

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED

7016 0340 0000 4616 7649

March 13, 2017

Mr. Burton F. Clark
P.O. Box 427
Delhi, NY 13753

Re: Order on Consent
R4-2016-0811-139
MLF#40798
Burton F. Clark, Inc.

Dear Mr. Clark:

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

This will also acknowledge receipt of \$2,000 the civil penalty pursuant to Paragraph I.

Sincerely,

Dusty Renee Tinsley / JV

Dusty Renee Tinsley
Assistant Regional Attorney
Region 4

Enclosure

ec: K. Young @ Young Sommer LLC
P. Wyckoff
M. Lanzafame



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of
Article 23 of the New York State
Environmental Conservation Law and
Title 6 of the New York Code of Rules
and Regulations promulgated thereunder

ORDER ON CONSENT

-by-

Burton F. Clark, Inc.,

R4-2016-0811-139
MLF #40798

Permit #4-3662-00086/00001

Respondent.

WHEREAS:

JURISDICTION

1. The Department of Environmental Conservation ("Department") is an agency of the State charged with jurisdiction over Mined Land Reclamation pursuant to Article 23 of the Environmental Conservation Law ("ECL") and the rules and regulations promulgated thereunder.
2. Respondent, Burton F. Clark, Inc., is the operator of the Earl Road Gravel Mine located on Earl Road, Unadilla, New York 13849 (Otsego County)("Mine").
3. Effective November 19, 2013, Denton L. Reed, P.O. Box 640, Unadilla, New York 13849 was issued an Article 23 Title 27 Mined Land Reclamation permit (#4-3662-00086/00001) ("Permit") for the Mine.

ENVIRONMENTAL CONSERVATION LAW

4. ECL §71-1305(2) states, "It shall be unlawful for any person to: . . . Violate any . . . order or condition of any permit of the department made pursuant thereto."

NOTICES OF VIOLATION

5. Notices of Violation were issued to Respondent by Department staff dated February 5, 2016, May 24, 2016, and August 5, 2016.

FIRST VIOLATION

6. The permit states "There shall be no natural swales or channels or constructed features such as ditches, pipes, etc., that are capable of discharging waters to any offsite areas or to any areas outside the limits of the Life of Mine except those explicitly described and shown in the narrative and graphic portions of the approved Mined Land Use Plan. All [silt] laden water and stormwater generated on, or running across, the site shall be retained within the approved project area. The permittee must comply with all applicable State Pollution Discharge Elimination

System (SPDES) permit requirements and provide necessary notification for off-site point source discharges.” (Special Conditions #5)

7. Department staff conducted inspections of the Facility on February 2, 2016, May 17, 2016, and July 19, 2016. During the inspections, Department staff observed:
 - a. on February 2, 2016: sediment-laden stormwater from the stripped area is flowing was flowing around a topsoil berm at the southeastern limit of the Life of Mine and leaving the Life of Mine.
 - b. on May 17, 2016: i) sediment-laden stormwater continued to be shed off the backside of the topsoil berm; ii) on the northern perimeter of the stripped area, stormwater was flowing on the outside of the silt fence; iii) on the southern perimeter, the silt fence had not been constructed according to NYS Standards and Specifications as the fence was not embedded six inches into the ground at all locations providing a location where stormwater flowed under the silt fence outside the Life of Mine; and iv) the silt fence was not maintained and as a result was partially buried under sediment allowing for stormwater and sediment to flow over the top of the failed fence, depositing sediment outside of the Life of Mine boundary.
 - c. on July 19, 2016: i) sediment laden stormwater continued to be shed off the back side of the topsoil berm contributing to sediment being deposited beyond the silt fence; ii) stormwater overtopped the banks of the stormwater retention pond which was full with less than one inch of freeboard; iii) stormwater from past precipitation events had flowed over the bank of the retention pond and had incised a deep channel on the inside of the silt fence, depositing significant volumes of sediment behind the silt fence; and iv) the silt fence had not been maintained leading top failure of the fence which was buried under sediment allowing stormwater and sediment to flow over the top of the failed fence and outside of the Life of Mine.
8. Respondent’s failure to maintain sediment laden water and stormwater generated on, or running across, the Mine within the approved project area are violations of the Permit and of ECL §71-1305(2).

SECOND VIOLATION

9. The permit states “Prior to excavation of previously undisturbed areas, topsoil and overburden shall be stripped, stockpiled separately, and used for reclamation of mined areas. These stockpiles shall be seeded to establish a vegetative cover within 30 days, or as soon as practicable following their construction. The permittee shall locate all overburden stockpiles within the permitted area of the approved Life of Mine. Sufficient quantities of topsoil must be retained on the site for use in reclamation, unless prior approval is granted by the Department.” (Special Conditions #2)
10. During the February 2, 2016, May 17, 2016, and July 19, 2016, inspections of the Mine, Department staff observed that approximately 9.65 acres of the Mine was stripped of topsoil and a topsoil berm had been created at the southeastern limit of the Life of Mine. The topsoil berm was not stabilized with vegetation.

11. Respondent's failure to seed the topsoil berm to establish a vegetative cover within 30 days, or as soon as practicable following their construction, is a violation of the Permit and ECL §71-1305(2).

THIRD VIOLATION

12. 6 NYCRR Part 422.1(a) states 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."
13. The permit states "All activities authorized by this permit must be in strict conformance with the approved plan submitted by the applicant or his/her agent as part of the permit application. Such plans were approved by Mined Land Reclamation Unit staff on April 1, 2013, and consist of the following: . . . (g) Earl Road Gravel Pit Mine Permit, Burton Clark, Inc. dba Clark Companies Mine Plan Map Modification, prepared by Central Testing and Engineering, dated February 28, 2013 ("Modification")." (Special Conditions 1)
14. On July 19, 2016, Department staff determined that Respondent was not in strict conformance with the Modification and deviated from the Modification without Department approval of an alteration or modification in constructing a scale and office building, on a concrete base, outside the life of mine designated in the Modification.
15. Respondent, in failing to maintain strict conformance with the Modification and deviating from the Modification without Department approval of an alteration or modification by constructing a scale and office building, on a concrete base, outside the life of mine designated in the Modification, violated ECL §71-1305(2), 6 NYCRR Part 422.1(a), and the Permit at Condition 1.

RESPONDENT'S ASSERTIONS

16. Respondent asserts that: the Mine stripping was completed in December, 2015; the Permit required that the stockpile be seeded to establish vegetative cover within 30 days, or as soon as practicable following construction; it was not practicable to seed and mulch the stockpile until the spring of 2016; the February 2016 Notice of Violation ("NOV") required that the topsoil berm be "seeded and mulched in the spring, as early as weather allows"; Respondent seeded and mulched the stockpile in February of 2016 and reseeded and remulched the stockpile in the spring of 2016; after the May 2016 inspection and NOV, Respondent took immediate corrective measures, including retaining a geologist to inspect the Mine and make recommendations, seeding and mulching, repairing and installing a new silt fence, and site grading; Respondent made additional repairs in June of 2016; the July of 2016 inspection occurred within 24 hours of a reported three inch, twenty four hour storm; and prior to the effective date of this Order, Respondent submitted to Department staff a TR-55 analysis determining the appropriate size of the storm water retention pond, Respondent repaired the silt fence in accordance with the NYS State Standards and Specifications for Erosion and Sediment Control, Respondent fully vegetated and stabilized the

topsoil stockpile, and Respondent sized the stormwater pond on the upgradient side of the topsoil stockpile according to the TR-55 analysis.

WAIVER

17. 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 it agrees to be bound by the terms, provisions and conditions contained herein.

CIVIL PENALTY

18. ECL Section 71-1307(1) states, "Any person who violates any provision of 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 eight thousand dollars and an additional penalty of two thousand dollars for each day during which such violation continues"

REMEDIES

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

I. **Civil Penalty.** Respondent is hereby assessed a civil penalty of THREE THOUSAND SEVEN HUNDRED DOLLARS (\$3,700) for the above violations of which TWO THOUSAND DOLLARS (\$2,000) shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department. ONE THOUSAND SEVEN HUNDRED DOLLARS (\$1,700) of the civil penalty is suspended conditioned on Respondent's compliance with the Schedule of Compliance. Payment of the suspended civil penalty shall be due within 30 days receipt of notice from the Department setting forth the nature of the violations. The civil penalties shall be paid by check made payable to the Department of Environmental Conservation.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

II. **Settlement.** This Order settles all violations identified herein as of the effective date of the Order.

III. **Binding Effect.** This Order is binding upon the Respondent, its successors, and its assigns. Respondent is responsible to ensure that its agents, employees, and all persons, firms, and corporations acting subordinate thereto comply with the terms of this Order.

IV. **Access.** Respondent shall allow duly authorized representatives of the Department 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, and/or the ECL and applicable federal regulations. All duly authorized representatives of the Department accessing the facility will report first to the operating personnel on-site and will comply with the safety standards applicable to site visitors.

V. **Effective Date.** The effective date of this Order shall be the date upon which it is signed on behalf of the Department.

VI. **Scope.** 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 or Department may have against Respondent for any conduct not cited in this Order on Consent.

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

C. The Department's right to enforce this Order against Respondent in the event that Respondent shall fail to fulfill any of the terms or provisions hereof;

D. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

E. 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.

VII. **Third Parties.** This Order shall not create any presumption of law or fact that shall inure to the benefit of any person other than the Department or Respondent.

VIII. **Communications.** Communications shall be sent to

Department:

New York State Department of Environmental Conservation
Region 4
Psalm Wyckoff (email: psalm.wyckoff@dec.ny.gov) and
Mark Lanzafame (email: mark.lanzafame@dec.ny.gov)
1130 North Westcott Road
Schenectady, NY 12306

All submittals relating to the Mined Land Reclamation violation shall have the following information: owner's name, facility name and address, and the MLF identification number.

Respondent:

Burton F Clark, Inc.
PO Box 427
Delhi, New York 13753

With a copy to:

Kevin M. Young
Young Sommer LLC
5 Palisades Drive
Albany, NY 12205

DATED: Rotterdam, New York
March 16, 2017

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

SCHEDULE OF COMPLIANCE

Respondent shall complete either Paragraph 1 or Paragraph 2 below:

1. Respondent shall reclaim the area outside the Life of Mine ("LOM") affected by the construction of the scale, scale house, and the road approaches according to the following schedule:
 - a) By September 1, 2017:
 - i. the scale, scale house and any foundations must be removed from the affected area;
 - ii. the road surfacing material (e.g. compacted crusher run) used to construct the approaches to the scale must be removed;
 - iii. the affected area be scarified to alleviate compaction; and
 - iv. the affected area must be smooth graded to blend to the elevation of the surrounding unaffected area.
 - b) By September 15, 2017, six inches of fertile soil shall be spread over all affected areas.
 - c) Within 48 hours of the application of soil pursuant to Paragraph 1(b) above:
 - i. seed must be applied to the affected area with a conservation seeding mixture that contains at least 2 legumes (ex. red clover, trefoil, etc.) at the rate of 80 pounds per acre;
 - ii. perform pH tests to the affected area and apply lime as necessary;
 - iii. fertilize the seeded affected area with a slow release nitrogen fertilizer at the rate of 300 pounds per acre; and
 - iv. apply hay mulch to the affected area at the rate of 2,000 pounds per acre without bare spots.
 - d) Vegetation must reach the regulatory requirement of 75% vegetative cover by September 1, 2018. Department staff will conduct a reclamation inspection on or after September 1, 2018. If, at the time of the inspection, the vegetation does not meet the required cover, Department staff will require the application of additional fertile soil and seed, fertilizer, and mulch until vegetation reaches 75% coverage.
2. By September 1, 2017, Respondent shall submit to Department staff a complete mining permit modification application to include the scale and scale house in the LOM.