

February 4, 1997

Certified Mail  
Return Receipt Requested

Guy J. Agostinelli, Esq.  
Zdarsky, Sawicki & Agostinelli  
404 Cathedral Place  
298 Main Street  
Buffalo, New York 14202

Re: 210 French Road; CMS Associates; Interim Remedial Measure  
Order on Consent

Dear Mr. Agostinelli:

Enclosed is your copy of the fully endorsed Interim Remedial  
Measure Order on Consent to address the proposed remedial  
activities at 210 French Road, Cheektowaga.

Thank you for your cooperation in this matter.

Sincerely,



Glen R. Bailey  
Senior Attorney  
Division of Environmental  
Enforcement

GRB:B:jab  
B033CMS.6

Enclosure

CC: (With Enclosure)  
Robert E. Mariacher  
CMS Associates  
210 French Road  
Cheektowaga NY 14227

C. Mark Hanna  
Hazard Evaluations, Inc.  
3836 North Buffalo Road  
Orchard Park NY 14127

David P. Locey

(W/O Enclosure)  
Edward Belmore  
Abby Snyder  
Gerald Mikol

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
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In the Matter of the Development and  
Implementation of an Interim Remedial  
Measure Program for an Inactive Hazardous  
Waste Disposal Site Under Article 27,  
Title 13, and Article 71, Title 27 of the  
Environmental Conservation Law  
of the State of New York by

ORDER  
ON  
CONSENT

INDEX # B9-0501-96-10

CMS Associates,

Respondent.  
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WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites." This Order is issued pursuant to the Department's authority under, inter alia, ECL Article 27, Title 13, ECL Section 3-0301, and constitutes an administrative settlement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") [42 USC 9601, et seq., as amended] and for purposes of 42 USC 9613(f)..

2. CMS Associates ("Respondent") is a partnership formed in accordance with the laws of the State of New York and is doing business in the State of New York. Respondent owns real property at 210 French Road, consisting of approximately 4 acres, located on the northern side of French Road between Boxwood Lane and Industrial Parkway, in the Town of Cheektowaga, Erie County, New York (the "Site"). Respondent has owned the property for some time, leasing space to various companies and operations, and since

the fall of 1994, Respondent has maintained an office at this address. The managing partner for CMS Associates is Robert E. Mariacher. The other partner is A&L Holding Company, a separate New York partnership consisting of Anthony H. Santiago and the Estate of Luke Santiago. Upon the removal from service of an underground storage tank which had been used by a number of tenants, it was determined that gasoline and chlorinated solvents had been stored in, and had leaked into the environment from, the storage tank. In conjunction with the removal of the underground storage tank, some 250 tons of contaminated soil was immediately excavated and stock-piled on Site, where it is now awaiting treatment and disposal.

3. The Department has determined that the Site is an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301.2, and may present a significant threat to the public health or environment. The Site has not been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as of the date of this Order.

4. A. Pursuant to ECL Section 27-1313.3.a, and consistent with CERCLA, whenever the Commissioner of Environmental Conservation (the "Commissioner")

"finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal

site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order."

B. Any person under order pursuant to ECL Section 27-1313.3.a. and/or 42 U.S.C. § 9607 has a duty imposed by ECL Article 27, Title 13 and/or CERCLA to carry out the program committed to under order. ECL Section 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL Section 3-0301.1.i.

5. The Department and Respondent agree that the goals of this Order are for Respondent to (i) implement an Interim Remedial Measure Program ("IRM Program") for the Site in accordance with the Work Plan which is attached to and incorporated in this Order; and (ii) reimburse the State's administrative costs.

6. Respondent, having waived Respondent's right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agrees to be bound by its terms. Respondent consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agrees not to contest the validity of this Order or its terms.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. IRM Work Plan Contents and Submittals

Attached to this Order as Appendix "A" and incorporated herein as an enforceable part of this Order is a Work Plan prepared by Hazard Evaluations, Inc., based upon the scope of work submitted to the Department dated August 5, 1996, which has been submitted to the Department and approved as adequate and appropriate as an Interim Remedial Measure for the Site (the "IRM Work Plan").

II. Performance and Reporting of the IRM Program

A. Within 30 days after the effective date of this Order, Respondent shall commence the IRM Program for the Site in accordance with the IRM Work Plan and the schedule contained therein.

B. During the performance of the IRM Program, Respondent must have on-Site a full-time representative who is qualified to supervise the work done.

C. Within the time frame set forth in the approved IRM Work Plan, Respondent must prepare and submit an IRM report (the "IRM Report") that includes all data generated and all other information obtained during the IRM Program and identifies any additional types of data that must be collected to determine the continuing potential for environmental impacts from the past disposal of hazardous wastes at the Site. The IRM Report shall be prepared and the IRM Program conducted in accordance with this Order.

D. During the implementation of the IRM Program,

including activities after approval of the IRM Report, Respondent shall cooperate with the Department and shall assist as requested in the implementation of any Citizen Participation Program as may be developed and implemented by the Department for this Site.

### III. Progress Reports

A. If the IRM field work requires more than two months for completion, Respondent shall submit to the parties identified in Subparagraph X.B., in the numbers specified therein, copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Order during the previous month;

2. include all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent;

3. identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month;

4. describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information relating to progress at the Site;

5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may

affect the future schedule for implementation of Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays; and

6. include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved.

B. Respondent shall submit these progress reports to the Department by the tenth day of every month, beginning the month following the effective date of this Order.

C. Respondent also shall allow the Department to attend, and shall provide the Department advance notice of, any of the following: pre-bid meetings, job progress meetings, substantial completion meetings and inspections, and final meetings and inspections, in so far as such activities relate to the IRM Program.

#### IV. Review of Submittals

A. 1. The Department shall review the IRM Report and any other submittal Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal.

2. a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within 30 days after

receiving written notice that Respondent's submittal has been disapproved, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so, if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary.

#### V. Penalties

A. 1. Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

2. Respondent shall be liable for payment to the Department of the sums as set forth by statute as penalties for each day or part thereof that Respondent is found to be in violation of the terms of this Order. In the event that the Department believes that Respondent is in violation of the terms of this Order, the Department shall so notify Respondent in



writing, specifying the violation and providing Respondent with ten days within which to cure the violation. All penalties begin to accrue on the first day Respondent is in violation of the terms of this Order and continue to accrue through the final day of correction of any violation. Such sums shall be due and payable within 15 days after receipt of notification from the Department assessing the penalties. If such payment is not received within 15 days after Respondent receives such notification from the Department, interest shall be payable at the annual rate of nine per centum on the overdue amount from the day on which it was due through, and including, date of payment. Penalties shall be paid by certified check or money order, made payable to "New York State Department of Environmental Conservation" and shall be delivered personally or by certified mail, return receipt requested, to the Director, Division of Environmental Enforcement, N.Y.S.D.E.C., 50 Wolf Road, Albany, New York 12233-5500. Payment of the penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

B. Respondent shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of war, riot, or an unforeseeable disaster arising exclusively from natural causes which results in conditions which the exercise of ordinary human prudence could not have prevented. Respondent shall, within five days of obtaining knowledge of any such condition, notify the Department in writing. Respondent shall include in such notice

the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to compliance with this Order pursuant to this subparagraph.

VI. Payment of State Costs

Within forty-five (45) days after receipt of an itemized invoice from the Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses including but not limited to direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for work performed at the Site up to the effective date of this Order, as well as expenses for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order. Such payment shall be made by certified check payable to the Department of Environmental Conservation. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, New York 12233-7010. Itemization of the costs shall include a listing of personal services indicating the employee name, title, biweekly salary, and time spent (in hours) on the project during the

billing period, as identified by an assigned time and activity code. This information shall be documented by reports of Direct Personal Service. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports. Respondent shall reimburse the Department for such expenditures in the amount accounted for, up to a maximum cumulative value in the amount of fifteen thousand dollars (\$15,000.00).

VII. Entry upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order.

VIII. Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's civil, criminal, or administrative rights or authorities, except that the Department hereby agrees not to commence any civil or administrative proceedings or actions against Respondent to require Respondent to undertake the same activities as set forth in the IRM Program while Respondent is in compliance with this Order.

B. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

C. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, settling, compromising, releasing, or in any way affecting any liability attributable to Respondent as to any other party, or rights available to Respondent or any other party regarding any inactive hazardous waste disposal site and/or any release to the environment, unless such matter is specifically addressed pursuant to this IRM Program and this Order.

IX. Contribution

The provisions of this Order do not constitute and shall not be deemed a waiver of any right Respondent otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Respondent's insurers, for payments made or response costs incurred or to be incurred. To the extent authorized under 42 USC 9613 and any other applicable law, Respondent shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the matters addressed pursuant to this Order. In any future action brought by Respondent against any potentially responsible party under CERCLA, the provision of 42 USC 9613(f)(3) shall apply.

X. Indemnification

Respondent shall indemnify and hold the Department, the

State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent, and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns. Respondent shall not be required to indemnify and hold the Department, the State of New York, their representatives and employees harmless for claims, suits, actions, damages and costs arising out of or resulting from any unlawful, willful or malicious acts or omissions on the part of the State, State agencies, or their officers, employees or agents. In the event of any such claims, suits, actions or assertions, each party shall notify the other in writing, and Respondent shall be entitled to participate, to the extent provided by law, in the defense or response to such claim.

XI. Communications

A. All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered.

B. 1. Communications from Respondent to the Department shall be sent to:

David P. Locey, P.E.  
Division of Environmental Remediation  
New York State Department of Environmental  
Conservation, Region 9  
270 Michigan Avenue  
Buffalo, New York 14203-2999

with copies sent

Director, Bureau of Environmental Exposure  
Investigation  
New York State Department of Health  
2 University Place  
Albany, New York 12203

and to: Edward Belmore, P.E.  
Division of Environmental Remediation  
New York State Department of Environmental  
Conservation  
50 Wolf Road  
Albany, New York 12233-7010

and to: Glen R. Bailey, Esq.  
New York State Department of Environmental  
Conservation  
Division of Environmental Enforcement  
270 Michigan Avenue  
Buffalo, New York 14203-2999

2. Copies of work plan amendments and reports shall be submitted as follows:

Four copies (one unbound) to David Locey,  
Division of Environmental Remediation;

Two copies to the Director, Bureau of  
Environmental Exposure Investigation;

One copy to Edward Belmore, P.E.  
Division of Environmental Remediation; and

One copy to Glen Bailey, Esq.  
Division of Environmental Enforcement.

3. Within 30 days of the Department's approval of any report submitted pursuant to this Order, Respondent shall submit to David P. Locey a computer readable magnetic media copy of the approved report in American Standard Code for Information Interchange (ASCII) format. Respondent shall also submit one microfilm copy (16 millimeter roll film M type cartridge) of such Department-approved submittals to Edward Belmore.

C. Communication to be made from the Department to the

Respondents shall be sent to:

Robert E. Mariacher  
CMS Associates, Inc.  
210 French Road  
Cheektowaga, New York 14227

with a copy to :

C. Mark Hanna  
Hazard Evaluations, Inc.  
3836 North Buffalo Road  
Orchard Park, New York 14127.

D. The Department and Respondent reserve the right to designate additional or different addressees for communication on written notice to the other.

### XII. Miscellaneous

A. 1. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous waste at the Site.

2. All activities required of Respondent under this Order are ordinary and necessary expenses for the continued operation of the business of Respondent.

B. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel and third party data validators acceptable to the Department to perform the technical, engineering and analytical obligations required by this Order. The experience, capabilities and qualifications of the firms or individuals selected by Respondent shall be submitted to the Department. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which Respondent and such firm or

individuals will be responsible for in compliance with this Order. Responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent, and the Department also shall have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data generated by Respondent with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

D. Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondent shall obtain whatever permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations are necessary to perform Respondent's obligations under this Order.

F. Respondent and Respondent's agents, servants, employees, successors, and assigns shall be bound by this Order. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent's responsibilities under this Order. Respondent's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the



performance of their designated duties on behalf of Respondent.

G. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondent with respect to the Site and shall condition all contracts entered into hereunder upon performance in conformity with the terms of this Order. Respondent or Respondent's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

H. All references to "professional engineer" in this Order are to an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

I. All references to "days" in this Order are to calendar days unless otherwise specified.

J. The section headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

K. 1. The terms of this Order shall constitute the

complete and entire Order between Respondent and the Department concerning the implementation of an interim remedial measure for the Site. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

2. If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to David P. Locey and Glen Bailey.

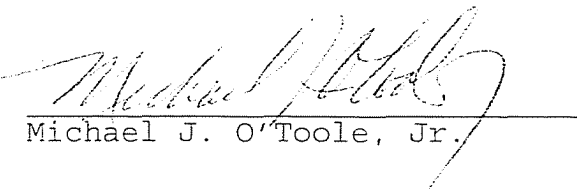
M. The effective date of this Order shall be the date it is signed by the Commissioner or his designee.

DATED: Albany, New York

1/22 1997

JOHN P. CAHILL  
Acting Commissioner  
New York State Department  
of Environmental Conservation

By:

  
Michael J. O'Toole, Jr.

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

CMS Associates

By: 

Robert E. Mariacher, Partner of  
CMS Associates

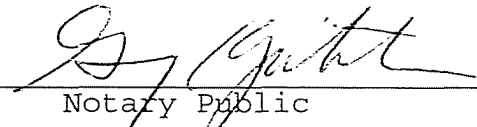
And By: A&L Holding Company,  
Partner of CMS Associates

By: 

Anthony H. Santiago, Partner of A&L  
Holding Company

STATE OF NEW YORK )  
 ) s.s.:  
COUNTY OF ERIE )

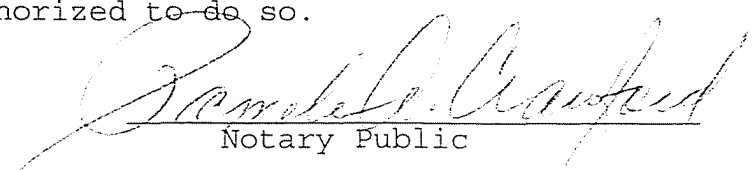
On this 15th day of December, 1997,  
before me personally came Robert E. Mariacher, to me known, who  
being duly sworn, did depose and say that he is a Partner of CMS  
Associates, the entity described in and which executed the  
foregoing instrument; that he signed his name thereto on behalf of  
said partnership and was authorized to do so.

  
Notary Public

GUY J. AGOSTINELLI  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires Nov. 30, 1998 1997

FLORIDA  
STATE OF NEW YORK )  
PINELLAS ) s.s.:  
COUNTY OF ERIE )

On this 10 day of JANUARY, 1998,  
before me personally came Anthony H. Santiago, to me known, who  
being duly sworn, did depose and say that he is a partner in A&L  
Holding Company, which, in form, is a partner in CMS Associates,  
the entity described in and which executed the foregoing  
instrument; that he signed his name thereto on behalf of said  
partnership and was authorized to do so.

  
Notary Public

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Development and  
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CMS Associates,

Respondent.

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APPENDIX A TO ORDER ON CONSENT

The parties hereby agree that the Phase II  
Environmental Site Evaluation dated November 27, 1996 prepared by  
Hazard Evaluations, Inc. which is annexed hereto and the drawing  
entitled Enhanced Soil Vapor Extraction System for CMS Associates  
prepared by William H. Merrill, Jr., Professional Engineer and  
Land Surveyor, dated November 27, 1996 under Job No. 6-112712  
annexed hereto shall constitute Appendix A to the Order on  
Consent in this proceeding.

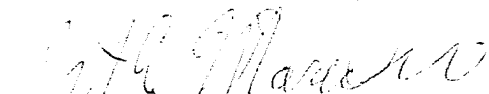
JOHN P. CAHILL  
Acting Commissioner  
New York State Department  
of Environmental Conservation

By:

  
Michael J. O'Toole, Jr.

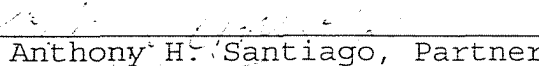
CMS ASSOCIATES

By:

  
Robert E. Mariacher, Partner of  
CMS Associates

A&L HOLDING COMPANY,  
Partner of CMS Associates

By:

  
Anthony H. Santiago, Partner of  
A&L Holding Company