

January 10, 2022

Via E-Mail (Sorto.evelyn@epa.gov)

Ms. Evelyn Sorto (3SD23)
Remedial Project Manager
U.S. Environmental Protection Agency Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Re: Jefferson Homebuilders, Inc./Culpeper Wood Preservers Facility –
Docket No. CERCLA-03-2020-0055DC (ASAOC for Removal Action)
Written Notice of Dispute Concerning Demand for Stipulated Penalties

Dear Ms. Sorto:

On behalf of respondent Jefferson Homebuilders, Inc. (JHB), I am submitting this written notice of dispute under Section XV of the Administrative Settlement Agreement and Order on Consent (ASAOC) for Removal Action at the Culpeper Wood Preservers facility in response to the demand for stipulated penalties set forth in the letter from Paul Leonard, Director, Superfund & Emergency Response Division of EPA Region 3, to Joseph R. Daniel, President of Jefferson Homebuilders, Inc.¹ Paragraph 66 of the ASAOC provides that JHB must pay any demand for stipulated penalties within 30 days unless JHB invokes the dispute resolution procedures under Section XV. Section XV, Paragraph 50 of the ASAOC provides: “If Respondent objects to any EPA action taken pursuant to this Settlement, ... it shall send EPA a written Notice of Dispute describing the objection(s) within 7 days after such action.” JHB received e-mail notice of EPA’s demand for stipulated penalties on January 3. Accordingly, this notice of dispute is timely.

Mr. Leonard’s letter alleges two violations of the ASAOC for which penalties are demanded: (1) performance of work without an EPA-approved design for properties BY06 and BY07; and (2) failure to comply with a construction start date in an approved project schedule for the north side of Brandy Road. JHB objects to EPA’s demand as to each category of alleged violation.

¹ Mr. Leonard’s letter is undated. Mr. Daniel and I received a copy of it by e-mail from you and Mr. Goldman, respectively, on January 3, 2022.

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1. BY06 and BY07

Mr. Leonard's letter states: "JHB installed and maintained waterline connections for two properties in violation of the" ASAOC. This statement is factually inaccurate. Mr. Daniel, the owner of BY06 and BY07, and not JHB, arranged for temporary connection of his properties to the public water supply that was already in place on the Culpeper Wood Preservers facility. When the Town informed him that he needed to disconnect them, Mr. Daniel promptly arranged for that as well.

Since Mr. Daniel had BY06 and BY07 disconnected from public water, JHB has directed its contractor to prepare a design to address BY06 and BY07, the design was submitted to EPA for approval, and EPA approved it. As with the remaining properties on the south side of Brandy Road, JHB is awaiting local government approvals and receipt of materials to complete the construction in accordance with the approved design.

Demanding penalties from JHB for the brief connection to public water of BY06 and BY07 by Mr. Daniel is neither appropriate nor warranted.

2. Project Schedule for North Side of Brandy Road

Mr. Leonard's letter asserts:

The EPA-approved project schedule required that construction on the north side of Brandy Road commence on August 2, 2021. As of November 21, 2021, construction had not started. JHB did not provide EPA with a notice of delay or a request that a delay to this work be considered a force majeure event and did not request a change to the EPA-approved project schedule.... EPA contends that by not starting construction on the north side of Brandy Road on or before August 2, 2021, JHB violated the settlement.

The first sentence is an inaccurate description of the March 23, 2021 project schedule and of the schedule's legal significance. The third sentence is factually inaccurate. EPA's contention that JHB violated the settlement is based on a faulty premise. The following explains why.

First, JHB's original Work Plan schedule lumped all of the construction, connection and restoration work into a single task, with no sub-tasks identified. The March 23, 2021 schedule revision took into account JHB's voluntary and self-initiated commitment to move forward with the north side work and not wait for the lengthy administrative process

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associated with the south side to be completed. The March 23, 2021 project schedule clearly states that “the construction schedule will be finalized in Task 5 (Design).” At the time of Design completion and approval for the north side of Brandy Road phase of project work, JHB had already alerted EPA about multiple issues that would affect the start of construction, and JHB thereafter has continued to communicate to EPA on the inability to finalize a schedule.

Second, nothing in the March 23, 2021 schedule states or implies that the “start” date referred to beginning physical construction (“breaking ground”). JHB’s contractor actually initiated the construction activities in July 2021 by beginning the materials acquisition process. It was because of this activity that JHB was able to notify EPA on July 29, 2021 that there were supply chain issues resulting in materials shortages;² JHB has continued to communicate to EPA that materials shortages were affecting the project schedule. In fact, on November 10, 2021, JHB notified EPA by e-mail that sufficient materials for the north side of Brandy Road construction finally had been delivered. The contractor immediately began scheduling his crew and equipment, along with the traffic control subcontractor. Physical construction began on November 22, 2021 – less than two weeks after materials delivery.

Third, construction on the north side of Brandy Road did not commence until November 2021 because approvals required by the Virginia Department of Transportation (VDOT) and the Town of Culpeper before construction was authorized to begin were not received in a time frame consistent with the March 2021 schedule. Thus, physical construction activities could not have started on or before August 2, 2021 because VDOT approval of the design for the north side of Brandy Road was not received until August 23, 2021, a date that was still well in advance of the necessary materials being delivered to the contractor.

Frustratingly, EPA’s penalty demand disregards the date of JHB’s actual completion of the north side of Brandy Road phase of project work, despite the numerous impediments that JHB and its contractor encountered. As background, following discussions with representatives of the Town, EPA took the lead with a process required by the Town of procuring an application from property owners and tenants for connection to the public water system. JHB built EPA’s activities into the schedule, with the assumption that all applications for the north side would be received by August 2, 2021, in advance of the schedule’s anticipated construction completion date and anticipated connection completion date. During the coordination of the application and fee payment process, the Town of Culpeper informed EPA and JHB that the service connections could not be completed until the applications had been received and the fees paid. JHB handled payment of the fees. EPA initiated the application process on August

² See Exhibit A, e-mail exchange between Dave Kerschner and Evelyn Sorto (July 29, 2021).

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26, 2021, and the last application was not actually received by the Town until December 6, 2021. JHB nevertheless completed the service connections on the north side of Brandy Road on December 3, 2021 – the earliest possible date that the connections could be administratively approved. Accordingly, the demand for stipulated penalties based on a purported failure to achieve a non-existent and impossible to predict schedule milestone is arbitrary and capricious, and fails to recognize that JHB completed the north side of Brandy Road phase of project work literally as soon as it could possibly do so.

EPA's penalty demand also indicates that EPA expected JHB to provide a firm construction schedule when JHB was unable to do so, and completely disregards JHB's frequent communications about the progress of the work and the project schedule. JHB incorporates herein by reference the monthly progress reports for the July, August, September, October, November and December reporting periods as evidence of JHB's diligence in keeping EPA apprised of factors beyond its control that affected its ability, and the timing, to perform construction of the north side of Brandy Road water line connections. It was JHB's sincere belief that these communications had been updating EPA sufficiently, and that the production of a construction schedule proposed without any firm basis, requiring frequent revisions that would also be proposed speculatively pending the receipt of all approvals and delivery of all required materials, was neither warranted nor useful to any of the parties.

Lastly, on March 27, 2020, JHB submitted a letter to EPA invoking *force majeure* under the ASAOC associated with the COVID-19 pandemic. JHB submitted a follow up letter to EPA on April 10, 2020, describing ways that JHB intended to minimize project delays to the extent possible. Although some of the conditions giving rise to JHB's invocation of *force majeure* have changed,³ the pandemic continues to this day. Its effects on supply chains and the availability of materials for construction projects like this one are well-known, and JHB has documented them in its monthly reports.⁴ JHB has taken reasonable and necessary measures to limit the impact of the pandemic on performance of its obligations under the ASAOC. EPA's demand for stipulated penalties is inconsistent with the on-going *force majeure* and, under these circumstances, arbitrary and capricious.

³ For example, federal and Commonwealth of Virginia states of emergency have been lifted.

⁴ See, e.g., Project Progress Report, October 2021 Reporting Period at ¶ B (“The construction schedule for the north side of Brandy Road has not yet been finalized. At this time the schedule is dependent on the receipt of materials necessary to perform the work. These materials have been ordered, [but] not all materials are currently available.”).

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Summary

JHB respectfully requests that EPA rescind its demand for stipulated penalties. If necessary, please contact me on JHB's behalf for informal negotiations as provided in paragraph 50 of the ASAOC.

Sincerely,



Dan J. Jordanger

Enclosure

cc: CINWD_AcctsReceivable@epa.gov (via e-mail)
R3_Hearing_Clerk@epa.gov (via e-mail)
Andrew S. Goldman, Esq. (via e-mail & regular mail)
Mr. Joseph R. Daniel (via e-mail)
David R. Kerschner, CPG (via e-mail)

Exhibit A

Jordanger, Dan

From: Sorto, Evelyn <sorto.evelyn@epa.gov>
Sent: Thursday, July 29, 2021 7:08 PM
To: Dave Kerschner
Cc: Daniel, Joe; Jordanger, Dan; Schantz, Victoria
Subject: RE: CWP Water Line Construction Schedule Update

Caution: This email originated from outside of the firm.

Thanks for the update Dave. I'll alert VDEQ, On Scene Coordinators, and oversight contractor.

Sincerely,

Evelyn Sorto
Remedial Project Manager
U.S. EPA Region III
Superfund & Emergency Management Division
DE, VA, WV Remedial Section (3SD23)
1650 Arch Street
Philadelphia, PA 19103
(215) 814-2123

From: Dave Kerschner <dkerschner@kuresources.com>
Sent: Thursday, July 29, 2021 5:32 PM
To: Sorto, Evelyn <sorto.evelyn@epa.gov>; Schantz, Victoria <Schantz.Victoria@epa.gov>
Cc: Daniel, Joe <joedaniel@culpeperwood.com>; Jordanger, Dan <djordanger@hunton.com>
Subject: CWP Water Line Construction Schedule Update

I apologize for the delay in getting back to you. Here is where things stand:

- We do not yet have VDOT approval for working in the ROW on the west/north side of the highway. Marvin is attempting to chase down that approval.
- We are also in the process of obtaining the information needed for our crew to establish the traffic controls that VDOT will require for our work.
- There is a shortage of water line materials, and we are working on lining up sufficient materials to move forward. I have been told (for another project) that this is a common problem that is associated with world-wide shortages of raw materials, along with shipping issues.

In summary, we will not be starting construction next week. Our team will be putting together an updated schedule when we have a better idea of when we will be starting, and whether the materials supply issue will result in any need to extend the construction schedule. I will give you at least a week's advance notice of construction start, in order to allow you to get your personnel's travel schedules approved and your other logistics taken care of.

Please let me know if you need any additional information at this time, or if I should be presenting the above in a more formal manner. I will be in the office until at least early afternoon tomorrow.

Take care,
Dave