December 9, 2010

Alvin Lam
Permits Section, Water Resources Division
Michigan Department of Natural Resources and Environment
PO Box 30458
Lansing, Michigan 48909

RE: Permit No. MI0058827
CMS Land Co-Bay Harbor Resort

Dear Mr. Lam:

Tip of the Mitt Watershed Council and Michigan Environment Council would like to provide comments on Michigan Department of Natural Resources and Environment's (MDNRE) proposal to issue a new discharge permit to CMS Land Company for the CMS Land Company Little Traverse Bay Environmental Project, Permit No. MI0058827.

As a means of introduction, Tip of the Mitt Watershed Council, founded in 1979, is a non-profit organization whose purpose is to protect, restore, and enhance water resources, including inland lakes, rivers, wetlands, ground water, and the Great Lakes. We base all our programs on sound science and policy analysis, and have garnered respect for our work from local, state, and federal agencies, businesses, fellow environmental organizations, and citizens.

The Michigan Environmental Council – a 501(c)(3) charitable organization – is a coalition of 70 organizations created in 1980 to lead Michigan's environmental movement in achieving positive change through the political process. MEC combines deep environmental policy expertise with close connections to key state and federal decision makers, decades of experience getting things done in the political process, and an ability to rally broad and powerful alliances in support of reforms. With our member groups and partners in the public health and faith-based communities, MEC promotes public policies to ensure that Michigan families will enjoy clear waters, clean beaches, beautiful landscapes and healthy communities for years to come.

We appreciate the opportunity to offer comments to ensure activities within Northern Michigan are taken with careful consideration to protect the health of our surface waters and Great Lakes, and the citizens and visitors who rely upon those water resources. Because safeguarding our waters is paramount to our missions, we have thoroughly

reviewed the permit application and draft permit for the proposed discharge. We believe that the discharge permit should be modified to reflect the concerns noted below:

1. The Antidegradation Demonstration was not fully met and the requirements of the demonstration need to be fulfilled prior to issuing the permit.

- Socio-economic analysis: In accordance with Rule 1098, all new uses discharges are required to submit an antidegradation demonstration. As such, the applicant is required to identify the social or economic developments and the benefits to the area that would be forgone if the discharge was not allowed. The Antidegradation Demonstration provided in the application and in the files available on the MDNRE NMS Web Inquiry System fails to provide a thorough and specific identification of the benefits that would be foregone if the lowering of water quality was not allowed. In fact, social and economic development, as required by Rule 98, Subrule 4(a), is not addressed at all in the Antidegradation Demonstration.

  The Antidegradation Demonstration submitted by CMS provides that "The Proposed Discharge Is Not Subject to the Antidegradation Rule Because it Does Not Constitute A New or Increase Loading of Pollutants to the Bay," "The Proposed Discharge is Exempt From the Antidegradation Rule," and an Alternatives Analysis. The MDNRE disagreed with the two initial findings of the Demonstration. However, the MDNRE failed to inform the applicant that the demonstration was incomplete and needed to thoroughly and specifically depict the benefits that will be forgone if the proposed discharge is not allowed to enable the MDNRE to complete the evaluation of the demonstration.

  There is no evidence in the MDNRE's files available on the NMS Web Inquiry System of a socio-economic analysis for this permit justifying the lowering of water quality. Therefore, the Antidegradation Demonstration is incomplete and the requirements of the demonstration need to be fulfilled prior to issuing the permit.

- Feasible and Prudent Alternatives Analysis: Furthermore, Rule 1098 requires the applicant to evaluate alternatives to surface water discharges. CMS does address an injection well in Emmet County in the Alternative Analysis provided in the Antidegradation Demonstration. However, in concluding that the injection well is not a prudent and feasible alternative to an NPDES permit, CMS indicated it is not "known when MDNRE and U.S. Environmental Protection Agency (EPA) will act on the pending permit applications." It should be noted that the public comment period for these permit applications are due out at any moment with a public hearing likely scheduled in January. Additionally, the injection well permit application has been initiated and is being required by MDNRE. Therefore, it is preliminary and quite inconsistent for CMS to conclude that it is not a feasible and prudent alternative when the MDNRE is itself pursing this as a feasible and prudent alternative.

- Lowering of water quality: According to Rule 1098(2), "there shall be no lowering of water quality with respect to the pollutant or pollutants that are causing the

nonattainment." The intent of the Antidegradation Demonstration is that for all waters, the level of water quality necessary to protect existing uses shall be maintained and protected. Little Traverse Bay is protected for agricultural uses, navigation, industrial water supply, public water supply in areas with designated public water supply intakes, cold-water fishery, other indigenous aquatic life and wildlife, partial body contact recreation, total body contact recreation (May through October) and fish consumption. However, according to the Little Traverse Bay Watershed Protection Plan, which has been approved by the MDNRE and the EPA, "Little Traverse Bay's cold water fishery and habitat for aquatic life are degraded…Potential impacts contributing to the impairment include toxic pollution." Whereas the designated use has not yet reached the point of nonattainment, the MDNRE has recognized that designated uses are degraded by toxic pollution and, therefore, no lowering of the water quality with respect to the toxic pollutant or pollutants should be permitted.

2. East Park Effluent has not been sufficiently analyzed to determine if treatment would reduce mercury concentrations and the feasible and prudent alternative analysis needs to be re-evaluated.

CMS has claimed that ultrafiltration would not reduce mercury levels on the effluent at East Park. However, CMS has failed to actually conduct testing to determine if ultrafiltration would reduce the mercury concentration. Without verification, the Department should not permit CMS to lower water quality of Little Traverse Bay. CMS should be required to conduct UF testing with the East Park inffluent. The range of mercury at East Park can vary, but it can be up to 15 ng/L. UF could reduce mercury concentrations in effluent at influent concentrations of 15 ng/L (and at even lower concentrations). Furthermore, are there specific streams of leachate at East Park which exhibit the higher mercury concentration that could be separated out for treatment or ways to separate out influent with the higher concentrations of mercury? More information such as this and the UF testing should be required to ensure that the mercury concentrations could not be lowered before CMS is permitted to lower water quality of Little Traverse Bay.

Additionally, in the August 13 Addendum to Section 1 – Part 10 – Water Flow Diagram and Narrative, CMS discusses other feasible and prudent alternatives for leachate collected at East Park. However, the evaluation is fundamentally skewed in that the analysis is dependent upon the "long-term." With CMS pursuing Captur, and the Department requiring Captur as a special condition, other mercury treatment technologies and disposal options need to be used for only a limited time period during which CMS is designing, constructing, and optimizing the Captur treatment system. According to the draft permit, this time period is no longer than 2 years, by December 31, 2012. Given that it would be temporary, it becomes more feasible that CMS could truck the East Park leachate to either the Development or to the current disposal well in Johannesburg during the time period in order to prevent lowering of water quality of Little Traverse Bay.

3. Dilution should not be permitted in accordance with the Great Lakes Water Quality Initiative guidance.

The Great Lakes Water Quality Initiative guidance was developed by the U.S. EPA for Great Lakes states to use in standardizing water quality regulations by 1994. It prohibits new pollution sources from using dilution to meet pollution standards and requires existing pollution sources to end dilution practices by 2004.

When it comes to pollution, there's an old saw: "The solution to pollution is dilution." As if simply diluting toxins and pollutants to the point of invisibility takes care of the problem. On the other hand, one of the laws of physics says, "energy can neither be created nor destroyed: it can only be transformed from one state to another." And that's the law. The truth is, no matter how diluted pollution becomes, nothing ever goes away entirely. It's changed, reduced, converted, transformed, but it's still there in some form.

So, dilution, especially at East Park, allows the same mass of mercury and other COCs to enter Little Traverse Bay. And dilution is not rendering the pollutants harmless. Treatment can do this, dilution cannot. This was the very reason why using dilution to meet pollution standards is not acceptable and should not be included in the draft permit, especially at East Park where no actual treatment is proposed.

4. The Draft Permit does not adhere to the Mercury Permitting Strategy Implementation of Method of 1631.

The MDNRE document "Mercury Permitting Strategy Implementation of Method 1631 For Fiscal Years 2005-2009, May 14, 2004," the most current document in this regard on the MDNRE website, states the following:

For issuance of permits for new discharges*:

- Set the permit limit at 1.3 ng/l as a monthly average with monitoring using Method 1631 effective upon issuance if data indicate reasonable potential to exceed the water quality standard. A new discharge is not eligible for a variance unless the proposed discharge is necessary to alleviate an imminent and substantial danger to the public health or welfare, as described in R 323.1103(1)(b).
- If there is reason to believe that mercury may be present in the discharge but there are insufficient data to make a reasonable potential determination:
- Require monitoring with Method 1631 to start at permit issuance and continue for the permit duration.
- Include a Special Condition that triggers a mercury pollutant minimization plan if the monitoring data after Year 1 indicates the presence of mercury at levels indicating reasonable potential to cause or contribute to exceedances of water quality standards.
- Evaluate the need for a permit modification to include a mercury limit or include a mercury limit at the time of permit reissuance if reasonable potential exists

According to these standards, a Special Condition that triggers a mercury pollutant minimization plan is required. We have not seen any document rescinding this policy or

any policy document development to take its place so we assume it still has standing within the Department.

5. **Modify cover page to clarify authorization.**

According to the cover page, the authorization to discharge under the National Pollutant Discharge Elimination System is technically limited to one discharge at one facility (2936 Charlevoix Avenue, Petoskey, Michigan 49770). While the authorization is for conditions set forth in the permit which covers the details that there are, in fact, two outfalls and two facilities, the cover page should be modified to correspond with the specifics outlined in the draft permit. The cover page would then be clear on what the authorization entails.

6. Sample Duration of the discharge for monitoring points 001A and 002A is insufficient and needs to be increased from One (1) Year to Five (5) Years.

Under normal circumstances, a one (1) year sample duration with the additional condition that the permit may be modified upon review of analysis might be considered sufficient. However, the draft permit calls for CMS Land Company to begin using a mercury treatment system at East Park and replace the ultrafiltration treatment system at the Development with the Captur treatment system within two years. Due to installation of a new system after two years, a system that currently is a pilot system whose results remain unpredictable at full-scale, monitoring of discharge points 001A and 002A should be long term and continue for the 5 years until the permit is up for renewal.

7. The Cessation of Discharge condition is fully supported by the Watershed Council.

We commend the DNRE for the inclusion of this provision as it provides an added level of protection to the draft permit.

8. The Total Mercury Treatment condition needs to be modified to include additional treatment should Captur prove unreliable.

We support the inclusion of the condition to require the use of the Captur treatment system to remove total mercury from the leachate. We commend CMS Land Company for seeking mercury removal technologies and investing in the development of the Captur system.

However, we believe the following conditions need to be included within the Total Mercury Treatment Condition:

- Outfall 001 – East Park: If the permittee demonstrates that the Captur system will not successfully reduce total mercury at East Park below 1.3 ng/L, the permittee shall design, construct, and operate a different total mercury removal treatment system within three (3) years.
- Outfall 002 – Development Site: If the permittee demonstrates that the Captur system will not further reduce total mercury at East Park, the permittee shall

design, construct, and operate a different total mercury removal treatment system within three (3) years.

9. Monitoring Procedures need to be clarified from "periodically" to "monthly."

Under both 2. Test Procedures and 3. Instrumentation, the draft permit states the permittee shall "periodically calibrate and perform maintenance procedures." What constitutes "periodically" – daily, weekly, monthly, yearly, etc? We recommend that "periodically" be modified to monthly. Given that a shorter time span between calibrations means less chance of questionable test results, we believe monthly is appropriate to ensure the accuracy of the measurements taken.

10. Records Retention needs to be increased from three (3) years to five (5) years.

The draft permit calls for CMS Land Company to begin using a mercury treatment system at East Park and replace the ultrafiltration treatment system with the Captur treatment system at the Development within two years. Due to installation of a new system after two years, record retention should be for 5 years until the permit is up for renewal to show the full scope of activity that occurred throughout the authorization.

11. Financial assurances are needed.

While not required under law, financial assurance requirements should be a condition of the permit. Typically, NPDES permits are a necessary component of a business making money. Therefore, a financial assurance is inherently built in – should the company default on the NPDES permit, they will not be profitable which is the ultimate goal of the business. However, this is not the case in this instance. Subsequently, CMS should be required to demonstrate financial responsibility for the estimated costs of cleanup at their facility or in the event of bankruptcy, or other occurrences that may require funding. Financial responsibility may be established by evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self- insurer, or other evidence of financial responsibility.

12. Cumulative impacts were not taken into consideration.

The Department process applications for re-issuance of NPDES permits on a watershed basis. This allows the department to review and consider the cumulative effects of all the permitted discharges to a specific receiving water body. However, it does not appear that cumulative impacts of multiple discharges into Little Traverse Bay were taken into consideration and the potential impact on the Bay and its aquatic life in the development of the draft permit.

Little Traverse Bay is the perhaps less than grateful recipient of many discharges including municipal and industrial. Additionally, the Bay Harbor CKD Site itself is a significant discharger, albeit, most of the discharge is entering the Bay via venting ground water. To understand the complex effects of multiple discharges of various effluents on the Bay and its aquatic life, it is vital that adequate data be collected and analyzed.

13. Water Treatment Additives should be reconsidered.

Sulfuric acid is currently used to lower the pH of the leachate at both East Park and the Development. The addition of sulfur into the aquatic ecosystem could potentially assist in the creation of methylmercury. We recommend requiring the use of a different agent to reduce the pH of leachate in order to avoid any potential additional creation of methylmercury in the Bay.

Tip of the Mitt Watershed Council and MEC recognize disposal of collected leachate is a key component of the remediation effort ongoing at the Bay Harbor Properties and East Park CKD site. At the same time, we want to make sure that all collected leachate is treated and disposed of safely meeting water quality standards to ensure the CKD leachate will not pose threats to the surface and ground water resources of Northern Michigan. In our opinion, the draft permit has a number of deficiencies that need to be addressed. Modifications are clearly in order pending the issuance of a final permit. However, given the unique situation of the site, it is necessary that these modifications be made as conditions to the NPDES permit. It may be argued that some of the items above could be addressed in the Administrative Order of Consent that will be negotiated between CMS Land Company and the State in the near future. However, allowing conditions to be made in the agreement rather than as permit conditions leaves the future unknown. Not only does it place the water quality of Little Traverse Bay at the whim of the political will of the State, but it takes it out of the public process and removes public involvement. The long history of the site which includes significant state involvement and not always upholding the public trust, the compliance history of the applicant, and the potential adverse impact of lowering water quality of Little Traverse Bay should be more than enough justification for modifications to be made as permit conditions rather than through any other agreements.

Issues to be Addressed and Modifications Needed to the Permit:

- **A full Antidegradation Demonstration needs to be provided and analyzed prior to approval of the permit, primarily the socio-economic analysis.**
- **East Park effluent needs to be sufficiently analyzed including requiring ultrafiltration testing and a re-evaluation of feasible and prudent alternatives is needed based on the short term until Captur is operational.**
- **Dilution should not be allowed in the permit to be in accordance with the Great Lakes Water Quality Initiative Guidance.**
- **Require that the permit adhere to the Mercury Permitting Strategy Implementation of Method 1631 and require a special condition for a mercury minimization plan.**
- **Clarify on the cover page that the authorization is for two discharge pipes from two facilities.**
- **Increase the sample duration of the discharge for monitoring points 001A and 002A from One (1) Year to Five (5) Years.**

- **Include within the Total Mercury Treatment Condition that if the permittee demonstrates that the Captur system will not successfully reduce total mercury at East Park to below 1.3 ng/L and further than ultrafiltration at the Development Site, the permittee shall design, construct, and operate a different total mercury removal treatment system within 3 years.**
- **Clarify "periodically" in monitoring procedures to "monthly" calibration and maintenance of equipment.**
- **Increase the records retention time up to the 5 year life of the permit.**
- **Require financial assurances for the estimated costs of cleanup at the facility or in the event of bankruptcy, or other occurrence that may require funding.**
- **Consider cumulative impacts from other discharges into the waterbody prior to final issuance.**
- **Consider the use of a different pH lowering agent other than sulfuric acid to reduce the potential for creation of methylmercury in the aquatic environment.**

Conclusion

We urge the MDNRE to give careful consideration to the comments provided and modify the draft permit to minimize adverse impacts to obtain a solution that benefits not only the remediation efforts at Bay Harbor properties and East Park and the citizens and visitors to Northern Michigan, but also the water resources themselves.

Thank you again for the opportunity to comment. Please feel free contact me with questions or concerns regarding the comments provided at 231.347.1181 or jenniferm@watershedcouncil.org.

Sincerely,

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Tip of the Mitt Watershed Council

James Clift
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cc: Bob Wager, DNRE
Elaine Pelc, DNRE