

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of Article 27, Titles 13 and
14 and Article 71, Title 36 of the New York State Environmental
Conservation Law and Part 375 of Title 6 of the
Official Compilation of Codes, Rules and Regulations of
the State of New York

ORDER ON CONSENT

-By-

Index No.
CO 8-20200506-47
DER Site No.
C828148

811 Jefferson Partners LLC and RP811Jeff LLC,

Respondents.

-----X
WHEREAS,

1. A. The New York State Department of Environmental Conservation ("Department") is responsible for inactive hazardous waste site and brownfield site remedial programs pursuant to Article 27, Titles 13 and 14 of the Environmental Conservation Law ("ECL") and Part 375 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") and may issue orders consistent with the authority granted to the Commissioner of the Department by such statute.

B. The Department is responsible for carrying out the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land, and air pollution consistent with the authority granted to the Department and the Commissioner by Article 1, Title 3 of the ECL.

C. This Order is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Titles 13 and 14 and ECL §3-0301.

2. 6 NYCRR 375-1 sets forth general requirements that are common to the implementation of various types of remedial programs overseen by the Department, including brownfield site remedial programs. When provisions of subpart 375-1 are violated, the Department has authority to impose civil penalties pursuant to ECL §71-2705 and to seek injunctive relief pursuant to ECL §71-2727(1) and (3)(a).

3. Respondent 811 Jefferson Partners LLC (Respondent 811 Jefferson) is a New York limited liability company. Respondent RP811Jeff LLC (Respondent RP) is a Delaware limited liability company.

4. Respondents are in the process of redeveloping a brownfield cleanup program (BCP) property that was remediated by a prior owner of the Former AB Dick Site, Site No. C828148, located at 811 Jefferson Road, in the Town of Henrietta, Monroe County (hereafter, the "Site"). Respondents are redeveloping the Site into a commercial retail building and will be seeking tax credits for the redevelopment under the BCP and New York State's Tax Law.

5. On March 3, 2020, the Department sent Respondents a Notice of Violation, which detailed several allegations including violations of the Site Management Plan ("SMP") and environmental easement for the Site, and the provisions of ECL Article 27, Titles 13 and 14, Article 71, and 6 NYCRR 375-1 that occurred during the redevelopment of the Site. Attached as Exhibit A is a copy of the March 3 Notice of Violation.

6. Respondents dispute the allegations contained in Exhibit A, except that Respondent RP admits that it violated the SMP for the Site on one occasion, when soil was transported off-site on February 24, 2020. The goal of this Order is to resolve any and all violations by Respondents regarding compliance with the SMP or otherwise related to redevelopment of the Site to date through the payment of a penalty by Respondent RP. Respondents have already taken required corrective actions at the Site and off-site, and both the Department and Respondents intend for the redevelopment of the Site to proceed without further incident.

7. Solely with regard to the matters set forth below, Respondents hereby waive any right to a hearing as may be provided by law, consent to the issuance and entry of this Order, and agree to be bound by its terms. Respondents consent to and agree not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agree not to contest the validity of this Order or its terms or the validity of data submitted to the Department by Respondents pursuant to this Order.

NOW, having considered this matter and being duly advised, it is **ORDERED THAT**:

I. PENALTY PAYMENT & SUSPENDED PENALTY

A. With respect to the violations which the Department alleges in its Notice of Violation in Exhibit A, the Department, in settlement of any and all such violations, hereby assesses against Respondent RP a civil penalty in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00). Half of the penalty will be payable and half of the penalty will be suspended. Therefore, Respondent RP will pay SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) within thirty (30) days of the effective date of this Order either by check made payable to the order of the "New York State Department of Environmental Conservation," with an invoice to be provided by the Department and the Case Number of this Order written in the memo section of the check, or by wire, at the election of Respondents, pursuant to wiring instructions provided by the Department. If such payment is made by check, it shall be sent to the

Department of Environmental Conservation, Division of Management and Budget
Services, 625 Broadway, 10th Floor, Albany, NY 12233-4900.

B. SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) of the penalty will be suspended and will only become payable if Respondents violate the SMP, Environmental Easement, the ECL, or any other applicable law or in the future, following any applicable periods to correct any such violation. The Department will notify Respondents of such non-compliance and will demand payment of the suspended penalty as soon as practicable after any such violations have occurred. Respondent RP will pay the \$7,500 within 30 days of any such demand by the Department.

II. SITE MANAGEMENT PLAN & SITE REDEVELOPMENT

Respondents agree to follow the SMP, the Excavation Work Plan within the SMP, the environmental easement, and all applicable laws during the remainder of site redevelopment.

III. STANDARD PROVISIONS

Respondents will further comply with the standard provisions which are attached, and which constitute material and integral terms of this Order and are hereby incorporated into this document.

DATED: Albany, New York

JUN 9 2020

Basil Seggos, Commissioner
New York State Department of Environmental
Conservation

By:



Michael J. Ryan

Director

Division of Environmental Remediation

CONSENT BY RESPONDENT

Respondent **811 Jefferson Partners LLC** hereby consent to the issuing and entering of this Order without further notice, waive their right to a hearing herein, and agree to be bound by the terms, conditions and provisions contained in this Order.

By
(Signature):



Print Name:

Frank Imburgia

Title:

Member

Date:

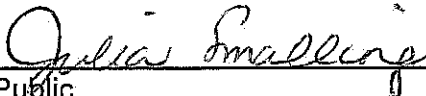
5-29-20

ACKNOWLEDGMENT

STATE OF New York) ss:
COUNTY OF Monroe)

On the 29 day of May in the year 2020 before me personally came Frank Imburgia to me known, who, being by me duly sworn, did depose and say that s/he resides in Pittsford, New York that s/he is the member of 811 Jefferson Partners LLC, the corporations described in and which executed the above instrument; and that s/he signed his/her name thereto by authority of the board of directors of said corporations.

JULIA SMALLING
Notary Public, State of New York
Qualified in Monroe County
Reg. No. 01SM6166500
Commission Expires 6/11/20 23



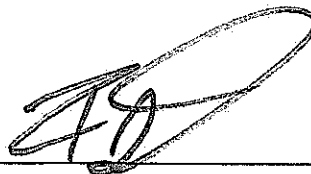
Notary Public

Signature and Office of individual taking acknowledgment

CONSENT BY RESPONDENT

Respondent **RP811Jeff LLC** hereby consents to the issuing and entering of this Order without further notice, waives its right to a hearing herein, and agrees to be bound by the terms, conditions and provisions contained in this Order.

By:
(Signature):



Print Name:

Frank Imburgia

Title:

Member

Date:

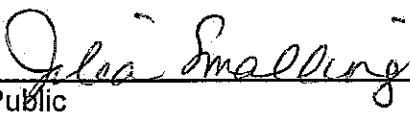
5-29-20

ACKNOWLEDGMENT

STATE OF New York) ss:
COUNTY OF Monroe)

On the 29 day of May in the year 2020 before me personally came Frank Imburgia to me known, who, being by me duly sworn, did depose and say that s/he resides in Pittsford, New York that s/he is the member of RP 811 Jeff LLC, the corporation described in and which executed the above instrument; and that s/he signed his/her name thereto by authority of the board of directors of said corporations.

JULIA SMALLING
Notary Public, State of New York
Qualified in Monroe County
Reg. No. 01SM6166500
Commission Expires 6/11/20 23


Notary Public

Signature and Office of individual taking acknowledgment

STANDARD PROVISIONS

Payment. Any penalty assessed pursuant to the terms and conditions of this Order shall payable to the "New York State Department of Environmental Conservation," with the Case Number of this Order written in the memo section of the check, or by wire, at the election of Respondent, pursuant to wiring instructions provided by the Department. If such payment is made by check, it shall be sent to the Department of Environmental Conservation, Division of Management and Budget Services, 625 Broadway, 10th Floor, Albany, NY 12233-4900. Unpaid penalties imposed by this Order shall bear interest at the rate of 9 percent per annum for each day the penalty, or any portion thereof, remains unpaid. Payments received shall first be applied to accrued interest charges and then to the unpaid balance of the penalty.

Communications. Except as otherwise specified in this Order, any reports, submissions, and notices herein required shall be made to: NYS Department of Environmental Conservation, Office of General Counsel, Attn: Andrew O. Guglielmi, 625 Broadway, 14th Floor, Albany, New York 12233-1500.

Duration. This Order shall take effect when it is signed by the Commissioner of Environmental Conservation, or his designee, and shall expire when Respondent has fully complied with the requirements of this Order.

Access. For the purpose of monitoring or determining compliance with this Order, employees and agents of the Department shall be provided access to any facility, site, or 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.

Force Majeure. If Respondent cannot comply with a deadline or requirement of this Order, because of an act of God, war, strike, riot, catastrophe, pandemic, or other condition which was not caused by the negligence or willful misconduct of Respondent and which could not have been avoided by the Respondent through the exercise of due care, Respondent shall apply in writing to the Department within a reasonable time after obtaining knowledge of such fact and request an extension or modification of the deadline or requirement.

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.

Modifications. No change in this Order shall be made or become effective except as specifically set forth by written order of the Commissioner, being made either upon written application of Respondent, or upon the Commissioner's own findings after notice and opportunity to be heard have been given to Respondent. Respondent shall have the burden of proving entitlement to any modification requested pursuant to this Standard Provision or the "Force Majeure" provision, *supra*. Respondent's requests for modification shall not be unreasonably denied by the Department, which may impose such additional conditions upon Respondent as the Department deems appropriate.

Other Rights. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting (1) any legal, administrative or equitable rights or claims, actions, suits, causes of action or demands whatsoever that the Department may have against anyone other than Respondent; (2) any right of the Department to enforce administratively or at law or in equity, the terms, provisions and conditions of this Order; (3) any right of the Department to bring any future action, either administrative or judicial, for any other violations of the ECL, the rules and regulations promulgated thereunder, or conditions contained in orders or permits, if any, issued by the Department to Respondent; (4) the summary abatement powers of the Department, either at common law or as granted pursuant to statute or regulation.

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

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

Service. If Respondent is represented by an attorney with respect to the execution of this Order, service of a duly executed copy of this Order upon Respondent's attorney by ordinary mail shall be deemed good and sufficient service.

Multiple Respondents. If more than one Respondent is a signatory to this Order, use of the term "Respondent" in these Standard Provisions shall be deemed to refer to each Respondent identified in the Order.

EXHIBIT "A"
March 3rd Notice of Violation

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel

625 Broadway, 14th Floor, Albany, New York 12233-1500

P: (518) 402-9185 | F: (518) 402-9018

www.dec.ny.gov

Via Email and First Class Mail

March 3, 2020

Frank Imburgia, Jr.
811 Jefferson Partners LLC and RP811 Jeff LLC
90 Goodway Dr
Rochester, NY 14623
frank@teamfsi.com

Re: Notice of Violation of Brownfield Cleanup Program Requirements
Former A B Dick Facility, #C828148

Dear Mr. Imburgia

The New York State Department of Environmental Conservation (the "Department") is responsible for ensuring that sites remediated under the Brownfield Cleanup Program (BCP) continue to be managed in a manner that is protective of public health and the environment. It has come to the Department's attention that actions by you or your agents and representatives at the Former AB Dick Facility Brownfield Site No. C828148 (the "site") have resulted in unacceptable threats to public health and the environment that constitute violations of the Environmental Conservation Law (ECL) and its implementing regulations, the Site Management Plan (SMP), and the Environmental Easement on the site.

Most significantly, between February 18th and 19th of 2020, potentially contaminated soil was removed from the remediated site and was transported to an off-site location, other than an approved landfill, without the review or approval of the Department, as required by the Excavation Work Plan (EWP) in the SMP, and as required by DER-10 Section 5.4 (f). These failures constitute violations of the ECL and specifically, 6 NYCRR 375-1.11(b)(2), by interfering significantly with a completed remedial program and by exposing the public health or the environment to a significantly increased threat of harm.

This letter constitutes a notice of these violations, which can result in penalties up to \$37,500 per day per violation. On Friday February 28th, I contacted your attorney, Alan Knauf, and told him the Department expects payment of penalties and that all necessary corrective actions be taken, in order to resolve the violations.

Furthermore, if these violations are not corrected and cured within 30 days, the Department will revoke the Certificate of Completion (COC) for the site, pursuant to 6 NYCRR Subpart 375-1.9(e). The revocation of the COC would result in the loss of the limited liability protections set forth in ECL § 27-1421, and the loss of tax credits for the redevelopment of the site.



Department of
Environmental
Conservation



The Department demands that the export of soil from the site cease immediately, and if any further soil is removed from the site in violation of the SMP, the COC will be immediately revoked. Furthermore, the amount and location of material removed from the site needs to be provided to the Department, and this material needs to be fully characterized to determine whether further corrective actions are necessary.

The Department has also since learned that you or your representatives were planning to discharge water from an excavation to the ground surface on February 25th. A Department construction inspector prevented this action. This could have been yet another violation of the SMP that would have led to more penalties.

One of the major problems uncovered by the recent actions at the site is the failure of on-site management by you or your agents. Specifically, your consultant is required to be on site during intrusive activities and a presence by qualified environmental professionals may have prevented the violations from occurring (see 6 NYCRR Part 375-1.6 (a)(3) and Section D-4 of the EWP). Specifically, "a QEP or person under their supervision will oversee all invasive work and the excavation and load-out of all excavated material."

Additionally, if you or your representatives believe that a specific requirement should not be applicable to a portion of the site, there must be a written request sent to the Department and you must receive written approval from the Department's project manager before moving forward. Here, you and your representatives unilaterally decided to disregard the law, regulations, and site-specific requirements at the site, and the Department is not going to allow any further unilateral actions to occur, without revocation of the COC and significant further penalties incurred.

Please have your attorney, Mr. Knauf, contact me to discuss preparation and execution of a consent order that will contain payment of appropriate penalties and any other corrective actions that are necessary in order to address the violations that have occurred. Hopefully, this will be the sole enforcement action that is needed at the site and there will be better communication between you, your representatives, and the Department so that this redevelopment can continue in a more responsible manner.

Nothing contained herein constitutes a waiver by the Department or the State of New York of any rights held pursuant to any applicable state and/or federal law or a release for any party from any obligations held under those same laws.

Very Truly Yours,



Andrew Guglielmi
Acting Bureau Chief, Remediation

Bureau

ec: Alan Knauf, aknauf@nyenvlaw.com