

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Environmental Remediation, Office of the Director

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RE: Former BICC Cables Corp. Site, Site No. C360051
Brownfield Cleanup Agreement Index No. W3-1063-05-03
Request for Formal Dispute Resolution

Dear Ms. Shaw and Ms. Rusinko:

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 One Point Street, Inc. ("Volunteer"), dated August 25, 2015, for formal dispute resolution under the provisions of the referenced Brownfield Cleanup Agreement.

In its request, Volunteer raises seven interrelated disputed issues. The ALJ recommends that, with respect to each of these issues, I hold that Volunteer failed to meet its burden to prove that the position taken by New York State Department of Environmental Conservation (DEC) staff is without a rational basis and should not prevail.

I have considered the Report, the request, including its attachments, and DEC staff's documents related to this matter. Based upon my review of the record and for the reasons stated in the Report, I adopt the Report's recommendation.

Sincerely,

/s/

Robert W. Schick, P.E.
Director

Enclosure

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



Department of
Environmental
Conservation

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of a Remedial Program for BICC Cables Site,
Westchester County, under Article 27, Title 14 of the
Environmental Conservation Law

**REPORT AND
RECOMENDATION**

- by -

One Point Street, Inc.,

Volunteer.

DEC Index No.:
W3-1063-05-03
Site No.: C360051

BACKGROUND AND PROCEEDINGS

This matter involves a dispute between One Point Street, Inc. ("OPSI" or "Volunteer") and staff of the Department of Environmental Conservation ("Department"). Volunteer and the Department entered into a Brownfield Cleanup Agreement ("BCA"), dated May 18, 2005 (DEC Index No. W3-1063-05-03), pursuant to which Volunteer was obligated to remediate contamination at 1 Point Street, Yonkers, Westchester County, New York ("site"). The crux of the dispute relates to Volunteer's assertion that staff is making unjustified demands for Volunteer to remove portions of an existing bulkhead¹ to create new habitat.

By letter dated August 25, 2015, Volunteer filed a request ("OPSI request") for formal dispute resolution with the Department's Office of Hearings and Mediation Services ("OHMS"). The OPSI request states that it is being brought under the provisions of the BCA (OPSI request at 1). Department staff responded ("staff response") to the OPSI request by letter dated September 14, 2015.

Under the terms of the BCA, when an Volunteer files a request for formal dispute resolution, OHMS must prepare and submit a report and recommendation to the Director of the Division of Environmental Remediation ("DER") (see BCA, subparagraph XIV.B.4). Accordingly, this report and recommendation is submitted to the Director of DER, Robert Schick, for his final decision resolving the dispute.

¹ There are several bulkheads at the site. Unless otherwise noted, all references in this report and recommendation to a "bulkhead" are references to the bulkhead in dispute, which is immediately to the east of the Electronic Power Research Institute ("EPRI") Building (see e.g. staff response, exhibits 4 at 9 [2007 plan sheet depicting the bulkhead (in green) as the "PROPOSED NEW BULKHEAD SECTION 'A'"]; 19 [2013 plan sheet depicting the bulkhead as the "EXISTING NON-STRUCTURAL CONTAINMENT BULKHEAD"])).

Summary of the Parties' Positions

Volunteer states that most of the disputes it seeks to resolve through the formal dispute resolution process are "related to the habitat mitigation requirement of the July 2014 OU-2 ROD²" (OPSI request at 1). Department staff argues that there are no issues in dispute that are subject to resolution under the terms of the BCA. Staff asserts that the habitat mitigation issue has been resolved and that the remaining issues relate to an "un-approved and un-permitted" bulkhead (staff response at 1). Volunteer raises seven specific disputes, each of which is recited below, followed by a summary of the respective parties' positions.

"ISSUE #1: The Section 401 WQC³ and Final SCS⁴ Approvals Must Be Issued Immediately So the Remedy May Proceed Because the August 19th Demands are Unrelated to the SCS Water Quality Impacts, therefore, the Department is Abusing its Discretion and Operating Outside of Its Jurisdiction" (OPSI request at 6)

Volunteer objects to "demands" that Department staff has made that would require Volunteer to cut down and remove the bulkhead. Volunteer asserts that the removal of the bulkhead will require "a total redesign of the SCS" (*id.*) Volunteer further states that DEC has been aware of the bulkhead for more than five years and that the bulkhead is part of the remedy at the site (*id.* at 7). Respondent also objects to the Department's alleged effort to tie removal of the bulkhead to the Department's issuance of the WQC (*id.*).

Department staff states that it is not required to issue the section 401 WQC immediately. Rather, staff states that, in accordance with 6 NYCRR 621.10(a)(2), it has until October 19, 2015 to make its determination (staff response at 9). Staff also states that the 401 WQC will reference and incorporate a set of remedial design plans and staff argues that it "cannot give final approval of an OU2 remedial design that does not address the removal of the [bulkhead] at or near the mud line" (*id.*).

"ISSUE #2: The Department has Failed to Provide a Detailed Technical and Legal Response Required by the BCP" (OPSI request at 7)

Volunteer cites to ECL 27-1411(4) for the proposition that Department staff must provide a technical or legal basis for its demand that the bulkhead be removed. Volunteer states that it has not been provided with staff's basis for demanding the removal and, therefore, staff's demand should be set aside (*id.*).

² The "OU-2 ROD" refers to the Department's "record of decision" for "operable unit" 2 at the site. A ROD documents the Department's decision on how a particular site will be remediated.

³ The "Section 401 WQC" refers to the "water quality certification" required under section 401 of the Federal Water Pollution Control Act for activities that may result in a discharge into navigable waters.

⁴ The "SCS" refers to the "sediment cover system" required as part of the site remediation.

Department staff argues that it has 45 days from its receipt of Volunteer's August 6, 2015 letter (August 6 letter), which provided Volunteer's justification for requesting that the bulkhead remain in place, to provide a written response (staff response at 6-7). Staff also states that it provided "oral comments and a Checklist of remaining issues in an effort to expedite the remedial project" (*id.* at 7). Staff includes a description of several issues or concerns it has with Volunteer's August 6 letter (*id.* at 7-8).

"ISSUE #3: A New Mud Flat Habitat Creation Demand in Areas 2A and IV-N is Legally and Technically Unjustified" (OPSI request at 8)

Volunteer states that there is no basis under the brownfield cleanup program, the BCA or the OU-2 ROD for the Department to require the creation of new habitat. Volunteer also states that the area of the site currently at issue was remediated five years ago and, at that time, Department staff argued that the remediated area could not serve as habitat. Volunteer asserts it is inconsistent for staff to now demand that this area serve as habitat (*id.*).

Department staff states that areas 2A and IV-N have always been areas where river water flowed and that the removal of the bulkhead will merely restore unrestricted tidal flow to those areas (staff response at 8).

"ISSUE # 4: The Demanded Additional Habitat Area is a Far Superior Habitat to the Habitat that Previously Existed in Areas 2A and IV-N, therefore, the Department has no Legitimate Basis to Make Such a Demand for Superior Habitat" (OPSI request at 8)

Volunteer asserts that the habitat mitigation requirements under the OU-2 ROD was satisfied by Volunteer's agreement to provide funding for an off-site habitat mitigation project (*id.*). Volunteer also asserts that existing aquatic resources within the SCS area are degraded and implementation of the SCS would provide a net benefit of habitat. Given this, Volunteer asserts that staff's "extra-jurisdictional" attempt to obtain additional habitat should be rejected (*id.* at 8-9).

Department staff does not address the assertion that the demanded habitat area is far superior to what previously existed at the site but, as noted under Issue #3 above, staff asserts that the removal of the bulkhead will restore tidal flow to an area of the site that had historically been subjected to such flows.

"ISSUE #5: No Enforcement Can be Brought Due to the Statute of Limitations and the Doctrine of Laches Bars the Department's (sic) Ability to Remove the Bulkhead" (OPSI request at 9)

Volunteer states that an enforcement action may not be brought by the Department because the statute of limitations has run and the Department's action would be barred by laches (*id.*).

Department staff states that "anticipatory affirmative defenses" against an enforcement action that has not yet been initiated "are not disputes" under the BCA (staff response at 5, 10).

"ISSUE #6[:] The Department Issued Approvals must be made Final since Legal Staff had Agreed to 'Table' the Bulkhead Issue for now since this Issue is Unrelated to the R[e]medy" (OPSI request at 10)

Volunteer states staff agreed to drop the issue of the removal of the bulkhead from the section 401 WQC review in July 2015 and that Volunteer relied upon that agreement (id.).

Department staff states that it is disingenuous for Volunteer to assert that this issue was tabled. Staff acknowledges that it agreed to remove language concerning the removal of the bulkhead from the public notice of the complete application for the WQC, but states that it has never acquiesced to the bulkhead remaining in place or becoming an approved part of the OU-2 remedy (staff response at 8-9).

"ISSUE #7[:] The Details of the Funding Mechanism for the Habitat Mitigation Plan is an Issue between the Department and NYS Parks" (OPSI request at 10)

Volunteer states that it has agreed to provide funding for off-site habitat mitigation, but that the Department has been unable to determine how Volunteer's funding will be paid to the State agency that is managing the off-site project. Volunteer states that this issue is solely a problem for the Department to address and it should not delay execution of the habitat mitigation agreement (id.).

Department staff states that the habitat mitigation issue has been resolved. Volunteer has agreed to fund off-site mitigation and staff states that this "will satisfy the habitat mitigation obligations under the OU-2 ROD and no on-site mitigation is required" (staff response at 10). Staff further states that "[t]here is no need for a 'Habitat Mitigation Agreement'" because the Department will issue a letter acknowledging that Volunteer has met the habitat mitigation requirement set forth under the OU-2 ROD after Volunteer provides the agreed upon funding (id.). Additionally, staff states that the issue of the funding mechanism will "not delay the remedial work" at the site (id. at 1).

DISCUSSION

Pursuant to BCA subparagraph XIV.A, the dispute resolution process is available to Volunteer to resolve disputes "regarding any notice of disapproval of a submittal, proposed Work Plan or Final Report, or during the implementation of any Work Plan." Accordingly, disputes that fall outside of those set forth above are not amenable to resolution under the formal dispute resolution process. In addition, where the formal dispute resolution process is invoked,

the BCA places the burden on Volunteer to demonstrate that Department staff's position "does not have a rational basis and should not prevail" (BCA subparagraph XIV.B.3).

With the foregoing in mind, the issues raised by Volunteer are addressed below. To address the overlapping subject matter contained in the issues raised by Volunteer, I have grouped Volunteer's issues into three categories: removal of the bulkhead, creation of habitat, and potential enforcement. The categories are meant only as a means to organize the issues. My inclusion of an issue raised by the Volunteer in one category does not necessarily indicate that the issue has no interrelation with the other categories. Similarly, my exclusion of an issue from a particular category does not necessarily indicate that the issue has no relation to that category.

Removal of the Bulkhead

Three of the issues raised by Volunteer center on the dispute over whether the bulkhead must be partially or fully removed: Issue #1 (immediate issuance of section 401 WQC and final SCS approvals), Issue #2 (lack of detailed response from the Department), and Issue #6 (staff's agreement to "table" the bulkhead issue).

With regard to Issue #1, Department staff asserts that 6 NYCRR 621.10(a)(2) provides 90 days, from the date of issuance of the notice of complete application, for the Department to make its determination on the section 401 WQC application. The notice of complete application for this project was issued on July 22, 2015 and, allowing the full 90 days, a determination for a major project would not be due until October 20, 2015. Although this raises the issue of whether Volunteer's concern is ripe, I note that the parties have provided factual assertions and argument in support of their positions on the merits of this issue. Moreover, Volunteer's discussion of Issue #1 indicates that resolution of the dispute over the bulkhead is integral to resolution of the WQC dispute (see e.g. OPSI request at 6 [opening paragraph under Issue #1 stating that "to remove and cut down the Containment Bulkhead hurts . . . the remedy" and that staff "fails to address the legitimate technical reasons the Containment Bulkhead cannot be removed without a total redesign of the SCS"]). Moreover, where the Department has all the information that it requires, it should render its WQC determination as soon as practicable. In consideration of the foregoing, I will address Issue #1 as it relates to the bulkhead.

In each of these issues (i.e., Issues #1, #2 and #6), Volunteer raises the issue of the removal of the bulkhead. Volunteer does not represent that the bulkhead was formally approved by the Department. Rather, Volunteer states that the bulkhead "has been in place since March 2010 with DEC's full knowledge" and that it "has been designed to be the back end wall of the proposed SCS" (OPSI request at 2). Additionally, Volunteer argues that certain remedial design plans and other documentation that Volunteer has submitted to the Department have depicted the bulkhead as part of the remedy and, therefore, it should be deemed to be part of the remedial plan (*id.* at 9 [stating "the Containment Bulkhead has been in place for more than five years, has served remedial purposes, . . . has been present on site plan drawings included in the approved 2013 RAWP⁵ and OU-2 ROD, and was present on the site plans for the June 16 SCS

⁵ A "RAWP" is a "remedial action work plan."

Approval"])). Volunteer also states that staff's representations that the bulkhead "was to be 'temporary' . . . implies its installation was permitted" by the Department (id.).

Volunteer's representations regarding the perceived acceptance of the bulkhead by Department staff are not sufficient to overcome the clear rejection of the bulkhead proposal by the Department. The record shows that the bulkhead was first proposed by Volunteer in 2007. By letter dated January 11, 2008, staff raised several concerns with regard to the proposed bulkhead. Among other things, staff stated that the bulkhead was not consistent with 6 NYCRR 608 and Department guidance because the bulkhead would result in the removal of one acre of habitat from the river (staff response at 3, exhibit 5 at 2-3). By letter dated April 7, 2008, Volunteer⁶ formally withdrew "the Proposal to install additional bulkhead and alter the sediment remedy" (staff response, exhibit 6 at 1 [emphasis removed]). Accordingly, the record plainly establishes that staff opposed the proposal to install the bulkhead and that Volunteer explicitly withdrew the proposal.

Given this history, it is not clear why the bulkhead was constructed. Staff refers to it as a "temporary" bulkhead that is "un-approved and un-permitted" (staff response at 1). Volunteer refers to it as a "containment bulkhead" and asserts that it is the "back end" of the SCS (OPSI request at 2). Regardless of the parties' characterization of the bulkhead, the record before me does not indicate that Volunteer requested that staff reconsider its opposition to the permanent placement of the bulkhead. Moreover, given that Volunteer formally withdrew the proposal for the permanent placement of a bulkhead, it would not have been irrational for staff to have assumed that the subsequent installation of the bulkhead was a temporary measure. Indeed, Volunteer filed a report with the Department in November of 2012 which states that certain bulkheads on the site are "remediation bulkheads" while, in contrast, the bulkhead in dispute here "was installed by OPSI and is unrelated to the site remediation activities" (staff response, exhibit 13 at 2).

Volunteer raises the issue of Department staff's purported failure to timely respond to Volunteer's proposal to leave the bulkhead in place (Issue #2). Department staff argues that it had 45 days from its receipt of Volunteer's August 6 letter, which set forth Volunteer's justification for requesting that the bulkhead remain in place, to provide a written response (staff response at 6-7). This time has now expired. Nevertheless, as provided under the terms of the BCA, staff is required to use its "best efforts" to meet this timeline. Accordingly, the 45 day requirement is not a deadline. In addition, I note that the parties have been working to resolve this dispute through settlement discussions, and through the informal and formal dispute resolution process established under the BCA. Staff also states that it provided "oral comments and a Checklist of remaining issues in an effort to expedite the remedial project" (id. at 7). While a decision should not be unduly delayed, ultimately, it is far more important for staff to make the right determination than to make a quick determination.

Volunteer's Issue #6 (i.e., whether staff agreed to table the bulkhead issue), relates to the differing interpretations that Volunteer and staff placed on certain statements and actions of the parties. Volunteer states that staff had "clearly indicated" that the bulkhead issue was not to be

⁶ The letter was submitted by Holzmacher, McLendon & Murrell, P.C., an engineering firm used by the Volunteer.

part of the WQC review (OPSI request at 10). Staff states that, although it agreed to remove language about the removal of the bulkhead from the public notice of the complete application, it has never acquiesced to the bulkhead remaining in place or becoming an approved part of the OU-2 remedy (staff response at 8-9).

It is not clear from the record why staff agreed to remove the reference to the bulkhead from the notice of complete application. Nevertheless, as noted by Department staff and as stated in the notice of complete application, the WQC application relates to Volunteer's remedial activities at the site, specifically the installation of the SCS (see Environmental Notice Bulletin, July 22, 2015). Volunteer states that the bulkhead "has been designed to be the back end wall of the proposed SCS" (response at 2) and that Volunteer has "fully integrated the Containment Bulkhead into the SCS Design and has relied on its continuing presence" (id. at 9). Clearly, the WQC is interrelated with the SCS design and the bulkhead. Accordingly, staff's determination that the bulkhead must be addressed as part of the WQC review is not without a rational basis.

Creation of Habitat

Three of the issues raised by Volunteer concern Volunteer's assertion that Department staff is demanding the creation of additional habitat without legal or technical justification. Issue #3 concerns Volunteer's representation that staff's demand for new mud flat habitat is unjustified. Issue #4 concerns Volunteer's assertion that staff is demanding creation of additional, and far superior, habitat. Lastly, Issue #7 concerns the funding mechanism for the habitat mitigation plan.

Department staff states that Volunteer has agreed to provide funding for an off-site habitat mitigation project and staff further states that, after the funds are received, staff will issue a letter acknowledging that Volunteer has met the mitigation requirement set forth under the OU-2 ROD (staff response at 10). Staff further states that the funding mechanism will be determined at a later date, but that this issue is not a dispute with the Volunteer and its resolution will not delay remedial work at the site. As to on-site habitat, staff states that it is not demanding that any new habitat be created. Staff states that the removal of the bulkhead will not create new habitat, but will restore unrestricted tidal flow to areas of the site that have historically been subject to these flows (id. at 8). The record supports staff's representations on these issues and, therefore, Volunteer has not met its burden to show that there is no rational basis for staff's positions on the creation of habitat issues.

Potential Enforcement

Issue #5 concerns the possibility that Department staff will initiate an enforcement action concerning the bulkhead. As Department staff states, this issue is anticipatory. The dispute resolution process established under the BCA is not an appropriate vehicle for addressing potential affirmative defenses to a possible enforcement action. In the event that an enforcement action is commenced, Volunteer may raise any affirmative defenses it deems appropriate within the context of that proceeding.

RECOMMENDATION

For the reasons stated, I recommend that the Director of Environmental Remediation determine that the Volunteer failed to meet its burden to establish that Department staff's position does not have a rational basis and should not prevail. Volunteer has not demonstrated that staff has no rational basis to maintain that (i) the bulkhead must be removed, in whole or in part; (ii) it is not demanding the creation of new on-site habitat; and (iii) potential enforcement actions are not within the scope of the formal dispute resolution provisions of the BCA.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: October 9, 2015
Albany, New York