

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of
Violations of the Environmental
Conservation Law Article 23

- by-

ORDER ON CONSENT
File No. R4-2009-0527-87

Francis N. Amlaw

Respondent

WHEREAS:

1. New York State Department of Environmental Conservation ("Department or DEC") has administrative jurisdiction pursuant to Environmental Conservation Law ("ECL") Title 27 of Article 23 to regulate surface mining and reclamation.
2. Respondent owns and operates an 11.4 acre sand and gravel mine located at Star Route 22, New Lebanon, New York ("mine").
3. The last mining permit was issued on September 30, 2003 with an expiration date of September 30, 2008. On August 27, 2008, Department staff received the Mining Permit Renewal Application.
4. Department staff inspected the mine on April 28, 2009, October 2, 2008 and April 28, 2009 and Department staff observed that Respondent had advanced his mining toward the southern Life of Mine limit, which was delineated by permit term area markers. Respondent encroached on the southern and western 25 foot setback from the adjacent property which is owned by Mrs. Joy Sherman.

First Violation

5. Regulations at 6 NYCRR 422.1 provides that *"Every applicant for a mining permit shall submit to the department a mined land-use plan which shall set forth in detail an outline of the mining property and the affected land, the applicant's mining plan and the applicant's reclamation plan. After the department has issued a mining permit, the permittee shall not deviate or depart from the mined land-use plan without approval by the department of an alteration or amendment thereto."*
6. Respondent's encroachment is a deviation from the approved Mine Land Use Plan. Respondent had not received Department approval prior to doing so.

7. Respondent violated regulations at 6 NYCRR 422.1 by deviating from the approved Mined Land Use Plan without prior Department approval.

Second Violation

8. Regulations at 6 NYCRR §422.2 (c)(1)(iii) provide that *“The perimeter of a temporary or permanent mine floor shall not be established closer to either the property line most nearly adjacent to the affected land or to any easement within or adjacent to the affected land than the following: a distance of 25 feet measured in a horizontal plane when the adjacent property or easement is at or below the proposed final elevation of the affected land; a distance equal to the sum of 25 feet plus one and one-half times the height of the mine face in an unconsolidated material or a distance equal to the sum of 25 feet plus one and one-quarter times the height of the mine face in a consolidated material, when the adjacent property is at a higher elevation than the affected land. The applicant may, with the approval of the department, modify the distance requirements contained in this subparagraph.”*

9. Respondent encroached into the 25 foot setback from the adjacent property line.

10. Respondent violated regulations at 6 NYCRR §422.2 (c)(1)(iii) by encroaching into the 25 foot setback from the adjacent property line.

Third Violation

11. Regulations at ECL Title 27 §23-2713 provide that *“All mining and reclamation activities on the affected land shall be conducted in accordance with an approved mined land-use plan. The approved mined land-use plan shall consist of both a mining and a reclamation plan, and any other information which the department deems necessary in order to achieve the purposes of this title.”*

12. By mining into the 25 foot setback and adjacent property, Respondent mined outside of the approved Mined Land Use Plan.

13. Respondent violated regulations at ECL Title 27 §23-2713 by mining outside of the approved Mined Land Use Plan.

14. ECL § 71-1307 (1) provides that any person who violates any provision of ECL Article 23 of this chapter or commits any offense described in Section 71-1305 of this title shall be liable to the people of the state for a civil penalty not to exceed \$5,000 and an additional penalty not to exceed \$1,000 for each day during which such violation continues.

15. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law, has consented to the issuance and entry of this Order, and agrees to be bound by the terms, provisions and conditions contained herein.

NOW, being duly advised and having considered this matter, **IT IS HEREBY ORDERED THAT:**

I. Penalty

With respect to the aforesaid violation, a civil penalty in the amount of FIVE THOUSAND DOLLARS (\$5,000) is hereby assessed against the Respondent of which \$2,000 shall be payable to the New York State Department of Environmental Conservation by money order or certified check. Payment of the civil penalty is due in accordance with the following schedule:

The balance (\$3,000) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

II. Compliance Schedule

Respondent shall commence implementation of the activities described in the attached Compliance Schedule, which is an enforceable part of this Order, in accordance with its terms. Respondent shall meet the schedule therein.

III. 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 Department by telephone and in writing, pursuant to the communications provision of this Order, after it obtains knowledge of any such condition or event and request an appropriate extension or modification of this Order.

IV. Reports

All reports required herein shall be made to the Region 4 office of DEC, 1130 North Westcott Road, Schenectady, NY 12306, Attn: Natural Resources Supervisor.

V. Access

Respondent shall allow duly authorized agents and employees of DEC access to any facility, site, or records owned, operated, controlled, or maintained by Respondent, without prior notice, at such times as may be desirable or necessary, and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility.

VI. Indemnification

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, their employees, servants, agents, successors or assigns.

VII. Successors and Assigns

The provisions of this Order shall be deemed to bind Respondent their agents employees, successors, and assigns, and all persons, firms, and corporations acting under or for Respondent.

VIII. Effective Date

The effective date of this Order shall be the date that the Commissioner or his designee signs it. The Department will provide Respondent (or the Respondent's Counsel) with a fully executed copy of this Order as soon as practicable after the Commissioner or her designee signs it.

IX. Default

The failure of Respondent to comply fully and in timely fashion with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to Respondent by DEC.

X. Entire Agreement; Modification

This Order constitutes the entire agreement of the parties, and no provision of the agreement shall be deemed waived or otherwise modified except as is specifically set forth in a writing executed by the Commissioner or Regional Director of DEC indicating an intent to modify this Order.

XI. Other Rights

Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting (1) any legal, administrative or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that the Department may have against anyone other than Respondent; (2) any right of the Department to enforce administratively or at law or in equity, the terms, provisions and conditions of this Order; (3) any right of the Department to bring any future action, either administrative or judicial, for any other violations of the ECL, the rules and regulations promulgated thereunder, or conditions contained in orders or permits, if any, issued by the Department to Respondent; (4) the summary abatement powers of the Department, either at common law or as granted pursuant to statute or regulation.

DATED: 2009
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

Respondent hereby consents to the issuing and entering of this Order, waives his right to a hearing herein, and agrees to be bound by the provisions, terms and conditions contained herein.

Francis N. Amlaw

DATE:_____

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

On the__day of _____in the year_____ before me, the undersigned, a Notary Public in and for the State, personally appeared, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public
Qualified in the County of:
My Commission Expires:

SCHEDULE OF COMPLIANCE

- 1) Immediately upon receipt of this Order, Respondent shall cease mining within the 25 foot setback on the southern and western boundaries and the adjacent property owned by Mrs. Joy Sherman. (See attached map)
- 2) By August 1, 2009, Respondent shall have a NYS licensed surveyor establish the southern and western Life of Mine. The southern and western Life of Mine shall be delineated every 100 feet and at all vertices, with 5 foot high stakes of which the uppermost 12 inches shall be painted bright red. Upon completion of the surveying or by August 1, 2009, Respondent shall submit to the Department for approval, a reclamation plan for the 25 foot setback and any impacted lands owned by Mrs. Joy Sherman.
- 3) By October 15, 2009, Respondent shall reclaim the 25 foot setback and any impacted lands on the adjacent property which is owned by Mrs. Joy Sherman. Reclamation shall include the replacement of topsoil (minimum of 6 inches) and seeding with a conservation mixture that includes two legumes. The seeded areas shall be covered with mulch, hay or straw. (800 lbs/ac).