

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Violation of Environmental
Conservation Law Article 27, Title 13 and Title 6
of the Official Compilation of the Codes, Rules
and Regulations of the State of New York
(6 NYCRR) Part 375 by

ORDER
ON
CONSENT

Seneca Market 1, LLC
4 Centre Drive Index No. B8-0699-05-08A
Orchard Park, New York 14127

Index No. B8-0699-05-08A

Respondent

WHEREAS:

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of Environmental Conservation Law ("ECL") Article 27 and Part 375 of Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The Department is also authorized to administer the Brownfield Cleanup Program under Article 27, Title 14 of the ECL.
2. Seneca Market 1, LLC (the "Respondent") is a New York Limited Liability Company having its office at 4 Centre Drive, Orchard Park, New York.
3. The Respondent is a party to a Brownfield Cleanup Agreement ("BCA") , Index No. B8- 0699-05-08, dated November 7, 2005, relative to certain property in the Village of Watkins Glen, Schuyler County, bounded by Franklin, Decatur and First Streets (the "site").
4. In February, 2006 the Respondent submitted a revised Remedial Design Work Plan ("RDWP") with respect to the BCA for the site. The RDWP included a Soil/Fill Management Plan ("SFMP"). In these documents the Respondent provided information and made representations with respect to the remediation, excavation, handing and disposal of soil/fill at the site. Based upon the information and representations provided by the Respondent, the Department approved the Work Plan with certain modifications and clarifications.
5. The approved SFMP stated that "(g)enerally, soil/fill at the Site is characterized as either impacted with chlorinated volatile organic compounds (CVOCs) or petroleum organics, specifically, benzene, toluene, and xylenes (BTEX)". The SFMP provided for soils on site to be field tested for organic vapors and visually assessed for contaminants. Soils with a sustained reading of 5 ppm or higher were to be set aside and lab tested. Soils that did not meet cleanup standards were to be removed from the site and disposed in an appropriate permitted landfill. Soil/fill "...excavated from the site, including soils excavated for the purpose of accessing impacted soils..." were allowed to be used on-site as sub-grade backfill provided the analytical results met the site specific action levels for volatile organic compounds and semi-volatile organic compounds.

6. On or about August 15, 2007, during an inspection of the site, the Department learned that stockpiled soil was being transported to, and disposed of at, unauthorized locations off the brownfield cleanup site. Upon investigation, the Department determined that approximately 1000 cubic yards of soil had been transported offsite to three privately-owned properties and approximately 1100 cubic yards had been transported to a Schuylar County road maintenance project along County Route 21. The soil in issue was disposed of at two properties allegedly owned by Raphael Specchio on SR 14 and on Reading Road in the Town of Reading; at property allegedly owned by Donald Franzese on Summit Road in the Town of Reading; and at property along Route 21, Schuylar County, in the Sugar Hill State Reforestation Area.

7. The disposal of soil was undertaken by the Respondent without the knowledge or consent of the Department and without notification to the Department.

8. 6 NYCRR § 375-1.6(a)(1)(i) requires that all work plans be implemented in accordance with all applicable laws, rules and regulations and 6 NYCRR § 375-1.11(b)(2) prohibits any activity that will interfere with any ongoing or completed remedial program at any site. Respondent's disposal of the noted soils without the Department's knowledge constitutes such interference which is a violation of the cited regulatory provisions.

9. Respondent waives its right to the service of a Notice of Hearing and Complaint and further waives its right to a hearing in this matter as provided by law, and having consented to the issuance and entry of this Order, agrees to be bound by the terms hereof.

NOW, HAVING CONSIDERED THIS MATTER AND HAVING BEEN DULY ADVISED, IT IS ORDERED THAT:

- I. Respondent shall pay to the Department a civil penalty of Thirty-Seven Thousand Five Hundred Dollars (\$37,500.00). However, upon the Respondent's full and timely compliance of its obligations as set forth in this Order on Consent, Twelve Thousand Five Hundred Dollars (\$12,500) of this penalty shall be fully and finally suspended by the Department.

The non-suspended portion of the penalty, being the sum of \$25,000, shall be paid to the Department of Environmental Conservation, in two (2) installments of \$12,500.00 each. The first installment shall be paid upon execution of this Order and the second installment shall be paid on November 15, 2008. Each payment shall be made by certified check or money order payable to the Commissioner of Environmental Conservation and mailed to:

New York State Department of Environmental Conservation
Office of General Counsel
Western Field Unit
Attention: Joseph J. Hausbeck, Esq.
270 Michigan Avenue
Buffalo, New York 14203

In the event Respondent should fail to fully or timely comply with any obligations as set forth in this Order, including but not limited to, the requirements set forth under Schedule A attached hereto, the \$12,500 suspended portion of the assessed civil penalty shall be reinstated upon written notification from the Department and such \$12,500 shall become immediately due and payable by the Respondent to the Department, in addition to all other sums due and owing hereunder.

For purposes of this Order, a "failure to fully or timely comply" means Respondents' failure to perform a specific act in the manner required or by the date required by this Order, including Schedule A attached hereto, or by any Department approved work plan, schedule or protocol established as a result of the requirements of this Order or the attached Schedule A, or by any applicable Department rule, regulation or procedure.

Payment of any penalty assessed by this Order shall not in any way alter the Respondents' obligation to complete performance of this Order or to comply with the requirements of the Environmental Conservation Law and the New York Codes, Rules and Regulations.

- II. Respondent shall fully and timely comply with the requirements of Schedule A attached hereto and made a part of this Order.
- III. 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 all State Costs, associated with the activities identified on Schedule A of this Order, incurred subsequent to the date of this Order and through and including the date upon which the Department determines that the Respondent has fully complied with its obligations hereunder.

Personal service costs shall be documented by reports of Direct Personal Service, which shall identify 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. 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. The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.
- IV. 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.

- V. Respondent shall use "best efforts" to obtain all Site access necessary to perform Respondent's obligations under this Order, including all Department-approved work plans and the schedules contained therein. If, despite Respondent's best efforts, access cannot be obtained, Respondent shall promptly notify the Department and include a summary of the steps taken by the Respondent. Following receipt of such notification and documentation of the failure of such efforts, the Department shall, as it deems appropriate and within its authority, assist Respondent in seeking access.
- VI. The provisions of this Order shall inure to the benefit of and be binding upon the Department and the Respondent and its successors and assigns.
- VII. Respondent's failure to comply with any provision of this Order shall constitute a default and failure to perform an obligation under this Order, shall be deemed a violation of this Order and the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification, or approval issued to Respondent by the Department.
- VIII. If Respondent cannot comply with a deadline or requirement of this Order because of an act of God, war, strike, riot, catastrophe or other condition which is not caused by the negligence or misconduct of Respondent and which could not have been avoided by Respondent through the exercise of due care, Respondent shall make its best effort to comply nonetheless and shall, within seventy-two hours (unless notice is required sooner by State or Federal law), notify the Department by telephone and in writing, pursuant to the communications provision of this Order, after it obtains knowledge of any such condition or event and request an appropriate extension or modification of this Order.
- IX. Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees 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 its successors and assigns.
- X. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.
- XI. The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified in Paragraphs 6, 7 and 8 of this Order. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to Paragraph VII of this Order. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

- XII. The effective date of this Order is the date the Commissioner or his designee signs it. The Department shall provide Respondent with a fully executed copy of this Order as soon as practicable after the Commissioner or his designee signs it.

DATED: October 9, 2008

Alexander B. Grannis, Commissioner
New York State Department of
Environmental Conservation

A handwritten signature in cursive script, appearing to read "Paul D'Amato", is written over a horizontal line.

Paul D'Amato
Regional Director

CONSENT BY RESPONDENT

Respondent hereby consent to the issuing and entering of the foregoing Order, waives its right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

Seneca Market 1, LLC

By: [Signature]

Title: Member

Date: 9/18/08

State of New York)
) ss:
County of Monroe)

On the 18th day of September in the year 2008, before me, the undersigned, personally appeared Peter Krog, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

[Signature: Joyce E. Levandowski]
Signature and Office of individual

JOYCE E. LEVANDOWSKI
Notary Public, State of New York
Qualified in Monroe County
Commission Expires Feb. 22, 2010

SCHEDULE A

Respondent shall perform the following actions on or before the date indicated.

1. The sampling of off-site disposal sites will be in accordance with the Department and NYSDOH approved sampling plan and the Department's approval letter. The Health and Safety Plan in place for the Seneca Market 1, LLC Site will be implemented during the soil sampling events.
2. The Department reserves the right to collect split samples and/or their own soil samples during the soil sampling events.
3. Respondent shall take soil samples at representative locations, selected by the Department, within the area where soils had been disposed of by the Respondent along the Route 21 road shoulder and the Finger Lakes Trail access area. Such samples shall be taken within ten (10) business days of the Department's approval of a sampling plan or within ten (10) business days of being granted access to such property, whichever is later. Soil samples shall be lab tested for TCL VOCs, TCL SVOCs, TAL Metals, Pesticides and PCBs, and sample results shall promptly be made available to the Department. Results from this sampling will be reviewed by the Department Staff and NYSDOH Staff prior to its making any disposition decision. If all of the soil analytical data results fall below 6 NYCRR Part 375-6.8(b) restricted residential use cleanup objectives, Respondent must seed and mulch the area by October 15, 2008 and ensure good growth of cover later in the season. If any of the soil sampling results exceed 6 NYCRR Part 375-6.8(b) restricted residential use cleanup objectives, Respondent, by October 30, 2008, shall remove and properly dispose of, at the appropriate permitted landfill, all soils then designated for removal by the Department and provide removal and disposal records to the Department within ten (10) days of disposal. Following removal of the designated soils, Respondent shall promptly backfill excavated areas with clean select fill from a NYSDEC-approved source and seed and mulch the area, as necessary, to ensure a good growth of cover later in the season.
4. Respondent shall take soil samples at representative locations, selected by the Department, within the area where soils had been disposed of by the Respondent at the following properties: Jr. Specchio Property #1 (Reading Road), Dominic Franzese Property (Summit Road), Jr. Specchio Property #2 (adjacent to Watkins Glen Golf Course). Such samples shall be taken at each property within ten (10) business days of the Department's approval of a sampling plan or within ten (10) business days of being granted access to such property, whichever is later. Soil samples shall be lab tested for TCL VOCs, TCL SVOCs, TAL Metals, Pesticides and PCBs, and sample results shall promptly be made available to the Department. Results from this sampling will be reviewed by the Department Staff and NYSDOH Staff prior to its making any disposition decision. If any soil sampling result exceeds the 6 NYCRR Part 375-6.8(b) residential use soil cleanup objectives, Respondent, by October 30, 2008, shall remove and properly dispose of, at the appropriate permitted landfill, all soils then designated for removal by the Department and provide removal and disposal records to the Department within ten (10) days of disposal. Following removal of the designated soils, Respondent shall

promptly backfill excavated areas with clean select fill from a NYSDEC-approved source.

With respect to the Specchio #1 (Reading Road) property only, if any soil sample result exceeds the 6 NYCRR 375-6.8(b) residential use soil cleanup objectives, Respondent may develop and propose, for consideration by the Department and the NYS Department of Health, a remedial work plan to address the soil contamination that is above the residential use soil cleanup objectives. Such proposal must be submitted to the Department by October 15, 2008 for review by staff of the Department and the NYSDOH and for their approval or disapproval. If the submitted remedial work plan is approved, the Respondent shall implement the plan within 30 days of the date of the Department's approval letter and fully and timely complete the plan in accordance with the plan's approved schedule. If the remedial work plan is disapproved, the Respondent shall remove and properly dispose of, at the appropriate permitted landfill, all soils then designated for removal by the Department and provide removal and disposal records to the Department within ten (10) days of such disposal. Following removal of the designated soils, Respondent shall promptly backfill excavated areas with clean select fill from a NYSDEC-approved source.

5. Respondent shall provide the Department with five (5) calendar days notice prior to conducting any of the sampling and/or removal activities noted above. All soil sampling events and/or removal events must be observed by the Department.
6. If despite the Respondent's prompt use of "best efforts" to obtain access to the parcels referenced in Paragraphs numbered 3 & 4 hereof, Respondent cannot obtain access to one or more of such parcels in sufficient time to comply with a specific date set forth in said Paragraphs numbered 3 & 4 for a specific deliverable with respect to the parcel(s) involved, then Respondent shall, prior to the expiration of such delivery date, promptly notify the Department and include a summary of the "best efforts" taken and documentation of the failure of such efforts. Upon receipt of such notification, the Department, in its sole discretion and as it deems appropriate, may consider an extension of the Order's specific delivery date(s) for the parcel(s) involved.