

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violations of Environmental
Conservation Law Articles 17 and 24

ORDER ON CONSENT

File No. R4-2008-0808-123

- by -

Two Girls and a Guy 2, LLC
4017-B State Street
Schenectady, NY 12304

Two Girls and a Guy, LLC
4017-B State Street
Schenectady, NY 12304

Respondents

WHEREAS:

1. The Department of Environmental Conservation ("Department" or "DEC") is the state agency which has jurisdiction over the environmental law and policy of the State pursuant to, *inter alia*, §3-0301 of the Environmental Conservation Law (ECL). DEC regulates the purity of the waters of the state pursuant to ECL § 17-0101 *et seq* and the rules and regulations promulgated, in part, under 6 NYCRR Parts 650 and 750. The Department also has administrative jurisdiction to preserve, protect and conserve freshwater wetlands and their benefits derived therefrom pursuant to ECL Article 24.
2. Respondents, Two Girls and a Guy, LLC owns a parcel at 50 Simmons Lane, Menands, New York ("50 Simmons Lane"), and Two Girls and a Guy 2, LLC owns a parcel at 37 Simmons Road ("37 Simmons Lane"). Each Respondent submitted Notices of Intent ("NOI") to be covered by the General Permit for Stormwater Discharges from Construction Activity, GP-02-01 and Respondent was issued permit numbers NYR10P419 (effective February 5, 2008) for 50 Simmons Lane and NYR10H942 (effective March 24, 2008) for 37 Simmons Lane. The two parcels are contiguous and are managed by the same individual.
4. On June 9, 2008, Department inspected 37 and 50 Simmons Lane to determine compliance with General Permit (GP-0-08-001) requirements ("permit").
5. On June 12, 2008, Department staff conducted a follow up site inspection to review site inspection reports.
6. On June 13, 2008, the Department issued the Respondents Notices of Violation/Stop Work Orders for both 37 and 50 Simmons Lane setting forth violations of the permit.

7. On July 22, 2008, Department partially lifted the stop work order for 37 and 50 Simmons parcel to allow filling for grading purposes only.

FAILURE TO DEVELOP AN ADEQUATE SWPPP

8. Permit Part III.B.2 requires that commercial developments prepare a SWPPP that includes practices designed in conformance with the New York State Stormwater Design Manual that includes (among other things) the dimensions, material specifications and installation details for each post construction stormwater practice, identification of any element of the design that are not in conformance with the design manual, the hydrologic and hydraulic analysis for all structural components of the stormwater management control system, a detailed summary of the sizing criteria and an operations and maintenance plan for the long term operation and maintenance of each practice.

9. Respondents failed to develop SWPPPs that met the minimum requirements of the SPDES Permit in violation of Permit Part III.B.2 .

FAILURE TO PERFORM AND DOCUMENT INSPECTIONS

10. Permit Part IV requires the owner/operator have a qualified inspector perform and document inspections at least twice every seven calendar days, separated by a minimum of two full calendar days when 5 acres is exposed.

11. Respondents' failure to have a qualified inspector perform inspections as required by the Permit is a violation of the SPDES Permit.

FAILURE TO OBTAIN CONTRACTORS CERTIFICATIONS

12. Permit Part III.A.5 requires that the owner/operator must identify the contractor(s) and subcontractor(s) that will be responsible for installing, constructing, repairing, inspecting and maintaining all erosion control practices included in the SWPPP. Each of these contractors must identify at least one trained individual that will be responsible for implementation of the SWPPP. The owner must have each of the contractors and subcontractors sign a copy of the certification statement contained in the permit. Respondent's failure to have the contractor(s) and subcontractor(s) sign the required certifications statements is a violation of the SPDES permit.

13. Respondents' failure to have their contractors and subcontractors sign a copy of the certification statement contained in the permit is a violation of Permit Part III.A.5.

FAILURE TO OBTAIN WRITTEN APPROVAL FOR 5+ ACRES

14. Permit Part III C 3 states that the owner shall not disturb greater than 5 acres of soils at any one time without prior written approval from the Department.

15. Respondents' failure to obtain written approval from the Department prior to exposing greater than 5 acres of soils at any one time is a violation of the permit.

FAILURE TO IMPLEMENT SWPPP

16. Permit Part III C requires that the owner ensure that the provisions of the SWPPP are implemented from the commencement of construction until all areas achieve final stabilization and the Notice of Termination is submitted.

17. Respondents failed to properly implement the SWPPP in violation of Permit Part III C.

WETLANDS REGULATIONS

18. Regulations at 6 NYCRR 663.4(20) prohibits filling in a regulated wetland or its 100' adjacent area without a permit.

19. Respondent, Two Girls and a Guy, placed road sweepings from the 50 Simmons Lane parcel into the adjacent area of the wetlands which is a violation of 6 NYCRR 663.4(20).

Waiver of Hearing

20. Respondents have affirmatively waived their rights to notice and hearing in the manner provided by law, and have consented to the issuing and entering of this Order and agree to be bound by the terms, provisions and conditions contained herein.

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

I. In respect of the aforesaid violations, a civil penalty in the amount of FIFTY THOUSAND DOLLARS (\$50,000) is assessed against the Respondents for the above violations. Respondents are jointly and individually responsible for paying the civil penalty. TWENTY FIVE THOUSAND DOLLARS (\$25,000) of the civil penalty is suspended conditioned on Respondents' compliance with the terms, conditions and provisions of this Order on Consent. TWENTY FIVE THOUSAND DOLLARS (\$25,000) of the penalty is due with the return of the signed and notarized Order. The penalty shall be paid by certified check made payable to the DEC and returned with the signed and notarized Order. The suspended penalty shall be due within fifteen (15) calendar days of the receipt by the Respondent of a notice of violation from the Department which sets out the violations of the Order.

II. 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.

III. 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 (including successors in title) and assigns.

IV. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or his/her designee (including, but not limited to, nor exemplified by, the rights to recover natural resources damages and to exercise any summary abatement powers) or authorities with respect to any party, including Respondent.

V. Respondent shall allow duly authorized representatives of DEC access to the site without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder, and the SPDES permit.

VI. This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VII. The Schedule of Compliance is incorporated into the Order on Consent and is enforceable thereunder.

VIII. Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, his agents, his servants, his employees, his successors and his assigns; and

C. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

IX. Compliance with the terms and conditions of this Order shall be in full civil settlement of the violation alleged in this Order.

X. (A) Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and applicable state and federal regulations and laws and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved plans and reports shall be incorporated into and become an enforceable part of this Order.

(B) (1) If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within fifteen (15) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

(2) After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department and State reserves its right to take whatever action it deems necessary after the second disapproval of a submittal including but not limited to the remedies provided in the Order.

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

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DATED: September , 2008
Rotterdam, New York

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

BY:

Eugene J. Kelly
Regional Director
Region 4

CONSENT BY RESPONDENT
Two Girls and a Guy, LLC

Respondent hereby consents to the issuance and entry of the foregoing Order, waives their right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

BY: _____ TITLE: _____

DATE: _____

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

On the ____ day of _____ in the year 200__, before me, the undersigned,
personally appeared _____

(Full name)

personally known to me who, being duly sworn, did depose and say that he/she/they reside at

(Full mailing address)

and that he/she/they is (are) the

_____ of the
(President or other officer or director or attorney in fact duly appointed)

(Full legal name of corporation)

the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by the authority of the board of directors of said corporation.

Notary Public, State of New York

SCHEDULE OF COMPLIANCE

1. Respondent, Two Girls and a Guy, LLC, shall not engage in any construction activities other than the fill activities authorized in the July 22, 2008 authorization until the Department issues written authorization that work may commence on the commercial development. Written authorization will not be granted until Respondent produces a full Stormwater Pollution Prevention Plan that meets the permit requirements for the commercial development on 50 Simmons Lane. Respondent shall comply with all permit requirements for the fill activities.
2. Respondent, Two Girls and a Guy 2, shall comply with the erosion and sediment control plan for the fill activities on 37 Simmons Lane. Once the fill on 37 Simmons land is completed and the site is stabilized, Respondent shall terminate permit coverage. A new NOI and a complete SWPPP will be required for any future development at 37 Simmons Lane.
3. Respondents' compliance with this Order on Consent, its SWPPP, permit, and the applicable regulations shall not be a defense to any subsequent violations of water quality standards.