

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 # B9-0454-94-04

Elm Holdings, Inc.
Respondent.

Site Code #932036

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 issued pursuant to the Department's authority under, inter alia, ECL Article 27, Title 13 and ECL 3-0301.
2. Elm Holdings, Inc. ("Respondent"), a corporation organized and existing under the laws of the State of Delaware, has previously done business in the State of New York in that Respondent's former subsidiary, The Carborundum Company, formerly owned and operated a manufacturing facility located at Hyde Park Boulevard Rhode Island in the Town of Niagara, Niagara County, New York (the "Site"). Respondent continues to do business in the State of New York at various other locations which are not the subject of the terms and conditions of this Order. Respondent has assumed responsibility from The Carborundum Company for matters addressed in this Order.
3. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2. The Site, known as Carborundum Company, Global Site, has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 932036. The Department has classified the Site as a Classification "2" pursuant to ECL 27-1305.4.b., that is, a significant threat to the public health or environment.
4. A. Pursuant to ECL 27-1313.3.a, whenever the Commissioner of Environmental Conservation (the "Commissioner") "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 has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. See, e.g., ECL 3-0301.1.i.

5. Respondent's former subsidiary, The Carborundum Company, entered into a Remedial Investigation/Feasibility Study ("RI/FS") Consent Order with the Department on September 7, 1995.

6. Pursuant to the RI/FS Consent Order The Carborundum Company performed a remedial investigation, feasibility study, and interim remedial measure, and submitted for Department approval a RI Report, a RI Phase II Report, an IRM Report, and a Feasibility Study.

7. To facilitate the selection of remedial alternatives for the Site, the Department divided the Site into three Operable Units. This Order addresses OU#1, Site Soil, ("OU#1") and OU#2, Groundwater, ("OU#2"). Investigation of OU#3, off-Site Soil East of Site, (OU#3), is continuing.

8. Following a period of public comment, on October 27, 2000 the Department selected a final remedial alternative for OU#1 and OU#2 of the Site in a Record of Decision ("ROD"). The ROD, attached to this Order as Appendix "A," is incorporated as an enforceable part of this Order.

9. The Department and Respondent agree that the goals of this Order are for Respondent to (i) develop and implement, in accordance with the ROD and the Groundwater Monitoring Work Plan which is attached to this Order as Appendix "B" and is incorporated as an enforceable part of this Order, an inactive hazardous waste disposal site remedial program ("Remedial Program") that shall include installation and periodic sampling of groundwater wells and filing of deed restrictions upon certain conditions, and (ii) reimburse the State's administrative costs.

10. Respondent, having waived Respondent's right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agrees to be bound by its terms. Respondent consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agrees not to contest the validity of this Order or its terms.

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

I. Remedial Construction

A. In accordance with the Department-approved Groundwater Monitoring Work Plan which is attached to and incorporated into this Order as Appendix B, Respondent shall install the groundwater monitoring wells.

B. During implementation of all construction activities identified in the Groundwater Monitoring Work Plan, Respondent shall have on-Site a full-time representative who is qualified to supervise the work done.

C. In accordance with the schedule in the Groundwater Monitoring Work Plan, after completion of the construction activities Respondent shall submit to the Department "as-built" drawings and a final engineering report (each including all changes made to the Groundwater Monitoring Plan during construction); and a certification that the Groundwater Monitoring Work Plan was implemented and that all construction activities were completed in accordance with the Department-approved Groundwater Monitoring Work Plan and were personally witnessed by him or her or by a person under his or her direct supervision. The "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

D. Following completion of construction activities, Respondent shall implement the Site monitoring program in accordance with the requirements of the Groundwater Monitoring Work Plan.

E. 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 Department-approved Groundwater Monitoring Work Plan and the ROD.

F. Respondent shall implement 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.

G. Respondent shall implement a citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "Citizen Participation in New York's Hazardous Waste Site Remediation Program: A Guidebook", dated June, 1998, and 6NYCRR Part 375.

H. If the Department concludes that any element of the Department-approved Remedial Program fails to achieve its objectives or otherwise fails to protect human health or the environment, Respondent shall take whatever action the Department determines necessary to achieve those objectives or to ensure that the Remedial Program otherwise protects human health and the environment.

II. Review of Submittals

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 except for the submittal discussed in Subparagraph I.F. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

2. a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within 30 days after receiving written notice that Respondent's submittal has been disapproved, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order and the Department may take or pursue whatever rights it has pursuant to any provision of statutory or common law

B. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary.

III. Penalties

A. Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

B. Respondent shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of war, riot, an unforeseeable disaster arising exclusively from natural causes which the exercise of ordinary human prudence could not have prevented, or because of any condition or event wholly beyond Respondent's reasonable control. Respondent shall, within five 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 III.B.

IV. Entry upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of 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. Respondent shall permit the Department full access to all records relating to matters addressed by this Order and to job meetings.

V. 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 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 related to the Site to the effective date of this Order, as well as for 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 certified check payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233-7010.

Personal service costs shall be documented by reports of Direct Personal Service, which shall identify 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. 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 expenditure reports.

VI. Department Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's civil, criminal, or administrative rights (including, but not limited to, nor exemplified by, the right to recover natural resource damages) or authorities.

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

VII. Indemnification

Respondent shall indemnify and hold the Department, the State of New York, and their 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 and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns.

VIII. Public Notice

A. Within 30 days after the effective date of this Order Respondent shall file a Declaration of Covenants and Restrictions with the Niagara County Clerk to give all parties who may acquire any interest in the Site notice of this Order.

IX. 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:

1. Communication from Respondent shall be sent to:

Environmental Remediation Engineer, Region 9
Division of Environmental Remediation
New York State Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203

with copies to:

Bureau Chief
Division of Environmental Remediation,
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216

New York State Department of Environmental Conservation
Division of Environmental Enforcement
270 Michigan Avenue
Buffalo, New York 14203

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

Nathan Bigman
c/o William Barber
BP Amoco
4850 E. 49th Street
MBC3-147
Cuyahoga Heights, Ohio 44125

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

Two copies to Region 9, Division of Environmental Remediation.

One copy to Division of Environmental Remediation, Albany.

One copy to the Director, Bureau of Environmental Exposure Investigation.

One copy to the Document Repository.

Document Repository: Carborundum Company, Global Site
The Town of Niagara Town Clerk's Office
7105 Lockport Road
Niagara Falls, New York 14305

C. 1. Within 30 days of the Department's approval of any report submitted pursuant to this Order, Respondent shall submit to Director, Division of Environmental Remediation, a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format.

2. Within 30 days after approval of the drawings and submittals described in Subparagraph I.C of this Order Respondent shall submit one microfilm copy (16 millimeter roll film M type cartridge) of such Department-approved drawings and submittals, as well as all other Department-approved submittals. Respondent shall submit same to Bureau Chief.

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

X. Miscellaneous

A. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and third party data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. The experience, capabilities, and qualifications of the firms or individuals selected by Respondent

shall be submitted to the Department within 90 days after the effective date of this Order. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which Respondent and such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent.

B. 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 generated by Respondent with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

C. Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

D. Respondent shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order.

E. Respondent and Respondent's officers, directors, agents, servants, employees, 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. Respondent's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondent.

F. 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.

G. 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. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

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

I. The paragraph 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.

J. 1. 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 Division of Environmental Enforcement and to Region 9 Division of Environmental Remediation.

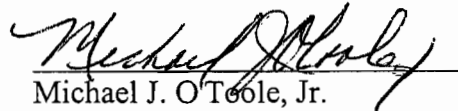
K. The effective date of this Order is the date the Commissioner or his designee signs it.

DATED:

1/4/01

JOHN P. CAHILL
Commissioner
New York State Department
of Environmental Conservation

By:


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: Richard M. Frankoski
Elm Holdings, Inc.
Title: Manager, Environmental Properties
Date: December 15, 2000

^{OHIO}
STATE OF ~~NEW YORK~~)
) s.s.:
COUNTY OF CUYAHOGA)

On this 15th day of December in the year 2000 before me, the undersigned, a notary public in and for said State, personally appeared Richard M. Frankoski; personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed this instrument.

Diane Luptak
Notary Public

DIANE LUPTAK, Notary Public
State of Ohio, Cuyahoga County
My Commission Expires Oct. 29, 2002