

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Violations of Article 27, Title 13 of the Environmental Conservation Law ("ECL") of the State of New York and Part 375 of Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") of the State of New York, and the Department of Environmental Conservation Order on Consent # B9-0501-2-07 by:

CMS Property Associates, L.L.C.
228 Linwood Avenue
Buffalo, New York 14209

Order on Consent
Index Number: B9-0501-2-07-E
Site Code # 9-15-168

Respondent.

WHEREAS:

JURISDICTION

1. The **NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION** ("Department" or "NYSDEC") is an Executive Agency of the State of New York ("State") with jurisdiction over the environmental policy and programs of the State.
2. Pursuant to Articles 3 and 71 of the Environmental Conservation Law ("ECL"), Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and Orders issued thereunder, the Department is charged with enforcing the ECL, including, but not limited to, Article 27 of the ECL which governs the collection, treatment and management of solid and hazardous waste.
3. Respondent, **CMS PROPERTY ASSOCIATES, L.L.C.** ("CMS") is a New York Domestic Limited Liability Company with offices located at 228 Linwood Avenue, Buffalo, New York 14209, Erie County.
4. CMS is a person as defined by ECL §27-1301(4).

5. In or about March 18, 2003, CMS entered into an Order on Consent with the Department ("the Order"). The Order, Index No. B9-0501-20-07, required CMS to implement an "inactive hazardous waste disposal site remedial program" ("Remedial Program") pursuant to ECL 27-1313.3(a) for real property it owned at 210 French Road, Cheektowaga, New York 14202 in Erie County ("the Site").

6. At the time the Order was signed the Site was registered as a Class 2 Inactive Hazardous Waste Disposal Site (Code # 9-15-168) as defined by 6 NYCRR § 375-2.7(b)(3)(ii) and ECL §§27-1301.2.

STAUTORY AND REGULATORY FRAMEWORK

7. Pursuant to ECL §27-1301(3), "Inactive hazardous waste disposal site remedial program" means activities undertaken to eliminate, remove, abate, control or monitor health and/or environmental hazards or potential hazards in connection with inactive hazardous waste disposal sites or to treat or dispose of wastes and waste contaminated materials from such sites...."

8. By the authority of ECL §27-1313.3(a), the Commissioner may order the owner of a hazardous waste disposal site to develop an inactive hazardous waste disposal site remedial program, and to implement such program.

9. Pursuant to 6 NYCRR §375-1.6, "All work undertaken as part of a remedial program for a site shall be detailed in a work plan unless determined otherwise by the Department."

10. Pursuant to 6 NYCRR §375-1.6(b), "All reports...which are submitted to the Department...pursuant to an Order...are to be submitted in accordance with the schedule contained in the approved work plan...."

11. Pursuant to ECL §27-1318(c), "The owner of an inactive hazardous waste disposal site, and/or any person responsible for implementing the remedial program at such site where institutional or engineering controls are employed pursuant to this title shall...annually submit to the department a written statement by an individual licensed...to practice the profession of engineering...certifying under penalty of perjury that the institutional controls and/or engineering controls employed at such site are unchanged from the previous certification and that nothing has occurred that would impair the ability of such control to protect the public health and environment, or constitute a violation or failure to comply with any operation and maintenance plan for such controls...."

12. Pursuant to 6 NYCRR§375-2.11(4), "No person to whom an order has been issued pursuant to ECL §27-1313(3) shall fail to comply therewith."

13. Pursuant to ECL §71-2705(1), "any person who violates any of the provisions of, or who fails to perform any duty imposed by title... 13 of article 27 or any rule or regulation promulgated pursuant thereto...or any order of the Commissioner made pursuant to this title shall be liable...for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues.... ...In the case of a second and any further violation, the liability shall be for a civil penalty not to exceed seventy-five thousand dollars for each such violation and an additional penalty not to exceed seventy-five thousand dollars for each day during which such violation continues."

FACTS

14. Order on Consent No. B9-0501-20-07 required Respondent to implement a Remedial Program Work Plan entitled *Operation Maintenance and Monitoring Plan, CMS Associates Remediation Site #915168* dated July 2001, (the "OM &M Plan").
15. The OM &M Plan, drafted by Ken W. Kloeber, Consulting Engineers, required Respondent to provide the Department with "Quarterly Reporting" and "Annual Evaluation of Remedial Action Measures (to be prepared and stamped by a NYS PE)"
16. Respondent's last complete/approvable Annual Evaluation (now referred to as a Periodic Review Report ("PRR")) was submitted on or about March 31, 2006.
17. Despite meeting with the Department on numerous occasions regarding compliance, Respondent did not submit another Annual Evaluation/PRR until or about September 2012.
18. The September 2012 report entitled "Annual Summary Report" did not meet the requirements of a PRR.
19. The Department has not received any subsequent Reports or any amendments to the September 2012 Annual Summary Report that would allow the Department to accept this Report as a complete and approvable PRR, but has, during the course of settlement, provided comments to the September 2012 report set forth above.
20. Pursuant to the Regulations, Respondent is also required to submit an annual certification that the Institutional Controls ("IC") and Engineering Controls ("EC"), "are unchanged from the previous certification and that nothing has occurred that would impair the ability of such controls to protect the public health and environment, or constitute a violation or failure to comply with any operation and maintenance plan for such controls."

21. In or about June 2009 Respondent submitted its first IC/EC annual certification.
22. The June 2009 certification stated that the OM & M requirements for the site were not being met based on, among other things, the fact that the OM & M plan was outdated.
23. Respondent did not submit a proposed Corrective Measures Work Plan to show how they would bring the site into compliance.
24. Respondent did not submit an IC/EC annual certification during the period from June 2010 to March 2013.
25. On or about April 29, 2013, during the course of this settlement, Respondent submitted an updated IC/EC certification reiterating that the OM & M requirements for the site were not being met based on, among other things, the fact that the OM & M plan was outdated.
26. Although the Department has provisionally accepted the IC/EC certification submitted on or about April 29, 2013, the veracity of the certification cannot be assessed without information from a PRR that covers the period in question.
27. Additionally, the IC/EC certification cannot be properly completed until Respondent provides the Department with a Site Management Plan that will, among other things, include an updated OM & M plan.
28. In or about July 23, 2009, the Department approved a Soil Vapor Intrusion Evaluation ("SVIE") Work Plan. The Department requested that Respondent to submit a Soil Vapor Intrusion Evaluation report by October 23, 2009.

29. Respondent performed SVIE sampling, but encountered field conditions different from those anticipated in the July 23, 2009 SVIE Work Plan requiring that Respondent submit a revised SVIE work plan in order to complete the SVI evaluation and submit a SVIE report.

30. During the course of this settlement, on or about February 28, 2013, Respondent submitted a revised SVIE Work Plan and, after revisions and amendments required by the Department, the Department approved the revised SVIE Work Plan on April 26, 2013.

VIOLATIONS

31. By failing to submit six Annual Evaluations/PRR's (from March 31, 2007 to the present) Respondent has violated ECL §27-1313(3), 6 NYCRR § 375-2.11(a)(4) and 6 NYCRR § 375-1.6(b).

32. By failing to provide a SVIE Report Respondent has violated ECL §27-1313(3), 6 NYCRR § 375-2.11(a)(4) and 6 NYCRR § 375-1.6(b).

33. By failing to submit three annual IC/EC certifications (from June 2010 to June 2012) Respondent has violated ECL §27-1318(c).

34. Respondent has waived its right to a hearing herein as provided by law and has consented to the issuing and entering of this Order on Consent ("Order") and has agreed to be bound by the provisions, terms and conditions herein.

NOW, being duly advised and having considered this matter, **THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION HEREBY ORDERS THAT:**

I. **Penalties.** With respect to the violations alleged in this Order, the Department hereby assesses against Respondent a civil penalty in the amount of Twenty Five Thousand Dollars

(\$25,000.00); Seven Thousand (\$7,000.00) of which is to be paid to the Commissioner by check or money order, made payable to the Commissioner of Environmental Conservation, and returned simultaneously with this signed Order to the Department's Region 9 office at:

NYS Department of Environmental Conservation
Attn: Regional Attorney
270 Michigan Avenue
Buffalo, New York 14203

The payment of the remaining Eighteen Thousand Dollars (\$18,000.00) shall be suspended during the term of this Order. The Department may vacate the suspension and assess the remaining Eighteen Thousand Dollars (\$18,000.00) of such penalty, or any part of it, for a violation of the provisions, terms or conditions of this Order, including the Schedule of Compliance attached as Schedule A to this Order and the continuation of such violation for a period of time in excess of any permitted grace periods and/or notice and cure periods set forth herein or in the attached Schedule A. Disagreement by the Department with conclusions and recommendations made in any report (including any PRR and any SVIE Report) shall not be a basis for vacating any such remaining portion of such penalty provided that Respondent acts reasonably and in good faith to resolve any such disagreement by the Department. In any event, prior to vacating the suspension the Department must give Respondent written Notice of its intent to vacate the suspension and state the claimed violation in reasonable detail. The Notice must provide Respondent with at least ten (10) days to cure the claimed violation.

Payment of the penalty assessed shall not in any way alter Respondent's obligation to complete performance of the Order.

II. **Stipulated Penalties.** In the event Respondent fails to complete to the satisfaction of the Department any required action herein, including without limitation, any corrective action set forth in Schedule A, by the dates established therein, Respondent hereby consents to entry of judgment in New York State Supreme Court for a stipulated penalty for each day the required actions remains incomplete. Such stipulated penalties shall be in the following amounts:

- a. For days 1 to 14, the penalty shall be \$100.00 per day;
- b. For days 15 to 30, the penalty shall be \$250.00 per day;
- c. For days 31 to the date the corrective action has been completed, the penalty shall be \$500.00 per day.

Respondent's failure to complete corrective action, submit report(s) and/or submit complete report(s) in the time frame(s) required by this Order shall be a basis for imposing stipulated penalties. However, disagreement by the Department with conclusions and recommendations made in any report (including any PRR and any SVIE Report) shall not be a basis for imposing any such stipulated penalties provided that once notified by the Department of any deficiencies in the report(s) or proposed corrective action, and provided a time period in which to cure the deficiency, Respondent acts reasonably and in good faith to resolve such disagreement with the Department. Once notified of any deficiency Respondent's failure to cure within the time provided in the notice will subject Respondent to stipulated penalties until the deficiency is cured. Any stipulated penalty required pursuant to this Article shall be due and payable ten (10) days after the date the Department mails written notice to Respondent that penalties have accrued.

Prior to filing a judgment for failure to pay the stipulated penalties the Department must provide Respondent with written Notice of the assessed penalty and its intent to enter a judgment. Respondent will then have ten (10) days to cure by paying the assessed penalty to the Department.

III. **Schedule of Compliance.** Respondent shall be immediately bound as provided by this Order and attached Schedule of Compliance, attached as "Schedule A". The Respondent shall implement all actions set forth in Schedule A, by the dates indicated therein. Schedule A is hereby incorporated into and made an enforceable part of this Order. Remedial activities undertaken under Schedule A of this Order are also being carried out under the terms of Order, Index No. B9-0501-20-07.

IV. **Communications.** Except as otherwise specified in this Order, any reports, submissions, and notices herein required shall be made in writing to:

To the Department:

Department of Environmental Conservation
270 Michigan Avenue
Buffalo, New York 14203
Attention: Martin L. Doster, P.E.

To the Respondent:

CMS Property Associates, L.L.C.
228 Linwood Avenue
Buffalo, New York 14209
Attention: James C. Muffoletto

With a copy at the same time to:
Guy J. Agostinelli, Esq.
Zdarsky, Sawicki & Agostinelli LLP
404 Cathedral Place
298 Main Street
Buffalo, New York 14202

V. **Effective Date and Duration.** The effective date of this Order is the date that the Commissioner of Environmental Conservation, or his designee, signs it; and this Order shall expire when Respondent has fully complied with the requirements of this Order.

VI. **Access.** For the purpose of monitoring or determining compliance with this Order, Respondent will assist the Department's employees and agents of the Department to gain access to any facility, site, or records not owned, operated, controlled or maintained by Respondent, in order to inspect and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility. Respondent will provide the Department's employees and agents of the Department access to any records owned, operated, controlled or maintained by Respondent in order to inspect and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility.

VII. **Force Majeure.** If Respondents cannot comply with a deadline or requirement of this Order because of an act of God, war, strike, riot, catastrophe or other condition that is not caused by the negligence or misconduct of Respondents, and that could not have been avoided by Respondents through the exercise of due care, Respondents shall make their best effort to comply nonetheless and shall, within seventy-two (72) hours of learning of such Force Majeure event (unless notice is required sooner by State or Federal law), notify the Department by telephone and in writing (which may be accomplished by way of an e-mail), and request an appropriate extension or modification of this Order.

VIII. **Indemnity.** 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

resulting from the acts and/or omissions of Respondent, intentional, negligent, or otherwise, of every nature and description, arising out of or resulting from the compliance or attempted compliance with the provisions of this Order by Respondent or its employees, servants, agents, successors or assigns.

IX. **Settlement.** Upon completion of all obligations in this Order, this Order settles all claims for civil and administrative penalties concerning the violations described in this Order against Respondent and its successors (including successors in title) and assigns. In the event of any non-compliance of this Order by Respondent and the continuation of such non-compliance for a period of time in excess of any grace and/or notice and cure period, the Department shall be entitled to enforce the terms and conditions of this Order and take such other action against Respondent as permitted by law.

X. **Summary Abatement.** This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

XI. **Entire Agreement.** This Order shall constitute the entire agreement of the Department and Respondent with respect to settlement of those violations specifically referenced herein.


XII. **Binding Effect.** The provisions, terms, and conditions of this Order shall be deemed to bind Respondent and Respondent's, legal representatives, receivers, trustees in bankruptcy, successors and assigns.

DATED: Buffalo, New York

_____, 2013

AUG 20 2013

Joseph J. Martens
Commissioner, New York State
Department of Environmental Conservation

By: 
Robert Schick
Director, Division of Environmental
Remediation

Schedule A

Prepared for CMS Property Associates, L.L.C.
228 Linwood Avenue Buffalo, New York 14209

Respondent, CMS Property Associates L.L.C. must, by the dates indicated, complete the following activities:

Within five (5) business days of the Effective Date of the Order, to the extent that Respondent has not already submitted the same, Respondent must submit the following:

1. A current Institutional Controls/Engineers Controls ("IC/EC") Certification prepared and executed by the responsible party and an approved Qualified Environmental Professional. The IC/EC certification received on or about April 29, 2013, during the course of this settlement has been provisionally accepted. It was accepted with the understanding that the accuracy cannot be verified until Respondent submits a PRR that covers the years in question. It was also provisionally accepted with the understanding that a complete IC/EC certification requires Respondent to draft and implement an acceptable OM & M plan. The PRR and OM & M plan are addressed below.
2. A Periodic Review Report ("PRR") that will revise, restate and supersede in its entirety the September 2012 report entitled "Annual Summary Report" filed by Respondent with the Department. The PRR must summarize compliance with the approved plans, including the IC/EC monitoring and OM&M plans and must conform to the PRR requirements below.
 - a. The PRR must summarize and document an evaluation of all site-related data to support the required elements of the IC/EC certification including:
 - i. The performance and effectiveness of the remedy, including the effectiveness of all treatment units;
 1. This summary must include identification of any needed repairs or modifications to the treatment units;

- ii. Any new conclusions or observations regarding the site contamination based on inspections and/or on the data generated by the implementation of the site monitoring plan for each of the media being monitored; and
 - iii. Recommendations, based on engineering judgment, regarding any necessary changes to the remedy and/or monitoring or OM&M plans.
- b. Where applicable, the PRR must summarize the data and/or information collected in compliance with the following:
 - i. Any discharge monitoring data for the certification period with relevant comments and conclusions;
 - ii. For a sewer use or air permit, reports are to be submitted to DER as stated in the permit requirements.
- c. Comments, conclusions and recommendations based on an engineering evaluation of the information included in the report must be prepared by a professional engineer.
- d. Comments, conclusions and recommendations based on an evaluation of the information in the report where institutional controls exist, must be prepared by a qualified person.
- e. The PRR must include and summarize the following:
 - i. A description of the on-line performance of the treatment system(s), which includes the:
 - 1. Number of days the system was run for the reporting period, or percentage of run time for the reporting period if the system is to operate continuously;
 - 2. Volume of contaminated groundwater processed per time period and the cumulative total of contaminated groundwater processed for the reporting period; and
 - 3. The average high and low flows per day;
 - ii. The mass of contaminants removed, or removed by the groundwater treatment systems;
 - iii. A description of routine maintenance and inspection forms;
 - iv. A description of breakdowns and/or repairs, with an explanation for any significant downtime;

- v. A summary of the performance monitoring conducted;
- vi. Any optimization performed;
- vii. Comments, conclusions and recommendations based on an evaluation and resolution of performance problems; and
- viii. All field data (such as vacuum and pressure readings and PID readings).

f. The PRR must include figures showing:

- i. Sampling and well locations, with tabulated significant analytical values at sampling locations, where effectiveness monitoring is performed;
- ii. Groundwater plume contours and flow directions; and
- iii. The area of influence/radius of capture of a treatment system.

g. The PRR must document a change of use and/or a property transfer.

h. The PRR should include any recommendations for modification to the ECs or ICs.

i. The PRR must include cumulative data summary tables and/or graphical representations of contaminants of concern, as follows:

- 1. Include a general listing of all compounds that were analyzed for, along with the applicable standards; and
- 2. Provide by sampling point, only those compounds detected, with the minimum reporting and detection limits noted.

j. The results of all analyses, copies of all laboratory data sheets and the required laboratory data deliverables must be submitted electronically upon the request of DER. This backup data is not to be included in the PRR or as an appendix to the PRR.

k. All inspection reports generated during the period are to be provided electronically.

3. Within ten (10) business days of the Effective Date of the Order, Respondent must initiate a Soil Vapor Intrusion ("SVI") investigation consistent with the final SVIE Work Plan approved by the Department on April 26, 2013.

4. Samples collected as part of the investigation must be analyzed within thirty (30) days of collection.

5. Within forty-five (45) days of being analyzed the samples must be independently validated by a validator who agrees to meet the 45 day deadline. If, for some unforeseen reason, the independent data validator cannot meet this schedule, Respondent will notify the Department at least 72 hours prior to the end of the 45 day period to request a suitable time extension.

6. The SVIE investigation must be completed within forty-five (45) days of effective date of this Order.

7. Within ten (10) business days of receiving the independently validated analytical data (the DUSR) for the analytical results Respondent must submit to the Department a Soil Vapor Intrusion Evaluation ("SVIE") Report, consistent with the SVIE work plan approved by the Department on April 26, 2013. Respondent must also send a letter, or a revision to previous letters as applicable, explaining the results of the SVI investigation to the owners of the properties that were included in the investigation.

8. If the approved SVIE Report indicates that mitigation is required, then within ten (10) business days of the Department's acceptance of the Report, Respondent must submit a remedial design plan for each mitigation site and must obtain access from the site owner to construct the mitigation.

- i. The design plan must include an implementation schedule that provides that mitigation will be completed within 90 days from the date the Department sends its approval of the design plan.

9. Within six (6) months of the Effective Date of the Order, Respondent must submit a Site Management Plan (SMP) that follows the Department's approved template currently found at <http://www.dec.ny.gov/data/der/tools/templates/smptemplate.doc>. This plan must incorporate the updated OM & M requirements for the site.

10. All data collected after April 1, 2013 shall conform to DEC's Division of Environmental Remediation (DER) requirements for electronic deliverables. DER has adopted a standardized electronic data deliverable (EDD) format that is required for all data submitted. Data must be formatted to meet the guidelines specified by DEC currently found at <http://www.dec.ny.gov/chemical/62440.html>.

CONSENT BY RESPONDENT

Respondent, **CMS Property Associates, L.L.C.** consents to the issuance and entry of the foregoing Order without further notice, waives its right to a hearing herein and agrees to be bound by the terms, conditions and provisions of this Order.

CMS PROPERTY ASSOCIATES, L.L.C.

By: A&L Holding Company, LLC, Member

By: Anthony H. Santiago Revocable Living Trust,
Manager

By: 
James C. Muffoletto, Trustee

Date: 6/27/13

ACKNOWLEDGMENT

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

On the 27th day of June in the year 2013, before me, the undersigned, personally appeared James C. Muffoletto, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.


Notary Public, State of New York

GUY J. AGOSTINELLI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Nov. 30, 2013