

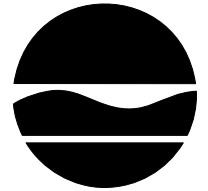
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NYS Department of
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Albany, New York 12233-5550

RE: National Rubber Adhesives Site;
Dispute Resolution
Brownfield Cleanup Agreement
(Index No. W2-0999-04-05)

Dear Messrs. Carriero and Lesser:

I am in receipt of the Report and Recommendation of Administrative Law Judge ("ALJ") Richard A. Sherman concerning the referenced matter. The Report, a copy of which is enclosed, addresses the request of Corastor Holding Company, Inc. and Hamil Stratten Properties, LLC (collectively, the "Volunteer"), dated December 14, 2007, for formal dispute resolution under the provisions of the referenced Brownfield Cleanup Agreement.

The ALJ recommends that I dismiss Volunteer's December 14, 2007 request for formal dispute resolution.

I have considered the Report, the request, including its attachments, and Department staff's response. Based upon my review of the record and for the reasons stated in the Report, I adopt the Report's recommendation.

Sincerely,

/s/

Dale A. Desnoyers
Director

Enclosure

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

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations
of Article 12 of the Navigation Law,
Article 17 of the Environmental
Conservation Law of the State of New York,
and Parts 611 to 614, 702 and 703 of
Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York,

**REPORT AND
RECOMMENDATION**

- by -

DEC Index No.
W2-0999-04-05

**CORASTOR HOLDING COMPANY, INC. and
HAMIL STRATTEN PROPERTIES, LLC,**

Volunteers.

Appearances:

-- Alison H. Crocker, Esq., Deputy Commissioner and
General Counsel (Michael J. Lesser, Esq., of counsel), for
the Department of Environmental Conservation

-- Carriero & Associates, PLLC (J. James Carriero,
Esq., of counsel), for Corastor Holding Company, Inc. and
Hamil Stratten Properties, LLC

BACKGROUND AND PROCEEDINGS

This matter involves a dispute between Corastor Holding
Company, Inc. and Hamil Stratten Properties, LLC (collectively,
the "Volunteer") and staff of the Department of Environmental
Conservation ("Department"). The Department and Volunteer
entered into a Brownfield Cleanup Agreement ("Agreement"), dated
October 14, 2004 (DEC Index No. W2-0999-04-05), pursuant to which
Volunteer was obligated to remediate contamination at the
National Rubber Adhesives site, 38-31 9th Street, Long Island
City, County of Queens, New York ("Site"). The dispute relates
to Volunteer's attempt to invoke formal dispute resolution under
the Agreement.

By letter dated December 14, 2007, Volunteer filed a
request for formal dispute resolution ("Request") with the Office
of Hearings and Mediation Services ("OHMS"). The Request states

that it is made pursuant to paragraph XIV of the Agreement (see Request, Exh A). By letter dated January 7, 2008 Department staff responded to the Request ("Staff Response").

Under the terms of the Agreement, upon a request by Volunteer for formal dispute resolution, OHMS is to prepare and submit a report and recommendation to the Director of the Division of Environmental Remediation ("DER") (see Agreement, subparagraph XIV.B.4). Accordingly, this report and recommendation is submitted to the Director of DER, Dale Desnoyers, for his final decision resolving the dispute.

Summary of Volunteer's Position

Volunteer objects to the August 30, 2007 termination of the Agreement by the Department. Volunteer asserts that it requested reinstatement into the Brownfield Cleanup Program shortly after it was advised of the termination and that the Department agreed to consider that request. To that end, according to Volunteer, an informal negotiation between the Department and Volunteer was held on October 12, 2007.

Volunteer argues that the termination was the result of the "inability and failure" of its expert consultant to comply with Department requirements (Request, at 2). Volunteer acknowledges that its reliance on its expert consultant proved to be misplaced and, therefore, Volunteer retained a new consultant. According to Volunteer, its new consultant attended the October 12, 2007 meeting with the Department and Department staff raised no objection to the new consultant at that time.

Volunteer argues that the Department's determination to terminate the Agreement is "arbitrary and capricious and an abuse of discretion" (Request, at 2). Volunteer asserts that, until just prior to the termination, each submission it made that was disapproved by the Department was later revised and approved. Furthermore, Volunteer asserts that it has expended considerable sums on consultants, remediation costs and State costs incurred in relation to the implementation of the Agreement.

Volunteer notes that it did not cause the contamination at the Site, but that it remains committed to the cleanup. Volunteer concludes by stating that the termination will result in the denial of the benefits available to it under the Agreement and that this is a "harsh penalty for a committed volunteer" (Request, at 3).

Summary of Staff's Position

In its response, Department staff argues that the Request is "null and void as it stands in direct contradiction of the plain terms of the Agreement" (Staff Response, at 1). Staff asserts that the conditions for invoking dispute resolution under the Agreement have not been met and, therefore, denies that it has any obligation to respond to the Request or participate in formal dispute resolution proceedings before OHMS.

Department staff recounts the remedial history of, and Volunteer's involvement with, the Site. With respect to the actions of Volunteer and staff immediately prior to the September 19, 2007 request by Volunteer for reinstatement, staff notes the following:

- In April 2007 Volunteer submitted a "Soil Vapor Extraction Pilot Study Report" ("Report").
- On May 14, 2007 the Department disapproved the Report.
- On May 23, 2007 Volunteer advised the Department that it would revise and resubmit the Report.
- On July 5, 2007 Volunteer submitted a revised Report.
- On July 26, 2007 the Department disapproved the revised Report.
- By letter dated August 30, 2007, having received no further submittals from Volunteer in relation to the revised Report, the Department terminated the Agreement.
- By letter dated September 19, 2007 Volunteer requested that the Agreement be reinstated.

Department staff argues that dispute resolution was only available to Volunteer within 20 days of the Department's disapproval of the revised Report on July 26, 2007. According to staff, the record is devoid of any attempt by Volunteer to extend the time periods established under the Agreement for seeking dispute resolution. Moreover, staff argues, Volunteer's letter of September 19, 2007 requesting reinstatement makes "no reference to Dispute Resolution whatsoever" (Staff Response, at 5).

Department staff concludes by noting that the Site is designated as a "significant threat" on the State Registry of Inactive Hazardous Waste Sites (Site No. 241028). Staff asserts that, given the "extremely high levels" of volatile organic compounds at the Site and the public health risk such levels pose, the Department must seek to expedite the remediation of the Site (Staff Response, at 6).

DISCUSSION

Volunteer's request for formal dispute resolution is premised on a misapplication of the provisions of the Agreement and must be rejected. The Request states that Volunteer "elect[s] to invoke formal dispute resolution with respect to the determination by [the Department] not to reinstate Volunteer into the Brownfield Cleanup Program" and, in closing, states "[i]t is requested that the Brownfield Site Cleanup Agreement be reinstated" (Request, at 1, 3). As detailed below, such relief is not available under the terms of the Agreement.

By letter ("Termination Letter") dated August 30, 2007 Department staff advised Volunteer that it was terminating the Agreement (see Request, Exh C). The Termination Letter states that "pursuant to [p]aragraph XIII of the Agreement, the Department has elected to terminate the Agreement as a consequence of the Volunteer[']s failure to submit a revised [Soil Vapor Extraction Pilot Study] report" (id. at 2). Pursuant to paragraph XIII of the Agreement, the Department may terminate the Agreement "in the event Volunteer fails to substantially comply with the Agreement's terms and conditions."

What constitutes a failure to substantially comply with the terms and conditions of the Agreement is not expressly defined. Nevertheless, submittals such as the Soil Vapor Extraction Policy Study Report ("Report") at issue here, are subject to Department approval and, if approved, "become an enforceable part of this Agreement" (Agreement, subparagraph II.E.1). Moreover, in the event the Department disapproves a submittal, the Agreement provides Volunteer with various options in response, up to and including termination of the Agreement (see Agreement, subparagraph II.E.2). Accordingly, it is evident that the submittal of an approvable Report is a substantial condition of the Agreement and Department staff was acting within its discretion in terminating the Agreement "as a consequence of the Volunteer[']s failure to submit a revised report" (Termination Letter, at 2).

Although Volunteer seeks to invoke formal dispute resolution under the terms of the Agreement, dispute resolution is not available in response to the Department's determination to terminate the Agreement. Subparagraph XIV.A of the Agreement expressly sets forth the circumstances under which dispute resolution may be invoked and termination of the Agreement is not listed. Rather, dispute resolution is available only in relation to disputes regarding (i) disapproval of a submittal, (ii) disapproval of a proposed work plan, (iii) disapproval of a final report, or (iv) the implementation of a work plan.

Pursuant to subparagraph XIV.A, Volunteer could have sought dispute resolution within 30 days of its receipt of the Department's letter, dated July 26, 2007, notifying Volunteer that the revised Report was disapproved. However, Volunteer did not submit a request for dispute resolution in relation to the Department's disapproval of the revised Report. Not until its receipt of the August 30, 2007 Termination Letter did Volunteer act, by retaining a new consultant and, by letter dated September 19, 2007, requesting reinstatement to the Brownfield Cleanup Program.

Nowhere in Volunteer's letter of September 19, 2007 does it mention, let alone request, dispute resolution (see Request, Exh D). Rather, that letter recounts Volunteer's difficulties with its prior consultant and states that its new consultant "will prepare a second revised Soil Vapor Extraction Study that will address the Department's concerns" (id. at 2). Accordingly, by its own statement, Volunteer does not dispute the Department's disapproval of the revised Report.

Because the Agreement does not provide for dispute resolution with respect to a Department determination to terminate the Agreement, no basis exists for instituting formal dispute resolution over staff's objection.

RECOMMENDATION

For the reasons stated, I recommend that the Director dismiss Volunteer's December 14, 2007 request for formal dispute resolution.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: May 1, 2008
Albany, New York