

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

TOWN OF MARBLEHEAD, acting by and  
through the Marblehead Municipal Water  
and Sewer Commission and Marblehead  
Municipal Light Department,

Plaintiff,

v.

Civil Action No.02-11520WGY

GEORGE W. BUSH, as President of the  
United States, MICHAEL O. LEAVITT,<sup>1</sup> as  
Administrator of the United States Environmental  
Protection Agency, the UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY,  
and the UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY'S ENVIRONMENTAL  
APPEALS BOARD,

Defendants.

**STIPULATED ORDER OF DISMISSAL**

Pursuant to Federal Rule of Civil Procedure 41(a)(2), Plaintiff Town of Marblehead, by and through the Marblehead Municipal Water and Sewer Commission and the Marblehead Municipal Light Department (collectively "Marblehead" or "Plaintiff") and Defendants George W. Bush, President of the United States; Micheal O. Leavitt, Administrator of the United States Environmental Protection Agency; the United States Environmental Protection Agency; and the the United States Environmental Protection Agency's Environmental Appeals Board<sup>2</sup>

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Michael O. Leavitt is hereby automatically substituted for Christine Whitman as the Administrator of the United States Environmental Protection Agency and as a party to this action.

<sup>2</sup>The Environmental Appeals Board is a component of EPA. The Defendants contend, therefore, that it is not a proper named defendant in its own right. Nevertheless, it is included

(collectively “Defendants” or “EPA”), through their duly authorized counsel, stipulate and agree as follows:

1. Marblehead owns a former railroad right-of-way, a portion of which is located adjacent to the site of the former Chadwick Lead Mill located off Lafayette Street in Salem and Marblehead, Massachusetts. That portion of the right-of-way is referred to hereinafter as the “Right-Of-Way”.

2. The Chadwick Lead Mill property and surrounding areas where contaminants from the former lead mill operations have come to be located have been listed pursuant to Massachusetts General Laws Chapter 21E (“Chapter 21E”) as the Former Lead Mill Site, Release Tracking Number 3-0012695. The site is referred to hereinafter as the “Former Lead Mill Site.”

3. Lead contamination has been documented on portions of the Right-Of-Way.

4. The property on which the Former Lead Mill Site is located was historically used in connection with a lead manufacturing plant and operated from the early to mid 1800s until approximately 1950.

5. Marblehead performed a removal action at the Right-Of-Way and incurred response costs pursuant to an EPA Administrative Order on Consent for Removal Action, EPA Docket No. I-96-1038 (August 7, 1996) (“AOC”). These removal activities occurred at the Right-Of-Way only and did not occur at other areas at the Former Lead Mill Site.

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herein for the sake of completeness.

6. Between August 8, 1996 and January 13, 1997, Marblehead fully performed its obligations under the AOC and incurred approximately \$154,000 in costs to comply with the AOC.

7. On March 14, 1997, Marblehead filed a verified petition for reimbursement with EPA's Environmental Appeals Board ("EAB"), pursuant to Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2), seeking reimbursement of approximately \$154,000 in costs in connection with removal actions it undertook at the Right-Of-Way pursuant to the AOC.

8. The authority to make determinations on petitions for reimbursement has been delegated by the President to the EPA Administrator. Executive Order No. 12,580 (Jan. 23, 1987). The Administrator subsequently delegated the authority to receive, evaluate and make determinations regarding petitions for reimbursement to the EAB. EPA Delegation of Authority 14-27. *See* EAB Dec. at 2, n.1.

9. The proceedings before the EAB in connection with Marblehead's Petition for Reimbursement consisted of briefing, the presentation of documentary evidence, and the submission of affidavits in accordance with the EAB's Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of those Petitions (Oct. 9, 1996). The proceedings did not include written discovery, depositions, expert witness testimony, live testimony, cross-examination, a hearing, or oral argument.

10. The EAB issued its Final Decision in the matter of *In Re: Town of Marblehead*, No. 97-3 on June 27, 2002 ("EAB Decision") and denied Marblehead's Petition for Reimbursement. In rendering its Final Decision, the EAB declined to consider certain supplemental evidence submitted by Marblehead in support of its Petition for Reimbursement,

pursuant to its Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions (Oct. 9, 1996) as well as certain EAB jurisprudence. *See* EAB Decision at 4-9.

11. The AOC requirements pertain “only to the right-of-way, and do not include the area on which the lead mill was located.” EAB Decision at 12 (citing AOC, ¶ 22).

12. To the extent the EAB Decision addressed the “divisibility of harm” defense, it did so only in connection with the Right-Of-Way and only to assess whether Marblehead met its burden to establish the defense in connection with its Petition for Reimbursement. EAB Decision at 33-36. The EAB Decision did not address divisibility of harm as it relates to the potential divisibility between contamination in the Right-Of-Way and contamination in other portions of the Former Lead Mill Site or other areas of the right-of-way that were not the subject of the AOC.

13. To the extent the EAB Decision addressed the applicability of the “innocent landowner” defense, it did so only in connection with the Right-Of-Way and only to assess whether Marblehead met its burden to establish the defense in connection with its Petition for Reimbursement. EAB Decision at 30 (“Marblehead has failed to prove the innocent landowner defense with respect to the . . . right-of-way. . . .”). The EAB Decision did not address the innocent landowner defense as it relates to any other portions of the Former Lead Mill Site or other areas of the right-of-way that were not the subject of the AOC.

14. To the extent the EAB Decision addressed the applicability of the “third party” defense, it did so only in connection with the Right-of-Way and only to assess whether Marblehead met its burden to establish the defense in connection with its Petition for

Reimbursement. EAB Decision at 21-22 (addressing “lead-related activities at the right-of-way”). The EAB Decision did not address the third party defense as it relates to any other portions of the Former Lead Mill Site or other areas of the right-of-way that were not the subject of the AOC.

15. The EAB Decision did not address, nor did it find, that Marblehead is jointly and severally liable for contamination in areas located outside the Right-of-Way but within the Former Lead Mill Site.

16. On July 26, 2002, pursuant to Section 106(b)(2)(B) of CERCLA, 42 U.S.C. § 9606(b)(2)(B) and 28 U.S.C. §§ 1331 and 1346, Marblehead timely filed this action seeking, among other relief, reimbursement of the costs incurred by it in connection with the removal actions conducted pursuant to the AOC and a declaration that it is not a liable party under CERCLA with respect to contamination on the Right-Of-Way or any other portion of the Former Lead Mill Site.

17. In this action, pursuant to Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2), Marblehead bears the burden of establishing by a preponderance of the evidence that it is not liable for response costs under CERCLA and that the costs for which it seeks reimbursement are reasonable in light of the removal actions required by the AOC. 42 U.S.C. § 9606(b)(2)(C).

18. Now, therefore, in light of the foregoing, the parties further stipulate and agree to the following terms and conditions of dismissal:

a. Marblehead hereby waives any claim that it may have against the United States and the Defendants for reimbursement under Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), for Marblehead’s costs incurred to date arising out of or related to the AOC, the

Right-Of-Way or the Former Lead Mill Site.

b. EPA hereby waives any cost recovery claim that it may have against Marblehead under Section 107 of CERCLA, 42 U.S.C. § 9607, for the costs incurred by EPA to date arising out of or related to the AOC, the Right-Of-Way or the Former Lead Mill Site.

c. In the context of any administrative or judicial proceeding in which Marblehead and EPA are parties, and to the extent such proceeding arises out of or relates to areas of the Former Lead Mill Site outside of the Right-Of-Way, EPA will not argue that anything in the EAB Decision or the proceedings underlying the EAB Decision shall operate as *res judicata*, collateral estoppel or issue preclusion; otherwise preclude or limit any defense that Marblehead may have to liability, including but not limited to any defenses under CERCLA; or limit the evidence that Marblehead may present or arguments that it may raise in such proceeding with respect to areas of the Former Lead Mill Site outside of the Right-Of-Way.

d. In the context of any judicial proceeding in which Marblehead and EPA are parties, and to the extent such proceeding arises out of or relates to the Right-Of-Way, EPA will not argue that anything in the EAB Decision or the proceedings underlying the EAB Decision shall operate as *res judicata*, collateral estoppel or issue preclusion; otherwise preclude or limit any defense that Marblehead may have to liability, including but not limited to any defenses under CERCLA; or limit the evidence that Marblehead may present or arguments that it may raise in such proceeding.

e. In the context of any other administrative or judicial proceeding arising out of or relating to the Former Lead Mill Site (inclusive of the Right-Of-Way), and in which a party other than the EPA asserts claims against Marblehead, nothing in the EAB Decision or the

proceedings underlying the EAB Decision should operate or be construed to operate as *res judicata*, collateral estoppel or issue preclusion; otherwise preclude or limit any defense that Marblehead may have to liability, including but not limited to any defenses under CERCLA; or limit the evidence that Marblehead may present or arguments that it may raise in such proceeding.

f. This paragraph 18 is without prejudice to EPA's right to assert in any other proceeding in which EAB decisions are at issue, other than the EAB Decision at issue in this case, that such decisions operate as *res judicata*, collateral estoppel or issue preclusion.

**For EPA:**



Dated: 6/3/04

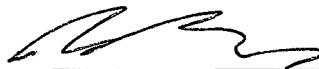
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Dated: 4/23/04

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MARBLEHEAD by and through the  
MARBLEHEAD MUNICIPAL WATER  
AND SEWER COMMISSION and the  
MARBLEHEAD MUNICIPAL LIGHT  
DEPARTMENT

Upon consideration of the foregoing stipulations, terms and conditions, and for good cause shown, it is hereby ORDERED that this action is voluntarily dismissed with prejudice pursuant to Fed. R. Civ. P. 41 (a)(2), each party to bear its own fees and costs.

SO ORDERED.

Dated: \_\_\_\_\_

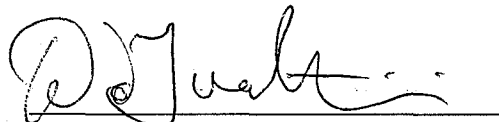
\_\_\_\_\_  
Hon. William G. Young  
Chief Judge



**CERTIFICATE OF SERVICE**

I hereby certify that on the date below the foregoing STIPULATED ORDER OF DISMISSAL was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: June 3, 2004

A handwritten signature in cursive script, appearing to read "D. Gaultieri", written over a horizontal line.

David S. Gaultieri  
Counsel for Defendants