

**New York State Department of Environmental Conservation**

**Office of General Counsel, Region 4**

1130 North Westcott Road, Schenectady, New York 12306-2014

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Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Joe Martens  
Commissioner

CERTIFIED - RETURN RECEIPT REQUESTED

7013 1090 0002 3365 0877

September 24, 2014

Water Reichert  
Project Manager  
Tappan Zee Constructors, LLC  
555 White Plains Road, Suite 400  
Tarrytown, NY 10591

Stephen L. Gordon, Esq.  
Beveridge & Diamond, PC  
477 Madison Avenue  
15<sup>th</sup> Floor  
New York, NY 10022-5835  
[sgordon@bdlaw.com](mailto:sgordon@bdlaw.com)

Re: Order on Consent  
R4-2014-0902-144

Dear Mr. Messrs. Reichert and Gordon:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$10,000 of the civil penalty pursuant to Paragraph I.

Please note the language in Paragraph II which requires the funding of the escrow EBP account as of the effective date of the Order.

Sincerely,

Richard Ostrov  
Regional Attorney  
Region 4

ec: C. Buetow  
B. Clarke

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the  
Violations of Environmental  
Conservation Law Articles 8 and 17 by:

ORDER ON CONSENT

File No. R4-2014-0902-144

Tappan Zee Constructors, LLC  
555 White Plains Road, Suite 400  
Tarrytown, New York 10591

Respondent

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Jurisdiction

1. The New York State Department of Environmental Conservation (“DEC” or “Department”) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to § 3-0301 of the Environmental Conservation Law (“ECL”). In particular, DEC is responsible for the protection of the water resources of the State, pursuant to ECL Article 17 and the rules and regulations promulgated there under. The United States Environmental Protection Agency (“EPA”) has approved the State of the New York’s State Pollution Discharge Elimination System (“SPDES”) to implement the Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit program that includes the regulation of stormwater discharges from the disturbance on one acre of land or more.

Respondent

2. Respondent, Tappan Zee Constructors, LLC, leases a parcel of land at the Port of Coeymans owned by P&M Brick, LLC (“site”). Respondent has applied to DEC for an ECL Article 15 permit (“permit”) to construct crane trestles, and for dredging a portion of the Port of Coeymans to allow for the off-loading of steel component materials from barges and the on loading of completed bridge sections to barges for transport to the New York/Tappan Zee replacement bridge construction project. The trestles are partially constructed on upland areas and will extend into the Hudson River. Respondent has also requested that the Department issue a Clean Water Act Section 401 Water Quality Certification (“WQC”) for a federal dredge and fill permit application currently under review by the United States Army Corps of Engineers.

### Current Status of Permit Applications

3. On July 30, 2014, the Department, as lead agency under the State Environmental Quality Review Act (“SEQRA”), issued and published a negative declaration, and concurrently issued a notice of complete application. On September 3, 2014, the Department issued and published an Amended Negative Declaration and concurrently a notice of complete application. As of the effective date of this Order, Respondent has not been issued any state or federal permits for the actions described in Paragraph 2 above.

### Applicable SEQRA Regulations

4. Department regulations at 6 NYCRR 617.3(a) provide that: “A project sponsor may not commence any physical alteration related to an action until the provisions of SEQRA have been complied with.”

5. A negative declaration can be amended or rescinded based on considerations found in 6 NYCRR 617.7(e) and 6 NYCRR 617.7(f), respectively, and therefore SEQRA is not completed until the issuance of all necessary permit(s).

### Applicable Stormwater Regulations

6. EPA’s regulations for the permitting of stormwater discharges are found at 40 CFR 122.26

7. Department regulations at 6 NYCRR 750-1.4(b) require that stormwater discharges from construction activities require a permit issued in accordance with 40 CFR 122.26.

8. Department regulations at 6 NYCRR 750-1.21(b) (2) authorize “... a general permit for ... Stormwater from construction activities as defined under 40 CFR 122.26(b) (14) (x) (see section 750-1.24 of this Part)”.

9. The Department has issued a SPDES General Permit for Stormwater Associated with Construction Activity (GP-0-10-001), effective January 29, 2010, that is consistent with the federal permit requirements under 40 CFR 122.26 (“General Permit”).

10. Department regulations at 6 NYCRR 750-1.21(c) provide that “Any general permit issued under this subdivision shall set forth the applicability of the permit and the conditions that apply to any discharge authorized by such general permit.”

11. Coverage under the General Permit cannot be obtained until the following criteria are satisfied:

“a. project review pursuant to the State Environmental Quality Review Act (SEQRA) have been satisfied, when SEQRA is applicable,

b. all necessary Department permits subject to the *Uniform Procedures Act (UPA)* (see 6 NYCRR Part 621) have been obtained, unless otherwise notified by the Department pursuant to 6 NYCRR 621.3(a)(4). *Owners or operators of construction activities* that are required to obtain *UPA* permits must submit a preliminary SWPPP to the appropriate DEC Regional Office at the time all other necessary *UPA* permit applications are submitted. The preliminary SWPPP must include sufficient information to demonstrate that the *construction activity* qualifies for authorization under this permit,

c. the final Stormwater Pollution Prevention Plan (SWPPP) has been prepared, and

d. an NOI has been submitted to the Department in accordance with the requirements of this permit.” (Part II, B. 2.a-d.)

12. The General Permit provides that: “An owner or operator shall not commence construction activity until their authorization to discharge under this permit goes into effect.” (Part II. B.1)

#### SEQRA Violations

13. On August 27, 2014, Department staff inspected the site and found that Respondent had commenced physical alteration related to activities subject to SEQRA by the construction of footings for the tower crane and the sled trestles (used to slide the completed bridge sections to the barges for transit downriver) and the footing for the straddle crane trestle to be used to offload steel deliveries by barge as well as digging of trenches/pits that extended down to the Hudson River shoreline.

14. Respondent violated 6 NYCRR 617.3(a) by commencing construction of the project and disturbing the site prior to complying with the provisions of SEQR .

#### Commencement of Construction Activity without a General Permit

15. Respondent is the "operator" of the site, as that term is defined in the General Permit. The Department's June 24, 2014 Notice of Incomplete Application (“NOIA”), issued in response to Respondent's ECL Article 15 permit application, stated in Paragraph 4 that Respondent would not be eligible for coverage under the General Permit until the Department approved the SWPPP, and all necessary Department permits were issued.

16. As of August 27, 2014, Respondent's ECL Article 15 permit and the WQC had not been issued to the Respondent for the site.

17. As of August 27, 2014, the Department had not accepted the Respondent's preliminary SWPPP for the site.

18. Respondent violated 6 NYCRR 750-1.4(b) by commencing construction activities at the site as described in Paragraph 13 above without coverage under a General Permit or individual SPDES permit.

#### Civil Penalties

19. ECL Section 71-1929 provides for the following civil penalties: "A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued there under, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such Violation as hereinafter provided."

20. ECL Section 71-4003 provides that "Except as otherwise specifically provided elsewhere in this chapter, 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 there under, shall be liable to a civil penalty of not more than one thousand dollars, and an additional civil penalty of not more than one thousand dollars for each day during which each such violation continues. Any civil penalty provided for by this chapter may be assessed following a hearing or opportunity to be heard."

#### Waiver of Hearing

21. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law, and has consented to the issuing and entering of this Order and agrees 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 to the violations cited in this Order on Consent a civil penalty in the amount of TEN THOUSAND DOLLARS (\$10,000) is assessed against Respondent. Payment of the civil penalty by bank check made payable to the "Department of Environmental Conservation" is due with the return of the signed and notarized Order on Consent to the Department.

## II. Environmental Benefit Project

A. In addition to the civil penalty payable pursuant to Section I, Respondent agrees to expend not less than FIFTY-FIVE THOUSDAND DOLLARS (\$55,000) on an Environmental Benefit Projects (“EBP”) to be determined by the Department in accordance with Commissioner’s Policy. The Department retains the sole authority to approve the EBP. As of the effective date of the Order, Respondent shall establish an escrow account in the amount of FIFTY-FIVE THOUSDAND DOLLARS (\$55,000) to fund the EBP (“EBP account”). The EBP account shall be established for the sole purpose of holding the EBP funds until notice of disbursement is provided to the Respondent by the Department in writing.

B. Within 60 days of the effective date of this Order, Respondent shall:

- 1) Notify the principal elected official and the interested stakeholders, regarding the Order’s requirement for Respondent to fund EBP(s) and solicit EBP project proposals;
- 2) Meet with municipal officials and stakeholders to discuss potential EBPs; and
- 3) Submit to the Department for approval EBP proposal(s) resulting from the consultation with the municipality. All EBP proposals shall meet the requirements of CP-37.

C. The Department will review the proposed EBP project(s) and notify the Respondent whether it meets the requirements of CP-37. Within 10 days of the Department’s notification of approval of the proposed EBP, Respondent shall deliver a check to the EBP sponsor and provide a completed affidavit of proof of delivery as set forth in Appendix A of this Order on Consent. The EBP sponsor shall certify in writing to the Department that the EBP funds were spent and used in accordance with the approved Department EBP. Appendix B contains a copy of the affidavit to be executed by the EBP recipient to be submitted to the Department within 10 days of completing the EBP.

D. Respondent shall recommence discussions with the municipality and stakeholders in the event that the proposed EBP is disapproved by the Department. Within 30 days of the notice of disapproval, Respondent shall resubmit an EBP proposal to the Department for approval.

E. The Department reserves its rights to reject any proposed EBP that does not comply with CP-37, and require the EBP fund to be submitted as a payable penalty.

F. Any statements, whether oral or written, that Respondent (or a third party at the request of the Respondent) makes with respect to the EBP will include language stating that the project was undertaken as part of the resolution of an enforcement matter brought by the Department for applicable violation(s). Respondent shall not use the cost of the EBP to reduce its tax liability.

G. The EBP provision of this Order don't create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation.

H. If the EBP has not been approved by the Department within one year of the effective date of this Order, the amount of the EBP set forth in Subparagraph II. A. shall be paid as a penalty for the violations set forth herein upon demand by the Department.

III. 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.

IV. 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.

V. Upon completion of all obligations created in this Order including the Schedule of Compliance, this Order settles civil and administrative penalties concerning the violations identified herein against Respondent.

VI. Except as provided in Paragraph V of this Order, 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.

VII. Respondent shall comply with the Schedule of Compliance that is incorporated into the Order on Consent and is enforceable there under.

VIII. The effective date of this Order shall be the date it is signed by the Regional Director.

IX. This Order shall terminate upon the occurrence of all the following actions: the state and federal issuance of all applicable permits, the effective date of the General Permit coverage of the site; and upon compliance with all the terms, conditions and provisions of this Order on Consent to be solely determined by the Department.

X. Respondent shall allow duly authorized representatives of DEC access to the facility 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, department regulations, the ECL and applicable federal regulations.

XI. All correspondence to the Department shall be sent to: Region IV, DEC, 1130 North Westcott Road, Schenectady, New York 12306, Attention: Regional Water Engineer and emailed to [andrea.dzierwa@dec.ny.gov](mailto:andrea.dzierwa@dec.ny.gov).

All correspondence to the Respondent shall be sent to: Walter Reichart, Project Manager, Tappan Zee Constructors, LLC, 555 White Plains Road, Suite 400, Tarrytown, New York 10591.

XII. This Order shall not create any presumption of law or fact which shall inure to the benefit of any person or entity other than the State of New York, the Department or the Respondent.

DATED: Sept. 24, 2014  
Rotterdam, New York

Joseph Martens  
Commissioner  
New York State Department of Environmental  
Conservation

BY:

  
\_\_\_\_\_  
Keith Goertz  
Acting Regional Director  
Region 4

CONSENT BY RESPONDENT

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

BY: [Signature] TITLE: PRESIDENT

DATE: SEP 22, 14

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

On the 22<sup>nd</sup> day of September 2014, before me, the undersigned,  
personally appeared DARRELL WATERS

(Full name)

personally known to me who, being duly sworn, did depose and say that he/she/they <sup>MAINTAIN A PLACE OF BUSINESS</sup> reside at

555 WHITE PLAINS RD., SUITE 400, TARRYTOWN, NY 10591  
(Full mailing address)

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

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

of the TAPPAN ZCC CONSTRUCTORS, LLC

(Full legal name of corporation)

The company 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 company.

[Signature]

Notary Public, State of New York

ADAM W. DOWNS  
Notary Public, State of New York  
No. 02DO6149313  
Qualified in Westchester County  
Commission Expires July 10, 2018

### Schedule of Compliance

- I. As of the effective date of this Order, Respondent shall take all measures necessary to prevent a discharge of stormwater from the disturbed area at the site to the Hudson River.
- II. As of the effective date of this Order and until coverage under the General Permit is obtained, Respondent shall cease any disturbances of, and construction activity on, the site except with regard to actions taken pursuant to Paragraph I.
- III. As of the effective date of this Order and until the coverage under the General Permit is obtained, Respondent shall retain a qualified inspector, as defined in Part IV. C of the General Permit, to conduct inspections at the site at least twice every seven calendar days and prepare an inspection report that complies with the requirements in Part IV C. 4 of the General Permit, and provide a copy of the inspection report to the Department within one calendar day of the inspection. Respondent shall complete any corrective actions noted in an inspection report within one calendar day of receiving the report from the qualified inspector of the need for corrective action. Respondent shall fax a report to the Department summarizing corrective actions taken on the same calendar day as corrective actions are completed. Respondent is responsible for ensuring that all inspection and corrective action reports are submitted to the Department by mail and by email to [andrea.dzierwa@dec.ny.gov](mailto:andrea.dzierwa@dec.ny.gov) attention: Region Water Engineer.
- IV. Compliance with the above provisions are not a defense to a turbid discharge from the site to the Hudson River or the causing or contributing to water quality violations.

APPENDIX A

STATE OF NEWYORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the  
Violations of Environmental  
Conservation Law Articles 8 and 17 by:

ORDER ON CONSENT

File No. R4-2014-0902-144

Tappan Zee Constructors, LLC  
555 White Plains Road, Suite 400  
Tarrytown, New York 10591

Affidavit of Funding EBP

Respondent

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I, \_\_\_\_\_, being duly sworn, deposes and says as follows, subject to the penalty of law:

1. I am employed by Respondent, Tappan Zee Constructors LLC, and hold the title of \_\_\_\_\_ with Respondent. I am authorized to make this affidavit on behalf of Respondent in this matter.
2. On behalf of Respondent I hereby certify that the Order's \$55,000 EBP funds have been delivered to the EBP recipient identified in the Department's \_\_\_\_\_ dated notification pursuant to Paragraph II of the Order on Consent.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATED: \_\_\_\_\_

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_ 2014

\_\_\_\_\_  
NOTARY PUBLIC

APPENDIX B

STATE OF New York DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the  
Violations of Environmental  
Conservation Law Articles 8 and 17 by:

ORDER ON CONSENT

File No. R4-2014-0902-144

Tappan Zee Constructors, LLC  
555 White Plains Road, Suite 400  
Tarrytown, New York 10591

Affidavit of Receipt, Use,  
and Accounting of EBP Funds

Respondent

I, \_\_\_\_\_, being duly sworn, deposes and says as follows, subject to the penalty of law:

1. I am the \_\_\_\_\_ and I am authorized to make this affidavit.
2. On behalf of the \_\_\_\_\_, I hereby certify that we received the \$55,000 EBP funds from the Respondent, that the EBP funds have been spent in accordance with the Department approved EBP, and that an accurate accounting of the use of the EBP funds is attached. Any EBP funds remaining shall be returned to the Department.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATED: \_\_\_\_\_

Sworn to before me this

\_\_\_\_\_ day of \_\_\_\_\_ 2014

\_\_\_\_\_  
NOTARY PUBLIC