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JUN 12 2009

June 12, 2009

***Via Hand Delivery***

Bureau Chief or Regional Hazardous  
Waste Remediation Engineer  
Supervising Project Manager  
Environmental Remediation  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233

Division of Environmental Enforcement  
Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

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

Ms. Karen Cahill  
New York State Department of Environmental  
Conservation  
Region 7 Headquarters  
615 Erie Boulevard West  
Syracuse, NY 13204-2400

***Re: Certificate of Mailing – Brownfield Cleanup Program Phase I Site - Destiny  
Project – Fact Sheet Titled Remedy Selected for Brownfield Site  
Contamination; Public Comment Period Announced***

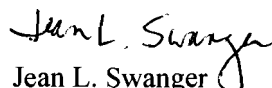
Dear Sir or Madam:

Enclosed please find a Certificate of Mailing for the Brownfield Cleanup Program Phase I Site, Destiny Project, Fact Sheet titled *Remedy Selected for Brownfield Site Contamination; Public Comment Period Announced*, dated June 2009. Its attachments include the June 2009 Phase I Site Fact Sheet titled *Remedy Selected for Brownfield Site Contamination; Public Comment Period Announced*, and the Brownfield Site Contact mailing list of persons to which a copy of the Fact Sheet was mailed and shipped to on June 10, 2009

If you have any questions, please contact me directly at (315) 442-0174.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.

  
Jean L. Swanger  
Paralegal

Enc.

Project Name: Brownfield Cleanup Program Phase I Site, Destiny Project, Syracuse, New York

### CERTIFICATION OF MAILING

I certify that I mailed on June 10, 2009 a copy of the attached Brownfield Cleanup Program Phase I Site Fact Sheet titled Remedy Selected for Brownfield Site Contamination; Public Comment Period Announced by first class mail to the person(s) on the attached mailing list, by depositing a true copy thereof, securely enclosed in a postpaid wrapper, in the Post Office box at the intersection of Townsend Street and East Fayette Street in the City of Syracuse, New York, which box is under the exclusive care and custody of the United States Post Office Department.

I certify that I deposited on June 10, 2009 a copy of the attached Brownfield Cleanup Program Phase I Site Fact Sheet titled Remedy Selected for Brownfield Site Contamination; Public Comment Period Announced to be shipped overnight by FedEx to the person(s) on the attached mailing list, by depositing a true copy thereof, securely enclosed in a postpaid wrapper, in the FedEx drop box at 510 East Fayette Street in the City of Syracuse, New York, which box is under the exclusive care and custody of FedEx.

Signature  Date 6/11/09

Attachment(s)

# FACT SHEET

## Prepared and Submitted by Destiny USA Brownfield Cleanup Program – Phase I Site<sup>1</sup>

**Brownfield Cleanup  
Program- Phase I Site  
Destiny USA  
Syracuse, NY**

**June 2009**

### **Remedy Selected for Brownfield Site Contamination; Public Comment Period Announced**

Public comments are requested on the remedy selected by the Applicant to address contamination related to the real property identified as “Phase I Site” on the attached Figure 1 (“Phase I Site”), located in the City of Syracuse, Onondaga County, New York, consistent with New York’s Brownfield Cleanup Program (“BCP”). See map for the location of the Phase I Site.

The selected remedy consists of excavation of approximately 88,000 cu. yds. of soils that contain significant levels of contamination in conjunction with the installation of a vapor barrier, vapor control system and concrete cap.

The remedy is described in a draft cleanup plan identified as the Phase I Remedial Workplan (“Phase I RWP”), which was submitted for the first phase of the Destiny USA project to the NYSDEC consistent with the BCP. The Phase I RWP is available for review at the Robert P. Kinchen Central Library; the address is provided below under “Location of Reports and Information – Document Repository.”

This Phase I RWP applies to the Phase I Site, in connection with the first phase of the Destiny USA project located in Syracuse, New York. The first phase includes an 800,000+ square foot building expansion to the existing Carousel Center. The Phase I Site consists of the building expansion footprint for the first phase as shown on Figure 1. The Phase I Site is located within the overall boundaries of the Destiny Site (“Destiny Site”), as shown on Figure 2.

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<sup>1</sup> NYSDEC originally denied the BCP Application and Applicant filed a proceeding challenging this determination. By order dated June 10, 2008, the Supreme Court ordered the entire Destiny site into the BCP. After the opinion was issued, Applicant repeatedly sought DEC’s participation in the remediation of the site under the strictures of the BCP as ordered by Supreme Court, offering to preserve the positions and rights of both parties pending the outcome of any appeal (see letters dated June 19, July 2 and July 11, 2008). Applicant explained to the Department that the exigencies imposed on this public project by prior delays, and legal and contractual obligations required that construction and remediation of Phase I proceed simultaneously.

DEC nevertheless determined not to participate in these efforts (see letters dated April 30, May 18 and June 1, 2009, attached), and decided instead to appeal the decision. While the appeal was pending, Applicant has proceeded with the BCP program relating to the Phase I Site in full compliance with all governing regulatory and statutory requirements, including NYSDEC precedents. Despite NYSDEC’s nonparticipation, Applicant has prepared and submitted all required public notices and sought input from NYSDEC, other agencies, and the public. This Fact Sheet does the same with respect to the Remedial Work Plan submitted to NYSDEC on May 20, 2009.

On June 5, 2009, the Appellate Division unanimously affirmed the decision of Supreme Court declaring the Destiny site to be a brownfield. A copy of that Decision is attached.

**Brownfield Cleanup Program:** New York's Brownfield Cleanup Program (BCP) encourages the voluntary cleanup of contaminated properties known as "brownfields" so that they can be reused and redeveloped. These uses include recreation, housing and business.

A **Brownfield** is any real property that is difficult to reuse or redevelop because of the presence or potential presence of contamination.

For more information about the BCP, visit:  
[www.dec.ny.gov/chemical/8450.html](http://www.dec.ny.gov/chemical/8450.html).

The BCP application proposes that the Destiny Site will be used as a unique development that will transform previously underutilized property into a major research, retail, entertainment, dining, hospitality, and tourism venue.

### **Public Comments About the Selected Remedy**

Written public comments about the selected remedy are being accepted for 45 days, from June 12, 2009 to July 27, 2009.

Written Comments should be submitted to:

Bureau Chief or Regional Hazardous Waste Remediation Engineer  
Supervising Project Manager  
Environmental Remediation  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012;

and,

William J. Gilberti, Jr.  
555 East Genesee Street  
Syracuse, New York 13202-2519

### **Highlights of the Selected Remedy**

The remedy has several goals:

1. identify cleanup levels or the process to be used to determine these levels;
2. explain why the remedy protects public health and the environment; and
3. provide a detailed description of the remedy selected to address site contamination.

#### As to Goal 1:

The site-specific remedial action objectives ("RAOs") were developed through an assessment of the contaminants, media of concern, potential migration pathways, exposure routes and potential receptors. These objectives are established based on standards, criteria and guidelines that are protective of human health and the environment.

The RAOs for the Phase I RWP include:

- Utilization of a remedy (excavation of contaminated soils in conjunction with the installation of a vapor barrier, vapor control system and concrete cap) that is fully protective of public health and the environment; and is finalized after evaluation of remedial alternatives;

- Utilization of contaminated soil excavation, capping, and existing groundwater controls and monitoring to prevent off-site migration of constituents;
- Protection of on-site workers and the surrounding community from exposure to site-related contaminants both during construction and after the implementation of the remedy;
- Identification of procedures for the proper management and disposal of soil, water and other wastes that would be generated as part of the implementation of the remedy;
- Identification of procedures associated with the operation and maintenance of any expansions in connection with the Destiny project to reduce the potential for future exposure of workers and the community to site-related contaminants.

#### As to Goals 2 and 3:

The remedy protects public health and the environment. The alternatives analysis set forth in the Phase I RIWP demonstrates that the selected remedy (excavation, capping and installation of a vapor barrier with a vapor extraction system) meets the criteria provided by the BCP program, including that it is protective of public health and the environment (including groundwater, drinking water, surface water, air, indoor air and sensitive populations).

Previous investigations, as discussed in the previously submitted Phase I RIR, identified soil contamination in surface and subsurface soils on the Phase I Site. Contaminants in soils include metals, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs) and polychlorinated biphenyls (PCBs) at concentrations exceeding the regulatory standards.

Groundwater investigation activities confirmed existing contamination on the Phase I Site associated with the historic activities. Contaminants in groundwater include metals, VOCs, and SVOCs at concentrations exceeding the regulatory standards.

In addition, soil vapor investigation activities confirmed volatile organic compounds, including trichloroethene (TCE), at concentrations exceeding background values published by the New York State Department of Health.

Soil excavation (over 80,000 cubic yards) in conjunction with a combined vapor barrier and extraction system across the entire footprint of the Phase I Site, addresses this contamination. These activities, in conjunction with the existing groundwater controls and capping, prevent further impacts to groundwater and achieve the RAOs for the Phase I Site.

#### **Next Steps**

NYSDEC will have the opportunity to review and approve and make any necessary revisions to the Phase I RWP. After comments, if any, are addressed, the final Phase I RWP will be placed in the document repository (See below for location). The Applicant will complete the remedial action, which has commenced. It is estimated that activities to complete the selected remedy will be completed by Summer 2009. The Applicant may then prepare a Final Engineering Report, officially called a "Phase I FER". This FER will describe how the Applicant addressed the contamination related to the Phase I Site. When the Applicant submits a draft Phase I FER for approval, the availability of the draft Phase I FER for public review will be announced.

The public will be kept informed throughout the process.

## Background

The Destiny Site consists of approximately 152 acres at the southeast end of Onondaga Lake (Figure 1). The Destiny Site is bounded by: Onondaga Lake, Conrail tracks and Harborside Drive, to the northwest; Interstate 81 (I-81) to the north and northeast; Bear Street on the south and southeast; and the New York State Barge Canal to the south and southwest.

The Phase I Site is located in a former area of extensive natural shoreline and lowland deposits consisting of marl (a naturally occurring deposit of clay, calcium, carbonate, and shell fragments), and organic vegetation including roots, wood, and peat. Prior to modern-day development, the general area was known for its extensive salt marshes and spring deposits that were mined for the salt content.

In the early 1900s, the Solvay Process Company brought the “Solvay Process” for generating Soda Ash (Sodium Carbonate) to the United States from Germany. The Company settled in Syracuse and commenced operation in or about 1907. The Solvay Process generated large quantities of waste materials, including Calcium Carbonate, Calcium Oxide, and Calcium Chloride. These wastes are generally characterized as being white to grey, relatively soft, clayey or “tooth paste-like” material. Areas were needed for the disposal of such waste materials, thus available areas of unoccupied land at the Solvay plant and on vacant land located throughout the south end of Onondaga Lake were utilized for such disposal. These disposal areas included a large portion of the area between Onondaga Lake and West Hiawatha Boulevard (current Carousel Area), including the Phase I Site. Throughout the first half of the 1900s, additional miscellaneous fill, including more Solvay waste and, most likely, various construction and demolition debris (C&D) waste, was deposited on and in the vicinity of the Phase I Site. Similar activities, excluding the additional deposition of Solvay wastes, continued from the 1930s to the 1980s. A portion of the former Marley Property was reportedly (Haley & Aldridge, 2002) used as a salvage yard for scrap metal. The salvage yard on the former Marley Property, which overlaps the Phase I Site, operated from the late 1930s up to the construction of the Carousel Center (Dunn, 1988).

From the 1940s to the 1980s, a five acre parcel of land at the south-central end of the Marley Property, known as the Clark (Clark Concrete Co.) Property, was used as a concrete batch plant for local construction projects. A DOT field station was also formerly located on this property. The Former Clark property is immediately adjacent to the Phase I Site. In or about 1987, the Clark Property was found to be contaminated with chlorinated and non-chlorinated hydrocarbons, including solvents. As a result, the Clark Property was listed on NYSDEC’s Registry of Inactive Hazardous Waste Disposal Sites, as a Class 2 Site (significant threat to the public health or environment-action required) in April of 1989.

Major oil storage facilities were located on and immediately south of the Phase I Site. These facilities were owned by Amerada Hess and Buckeye Petroleum. These facilities were part of a large petroleum storage complex at the south end of Onondaga Lake known as Oil City.

Investigative activities have been conducted and are summarized in the Phase I RIR. The Phase I Site was most recently used for parking, vehicle driveways, and pedestrian walkways into the adjacent Carousel Center. Site work has commenced on the first phase of the Destiny project, which includes an 800,000+ square foot building expansion of the existing Carousel Center. Construction of the expansion is currently ongoing.

A more complete site history, as well as results of environmental studies of the Phase I Site, is provided in the Phase I RIWP, Phase I RIR, and Phase I RWP, which are available for public review.

## **FOR MORE INFORMATION**

### **Location of Reports and Information - Document Repository**

Project documents are available at the following location to help the public stay informed. These documents include, to date, the application to participate in the BCP, the Phase I Citizen Participation Plan, the Phase I Remedial Investigation Work Plan, Phase I Remedial Investigation Report, and the Phase I Remedial Workplan.

Robert P. Kinchen Central Library  
The Galleries of Syracuse  
447 South Salina Street  
Syracuse, New York 13204-2494  
Telephone: (315) 435-1900  
Email: [reference@onlib.org](mailto:reference@onlib.org)

### **Who to Contact**

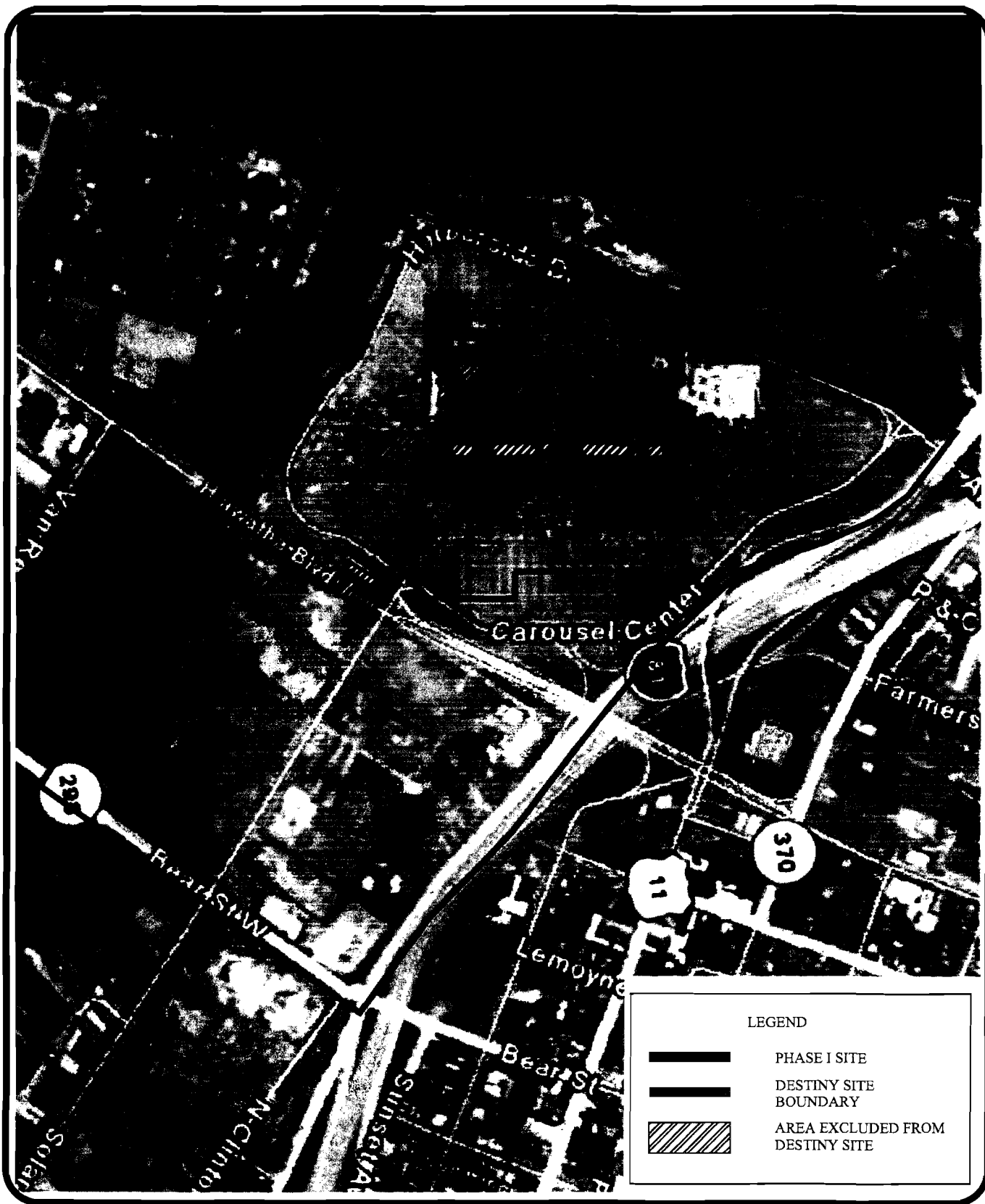
Comments and questions are always welcome and should be directed as follows:

Bureau Chief or Regional Hazardous Waste Remediation Engineer  
Supervising Project Manager  
Environmental Remediation  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012

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

William J. Gilberti, Jr.  
555 East Genesee Street  
Syracuse, New York 13202-2519

If you know someone who would like to be added to the project mailing list, have them contact William J Gilberti, Jr. at the address listed above. We encourage you to share this fact sheet with neighbors and tenants, and/or post this fact sheet in a prominent area of your building for others to see.



SPECTRA ENVIRONMENTAL GROUP, INC.  
19 British American Blvd  
Latham, NEW YORK 13202

## 2008 AERIAL PHOTOGRAPH SHOWING DESTINY SITE

ONONDAGA COUNTY

NEW YORK

PROJ. No.: 06448

DATE: 09/09/2008

SCALE: NOT TO SCALE

DWG. NO. 06448SLMAP.DWG

FIGURE 1





**destiny usa**

June 19, 2008

Alexander B. Grannis, Commissioner  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, New York 12233-0001

Re: **Brownfield Site Cleanup Agreement – Site No.: C734104**; *Destiny USA Development, LLC et al v. New York State Department of Environmental Conservation et al.*, Index No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)

Dear Commissioner Grannis:

Pursuant to the recent decision of the Hon. John C. Cherundolo, J.S.C. in the above-referenced litigation, we hereby request that the New York State Department of Environmental Conservation ("Department") immediately sign the Brownfield Site Cleanup Agreement for Site No. C734104 ("BCA") relating to the Destiny USA project.

Three (3) original signed BCAs were delivered to the Department on December 28, 2006. A copy of that signed BCA is provided herewith as Exhibit A. I have also enclosed a copy of the above-referenced court decision as Exhibit B. It is understood that the BCA will be interpreted and implemented in light of, and consistent with, the above-referenced court decision. In the event there is a conflict or anomaly as a result of the unique facts and circumstances of this case, the interpretation which best gives effect to the above-referenced court decision shall control.

Your immediate attention to this important matter would be greatly appreciated. We look forward to this opportunity to work cooperatively with the Department to redevelop this historically underutilized and contaminated property and to avoid any further loss and/or delay to this necessary public improvement project.

Very truly yours,

By: Bruce A. Kenan

The Clinton Exchange • 4 Clinton Square • Syracuse NY 13202-1078  
Tel: (315) 422-7000 • Fax: (315) 422-2485 • [www.destinyusa.com](http://www.destinyusa.com)



destiny usa

2 July 2008

Alexander B. Grannis, Commissioner  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, New York 12233-0001

Re: **Brownfield Site Cleanup Agreement – Site No.: C734104; Destiny USA Development, LLC et al v. New York State Department of Environmental Conservation et al.**, Index No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)

Dear Commissioner Grannis:

Although we have never met in person, I wrote to you on June 19, 2008 for the dual purpose of informing you of the Supreme Court decision in the above-referenced litigation and enclosing a Brownfield Cleanup Agreement that we had signed and are fully prepared to enter into pursuant to the Court's directive.

I am the lead partner in the development of the unique and historic public project known as Destiny USA. I am an architect by training, and I have been a partner with the Pyramid Companies since 1970. During that period of time, we have enjoyed a close and cooperative working relationship with the New York State Department of Environmental Conservation, both regionally and at the State level.

Indeed, despite the current litigation concerning our Brownfield application, we continue to work positively throughout the State and in Syracuse with Department staff on the many environmental issues we confront. Our intent is to continue in this vein and hope that you will work with us in this effort.

As you may know, the Destiny USA project is a public project undertaken, designed, and constructed under the auspices of the Syracuse Industrial Development Agency, indeed itself a state public authority. The project was borne out of a critical need to ease the decades-long decline in the economic well-being of the region. It was, in fact, Destiny that was approached by elected city and county officials to expand the existing Carousel Center into a transformational project, endorsed by every level of government, from the local municipal level through the United States Congress. Your staff may have already advised you that Destiny will be built entirely according to LEED standards and will serve as a demonstration project for the commercialization of new technologies in the area of renewable energies. Destiny has thus been designated a Qualified Green Building and Sustainable Design Project. We have also worked

closely with the United States Environmental Protection Agency entering into a landmark Memorandum of Understanding in September of 2006 to construct and operate in an environmentally responsive manner, In recognition of our efforts; we were bestowed with an Environmental Quality Award by the Agency in April of this year.

While we've had no response to my prior letter, as you are aware, the most pressing issue, in light of the court's opinion, is the execution of the Brownfield Cleanup Agreement that we have fully executed and has been in the Department's possession since 2006.

As Supreme Court acknowledged in its opinion, for each phase of the Project, the legislatively required Agency Agreement sets forth a mandatory construction schedule, including an Expected Commencement Date, Outside Commencement Date, Expected Completion Date and Outside Completion Date. It also imposes serious penalties and remedies for failure to comply with that schedule, which include the loss of the entire project. As you can imagine, our loan documents contain similar provisions regarding scheduling, and failure to construct on schedule poses the risk of defaulting on the loan and losing the financing.

We therefore find ourselves in a most delicate position: by virtue of the Court order, we are in the Brownfield Cleanup Program (BCP).<sup>1</sup> Nevertheless, the Department appears unwilling to sign the Brownfield Cleanup Agreement (BCA). Our goal is to arrive at a solution that would accommodate the interests of the Department as well as those of the Destiny Project. We believe it is entirely possible to proceed with the Destiny project in the Brownfield Cleanup Program while preserving the Department's rights to appeal. An agreement could be designed that preserves all parties rights in the current litigation, but nevertheless allows for the implementation of the effect of the underlying court decision and the continuation of this public improvement project in the BCP without further delay. Such an agreement could also allow for removal of the project from the BCP, or modification of the BCA, depending on the outcome of any appeal, without prejudice to either side.

I respectfully request that this matter receive immediate attention so that this vital public project is not lost at this critical juncture of its existence.

Very truly yours,

  
Bruce A. Kenan

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<sup>1</sup> Our attorneys inform us that the Department's appeal of Supreme Court's decision will not stay the aspect of the decision ordering us into the program as of 2005, since any appeal by the State will stay only the enforcement of the order but not its effect. The Court's determination to put us into the program is self-effectuating, and hence, is unaffected by the automatic stay.



**destiny usa**

July 11, 2008

Alexander B. Grannis, Commissioner  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, New York 12233-0001

Re: **Brownfield Site Cleanup Agreement – Site No.: C734104; Destiny USA Development, LLC et al v. New York State Department of Environmental Conservation et al.**, Index No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)

Dear Commissioner Grannis:

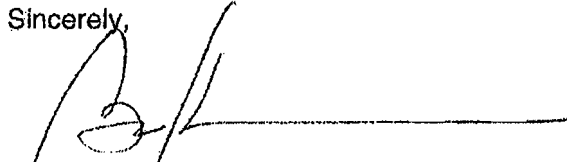
As of this date, I have not received a response from you or your office to either of my two prior letters, dated June 19, 2008 and July 2, 2008, both of which I enclose again for your ease of reference. We are at a loss to understand as to why the Department does not wish to engage in discussions with Destiny USA regarding our entry into the Brownfield Cleanup Program, especially in light of Supreme Court's decision in the above-referenced litigation.

As I have explained to you in the previous letters, for a variety of reasons, the Project operates under severe time constraints. If the construction deadlines are not met, the Project itself is exposed. We cannot risk this occurrence.

You leave us with only one avenue for going forward. We have obtained and reviewed the Brownfield Cleanup Agreements and approved Workplans for large commercial projects admitted into the program with environmental profiles similar to those of the Destiny USA site. We are developing our approach to this site, including a remedial plan, in accordance with these Department approved plans and are proceeding accordingly.

Thank you for your kind attention to this matter.

Sincerely,



Bruce A. Kenan  
Destiny USA

Enclosures

The Clinton Exchange • 4 Clinton Square • Syracuse NY 13202-1078  
Tel: (315) 422-7000 • Fax: (315) 422-2485 • [www.destinyusa.com](http://www.destinyusa.com)

**Gilberti Stinziano Heintz & Smith, P.C.**  
**ATTORNEYS AND COUNSELORS AT LAW**

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E-mail: emailroom@gilbertilaw.com

Writer's Direct E-mail: wjg@gilbertilaw.com

April 30, 2009

*Via E-mail and Federal Express – Standard Overnight*

Maureen Leary, Esq.  
Assistant General Counsel  
NYS Attorney General's Office  
The Capitol  
Albany, New York 12224

Karen R. Kaufmann, Esq.  
Assistant Attorney General  
State of New York  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224

Re: **Brownfield Site Cleanup – Site No.: C734104; *Destiny USA Development, LLC et al v. New York State Department of Environmental Conservation et al.*, Index No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)**

Dear Ms. Leary and Ms. Kaufmann:

I am writing in response to the position taken by the New York State Department of Environmental Conservation ("the Department") with respect to the Fact Sheet, circulated under cover letter dated April 24, 2009, relative to the above-referenced matter. As articulated in phone calls yesterday (April 29<sup>th</sup>) afternoon between Maureen Leary of the Attorney General's Office and Greg Faucher of our office, the Department has asserted that the Fact Sheet creates the false impression that the Department has reviewed and approved the contents of the Fact Sheet, since it uses a Department-required and generated form. Mr. Faucher assured Ms. Leary that our client's intent in this instance, as always in this matter, was simply to comply with all statutes, regulations, lawful guidance documents and policies in pursuing our Brownfield cleanup for the Phase I site.

The Fact Sheet format used was required by DEC program policy. It's as simple as that. There was no intent to mislead, confuse or do anything of the sort. The Department's suggestion that there was fraudulent intent is, in fact, deeply troubling and emblematic of the unfortunate posture the Department has taken repeatedly and historically in this matter. A brief review of that history seems appropriate now, in light of this recent episode.

April 30, 2009

Page 2

When Justice Cherundolo issued his Decision and Order in the Brownfield litigation on June 10, 2008 ("Decision"), he vacated the October 5, 2007 decision of the Department and ordered the entire project site of Destiny USA into the Brownfield Cleanup Program (BCP), *nunc pro tunc*, as of June 28, 2005. (As you certainly know, these aspects of the Decision are self-effectuating and unaffected by any automatic stay afforded to the State by virtue of the appeal. In other words, the stay does not nullify the Decision; it only stays the enforcement of the portions that are not self-effectuating.) Recognizing that and, at the same time, committed to redevelop its historically underutilized and contaminated property, my client immediately wrote to Commissioner Grannis, requesting that he sign the Brownfield Site Cleanup Agreement and enter into a cooperative working arrangement to avoid further loss and delay to this necessary public improvement project.

My client heard nothing in response to its initial request or to any of its subsequent requests to initiate a productive dialogue with the Department to proceed under the Decision pending the Department's decision to appeal. The Department was fully aware of the project's value to the State via job creation and sales tax generation, the time and financial constraints under which it operates, and the necessity of moving forward with construction and cleanup pending appeal.

But the Department was unwilling to negotiate. Our client offered to provide a solution that would "accommodate the interests of the Department as well as those of the Destiny Project. . . . An agreement could be designed that preserves all parties' rights in the current litigation, but nevertheless allows for the implementation of the effect of the underlying court decision and the continuation of this public improvement project in the BCP without further delay. Such an agreement could also allow for removal of the project from the BCP, or modification of the BCA, depending on the outcome of any appeal, without prejudice to either side." Still, the Department refused to write, talk, or meet with Destiny or its representatives.

My client therefore had no choice but to proceed under the Decision in full compliance with the requirements of the BCP and with full knowledge of, and notice to, the Department of every step along the way. The Department has had ample opportunity to participate in, comment upon, review, approve, modify and/or disapprove each and every action Destiny has taken in compliance with the Decision. Until now, the Department has remained entirely silent, and its stance has been an aggressive, litigious one when one might have assumed its interest would be a positive, environmental one, with the interests of the State and its citizens in mind. Of the myriad levels of government to endorse this project and understand its critical role in assuring the economic vitality of New York State, only the Department of Environmental Conservation has taken a position contrary to the project.

April 30, 2009  
Page 3

The Department's response to this latest event is entirely congruent with its approach to date. Perhaps it is not sheer coincidence that this first Departmental response comes a mere three weeks after the oral argument on the appeal. At that time, I informed the Fourth Department of the developments since the Decision after the Attorney General had opened this area in her argument by claiming that building on the site in the period between Judge Cherundolo's decision and the appeal had the effect of mooted the appeal.

Nonetheless, despite this history, we have no interest in crossing swords with the Department over the question of formatting. We are more than happy to substitute the enclosed Fact Sheet for the prior Fact Sheet. The two are identical except for the header. Contrary to the allegations you may be making by implication or otherwise, we do not acknowledge any legal error; neither are we in any way changing the date of filing and circulation of the Fact Sheet. By this act, we are merely accommodating your request to refrain from using the Department's required form Fact Sheet in our case.

As soon as you advise in writing that the substitution meets with your approval, we will make the substitution.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.



William J. Gilberti, Jr.

WJG/psn  
Enclosure

# **FACT SHEET**

## **Prepared and Submitted By Destiny USA Brownfield Cleanup Program – Phase I Site**

**Brownfield Cleanup  
Program- Phase I Site  
Destiny USA  
Syracuse, NY**

**April 2009**

### **Phase I Remedial Investigation Report Under Review; Report Recommends Cleanup of Brownfield Site Contamination**

An investigation has been completed for the real property shown on Figure 1 ("Phase I Site"), in connection with the first phase of the Destiny USA project located in the City of Syracuse, Onondaga County, New York, under New York's Brownfield Cleanup Program ("BCP"). This Phase I Remedial Investigation Report ("Phase I RIR") was submitted by Destiny USA Development, LLC ("Destiny" or "Applicant") under the BCP. This Phase I RIR applies to the Phase I Site, in connection with the first phase of the Destiny USA project located in Syracuse, New York (Figure 1). The first phase includes an 800,000+ square foot building expansion of the existing Carousel Center. The Phase I Site consists of the building expansion footprint for the first phase as shown on Figure 1. The Phase I Site is located within the overall boundaries of the Destiny Site ("Destiny Site"), as shown on Figure 2.

New York's BCP encourages the voluntary cleanup of contaminated properties known as "brownfields," so that they can be reused and redeveloped. These uses include recreation, housing and business. A brownfield is any real property where the presence or potential presence of contamination may complicate reuse or redevelopment.

The application proposes that the Destiny Site will be used as a unique development that will transform previously underutilized property into a major research, retail, entertainment, dining, hospitality, and tourism venue.

Destiny has submitted a Phase I RIR to the New York State Department of Environmental Conservation ("NYSDEC") that describes the results of the investigation of the Phase I Site and recommends action to address contamination.

NYSDEC is currently reviewing the Phase I RIR. The Phase I RIR is available at the document repository created for the Phase I Site; the address is provided below under "Location of Reports and Information – Document Repository."

### **Background**

The Destiny Site consists of approximately 152 acres at the southeast end of Onondaga Lake (Figure 1). The Destiny Site is bounded by: Onondaga Lake, Conrail tracks and Harborside Drive, to the northwest; Interstate 81 (I-81) to the north and northeast; Bear Street on the south and southeast; and the New York State Barge Canal to the south and southwest.



The Phase I Site is located in a former area of extensive natural shoreline and lowland deposits consisting of marl (a naturally occurring deposit of clay, calcium, carbonate, and shell fragments), and organic vegetation including roots, wood, and peat. Prior to modern-day development, the general area was known for its extensive salt marshes and spring deposits that were mined for the salt content.

In the early 1900s, the Solvay Process Company brought the "Solvay Process" for generating Soda Ash (Sodium Carbonate) to the United States from Germany. The Company settled in Syracuse and commenced operation in or about 1907. The Solvay Process generated large quantities of waste materials, including Calcium Carbonate, Calcium Oxide, and Calcium Chloride. These wastes are generally characterized as being white to grey, relatively soft, clayey or "tooth paste-like" material. Areas were needed for the disposal of such waste materials, thus available areas of unoccupied land at the Solvay plant and on vacant land located throughout the south end of Onondaga Lake were utilized for such disposal. These disposal areas included a large portion of the area between Onondaga Lake and West Hiawatha Boulevard (current Carousel Area), including the Phase I Site. Throughout the first half of the 1900s, additional miscellaneous fill, including more Solvay waste and, most likely, various construction and demolition debris (C&D) waste, was deposited on and in the vicinity of the Phase I Site. Similar activities, excluding the additional deposition of Solvay wastes, continued from the 1930s to the 1980s. A portion of the former Marley Property was reportedly (Haley & Aldridge, 2002) used as a salvage yard for scrap metal. The salvage yard on the former Marley Property, which overlaps the Phase I Site, operated from the late 1930s up to the construction of the Carousel Center (Dunn, 1988).

From the 1940s to the 1980s, a five acre parcel of land at the south-central end of the Marley Property, known as the Clark (Clark Concrete Co.) Property, was used as a concrete batch plant for local construction projects. A DOT field station was also formerly located on this property. The Former Clark property is immediately adjacent to the Phase I Site. In or about 1987, the Clark Property was found to be contaminated with chlorinated and non-chlorinated hydrocarbons, including solvents. As a result, the Clark Property was listed on NYSDEC's Registry of Inactive Hazardous Waste Disposal Sites, as a Class 2 Site (significant threat to the public health or environment-action required) in April of 1989.

Major oil storage facilities were located on and immediately south of the Phase I Site. These facilities were owned by Amerada Hess and Buckeye Petroleum. These facilities were part of a large petroleum storage complex at the south end of Onondaga Lake known as Oil City.

A more complete site history, as well as results of environmental studies of the Phase I Site, were provided in the Phase I RIWP and are also included in the Phase I RIR, which are available for public review.

### **Highlights of the Phase I Remedial Investigation Report**

The remedial investigation of the Phase I Site has several goals:

- 1) Describe the investigation activities completed;
- 2) Describe the nature and extent of contamination at the Phase I Site;
- 3) Provide information about off-site contamination issues, and
- 4) Recommend whether the Applicant believes that cleanup of contamination associated with the Phase I Site is required.

The following investigative activities were performed:

- Investigation of soil conditions at the Phase I Site through the installation of 20 soil borings;
- Investigation of groundwater conditions upgradient of the Phase I Site through the installation of two monitoring wells and sampling of one existing monitoring well to evaluate previously detected ground water contamination; and

- Investigation of soil vapor at the Phase I Site through the installation of six soil vapor points to evaluate soil vapors up-gradient to the Phase I Site building footprint.

**Phase I Remedial Investigation findings and recommendations:**

- **Soil** - Soil investigation activities confirmed existing and anticipated contamination on the Phase I Site associated with the historic activities. Contamination was confirmed in the surface and subsurface soils in several samples on the Phase I Site. Contaminants in soils include metals, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs) and polychlorinated biphenyls (PCBs) at concentrations exceeding the regulatory standards. Based on the historical and Phase I Remedial Investigation ("Phase I RI") analytical test results it is recommended that, during construction activities, all soils must be characterized to identify material handling requirements and for material reuse, handling and/or waste disposal requirements and be managed in accordance with federal, state and local regulations.
- **Groundwater** - Groundwater investigation activities confirmed existing and anticipated contamination on the Phase I Site associated with the historic activities. Contamination was confirmed in groundwater from two monitoring wells on the Phase I Site and one monitoring well down gradient of the Phase I Site. Contaminants in groundwater include metals, VOCs, and SVOCs at concentrations exceeding the regulatory standards. Based on the Phase I RI groundwater analytical test results it was recommended that any groundwater handled during construction activities, (e.g. during dewatering activities), should be handled as being impacted with petroleum and metals. Accordingly, groundwater will require disposal in accordance with federal, state and local regulations. The existing Amerada Hess groundwater collection system should be maintained and operated in accordance with applicable federal, state and local regulations to control and treat groundwater that leaves the Phase I Site.
- **Soil Vapor** - Soil vapor investigation activities confirmed volatile organic compounds, including trichloroethene (TCE), at concentrations exceeding background values published by the New York State Department of Health. Based on these soil vapor results, the following recommendations were made: continue implementation of the Community Air Monitoring Plan during Remedial Activities and any future soil disturbances, take precautionary mitigation measures to control exposure to soil vapors, and design and install a vapor barrier and vapor extraction system prior to building slab construction to control potential vapor intrusion into the site building.
- A Phase I Remedial Work Plan ("Phase I RWP"), including an alternatives analysis, should be prepared to address the general recommendations provided above. The Phase I RWP shall also consider the proposed future use for the property and specific site development and construction plans.

**Next Steps**

NYSDEC will have the opportunity to review and approve and make any necessary revisions to the Phase I RIR. The final Phase I RIR will be placed in the document repository (See below for location). The Applicant may then develop a Remedial Work Plan, officially called a "Phase I Remedial Work Plan". This plan describe how the Applicant would address the contamination related to the Site. When the Applicant submits a draft Phase I RWP for approval, the availability of the draft plan for public review will be announced.

The public will be kept informed throughout the process.

**FOR MORE INFORMATION**

### **Location of Reports and Information - Document Repository**

A Document repository has been established to help the public to review important project documents. These documents include, to date, the application to participate in the BCP accepted by NYSDEC, the Phase I Citizen Participation Plan, the Phase I Remedial Investigation Work Plan, and the Phase I Remedial Investigation Report.

Robert P. Kinchen Central Library  
The Galleries of Syracuse  
447 South Salina Street  
Syracuse, New York 13204-2494  
Telephone: (315) 435-1900  
Email: [reference@onlib.org](mailto:reference@onlib.org)

### **Who to Contact**

Comments and questions are always welcome and should be directed as follows:

Destiny USA Development, LLC c/o  
William J. Gilberti Jr., Esq.  
555 East Genesee Street  
Syracuse, New York 13202

Bureau Chief or Regional Hazardous Waste Remediation Engineer  
Supervising Project Manager  
Environmental Remediation  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012

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

For more information about NYSDEC's brownfield program, visit:  
<http://www.dec.ny.gov/chemical/brownfields.html>.

If you know someone who would like to be added to the project mailing list, have them contact the NYSDEC project manager above. We encourage you to share this fact sheet with neighbors and tenants, and/or post this fact sheet in a prominent area of your building for others to see.



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

May 18, 2009

William J. Gilberti, Jr.  
Gilberti Stinziano Heintz & Smith, P.C.  
555 East Genesee Street  
Syracuse, NY 13202-2159

RE: Destiny USA et al. v. DEC et al.  
Appeal Docket No. 08-1855

Dear Mr. Gilberti:

This responds to your letter dated April 30, 2009. Unfortunately, you do not adequately address either of the two issues of serious concern raised by your client's activities during construction of Phase I of the Destiny USA project: first, improperly proceeding in furtherance of Brownfield Cleanup Program procedures although the project has not been admitted to the BCP; and second, publication of Fact Sheets that misrepresent to public officials and the media that they have been reviewed and approved by DEC, when that is not the case.

As you well know, the question of Destiny's eligibility for the BCP is the precise issue that is currently being considered by the Fourth Department. This office has twice explained in written correspondence to you that Justice Cherundolo's ruling is unquestionably stayed pending appeal by CPLR 5519(a)(1) (copies of my letters dated September 9 and October 29, 2009 are attached). Accordingly, no Brownfield Cleanup Agreement was ever executed with Destiny, which even under the lower court ruling would be a prerequisite for any further BCP process. Nevertheless, Destiny has made a series of unauthorized submissions and publications in purported furtherance of BCP procedures, including:

- September 2008 Phase I Remedial Investigation Work Plan, including Citizen Participation Plan;
- October 22, 2008 Certificate of Mailing of Phase I site Remedial Investigation Work Plan Fact Sheet with Brownfield Site Contact mailing list;
- Monthly Progress Reports for January - April 2009;

- April 2009 Phase I Remedial Investigation Report;
- April 24, 2009 letter regarding Significant Threat Assessment;
- April 27, 2009 Certificate of Mailing of Phase I Remedial Investigation Report Fact Sheet.
- May 11, 2009 Certificate of Mailing of Phase I Remedial Investigation Report Reformatted Fact Sheet.

These submissions are a nullity. Justice Cherundolo's order directing DEC to admit Destiny into the BCP is precisely the type of order that has been universally held stayed by CPLR 5519(a)(1): an order that "command[s] the performance of some affirmative act" by the agency. *See State of New York v. Town of Haverstraw*, 219 A.D.2d 64, 65 (2d Dept. 1996). Thus, there is absolutely no legal basis for your assertion that your client "had no choice but to proceed under the Decision in full compliance with the requirements of the BCP."

Knowing that Destiny cannot obtain DEC's approval for publications as would be required under BCP procedures, your client has compounded the error by circulating public notices that falsely purport to have been reviewed and approved by DEC. In your letter, you assert that "[t]he Fact Sheet format used was required by DEC program policy." However, since you are obviously familiar with the BCP procedural guidance, you are also aware that Fact Sheets are not published until after they have been reviewed and approved by DEC. This is clearly stated in DEC's draft DER-23/Citizen Participation Handbook for Remedial Programs at page 3-3:

The Applicant should submit each draft fact sheet, in electronic format, to the DER Project Manager for review and approval.

Distribution: When DER approves a fact sheet, it will direct the Applicant to distribute the fact sheet to the site contact list.

I attach hereto the relevant excerpt from DER-23, which is available at [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/der23.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/der23.pdf). It is unacceptable for Destiny and your law firm to represent to the public, not only that Destiny has been admitted to the BCP, but also that DEC has reviewed and approved your submissions. Contrary to the conclusion in your letter, these continuing misrepresentations will not be resolved by your publication of the Reformatted Fact Sheet which also has not been reviewed and approved by DEC.

We are therefore advising you to cease taking any further steps in purported compliance with procedures governing participation in the Brownfield Cleanup Program, into which the Destiny project has not been accepted. In addition, you or your client should immediately submit to this office for review a proposed publication to the contact list with a statement explaining clearly that Destiny has not been admitted to the BCP and that any documents published in purported furtherance of BCP procedures are and have been without any review or approval by DEC. I request your timely response indicating that your client will be ceasing its activities in

furtherance of BCP procedures pending outcome of the ongoing legal proceedings, and including the aforementioned proposed publication. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen R. Kaufmann", written in a cursive style.

Karen R. Kaufmann, AAG

c: Phil Lodico, Esq.



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

September 9, 2008

William J. Gilberti, Jr.  
Gilberti Stinziano Heintz & Smith, P.C.  
555 East Genesee Street  
Syracuse, NY 13202-2159

RE: Destiny USA et al. v. DEC et al.  
Index No. 08-1015

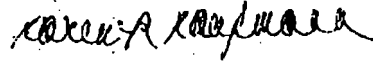
Dear Mr. Gilberti:

This responds to the letters sent by your client to Commissioner Grannis dated June 19 and July 2 and 11, 2008. Please ensure that any future correspondence regarding this litigation is addressed to me as attorney for the respondents.

In the July 2 letter, your client states that you have informed him that the appeal of the Supreme Court decision does not stay the Court's order directing DEC to admit the Carousel and Oil City parcels into the Brownfield Cleanup Program. This is obviously erroneous. Contrary to Mr. Kenan's assertion, the Court's Decision and Order finding the project eligible for the BCP is not self-effectuating. By its clear language, it directs DEC to include the Carousel and Oil City parcels in the BCP (slip op. p. 61), and further directs DEC to include such parcels effective as of June 28, 2005 and to "enter into immediate discussions . . . so as to make arrangements for a Brownfield [sic] Cleanup Agreements [sic] to be executed as soon as practicable" (p. 62). These are exactly the kind of executory directives to the agency that courts have consistently found to be stayed under CPLR §5519(a) upon the State's appeal, which in this case was filed on July 1, 2008. See Matter of Pokoik v. Dept. of Health Services, 220 A.D. 13, 14-15 (2d Dept. 1996) (CPLR 5519(a) provides a stay of enforcement of the judgment or order appealed from, with the scope of the automatic stay of CPLR 5519(a) "restricted to the executory directions of the judgement or order appealed from which command a person to do an act").

Your client's letter dated July 11 states that Destiny USA is proceeding to develop the site, including a remedial plan, pursuant to BCAs and workplans applicable to comparable projects. Please be advised that such activity has no bearing on DEC's view of the project's eligibility for the BCP as a matter of law or fact.

Sincerely,

A handwritten signature in dark ink, appearing to read "Karen R. Kaufmann", written in a cursive style.

Karen R. Kaufmann, AAG  
(518) 486-4551

c: Phil Lodico, Esq. (DEC)





STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

October 29, 2008

William J. Gilberti, Jr.  
Gilberti Stinziano Heintz & Smith, P.C.  
555 East Genesee Street  
Syracuse, NY 13202-2159

RE: Destiny USA et al. v. DEC et al.  
Index No. 08-1015

Dear Mr. Gilberti:

I am writing to clarify DEC's position as to the status of your clients' application for the Brownfield Cleanup Program. As I explained in my letter dated September 9, 2008, the Order directing DEC to admit the Carousel and Oil City parcels into the BCP is stayed pending appeal pursuant to CPLR §5519. The Destiny USA development project is not subject to the requirements of the BCP, and therefore the submissions of the Phase I Remedial Investigation Work Plan on September 16, 2008 and the Fact Sheet and its mailing dated October 22, 2008 are a nullity. Under the circumstances, it would be improper for DEC to take any action based on purported BCP procedures, including expending State resources to respond to or comment on the Work Plan. Please be advised that any actions taken by your clients pursuant to such procedures are at their own risk.

Sincerely,

Karen R. Kaufmann, AAG  
(518) 486-4551

c: Phil Lodico, Esq.  
Ben Conlon, Esq.

### 3.2 Important Information About the BCP Citizen Participation Requirements

**1. Fact Sheet Preparation and Distribution.** Many of the CP requirements discussed in this section involve preparing and distributing fact sheets to the site contact list. All required fact sheets share the following protocols:

**Preparation:** The Applicant should use electronic fact sheet templates available from DER to prepare the draft fact sheets. The templates and instructions for preparing the fact sheets are available on the DER web site at: [\[this link is not yet active\]](#)

The Applicant should submit each draft fact sheet, in electronic format, to the DER Project Manager for review and approval. The DER Project Manager should provide an appropriate DEC Citizen Participation Specialist (CPS) copies of the draft fact sheets and encourage them to review them and provide comments within the required timeframes.

**Distribution:** When DER approves a fact sheet, it will direct the Applicant to distribute the fact sheet to the site contact list. The Applicant must also place the fact sheet in the document repository. Fact sheets that announce public comment periods must be received by the site contact list before the comment period begins. Other fact sheets that describe upcoming field work should be sent to the site contact list before significant site activities take place.

The Applicant must provide a certification of mailing to the DER Project Manager within five days of mailing each fact sheet. The Applicant must complete a form on a form supplied by DER, that the fact sheet was mailed to the regular household address. Access the form on the DER web site at: [\[this link is not yet active\]](#)

**Note:** Where the site or adjacent property contains multiple dwelling units (for example an apartment building or a multi-unit townhouse), the Applicant shall work with the DER Project Manager to develop a plan for distribution of the fact sheet by other means (such as notice in lieu of mailing to each individual).

**2. Significant threat determination and fact sheets.** DER may determine at any time in the remedial program whether a field site constitutes a significant threat to public health or the environment. The Applicant must make such determination no later than 20 days after it approves the RI Report. In cooperation with DER, the Applicant must provide a fact sheet about the significant threat determination to the site contact list.

The DER Project Manager should work with the Applicant to be sure the appropriate fact sheet includes the significant threat determination once made.

**3. Combining Citizen Participation Activities.** There are instances when CP requirements may be combined during the remedial program. For some projects, DER may encourage Applicants to submit certain reports and work plans simultaneously. This will allow for a more integrated approach to review the documents. This symbol (\*) in the text that follows alerts the reader to opportunities to combine CP activities.

**4. Public Comment Periods.** DER requires several public comment periods about draft remedial documents during the remedial process. DER will consider a request in writing by letter or email to extend a comment period provided that the request is received within five days of the identified end of the comment period. The maximum time allotted for extensions will be 30 days.

**5. Interim Remedial Measures (IRMs).** DER does not require CP activities for an IRM unless the scope of the IRM is likely to represent all or a significant portion of the remedy for the site. In this case, the review and approval of the IRM work plan will be conducted using the same procedures as for a Remedial Work Plan, including CP. See discussion of IRMs in **DER Approves Proposed Remedial Work Plan**.

**Note:** In the instance of a non-emergency IRM that does not represent all or a significant portion of the remedy for the site, DER should determine if it is necessary to conduct CP. This should be decided on a site-specific basis, considering the scope of the IRM, the level of citizen interest and concern, and other factors.

### 3.3 Application Process

**1. Site Contact List.** The Requestor must provide with its BCP Application a site contact list consisting of, at a minimum:

- the chief executive officer and planning board members of the county, city, town and village in which the site is located;
- residents, owners, and occupants of the site and properties adjacent to the site;
- the public water supplier that serves the area in which the site is located;
- any person who has requested to be placed on the site contact list;
- the administrator of any solid waste or hazardous waste facility located on or near the site for the purpose of monitoring and/or discharge of waste at the facility; and
- the chief executive officer of the local government for the brownfield project.

DER uses the site contact list as part of the process of determining if the Application is complete. The site contact list also states the mailing of notices and fact sheets about the brownfield site throughout the investigation and remediation process.

The site contact list is a part of the site's CP Plan which must be developed within 20 days of the execution of the Brownfield Cleanup Agreement. The site contact list may expand to include other interested stakeholders over the life of the project. These would include those who are affected or potentially affected by the site, or who have expressed an interest in the investigation, remediation, and/or redevelopment of the site. The site contact list should be updated regularly as additional stakeholders are identified.

View resources on the DER web site about developing a site contact list at: [\[this link is not yet active\]](#)

**2. Document Repository.** The Requestor must identify in its BCP Application the location of a document repository for the project. The repository should be located in a publicly accessible building near the brownfield site, and should be convenient to the affected/interested

**Gilberti Stinziano Heintz & Smith, P.C.**  
**ATTORNEYS AND COUNSELORS AT LAW**

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Writer's Direct E-mail: [wjg@gilbertilaw.com](mailto:wjg@gilbertilaw.com)

June 1, 2009

*Via Federal Express – Standard Overnight  
and E-mail ([karen.kaufmann@oag.state.ny.us](mailto:karen.kaufmann@oag.state.ny.us))*

Karen R. Kaufmann, Esq.  
Assistant Attorney General  
State of New York  
Environmental Protection Bureau  
The Capital  
Albany, New York 12224

Re: Brownfield Site Cleanup – Site No: C73410; *Destiny USA Development, LLC et al. v. New York State Department of Environmental Conservation et al.*  
Index No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)

Dear Ms. Kaufmann:

We are in receipt of your letter dated May 18, 2009. It is apparent through our exchange of correspondence that we are not coming any closer to an understanding with respect to the items you have raised. I am therefore attaching a copy of my prior letter, which unquestionably thoroughly and comprehensively answers these questions.

I do not know how to say it any more clearly. The automatic stay your client is standing behind has been interpreted by the courts of this State as staying the enforcement of the underlying Decision and Order and not its effect. Whether or not you choose to agree with that is of no moment because that is the settled law. In short, while you are correct that we cannot force DEC to carry out its obligations as required by the legislature under the Brownfield statute, we have every right as a Brownfield participant pursuant to the Decision and Order (the effect of which is not stayed, once again) to go forward under the statute to do what we are doing.

We take great umbrage at your charge that our client has misrepresented anything to the public, to the media or to state agencies. All of its actions have been documented with extreme care, and have been made public pursuant to statutes enacted for the very purpose of public scrutiny. Indeed, to the contrary, DEC's lack of participation and its appeal of Justice Cherundolo's Decision and Order are part of this Brownfield record. In addition, we will be happy to make this exchange of correspondence, including your prior letter and our letters, part

Karen R. Kaufmann, Esq.  
State of New York  
June 1, 2009  
Page 2

of the public record going forward and will place them in the public depository along with the last Fact Sheet.

Moreover, it is unfortunate that DEC, the agency charged with the responsibility of working with the citizens of this State in the clean-up of contaminated properties, has ordered my client to cease such activities and has demanded a repudiation of prior environmental remediation activities on the site, when those very activities were conducted openly and under the watchful eye of the public and constituent agencies. Would DEC have preferred that the site remain contaminated?

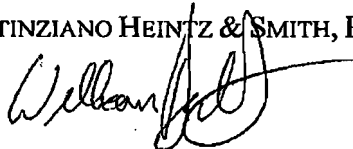
My client stands ready to work with this Department toward the protection of the environment and bringing about a resolution of this matter that is reasonable and in the best interests of the citizens of New York State. Any solution that results in killing this critical public improvement project is per se irrational and detrimental to the welfare of the State. It is quite apparent that we need to bring the light of day to our exchange, which will also be consistent with your desire to ensure that there is a full understanding that DEC is not participating in the remediation of the site by reason of the stay.

Therefore, we will make ourselves available for a meeting anytime this week that includes representatives of DEC, our client, City of Syracuse, County of Onondaga, and, if you wish, the representative interests on the contact list at a neutral location in the City of Syracuse. This will ensure that all concerned understand your position as well as ours, and hopefully will bring about civil discourse toward resolution of these issues. I am certain that such a meeting will produce far greater results than the conference call only among counsel that you suggested.

Please let me know convenient dates and times for such a meeting. If you like, we will make all the necessary arrangements.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.



William J. Gilberti, Jr.

WJG/psn  
Enclosure

**Gilberti Stinziano Heintz & Smith, P.C.**  
**ATTORNEYS AND COUNSELORS AT LAW**

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Writer's Direct E-mail: wjg@gilbertilaw.com

April 30, 2009

*Via E-mail and Federal Express – Standard Overnight*

Maureen Leary, Esq.  
Assistant General Counsel  
NYS Attorney General's Office  
The Capitol  
Albany, New York 12224

Karen R. Kaufmann, Esq.  
Assistant Attorney General  
State of New York  
Environmental Protection Bureau  
The Capitol  
Albany, New York 12224

Re: **Brownfield Site Cleanup – Site No.: C734104; Destiny USA Development, LLC  
et al v. New York State Department of Environmental Conservation et al., Index  
No. 08-1015, RJI No. 33-08-0458 (Onondaga Co.)**

Dear Ms. Leary and Ms. Kaufmann:

I am writing in response to the position taken by the New York State Department of Environmental Conservation ("the Department") with respect to the Fact Sheet, circulated under cover letter dated April 24, 2009, relative to the above-referenced matter. As articulated in phone calls yesterday (April 29<sup>th</sup>) afternoon between Maureen Leary of the Attorney General's Office and Greg Faucher of our office, the Department has asserted that the Fact Sheet creates the false impression that the Department has reviewed and approved the contents of the Fact Sheet, since it uses a Department-required and generated form. Mr. Faucher assured Ms. Leary that our client's intent in this instance, as always in this matter, was simply to comply with all statutes, regulations, lawful guidance documents and policies in pursuing our Brownfield cleanup for the Phase I site.

The Fact Sheet format used was required by DEC program policy. It's as simple as that. There was no intent to mislead, confuse or do anything of the sort. The Department's suggestion that there was fraudulent intent is, in fact, deeply troubling and emblematic of the unfortunate posture the Department has taken repeatedly and historically in this matter. A brief review of that history seems appropriate now, in light of this recent episode.

April 30, 2009  
Page 2

When Justice Cherundolo issued his Decision and Order in the Brownfield litigation on June 10, 2008 ("Decision"), he vacated the October 5, 2007 decision of the Department and ordered the entire project site of Destiny USA into the Brownfield Cleanup Program (BCP), *nunc pro tunc*, as of June 28, 2005. (As you certainly know, these aspects of the Decision are self-effectuating and unaffected by any automatic stay afforded to the State by virtue of the appeal. In other words, the stay does not nullify the Decision; it only stays the enforcement of the portions that are not self-effectuating.) Recognizing that and, at the same time, committed to redevelop its historically underutilized and contaminated property, my client immediately wrote to Commissioner Grannis, requesting that he sign the Brownfield Site Cleanup Agreement and enter into a cooperative working arrangement to avoid further loss and delay to this necessary public improvement project.

My client heard nothing in response to its initial request or to any of its subsequent requests to initiate a productive dialogue with the Department to proceed under the Decision pending the Department's decision to appeal. The Department was fully aware of the project's value to the State via job creation and sales tax generation, the time and financial constraints under which it operates, and the necessity of moving forward with construction and cleanup pending appeal.

But the Department was unwilling to negotiate. Our client offered to provide a solution that would "accommodate the interests of the Department as well as those of the Destiny Project. . . . An agreement could be designed that preserves all parties' rights in the current litigation, but nevertheless allows for the implementation of the effect of the underlying court decision and the continuation of this public improvement project in the BCP without further delay. Such an agreement could also allow for removal of the project from the BCP, or modification of the BCA, depending on the outcome of any appeal, without prejudice to either side." Still, the Department refused to write, talk, or meet with Destiny or its representatives.

My client therefore had no choice but to proceed under the Decision in full compliance with the requirements of the BCP and with full knowledge of, and notice to, the Department of every step along the way. The Department has had ample opportunity to participate in, comment upon, review, approve, modify and/or disapprove each and every action Destiny has taken in compliance with the Decision. Until now, the Department has remained entirely silent, and its stance has been an aggressive, litigious one when one might have assumed its interest would be a positive, environmental one, with the interests of the State and its citizens in mind. Of the myriad levels of government to endorse this project and understand its critical role in assuring the economic vitality of New York State, only the Department of Environmental Conservation has taken a position contrary to the project.

April 30, 2009  
Page 3

The Department's response to this latest event is entirely congruent with its approach to date. Perhaps it is not sheer coincidence that this first Departmental response comes a mere three weeks after the oral argument on the appeal. At that time, I informed the Fourth Department of the developments since the Decision after the Attorney General had opened this area in her argument by claiming that building on the site in the period between Judge Cherundolo's decision and the appeal had the effect of mooted the appeal.

Nonetheless, despite this history, we have no interest in crossing swords with the Department over the question of formatting. We are more than happy to substitute the enclosed Fact Sheet for the prior Fact Sheet. The two are identical except for the header. Contrary to the allegations you may be making by implication or otherwise, we do not acknowledge any legal error; neither are we in any way changing the date of filing and circulation of the Fact Sheet. By this act, we are merely accommodating your request to refrain from using the Department's required form Fact Sheet in our case.

As soon as you advise in writing that the substitution meets with your approval, we will make the substitution.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.



William J. Gilberti, Jr.

WJG/psn  
Enclosure



# **FACT SHEET**

## **Prepared and Submitted By Destiny USA Brownfield Cleanup Program – Phase I Site**

**Brownfield Cleanup  
Program- Phase I Site  
Destiny USA  
Syracuse, NY**

**April 2009**

### **Phase I Remedial Investigation Report Under Review; Report Recommends Cleanup of Brownfield Site Contamination**

An investigation has been completed for the real property shown on Figure 1 ("Phase I Site"), in connection with the first phase of the Destiny USA project located in the City of Syracuse, Onondaga County, New York, under New York's Brownfield Cleanup Program ("BCP"). This Phase I Remedial Investigation Report ("Phase I RIR") was submitted by Destiny USA Development, LLC ("Destiny" or "Applicant") under the BCP. This Phase I RIR applies to the Phase I Site, in connection with the first phase of the Destiny USA project located in Syracuse, New York (Figure 1). The first phase includes an 800,000+ square foot building expansion of the existing Carousel Center. The Phase I Site consists of the building expansion footprint for the first phase as shown on Figure 1. The Phase I Site is located within the overall boundaries of the Destiny Site ("Destiny Site"), as shown on Figure 2.

New York's BCP encourages the voluntary cleanup of contaminated properties known as "brownfields," so that they can be reused and redeveloped. These uses include recreation, housing and business. A brownfield is any real property where the presence or potential presence of contamination may complicate reuse or redevelopment.

The application proposes that the Destiny Site will be used as a unique development that will transform previously underutilized property into a major research, retail, entertainment, dining, hospitality, and tourism venue.

Destiny has submitted a Phase I RIR to the New York State Department of Environmental Conservation ("NYSDEC") that describes the results of the investigation of the Phase I Site and recommends action to address contamination.

NYSDEC is currently reviewing the Phase I RIR. The Phase I RIR is available at the document repository created for the Phase I Site; the address is provided below under "Location of Reports and Information – Document Repository."

### **Background**

The Destiny Site consists of approximately 152 acres at the southeast end of Onondaga Lake (Figure 1). The Destiny Site is bounded by: Onondaga Lake, Conrail tracks and Harborside Drive, to the northwest; Interstate 81 (I-81) to the north and northeast; Bear Street on the south and southeast; and the New York State Barge Canal to the south and southwest.

The Phase I Site is located in a former area of extensive natural shoreline and lowland deposits consisting of marl (a naturally occurring deposit of clay, calcium, carbonate, and shell fragments), and organic vegetation including roots, wood, and peat. Prior to modern-day development, the general area was known for its extensive salt marshes and spring deposits that were mined for the salt content.

In the early 1900s, the Solvay Process Company brought the "Solvay Process" for generating Soda Ash (Sodium Carbonate) to the United States from Germany. The Company settled in Syracuse and commenced operation in or about 1907. The Solvay Process generated large quantities of waste materials, including Calcium Carbonate, Calcium Oxide, and Calcium Chloride. These wastes are generally characterized as being white to grey, relatively soft, clayey or "tooth paste-like" material. Areas were needed for the disposal of such waste materials, thus available areas of unoccupied land at the Solvay plant and on vacant land located throughout the south end of Onondaga Lake were utilized for such disposal. These disposal areas included a large portion of the area between Onondaga Lake and West Hiawatha Boulevard (current Carousel Area), including the Phase I Site. Throughout the first half of the 1900s, additional miscellaneous fill, including more Solvay waste and, most likely, various construction and demolition debris (C&D) waste, was deposited on and in the vicinity of the Phase I Site. Similar activities, excluding the additional deposition of Solvay wastes, continued from the 1930s to the 1980s. A portion of the former Marley Property was reportedly (Haley & Aldridge, 2002) used as a salvage yard for scrap metal. The salvage yard on the former Marley Property, which overlaps the Phase I Site, operated from the late 1930s up to the construction of the Carousel Center (Dunn, 1988).

From the 1940s to the 1980s, a five acre parcel of land at the south-central end of the Marley Property, known as the Clark (Clark Concrete Co.) Property, was used as a concrete batch plant for local construction projects. A DOT field station was also formerly located on this property. The Former Clark property is immediately adjacent to the Phase I Site. In or about 1987, the Clark Property was found to be contaminated with chlorinated and non-chlorinated hydrocarbons, including solvents. As a result, the Clark Property was listed on NYSDEC's Registry of Inactive Hazardous Waste Disposal Sites, as a Class 2 Site (significant threat to the public health or environment-action required) in April of 1989.

Major oil storage facilities were located on and immediately south of the Phase I Site. These facilities were owned by Amerada Hess and Buckeye Petroleum. These facilities were part of a large petroleum storage complex at the south end of Onondaga Lake known as Oil City.

A more complete site history, as well as results of environmental studies of the Phase I Site, were provided in the Phase I RIWP and are also included in the Phase I RIR, which are available for public review.

### **Highlights of the Phase I Remedial Investigation Report**

The remedial investigation of the Phase I Site has several goals:

- 1) Describe the investigation activities completed;
- 2) Describe the nature and extent of contamination at the Phase I Site;
- 3) Provide information about off-site contamination issues, and
- 4) Recommend whether the Applicant believes that cleanup of contamination associated with the Phase I Site is required.

The following investigative activities were performed:

- Investigation of soil conditions at the Phase I Site through the installation of 20 soil borings;
- Investigation of groundwater conditions upgradient of the Phase I Site through the installation of two monitoring wells and sampling of one existing monitoring well to evaluate previously detected ground water contamination; and

- Investigation of soil vapor at the Phase I Site through the installation of six soil vapor points to evaluate soil vapors up-gradient to the Phase I Site building footprint.

#### Phase I Remedial Investigation findings and recommendations:

- **Soil** - Soil investigation activities confirmed existing and anticipated contamination on the Phase I Site associated with the historic activities. Contamination was confirmed in the surface and subsurface soils in several samples on the Phase I Site. Contaminants in soils include metals, volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs) and polychlorinated biphenyls (PCBs) at concentrations exceeding the regulatory standards. Based on the historical and Phase I Remedial Investigation ("Phase I RI") analytical test results it is recommended that, during construction activities, all soils must be characterized to identify material handling requirements and for material reuse, handling and/or waste disposal requirements and be managed in accordance with federal, state and local regulations.
- **Groundwater** - Groundwater investigation activities confirmed existing and anticipated contamination on the Phase I Site associated with the historic activities. Contamination was confirmed in groundwater from two monitoring wells on the Phase I Site and one monitoring well down gradient of the Phase I Site. Contaminants in groundwater include metals, VOCs, and SVOCs at concentrations exceeding the regulatory standards. Based on the Phase I RI groundwater analytical test results it was recommended that any groundwater handled during construction activities, (e.g. during dewatering activities), should be handled as being impacted with petroleum and metals. Accordingly, groundwater will require disposal in accordance with federal, state and local regulations. The existing Amerada Hess groundwater collection system should be maintained and operated in accordance with applicable federal, state and local regulations to control and treat groundwater that leaves the Phase I Site.
- **Soil Vapor** - Soil vapor investigation activities confirmed volatile organic compounds, including trichloroethene (TCE), at concentrations exceeding background values published by the New York State Department of Health. Based on these soil vapor results, the following recommendations were made: continue implementation of the Community Air Monitoring Plan during Remedial Activities and any future soil disturbances, take precautionary mitigation measures to control exposure to soil vapors, and design and install a vapor barrier and vapor extraction system prior to building slab construction to control potential vapor intrusion into the site building.
- A Phase I Remedial Work Plan ("Phase I RWP"), including an alternatives analysis, should be prepared to address the general recommendations provided above. The Phase I RWP shall also consider the proposed future use for the property and specific site development and construction plans.

#### Next Steps

NYSDEC will have the opportunity to review and approve and make any necessary revisions to the Phase I RIR. The final Phase I RIR will be placed in the document repository (See below for location). The Applicant may then develop a Remedial Work Plan, officially called a "Phase I Remedial Work Plan". This plan describe how the Applicant would address the contamination related to the Site. When the Applicant submits a draft Phase I RWP for approval, the availability of the draft plan for public review will be announced.

The public will be kept informed throughout the process.

#### FOR MORE INFORMATION

### **Location of Reports and Information - Document Repository**

A Document repository has been established to help the public to review important project documents. These documents include, to date, the application to participate in the BCP accepted by NYSDEC, the Phase I Citizen Participation Plan, the Phase I Remedial Investigation Work Plan, and the Phase I Remedial Investigation Report.

Robert P. Kinchen Central Library  
The Galleries of Syracuse  
447 South Salina Street  
Syracuse, New York 13204-2494  
Telephone: (315) 435-1900  
Email: [reference@onlib.org](mailto:reference@onlib.org)

### **Who to Contact**

Comments and questions are always welcome and should be directed as follows:

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Supervising Project Manager  
Environmental Remediation  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7012

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

For more information about NYSDEC's brownfield program, visit:  
<http://www.dec.ny.gov/chemical/brownfields.html>.

If you know someone who would like to be added to the project mailing list, have them contact the NYSDEC project manager above. We encourage you to share this fact sheet with neighbors and tenants, and/or post this fact sheet in a prominent area of your building for others to see.

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**647**

**CA 08-01855**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ.

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IN THE MATTER OF DESTINY USA DEVELOPMENT, LLC  
AND PYRAMID COMPANY OF ONONDAGA,  
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION AND ALEXANDER B. GRANNIS, AS  
COMMISSIONER OF NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION,  
RESPONDENTS-APPELLANTS.

---

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KAREN R. KAUFMANN OF  
COUNSEL), FOR RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (WILLIAM J.  
GILBERTI, JR., OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Onondaga County (John C. Cherundolo, A.J.), entered June 10, 2008 in a  
proceeding pursuant to CPLR article 78. The judgment granted the  
petition.

It is hereby ORDERED that the judgment so appealed from is  
unanimously modified on the law by vacating that part of the third  
decretal paragraph declaring null and void the "guidance" and "guide  
factors" issued pursuant to ECL 3-0301 (2) (z) and by vacating the  
fourth decretal paragraph and as modified the judgment is affirmed  
without costs.

Memorandum: Petitioners commenced this CPLR article 78  
proceeding seeking, inter alia, to annul that part of the  
determination of respondent New York State Department of Environmental  
Conservation (DEC) denying the application of petitioner Destiny USA  
Development, LLC (Destiny) for inclusion of certain parcels of  
property in the Brownfield Cleanup Program ([BCP]; see generally ECL  
art 27, tit 14). The DEC and its Commissioner appeal from a judgment  
that, inter alia, annulled the determination of the DEC, "declared"  
that its promulgated "guidance" and "guide factors" were null and void  
and that its refusal to include the parcels in the BCP violated the  
equal protection clauses of the state and federal constitutions, and  
ordered the DEC to include the "entire project site of DestiNY USA,  
including all of the 'Carousel Parcels' and all of the 'Oil City  
Parcels' in the BCP" (*Destiny USA Dev., LLC v New York State Dept. of*

*Envtl. Conservation*, 19 Misc 3d 1144[A], 2008 NY Slip Op 51161[U], \*28). We note at the outset that, because this is properly a CPLR article 78 proceeding, Supreme Court erred in making a declaration (see generally *Matter of Barker Cent. School Dist. v Niagara County Indus. Dev. Agency*, \_\_\_ AD3d \_\_\_ [May 1, 2009]).

Contrary to the contention of respondents (hereafter, DEC), the court properly granted the petition. Destiny applied to have 17 parcels located in a formerly industrial area of the Syracuse waterfront admitted into the BCP as a part of its development of an international resort and tourism destination known as DestiNY USA (hereafter, Project). The DEC admitted only six of those parcels into the BCP. Two of the rejected parcels are occupied by the already existent Carousel Center (Carousel parcels), which Destiny intends to redevelop as part of the Project. Located on a third rejected parcel, known as the Clark Containment Cell (Clark parcel), is an engineered containment structure containing hazardous waste soils. The remaining eight rejected parcels are in that part of Syracuse referred to as "Oil City," by virtue of the former petroleum bulk storage and industrial use of that parcel. Oil City has an established history of contamination.

We note at the outset the well-established principle that, "where . . . the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363; see *Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Env'tl. Conservation*, 61 AD3d 88, 93). "Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459). Indeed, agency determinations that conflict with the clear wording of a statute are entitled to little or no weight (see *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 103; *Kurcsics*, 49 NY2d at 459).

The DEC acknowledged that there was contamination at each of the rejected parcels, but it nevertheless determined that those parcels failed to meet the definition of a brownfield site and thus were ineligible for participation in the BCP. The term brownfield site, "with certain exceptions not relevant herein, is defined as 'any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant' " (*Lighthouse Pointe Prop. Assoc. LLC*, 61 AD3d at 90, quoting ECL 27-1405 [2]). The record establishes that the determination of the DEC with respect to those parcels was based upon its own interpretation of the relevant BCP statutes as well as the application of its own internal "guidance" and "guide factors," rather than on a factual determination within the expertise of the DEC. We thus conclude that the determination of the DEC with respect to those parcels is not entitled to our deference (see *Flacke*, 69 NY2d at 363; *Kurcsics*, 49 NY2d at 459; cf. *Lighthouse Pointe Prop. Assoc. LLC*, 61 AD3d at 93-94).

Contrary to the further contention of the DEC, the court properly determined that its refusal to include in the BCP the portion of the Carousel parcels outside of the existing mall structure was arbitrary and capricious. "[A]n agency, by law, is not allowed to 'legislate' by adding 'guidance requirements' not expressly authorized by statute" (*Matter of HLP Props., LLC v New York State Dept. of Envtl. Conservation*, 21 Misc 3d 658, 669; see *Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 866). As noted, the term brownfield site is defined in ECL 27-1405 (2) as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" (emphasis added). The DEC did not address in its determination any of the specified complications to redevelopment that Destiny asserted would result from contaminants in the subject parcels. Instead, the DEC relied upon its self-promulgated "guidance" and "guide factors" that require, inter alia, consideration of whether a parcel is "idled, abandoned or underutilized" and a comparison of the estimated remediation cost "to the anticipated value of the proposed site as redeveloped or reused." Those factors effectively limit inclusion in the BCP to parcels of real property that, but for BCP participation, would remain undeveloped. We conclude that the application of such a categorical limitation without a fact-specific analysis contravenes the broadly worded definition of brownfield site set forth in ECL 27-1405 (2), which requires that redevelopment only potentially be "complicated" by the presence of contamination (see *HLP Props., LLC*, 21 Misc 3d at 668-670). Similarly, the DEC's reliance on the comparative cost of remediation to the total project cost was unwarranted, inasmuch as the Legislature has addressed that issue in Tax Law sections that are applied after the completion of remediation, not before acceptance into the BCP (see Tax Law §§ 21 - 23; *HLP Props., LLC*, 21 Misc 3d at 671). Thus, the categorical application by the DEC of its "guidance" and "guide factors" as a precondition to admission into the BCP both conflicts with the intent of the Legislature and constitutes an impermissible attempt to legislate (see *HLP Props., LLC*, 21 Misc 3d at 668-670; see also *Matter of East Riv. Realty Co., LLC v New York State Dept. of Envtl. Conservation*, 22 Misc 3d 404, 422; see generally *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 594).

Although we conclude that the categorical application by the DEC of certain "guidance" and "guide factors" as preconditions to admission into the BCP has rendered its determination arbitrary and capricious, we nevertheless agree with the DEC that the court erred in "declaring" those factors null and void. "[B]y their own terms [the 'guidance' and 'guide factors'] are explanatory and advisory, to be followed 'under appropriate conditions' " (*Matter of Sheehan v Ambach*, 136 AD2d 25, 29, lv denied 72 NY2d 804), and thus they are appropriate inasmuch as they facially "do not represent 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers' " (*id.* at 29, quoting *Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 66 NY2d 948, 951). We therefore modify the judgment accordingly.

We reject the DEC's contention that the issue of the inclusion of the Carousel parcels in the BCP is moot inasmuch as Destiny has commenced redevelopment and remediation with respect to those parcels. A 2005 Stipulation Agreement between the DEC and Destiny (Stipulation) not only ensures that any remediation activities undertaken by Destiny are in compliance with the BCP standards, but it also expressly provides that "[n]either entering into the Stipulation *nor implementation of any work pursuant to the Stipulation* will adversely affect DestiNY's (or an affiliate's) eligibility or the eligibility of the Site as a brownfield site pursuant to the BCP" (*cf.* 377 Greenwich LLC v New York State Dept. of Env'tl. Conservation, 14 Misc 3d 417, 425-426; see generally ECL 27-1409).

Contrary to the DEC's further contention, the eight parcels located in the "Oil City" area of the project site were not subject to statutory exclusions. We note that the DEC set forth in its determination that those parcels were ineligible for BCP participation because they were "subject to . . . on-going state or federal enforcement action related to the contamination which is at or emanating from the site subject to the present application" (ECL 27-1405 [2] [e]), and that the DEC has since abandoned any reliance on paragraph (e) of that statutory subdivision.

In opposition to the petition, however, the DEC also relied upon a different paragraph of that statutory subdivision, i.e., ECL 27-1405 (2) (d), in support of its contention that the eight parcels located in the "Oil City" area of the project site are subject to statutory exclusions. We conclude that the DEC's reliance thereon is misplaced. Pursuant to paragraph (d) of ECL 27-1405 (2), property "subject to an order for cleanup pursuant to article twelve of the navigation law or pursuant to title ten of article seventeen of this chapter [are excluded from the definition of a brownfield site,] except such property shall not be deemed ineligible if it is subject to a stipulation agreement." Here, the record establishes that the DEC had previously entered into what were denominated Orders on Consent with several petroleum companies with respect to the eight Oil City parcels, and the DEC conceded at oral argument before Supreme Court that two of those parcels were no longer subject to the Orders on Consent. Even assuming, arguendo, that the Orders on Consent with respect to the remaining six parcels were "order[s] for cleanup" within the meaning of ECL 27-1405 (2) (d), we conclude that those parcels were included in the Stipulation, which by its own terms is a "stipulation agreement within the meaning of" ECL 27-1405 (2) (d). Thus, the Orders on Consent were superseded by the Stipulation. Further, in the cover letter to the Stipulation, the DEC expressly stated that the Stipulation would "govern the remediation of the Site during its term" and would not "adversely affect DestiNY's (or an affiliate's) eligibility or the eligibility of the Site as a brownfield site pursuant to the BCP."

We further reject the DEC's contention that the Clark parcel was "subject to . . . on-going state or federal environmental enforcement action related to the contamination," and thus that it was properly excluded under ECL 27-1405 (2) (e). The Clark parcel was subject to



voluntary remediation agreements in the form of two "Agreements and Determinations" between the DEC and Destiny's predecessor in interest. Contrary to the DEC's contention, those voluntary agreements are not "enforcement actions" within the meaning of the BCP but, rather, they serve to obviate the need for the DEC to achieve remediation goals through litigation. Indeed, the two agreements expressly reserve to the DEC the right to commence an action if necessary.

We agree with the DEC, however, that the court erred in "declaring" that its determination was null and void on constitutional grounds inasmuch as we agree with the court that the DEC's determination was arbitrary and capricious, apart from any constitutional issues. "It is fundamental that a court should not decide a constitutional issue except where it is unavoidable, and should not decide a case on constitutional grounds where the decision may be based on alternative, nonconstitutional grounds" (*Ajay Glass & Mirror Co. v County of Erie*, 155 AD2d 988, 988-989; see *Rescue Army v Municipal Court of City of Los Angeles*, 331 US 549, 569; see also *Matter of Vogel v Blackwell*, 225 AD2d 1091, 1092). We therefore further modify the judgment accordingly.

Finally, we reject the contention of the DEC that the court erred in directing it to grant the application in its entirety. A judgment in a CPLR article 78 proceeding may "annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent" (CPLR 7806), and the record here was sufficiently developed for the court to direct the DEC as it did (see *Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 10 NY3d 846).

## **CONTACT LIST INFORMATION**

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Site Owners/Residents/Lessees:

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Clinton Exchange  
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Syracuse Industrial Development Agency  
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New York State Canal Corporation  
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Carmella R. Mantello, Director  
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Adjacent Property Owners:

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Telephone Unknown

Destiny Land Use Co. LLC  
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NY Central Lines LLC  
500 Water St. J910  
Jacksonville, FL 32202  
Telephone Unknown

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(732) 750-6000

People of the State of New York  
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Buckeye Pipe Line Company, LP  
P.O. Box 368  
5002 Buckeye Road  
Emmaus, PA 18049-5347  
(484) 232-4000

Belcher Co. of NY Inc.  
P.O. Box 4372  
Houston, TX 77210  
Telephone Unknown

Public water supplier:

Michael J. Ryan, P.E., Commissioner  
City of Syracuse Water Department  
101 North Beech Street  
Syracuse, New York 13210  
Telephone: (315) 473-2609

Local news media:

The Post Standard  
Clinton Square  
P.O. Box 4915  
Syracuse, New York 13221-4915  
Telephone: (315) 470-0011

WSTM/WSTQ - NBC 3  
1030 James Street  
Syracuse, New York 13203  
Telephone: (315) 477-9400

WTVH – CBS 5  
980 James Street  
Syracuse, New York 13203  
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WSYR Channel 9  
5904 Bridge Street  
East Syracuse, New York 13057  
Telephone: (315) 446-9999  
Newsroom: (315) 446-3333

News 10 Now  
815 Erie Boulevard East  
Syracuse, New York 13210  
Telephone: (315) 234-0640

WSYT Fox 68  
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WAQX – FM – 95X

WLTI – FM – LITE ROCK 105.9

WNTQ – 93Q

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No Person Has Requested to be Placed on the Contact List

There is no School or Daycare Facility Located on or Near the Site

A document repository for the project is located at:

Robert P. Kinchen Central Library

The Galleries of Syracuse

447 South Salina Street

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