

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

Office of General Counsel, Region 4

1130 North Westcott Road, Schenectady, NY 12306-2014

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www.dec.ny.gov

**CERTIFIED - RETURN RECEIPT REQUESTED**

7013 1090 0002 3365 3700

June 9, 2015

Peter B. Johnston  
Johnston & Rhodes Blue Stone Company  
1 Bridge St.  
East Branch, NY 13804

Re: Order of Consent  
R4-2015-0511-58

Dear Mr. Johnston:

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,



Karen Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: P. Wyckoff



Department of  
Environmental  
Conservation

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

-by-

Order on Consent  
File No. R4-2015-0511-58

Johnston & Rhodes Blue Stone Company  
1 Bridge St.  
East Branch, NY 13756

Respondent  
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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 operates a bluestone mine known as the "Doc Smith Quarry" located off East River Road, Walton, New York ("site"). Operation of the mine is governed by a permit issued August 13, 2014 with an expiration date of August 12, 2019 (MLF # 40785).
3. On May 5, 2015, Department staff inspected the site.
4. At the time of the inspection, Department staff observed a pair of eagles nesting in a tree in the vicinity of the quarry.

Violations

5. ECL §71-1305 (2) provides that *"It shall be unlawful for any person to: violate any of the provisions of or fail to perform any duty imposed by Article 23 of this chapter or any rule or regulation promulgated thereunder or any order or condition of any permit of the department made pursuant thereto."*
6. Special Condition #28 of Respondent's permit stipulates that *"If eagle nesting activity is observed at an alternate location within 660' of the life-of-mine boundary the permittee shall cease mining activity within 660' of the alternate nesting area and contact Region 4 Bureau of Wildlife, NYSDEC @ 607-652-7367. NYSDEC will make a written determination if mining activity will impact the nesting area. Based on this determination, the mining permit may require modification."*

7. The permittee did not cause mining activity to cease and did not contact the Region 4 Bureau of Wildlife when the new nest location was observed by miners operating at the site, therefore Respondent is in violation of permit Special Condition # 28.

8. Special Condition #29 of Respondent's permit stipulates that "*there are no restrictions of use on this mine from Sept 1<sup>st</sup> until January 1<sup>st</sup>. Between January 2<sup>nd</sup> and August 31 the following restrictions apply.*

A) *There shall be no approach to within 330 feet of the eagles nest tree.*

B) *There shall be no noisy equipment such as heavy equipment, chain saws, rock saws, etc. used within 660 feet of the eagles nest tree.*

C) *There shall be no blasting within 0.5 miles of the eagles nest tree."*

9. At the time of the May 5, 2015 inspection, Department staff observed that mining was occurring in the southern portion of the lower quarry, within 660 ft of the nest, including the operation of a hand-held tracer saw. Furthermore, at the time of the inspection, Department staff observed pallets of stone, a rock saw (and tank of water for cooling), and a skid steer which indicated that mining is ongoing in the northern portion of the lower quarry, within 330 feet of the nest, although not at the time of the inspection. Also, an excavator was parked at approximately the 330 ft buffer line. Therefore, the above ongoing activities constitute a violation of permit Special Condition # 29.

10. Item B of *Notification of Other Permittee Obligations*, as set forth in Respondent's Permit, provides that: "*The permittee is responsible for informing its independent contractors, employees, agents, and assigns of their responsibility to comply with this permit, including all special conditions while acting as the permittee's agent with respect to the permitted activities, and such persons shall be subject to the same sanctions for violations of the Environmental Conservation Law as those prescribed for the permittee.*"

11. The miner operating the site at the time of the inspection was a contractor. He was aware of the eagle's nest however the Respondent did not make him aware of the Eagle Projection Restrictions set forth in Special Condition #29 of the Permit.

12. Respondent's failure to inform its contractor of the Eagle Projection Restrictions set forth in Special Condition #29 of the permit is a violation of Item B of *Notification of Other Permittee Obligations* of Respondent's permit.

13. 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 \$8,000 and an additional penalty not to exceed \$2,000 for each day during which such violation continues.

14. Respondent has affirmatively waived its 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 of the aforesaid alleged violations, a civil penalty in the amount of TWO THOUSAND DOLLARS (\$2,000) which 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.

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 his 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, its employees, servants, agents, successors or assigns.

VII. Successors and Assigns

The provisions of this Order shall be deemed to bind Respondent, its 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: *June 9* 2015  
Ritterdam, New York

Joseph J. Martens  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

A handwritten signature in black ink, appearing to read "Keith Goertz", is written over a horizontal line. The signature is stylized and cursive.

Keith Goertz  
Regional Director  
Region 4

CONSENT BY RESPONDENT

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

Johnston & Rhodes Blue Stone Company

Authorized Representative Peter B. Johnston

SIGNED: [Signature]

TITLE: PRESIDENT

DATE: 6/5/15

STATE OF New York

COUNTY OF Delaware ) ss.:

On the 5<sup>th</sup> day of June in the year 2015 before me, the undersigned, a Notary Public in and for the State, personally appeared Peter B. Johnston Sr. 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.

[Signature]  
Notary Public  
Qualified in the County of:  
My Commission Expires:

TARA SPARLING  
Notary Public • State of New York  
Reg. No. 01SP139358  
Appointed in Delaware County  
My Commission Expires 1-9-18



## SCHEDULE OF COMPLIANCE

1. Effective immediately, all mining within the 330 ft buffer from the eagle nest tree, must cease. All use of noisy equipment within the 660 ft buffer from the eagle nest must also cease.
2. By June 30, 2015, Respondent must mark in the field, the 330 ft buffer and 660 ft buffer lines, where they cross the upper and lower quarries. The markers must be highly visible paint blazes on trees, rocks and boulders, placed every 20 ft across the Life-of-Mine area.
3. On the 1<sup>st</sup> and 15<sup>th</sup> of every month from June 15<sup>th</sup> to September 1<sup>st</sup>, for the life permit, Respondent shall send an email report to DEC Wildlife Staff [scott.vanarsdale@dec.ny.us](mailto:scott.vanarsdale@dec.ny.us)). The report shall state whether or not the eagles appear to be actively using the current nest.