

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

United States of America,

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Plaintiff,

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Civil Action No. 17-1165

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v.

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**Beazer East, Inc., CBS Corporation,
Chemung County, the City of Elmira,
the Elmira Water Board, Hardinge Inc.,
Toshiba America Inc., the Town of
Horseheads, and the Village of
Horseheads,**

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Defendants.

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COMPLAINT

The United States of America (“United States”), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), files this complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against the Defendants named in Paragraphs 4 and 5 herein under Sections 106, 107(a) and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. §§ 9606, 9607(a) and 9613(g). The United States seeks to recover response costs that it has incurred in conducting response activities in connection with the release or threatened release of hazardous substances into the environment at or from a facility, known as the Fourth Operable Unit (“OU4”) of the

Kentucky Avenue Wellfield Superfund Site, located in the Town and Village of Horseheads, New York, under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The United States further seeks injunctive relief, under Section 106 of CERCLA, 42 U.S.C. § 9606, requiring that the Defendants take action to abate conditions at or near OU4 that may present an imminent and substantial endangerment to the public health or welfare or the environment because of actual and threatened releases of hazardous substances into the environment at or from OU4. Finally, the United States seeks a declaratory judgment, under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), declaring that all the Defendants will be liable for any further response costs that the United States may incur as a result of a release or threatened release of hazardous substances into the environment at or from OU4.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this district under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b) and (c) because the claims arose and the threatened and actual releases of hazardous substances occurred in this district.

DEFENDANTS

4. Beazer East, Inc., City of Elmira, Elmira Water Board, Hardinge Inc., and the Village of Horseheads are each companies or municipal entities that currently own or operate OU4, or formerly owned or operated OU4, at the time of disposal of hazardous substances (hereinafter the “Owner/Operator Defendants”).

5. CBS Corporation, Chemung County, Toshiba America Inc., Town of Horseheads,

and the Village of Horseheads are each companies or municipal entities that owned or possessed hazardous substances and by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of such hazardous substances, which came to be located at OU4 (hereinafter the “Generator Defendants”).

6. Each of the Defendants is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

GENERAL ALLEGATIONS

7. OU4 generally refers to the Koppers Pond portion of the Kentucky Avenue Wellfield Superfund Site. The contamination at OU4 resulted from the disposal of waste into a industrial manufacturing drainage-way that fed into Koppers Pond, which was located in the Village of Elmira Heights, the Town of Horseheads, and the Village of Horseheads, New York.

8. Disposal activities at OU4 occurred from the early 1950s through approximately 2014 during which time hazardous substances including PCBs were disposed of at OU4.

9. EPA placed the Site on the National Priorities List (“NPL”) in September 8, 1983. The NPL was established under Section 105(a) of CERCLA, 42 U.S.C. § 9605(a), and is found at 40 C.F.R. Part 300, Appendix B. The NPL is a list of those sites at which there are releases of hazardous substances, and which EPA has ranked as having the highest priority for remediation or other response action among all nationally identified releases, based on relative risk or danger to public health, welfare, or the environment.

10. In September 2016, EPA issued a Record of Decision (“ROD”) that selected a remedy for OU4. The selected remedy addresses contaminated soils and sediment within OU4

by placing a geotextile membrane covered by a six-inch thick cap over the 9-acre Koppers Pond footprint, and consolidation within the Koppers Pond footprint of any other areas where contamination from the drainage-way came to be located. Finally, institutional controls will be developed and implemented to impose activity and use limitations at OU4 to ensure the long-term effectiveness of the cap.

11. OU4 is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

12. At all times relevant to this action, there has been a “release” or “threatened release” of “hazardous substances” into the environment at or from OU4, within the meaning of Sections 101(14), 101(22) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(22), and 9607(a).

13. EPA has incurred and will continue to incur “response costs,” as defined in Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), for actions taken in response to the release or threatened release of hazardous substances at or from OU4.

14. EPA’s response actions taken at or in connection with OU4 and the costs incurred incident thereto were not inconsistent with the National Contingency Plan, which was promulgated under Section 105 of CERCLA, 42 U.S.C. § 9605, and is codified at 40 C.F.R. Part 300.

FIRST CLAIM FOR RELIEF

(Cost Recovery)

15. Paragraphs 1 through 14 are re-alleged and incorporated herein by reference.

16. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . .

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person ... at any facility [a “generator” of hazardous substances]

shall be liable for,

- (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan. . . .

17. Each of the Owner/Operator Defendants, named in Paragraph 4, is within the class of liable persons described in Section 107(a)(1) or (2) of CERCLA, 42 U.S.C. § 9607(a)(1) or (2), because each is either the current owner and operator of OU4, or owned and/or operated OU4 at the time of disposal of a hazardous substance at OU4, or is a successor in interest to such persons.

18. Each of the Generator Defendants, named in Paragraph 5, is within the class of liable persons described in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), because each arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, at OU4 of hazardous substances that they owned or possessed, or is a successor in interest to such persons.

19. Under Section 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A), each of the Defendants is jointly and severally liable to the United States for all response costs incurred

or that will be incurred by the United States in connection with OU4, including enforcement costs and prejudgment interest on such response costs.

SECOND CLAIM FOR RELIEF

(Injunctive Relief Under Section 106 of CERCLA)

20. Paragraphs 1-19 are realleged and incorporated herein by reference.
21. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), provides, in pertinent part, that: [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may . . . secure such relief as may be necessary to abate such danger or threat
22. The President, through his delegate, the Regional Administrator of EPA Region 2, has determined that there is or may be an imminent and substantial endangerment to the public health or welfare or the environment because of actual and threatened releases of hazardous substances into the environment at or from OU4.
23. Under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), each of the Defendants is jointly and severally liable for injunctive relief to abate the danger or threat presented by a release or a threatened release of hazardous substances into the environment at or from OU4.
24. EPA has determined that the remedy selected in the ROD is necessary to abate the danger or threat at or from OU4.
25. Therefore, under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), each of the Defendants is jointly and severally liable to undertake the remedial action identified in the ROD, which action EPA has determined is necessary to abate the danger or threat at or from OU4.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully requests that this Court:

1. Enter judgment in favor of the United States and against the Defendants, jointly and severally, under Section 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A), for all costs incurred by the United States, including enforcement costs and prejudgment interest, for response actions taken in connection with OU4;
2. Order the Defendants to abate the conditions at OU4 that may present an imminent and substantial endangerment to the public health or welfare or the environment by undertaking the remedy selected in the ROD;
3. Enter a declaratory judgment of liability in favor of the United States and against the Defendants, under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), that will be binding on any subsequent action or actions to recover further response costs;
5. Award the United States its costs of this action; and
6. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

ELLEN M. MAHAN
Deputy Section Chief
U.S. Department of Justice

/s/ C. A. Fiske
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CERTIFICATE OF SERVICE

According to Paragraph 97 of the accompanying Consent Decree and the Defendants' respective Consent Decree signature pages, the Defendants have agreed to waive service by summons and the other formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure.

Accordingly, I, Catherine Adams Fiske, hereby certify that on this 14th day of November, 2017, the foregoing Complaint was served via first class United States mail on:

Toshiba America, Inc.
c/o CT Corporation
111 Eight Avenue, 13th Floor
New York, NY 10011

And by email on:

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/s/ C. A. Fiske
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