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February 1, 2007

Via Telecopy and Regular Mail

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Re: Former ExxonMobil Oil Terminal, Lighthouse Point, Ogdensburg, New York
Order on Consent dated October 21, 2003 (Case No. A6-0471-1202) ("Consent Order")

Dear Mr. Walsh and Ms. Christian:

I am in receipt of a "Report and Recommendation" ("Report"), a copy of which is enclosed, that was submitted by Chief Administrative Law Judge ("CALJ") James T. McClymonds. The Report addresses the request of ExxonMobil Oil Corporation ("ExxonMobil"), by letter dated August 25, 2006, for formal dispute resolution pursuant to the Consent Order. By letter dated August 30, 2006, Dale A. Desnoyers, Director of the Division of Environmental Remediation of the New York State Department of Environmental Conservation ("Department"), advised ExxonMobil that pursuant to Paragraph II.F of the Consent Order, the Consent Order was terminated "effective immediately."

The CALJ recommends that I dismiss ExxonMobil's August 25, 2006 request for formal dispute resolution upon the ground that the request has been rendered academic by the termination of the Consent Order by Department staff.[1]

I have considered the Report, the August 25, 2006 request by ExxonMobil, Department staff's August 30, 2006 letter terminating the Consent Order, and related correspondence submitted by ExxonMobil and Department staff referenced in the Report. Based upon my review of the record and for the reasons stated in the Report, I adopt the Report's recommendation that ExxonMobil's request for dispute resolution be dismissed upon the ground that it has been rendered academic by the termination of the Consent Order by Department staff. Furthermore, based upon my review of the terms and conditions of the Consent Order, even if Exxon Mobil's request had not been rendered academic, I conclude that the Consent Order does not provide for formal dispute resolution of the Department's remedy selection.

However, as provided under Paragraph VII of the Consent Order, it should be noted that certain obligations survive termination of the Consent Order. Such obligations include, but are not limited to, Paragraph V ("Payment of State Costs") and Paragraph IX ("Indemnification") of the Consent Order. In addition, the termination of the Consent Order does not affect any liability that ExxonMobil may have for the remediation of the site and/or the payment of any state costs allowable under the law.

In light of the foregoing, ExxonMobil's request for a 60-day stay of proceedings has been rendered academic.

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

Sincerely,

/s/
Carl Johnson
Acting Executive Deputy Commissioner

Enclosure

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

[1] By memorandum dated November 2, 2006, then Commissioner Denise M. Sheehan granted the request of Dale A. Desnoyers to recuse himself in this matter, and delegated decision making authority to me. The parties were so informed by letter of same date.

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,

- by -

EXXONMOBIL OIL CORPORATION,

Respondent.

REPORT AND RECOMMENDATION

DEC Case No. A6-0471-1202

Appearances:

-- Alison H. Crocker, Esq., Acting Deputy Commissioner and General Counsel (Richard A. Sherman, Esq., Associate Counsel, of counsel), for the Department of Environmental Conservation

-- McCusker, Anselmi, Rosen, Carvelli, and Walsh (Joseph T. Walsh, III, Esq., of counsel), for respondent ExxonMobil Oil Corporation

By letter dated August 25, 2006, with attachments, respondent ExxonMobil Oil Corporation requests formal dispute resolution ("Request"). The request is made pursuant to paragraphs VI.A and VI.B of an Order on Consent dated October 21, 2003 in Case No. A6-0471-1202 (see Request, Exh A ["Consent Order"]). By letter dated September 7, 2006, with attachments, staff of the Department of Environmental Conservation ("Department") responded to ExxonMobil's request ("Response").

Pursuant to paragraph VI.B.4 of the Consent Order, and the November 2, 2006 memorandum of Commissioner Denise M. Sheehan, this report and recommendation is respectfully submitted to Deputy Commissioner Carl Johnson for his final decision resolving the dispute.

Facts and Procedural Background

ExxonMobil and Department staff executed the subject Consent Order dated October 21, 2003, in settlement of ExxonMobil's civil liability for the alleged discharge of petroleum into the waters of the State in violation of Navigation Law article 12, Environmental Conservation Law ("ECL") article 17, and their implementing regulations, occurring at a former major oil storage facility owned and operated by ExxonMobil. The facility is located west of and adjacent to a peninsula along the St. Lawrence Seaway in Ogdensburg, New York, in the area known as Lighthouse Point (the "site").

Pursuant to the Consent Order, ExxonMobil submitted to the Department a Remedial Action Selection Summary Report dated April 26, 2006, that, among other things, proposed several alternative remedies for remediation of soil and groundwater impacts from the historic operation of the site (see Request, Exh C ["RASR"]). By letter dated May 18, 2006, the Department indicated that Remedy No. 11, as proposed in the RASR, with modifications specified by the Department, constituted the most appropriate means of achieving the stated remedial action objectives for the area designated operable unit 1 of the site (see Request, Exh B). The Department further indicated that after a 30-day public comment period on the proposed remedy, the Department would approve the remedy for operable unit 1 of the site and request that ExxonMobil prepare a remedial action work plan.

Characterizing the Department's May 18, 2006 letter as a "conditional approval" of the RASR, ExxonMobil, in a letter dated June 9, 2006, requested informal dispute resolution pursuant to Consent Order paragraph VI.A (see Request, Exh E). In response, the Department asserted that its approval of the RASR for operable unit 1 was unconditional (see Desnoyer Letter, June 30, 2006, Response, attachment). The Department also rejected invocation of informal dispute resolution pursuant to the Consent Order. The Department asserted that ExxonMobil's objection appeared to concern the Department's selection of remedy, which it contended was not subject to the dispute resolution provisions of the Consent Order.

By letter dated June 30, 2006, ExxonMobil specified its objections to the proposed remedy selected by the Department, and urged the adoption of Remedy No. 12, as identified in the RASR (see Request, Exh F). At the conclusion of the public comment period, which included a public meeting, and in response to ExxonMobil's June 30, 2006 correspondence, the Department

selected the final remedy for operable unit 1 (see Department Letter, July 25, 2006, Request, Exh D). The Department requested that ExxonMobil notify the Department within 30 days in writing of its intention to implement the remedy selected as detailed in the letter.

ExxonMobil subsequently filed its August 25, 2006 request for formal dispute resolution with the Department's Office of Hearings and Mediation Services ("OHMS") and forwarded a copy of its request to Department staff. By letter dated August 30, 2006, Department staff terminated the Consent Order, effectively immediately, pursuant to paragraph II.F of that Order (see Department Letter, Aug. 30, 2006, Response, attachment). The Department reiterated that throughout the process, the Department had consistently maintained that, where it is the lead agency overseeing remedial activity at a contaminated site, remedy selection is not subject to dispute resolution. The Department noted that although it would consider input from a variety of sources, including responsible parties, remedy selection remained the "sole province of the Department" (id.). The Department further noted that nothing in the dispute resolution provisions of the Consent Order subjected remedy selection to formal dispute resolution. The Department stated that ExxonMobil's failure to agree to implement the selected remedy on or before the date agreed to by the parties forced it to conclude that pursuing further agreement on a mutually acceptable remedial action work plan was futile. Therefore, the Department exercised its option under Consent Order paragraph II.F to terminate the Order.

Department staff subsequently filed its September 7, 2006 response to ExxonMobil's request, forwarding its August 30, 2006 letter terminating the Consent Order and asserting its position that the Department's determination to terminate the Consent Order is not subject to the dispute resolution provisions of that Order. By letter dated September 12, 2006, I informed the parties that this report and recommendation would be prepared and forwarded to the Director of the Division of Environmental Remediation for final decision.

Subsequently, by letter dated September 14, 2006, ExxonMobil forwarded its response to Department staff's notice of termination, requested that I include its response in the record before me, and requested a meeting pursuant to paragraph VI.B.3 of the Consent Order. By letter dated September 29, 2006, with attachments, Department staff opposed ExxonMobil's request for a meeting.

In a letter dated October 6, 2006, I informed the parties that I accepted their September 14, 2006, and September 29, 2006 submissions, respectively, as filed. In the exercise of the discretion afforded me under the Consent Order, I also declined ExxonMobil's request for a meeting on the ground that such a meeting would not materially facilitate the resolution of the issues presented. I concluded that the parties' respective positions, arguments, and authorities were sufficiently set forth in the submissions filed and provided a complete record upon which to base this report and recommendation.

In a letter dated October 9, 2006, ExxonMobil requested a 60-day stay of the formal dispute resolution process, including issuance of this report and recommendation, to allow for settlement discussions between the parties. ExxonMobil also indicated that it would be seeking Department staff's consent to the stay and that it would inform me when such consent was obtained. Subsequently, in a letter dated October 16, 2006, ExxonMobil filed a response to Department staff's September 29 letter, and reiterated its request for a 60-day stay. No further submissions were received from the parties.

On November 2, 2006, I received a copy of a memorandum of the same date from Commissioner Denise M. Sheehan to Deputy Commissioner Carl Johnson. In that memorandum, Commissioner Sheehan granted the request of Dale A. Desnoyers, Director of the Division of Environmental Remediation, to recuse himself from this proceeding, and delegated decision making authority to Deputy Commissioner Johnson.[1]

Accordingly, this report and recommendation is submitted to Deputy Commissioner Johnson for issuance of a final decision in the matter. In addition, I defer to the Deputy Commissioner's discretion the determination whether ExxonMobil's request for a stay of this proceeding be further granted.

Discussion

In its request for formal dispute resolution, ExxonMobil contends that the Consent Order and governing Departmental guidance documents provide the Department with the authority only to approve or disapprove the RASR. Accordingly,

[1] The parties were informed of Mr. Desnoyers's recusal and the Commissioner's delegation to Deputy Commissioner Johnson by letter from Mr. Desnoyers dated November 2, 2006.

ExxonMobil argues that the Department acted arbitrarily and capriciously in issuing a "conditional" approval of the RASR and selecting a final remedy. ExxonMobil also contends that the remedy selected by the Department improperly requires remediation beyond the previously approved assessment of petroleum impacts from ExxonMobil's historic operation at the site, that the Department failed to recognize the viability of ExxonMobil's proposal to biodegrade all areas of petroleum-contaminated soils at the site, and that Remedy No. 12 proposed by ExxonMobil fulfills the remedial action objectives without the use of institutional controls and allows future planned development of the site. ExxonMobil seeks resolution of these issues pursuant to the formal dispute resolution provisions of the Consent Order.

The Consent Order provides procedures for both informal and formal dispute resolution when ExxonMobil "disagrees with the Department's notice of disapproval of a submittal or a proposed Work Plan, disapproval of a final report, or rejection of [ExxonMobil's] assertion of a Force Majeure Event" (Consent Order, ¶ VI.A). Other provisions of the Consent Order concerning specific document submittals also reference the availability of dispute resolution pursuant to paragraph VI, including the sections on the submission of Work Plans (see id. ¶ II.B.2), revised Work Plans (see id. ¶ II.C), submittals other than Work Plans (see id. ¶ II.E.2), and submittals other than Progress Reports and Health and Safety Plans (see II.I.2).

In the Department's August 30, 2006 letter to ExxonMobil, the Department terminated the Consent Order pursuant to paragraph II.F. That paragraph, entitled "Department's Determination of Need for Remediation," provides that if ExxonMobil "elects not to develop a Work Plan under this Subparagraph or either party concludes that a mutually acceptable Work Plan under this Subparagraph cannot be negotiated, then this Order shall terminate in accordance with Subparagraph VII.A" (id.). As Department staff notes, nothing in paragraphs II.F, VI, or VII of the Consent Order provide for dispute resolution relative to a determination to terminate the Consent Order pursuant to paragraph II.F.[2]

Accordingly, because Department staff has terminated the Consent Order, ExxonMobil's request for formal dispute resolution has been rendered academic. ExxonMobil's request

[2] Because the termination of the Consent Order is not subject to that Order's formal dispute resolution provisions, ExxonMobil's arguments that the order was arbitrarily and capriciously terminated are not before me.

sought resolution of a dispute concerning the scope of the Department's authority to select a remedy and the merits of the remedy selected under the Consent Order. These issues have been rendered moot by the termination of the Consent Order. Accordingly, I recommend that the Deputy Commissioner dismiss ExxonMobil's request for formal dispute resolution as academic.

In the alternative, even assuming ExxonMobil's request has not been rendered academic, the Consent Order does not provide for formal dispute resolution of the Department's remedy selection. A consent order, such as the Consent Order in this case, which was entered into between the Department and a respondent in an enforcement proceeding, is in the nature of a settlement agreement (see 19th Street Assocs. v State of New York, 79 NY2d 434, 442 [1992]; Callahan v Carey, 307 AD2d 150, 153 [3d Dept], lv dismissed 100 NY2d 615 [2003]). Under New York law, a settlement agreement is a contract and, therefore, interpreted according to general principles of contract law (see 19th Street Assocs., 79 NY2d at 442; Callahan v Carey, 307 AD2d at 153; see also Collins v Harrison-Bode, 303 F3d 429, 433 [2d Cir 2002]). Under long settled common-law contract principles, an agreement is to be construed in accordance with the parties' intent as expressed by the terms of that agreement (see Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (see id.). In addition, it is important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases (see South Road Assocs., LLC v International Bus. Mach. Corp., 4 NY3d 272, 277 [2005]). Where the document makes clear the parties' over-all intention, isolated provisions of the agreement should be construed to carry out the plain purpose and object of the agreement (see Kass v Kass, 91 NY2d 554, 567 [1998]).

Here, the plain terms of the Consent Order indicate that the Department's selection of remedy is a determination separate from the Department's approval of the RASR. The Consent Order's provisions governing the submittal, and approval or disapproval, of remedial investigation and remedial action selection work plans, such as the RASR (see Consent Order, ¶ I.A and B), are separate from the provision governing the Department's determination of need for remediation (see id. ¶ II.F). Moreover, Paragraph II.F provides that the "Department will determine upon its approval of each final report dealing with the investigation of the Site whether remediation, or additional remediation as the case may be, is needed to protect public health and/or the environment" (emphasis added). Thus, in

addition to approval of the RASR, the Department has the separate authority to select the appropriate remedy.

This reading of the Consent Order is confirmed by the Department's "Draft DER-10, Technical Guidance for Site Investigation and Remediation" (dated Dec. 2002 ["DER-10"]), which is incorporated by reference in the provisions of the Consent Order governing the development and submittal of remedial action selection work plans. DER-10 confirms that the Department's selection of remedy is a determination separate from its approval of a remedial action work plan (see id. ¶ 4.4[a][3]). Thus, ExxonMobil's argument that the Department only had the authority under the Consent Order to either approve or disapprove the RASR, and lacked the authority to select a remedy separate from those recommended by ExxonMobil in the RASR is not supported by the unambiguous terms of the Consent Order or DER-10 incorporated therein.

Moreover, the unambiguous terms of the Consent Order clearly indicate that the Department's remedy selection is not subject to formal dispute resolution. Nothing in either paragraph VI or II.F expressly provides for formal dispute resolution for remedy selection. This is in contrast to the provisions for work plans and other document submittals that expressly provide for dispute resolution pursuant to Consent Order paragraph VI, among other options. Thus, the Department's position that remedy selection is the sole province of the Department and is not the subject of dispute resolution is supported by the unambiguous terms of the Order. Accordingly, even assuming ExxonMobil's request for formal dispute resolution is not rendered academic by the termination of the Order, the request should be rejected on the ground that issues concerning the Department's selection of remedy is not a proper subject of formal dispute resolution under the Consent Order.

Recommendation

For the reasons stated, I recommend that the Deputy Commissioner dismiss ExxonMobil's August 25, 2006 request for formal dispute resolution pursuant to the October 21, 2003 Consent Order in Case No. A6-0471-1202 upon the ground that the request has been rendered academic by the termination of the Consent Order by Department staff on August 30, 2006.

Respectfully submitted,

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: November 3, 2006
Albany, New York