

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE STATE OF NEW YORK, and JOSEPH MARTENS,
as Commissioner of the New York State Department of :
Environmental Conservation and Trustee of Natural :
Resources, :
:
Plaintiffs, : 98 Civ. 3165 (KTD)
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- against- :
:
ESTATE OF WILLIAM S. LASDON,
NEPERA, INC., and WARNER LAMBERT :
COMPANY, :
Defendants. :
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**STIPULATION AND ORDER CONCERNING THE CONSENT DECREE BETWEEN
THE STATE OF NEW YORK AND ESTATE OF WILLIAM S. LASDON, NEPERA,
INC., AND WARNER LAMBERT COMPANY, WITH RESPECT TO THE HARRIMAN
SITE**

DATED: DECEMBER 17, 2013

Plaintiffs State of New York and Joseph Martens, as Commissioner of the New York State Department of Environmental Conservation and Trustee of Natural Resources, and Defendants Nepera, Inc. and Warner-Lambert Company, through their respective undersigned counsel, hereby enter into the following stipulation, which shall be final and binding on the undersigned parties when fully executed by them, and, upon approval by the Court, an order thereof.

WHEREAS:

1. This stipulation and order concerns a site consisting of approximately 29 acres of property located at and near Route 17 in the Village of Harriman, County of Orange, State of New York, approximately one mile southwest of Exit 16 of the New York State Thruway, and the areas of contamination attributable to that site as more fully described in the 1997 Record of Decision (the "ROD") for the Inactive Hazardous Waste Disposal Site No. 336006 (the "Harriman Site"). The Harriman Site is listed in the Registry of Inactive Hazardous Waste Disposal Sites as a Class "2" site.

2. The Harriman Site was used for the manufacture of pharmaceuticals and chemicals from the 1940s until 2005. Operations at the Site resulted in releases of hazardous substances. The identified soil contaminants included mercury, benzene, toluene, xylene, and pyridine-based compounds. The identified groundwater contaminants included mercury, benzene, toluene, and xylene.

3. The State, through the Department of Environmental Conservation (DEC), and Nepera, Inc. and Warner-Lambert Company (the "Corporate Defendants") lodged a consent

decree (the "Consent Decree") with the Court pursuant to CERCLA Section 107(a), 42 U.S.C. §9607(a) in 1998. The Court entered the Consent Decree on May 21, 1998. The Consent Decree, among other things, required defendant Lasdon Estate to pay \$13,000,000 into a remedial trust to fund the investigation and remediation of the Harriman Site and another site near Maybrook, New York, to pay for future and past response costs associated with those sites and other environmental claims and related expenses for environmental conditions arising from the sites. The Consent Decree additionally established a process under which the Corporate Defendants would remediate the Harriman Site in accordance with the ROD, under DEC supervision.

4. The Corporate Defendants have implemented several investigative and remedial actions at the Harriman Site since 1998 under DEC supervision, but the remediation of the Harriman Site remains incomplete.

5. For approximately the last five years, DEC engaged in discussions with the Corporate Defendants and other parties, including ELT Harriman LLC, the current owner of the Site, and Rutherford Chemicals LLC, which purchased the Site from Nepera, Inc. in 2003, then sold it to ELT Harriman LLC. The goal of these discussions was to arrive at an agreed upon scope of work in order to complete the remediation and restoration of the Harriman Site. Such remediation and restoration required significant work beyond the scope of the Consent Decree and ROD, and was predicated at least in part on other independent legal and regulatory authorities under New York State and federal environmental law. The cessation of manufacturing operations complicated these discussions. As of October 2013, these discussions had not resulted in a mutually acceptable plan.

6. By letter dated October 29, 2013, which amended and superseded a prior draft

dated October 28, 2013, Benjamin Conlon, Esq., Chief of DEC's Remediation Bureau, wrote to the Corporate Defendants and the other parties concerning remediation, corrective action and closure obligations remaining at the Harriman Site. (Mr. Conlon's October 29, 2013 letter will be referred to as the "DEC Letter," and is attached hereto as Appendix A.) The DEC Letter separately addressed the Corporate Defendants' remedial obligations under the Consent Decree (DEC Letter Section A), and other parties' obligations under a RCRA Permit and other authorities (DEC Letter Section B).

7. Section A of the DEC Letter included certain final determinations pursuant to Paragraph 46 of the Consent Decree addressed to the Corporate Defendants' obligations and demanded certain remedial actions. DEC's issuance of these determinations triggered the Corporate Defendants' deadline to seek Court review of such determinations within 30 days, pursuant to the Consent Decree.

8. More particularly, Section A of the DEC Letter, pursuant to Paragraphs 30 and 32 of the Consent Decree, demanded that the Corporate Defendants submit a work plan for a remedial investigation and feasibility study (RI/FS) covering certain specified items. The DEC Letter asserted the State's belief that such investigation and study is necessary to evaluate, pursuant to paragraph 60 of the Consent Decree, whether and to what extent the remedy selected in the ROD is protective of human health or the environment.

9. In response to the DEC Letter, the Corporate Defendants asserted the intent to file a petition in this Court pursuant to Paragraph 47 of the Consent Decree challenging certain aspects of the determinations in the DEC Letter, on grounds, among others, that: (i) the State's interpretation of aspects of the Consent Decree and the ROD are incorrect; (ii) the State's instruction that the Corporate Defendants study or undertake soil excavation remedies is beyond

the 1997 ROD; and (iii) the State's demands for other response actions exceed the activities that the State may require under the ROD. Thereafter the parties agreed to attempt to resolve the issues in dispute through informal negotiations pursuant to Consent Decree Section IX.

10. The State and Corporate Defendants then engaged in informal discussions, and the parties subsequently agreed upon a framework for resolving their disputes concerning Section A of the DEC Letter. That framework, which is embodied in this stipulation and order ("Stipulation and Order"), included: (a) the State's agreement to withdraw Section A of the DEC Letter as a formal determination pursuant to the Consent Decree, and its replacement by this superseding Stipulation and Order; (b) the Corporate Defendants' agreement to perform certain specified remedial activities, including some work they believe is not currently required under the ROD and Consent Decree; (c) the State's agreement that the remedy selected in the ROD and required under the Consent Decree does not include certain remedial actions, without prejudice to the State's rights under the reopener provisions in the Consent Decree, as more specifically enumerated in the reservations of rights below; and (d) the State's reservation of rights to seek additional remedial work from the Corporate Defendants through exercise of the reopener clause in the Consent Decree, or pursuant to legal and regulatory authorities independent of the ROD and Consent Decree to the extent such enforcement is not prohibited by the State's covenants not to sue in the Consent Decree, and the Corporate Defendants' reservation of rights to oppose imposition of such additional remedial obligations.

11. The Corporate Defendants agree not to contest the authority or jurisdiction of the State to enforce this Stipulation and Order, and agree not to contest the validity of this Stipulation and Order or its terms or the validity of data submitted to the State by the Corporate Defendants pursuant to this Stipulation and Order.

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND ORDERED AS
FOLLOWS:**

A. DEC Letter Section A Withdrawn and Superseded

12. The State withdraws DEC Letter Section A as a formal determination pursuant to the Consent Decree, and it is superseded in its entirety by this Stipulation and Order. DEC Letter Section A shall not be cited for any purpose as a position or finding of DEC. Neither the Corporate Defendants nor the Maybrook & Harriman Environmental Trust shall be deemed to have failed to contest any final determination set forth in or suggested by Section A of the DEC Letter.

B. Submission and Implementation of a Supplemental RI/FS Work Plan

13. Within sixty (60) days of the filing of this Stipulation and Order by the stipulating parties, the Corporate Defendants shall submit a Supplemental Remedial Investigation/ Feasibility Study (RI/FS) Work Plan to DEC for its approval. The scope of the Supplemental RI/FS Work Plan shall be consistent with the scope of work attached as Appendix B.

14. The Supplemental RI/FS Work Plan shall be reviewed by DEC, amended by the Corporate Defendants as appropriate, and any disputes arising out of that process resolved in accordance with Section V.E. and other applicable provisions of the Consent Decree.

15. The Corporate Defendants shall implement the Supplemental RI/FS Work Plan consistent with the schedule contained therein, as approved by DEC, in accordance with the applicable provisions of the Consent Decree.

16. The Corporate Defendants shall implement the Supplemental RI/FS Work Plan, notwithstanding any objection that aspects of such work are outside the scope of the ROD. The Corporate Defendants agree to include certain remedial actions in the Feasibility Study ("FS")

identified in Appendix B for the sake of efficiency. Nothing in Appendix B, nor the inclusion of such remedial action for purposes of the FS shall be cited or construed to mean that such remedial action is required or could be required to be implemented pursuant to the ROD or Consent Decree.

17. The State does not have sufficient information regarding the clay liner at the bottom of the lagoon at Area C to determine whether it is effective in preventing mercury contamination from migrating into the Ramapo River. Accordingly, the Corporate Defendants agree to investigate the surface and subsurface soils, between the lagoon and riverbank, to determine whether the clay liner is effective. If this investigation indicates the actual or threatened migration of mercury from the lagoon to the Ramapo River that would need to be mitigated to be protective of public health or the environment, then DEC may require additional sampling of the lagoon liner and soils below the liner to determine the effectiveness of the clay liner. Such investigation shall not be cited or construed to mean that the remediation and closure of the lagoon is required to be implemented pursuant to the ROD or Consent Decree. Nothing in this paragraph shall be cited in favor or against any position the State may take in the future that the ROD or Consent Decree may require remedial activities at the lagoon to mitigate the actual or threatened migration of mercury through the lagoon's clay liner and into the Ramapo River.

C. Limitations on the Scope of the Remedy Selected in the ROD

18. The State agrees that the remedy selected in the ROD and the work required of the Corporate Defendants under the Consent Decree do not include certain remedial actions. Such agreement is without prejudice to the State's rights under the reopener provisions in Consent Decree Paragraph 60, and without prejudice to any position regarding any other independent authority, or lack of such authority, of the State to supplement, amend or modify the

ROD.

19. The remedy selected in the ROD and required by the Consent Decree, including as it relates to migration of mercury into the Ramapo River, does not include excavation of contaminated soils under the parking lot at Area B. Nothing in this paragraph shall preclude the State from requiring excavation and removal of contaminated soils that is incidental and necessary to implementation of the selected remedy.

20. The remedy selected in the ROD and required by the Consent Decree does not require: (a) demolition or remediation of buildings, structures and supporting infrastructure; (b) the remediation of impacted soil under or emanating from buildings; (c) remediation or easements in response to soil vapor; (d) the delineation and remediation of the contamination underlying or originating from Operable Units A, E and I; or (e) the remediation of surface soil, except that nothing in this paragraph shall be cited or construed in favor or against the ability of the State to require, pursuant to the ROD and Consent Decree, remediation concerning surface soils along the riverbank adjacent to Area B, along the riverbank adjacent to the "lagoon area," or in certain off-site areas and other areas identified by Appendix B to the extent that any such surface soils may be a source for actual or threatened migration of mercury into the Ramapo River that would need to be mitigated to be protective of public health and the environment.

D. Reservations of Rights

21. Nothing in this Stipulation and Order, in Appendix B or in the Supplemental RI/FS Work Plan to be submitted by the Corporate Defendants consistent with Appendix B, nor the State's approval or modification thereof, nor any amendments thereto, shall be cited or construed to amend, increase or expand the scope of remediation required under the ROD.

22. Nothing in the Supplemental RI/FS work plan to be submitted by the Corporate

Defendants consistent with Appendix B shall be cited or construed to amend, increase or expand the Consent Decree, notwithstanding anything to the contrary in Paragraph 33 thereof.

23. If the State selects a remedial action for the Harriman Site that is not required pursuant to the 1997 ROD, whether through the Reopeners Provision at Paragraph 60 or otherwise, then the Corporate Defendants' failure to construct such a remedy shall not preclude or delay the issuance of a final construction certification by DEC to which the Corporate Defendants would otherwise be entitled, should the Corporate Defendants fulfill all requirements related to an Operation and Maintenance Plan, engineering certifications, and other requirements pursuant to Paragraphs 24 to 26 of the Consent Decree.

24. Nothing in this Stipulation and Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the State's rights or authorities, including, but not limited to, the right to require further investigations and/or response action(s), to recover natural resource damages, and/or to exercise any summary abatement powers with respect to any person, including the Corporate Defendants, other than pursuant to the Consent Decree and the ROD. The State specifically reserves its rights to seek remedial actions from the Corporate Defendants outside the scope of the Consent Decree and ROD to the extent such enforcement has an independent legal or regulatory basis and to the extent such enforcement is not prohibited by the State's covenants not to sue in the Consent Decree. Similarly, nothing contained herein limits or waives any defenses the Corporate Defendants might have against the exercise of such rights or authorities by the State.

25. Nothing in this Stipulation and Order shall be cited or construed to limit the State's ability to exercise its rights under the reopeners clause pursuant to the Reopener Provisions in Paragraph 60 of the Consent Decree, nor to limit or waive any defenses the

Corporate Defendants might have against such reopeners as the State may seek.

26. This Stipulation and Order shall apply with respect to any work set forth in Appendix B funded or performed by the Maybrook & Harriman Environmental Trust pursuant to Paragraph 10 of the Consent Decree. Otherwise, nothing in this Stipulation and Order shall be binding on, nor inure to the benefit of, any person or entity other than the parties to this Stipulation and Order.

E. General Provisions

27. The Consent Decree remains in full force and effect. The definitions set forth in the Consent Decree shall apply to this Stipulation and Order.

28. The absence of any provision in this Stipulation and Order shall not be cited or construed to increase or expand the scope of remediation required under the ROD.

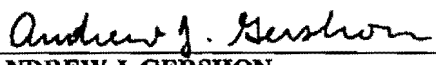
29. The stipulating parties may execute this Stipulation and Order in counterparts and by electronic signature. Copies of signatures, including copies transmitted electronically, shall be treated as originals.

SO AGREED:

Dated: December 17, 2013

FOR THE PLAINTIFFS:

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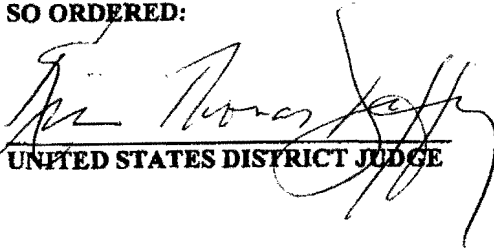
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SO ORDERED:


UNITED STATES DISTRICT JUDGE

1-24-14
DATED

