Appendix L

NYSDEC Appeal Determination Letter

1454 39th Street, Brooklyn, NY
BCP #C224311

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RE: 1454 (formerly 1440-1460) 39th Street Site
City of New York, Kings County
NYSDEC Site ID No. C224311
Brownfield Cleanup Agreement Index No. C224311-08-20

Dear Ms. Shaw and Mr. Deyette:

This letter responds to a March 16, 2023 appeal ("Appeal") of the determination by Mr. Michael Cruden regarding the dispute determination, described below. In my title as Assistant Director of the Division of Environmental Remediation, I am the designated appeal individual pursuant to 6 NYCRR 375-1.5(b)(2)(iv) to review dispute decisions pertaining to the Brownfield Cleanup Agreement for the above-named site.

At the outset, it is noted that the appeal included arguments and information that were not before the designated individual (Mr. Michael Cruden) prior to rendering his February 25, 2023 determination on the initial dispute filing. This includes the request to revisit the Department's 2021 determination that the Applicant achieved a Track 2 cleanup as set forth in the Department's October 2021 Decision Document (DD) for this site; this argument is time barred. Information that was not before Mr. Cruden is not properly before me and was not considered in this appeal. However, to provide clarity to the issues properly before me, I have performed an in-depth review and analysis of the project file and site data in rendering this decision.

Background

On January 13, 2023, Ms. Linda Shaw submitted a letter on behalf of her client SNL XXII, LLC (the "Applicant"), commencing dispute resolution procedures as allowed by Brownfield Cleanup Agreement Index No. C224311-08-20 relative to the determination by the New York State Department of Environmental Conservation (the "Department") that the remediation at the 1454 (formerly 1440-1460) 39th Street Site (the "Site"). The main disputed issues were as follows:

1. The Applicant believes that Phase II Environmental Site Assessment (Phase II) data used to justify remedial excavation depths does not need to be validated.
2. The Applicant believes that the Department's exclusion from the Final Engineering Report (FER) of large volumes of excavated soil is unsupported by the Remedial Action Work Plan (RAWP) and Interim Remedial Measure Work Plan (IRMWP).
3. The Applicant believes that nickel contaminated soil below 15 feet, below ground surface (bgs) should be counted for remedial excavation.
4. The Applicant believes that historic fill is an indicator of remedial excavation depth.

These matters were reviewed by the named individual to resolve such disputes, Mr. Michael Cruden, Bureau Director, Division of Environmental Remediation, NYSDEC.
Mr. Cruden presented his decision on the dispute in a letter dated February 24, 2023. Ms. Shaw subsequently filed an appeal to Mr. Cruden's decision in a letter dated March 16, 2023.

1. In the Dispute Determination ("Dispute Determination") correspondence dated February 24, 2023, Mr. Cruden concludes that the Applicant did not collect and validate the confirmation samples at the established remedial excavation depths. For purposes of clarity, the planned remedial excavation depths are shown on Figures 2.8 from the IRMWP and 5.1A from the RAWP. Mr. Cruden also noted that, the Department may, at the Department's own option, accept other validated data which demonstrates that removals are consistent with the remedial depths established by the approved work plans and DD.

2. In the Dispute Determination, Mr. Cruden made the following findings:

    a. None of depths depicted on the Remedial Action Work Plan (RAWP) or the Interim Remedial Measure Work Plan (IRMWP) figures are at a depth deeper than 15 feet below grade, and he notes that the data from the Phase II is for samples less than 15 feet below grade.
    b. The IRM WP and RAWP clearly indicate that confirmation endpoint sampling was required to be taken at the remedial design depths (not the development depths) shown on Figure 2.8 of the approved IRM WP and Figure 5.1A of the approved RAWP.

    None of the depths depicted on the remedial excavation figures were at a depth of 25 feet below grade (development depth).

3. In the Dispute Determination, Mr. Cruden concludes that removal of nickel in a relatively discrete location (S-43) at 16-17 feet bgs is not necessary to achieve remediation of the site in accordance with the DD, which calls for a Track 2 residential cleanup.

4. In the Dispute Determination, Mr. Cruden concludes that historic fill (absent analytical data) is not an indicator of remedial excavation depth as this position is not supported by the IRMWP, RAWP or the DD, and that the Applicant shall provide an FER consistent with the DD and approved workplans, including Figure 5.1A of the approved RAWP.

Discussion

Dispute Appeal Issue #1 – Need to validate and use the Phase II data because the Phase II data (reportedly) contains deeper exceedances than the RI data; DEC should acknowledge that the vertical delineation of soil in the RIR should define the remedial depths, as well as delete the statement from the final decision that, "The Applicant did not collect and validate the confirmation samples at the established remedial depths."

Appeal Determination #1 -

The first and second parts of the above appeal item appear to contradict each other. The Applicant argues that the Department should have considered the Phase II (unvalidated) data when determining how much soil excavation was required for remediation, but that the vertical delineation in the RIR should define the remedial depths, seemingly implying that the Phase II data should not be used. Now that the Phase II data has been validated, the Applicant indicates it should be considered. It should be noted that the deepest interval analyzed for the Phase II ESA was 9 feet bgs in one location, with the rest at typically less than 5 feet bgs, while deeper intervals, up to 45-46 feet bgs, were analyzed during the RI.

The Phase II data was not validated at the time Mr. Cruden issued the February 25, 2023, determination and should not be considered as part of this appeal. Typically, validated data should have been presented to the DEC Project Manager for consideration and inclusion in the RI. However, in order to bring closure to this issue, as requested, I have considered all Phase II and RI validated data to inform the remedial excavation depths and volumes for each grid cell. In doing so, the remedial excavation volume to achieve a Track 2 residential cleanup totals 4,649 (~4,700) cubic yards (cy) as shown in the righthand column of the attached table. This volume includes a typical allowance for over-excavation of an additional 1-foot of material beyond the demonstrated exceedance of the residential soil cleanup objectives (RSCOs) to ensure achieve of RSCOs. However, confirmatory endpoint samples were never collected to demonstrate RSCOs were achieved at the remedial excavation depths as required in the IRMWP Section 3.1, bullet 5 and Figure 2.8 – Historic Fill Excavation Plan.

The attached table and below discussion provide the detailed analysis of remedial soil excavation depths and volumes by grid cell between the IRM WP (Figure 2.8), RAWP (Figure 5.1A) and DD.

IRMWP:

The IRMWP remedial removal limits "Figure 2.8 – Contaminated Fill Excavation Plan" and detailed in the attached table, resulted in an estimated 7,689 cy of remedial excavation, and were based on:

- Completion of a Track 1 unrestricted use remedy, which would require removal of all soils exceeding unrestricted use soil cleanup objectives (UUSCOs).
- Use of both Phase II and RI data.
- An incorrect assumption that all historic fill soil was contaminated in the absence of data demonstrating such. Material to be excavated for remedial purposes must be demonstrated to require remediation by exceeding the applicable SCOs. This assumption resulted in an over-estimation of the remedial excavation depth and volumes.

RAWP/DD:

While performing the IRM, it became apparent that UUSCOs could not be achieved. Therefore, the subsequent RAWP and DD set forth a Track 2 residential cleanup. As a result, IRMWP Figure 2.8 was revised and included in the RAWP as Figure 5.1A, resulting in an estimated remedial excavation volume of 7,059 cy (see attached table). However, Figure 5.1A and the associated volume estimates still (incorrectly) assumed removal to UUSCOs, not the updated RSCOs reflected in the RAWP and DD. The estimate did correctly exclude remedial excavation of all historic fill unless the Phase II or RI data demonstrated presence of contamination.

The DD cites approximately 6,500 cy of contaminated soil (over RSCOs) will be removed from the site. It is not clear exactly how this number was determined, and it is not supported by the documentation in the record.

As indicated in the February 24, 2023, dispute determination, the Applicant did not collect and validate confirmation endpoint samples at the established remedial depths as required IRMWP[1]. Based upon the above, I conclude that the remedial excavation volume to achieve a Track 2 residential cleanup is 4,649 (~4,700) cubic yards (cy).

Dispute Appeal Issue #2 – The DEC requested exclusion of large volumes of soil requiring remediation from the FER is unsupported by the RAWP and IRM WP. The February 24,

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[1] The Applicant collected endpoint samples at the development depth, not the remedial depth as required in the above-noted work plans. The Applicant is required to take confirmatory endpoint samples at the bottom of remedial excavations (not at, as in this case, the deeper development excavation depth). The DER-10 definition and purpose of confirmation samples was discussed in a prior appeal determination by the Department in matter of BCP Site C224279 – 1921 Atlantic Avenue Site, dated February 2022.

2023, determination indicates that the Applicant must provide a Final Engineering Report (FER) consistent with the DD and approved workplans as depicted on Figure 5.1A of the approved RAWP, demonstrating ~6,500 cy of soil removed for remedial purposes. The Applicant indicates it is willing to settle this dispute based on the soil volumes depicted on Figure 5.1A in the approved RAWP.

Appeal Determination #2

See response to Dispute Appeal Issue #1 above, whereby the corrected remedial excavation volume is ~4,700 cy, considering the Phase II and RI data to achieve a Track 2 residential cleanup. By way of this appeal decision, the DD and RAWP for this site are hereby amended to reflect this remedial excavation volume. Since this is a minor change, in accordance with DER's processes, there is no need to issue an amended DD or explanation of significant difference (ESD) since the remedial elements themselves remain unchanged (e.g., excavation is still a remedial element, only the remedial excavation volume was updated); rather, the DER project manager will document this minor change in a memo to the file. Further, the Applicant should update the draft FER to reflect the corrected remedial excavation volume, including the detailed analysis in the attached table.

Appeal Dispute Issue #3 – Nickel contamination (below) 15 feet bgs should be counted.

Appeal Dispute Determination #3 – No appeal determination is necessary as the Applicant withdrew this disputed item because soils below 15 feet bgs were beneficially reused.

Dispute Appeal Issue #4 – The Applicant argues that historic fill contamination required remediation down to 15 feet bgs. The Applicant is also requesting that the Department clarify whether Figure 5.1A includes excavation of the "entire historic fill layer".

Appeal Determination #4 – As noted in Appeal Determinations #1 and #2 above, and on the attached table, remedial excavation depths and volumes have been carefully reviewed considering Phase II and RI data. In order determine that the presence of historic fill warrants remediation, there must be analytical data that demonstrates as such. The attached table right hand column provides the data-supported remedial excavation depth and volume (~4,700 cy) by grid number.

As noted above the DD will be reissued with the correct remedial excavation volume, and the FER should be revised to reflect the corrected volume. Since the site appears to have achieved a Track 2 residential cleanup, the environmental easement that was previously recorded may be extinguished, and the site will rely on local controls regarding groundwater use.

Sincerely,

Janet E Brown

Janet Brown, PE
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Division of Environmental Remediation

Attachment

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Table 1 Remedial Action Depth Evaluation NYSDEC BCP Site #C224311
1454 39th Street, Brooklyn, New York

Grid ID	Grid Excavation Depth	IRMWP Grid Depth Rationale/Boring	Grid Size (Square Feet)	Estimated Cubic Yards	Changes from IRMWP to RAWP	Grid Excavation Depth	Estimated Cubic	Changes from RAWP USCOs to RSCOs	Grid Excavation Depth	Estimated Cubic
A1	10	USCO Exceedance - S-2 & S-16 to 9' / Fill to 10' in S-2	900	333		10	333	Hg @ 9' over RSCO @ S-2, OK	10	333
B1	2	USCO Exceedance@S-33	900	67		2	67	No RSCO Exceedance @ S-33	0	0
C1	15	USCO Exceedance@S-34	900	500		15	500	Hg, PAHs @ 4-5' over RSCO @S-34	6	200
D1	11	Average of Surrounding Grids	900	367		11	367	Average of Surr. Grid, OK	11	367
E1	13	USCO Exceedance@S-35 to 13'	900	433		13	433	Cr @ 13-14' over RSCO @ S-36	15	500
F1	8	Fill to 8' @S-26	900	267	Grid Depth Chg Btw IRMWP to RAWP	5	167	Ni @ 13-14' over RSCO @ S-44	15	500
G1	5	Fill to 5' @S-12	900	167		5	167	No RSCO Exceedance @ S-17, S-12	0	0
H1	6	Fill to 6' @S-25	900	200		6	200	No RSCO Exceedance @ S-38, S-3	0	0
I1	5	Average of Surrounding Grids	744	165		5	165	Based on revision to surr grid	2	55
A2	9	Average of Surrounding Grids	900	300		9	300	Average of Surr. Grid, OK	9	300
B2	14	USCO Exceedance@S-39 to13'	900	467		14	467	Hg @ 12-13' over RSO @ S-39	14	467
C2	10	Average of Surrounding Grids	900	333		10	333	Rev to 6' based on Surr. Grid	6	200
D2	5	Fill to 5'@S-27	900	167		5	167	No RSCO Exceedance @ S-27	0	0
E2	5	Average of Surrounding Grids	900	167		5	167	Average of Surr. Grid, OK	5	167
F2	10	Fill to 10'@S-20	900	333	Grid Depth Chg Btw IRMWP to RAWP	5	167	PAHs @ 3.5-4' over RSCO @ S-20	5	167
G2	9	Fill to 8' @S-24	900	300	Grid Depth Chg Btw IRMWP to RAWP	4.5	150	PAH @ 3-3.5' over RSCO @ S-24	4.5	150
H2	6	Fill to 6'@S-11	900	200		6	200	No RSCO Exceedance @ S-11	0	0
I2	7	Fill to 7'@S-5-23	617	160	Grid Depth Chg Btw IRMWP to RAWP	4.5	103	PAH @ 3-3.5' over RSCO @ S-23	4.5	103
A3	9	Average of Surrounding Grids	900	300		9	300	Average of Surr. Grid, OK	9	300
B3	14	USCO Exceedance @S-39 to 13'	900	467		14	467	Hg @ 12-13' over RSO @ S-39	14	467
C3	15	Fill to 15'@S-41	900	500		15	500	No RSCO Exceedance @ S-41	0	0
D3	8.5	USCO Exceedance @S-10 to 7.5'	900	283		8.5	283	No RSCO Exceedance @ S-10	0	0
E3	5	USCO Exceedance @S-42 to 4'	900	167		5	167	PAH @ Surf over RSCO @ S-42	2	67
F3	5	Fill to 5' @S-43	900	167		5	167	No RSCO Exceed @ S-43 in Top 15' (fill 16-17')	0	0
G3	10	Fill to 10' @S-30	900	333		10	333	PAHs @ 2' over RSCO @ S-7	3	100
H3	9	Fill to 9' @S-21	900	300		9	300	PAHs @ 2.5' over RSCO @ S-4	3.5	117
I3	10	Fill to 10' @S-22	608	225	Grid Depth Chg Btw IRMWP to RAWP	3	68	PAHs @ 1.5-2' over RSCO @ S-22	3	68
G4	3	Average of surrounding Grids	188	21		3	21	Average of Surr. Grid, OK	3	21
			Total	7589		Total	7059		Total	8649
Original IRM Table					RAWP Table (Revised from IRMWP)			Corrected to reflect RSCOs (vs UUSCOs)		