

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
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May 24, 2016

Terresa M. Bakner, Esq.
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260

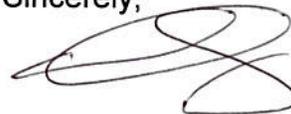
Re: Order on Consent
Johnston & Rhodes Bluestone Co.
R4-2015-0212-11

Dear Ms. Bakner:

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

This will also acknowledge receipt of \$4,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: P. Wyckoff

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of the Environmental
Conservation Law ("ECL") Article 23,
Title 27 and Part 422 of Title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York ("6 NYCRR"),

ORDER ON CONSENT
File No. R4-2015-0212-11

- by -

Johnston & Rhodes Bluestone Company
1 Bridge Street, P.O. Box 130
East Branch, NY 13756

Respondent

WHEREAS:

1. The Department has jurisdiction pursuant to ECL Article 23 to regulate surface mining and reclamation.
2. Respondent's Mined Land Reclamation Permit, #4-1234-00195/00001 ("permit") for a five acre bluestone mine, known as the Davis Quarry located off Blanchard Road, Hamden, New York ("mine"), expired on August 1, 2008.
3. On October 15, 2009, November 5, 2009, July 19, 2011, November 10, 2011, September 12, 2013, November 14, 2014, and June 24, 2015, Department staff conducted inspections of the mine and reclamation activities and observed a:
 - failure to remove all refuse including stumps and logs;
 - failure to remove all spoil piles and/or failure to use in the reclamation; and
 - failure to achieve 75% vegetative coverage of areas planted by the end of the second growing season.
4. Regulations at 6 NYCRR 422.3(e) requires that: "*The permittee shall reclaim all affected land within a two year period after mining ceases unless the department shall approve a longer period.*"
5. Regulations at 6 NYCRR 422(d) (1) (i) provide that: "*All refuse, spoil, unused mineral stockpiles and personal property shall either be removed from the permit area or utilized during reclamation of the affected land.*"

6. Regulations at 6 NYCRR 422.d (1) (vi) (d) provides that:

“An acceptable vegetative cover shall be considered to be a permanent stand or a stand capable of regeneration and succession sufficient to assure 75 percent coverage of the areas planted if only ground cover (no trees) is utilized, or a 60 percent survival rate for shrubs and trees which are utilized, by the end of the second growing season after planting. If revegetation is not completely successful, the areas of failure must be randomly distributed, shall not exceed one-half acre in every two acres so treated and shall not endanger the success of revegetation in adjacent areas within the affected land.”

7. Respondent was required pursuant to 6 NYCRR 422.3(e), to complete the reclamation of the mine by no later than August 1, 2010.

8. Respondent's failure to reclaim the mine is a violation of and 6 NYCRR 422.3(e).

9. ECL Section 71-1307(1) provides that any person who violates any provision of Article 23 of the ECL or commits any offense described in Section 71-1305 of this title shall be liable to the people of this state for a civil penalty not to exceed eight thousand dollars (\$8,000) and an additional penalty of two thousand dollars (\$2,000) for each day during which such violation continues.

10. Respondent has affirmatively waived its right to a hearing in the manner provided by law and has consented to the issuing of this Order on Consent and has agreed 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:

Civil Penalty

I. With respect to the aforesaid violation, a civil penalty in the amount of TEN THOUSAND DOLLARS (\$10,000) is hereby assessed against the Respondent. FOUR THOUSAND DOLLARS (\$4,000) of the civil penalty is due by bank check made payable to the “NYS DEC” and returned with the signed and notarized copy of this Order on Consent.

The balance of the penalty, SIX THOUSAND DOLLARS (\$6,000), is suspended and shall not be payable, provided that Respondent fully complies with the requirements of this Order on Consent in a timely fashion. In the event that Respondent fails to comply with the requirements of this Order on Consent the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order on Consent.

II. Schedule of Compliance

Respondent shall comply with the Schedule of Compliance set forth in this Order on Consent which is incorporated and made part of the terms, provisions, and conditions of this Order on Consent.

III. Communications¹

Department:

All communications required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Psalm Wyckoff, psalm.wyckoff@dec.ny.gov All communications shall include a reference to the Order on Consent Case Number R4-2015-0212-11.

Respondent:

All communications required herein shall be made to: Respondent - Johnston & Rhodes Bluestone Company, 1 Bridge Street P.O. Box 130, East Branch, NY 13756, Peter B. Johnston, pjohnston@citlink.net. All communications shall include a reference to the Order on Consent Case Number R4-2015-0212-11.

IV. Access

Respondent shall allow duly authorized representatives of DEC access to the facility referred to in this Order 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 or the ECL. ²

V. Summary Abatement

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.

VI. Indemnification

Respondent shall indemnify and hold DEC, New York State, and their representatives and employees harmless for all claims, suits, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

² The parties shall update the communication contact information as necessary.

VII. Review of Submittals

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondent makes pursuant to this Order 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 generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3.a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accepts such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

VIII. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent and its successors (including successors in title) and assigns.

IX. Modification

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.

X. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein.

XI. Effective Date

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

XII. Reservation of Rights

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.

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, its officers, directors, agents, servants, employees, successors and assigns;

C. 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

D. 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.

XIII. Termination of the Order on Consent

The Order on Consent shall terminate upon the Department's final approval of the reclamation of the mine in accordance with the criteria in 6 NYCRR Part 422. The Department has the sole discretion to determine whether the final reclamation has achieved all relevant criteria in 6 NYCRR Part 423 including but not limited to the 75% vegetative coverage standard to be attained by the second growing season without rills or gullies.

DATED: *May 23* 2016
Rotterdam, New York

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Acting Regional Director
Region 4

SCHEDULE OF COMPLIANCE

1. By May 30, 2016, Respondent shall submit a reclamation plan for **all affected areas** within the Johnston and Rhodes Davis Mine LOM for the Department's approval, including the following:

A. Reclamation Map – to include the following details:

1. Accurately located property lines;
2. Life of Mine boundary;
3. Areas to be reclaimed as meadow versus areas to be reclaimed with trees and shrubs (see discussion below);
4. Superimpose all features on the most currently available aerial photography (USGA NAIP, 2015).

B. Reclamation Narrative – including the following details:

1. Address affected areas, including the central floor, northern, all portions of the large spoil pile, and the small spoil pile near the southern perimeter of the mine.
2. Removal or use of spoil rock in reclamation (e.g. the small soil pile on southern perimeter, the natural cleft rock piles on the northern floor area).
3. For any areas to be revegetated with grass and legumes:
 - Application of 3" of topsoil on areas with bare rock or graded spoil piles, in accordance with the approved reclamation plan (2001).
 - Application of seed, fertilizer and mulch:
 - pH testing and lime as necessary and fertilizing with a slow release nitrogen fertilizer at the rate of 300 pounds per acre.
 - Use of a conservation seeding mixture that contains at least 2 legumes (ex. Red clover, trefoil, etc) at the rate of 80 pounds per acre. (Legumes nitrogen to the soil and their broad leaves shade the soil for moisture retention and thus better germination rates.)
 - Mulch the seeded area with hay mulch at the rate of 2,000 pounds per acre without bare spots.

4. For any areas that may be revegetated with tree and shrub seedlings (e.g. the large spoil pile):
 - Site preparation, and planting of ground cover and tree seedlings shall be in accordance with the Forest Reclamation Advisories by the ARRI.
(<http://arri.osmre.gov/Publications/Publications.shtm#FRAs>)
 - Tree and shrub spacing shall be in accordance with the State Nursery:
<http://www.dec.ny.gov/animals/75753.html>
 - The Department recommends a mix of nitrogen fixing shrubs (e.g. bristly locust), early successional trees (e.g. evergreens and poplars) with hardwoods (e.g. white oak).
<http://www.dec.ny.gov/animals/71275.html>

The timeframes for completing each task in the schedule must show that all reclamation work will be completed by September 15, 2016. The plan must reference the source of the topsoil. The permittee must notify the Department one week prior to commencing each step. The permittee must notify the Department within 10 days of completing the final reclamation of the entire mine.

The Department will review and approve the reclamation plan, or approve with revisions, prior to commencing any reclamation work.

By September 15, 2016, all work in the approved reclamation plan must be completed.

The criteria for approving reclamation includes 75% vegetative coverage or 60% survival rates for planted trees and shrubs, attained by the second growing season. Areas of failure must be randomly distributed, shall not exceed one-half acre in every two acres so treated and shall not endanger the success of reclamation on adjacent areas within the affected land (e.g. no erosive rills and gullies). (NYCRR Part 422.3(d)(2)(vi)(a)). In 2017, DEC staff will inspect the site to determine if the reclamation can be approved.