STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of

UNIVERSAL WASTE, INC.,
UTICA ALLOYS, INC.
and
CLEARVIEW ACRES, LTD.

DECLARATORY RULING
DEC 27-28

for a Declaratory Ruling

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INTRODUCTION

On September 4, 1993, the New York State Department of Environmental Conservation ("Department") Office of Hearings referred this matter, pursuant to State Administrative Procedure Act §204 and 6 NYCRR Part 619, to me for a Declaratory Ruling. The sole issue referred is whether Department staff have the authority to conduct a State-financed Remedial Investigation/Feasibility Study (RI/FS) at the Universal Waste/Utica Alloys/Clearwater Acres site (Site) located in Utica, New York. The owners and operators of the Site (PRPs), through their attorney, Michael Gerrard, have objected to the referral.

BACKGROUND

The Site is listed in the Department's Registry of Inactive Hazardous Waste Disposal Sites as a Class 2 site; that is, a site at which hazardous waste constitutes a significant threat to the environment. ECL §27-1305(4)(b)(2); 6 NYCRR 375-1.8(a)(2)(ii). On March 4, 1986, Department staff commenced an administrative proceeding, pursuant to ECL §27-1313, to compel the PRPs to develop and implement a remedial program for the Site. By decision dated April 10, 1986, the Administrative Law Judge ruled that hazardous wastes exist at the Site but that the questions of whether the Site is an inactive hazardous waste disposal site and whether it presents a significant threat to the environment require further adjudication. Later and during the course of that proceeding which remains pending, Department staff provided notice to the PRPs that, because of the PRPs' refusal to undertake a proper investigation and remediation of the Site, staff intended to conduct a State-funded RI/FS which would determine the extent of contamination and identify the best possible remediation options. In light of staff's proposed course of action, staff made a Motion to Dismiss the administrative proceeding, without prejudice, or, in the alternative, to suspend the proceeding pending completion of the RI/FS. The PRPs cross-moved to prohibit the performance of the

RI/FS. The Administrative Law Judge denied PRPs' cross-motion, and they appealed the decision to the Commissioner. By letter to Michael Gerrard, dated September 3, 1992, Assistant Commissioner Robert Feller stated:

> The Commissioner agrees that the issue should be reviewed but does not believe that it is appropriate to do so within the context of the adjudicatory hearing. Instead, the matter will be referred to the Department's General Counsel and will be considered as a request for a declaratory ruling.

Subsequent to that referral, there has been an exchange of correspondence between Mr. Gerrard and Department staff, and I take official notice of that correspondence. As a result of that correspondence, staff have agreed that a "supplemental investigation of both the Universal Waste Site as well as off-site sewers, groundwater and surface water, rather than an RI/FS is called for under the current circumstances." Letter from Jeffrey T. Lacey to Michael B. Gerrard, dated November 29, 1993 (emphasis added). Given that staff are no longer seeking to conduct an RI/FS, but only a supplemental on-site investigation, the issue whether staff have the authority to conduct a State-funded RI/FS has been partially mooted; it is, therefore, not necessary to rule on that broad issue. See Gibson Chemical and Oil Corp. v. State of New York, et al., Index No. 89-22369 (Sup. Ct., Suffolk Cty, 1990). The issue remaining is whether staff have the authority to conduct a State-funded supplemental investigation. This Ruling will address that limited issue.

ANALYSIS

Authority to conduct investigations of suspected hazardous waste sites is conferred by ECL §27-1305(4), which provides:

> a. The department shall conduct investigations of the sites listed in the registry and shall investigate areas or sites which it has reason to believe should be included in the registry. The purpose of these investigations shall be to develop the information required by subdivisions two and three of this section to be included in the annual report by the department.
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> b. The department shall, as part of the registry, assess and, based upon new information received, reassess by March thirty-first of each year, in cooperation with the department of health, the relative need for action at each site to remedy environmental and health problems resulting from the presence of hazardous wastes at such sites....

ECL §27-1309(3) further provides that:

> Any duly designated officer or employee of the department, or of any state agency, and any agent, consultant, contractor or other person so authorized in writing by the commissioner, may enter any inactive hazardous waste disposal site and areas near such site and inspect and [subject to the limitation of ECL §27-1309(4)] take samples of wastes, soils, air, surface water and groundwater. In order to take such samples, the department may utilize or cause to be utilized such sampling methods as it determines to be necessary including, but not limited to, soil borings and monitoring wells.

In construing the extent of the authority conferred on the Department by the statute, the court, in In re Kohilakis v. New York State Department of Environmental Conservation, mem., 171 A.D.2d 870, at 871, 567 N.Y.S.2d 796, at 796 (2nd Dep't, 1991), stated that:

> [T]he New York State Department of Environmental Conservation ... possesses broad powers to enter any inactive hazardous waste disposal site and inspect and take samples of waste, soils, air, surface water and ground water (see, ECL 27-1305[4][a]; 27-1309[3]...).

Likewise, the court, in New York State Department of Environmental Conservation v. Damico, mem., 130 A.D.2d 974, at 974, 516 N.Y.S.2d 153, at 154 (4th Dep't, 1987), held that:

> The DEC is authorized by law to inspect, investigate and take samples to enable it to classify each [inactive hazardous waste] site according to its relative priority... (see, ECL 27-1305[4][a], [b][1]-[5]; 27-1309[3], [4]).

While those cases did not specifically address the Department's authority to conduct a supplemental investigation, they place no limitations on that authority. Moreover, the duty to ensure the proper classification of a site clearly implies the authority to perform such investigations as are necessary to make that classification. Finally, it is clear such investigations may properly be made from time to time as the necessity arises; the Department is not restricted to a single investigation after which further investigation is precluded. That this is so may be inferred from two separate requirements of ECL § 27-1305(4): first, the purpose of the investigations is to develop information required by ECL §27-1305(2)(3), one of which requirements is that the Registry shall be kept up-to-date; and second, the relative

need for action must be reassessed annually. It is self-evident that even the most thorough investigation may not contain the information needed years afterward to discharge the duty to keep the Registry current and to adjust priorities to suit current circumstances.

Given that a supplemental investigation may be conducted, it is unquestionable that, under ECL §27-1309(5), it may be paid for in the first instance with public monies, subject to the State's right of cost-recovery in due course. ECL §27-1309(5) provides:

> The expense of any such sampling and analysis shall be paid by the department, but may be recovered from any responsible person in any action or proceeding brought pursuant to this title or common law.

The recoverability of such investigative expenses is well-established. See State of New York v. Schenectady Chemicals, Inc., 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3rd Dep't, 1984), see also State of New York v. General Electric Co., mem., 103 A.D.2d 985, 479 N.Y.S.2d 1008 (3rd Dep't, 1984).

The initial State funding source for investigative actions is identified by ECL §27-1313(7) as follows:

> Moneys for actions taken or to be taken by the department ... in connection ... with the elimination of a significant threat to the environment pursuant to this section shall be payable directly to such [agency] from the hazardous waste remedial fund pursuant to section ninety-seven-b of the state finance law. This includes any inspection or sampling of wastes, soils, air, surface water and groundwater done on behalf of a state agency whether or not such action is taken prior to the issuance of ... a finding pursuant to subdivision three of this [section] and any administrative expenses related thereto.

SFL §97-b(3), in turn, provides:

> Moneys of the hazardous waste remedial fund except monies in the industry fee transfer account, when allocated, shall be available to the department of environmental conservation for the following purposes:
> ...
> (c) inactive hazardous waste site identification, classification and investigation actions including testing, analyses, record searches ....

CONCLUSION

In view of the foregoing analysis, I rule that Department staff have the authority to conduct a State-funded supplemental investigation at the site.

Dated: Albany, New York
February 11, 1994

Marc S. Gerstman