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December 3, 2007

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**Re:** Rochester Technology Park; Voluntary Cleanup Agreement  
Dispute Resolution (Index No. B8-0612-02-05)

Dear Ms. McCreary and Messrs. Picciotti and Hausbeck:

I am in receipt of the "Report and Recommendation" ("Report") of Administrative Law Judge ("ALJ") Richard A. Sherman concerning the referenced matter. The Report, a copy of which is enclosed, addresses the request ("Request") of Continental Industrial Capital, LLC ("CIC"), dated July 23, 2007, for formal dispute resolution under the provisions of the referenced Voluntary Cleanup Agreement ("VCA").

The ALJ recommends that I determine that (i) CIC, the volunteer under the VCA, is obligated to undertake additional investigative activities at Building 4 of the Rochester Technology Park to define the source and extent of soil vapor entering the building; and (ii) the New York State Department of Health's *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* and the Department's *DER-13/Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York* provide applicable guidance for developing the investigative and remedial activities necessary to address soil vapor intrusion at Building 4.

I have considered the Report, the Request, Department staff's statement of position and CIC's response to staff's position, as well as the various attachments to these submissions. Based upon my review of the record and for the reasons stated in the Report, I adopt the Report's recommendations.

This letter represents the final decision of the Department of Environmental Conservation in this matter.

Sincerely,

/s/

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Dale A. Desnoyers  
Director, Division of  
Environmental Remediation

Enclosure

cc: Louis A. Alexander, Assistant Commissioner  
James T. McClymonds, Chief Administrative Law Judge

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Implementation of  
the Voluntary Cleanup Agreement for  
Rochester Technology Park

**REPORT AND  
RECOMMENDATION**

- by -

DEC Index No.  
B8-0612-02-05

**CONTINENTAL INDUSTRIAL CAPITAL, LLC,**

Volunteer.

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Appearances:

- Alison H. Crocker, Esq., Deputy Commissioner and General Counsel (Joseph J. Hausbeck, Esq., Senior Attorney, of counsel), for the Department of Environmental Conservation
- Harris Beach PLLC (Joseph D. Picciotti, Esq., of counsel), for volunteer Continental Industrial Capital, LLC
- Nixon Peabody, LLP (Jean H. McCreary, Esq., of counsel), for Eastman Kodak Company

BACKGROUND AND PROCEEDINGS

Continental Industrial Capital, LLC ("CIC" or "volunteer") entered into a Voluntary Cleanup Agreement ("VCA") with the Department of Environmental Conservation ("Department"), effective September 7, 2003. The VCA was executed in order to address pre-existing contamination at the Rochester Technology Park ("Tech Park") under the Department's now dormant voluntary cleanup program. The VCA provides a framework for remedial activities to be undertaken at the Tech Park, which CIC purchased from the Eastman Kodak Company ("Kodak") in 2000.<sup>1</sup>

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<sup>1</sup> CIC recently advised Department staff that it sold the Tech Park to The Tryad Group in August, 2007. Subparagraph XIV.J of the VCA, states that CIC, "[its] grantees, lessees, sublessees, successors and assigns shall be bound by [the VCA]. Any change in ownership of [CIC] including, but not limited to, any transfer of assets or real or personal property, shall in no way alter [CIC's] responsibilities under the [VCA]."

The stated purpose of the VCA is to establish a process through which CIC will implement, with Department approval, activities to address environmental contamination within defined areas of the Tech Park. One of the areas within the Tech Park to be addressed is designated as "Building 4." In 2005, a dispute arose between the parties relating to the need for and extent of investigative and remedial activities required to address soil vapor intrusion at Building 4 as well as the appropriate remedial standards to be applied. Negotiations ensued, but the parties were unable to resolve their differences.

Under cover letter dated July 23, 2007, Kodak filed a request ("Request"), on behalf of CIC,<sup>2</sup> for formal dispute resolution in accordance with the terms of subparagraphs XIII.A and XIII.B of the VCA. Subsequent to the filing of the Request, Department staff, Kodak and CIC recommenced negotiations to determine whether the dispute could be settled without resort to formal dispute resolution. Those negotiations failed to resolve the matter and, in accordance with subparagraph XIII.B.2 of the VCA, Department staff filed a "Statement of Position," under cover letter dated August 29, 2007. Although not provided for under the VCA, Kodak also filed a response ("Response"), dated September 13, 2007, to the Statement of Position. Staff did not object to the filing of the Response and it will be considered in the discussion herein.

#### Summary of CIC/Kodak Position

The Request states that "[i]t is Kodak and CIC's position that the increased scope of work [sought by Department staff] for Building 4 is not warranted on the basis that (a) the Contemplated Use for Building 4 is for industrial or commercial usage as provided in the [VCA]; (b) prior sampling results show that the risk is within acceptable thresholds for an industrial or commercial workplace and otherwise poses no unacceptable risk; and (c) the residential standard contained in the guidance being applied by the Department is not a duly promulgated regulation" (Request, at 1).

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<sup>2</sup> Included with the Request was a letter, also dated July 23, 2007, wherein CIC requested that Kodak prepare the Request and any necessary subsequent submissions, subject to CIC review and approval. Accordingly, documents referenced herein that were submitted by Kodak are also attributable to CIC.

In the Request, CIC and Kodak represent that Building 4 is partially vacant and that the portion of the building that is in use is predominantly used for industrial purposes with associated office space. The Request emphasizes that, under the provisions of the VCA, the contemplated use of Building 4 is restricted to "industrial or commercial" and, therefore, it should be deemed a workplace setting.

With regard to soil vapor, Kodak asserts in the Request that sufficient testing has already been done and that concentrations of volatile organic compounds ("VOCs") in the indoor air samples are below applicable Permissible Exposure Limits ("PELs") as established by the Federal Occupational Safety and Health Administration ("OSHA"). Specifically, the Request asserts that the PEL for the contaminant of concern here, trichloroethene ("TCE"), is approximately 685,000 micrograms per cubic meter ("mcg/m<sup>3</sup>") and the highest sample value for indoor air at Building 4 was 120 mcg/m<sup>3</sup>. Further, the Request states that an exposure assessment, done by a consultant on behalf of Kodak, determined that the current and foreseeable risk of adverse health effects to workers at Building 4 from exposure to soil vapor intrusion is within acceptable thresholds established by the United States Environmental Protection Agency ("EPA"). The Request states that appropriate mitigation measures should be limited to institutional controls (e.g., requiring DEC approval prior to activities that may disturb the slab) and signage to prevent employee exposure to contaminated soil and soil vapor at adverse levels.

The Request concludes by recommending that Building 4 be determined to be an industrial or commercial facility for which the OSHA PELs provide the applicable standards for indoor air. The Request also recommends that it be determined that no further delineation of subslab soil vapor or indoor air mitigation is warranted because the indoor air sampling results are so significantly below the PEL standards.

Subsequent to Department staff's filing of its Statement of Position (discussed infra), Kodak filed the Response, wherein it states that it does not concur with the Department's statement of the issue. The Response states that Kodak has been and remains willing to undertake additional investigative activities to define the source of indoor air impacts and the extent of subsurface soil vapor contamination. The Response states that the "sole issue [in dispute] is defining what is the applicable indoor air quality criterion to be applied in considering the remedial approach to take at the site" (Response, at 1).

### Summary of Department Staff Position

Department staff asserts that the issue to be resolved by this proceeding is "the Volunteer's refusal to undertake additional requested investigative activities associated with defining the source of indoor air impacts and nature and extent of soil vapor contamination" (Statement of Position, at 1). Staff states that the investigation is necessary to determine appropriate remedial actions needed to reduce exposure to potentially harmful soil vapor and remove the source of the subsurface contamination at Building 4.

Department staff assert that the guidance set forth in the New York State Department of Health, *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* ("DOH Guidance"), is applicable to the investigation and remediation of indoor air contamination at Building 4. Staff notes that the VCA expressly states that the activities undertaken by the volunteer "'shall be performed in accordance with the requirements of all applicable Federal and State laws, regulations, and guidance documents'" (Statement of Position, at 9 [quoting VCA, subparagraph XIV.K; emphasis supplied by staff]). Further, the DOH Guidance states that it should be followed in residential and non-residential settings where people may be exposed involuntarily to chemicals from soil vapor intrusion (id. at 7-8 [citing DOH Guidance, section 1.7.1]).

According to Department staff, the limited vapor intrusion sampling that was done at Building 4 in 2005 may not be indicative of conditions when the building is fully operational because it was vacant and unheated at the time of the sampling. Staff notes that air samples collected more recently from occupied areas of the building were comparable to 2005, though slightly higher, and that "there was absolutely no evidence of TCE being in use on site" (Statement of Position, at 2, 15). Even with the limited data available, staff maintains the data is sufficient to demonstrate that the subslab soil vapor and indoor air at Building 4 present a public health threat. Staff concludes by stating that the volunteer is obligated under the VCA to submit a work plan for additional investigation and, on the basis of that investigation, to mitigate and/or monitor soil vapor contamination (id. at 23). Further, staff states that the volunteer's refusal to undertake such action requires termination of the VCA (id.).

## DISCUSSION

Pursuant to subparagraph XIII.B.3 of the VCA, the volunteer has the burden of proving that Department staff's position "does not have a rational basis and should not prevail."

The Request and Response submitted by Kodak frame the dispute in somewhat different terms. The Request states that the dispute relates to whether the increased scope of work requested by Department staff for Building 4 is warranted given that the contemplated use of the building is industrial or commercial, sampling results show health risks to be within acceptable limits for such use and the residential standard advanced by staff for indoor air is only guidance, not a rule. The Response states that Kodak has been and remains willing to undertake additional investigative and remedial measures and, therefore, the "sole issue" is determining the applicable indoor air quality criterion to be applied when devising investigative and remedial plans.

Department staff frames the dispute differently than either the Request or the Response. Staff asserts that the dispute arises from CIC's refusal to undertake additional investigative activities to define the source of indoor air impacts at Building 4 and the nature and extent of soil vapor contamination.

While the dispute has been framed in various ways, it is clear that the volunteer and Department staff disagree with regard to the appropriate air quality objective to employ in devising investigative and remedial activities at Building 4. Kodak and CIC argue that the indoor air standards set forth under OSHA PELs should govern, while Department staff argues that it is appropriate to follow the DOH Guidance in determining appropriate investigative and remedial actions. As stated in the Response, "[u]ntil the issue of what standard is to be the objective of any remedial system is resolved, Kodak cannot propose to implement one" (Response, at 2). Accordingly, this report will focus on the dispute between the parties over the proper objective for indoor air quality at Building 4.

The VCA is an agreement between the volunteer and the Department and, unless the VCA is silent or ambiguous on an issue in dispute, the express terms of the VCA are controlling. Paragraph IV provides that the "[VCA] shall be enforceable as a contractual agreement under the laws of the State of New York." As the Court of Appeals recently held, "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence

of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]).

The stated purpose of the VCA is "to set forth a process through which the Department will approve and the Volunteer will implement activities designed to address in whole or in part environmental contamination at the Site" (VCA, at 1). At the end of that process, provided that certain conditions are met, "the Department shall timely provide Volunteer with the Release and Covenant Not to Sue attached [to the VCA]" (VCA, subparagraph II.H; see also VCA, exhibit C). Thus, the primary benefit of the bargain for the State is the cleanup of a contaminated site in accordance with a Department-approved plan and the primary benefit of the bargain for the volunteer is the release from certain potential claims by the Department once the site is remediated to the Department's satisfaction.

To achieve the objectives of the VCA, "Existing Contamination" at Building 4 must be addressed. The VCA defines existing contamination to include "contamination identified during the implementation of this Agreement, the nature and extent of which were unknown or insufficiently characterized as of the effective date of this Agreement, but which shall have been fully characterized and addressed to the Department's satisfaction" (VCA, subparagraph I.B [emphasis supplied]). The VCA also provides that the volunteer shall perform all activities under the agreement "in accordance with the requirements of all applicable Federal and State laws, regulations, and guidance documents" (VCA, subparagraph XIV.K). Accordingly, by the express terms of the VCA, the volunteer has agreed to fully characterize and address existing contamination to the Department's satisfaction and in accordance with applicable State guidance.

The principal State guidance documents concerning the remediation of soil vapor intrusion sites are the DOH Guidance and *DER-13/Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York* ("DER-13") issued by the Department on October 18, 2006. DER-13 states that the DOH Guidance and DER-13 "provide a basis for deciding how, where, and when to conduct soil vapor intrusion evaluations" (DER-13, section III). Further, "[b]ased upon the findings of the soil vapor intrusion evaluation, appropriate decisions will be made and will be included as part of the remedy selected for the site" (DER-13, section V.1).



Kodak argues that the State guidance documents are inapplicable because the State lacks authority to establish indoor air quality standards for Building 4. This, according to Kodak, is because indoor occupational exposures fall within the purview of OSHA. Kodak notes that under the VCA the contemplated use for Building 4 is limited to industrial or commercial and the current occupancy of Building 4 is consistent with such use. Therefore, Kodak argues, the OSHA PEL standards for occupational exposures apply and the State guidance documents do not. This argument is without merit.

First, it is important to note that the VCA does not limit the use of Building 4 in the manner suggested by the volunteer. It is true that, pursuant to the VCA, the contemplated use for Building 4 is industrial or commercial. However, this designation does not limit the potential for exposure to "an industrial workplace setting to which the OSHA standard applies" as Kodak asserts (Response, at 1). By its common meaning, "commercial use" contemplates uses beyond that of an industrial workplace, including retail shopping outlets and other commercial enterprises that may routinely cater to the general public (see e.g. Black's Law Dictionary 285 [8<sup>th</sup> ed 1999] [defining "commerce" as "the exchange of goods and services"]; see also 6 NYCRR 375-1.8[g][2][iii] [defining "commercial use" for the purposes of the Department's remedial programs to include sites used "for the primary purpose of buying, selling or trading of merchandise or services. . . . [and including] passive recreational uses, which are public uses with limited potential for soil contact"]). Thus, the VCA does not restrict the use of Building 4 in such a way as to limit those potentially exposed to indoor air contamination to industrial workers.<sup>3</sup>

Additionally, regardless of the contemplated use of a site, both DER-13 and the DOH Guidance state that they are applicable to a broad range of contaminated sites. DOH Guidance states that it "should be followed in residential and non-residential settings where people may be exposed involuntarily to chemicals from soil vapor intrusion" (DOH Guidance, section 1.7.1). In response to public comments asserting that OSHA standards are the appropriate standards for addressing workplace exposures, DOH stated that the guidance pertains to "current and potential involuntary human exposures" and noted that in the

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<sup>3</sup> Nothing herein should be read to indicate that the State guidance documents would be inapplicable at a site where access is restricted to industrial workers only. On the facts presented here, I do not reach that issue.

several other states that have developed similar guidance, OSHA standards are deferred to "only when the chemical(s) in soil vapor are routinely used as part of regular operations in the building" (Response to Public Comments Received on the New York State Department of Health's Guidance for Evaluating Soil Vapor Intrusion in the State of New York, comment and response A.3.2). Here, the VCA does not restrict the use of Building 4 to industrial workers only and there is no indication that TCE is in use on-site. Accordingly, the OSHA PELs are not controlling.

DER-13 states that soil vapor intrusion will be evaluated at "all past, current, and future contaminated sites" and expressly includes Voluntary Cleanup Program sites, such as Building 4, in the definition of contaminated sites (DER-13, section I). Thus, by their express terms, both the DOH Guidance and DER-13 are applicable to a broad spectrum of remedial sites, irrespective of whether a site is restricted to non-residential use.

A point of agreement of the parties is that the DOH Guidance and DER-13 are not duly promulgated rules. As the parties note, and as the documents themselves make clear, these documents are intended as guidance only. The DOH Guidance, for example, states that the purpose of developing air guideline values, such as that for TCE, "is to help guide decisions about the nature of efforts to reduce exposure to the chemical. . . . In all cases, the specific corrective actions to be taken depend on a case-by-case evaluation of the situation" (DOH Guidance, section 3.2.5; see also DOH Guidance, preface at i [expressly stating that "[t]he guidance is not a regulation, rule or requirement"]). Thus, the guidance is intended to "guide" decision making at soil vapor intrusion sites and is not a fixed "statement, regulation or code of general applicability that implements or applies law" (State Administrative Procedure Act § 102[2][a]; see also Cubas v Martinez, 8 NY3d 611, 621 [2007][noting that "a rule or regulation is a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances"] [internal quotation marks and citations omitted]).

The fact that the State guidance documents were not promulgated as rules or regulations, however, is of little consequence under the circumstances presented here. By the express terms of the VCA, the volunteer has agreed to address contamination at Building 4 to the Department's satisfaction and in accordance with applicable State laws, regulations and guidance. Accordingly, the volunteer has failed to demonstrate that Department staff's request for the volunteer to evaluate and

address soil vapor intrusion at Building 4 in accordance with the DOH Guidance and DER-13 is irrational.

#### RECOMMENDATIONS

For the reasons stated, I recommend that the Director of Environmental Remediation ("Director") determine that the volunteer is obligated under the terms of the VCA to undertake additional investigative activities at Building 4 to define the source and extent of soil vapor entering the building. Further, I recommend that the Director determine that the DOH Guidance and DER-13 provide applicable guidance for developing the investigative and remedial activities to address soil vapor intrusion at Building 4.

/s/

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Richard A. Sherman  
Administrative Law Judge

Dated: Albany, New York  
November 29, 2007