

**New York State Department of Environmental Conservation**  
**Division of Environmental Remediation**  
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Joe Martens  
Commissioner

Linda R. Shaw, Esq.  
Knauf Shaw LLP  
1125 Crossroads Building  
2 State Street  
Rochester, NY 14614

RE: Kirstein Building and Parking Lot Site  
Site No.: C828127  
Dispute Resolution  
Brownfield Cleanup Agreement  
(Index No. B8-0692-05-04)

Dear Ms. Shaw:

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 234-250 Andrews St. LLC (applicant), dated September 5, 2012, for formal dispute resolution under the provisions of the referenced Brownfield Cleanup Agreement.

The ALJ recommends that I dismiss applicant’s September 5, 2012, request for formal dispute resolution.

I have considered the Report, the request, including its attachments, along with the New York State Department of Environmental Conservation 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.

If you have any questions please contact Benjamin Conlon at 518-402-8556.

Sincerely,

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  
Benjamin A. Conlon, Esq., Office of General Counsel

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

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In the Matter of a Remedial Program for Kirstein Building and  
Associated Parking Lot under Article 27, Title 14 of the  
Environmental Conservation Law

**REPORT AND  
RECOMMENDATION**

- by -

**234-250 ANDREWS ST. LLC,**

Applicant.

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DEC Index #  
B8-0692-05-04  
Site # C828127

**BACKGROUND AND PROCEEDINGS**

This matter involves a dispute between 234-250 Andrews St. LLC (applicant) and staff of the Department of Environmental Conservation (Department). Applicant and the Department entered into a Brownfield Cleanup Agreement (BCA), dated August 31, 2005 (DEC Index No. B8-0692-05-04), pursuant to which applicant was obligated to remediate contamination at 37 Bittner Street, Rochester, County of Monroe (site). The dispute relates to applicant's objection to staff's decision to terminate the BCA.

By letter dated September 5, 2012, applicant filed a request (request) for formal dispute resolution with the Office of Hearings and Mediation Services (OHMS). The request states that it is being brought pursuant to section XIV.B of the BCA (request at 1). Department staff responded (staff response) to the request by letter dated September 10, 2012. On December 19, 2012, staff provided this office with a copy of the BCA and a copy of a March 21, 2012 letter from staff to applicant that is referenced in the staff response. On March 26, 2013 staff counsel advised this office that applicant was trying to pay oversight costs owed to the Department and that applicant may seek to "get back into the program by re-applying." On June 25, 2013, this office sought an update from the parties. Staff advised that the dispute between the parties over the termination of the BCA remained open and that the parties were not engaged in any discussions to resolve the matter.

Under the terms of the BCA, when an applicant 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.

### Summary of Applicant's Position

Applicant objects to Department staff's decision to terminate the BCA. Applicant states that "[p]ursuant to section XIV.B [of the BCA], this letter shall serve as a request for formal dispute resolution with regard to the August 6, 2012 letter [termination letter] from the NYSDEC . . . which effectively stated that the [BCA] . . . would be terminated within five days of that letter" (request at 1). Applicant states that the termination letter contains erroneous "conclusions about when certain periods of time to respond ended" and that "the 30 day timeframe to file a formal dispute runs from August 6<sup>th</sup> of [*sic*, probably should read "to"] today [i.e., the date of the request, September 5, 2012]" (*id.*). Applicant further states that "until receipt of the August 6<sup>th</sup> letter, there was no indication informal negotiations [had] ended" and, therefore, applicant argues that its request for formal dispute resolution is timely (*id.* at 3).

### Summary of Staff's Position

Department staff argues that, pursuant to its August 6, 2012 termination letter to applicant, "[t]he effective date of the termination is August 21, 2012, five days after the letter's actual date of receipt" (staff response at 1). Therefore, staff argues, the "dispute resolution provisions [of the BCA] no longer apply" (*id.* at 2). The BCA provides for staff to file a "statement of position" in response to a request for formal dispute resolution. However, because staff considers the BCA to be terminated, it declined to file a statement of position (*id.*).

## DISCUSSION

Pursuant to BCA paragraph XIII, "[t]he Department may terminate [the BCA] at any time . . . in the event Applicant fails to substantially comply with the Agreement's terms and conditions." The BCA further provides that, with the exception of certain provisions of the BCA not relevant here, the BCA will terminate effective five days from the date of applicant's receipt of a written notice of termination from the Department (*id.*). Paragraph XIII requires staff to set forth its rationale for terminating the BCA, but does not provide a mechanism for applicant to challenge staff's decision. Similarly, applicant may terminate the BCA at any time and there is no provision for staff to challenge applicant's decision.

Staff's termination letter states that "the Department is terminating the Agreement per the Agreement's Subparagraph XIII" because "Applicant has failed to substantially comply with the Brownfield Cleanup Agreement" (request, exhibit A at 2). Staff identifies specific milestones set forth under the interim remedial measures (IRM) work plan for the site and states that during site inspections over a three month period staff "observed that none of the required activities had taken place" (*id.*). The BCA does not expressly define what constitutes a failure to substantially comply with the terms and conditions of the agreement. Nevertheless, the IRM work plan is clearly an integral part of the BCA (*see* BCA subparagraph II.B.2.i [stating that a "Department-approved Work Plan shall be incorporated into and become an enforceable part of this Agreement"]). Accordingly, applicant's failure to timely implement the IRM would provide a sufficient basis for termination of the BCA.

By letter dated December 2, 2011, Department staff approved a modified schedule for implementation of the site's IRM work plan and advised applicant that the IRM work plan was incorporated into the BCA (see request, exhibit E at 1). By letter dated December 21, 2011, applicant advised staff that it opposed certain aspects of the IRM work plan and invoked the informal dispute resolution provisions of the BCA (see request, exhibit C at 1; see also BCA subparagraph II.B.2.ii [providing that applicant may invoke informal dispute resolution within 20 days of the Department's modification of a work plan]). Under the informal dispute resolution provisions of the BCA, the parties must resolve the dispute within 30 days or the modified IRM work plan becomes binding on the applicant (see BCA subparagraph XIV.A). Here, however, Department staff agreed, at least initially, to toll the 30-day requirement.

Applicant represents that, prior to the August 6, 2012 termination letter, Department staff provided "no indication informal negotiations [had] ended" (request at 3). By letter dated March 21, 2012, however, staff advised applicant that staff "no longer agrees to toll the period for informal dispute resolution and considers it concluded as of March 16, 2012."

Department staff did not provide its rationale for deeming the informal dispute resolution process to have concluded on March 16, 2012. Staff's March 21, 2012 letter to applicant's counsel notes that, by letter dated February 27, 2012, staff had requested applicant to "advise the Department by no later than March 9, 2012 as to whether [applicant] accepts" the IRM schedule. The termination letter states that staff had agreed to extend the informal dispute resolution period only through March 9, 2012 (see request, exhibit A at 1-2). However, the termination letter also notes the March 16, 2012 termination date (id. at 2). Because it is the date cited by staff as the end date of informal dispute resolution in its March 21, 2012 letter and is referenced in the termination letter, I deem March 16, 2012 to be the end date of the informal dispute resolution period for the purposes of this report.

Under the terms of the BCA, it is clear that informal dispute resolution is intended to be a short-lived process. Pursuant to subparagraph XIV.A, informal dispute resolution "shall not exceed thirty (30) Days." Staff states that it agreed to extensions of this timeframe by letters dated January 17, February 10, and February 27, 2012 (request, exhibit A at 1-2). No provision of the BCA requires staff to extend the period for informal dispute resolution. Further, once staff agreed to an extension, it was not required to continue granting further extensions. As detailed above, I have concluded that the last extension ran until March 16, 2012. Applicant does not contest staff's representations regarding the three extensions nor does applicant provide any evidence to demonstrate that staff agreed to a fourth extension.

Pursuant to BCA subparagraph XIV.A, if the parties are unable to resolve a dispute through the informal dispute resolution process, "the Department's position shall be considered binding unless Applicant notifies the Department in writing within thirty (30) Days after the conclusion of the . . . informal negotiations that it invokes the [formal] dispute resolution provisions" of the BCA. Applicant did not seek formal dispute resolution until September 5, 2012; nearly six months after the informal dispute resolution process came to a close on March 16, 2012. Accordingly, applicant's request for formal dispute resolution was untimely.

Lastly, I note that applicant may not rely on the August 6, 2012 termination letter as a separate basis for instituting formal dispute resolution under the BCA. Subparagraph XIV.A enumerates the circumstances under which dispute resolution may be invoked and a decision by staff to terminate the BCA is not listed. Rather, dispute resolution is available to applicant only in relation to disputes regarding (i) disapproval of a submittal, (ii) disapproval of a proposed work plan, (iii) disapproval of a final report, (iv) implementation of a work plan, or (v) a determination by the Department that a proposed change of use for a site is prohibited. Therefore, Department staff's August 6, 2012 termination letter does not constitute a basis for initiating formal dispute resolution under the BCA.

Applicant's request for formal dispute resolution relative to the Department-approved work plan was untimely and the formal dispute resolution provisions of the BCA are not available to contest the Department's determination to terminate the BCA. Accordingly, there is no basis under the BCA for instituting formal dispute resolution over the objection of staff.

#### RECOMMENDATION

For the reasons stated, I recommend that the Director dismiss applicant's September 5, 2012 request for formal dispute resolution.

\_\_\_\_\_/s/\_\_\_\_\_  
Richard A. Sherman  
Administrative Law Judge

Dated: July 8, 2013  
Albany, New York