

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

REGIONAL HEARING
CLERK

2014 APR - 1 AM 9: 58

U.S. Environmental
Protection Agency-Reg 2

In the Matter of

Amerimart Development Company,
Inc., Qual-Econ Lease Co., Inc., MJG
Enterprises, Inc., and Clear
Alternative of Western, NY, Inc. (dba
G & G Petroleum)

Respondents
Proceeding Under Section 9006 of the
Solid Waste Disposal Act, as
amended.

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. RCRA-02-2012-7501

PRELIMINARY STATEMENT

This civil administrative proceeding for injunctive relief and the assessment of a civil penalty was initiated pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. Section 6901 et seq. (hereinafter referred to as the "Act"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (hereinafter "CROP"). The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency ("EPA" or "Complainant"), issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing" (ie., "Complaint") on or about June 29, 2012 to the above-named Respondents. The Complaint alleged violations of the Act and the federal underground storage tank regulations promulgated at 40 C.F.R. Part 280. The Complaint was amended on August 21,

2013 for the sole purpose of removing a Respondent, Commercial Realty Fund II, from the original Complaint. Unless otherwise specified, references to the Complaint hereinafter refer to the amended Complaint.

The Complainant and the Respondent Amerimart Development Company, Inc, have been able to reach a settlement and both parties enter into this Consent Agreement and Final Order (“CA/FO”) pursuant to 40 C.F.R. subsections 22.18(b)(2) &(3) of the CROP. Complainant and Respondent agree that settlement of this matter upon the terms set forth in this CA/FO is an appropriate means of resolving EPA’s claims against Amerimart Development Company, Inc. without further litigation. The CA/FO does not resolve EPA’s claims against any other Respondent in this civil administrative matter.

EPA’S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is the Amerimart Development Company, Inc. (hereinafter “Respondent” or “Respondent Amerimart” or “Amerimart”), whose corporate headquarters address is 1066 Sheridan Drive, Tonawanda, NY 14150. Respondent has at various times used the following other address: 2320 West Oakfield Road, Grand Island, NY 14072.
2. The Respondent is a “person” as that term is defined in Section 9001(5) of the Act, 42 U.S.C. Section 6991(5), and in 40 C.F.R. Section 280.12.

3. The Respondent Amerimart has been, for the times relevant to the violations for which the company is alleged to be liable in Counts 1 through 4 and 12 through 22 of the Complaint, an “owner” and/or “operator” of “underground storage tanks” (“USTs”) or “UST system”, as those terms are defined in Section 9001 of the Act, 42 U.S.C. Section 6991, and 40 C.F.R. Section 280.12.

4. Respondent Amerimart has in the past been the sole owner and operator of UST systems at the following four facilities identified in the Complaint as follows:
 - (a) Texas Gas Convenient Mart, 473 East Delavan Avenue, Buffalo, N.Y.
(PBS #9-221090) (Counts 1 through 4);
 - (b) A & M Gas Mart, 2756 Bailey Avenue, Buffalo, N.Y.
(PBS #9-222666) (Counts 12 and 13);
 - (c) Sheridan Convenient Mart, 1066 Sheridan, Tonawanda, N.Y.
(PBS #9-448427) (Counts 14 through 17); and
 - (d) Walden Convenient Mart, 599 Walden Avenue, Buffalo, N.Y.
(PBS # 9-459690) (Counts 18 through 22).

5. During 2006, 2007, 2008, 2010 and 2011, pursuant to Section 9005 of the Act, 42 U.S.C. Section 6991d, authorized representatives of EPA inspected federally regulated UST systems located at each of the four facilities (identified in paragraph 4 above) owned and operated by the Respondent Amerimart

Development Company, Inc., in Buffalo, NY and/or Tonawanda, NY, in order to determine compliance with subtitle I of the Act and 40 C.F.R. Part 280.

6. EPA sent information request letters (“IRLs”) to Respondent Amerimart in 2008, 2009, 2010, 2011 and 2012 to determine the status of Respondent’s compliance with the Act and federal UST regulations.
7. Respondent Amerimart submitted responses to EPA’s IRLs in 2008, 2009, 2010, 2011 and 2012.
8. Based on the findings of EPA’s inspections of Respondent’s UST systems located at the facilities identified in paragraph 4 above, and the information and documentation contained in the Respondent’s responses to EPA’s IRLs, EPA issued the original Complaint on June 29, 2012 (later amended on August 21, 2013) which alleged that Respondent Amerimart committed the following violations of UST requirements in 40 C.F.R. Part 280:
 - (i) Failure to perform release detection and to maintain release detection records for tanks (Sections 280.41(a), 280.34(b)(4), 280.34(c) and 280.45);
 - (ii) Failure to perform release detection and to maintain release detection records for pressurized piping (Sections 280.41(b)(1), 280.34(b)(4), 280.34(c), and 280.45);
 - (iii) Failure to use overfill prevention equipment for UST systems (Sections 280.20(c) (1)(ii) and 280.21(d)); and
 - (iv) Failure to conduct triennial testing of cathodic protection (280.31(b)) for steel UST systems.

9. On or about January 20, 2014, Respondent Amerimart submitted in its prehearing exchange in this proceeding copies of federal corporate tax returns, which were either (i) signed by Respondent's President and mailed by the company's tax accountant on its behalf or (ii) electronically filed by the company's tax accountant on Respondent's behalf with the Internal Revenue Service ("IRS"), U.S. Department of Treasury, for calendar years 2009, 2010 and 2011. Subsequent to its prehearing exchange, Amerimart provided to EPA a copy of the federal corporate 2012 tax return which was prepared and electronically filed with the IRS by the Respondent's tax accountant on Respondent's behalf. Amerimart has cited the above-mentioned tax returns in support of (i) its claim that it has an inability to pay the penalty that Complainant proposed to be assessed against it and (ii) the need for payment in settlement of a civil penalty in installment payments, as specified in paragraph 4 of the Consent Agreement, below. EPA has relied on the completeness and accuracy of the above-mentioned financial documents submitted by Respondent Amerimart in negotiating this settlement.
10. Respondent has informed EPA that it has notified or will notify NYSDEC by April 5, 2014 that Respondent is neither the contact person for, nor the owner or operator of, the UST systems located at the facilities listed below:
- (1) Texas Gas Convenient Mart, 473 Delavan Avenue, Buffalo, New York
 - (2) Super Stop/Amerimart, 1545 Broadway, Buffalo, New York
 - (3) Amerimart, 5565 Millersport Highway, Amherst, New York

(4) A & M Gas Mart, 2756 Bailey Avenue, Buffalo, New York

(5) Sheridan Convenient Mart, 1066 Sheridan, Tonawanda, New York

(6) Walden Convenient Mart, 599 Walden Avenue, Buffalo, New York

Furthermore, Respondent has informed EPA that it is not now, and never has been, the contact person for, or the owner or operator of, UST systems located at the following facilities:

(1) Herrscher's Express Mart, 4291 Maple Road, Amherst, New York

(2) G & G Petroleum, 1531-1543 Niagara Street, Buffalo, New York

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 9006 of the Act, 42 U.S.C. Section 6991e, and Section 22.18 of the CROP, it is hereby agreed by and between the Complainant and the Respondent Amerimart as follows:

1. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, Respondent Amerimart (a) admits the jurisdictional allegations of the Complaint; and (b) neither admits nor denies the EPA Findings of Fact and Conclusions of Law in the section above.
2. Respondent Amerimart certifies, as of the date of its signature of the Consent Agreement, the accuracy of each of the following statements: (i) that it has an inability to pay the proposed penalty that Complainant sought against Amerimart

in the Complaint; (ii) that Amerimart has examined the tax return records, including schedules and statements, which it submitted to EPA, as mentioned in paragraph 9 of the EPA's Findings of Fact and Conclusions of Law section above, and subject to paragraph (iii) immediately below, to the best of its knowledge and belief, these tax records are true, correct and complete and the same as the tax returns which were either signed by Respondent's President and mailed by the company's tax accountant on its behalf or electronically filed by the company's tax accountant on Respondent's behalf with the Internal Revenue Service, U.S. Department of Treasury; (iii) the amount (i.e., \$18,000 worth of land, net of amortization shown on line 12 on Schedule L of Respondent's 2009-2012 federal income tax return is incorrect, because Respondent has not owned any real property since several years before this proceeding was commenced and such amount had no impact on the returns as the land so valued was not and could not be depreciated; and (iv) Respondent Amerimart is no longer an owner or operator of any UST system at the four subject facilities identified in paragraph 4 of EPA's Findings of Fact and Conclusions of Law section above. If Respondent Amerimart is or becomes an owner and/or operator of any UST system at the time of or after its signature on this Consent Agreement, it shall inform EPA and the NYSDEC of this ownership or operation within 10 days of the effective date of this CA/FO or prior to the commencement of said ownership and operation. Respondent shall comply with all applicable UST requirements in 40 C.F.R. Part

280 or New York State regulations that have been approved by EPA pursuant to Section 9004 of the Act, 42 U.S.C. Section 6991c.

3. If in the future EPA believes that any information which Respondent Amerimart certified to, pursuant to paragraph 2 above, is untrue or inaccurate, EPA will so advise the Respondent of its belief and basis, and will afford the Respondent thirty (30) days to (i) submit comments to EPA and (ii) correct the alleged untrue or inaccurate certification. If, after consideration of Respondent's reply, EPA determines that any part of the certification was untrue or inaccurate as of the date of Amerimart's signature of this Consent Agreement, then EPA reserves its right to pursue all legal actions which it deems appropriate, including the initiation of a separate criminal investigation pursuant to 18 U.S.C. Section 1001 et seq. or any other applicable law.

4. Respondent Amerimart agrees to pay, by certified check, a civil penalty in the amount of Thirty Thousand Dollars (\$30,000) payable to the "Treasurer of the United States of America, in accordance with the payment schedule (in six installments) as described below:
 - a) The first installment amount of Five Thousand Dollars (\$5,000) must be received at the address below on or before forty-five (45) calendar days after the date of signature of the Final Order at the end of the document (first due date). The second through sixth installments each in the amount of Five Thousand Dollars

(\$5,000) must be received at the address below on or before the following dates:

Installment 2 on October 15, 2014; Installment 3 on April 15, 2015; Installment 4 on October 15, 2015; Installment 5 on April 15, 2016; Installment 6 on October 15, 2016.

Each check shall be identified with the notation of the name and docket number of this case as follows: In the Matter of Amerimart Development Company, Inc., et al., Docket No. RCRA-02-2012-7501 and shall indicate that the payment is being made by Respondent Amerimart Development Company, Inc.

Each check shall be mailed to:

United States Environmental Protection Agency
Fines & Penalties
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent Amerimart shall also send a copy of the payment to both:

Bruce Aber, Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866; and

Office of Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Each payment must be received at the above addresses on or before the due dates specified above (the date(s) by which each payment must be received shall hereinafter be referred to as the “due date”).

- b) If Respondent Amerimart fails to pay any of the installments required above by its due date, Respondent shall also be liable to EPA for an additional stipulated penalty of Two Thousand Five Hundred dollars (\$2,500.00) per month for each month where full payment has still not been made. All stipulated penalties for failure to pay a penalty installment on time are due and payable within thirty (30) calendar days of Respondent's receipt from EPA of a written demand for payment of penalties. All stipulated penalty payments shall be made in accordance with the payment instructions above. Stipulated penalties shall accrue as provided above, regardless of whether EPA has notified Respondent of the violation or has made a demand for payment, but need only be paid upon demand.
- c) Failure to pay the full amount of the penalty, or any stipulated penalty demanded by EPA, according to the above provisions, will result in the referral of this matter to the United States Department of Justice or the United States Department of Treasury for collection and/or other appropriate action.
- d) If timely payment is not received on or before the due dates, interest will be assessed, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. Section 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$25.00 will be assessed for each thirty (30) calendar day period, or any portion thereof, following the due date in which the balance remains unpaid.
- e) A 6% per annum penalty will also be applied on any principal amount not paid within ninety (90) days of its due date.

5. Unless Respondent Amerimart provides EPA with a written explanation in accordance with paragraph 6, below, all stipulated penalties are due and payable within thirty (30) calendar days of the Respondent's receipt from EPA of a written demand for payment of the penalties. Respondent Amerimart agrees that such demand may be mailed to Attorney Brenda Joyce, Counsel for Amerimart, Bender & Bender, LLP, 68 Niagara Street, Buffalo, New York 14202. All stipulated penalty payments shall be made by cashier's or certified check in accordance with the payment instructions in paragraph 4 of this Consent Agreement. Any payment of stipulated penalties shall be in addition to any other payments required under any other paragraph of this Consent Agreement. Nothing in this Consent Agreement, including payment of penalties identified in this Consent Agreement, shall preclude EPA from initiating a separate criminal investigation pursuant to 18 U.S.C. Section 1001 et seq. or any other applicable law.

6. After receipt of a demand from EPA for payment of stipulated penalties pursuant to paragraph 4 b, above, Respondent Amerimart shall have fifteen (15) calendar days in which to provide Complainant with a written explanation of why it believes that a stipulated penalty is not appropriate for the cited violation(s) of this Consent Agreement (including any technical, financial or other information that Respondent deems relevant). Pursuant to paragraph 7, below, EPA shall evaluate the written explanation provided by the Respondent Amerimart.

7. The Complainant may, in her sole discretion, reduce or eliminate any stipulated penalty due under this Consent Agreement if Respondent has, in writing, demonstrated to EPA's satisfaction good cause for such action by EPA. If, after review of Respondent's submission pursuant to the preceding paragraph, Complainant determines that Respondent has failed to comply with the provisions of this Consent Agreement, and Complainant does not, in her sole discretion, eliminate the stipulated penalties demanded by EPA, Complainant will notify Respondent, in writing, that either the full stipulated penalty or a reduced stipulated penalty must be paid by Respondent. Respondent shall pay the stipulated penalty amount indicated in EPA's notice within thirty (30) calendar days of its receipt of such written notice from EPA.

8. At any time prior to Respondent's payment of stipulated penalties, the Complainant, may, for good cause as independently determined by her, reduce or eliminate the stipulated penalty(ies). If the Complainant makes such determination, EPA shall notify Respondent in writing of any such action.

9. The civil penalty and any applicable stipulated penalties provided for herein are penalties within the meaning of Title 26, Section 162(f) of the United States Code, 26 U.S.C. § 162(f), and are not deductible expenditures for purposes of federal law.

10. This Consent Agreement, which is being voluntarily and knowingly entered into by the Complainant and the Respondent Amerimart, resolves (conditional upon the accuracy of the certifications provided in paragraph 2 of the Consent Agreement and full payment of the civil penalty herein and of any stipulated penalty that becomes due) the civil and administrative claims against the Respondent Amerimart alleged in Counts 1 through 4 and 12 through 22 of the Complaint in this matter. Nothing herein shall be read to preclude EPA or the United States, on behalf of EPA, however, from pursuing appropriate injunctive or other equitable relief or criminal sanctions against Respondent Amerimart for any violation of law. Nothing herein shall be construed as a release for any other Respondent in this proceeding.

11. In consideration of Respondent Amerimart's entering into this settlement agreement and assuming that Respondent Amerimart has accurately informed EPA that it does not currently own or operate any USTs at the two stations listed in this paragraph, EPA will not seek a ruling of liability or civil penalty against Respondent Amerimart for the violations alleged in Counts 5 through 11 of the Complaint where it is alleged that Respondent Amerimart shared responsibility with Respondent Qual-Econ Lease Co., Inc. for two stations (located at 1545 Broadway, Buffalo, NY and 5565 Millersport Highway, Amherst, New York) and that both were jointly and severally liable for payment of a civil penalty. Instead,

EPA will seek a penalty against Respondent Qual-Econ Lease Co., Inc. for the violations alleged in Counts 5 through 11 of the Complaint.

12. Respondent has read the Consent Agreement, understands its terms, finds it to be reasonable and consents to the issuance and its terms. Respondent consents to the issuance of the accompanying Final Order. Respondent agrees that all terms of settlement are set forth herein.
13. Respondent explicitly and knowingly and voluntarily consents to the assessment of the civil penalty and any stipulated penalties as set forth in this Consent Agreement and agrees to pay the civil penalty and any stipulated penalties in accordance with the terms of this Consent Agreement.
14. Respondent explicitly and knowingly waives its right to request or to seek any Hearing in this proceeding on the Complaint or on this Consent Agreement or on the Findings of Fact and Conclusions of Law herein, or on the accompanying Final Order.
15. The Respondent Amerimart agrees not to contest the validity or any term of this CA/FO in any action brought: a) by the United States, including EPA, to enforce this CA/FO; or b) to enforce a judgment relating to this CA/FO.
16. Respondent Amerimart waives its right to appeal this Consent Agreement and the accompanying Final Order.

17. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative proceeding, except in an action or proceeding to enforce or seek compliance with this Consent Agreement and its accompanying Final Order (ie., the “CA/FO”). If EPA determines that any part of the certifications in paragraph 2 of the Consent Agreement was untrue or inaccurate, Respondent further agrees that in any further action by EPA or the United States to seek a penalty or other relief for alleged violations at the facilities identified in paragraph 4 of the EPA Findings of Fact and Conclusions of Law section above, Respondent Amerimart shall not assert, plead or otherwise raise in any fashion or manner, whether by answer, motion or otherwise, any affirmative defense based on the passage of time during the period commencing the date this Consent Agreement was signed by Respondent, including (but not limited to) statute of limitations, laches, estoppel or waiver. Nothing herein shall revive any action or proceeding that was time barred as of the date this Consent Agreement was signed by Respondent Amerimart.
18. Respondent explicitly waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer for Region 2, where the purpose of such discussion, memorandum, or communication is to discuss a

proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Final Order.

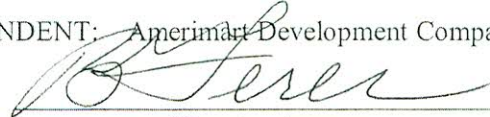
19. This Consent Agreement and Final Order does not relieve Respondent of its obligations to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of the Act and the regulations promulgated thereunder.
20. Nothing in this Consent Agreement and Final Order shall be construed as a release for Respondent Amerimart from any other action under any law and/or regulation administered by EPA.
21. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and Final Order and all the terms and conditions set forth in this Consent Agreement and Final Order.
22. The provisions of this Consent Agreement and Final Order shall be binding upon EPA and the Respondent, their officers/officials, agents, authorized representatives and successors or assigns.

23. Any failure by the Respondent to perform fully any requirement herein will be considered a violation of this CA/FO, and may subject Respondent to a civil judicial action by the United States to enforce the provisions of this CA/FO.
24. Each party hereto agrees to bear its own costs and fees in this matter.
25. Respondent consents to service upon itself (or its legal counsel) of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.
26. Pursuant to 40 C.F.R. § 22.31(b), the effective date of the Final Order herein shall be the date when it is filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2.

In the Matter of Amerimart et al., RCRA-02-2012-7501

RESPONDENT: ~~Amerimart~~ Development Company, Inc.,

BY:



(Signature)

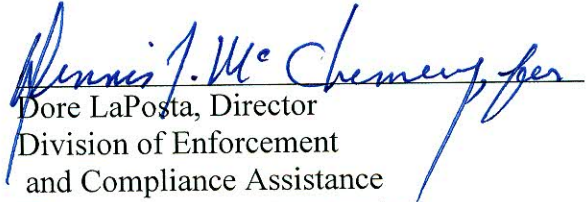
NAME: _ Bernard Ferer

TITLE: _ President

DATE : March 27, 2014

In the Matter of Amerimart et al., RCRA-02-2012-7501

COMPLAINANT:


Dore LaPosta, Director
Division of Enforcement
and Compliance Assistance
U.S. Environmental Protection
Agency - Region 2

DATE: 03/31/14

In the Matter of Amerimart et al., RCRA-02-2012-7501

FINAL ORDER

The Regional Judicial Officer of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement between EPA (ie., the Complainant) and Respondent Amerimart Development Company, Inc. ("Amerimart"). The Consent Agreement entered into by Complainant and Respondent Amerimart, is hereby approved, incorporated herein, and issued as an Order pursuant to Section 9006 of the Act and 40 C.F.R. Section 22.18(b)(3). The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2, New York, New York.



Helen Ferrara
Regional Judicial Officer
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th Floor
New York, New York 10007

DATE: March 31, 2014

In the Matter of Amerimart et al., RCRA-02-2012-7501

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed Consent Agreement and Final Order (“CA/FO”), bearing the above-referenced docket number, in the following manner to the respective addressees listed below:

Original and Copy
By Hand-Delivery:

Karen Maples
Regional Hearing Clerk
U.S Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Certified Mail/
Return Receipt Requested:

Christine D. Coughlin
Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania, N W
Washington, D.C. 20460

Copy by Certified Mail/
Return Receipt Requested:

Brenda J. Joyce, Esq.
Counsel for Amerimart Development Company, Inc.
68 Niagara Street
Buffalo, NY 14202

Copy by Certified Mail/
Return Receipt Requested
and Regular Mail to:

Qual-Econ Lease Co., Inc.:
Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
14 Colonial Drive
Tonawanda, NY 14150

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
P.O. Box 473
Grand Island, NY 14072

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
2320 West Oakfield Road
Grand Island, NY 14072

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.,
105 Galileo Drive
Williamsville, NY 14221

**Copy by Certified Mail/Return Receipt Requested
and Regular Mail to MJG Enterprises, Inc.:**

Michael J. Geiger
c/o MJG Enterprises, Inc.
14 Colonial Drive
Tonawanda, NY 14150

Michael J. Geiger
c/o MJG Enterprises
105 Galileo Drive
Williamsville, NY 14221

**Copy by Certified Mail/Return Receipt Requested and Regular Mail to
Clear Alternative of Western, NY, Inc. (d/b/a G & G Petroleum):**

Peter G. Gerace
c/o Clear Alternative of Western, NY, Inc. (d/b/a G & G
Petroleum)
3109 Delaware Avenue
Kenmore, NY 14217

Michael J. Geiger
Peter Gerace
c/o Clear Alternative of Western, NY (d/b/a G & G
Petroleum
1543 Niagara Street
Buffalo, NY 14213

In addition, I certify that a PDF version of the foregoing Consent Agreement & Final Order was electronically sent to each of the following email addresses:

Anderson.sybil@epa.gov; oaljfiling@epa.gov; bjoyce@benderlawbuffalo.com

Dated: March 31, 2014
New York, New York



Bruce Aber
Assistant Regional Counsel