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New Jersey Appellate Court Grants Hearing to Contest Rescission of a No Further Action Letter

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In the Matter of Crompton Colors, Inc., No. A 0778 09T1 (App. Div. 10/27/11), the NJ Appellate Division ruled that a property owner is entitled to have an administrative hearing regarding the rescission of a no further action letter ("NFA Letter") by the DEP. In this case, a subsidiary of Hartz Mountain Industries, a former landlord of an industrial tenant named Crompton Colors, Inc., appealed DEP's rescission of an NFA Letter issued in 2002 and the denial of its request for a hearing to contest the decision.

Hartz purchased the property located in Bloomfield, NJ in 1965 and leased to Peerless Bindery. The property consisted of a warehouse and an office building. In 1990, the buildings were demolished and a 10,000 gallon heating oil underground storage tank was removed. According to the Report submitted by Hartz to DEP, petroleum product was encountered in the soil and floating on the groundwater. The impacted soil was subsequently excavated and the floating oil was removed. Although groundwater monitoring wells initially did not detect any contamination, a second round of sampling revealed slight exceedences for petroleum constituents. At that point, additional soil was removed from this area and residual petroleum in fill material was left in place and covered with the newly constructed warehouse concrete slab.

The property was subdivided into two lots in 1991. One lot was occupied by the new warehouse that was leased by a predecessor of Crompton Colors and the second lot was leased to a daycare center. A Remedial Action Work Plan was submitted to DEP in January of 1996, which was found by DEP to be unacceptable. Hartz then submitted a Remedial Investigation Report that discussed the results of the supplemental soil and groundwater sampling, which showed elevated levels of semi volatile organic compounds that are typical of urban fill material. As the contamination was detected in an area that is located up-gradient from the former tank, the report concluded that the contaminants were unrelated to the tank. The DEP issued an NFA

Letter with respect to the former tank but required further investigation to confirm that the source of the contamination was from an off site source. Hartz did not implement the requested additional investigation. The environmental documents referenced the street address as 60 West Street, which represented the original address of the undivided property. However, after the property had been subdivided, the warehouse facility was known as 50 West Street.

In 2001, the Industrial Site Recovery Act ("ISRA") was triggered when Crompton Colors ceased operations at the warehouse. Crompton Colors filed the appropriate paperwork using the 50 West Street address relying on the prior tank NFA letter. However, DEP responded that the site known as 50 West Street was not eligible for an expedited review because it had not been previously issued an NFA Letter. Crompton Colors then prepared and submitted a Preliminary Assessment, along with revised paperwork with the correct lot number requesting DEP issue an NFA. Crompton Colors did not disclose, however, the presence of soil and groundwater contamination that had been identified in the 1996 NFA Letter. In 2002, DEP issued the NFA Letter for the Crompton Colors' ISRA case.

In 2004, DEP was under pressure to re-evaluate closed cases in response to a situation where a daycare facility began operating at a former thermometer manufacturing facility where significant mercury contamination was discovered. As a result of this incident, DEP mapped all known childcare centers and schools within a 500 foot radius of contaminated sites and re-examined all open and closed DEP cases within the radius to determine whether any of these properties could adversely impact the childcare facilities. As a result of the childcare center being located at the Bloomfield property, DEP reviewed the 2002 NFA determination and concluded that the contamination not addressed by Hartz in 1996 was located at 50 West Street. Therefore, DEP rescinded the NFA Letter issued in 2002 and directed Hartz and Crompton's successor, Chemtura, to investigate potential vapor intrusion concerns at the childcare center.

Hartz argued that DEP did not have the basis to reopen the case or the authority to require a vapor intrusion study and requested an administrative hearing. DEP rejected the claims that the contamination was from an off site source as they concluded that the nearest potential off site source was more than a ½ mile away in a down-gradient location. The DEP also denied the request for a hearing, stating that DEP was merely requesting Hartz to submit documentation and perform studies Hartz should have done as part of its original application in 2002.

The Appellate Division stated that the revocation of the NFA was a rescission of the permission DEP provided Hartz in 2002 to convey the property free and clear of any remedial obligations under ISRA. The Court found that the directives to perform environmental studies fell in the purview of N.J.S.A. 13:1K 13.1b, which expressly provides that DEP is required to give a recipient of an order requiring abatement of a violation notice of its rights to a hearing. Although

Hartz will now be afforded the opportunity to participate in an administrative hearing, it must present evidence that challenges DEP's conclusion that the contamination that triggered the "reopener" is not from an off site source. As the DEP is typically given significant discretion over technical determinations, Hartz will be hard pressed to show DEP acted in an arbitrary and capricious manner and have DEP's decision over turned.

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