaga Lake remedy. Plaintiffs simplistically assert, without any factual support, that the water-logged, contaminated sediment can instead simply be trucked out of state for disposal. However, this would be a radical revision of the approved remedial plan, and would result in years of delay, greatly increase associated environmental costs, significantly increase cost of the cleanup, and not solve the problem of odors associated with dewatering, which would still have to be done at or near the site before anything could be trucked out.

Thus, DEC, the expert agency with oversight responsibility, views the preliminary and permanent injunctive relief sought by plaintiffs as a direct challenge to the remedial plan it and EPA approved pursuant to CERCLA Section 104, 42 U.S.C. § 9604. Moreover, DEC believes Honeywell's ongoing remediation work is being conducted in compliance with the ROD, Consent Decree, and approved remedial design, including the Community Health And Safety Plan. Hesler Aff., ¶ 24.

Because this Court lacks jurisdiction to enjoin the continued performance of the remediation approved by DEC and EPA, plaintiffs' injunction claims should be dismissed, and their motion for a preliminary injunction denied.

## POINT II

### **PLAINTIFFS CANNOT MEET THE APPLICABLE LIKELIHOOD-OF-SUCCESS ON THE MERITS STANDARD FOR A PRELIMINARY INJUNCTION**

The State agrees with, and will not repeat at length the remainder of the discussion included in Point II of Honeywell’s Memorandum of Law in opposition to plaintiffs’ preliminary injunction motion. Even if this Court had jurisdiction to grant the requested preliminary injunctive relief, plaintiffs would not be able to meet the applicable standard to demonstrate entitlement to this extraordinary and drastic remedy. The State and its DEC, the lead agency trying to effectuate the cleanup of the Onondaga Lake site, certainly consider this a situation where “the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme.” *Sussman v. Crawford*, 488 F.3d136, 140 (2d Cir.2007). Consequently plaintiffs would have to meet the “more rigorous likelihood-of-success [on the merits] standard” to demonstrate entitlement to a preliminary injunction. *Id.* The Court’s lack of subject matter jurisdiction to grant the requested injunction is clearly fatal to plaintiffs’ likelihood of success on the merits here.

While there is no reason for the Court to reach the question of whether plaintiffs will suffer irreparable harm in the absence of the preliminary injunction they seek, it is again worth noting that measures are in place – within the context of the existing, approved remedial plan – to protect plaintiffs and other members of the public from air emissions. *See* above at pp. 7-9. DEC is committed to monitoring and other proactive steps to ensure that the important cleanup of the Onondaga Lake site is accomplished in a manner that protects public health and minimizes any potential odors or other impacts on the public.

**CONCLUSION**

For reasons set forth above and in Honeywell's papers in support of its motion to dismiss, and in opposition to plaintiffs' preliminary injunction motion, the Court should dismiss plaintiffs' claims for injunctive relief directed at the Onondaga Lake remedy, deny plaintiffs' motion for a preliminary injunction, and allow the remediation of the Onondaga Lake site to continue.

Dated: New York, New York  
May 1, 2013

Respectfully submitted,

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