COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

September 3, 2019

In the Matter of
143 Lynnfield Street, LLC and
CommTank, Inc.

OADR Docket No. 2018-009
Peabody, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

143 Lynnfield Street, LLC ("Lynnfield") and CommTank, Inc. (collectively, "Petitioners") filed this appeal concerning the real property at 143 Lynnfield Street, Peabody, Massachusetts ("the Property"). The Petitioners challenge the Demand for Stipulated Penalties in the amount of $30,000 (No. 00004760) ("Demand") that the Massachusetts Department of Environmental Protection's Northeast Regional Office ("MassDEP") issued based upon alleged violations of an Administrative Consent Order (Nos. ACO-NE-16-9001-2346C-SETT and ACO-NE-16-9002-2346C-SETT) ("ACO") entered between the Petitioners and MassDEP.

After holding an adjudicatory hearing and reviewing the administrative record, I recommend that MassDEP's Commissioner affirm the Demand. The Petitioners and MassDEP were both represented by counsel when they negotiated the terms of the ACO over a period of approximately 9 months. The ACO unambiguously provides MassDEP with the authority to demand $30,000 in stipulated penalties because it authorizes MassDEP to demand $1,000 per day per violation for as long as the violation continues. An overwhelming preponderance of the

evidence demonstrates that the Petitioners committed three separate violations of the ACO that continued for *several* months. While MassDEP could have demanded a penalty for hundreds of days of violations for three separate violations it exercised its discretion to demand a stipulated penalty for 30 days of a single violation. The penalty is consistent with MassDEP's statutory authority and in furtherance of deterring the Petitioners and other regulated entities from abdicating their obligations under an ACO. A preponderance of the evidence demonstrates that the Petitioners should be bound by the ACO and not excused from complying with the stipulated penalty provision to which they agreed.

WITNESSES

At the adjudicatory hearing, the following witnesses testified on behalf of MassDEP:

1. John J. MacAuley, Jr. MacAuley is employed as an Environmental Analyst V with the Bureau of Air and Waste in the Department's Northeast Regional Office, Wilmington, MA. He serves as Section Chief of the Asbestos Program. He has substantial training, education, and certifications and many years of experience in asbestos handling and remediation.

2. Peter C. Seward. Seward is employed with MassDEP as an environmental analyst in the asbestos program in MassDEP's Northeast Regional Office. He has substantial training, education, and certifications with respect to asbestos management.

3. Mark G. Fairbrother. Fairbrother is employed with MassDEP as Section Chief of the Solid Waste Management Section in MassDEP's Northeast Regional Office. He has been employed in the Solid Waste Section since 2001 and has served as Section Chief since 2016.

4. John P. Morey. Morey has been employed with MassDEP since 2001 and is presently serving as an environmental analyst in the Solid Waste Section in MassDEP's Northeast Regional Office.

The following witnesses testified for the Petitioners:

1. Bruce M. Poole. Poole is president of S.P. Engineering, Inc., which is an environmental services corporation specializing in laboratory analysis, environmental site assessments, regulatory compliance, and remediation of contaminated soils and groundwater. He has been working in these areas since approximately 1980 and has substantial education and experience with the subject matter at issue in this appeal.

2. Luis A. Diaz. Diaz is Vice President of CommTank.

BACKGROUND

CommTank is a Massachusetts corporation and Lynnfield is a Massachusetts limited liability company; both have their principal offices at 84 New Salem Street, Wakefield, MA. Part of CommTank's business is to remove old underground storage tanks and install new tanks and provide related services. Diaz PFT[1], p. 1.

The Property encompasses approximately 15 acres. Four large buildings occupy the Property: one was used for manufacturing (Building 1, built in 1880), two were used as warehouses (Building 2, built in 1990; Building 3, built in 1940)), and the last building (Building 4, built in 1925) was used as a maintenance garage. Building 3 was demolished at some point, leaving a pile of debris in a stockpile at the site. ACO, ¶ 5.E. The Property is surrounded by woodlands, Centennial Technology Park, and residential properties. Wetlands consisting of two ponds and an intermittent stream are present at the Property.

In March 2016, the City of Peabody Office of Inspectional Services issued a notice to Lynnfield that it was in violation of a Peabody City Ordinance for failing to maintain the Property in accord with applicable laws. ACO, ¶ 5.G. The notice required, among other things, that Lynnfield remove from the Property "garbage, and all junked or abandoned vehicles . . . ." Id. Approximately two weeks later (March 14, 2016), MassDEP inspected the Property with City of Peabody officials. ACO, ¶ 5.H; Morey PFT, p. 3. During the inspection, MassDEP concluded that the Petitioners were utilizing large portions of the Property for allegedly unlawful storage purposes and observed the following alleged violations for the stored items:

[1] "PFT" is the acronym for the pre-filed testimony that each witness filed prior to the adjudicatory hearing.

1. Approximately 100 used storage tanks, ranging in size from 125 gallons to several thousands gallons;
2. Numerous tanks, containers and other debris piles that MassDEP believed contained hazardous constituents per 310 CMR 30.100-199, many with no information identifying their contents, allegedly in violation of G.L. c. 21C § 9;
3. There was no documentation provided identifying whether the containers and tanks were empty, allegedly in violation of 310 CMR 30.106(2) and (3) (the tanks were later verified to be empty); and
4. Six large stockpiles of debris, including alleged solid waste as defined in 310 CMR 16.02 and 310 CMR 19.006, some of which were located in the Buffer Zone to the wetlands on the Property, allegedly in violation of the Wetlands Regulations, 310 CMR 10.02 and 10.53 and the Wetlands Protection Act.

ACO, pp. 4-7.

MassDEP alleged that the stockpiles were in violation of the regulations prohibiting the unlawful establishment of a Solid Waste Facility and a Dumping Ground, in violation of 310 CMR 16.00 and 310 CMR 19.000 and unlawfully managing asbestos in violation of 310 CMR 7.15. ACO, pp. 8-9. Shortly after the MassDEP March 14 inspection, the Petitioners created a "stockpile map" to identify the whereabouts and contents of the six uncovered stockpiles, numbered 0 through 5. ACO, p. 7, Figure 1. The following materials were allegedly observed in one or more of the stockpiles: used sand blasting grit remnants known as "Black Beauty," construction and demolition waste, tank cleaning debris, coal ash, sludge pit excavate materials, and asbestos containing materials and debris. ACO, pp. 7-10; Morey PFT, p. 3. In addition to

creating the stockpile map, the Petitioners also covered the stockpiles with plastic tarps and collected samples of the stockpiles which were submitted for testing and identification.

On March 15, 2016, the Peabody Board of Health issued to Lynnfield an "Order to Correct Violations" for creating a public health nuisance in violation of G.L. c. 111, §§ 122-23.

On March 28 and 29, 2016, MassDEP issued to the Petitioners Unilateral Administrative Orders ("UAOs") for their alleged failure to operate in compliance with laws governing: Hazardous Waste management (310 CMR 30.000), Hazardous Material remediation (G.L. c. 21E and 310 CMR 40.000), Solid Waste management (310 CMR 16.00, 310 CMR 19.000), Clean Air (310 CMR 7.00 and G.L. c. 111 §§ 142A-N), and Wetlands (310 CMR 10.000). The UAOs required, among other things, that the Petitioners bring the Property into compliance with all applicable environmental laws. ACO, p. 9; Morey PFT, p. 4.

The Petitioners appealed the UAOs here, to the Office of Appeals and Dispute Resolution ("OADR") and I stayed the appeals, at the parties' request, while they engaged in settlement negotiations over the next *nine* months. During that period, the Petitioners performed certain measures that were in compliance with the UAOs, including, among other things, identification and proper disposal of the tanks' contents. ACO, pp. 10-11.

The parties ultimately reached a settlement agreement that was memorialized in the ACO, which the parties executed on January 19, 2017 and which was approved by MassDEP's Commissioner on March 7, 2017. The ACO required, among other things, that the Petitioners perform the following measures within specified periods of time: cease and desist from unlawful alteration of wetlands Resource Areas; cease and desist from unlawfully receiving and handling Solid Waste; cover all stockpiles; retain a wetland scientist to delineate all wetlands; test and identify the constituent parts of each stockpile; identify disposal and/or recycling facilities to

accept materials to be removed from the Property; submit a Solid Waste report summarizing the results of testing and identifying the facility to receive each material; and properly dispose or remove Solid Waste. ACO, pp. 10-16.

On May 2, 2018, MassDEP issued to the Petitioners the Demand, which arose out of alleged violations of the ACO. The Petitioners appealed the Demand to OADR.

BURDEN OF PROOF

In an adjudicatory proceeding involving MassDEP's enforcement of an ACO, MassDEP has the burden of proving the elements of its case by a preponderance of the evidence. "A party in a civil case having the burden of proving a particular fact [by a preponderance of the evidence] does not have to establish the existence of that fact as an absolute certainty. . . . [I]t is sufficient if the party having the burden of proving a particular fact establishes the existence of that fact as the greater likelihood, the greater probability." Massachusetts Jury Instructions, Civil, 1.14(d).

The relevancy, admissibility, and weight of evidence that the parties sought to introduce in the hearing were governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ."

DISCUSSION

I. MassDEP's Demand For Stipulated Penalties Should Be Upheld

A. The Demand

MassDEP asserts that the Petitioners violated ¶ III.8.P of the ACO, which provides:

> Within thirty (30) days of MassDEP's approval of the Solid Waste Report required above, Respondents shall remove all accumulated solid waste from the Site and properly dispose of said waste at appropriate solid waste or recycling facilities in accordance with the requirements of 310 CMR 16.00 and 310 CMR 19.000, and submit to MassDEP, for review and approval, a written report (the 'Solid Waste Completion Report') describing the steps Respondents took to comply with the requirements of this Consent Order . . . . The Solid Waste Completion Report shall be signed and certified by a responsible corporate officer, in accordance with the requirements of 310 CMR 19.011, and shall include, at a minimum, the following:
>
> 1. Confirmation that the removal of solid waste from the Site has been completed;
> 2. A Site sketch identifying the former locations and extent of the solid waste stockpiles at the Site;
> 3. A description of the nature of material(s) removed from the Site;
> 4. Documentation of the quantity of material(s) removed from the Site;
> 5. Identification of the disposal location(s) of said material; and
> 6. Analytical results of additional sampling completed to characterize the material, if any. (emphasis added)

MassDEP contends the Petitioners committed three independently enforceable and continuing violations of this provision over many days because the Petitioners allegedly failed to: (1) remove, properly dispose, and/or recycle all accumulated Solid Waste from the Property within 30 days of MassDEP's approval of the Solid Waste Report; (2) submit to MassDEP a Solid Waste Completion Report within 30 days of MassDEP's approval of the Solid Waste

Report; and (3) submit a Solid Waste Completion Report that describes "the requisite steps [the Petitioner] took to comply with the [ACO]." MassDEP's Closing Brief, p. 2.

For the alleged violations, MassDEP demanded that the Petitioners pay a stipulated penalty in the amount of $30,000, pursuant to ACO, ¶ III.19. That provision provides:

> If Respondents violate any provision of the Consent Order, Respondents shall pay stipulated civil administrative penalties to the Commonwealth in the amount of $1,000 per day for each day, or portion thereof, each such violation continues.
>
> Stipulated civil administrative penalties begin to accrue on the day a violation occurs and shall continue to accrue until the day Respondents correct the violation or completes performances, whichever is applicable. Stipulated civil administrative penalties shall accrue regardless of whether MassDEP has notified Respondents of a violation or act of noncompliance. . . . If simultaneous violations occur, separate penalties shall accrue for separate violations of this Consent Order. . . .

B. <u>The Standard of Review for an Appeal of a Stipulated Penalties Demand</u>

The standard of review for alleged violations of the ACO has been seriously circumscribed by the provisions of the ACO itself and prior MassDEP adjudicatory decisions interpreting similar ACO provisions.

The relevant terms of the ACO provide that it was entered because the parties agreed it was in their "own interests . . . to proceed promptly with the actions called for [in the ACO] rather than to expend additional time and resources litigating the matters set forth above. . . ." ACO, ¶ 6. The Petitioners entered the ACO without "admitting or denying the facts or allegations set forth" in the ACO, but they agreed not to "contest such facts and allegations for purposes of the issuance or enforcement of this Consent Order." ACO, ¶ 6.

The ACO also provides: "Respondents understand, and <u>hereby waive</u>, their right to an adjudicatory hearing before MassDEP on, and judicial review of, the issuance and terms of this

Consent Order and to notice of any such rights of review. This waiver does not extend to any other order issued by the MassDEP." ACO, p. 17, ¶ 13 (emphasis added).

The ACO also included a provision defining the scope of an appeal to challenge a Demand for stipulated penalties. ACO, ¶ 19. That provision explicitly provided that the Petitioners "reserve whatever rights they may have to contest MassDEP's determination that [the Petitioners] failed to comply with the Consent Order and/or to contest the accuracy of MassDEP's calculation of the amount of the stipulated civil administrative penalty."

The above terms have been previously applied in other MassDEP adjudicatory decisions to narrowly confine the standard of review. As I previously discussed in Matter of Empire Recycling, LLC, Docket No. 2015-017, Recommended Final Decision (January 27, 2016), adopted by Final Decision (February 12, 2017), the legal standard applicable to a demand for stipulated penalties or suspended penalties arising out of an ACO has been relatively clear since the decision in Matter of Pitt Construction Corp., Docket No. 2003-11, Recommended Final Decision (May 24, 2005), adopted by Final Decision (September 23, 2005). There, MassDEP demanded stipulated *and* suspended penalties arising out of a consent order. Under those circumstances, the Administrative Magistrate found that MassDEP did not have to satisfy the requirements of the Civil Administrative Penalty Statute, G.L. c. 21A §16, to demand the penalty. The Magistrate stated: "The penalty was agreed-to previously, and with that agreement Pitt Construction waived further appeal rights. Moreover, as the penalty was stipulated, there is no need for the Department to establish that the underlying conduct was willful or part of a pattern of non-compliance[,]" which would otherwise be required absent the ACO. Thus, the Magistrate held that the only issues on appeal were whether the party was bound by the consent order, whether the "violation or violations alleged occurred, and [whether] the penalty was

calculated correctly in accordance with the terms of the order. The reasonableness of the penalty is not ordinarily in issue -- absent some extraordinary circumstance -- because the parties consented knowingly to the penalty scheme when they executed the consent order." Thus, the Administrative Magistrate in Pitt Construction proceeded to find that MassDEP had established the predicate violation to demand the suspended penalty and that the penalty had been correctly calculated. The Magistrate therefore affirmed the penalty amount in favor of MassDEP and against Pitt.[2]

In Empire, I expounded upon Matter of Pitt Construction, explaining that the Massachusetts courts have considered similar issues in the context of consent judgments. I explained that a consent judgment is analogous to an ACO. It "is essentially a settlement agreement that is entered as a judgment." Thibbitts v. Crowley, 405 Mass. 222, 227 (1989). The courts have held that a "consent judgment . . . conclusively determines the rights of the parties as to all matters within its scope . . . [and] any exceptions made by either party to the underlying actions are extinguished unless specifically noted in the judgment or otherwise incorporated into the judgment." Kelton Corp. v. County of Worcester, 426 Mass. 355, 359-360, 688 N.E.2d 941 (1997). "Principles of fairness and careful use of limited judicial resources prohibit a further round of litigation to resolve a question that should have been resolved in the first round." Whelan v. Division of Med. Assistance, 44 Mass. App. Ct. 663, 668, 694 N.E.2d 10 (1998); see Fishman v. Alberts, 321 Mass. 280, 281, 72 N.E.2d 513 (1947) ("The great weight of authority supports the principle that [a consent judgment] is as binding and conclusive upon the parties as

[2] In his Final Decision in Matter of Pitt, the DEP Commissioner concurred with the result reached by the Magistrate but questioned whether a party has a right of appeal arising out of a consent order. He stated: "Apparently the Department issued its demand in the form of a Notice of Intent to Assess Administrative Penalties that included appeal rights despite a prior administrative consent order with a waiver of appeal rights. As the issue was not briefed, I do not necessarily conclude that further action under an administrative consent order creates a right of appeal to an adjudicatory proceeding. Instead, parties may be bound by a procedure identified in a consent order to address any subsequent disputes."

if it had been entered after a trial and a determination of all the issues"); Levy v. Crawford, 33 Mass. App. Ct. 932, 933 (1992) ("As a general proposition, an agreement for judgment serves as a waiver of all matters within the scope of that judgment"); Thibbitts, supra. (burden on party to modify consent judgment entered against it more formidable than had party litigated and lost).

A consent judgment is a separate and valid contract whereby the parties make a "free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment." Thibbitts v. Crowley, supra (quoting United States Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269, 1274 (3d Cir. 1979)). A court is "powerless to enlarge or contract the dimensions of a true consent decree except upon (i) the parties' further agreement or (ii) litigation of newly-emergent issues.'" Thibbits, at 227 (quoting from Pearson v. Fair, 808 F.2d 163, 166 (1st Cir. 1986)). The "newly emergent issues" exception generally exists where there was an absence of power, authority, or consent to enter the agreement in the first instance. Id. at 228; Pearson v. Fair, 808 F.2d 163 (1st Cir. 1986).

When a provision in a consent judgment is not ambiguous, "the parties' rights and obligations are to be determined from contract language itself," just like any other contract. Kelton Corp., supra. (quoting Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 792, 667 N.E.2d 907 (1996)).

Given the above legal standard there are three issues to resolve: (1) whether the Petitioners violated the ACO, as alleged in the Demand; (2) whether the penalty demanded was correctly calculated; and (3) whether there are newly emergent issues.

C. The Petitioners Violated the ACO as Alleged

On May 8, 2017, the Petitioners submitted to MassDEP for its review and approval the Solid Waste Report and Disposal Options Plan ("Solid Waste Report"), as required by the ACO.

Morey PFT, Ex. 3. The Petitioners also provided a table specifying the ACO deadlines by which they were to remedy the noncompliance at the Property. Morey PFT, Ex. 2. The Solid Waste Report not only detailed the Solid Waste materials at the Property, it also listed several disposal and/or recycling facilities for each stockpile and provided a plan for removal of Solid Waste, all as required by the ACO. Morey Rebuttal PFT, p. 1; Fairbrother PFT. The Petitioners foresaw that two of the piles might require approximately two to four weeks for Petitioner CommTank's personnel to separate various Solid Waste materials prior to being removed from the Property. Morey PFT, Ex. 3, p. 12. The Petitioners were familiar with the various disposal and recycling facilities that *they* had selected and designated in the Solid Waste Report and their requirements for acceptance of materials. Morey Rebuttal PFT, p. 3. MassDEP promptly responded to the Solid Waste Report with questions concerning disposal/recycling of the Solid Waste at the Property. More PFT, p. 5, Ex. 5. One of the questions sought to clarify that the Petitioners intended to comply with the ACO and that they were *not* seeking a modification of the ACO for extra time to complete the necessary actions for removal of the stockpiles. Id. at pp. 1-2. The Petitioners responded on June 22, 2017, with answers, including the statement that the Petitioners would load "large concrete rubble . . . on a licensed truck and [send it] to a processing facility." Morey PFT, p. 5. The Petitioners stated: "The schedule for concrete separation and stockpile removal . . . is a realistic estimate of the time needed. CommTank plans to complete the removal of specified materials in the 30 days timeframe contained in the ACO, but may need additional time, should circumstances change. If so, CommTank will request a modification of the ACO schedule to complete the necessary actions for stockpiles 2 and 5." Morey PFT, p. 5, Ex. 4; Poole, p. 8.

On July 7, 2017, MassDEP issued the Documentation of Debris Stockpiles and Disposal Options Plan ("Disposal Plan") approving the Petitioners' Solid Waste Report under the ACO, which included the Petitioners' plan for disposal or recycling of Solid Waste and otherwise eliminating the stockpiles. Morey PFT, Ex. 5. The Disposal Plan included the Petitioners' specification of facilities for receiving the materials to be removed, and it confirmed the 30 day deadline in the ACO. Morey PFT, Ex. 5. Accordingly, pursuant to the ACO, ¶ III.8.p, within 30 days of that approval (or August 7, 2017), the Petitioners were required to (1) remove, properly dispose, and/or recycle all accumulated Solid Waste from the Site; (2) submit to MassDEP a Solid Waste Completion Report; and (3) submit a Solid Waste Completion Report that describes "the requisite steps [the Petitioner] took to comply with the [ACO]."

About one month later on August 3 (and just shy of the August 7 deadline), the Petitioners sent a notice to MassDEP, purportedly pursuant to ACO ¶ 12, stating that "because of the limited availability of trucking companies . . . the [Petitioners] will need additional time to remove the material." Morey PFT, p. 6, Ex. 6. The Petitioners added that "The trucking companies are extremely busy and somewhat short-staffed because of summer vacations. The [Petitioners] anticipate a delay of up to 30 days to complete the removal of the material." Morey PFT, p. 6, Ex. 6; Diaz PFT, p. 2; Poole PFT, p. 10.

The ACO provision cited by the Petitioners (¶ 12) is titled "Force Majeure." It provides, in relevant part: "MassDEP agrees to extend the time for performance of any requirement of this Consent Order if MassDEP determines that such failure to perform is caused by a Force Majeure event. The failure to perform a requirement of this Consent Order shall be considered to have been caused by a Force Majeure event if the following criteria are met: (1) an event delays performance of a requirement of this Consent Order beyond the deadline established herein; (2)

such event is beyond the control and without the fault of [the Petitioners] and [Petitioners'] employees agents, consultants, and contractors; and (3) such delay could not have been prevented, avoided, or minimized by the exercise of due care by Respondents or Respondents' employees, agents, consultants, and contractors." ACO, ¶ 12.A.

The Petitioners stated that they had been working diligently to meet the deadline and the "short delay could not have been prevented, avoided, or minimized." Morey PFT, Ex. 6. Therefore, the Petitioners sought an extension of 30 days to extend the time for performing obligations of Paragraph 8.P, to and including September 6, 2017.

On August 16, 2017, MassDEP denied the Petitioners' Force Majeure request because they failed to provide any of the required supporting documentation and the Petitioners "failure to secure commitments from trucking companies to provide transportation does not meet the definition of the Force Majeure." Morey PFT, p. 7, Ex. 7. In its denial, MassDEP stated: "The deadlines in the ACO were negotiated at great length and agreed to by the [Petitioners] in Paragraph III.11 of the ACO" to "constitute reasonable periods of time for [the Petitioners]" to complete the ACO required actions. Morey PFT, p. 7, Ex. 7; Fairbrother PFT, p. 4.

The Petitioners admitted that Solid Waste remained at the site after the August 7, 2018, deadline. Hearing[3] III, 14:20. A September 6, 2017, site inspection confirmed that several large piles of material had not been removed. Seward PFT, p. 3, Exs. 1-7. Another inspection on September 26, 2017, also confirmed that several of the large piles had not been removed, but the inspector was assured the materials would be removed that week. MacAuley PFT, p. 6. Further, in September 2017, additional alleged violations were observed, including piles of open, uncontained, and uncovered asbestos. Seward Rebuttal PFT, p. 1, Exs. 1-3.

[3] Citation to "Hearing" refers to the digital recordings of the adjudicatory hearing, followed by the file number of the recording. Thus, the "III" indicates that this is the third recording file.

The Solid Waste Completion Report that was due on August 7, 2017, was not submitted to MassDEP until over six months later, on February 20, 2018. Morey PFT, p. 7, Ex. 8. Not only was the report submitted over six months after it was due, and Solid Waste was not removed from the Property by the August 7, 2019, deadline, the report was submitted with insufficient information, including documentation that the materials were properly removed and disposed of; missing were required Waste Profiles, Bills of Lading, and Landfill Weight Slips documenting proper disposal of the materials, and analytical results from the required additional sampling. Morey PFT, pp. 8, Ex. 11. In fact, when the Petitioners submitted their Solid Waste Completion Report over six months late, they stated in their report that they still had not removed all of the Solid Waste from the Property because, among other reasons, it was still necessary for the Petitioners' employees to separate various materials within the piles at the Property. Morey PFT, Ex. 8, p. 9; Diaz PFT, p. 4. The remaining materials included approximately 500 cubic yards of concrete rubble, concrete slabs, concrete block, asphalt, brick, and rock. Morey PFT, Ex. 11. Site inspections verified that all Solid Waste had not been removed. Morey PFT, p. 8, ¶ 34; Fairbrother PFT, p. 4.

As a consequence of the above, MassDEP issued the Demand on May 2, 2018, requiring that the Petitioners pay $30,000 for three independent violations of failing to meet the August 7, 2017, deadline to: (1) remove, properly dispose, and/or recycle all accumulated Solid Waste from the Property; (2) submit to MassDEP a Solid Waste Completion Report; and (3) submit a Solid Waste Completion Report that describes "the requisite steps [the Petitioner] took to comply with the [ACO]." Morey PFT, Ex. 12. The Petitioners did not submit a complete Solid Waste Completion Report until July 23, 2018, approximately two weeks from being one year overdue. Morey PFT, ¶ 32.

The Petitioners have asserted a number of reasons why they failed to comply with the above three requirements of the ACO, missing the agreed upon deadline by many months, indeed close to a year. They asserted the same reason they attempted to use on August 3, 2017, under the Force Majeure provision of the ACO, namely that the trucking companies that they had previously identified in the Solid Waste Report were unavailable. Diaz testified that "none" of the trucking companies or landfills the Petitioners had contacted were available to perform the work. Diaz PFT, p. 2; Poole PFT, p. 9. "Some" of the companies said that they were too busy to accommodate the Petitioners' schedule because the summer months are "typically the busiest time of the year for contractors" because of the construction season and because employees take vacations. Diaz, p. 3. Also, several of the landfills declined to accept the materials at issue. The Petitioners were not able until early September 2017 to make arrangements with a Vermont company to accept the materials, but the 200 mile distance delayed removal efforts and made it more costly. Diaz PFT, p. 3. Further, the Petitioners were delayed in the winter months because the ground and the materials to be removed froze. Id.

The Petitioners purported Force Majeure justification is without merit for several reasons. First, a preponderance of the evidence demonstrates that the primary reason for the Petitioners' noncompliance is that their own employees were deployed and prioritized offsite to complete CommTank jobs at other locations, instead of separating the Solid Waste materials as specified in the Solid Waste Report. This is supported by the Petitioners' own documents and testimony. Morey PFT, p. 9, Exs. 9, 11; Hearing III, 16:20. Instead, Petitioners' employees who were available to separate the materials were deployed to other projects being handled by the Petitioners. Morey PFT, p. 9, Exs. 9, 11; Hearing III, 16:20, 17:15-19:00. This admission

detracts from the Petitioners' credibility – they never notified MassDEP that this was causing delay, and instead they asserted other reasons for delay. Hearing III, 18:35.

Moreover, there is no evidence in the administrative record that would satisfy the elements of the Force Majeure provision. Indeed, while some delay may have been experienced because of the availability of trucks, a preponderance of the evidence demonstrates that a significant cause of delay was the Petitioners' decision to deploy and prioritize their employees at other sites to support their business interests and eventually the materials became frozen and inseparable during the winter. This dovetails with application of the second and third elements: the Force Majeure "event [must be] beyond the control and without the fault of [the Petitioners] and [Petitioners'] employees agents, consultants, and contractors" and "such delay could not have been prevented, avoided, or minimized by the exercise of due care by Respondents or Respondents' employees, agents, consultants, and contractors." ACO, ¶ 12.A. As discussed, substantial evidence demonstrates that much of the delay was caused by the Petitioners' own conduct.

Further, prior to the submission of the Solid Waste Report it was the Petitioners who were responsible for investigating and securing trucking companies and disposal facilities who would work with the Petitioners to comply with the terms of the ACO. And prior to the submission of the Solid Waste Report, the Petitioners in fact researched, secured, and identified in the Solid Waste Report several alternative companies and disposal locations that were available for them to comply with the ACO. It was incumbent upon the Petitioners to do that in a manner that enabled them to meet their ACO obligations. Their failure to adequately investigate and engage the companies and the facilities was something that was reasonably foreseeable and under the control of the Petitioners. It was their responsibility to engage

companies and facilities who would be obligated to meet the ACO deadlines. Their failure to adequately vet the companies and facilities and bind them contractually cannot excuse their failure to comply with the ACO for the many months it took them to complete their obligations under the ACO.

The Petitioners other purported excuses for the delayed performance are also without merit and do not satisfy any contractual or legal defense that would excuse performance for the many months of delay. Indeed, contrary to Poole's claims that the City hindered cleanup processes, the documentation actually shows that the City was working with MassDEP and the Petitioners to facilitate and expedite the cleanup. Morey Rebuttal PFT, pp. 2-3. The City even allowed an extension for removal of the tanks in order to expedite removal of the solid waste. Morey Rebuttal PFT, p. 3. In addition, the Petitioners claim that they were delayed by their attempts to reuse some of the concrete materials as backfill is without merit. MassDEP had only permitted the Petitioners to reuse soil from Stockpile S-1, the concrete was required to be sent to a recycling facility and thus could not be used as backfill. Morey PFT, p. 3. Further, MassDEP did not require a two week notice before asbestos abatement could start and the asbestos abatement did not block access to the site, contrary to Poole's testimony. MacAuley Rebuttal PFT, pp. 1-2, Ex. 1; Seward Rebuttal PFT, p. 2, Exs. 1-3. Moreover, MassDEP allowed the requested extension of the asbestos abatement work until September 29, 2017, so that the Petitioners could prioritize compliance with the ACO, but they failed to do that. MacAuley Rebuttal PFT, pp. 1-2, Ex. 1.

D. <u>The Penalty was Correctly Calculated</u>

MassDEP is authorized by G.L. c. 21A, § 16 and 310 CMR 5.00 to assess civil administrative penalties. The administrative record demonstrates that even though the

Petitioners' noncompliance consisted of hundreds of days for multiple independent violations, MassDEP exercised its discretion to determine that 30 days of $1,000 for each day of one violation was a reasonable amount to penalize the Petitioners. Morey PFT; Fairbrother PFT, p. 5. The penalty amount was unambiguously derived from within the four corners of the ACO that was negotiated over 9 months by the Petitioners' counsel and the amount was approved by MassDEP's Regional Enforcement Review Committee ("RERC"). Hearing I, 54-55:54; Hearing II, 22:25-24. Stipulated penalties accrue under the ACO "regardless of whether the Department has notified the [Petitioners] of a violation or act of noncompliance." ACO, ¶ III.19. The RERC is a group of high-level regional MassDEP officials who regularly meet to deliberate with respect to MassDEP's exercise of discretion in enforcement actions. Id. The RERC considered the Petitioners' potential penalty exposure for each day of continuing violations but decided to impose a penalty for only 30 days of noncompliance to enable the Petitioners to focus on returning the site to compliance. Hearing I, 54:33-1:10:05; Hearing II, 24-28. This is consistent with MassDEP's statutory authority and its broad enforcement authority. See G.L. c. 21A, § 16; Matter of Sullivan, Docket No. WET 2011-013, Recommended Final Decision (May 31, 2011) (citing several Massachusetts appeals court decisions), adopted by Final Decision (June 22, 2011).

Given the above, particularly the unambiguous ACO provisions, there is no merit in the Petitioners' assertions that that the penalty amount is unwarranted because MassDEP did not account for the cost of compliance, failed to identify the precise period of noncompliance, and did not apply the penalty calculation criteria from 310 CMR 5.25. The ACO itself and failure of the Petitioners to comply with it clearly provided notice to them that they were in noncompliance. The Civil Administrative Penalty Statute is not applicable because the

Petitioners agreed to the ACO terms that provide clear authority to uphold the amount sought in the Demand. The ACO itself reserves for the Petitioners only the right to challenge the Demand based on whether the Petitioners violated the ACO and whether the stipulated penalty amount was correctly calculated. This result is consistent with the Civil Administrative Penalty Statute, G.L. c. 21A § 16. It provides that if a person waives the right to an adjudicatory hearing, the "penalty shall be final immediately upon such waiver." G.L. c. 21A § 16. As the Magistrate stated in Pitt Construction: "The penalty was agreed-to previously, and with that agreement Pitt Construction waived further appeal rights. Moreover, as the penalty was stipulated, there is no need for the Department to establish that the underlying conduct was willful or part of a pattern of non-compliance."

Contrary to the Petitioners' arguments, there is nothing arbitrary and capricious about the demanded penalty amount. The Petitioners were represented by counsel when they were previously faced with possibly significant penalty exposure and decided to enter the ACO – the ACO required the Petitioners to bring the Property into compliance but they received a substantial benefit of the bargain by not having to pay any penalty at that time and expend resources litigating. The plain and unambiguous terms of the ACO demonstrate a negotiated compromise that included the stipulated penalties. The Petitioners knew this all along, and cannot now be heard to complain because in hindsight they would have negotiated a different deal. The penalty is not in the nature of liquidated damages, and instead was assessed pursuant to MassDEP's enforcement authority to deter noncompliance by the Petitioners and others who fall under MassDEP's enforcement jurisdiction. The Massachusetts Court of Appeals has previously recognized MassDEP's broad enforcement authority and the ability to fashion an enforceable consent order. DiCicco v. Dep't of Envtl. Prot., 64 Mass. App. Ct. 423 (2005).

E. There are no Newly Emergent Issues

The administrative record contains no evidence of "newly emergent issues." There is no contention that the parties did not enter the ACO under their own volition. There is no allegation that they did not possess the requisite authority or power to enter the ACO. There is thus no apparent basis for the emergent issues exception.

CONCLUSION

For all the foregoing reasons, I recommend that MassDEP's Commissioner issue a Final Decision adopting the Recommended Final Decision to affirm the Demand.[4]

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: __9/3/2019__

Timothy M. Jones
Presiding Officer

[4] Given this Recommended Final Decision, the Petitioners' Motion for Summary Decision and Motion for Directed Finding/Summary Disposition are denied. The Petitioners' Motion to Strike is denied, but I have taken their arguments into consideration in evaluating the weight of the evidence and making my own findings of fact and conclusions of law, separate and apart from the alleged improper conclusions of law and findings of fact to which the Petitioners objected.

SERVICE LIST

In The Matter Of:	143 Lynnfield Street, LLC and CommTank, Inc.
Docket No. 2018-009	File No. ACO-NE-16-9001-2346C-SETT and ACO-NE-16-9002-2346C-SETT Peabody

Representative	Party
Frederick Van Magness, Jr. PO Box 533 North Reading, MA 01864 fred@vanmagnesslaw.com	PETITIONER 143 Lynnfield Street, LLC and CommTank, Inc.
Jeanne Argento MassDEP – Office of General Counsel Northeast Regional Office 205B Lowell Street Wilmington, MA 01887 Jeanne.Argento@state.ma.us	DEPARTMENT
Cc: Susan Ruch Deputy Regional Director – Bureau of Air and Waste MassDEP – Northeast Regional Office 205B Lowell Street Wilmington, MA 01887 Susan.Ruch@state.ma.us	DEPARTMENT

Date: September 3, 2019