

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Development and
Implementation of a Remedial Program
for an Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13, and
Article 71, Title 27 of the Environmental
Conservation Law of the State of New York
by

ORDER
ON CONSENT

INDEX #A9-0357-9706

Tennessee Gas Pipeline Company

Respondent.

Site Code # 915140
Station Number 229

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites." This Order is entered into pursuant to the Department's authority under ECL Article 27, Title 13 and ECL 3-0301.

2. Tennessee Gas Pipeline Company ("Respondent"), is the owner of a gas compressor station located in the State of New York, namely: Station No. 229, Town of Eden, Erie County (hereinafter referred to as "the Site"). In the course of operations, certain parts of the Site and adjacent areas became contaminated with polychlorinated biphenyls ("PCBs") and other hazardous wastes and/or substances.

3. The Department has classified the Site as a Class "2" Inactive Hazardous Waste Site, as that term is defined in accordance with ECL 27-1301.2 and the Site is listed

on the Registry of Inactive Hazardous Waste Sites in New York State as Site Number 915140.

4. A. Pursuant to ECL 27-1313.3.a, whenever the Commissioner of Environmental Conservation (the "Comrmissioner") "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order."

B. Any person under order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the remedial program committed to under order. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

5. Following a period of public comment, the Department selected a final remedial alternative for the Site in a Record of Decision ("ROD") which was issued in March 1997. The ROD, attached to this Order as Appendix "A," is incorporated as an enforceable part of this Order.

6. The Department and Respondent agree that the goals of this Order are for Respondent to (i) develop and implement, in accordance with the ROD, an inactive hazardous waste disposal site remedial program ("Remedial Program") for the Site that

shall include design and implementation, and, as necessary, operation, maintenance and monitoring of the selected remedial alternative; and (ii) reimburse the State's reasonable administrative costs.

7. Previously, Respondent had entered into three Orders on Consent for this Site with the Department including RI/FS Order #D0-0004-8903, entered in January 1991, IRM Order #A4-0302-93-06, entered in June 1993 and IRM Order A9-0328-9503, entered in April 1995.

NOW, having considered this matter and being duly advised, IT IS ORDERED AND ACKNOWLEDGED THAT:

I. Remedial Design Contents

A. Within sixty days of the formal entry of this Order on Consent, Respondent shall submit a draft Remedial Design work plan to implement the remedial alternative for the site as selected by the Department in the ROD (the "Remedial Design"). Subsequent to review, comment and approval by the Department, the final approved Remedial Design work plan and Department's approval letter shall be incorporated herein as enforceable parts of this Order. The Remedial Design work plan shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Remedial Design was prepared in accordance with this Order.

B. The Remedial Design work plan is to be prepared in accordance with the ROD, and include, but is not limited to:

- schedules for submissions;
- work descriptions

- identification of data quality objectives;
- a contingency plan to be implemented if any element of the Remedial Design fails to achieve any of its objectives or otherwise fails to protect human health or the environment;
- a health and safety plan for the protection of persons at and in the vicinity of the Site during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional; and
- a citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto, and 6 NYCRR Part 375.

C. In the event a dispute arises with respect to approval of the Remedial Design, the dispute resolution procedures described in Paragraph IV shall apply.

II. Remedial Design Construction and Reporting

A. Under the terms and conditions set forth in and upon approval of the Remedial Design work plan, Respondent shall commence construction of the Remedial Design in accordance with the schedule described therein; provided, however, Respondent shall not be required to commence construction after October 1st in any year and may, under such circumstances, defer commencement of construction to the following construction season.

B. Respondent shall implement the Remedial Design in accordance with the approved Remedial Design work plan and other supplemental submissions made thereto.

C. During implementation of all construction activities identified in the Remedial Design, Respondent shall have on-Site a full-time representative who is qualified to

supervise the work done and will observe the work for conformance with the approved Remedial Design.

D. Within the time frame set forth in the Remedial Design work plan, Respondent shall submit to the Department an appropriate post-remedial operation and maintenance plan ("O & M Plan") based on the site-specific circumstances and conditions; "as-built" drawings and a final engineering report (each including all changes made to the Remedial Design during construction); and a certification by a professional engineer that the Remedial Design was implemented and all construction activities were completed in accordance with the Department-approved Remedial Design and/or approved field changes. The O & M Plan, "as-built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Upon the Department's approval of the O & M Plan, Respondent shall implement the O & M Plan in accordance with the requirements of the Department-approved O & M Plan.

F. After receipt of the "as-built" drawings, final engineering report, and certification, the Department shall notify Respondent in writing whether the Department is satisfied that all construction activities have been completed in compliance with the approved Remedial Design.

G. In the event a dispute arises with respect to any of the submittals described above the dispute resolution procedures described in Paragraph IV shall apply.

III. Progress Reports

Respondent shall submit to the Department copies of its consultant's daily work summaries on a monthly basis. If the Remedial Construction fieldwork extends for more than four months, respondent, beginning with the fifth month of field work and thereafter shall submit in lieu of the above referenced summaries to the parties identified in Subparagraph XI.B, in the numbers specified therein copies of written monthly progress reports that: (i) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (ii) include a summary of all laboratory results of sampling and tests (for which quality assurance/quality control review has been completed) and all other data required to be obtained pursuant to this Order by Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information; (iii) identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month; (iv) describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information relating to the progress at the Site; (v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays; (vi) include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved; and (vii) describe all activities undertaken in support of the Citizen Participation Plan during the previous month and those to be undertaken in the next

month. Respondent shall submit these progress reports to the Department by the fifteenth day of every month following the effective date of this Order.

Respondent also shall allow the Department to attend, and shall provide the Department at least seven days advance notice of, any of the following: job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

IV. Review of Submittals and Dispute Resolution

A. (1) The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(2) (a) If the Department disapproves a revised submittal, including any submittal made in accordance with Paragraph VII, Respondent shall be in violation of this Order unless, within ten (10) days of receipt of the Department's notice of disapproval, Respondent serves on the Department's Director of Hazardous Waste Remediation ("the Director") a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis or opinion supporting its position, and all supporting documentation on which Respondent relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation no later than ten business (10) days after receipt of Respondent's

Statement of Position. Respondent shall have five (5) business days after receipt of the Department's Statement of Position within which to serve upon the Department a reply to the Department's Statement of Position, and in the event Respondent serves such a reply, the Department shall have five (5) business days after receipt of Respondent's reply to the Department's Statement of Position within which to serve upon Respondent the Department's reply to Respondent's reply to the Department's Statement of Position. In the event that the periods for exchange of Statements of Position and replies may cause a delay in the work being performed under this Order, the time periods may be shortened upon and in accordance with notice by the Department as agreed to by Respondent.

(b) An administrative record of any dispute under this Paragraph shall be maintained by the Department. The record shall include the Statement of Position of each party served pursuant to the preceding subparagraph, and any relevant information. The record shall be available for review of all parties and the public.

(c) Upon review of the administrative record as developed pursuant to this Paragraph, the Director shall issue a final decision and order resolving the dispute. Respondent shall revise the submittal in accordance with the Department's specific comments, as may be modified by the Director and except for those which have been withdrawn by the Director, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the Director revises the time frame in the Director's final decision and order resolving the dispute.

(d) After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval of the revised submittal.

(e) If the revised submittal fails to address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, Respondent shall be in violation of this Order and the ECL, unless a court of competent jurisdiction decrees otherwise.

(f) The invocation of the procedures stated in this Paragraph shall not extend, postpone, or modify Respondent's obligations under this Order with respect to any disputed items, unless and until the Department agrees or a court determines otherwise.

(3) Nothing contained in this Paragraph shall be construed as precluding additional discussions or meetings between the parties prior to a formal written disapproval by the Department.

V. Penalties

A. (1) Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL except as otherwise provided in this Order.

B. Respondent shall not suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement hereof because of events beyond the reasonable control of Respondent, including but not limited to war, riot, or an unforeseeable disaster arising exclusively from natural causes which the exercise of ordinary human prudence could not have prevented. Respondent shall, within five (5) days of when it obtains knowledge of any such condition, notify the Department in writing.

Respondent shall include in such notice the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to compliance with this Order pursuant to Subparagraph V.B.

VI. Entry Upon Site

Respondent hereby consents, upon compliance and in conformance with all site safety procedures, to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order. During implementation of the Remedial Design, Respondent shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all non-privileged records relating to matters addressed by this Order and job meetings provided that the Department has complete access to all raw data required to be obtained pursuant to this Order. The Department shall notify the Site Superintendent when access to the Site is desired.

VII. Payment of State Costs

Within 60 days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's reasonable expenses including, but not limited to, direct

labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for work performed at the Site to date, as well as for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order. Such payment shall be made by check payable to the Department of Environmental Conservation. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, NY 12233-7010. Itemization of the costs shall include an accounting of personal services indicating the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. This information shall be documented by quarterly reports of Direct Personal Service. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by the New York State Office of the State Comptroller's quarterly expenditure reports.

VIII. Department Reservation of Rights

A. Except as provided in Subparagraph VIII.D. herein, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to nor exemplified by, the following:

1. the Department's right to bring any action or proceeding against anyone other than Respondent, its directors, officers, employees, servants, agents, successors, and assigns;

2. the Department's right to enforce this Order against Respondent, its directors, officers, employees, servants, agents, successors, and assigns in the event Respondent fails to satisfy any of the terms of this Order;

3. the Department's right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous substances or constituents at or from the Site or areas in the vicinity of the Site;

4. the Department's right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors, and assigns with respect to hazardous substances that are present at the Site or that have migrated from the Site;

5. the Department's right to bring any criminal action against the Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns; and

6. the Department's right to gather information and enter and inspect property and premises.

B. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

C. Nothing contained in Subparagraphs A and B above represents a concession by Respondent that the Department has the rights described therein, and nothing in this

Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of Respondent's rights including, but not limited to, its right to defend against any action brought by the Department; provided, however, that Respondent acknowledges its obligation to implement the approved Remedial Design. As to the Remedial Design that Respondent has agreed to perform under this Order, the Department agrees not to seek penalties or commence any legal action or proceeding against Respondent concerning the remediation while Respondent is in compliance with the terms of this Order.

D. If, after review, the Department accepts and approves the engineer's certification that construction of the Remedial Program was completed in accordance with the approved Remedial Design, then, except for the provisions of Paragraph IX (General Indemnification) of this Order, and except for the future Operation and Maintenance of the Site, reimbursement of Department expenditures at the Site, and any Natural Resource Damage claims that may arise, such acceptance shall constitute a release for each and every claim, demand, remedy or action whatsoever against Respondent, its directors, officers, employees, agents, successors and assigns, which the Department has or may have pursuant to Article 27, Title 13 of the ECL relative to or arising from the disposal of hazardous wastes at the Site; provided, however, that the Department specifically reserves all of its rights concerning, and any such release and satisfaction shall not extend to, any investigation or remediation the Department deems necessary due to:

(1) environmental conditions on-Site or off-Site which are related to the disposal of hazardous wastes at the Site and were unknown to the Department at the time of its approval of the Remedial Investigation Report; or

(2) information received, in whole or in part, after the Department's approval of the Remedial Investigation Report, and such unknown environmental conditions or information indicates that the Remedial Program is not protective of human health or the environment. The Department shall notify Respondent of such environmental conditions or information and its basis for determining that the Remedial Program is not protective of human health and the environment.

Nothing herein shall be construed as barring, diminishing, adjudicating or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the Department may have against anyone other than Respondent, its directors, officers, employees, agents, successors and assigns.

IX. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and its representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent, its directors, officers, employees, servants, agents, successors or assigns. Respondent shall not indemnify and hold the Department, the State of New York and their representatives harmless for liabilities to the extent such liabilities arise from any grossly negligent acts or omissions of the Department or the State, their servants, agents, representatives or employees.

X. Public Notice and Deed Restriction

A. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the Clerk of the County wherein the Site is located to give all parties who may acquire any interest in the Site notice of this Order. The Declaration shall be modified, if necessary, to reflect any further restrictions required in the final engineering report and under the ROD approved by the Department.

B. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the Clerk of the County wherein the Site is located which shall identify those future use restrictions as may be specified for adjacent PCB impacted areas owned by Respondent and located in the tributary corridor identified in the ROD and as depicted in the plans and appendices attached and incorporated hereto. The Declaration shall be modified, if necessary, to reflect any further restrictions required in the final engineering report and under the ROD approved by the Department.

C. In the event Respondent proposes to convey the whole or any part of its ownership interest in the Site or any adjacent areas owned by Respondent and depicted in the plans and appendices attached and incorporated hereto, Respondent shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order. This requirement shall terminate when the Department confirms that the site is remediated and de-lists this Site.

XI. Communications

A. All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

Communication from Respondent shall be sent to:

Andrew English
Division of Hazardous Waste Remediation
New York State Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

with copies thereof sent to:

1. G. Anders Carlson
Director, Bureau of Environmental
Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203
2. Director, Region 9
New York State Department of
Environmental Conservation
270 Michigan Ave.
Buffalo, New York 14203-2999
3. Case Attorney
Division of Environmental Enforcement
Central Field Unit
NYSDEC
50 Wolf Road
Albany, N.Y. 12233-5500

B. Copies of work plans and reports shall be submitted as follows:

1. Four copies (one unbound) to
Andrew English, Division of Hazardous
Waste Remediation.

2. Two copies to the Director, Bureau of Environmental Exposure Investigation.
3. One copy to Regional Director, Region 9 NYSDEC
4. One copy to Case Attorney DEE, Central Field Unit, NYSDEC

C. Communication to be made from the Department to Respondent shall be sent to:

A. Timothy Webster, Esq.
Harris Beach & Wilcox
One Grimsby Drive
Hamburg, New York 14075

Ed Schaper, Jr.
Tennessee Gas Pipeline Co.
El Paso Energy Building
1001 Louisiana Avenue
Houston, TX 77002

D. The Department and Respondent respectively reserve the right to designate additional or different addressees for communication or written notice to the other.

XII. Miscellaneous

A. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous wastes at the Site.

B. As described in the Remedial Design work plan, Respondent has retained and shall continue to retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent, and the

Department also shall have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data required to be obtained by Respondent with respect to implementation of this Order and shall submit these results in the progress reports required by this Order. Respondent shall not be required to delay previously scheduled field activities in order to accommodate a request for samples pursuant to this provision.

D. Respondent shall notify the Department at least ten ("10") working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondent shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order. The Department will assist the Respondent in these efforts to the extent possible.

F. Respondent, its successors, and assigns shall be bound by this Order. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent's responsibilities under this Order.

G. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondent with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. Respondent or Respondent's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order.

Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

H. All references to "professional engineer" in this Order are to an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law who shall be an individual or a member of an independent firm. Such independent firm, the professional engineers of which are certifying work under this order, must be authorized to engage in engineering services in accordance with Article 145 of the New York State Education Law.

I. All references to "days" in this Order are to calendar days unless otherwise specified.

J. The section headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

K. (1) The terms of this Order shall constitute the complete and entire Order between Respondent and the Department concerning the Site. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

(2) If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Michael J. Lesser, case attorney, and to Andrew English, Section Chief.

L. The effective date of this Order shall be the date it is signed by the Commissioner or his designee.

M. This Order shall supersede all previous Orders On Consent between the Respondent and the Department with respect to the site, including D0-0004-8903, A4-0302-93-06 and A9-0328-9503 which have been fully executed.

DATED: Colonie, New York

9/13, 1997

John P. Cahill
Acting Commissioner
New York State Department
of Environmental Conservation

by:

Michael J. O'Toole, Jr.
Michael J. O'Toole, Jr.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

By: Gregory J Odegard

Title: VIC President

Date: 8/6/97

STATE OF TEXAS)
) ss:
COUNTY OF HARRIS)

On this 6th day of August, 1997, before me personally came Gregory J. Odegard, to me known, who being duly sworn, did depose and say that he resides in Houston, Texas that he is the Vice President of Tennessee Gas Pipeline the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Laura A Cassoni
Notary Public

