

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Violation of Articles 15, 17, 27, 70 and 71 of the Environmental Conservation Law and Part 700 *et seq.* of Title 6 of the New York Codes, Rules and Regulations

CONSENT ORDER
File No. 17-14
R9-20170303-24

-by-

Queen City Landing, LLC

Respondent.

WHEREAS:

1. The Department of Environmental Conservation ("DEC") is an executive department of the State of New York ("State") with jurisdiction over the environmental policy and laws of this State, pursuant to, *inter alia*, the Environmental Conservation Law ("ECL") 3-0301.
2. The DEC is responsible for the regulation and protection of navigable waters in the state of New York to protect public health and the environment pursuant to Article 15, Title 7; Article 17, Title 5, and Article 71 of the ECL and Part 700 *et seq.* of Title 6 of the New York Codes, Rules and Regulation of the State of New York ("6 NYCRR").
3. The DEC also has jurisdiction to enforce provisions of the law relating to hazardous waste management facilities pursuant to ECL 3-0301 and Article 27, Titles 13 and 14; and Article 71 of the ECL and the regulations promulgated thereunder at Part 375 *et seq.*, of Title 6 of the NYCRR.
4. The DEC also has jurisdiction to enforce provisions of law related to the issuance of emergency authorizations pursuant to ECL Article 70.
5. Queen City Landing, LLC ("Respondent") is a New York State domestic business corporation authorized to do business in the State of New York.
6. Respondent owns, operates and/or maintains control of the facility and property located at 975 and 1005 Fuhrmann Boulevard, Buffalo, New York 14203 ("Facility").
7. Respondent entered into the Brownfield Cleanup Program ("BCP") and agreed to undertake remedial efforts under New York State DEC oversight.
8. Respondents identified numerous wastes on-site including asbestos and lead based paint ("LBP").

9. During an inspection, the Department noted the presence of loose paint chips, many of which were not adhered to a substrate and were widely dispersed throughout the structure at the Site.
10. Respondent failed to order the collection and segregation of the paint debris littered on the floors within the Facility.
11. Respondent processed the resulting construction and demolition debris and potentially comingled the paint debris with the construction and demolition debris.
12. On or about the same time, the Respondent failed to take the necessary precautions to prevent a concrete wall panel from failing and falling into Lake Erie on or about November 17, 2016.
13. Respondent was issued an Emergency Authorization to Remove the Concrete Panel from Lake Erie on November 18, 2016.
14. The wall or portions of the wall remained in Lake Erie until on or about December 10, 2016.

ENFORCEABLE PROVISIONS OF LAW

15. Pursuant to 6 NYCRR 375-1.6, all work plans shall be prepared and implemented in accordance with the requirements of all applicable laws, rules and regulations.
16. Pursuant to ECL § 15-0505, no person shall place fill below the mean high water level in any of the navigable waters of the state.
17. Pursuant to ECL § 17-0501, it shall be unlawful for any person, directly or indirectly, to throw drain, run, or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.
18. Pursuant to ECL § 71-1127, any person who violates any of the provisions of, or who fails to perform any duty imposed by Article 15 or who fails to comply with any rule, regulation, determination or order of the department heretofore or hereafter promulgated pursuant to Article 15, or any condition of a permit issued pursuant to Article 15 of this chapter, shall be liable for a civil penalty of not more than five hundred (500) dollars for such violation and an additional civil penalty of not more than one hundred (100) dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation.
19. Pursuant to ECL § 71-1929, a person who violates the provisions of or fails to perform any duty imposed by Titles 1 through 11 inclusive and Title 19 of Article 17 of the ECL, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable for a penalty of not to exceed \$37,500 per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation.
20. ECL § 71-2705 provides that any person who violates the provisions of or fails to perform any duty imposed by Title 9, 11 and 13 of Article 27 the ECL, any rule or

regulation promulgated pursuant thereto, or any order of the Commissioner, shall be liable for a civil penalty not to exceed \$37,500 and an additional penalty not to exceed \$37,500 for each day the violation continues. In addition, such person may be enjoined from continuing such conduct.

Pursuant to ECL § 71-4003, a person who violates any provision of this chapter, or any rule, regulation or order promulgated pursuant thereto, or the terms or conditions of any permit issued thereunder, shall be liable for a civil penalty of not more than one thousand (\$1,000) dollars, and an additional civil penalty of not more than one thousand (\$1,000) dollars for each day during which each such violation continues.

FACTS

21. Upon information and belief, Respondent's contractor, AMD Environmental, sent Respondent an XRF Lead Based Paint Inspection Report dated September 11, 2015, to Respondent at its place of business, which stated that building components which consistently tested positive for lead at the Facility were walls (concrete, plaster, brick), door components (door, casing, jambs), elevator door casings, stair components, exterior door and window components, and exterior walls.

22. Upon information and belief, at no time from September of 2015 until September of 2016, did Respondent order additional sampling investigation of LBP.

23. Thereafter on September 21, 2016, in a letter from Respondent's contractor, C&S Companies, titled "Lead Abatement and Beneficial Use Determination," the Respondent requested permission to crush the concrete on-site and beneficially reuse the materials on-site ("September 21, 2016 Letter").

24. The September 21, 2016 Letter stated that the "only affected area on-site is a four-foot by eight-foot exterior wall that contains graffiti". The letter describes the manner in which the Respondent would handle the materials located in this 32 square-foot section of the wall that was contaminated with LBP.

25. Generally, the September 21, 2016 Letter states that the materials with LBP in this area would be segregated and disposed of off-site.

26. The September 21, 2016 Letter identifies a specific 32 square-foot section of wall contaminated with LBP that will be segregated and disposed of off-site. This wall section was properly tested and then disposed of at an off-site permitted landfill in February 2017.

27. After reading the September 21, 2016 Letter, the DEC requested additional sampling as part of the beneficial use analysis to address Department concerns about LBP.

28. These samples of the loose paint confirmed the presence of lead and mercury at elevated levels (by total analysis) in certain paint flakes samples. In at least one sample, the results identified (total) lead at 57,700 ppm and mercury at 109 ppm.

29. The Respondent did not order any additional areas, other than the single 32 square-foot area described in the September 21, 2016 Letter, to be segregated and disposed of off-site.

30. Thereafter, Respondent ordered the demolition of the structure(s) and the crushing of the concrete, thereby potentially comingling the LBP with the construction and demolition debris that was proposed to be used, after crushing, as fill at the Site under an approved BUD.
31. Upon information and belief, on or about November 16, 2016, Respondent's demolition contractor unintentionally caused the structural failure of a portion of a concrete panel wall, which thereafter fell into Lake Erie.
32. Respondent sought an emergency authorization to remove the concrete wall panel, which had fallen over the seawall into Lake Erie.
33. Pursuant to ECL § 71-0116, on November 18, 2016, the Department issued an Emergency Authorization, permitting the Respondent to remove the concrete wall panel.
34. The emergency authorization required that Respondent provide written notice within forty-eight (48) hours of completion of the emergency work.
35. Upon information and belief the wall was removed on or about December 10, 2016.
36. On or about January 17, 2017 the Respondent's consultant provided the DEC with the results from the September 29, 2016 sampling event.

VIOLATIONS

37. Respondent was responsible for ensuring the implementation of all work plans in accordance with the requirements of all applicable laws, rules and regulations. Respondent did not implement the requirements set forth in the September 21, 2016 Letter, in violation of 6 NYCRR 375-1.6.
38. Respondent violated ECL § 15-0505 by placing fill, namely the concrete wall panel, below the mean high water level in Lake Erie.
39. Respondent violated ECL § 17-0501 by discharging inorganic matter into Lake Erie that contributed to a condition in contravention of the standards adopted by the department pursuant to section § 17-0301.
40. Respondent violated ECL § 70-0116 by failing to comply with the express terms of the emergency authorization and failing to notify the Department that the work was completed within 48 hours of the completion.

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

I. Civil Penalty. Respondent is assessed a civil penalty of Fifty Thousand Dollars (\$50,000), to be paid by Respondent. The penalty is to be paid by certified check or money order made payable to the Commissioner of the Department of Environmental Conservation and mailed to the Regional Attorney, NYSDEC, 270 Michigan Avenue, Buffalo, New York 14203 with this executed Order.

II. Release and Reservation of Rights.

- A. Upon completion of all obligations created in this Order, this document

settles the claims for civil and administrative penalties concerning the specific violations described in this Order on or before the effective date hereof against Respondent and its successors and assigns, except as specifically exempted below in Paragraph IX. Any failure by Respondent to fully comply with the terms of this Order may subject Respondent to further enforcement for the violations described herein.

- B. Neither the execution of this Order nor the admissions made herein shall be used or alleged by the Department to claim a breach of the Brownfield Cleanup Agreement for Site Nos: C915304 and C915305.
- C. Except as provided above, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, waiving or in any way affecting any of the civil, administrative, or criminal rights of the DEC or of the Commissioner or his or her designee or authorities with respect to any party, including Respondent.

III. Indemnification. Respondent shall indemnify and hold harmless the DEC, the State of New York, and their representatives and employees for all claims, damages and costs of every nature arising out of or resulting from the acts and/or omissions of Respondent or resulting from the compliance or attempted compliance with the provisions of this Order by Respondent and its successors and assigns.

IV. Modification. If, for any reason, Respondent desires that any term of this Order be changed, Respondent shall make timely written application therefore to the Regional Director of the DEC's Region 9 Office, setting forth reasonable grounds for the relief sought. The DEC agrees not to unreasonably deny a request for an extension of time and modification of this Order. 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.

V. Access. Respondent must permit access to any site, facility, or records owned, operated, controlled or maintained by Respondent in order for DEC staff to inspect and/or perform any necessary tests, related to the requirements of the Order, during reasonable hours. No prior notification is required for site inspections.

VI. Not a Permit. This Order is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Respondent's compliance with this Order shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The DEC does not, by its consent to the issuance of this Order, warrant or aver in any manner that Respondent's compliance with any aspect of this Order will result in compliance with provisions of any federal, State, or local laws, regulations, or permits

VII. Summary Abatement. This Order does not bar, diminish, adjudicate or in

any way affect the DEC's rights or authorities, including but not limited to, exercising summary abatement powers.

VIII. Binding Effect. The provisions of this Order shall inure to the benefit of and be binding upon the DEC and Respondent and its heirs, successors, employees, and all persons, firms, corporations acting under or for Respondent.

IX. Natural Resource Damages. Nothing in this Order bars or diminishes the DEC's right to seek recovery for natural resource damages, as applicable.

X. Failure, Default and Violation of Order. Respondent's failure to comply fully and in a timely fashion with any provision, term or condition of this Order shall constitute a default and failure to perform an obligation of this Order and under the ECL and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to Respondent by the Department.

XI. Force Majeure. 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 DEC by telephone and in writing after it obtains knowledge of any such condition or event and request an appropriate extension or modification of this Order.

XII. Effective Date. The effective date of this Order is the date that the Commissioner or his designee signs it. The DEC will provide Respondent (or Respondent's counsel) with a fully executed copy of this Order as soon as practicable after the Commissioner or his designee signs it.

DATED: Buffalo, New York
May 31, 2017

BASIL SEGGOS
COMMISSIONER
NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

By: Abby M. Snyder
Abby M. Snyder
Regional Director

CONSENT BY QUEEN CITY LANDING, LLC

Respondent Queen City Landing, LLC hereby consents to the issuing and entering of the aforementioned Order, waives its right to a hearing as provided by law, and agrees to be bound by the provisions, terms and conditions contained therein.

Queen City Landing, LLC

By: *Craig A. Slater*

Name: Craig A. Slater

Title: Authorized Representative/Attorney
in Fact

Date: May 2, 2017

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

On the 2nd day of May in the year 2017, before me, the undersigned, personally appeared Craig A. Slater personally known to me who, being duly sworn, did depose and say that his address is 500 Seneca Street, Suite 504, Buffalo, New York 14204 and that he is the Authorized Representative and Attorney in Fact for Queen City Landing, LLC, the Respondent and company described in and which executed the above instrument; and that he signed name thereto by the authority of the Members of said company.

Audrey J. Miller
Notary Public, State of New York

AUDREY J. MILLER

Notary Public, State of New York

Qualified in Erie County


My Commission Expires: 3/30/2018

**SECRETARY'S CERTIFICATE
OF
QUEEN CITY LANDING, LLC**

The undersigned certifies that he is the Secretary of Queen City Landing, LLC (the "Company") and that, as such, the undersigned is authorized to execute and deliver this certificate in the name and on behalf of the Company. The undersigned further certifies that:

- a) Attached here to is a true, correct and complete copy of the resolution adopted by the Members of the Company authorizing Craig A. Slater, Esq. to execute and deliver on behalf of the Company a New York State Department of Environmental Conservation Consent Order dated as of the 2nd day of May, 2017, which resolution remains in full force and effect without amendment or modification on and as of the date hereof.

IN WITNESS WHEREOF, the Company has caused this certificate to be executed and delivered by its Secretary as of the 2nd day of May, 2017.

By: 
Gregory P. Photiadis, Company Secretary

**RESOLUTION OF
OF THE MEMBERS
OF
QUEEN CITY LANDING, LLC**

QC Landing South, LLC and 3556 Lakeshore, LLC the members of Queen City Landing, LLC (the "Company") hereby adopt the following resolution as of the 2nd day of May, 2017:

IT IS HEREBY RESOLVED, that Craig A. Slater, Esq., Environmental Counsel for the Company, is hereby authorized and empowered to execute and deliver on behalf of the Company, a Consent Order with regard to Queen City Landing, LLC, to the New York State Department of Environmental Conservation dated as of the 2nd day of May, 2017.