

**NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501**

In the Matter

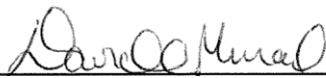
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**the Application of Greenstar Environmental Solutions, LLC
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 53671

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
June 8, 2023**

This matter considers the written appeal by Greenstar Environmental Solutions, LLC, (“Greenstar” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On May 5, 2017, Suzanne McLeod, as Managing Member, applied on behalf of Greenstar for recertification as a WBE (DED Exhibit 1).
2. On May 8, 2020, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1);
 - (b) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i);
 - (c) Minority group members or women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(ii); and

- (d) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).
3. Greenstar filed a Notice of Appeal by letter dated June 15, 2020 (APP Exhibit 1).
 4. A Notice to Proceed by Written Appeal was sent to Greenstar on August 3, 2020 (DED Exhibit 3).
 5. Applicant submitted its written appeal by letter dated October 1, 2020 (APP Exhibit 2).
 6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated March 16, 2023, and a brief of Ashley Lherisson-Fortune, Esq., counsel for the Division, dated April 5, 2023.

FINDINGS OF FACT

7. Greenstar is primarily engaged in hydrogeologic and environmental consulting, engineering, and remediation services, located in Wappingers Falls, New York (DED Exhibit 1).
8. Suzanne McLeod is the Managing Member of Greenstar and has a 51% ownership interest. Peter Nimmer is also a Member and has a 49% ownership interest (DED Exhibit 1).
9. Ms. McLeod, as chief operating officer, handles the financial aspects of the business, including payroll, accounting, and invoicing. Mr. Nimmer handles the technical aspects of the business including environmental remediation strategies, estimating and field support (DED Exhibit 4).
10. Ms. McLeod's resume states that she is primarily responsible for the administrative and financial functions of the business, including client invoicing, cash reconciliation, accounts payable and receivable, preparation of monthly, quarterly, and year-end financial

statements, preparation of operating budgets. administering employee benefits and payroll (DED Exhibit 5).

11. Mr. Nimmer’s resume states that he is the Senior Geologist at Greenstar and is responsible for the technical oversight of field activities, preparing reports, developing and implementing site investigation and remediation strategies, and interpreting the chemical data collected. He has a Geologist license and hazardous waste and onsite management training and has prior experience in geologic and hydrogeologic investigations at sites impacted by hazardous waste, petroleum, metals, and other environmental contaminants (DED Exhibit 5).

12. Greenstar’s Second Revised LLC Agreement (“Operating Agreement”) dated September 28, 2010, states that Ms. McLeod and Mr. Nimmer are both Member-Managers. Article II of the Operating Agreement states that both Ms. McLeod and Mr. Nimmer are the Member-Managers of Greenstar. Section 7.2 of the Operating Agreement states that the Member-Managers have the exclusive and complete authority to manage the company and that this authority is only exercisable by the majority vote of the Member-Managers (DED Exhibit 6).

APPLICABLE LAW

5 NYCRR former § 144.2(b)(1) states in relevant part as follows:

Decisions pertaining to the operations of the business enterprise must be made by...women claiming ownership of that business enterprise. The following will be considered in this regard:

- (i) ...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
- (ii) ...women must demonstrate the working knowledge and ability needed to operate the business enterprise.

5 NYCRR former § 144.2(b)(2) states in relevant part as follows:

Articles of incorporation, corporate bylaws, partnership agreements and other agreements...must permit...women who claim ownership of the business enterprise to make those decisions without restrictions.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division’s interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

Current 5 NYCRR § 144.2(c)(1) states as follows:

...women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things. In evaluating whether a ...woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff’s determination to deny the application filed by Greenstar for recertification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard “demands only that a given inference is reasonable and plausible, not necessarily the most probable,” and applicant must demonstrate that Division staff’s conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. (See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021)).

DISCUSSION

Prior Certification

Although an applicant may have been certified in the past, the Division is not prohibited from concluding that a particular criterion is not met with respect to a subsequent application. Estoppel cannot be “invoked against a governmental agency to prevent it from discharging its...duties.” *Matter of Bilow v. Daines*, 77 AD 3d 1249 (3rd Dept. 2005). The Division cannot be compelled to certify a business that it deems ineligible merely because the business has previously been certified and may have been certified in error. See *Oxenhorn v. Fleet Trust Co.*, 94 NY2d 110 (1999).

Operation

The eligibility criteria for WBE certification require that the woman owner “exercises the authority to control independently the day-to-day business decisions of the enterprise.” See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD3d 1343 (3rd Dept. 2020). The woman owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1317 (4th Dept. 2018)

As an environmental consultant of contaminated buildings, sites, soil and groundwater, the revenue-generating functions of Greenstar are developing and implementing site investigations and remediation strategies (DED Exhibit 1).

Mr. Nimmer has thirty-two (32) years of experience as a geologist and licensed site remediation professional (LSRP), overseeing hydrogeologic investigations and field activities at sites affected by hazardous waste and other environmental contaminants. He has a Professional Geologist license, has completed geology workshops and OSHA onsite management courses. He is responsible for monitoring of field personnel and review and interpretation of chemical data obtained from the soil and ground water (DED Exhibits 4 and 5). He is also the sole contact on Greenstar's marketing flyers for clients to contact him directly for a price quote or environmental site assessment (DED Exhibit 7).

Ms. McLeod is primarily responsible for the administrative and financial aspects of the business, including invoicing, bookkeeping, payroll, negotiating with financial institutions and managing business insurance and other employee benefits. Her prior experience includes being a staff accountant and assistant controller. She has no prior training or certifications in Greenstar's core revenue-generating functions, which include overseeing environmental remediation and consulting (DED Exhibits 4 and 5).

Ms. McLeod's financial oversight is insufficient to demonstrate technical competence and knowledge to manage Greenstar's critical revenue-generating functions. She depends on Mr. Nimmer to conduct environmental sampling and develop strategies for environmental remediation, create reports and interpret chemical data. He has the working knowledge and technical expertise needed for Greenstar to operate (DED Exhibits 4 and 5).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that Ms. McLeod does not (i) make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1); (ii) have adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i); and (iii) have the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(ii).

Control

The Division notes that Greenstar's Second Revised LLC Agreement ("Operating Agreement") dated September 28, 2010, states that Ms. McLeod and Mr. Nimmer are both Member-Managers. Section 7.2 of the Operating Agreement states that the Members-Managers have the exclusive and complete authority to manage the company and that this ability is only exercisable by the majority vote of the Members-Managers (DED Exhibit 6). Therefore, Greenstar's corporate documents fail to demonstrate Ms. McLeod's full control pertaining to the operations of the business. Ms. McLeod shares operational control of the business with Mr. Nimmer (DED Exhibit 6). The record before the division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that relevant business agreements do not permit the woman owner to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).

CONCLUSION

Greenstar did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a WBE with respect to the eligibility criteria at 5 NYCRR

former §§ 144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(2) was not found on substantial evidence.

RECOMMENDATION

The Division's determination to deny Greenstar's application for recertification as a WBE should be affirmed.

In the Matter of Greenstar Environmental Solutions, LLC
DED File ID No. 53671
Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Recertification – 5/6/2017
DED 2	Denial Letter – 5/8/2020
DED 3	Notice to Proceed via Written Appeal – 8/3/2020
DED 4	Narratives
DED 5	Ms. McLeod and Mr. Nimmer Resumes
DED 6	Greenstar Operating Agreement
DED 7	Greenstar Marketing Flyer
APP 1	Applicant’s Notice of Appeal – 6/15/2020
APP 2	Applicant’s Appeal Letter – 10/1/2020