

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 5904

December 19, 2017

Joseph R. Wunderlich
Joseph R. Wunderlich, Inc.
P.O. Box 245
Latham, NY 12110-0245

Re: Order on Consent
R4-2017-1027-262

Dear Mr. Wunderlich:

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

This will also acknowledge receipt of \$3000 the civil penalty pursuant to Paragraph I.

Sincerely,



Stephen Repsher
Assistant Regional Attorney
Region 4

Enclosure

ec: P. Wyckoff
J. June

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of
Articles 17 and 23 of
the New York State Environmental
Conservation Law and Title 6 of the Official
Compilation of the New York State Code of
Rules and Regulations

ORDER ON CONSENT

-by-

R4-2017-1027-262

Joseph R. Wunderlich, Inc.,

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 Title 27 of the Environmental Conservation Law ("ECL") and the rules and regulations promulgated thereunder at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").
2. Respondent Joseph R. Wunderlich, Inc., is the owner of a sand and gravel mine approximately eighty-nine and one-half (89.5) acres in size, known as Pollock Road Pit, and located on Pollock Road, Town of Colonie, New York ("Mine").
3. Respondent was issued a Mined Land Reclamation renewal permit for mining activities (#4-0126-00067/00001) (the "Permit") for the Mine, effective April 1, 2016 and expiring on March 31, 2021.

VIOLATIONS

4. ECL § 23-2713(1) requires that "[a]ll mining and reclamation activities on the affected land shall be conducted in accordance with an approved mined land-use plan. Regulations at 6 NYCRR § 422.1(a) likewise require that "[a]fter 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."
5. ECL § 71-1305(2) states 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 No. 1 of the Permit states, "All activities authorized by this permit must be in strict conformance with the approved plans submitted by the applicant...as part of the permit application."

7. Special Condition No. 16 of the Permit requires that “[s]ufficient materials shall be left in place in the sloped areas situated along the final limits of the mine (life of mine boundary) to achieve the approved final grades without backfilling.”
8. The steepness and proximity of Respondent’s excavation to the Life of Mine boundary adjacent to the location of utility poles resulted in a condition requiring backfilling to achieve the reclamation slope, in violation of ECL § 23-2713(1), 6 NYCRR § 422.1(a), ECL § 71-1305(2), and Permit Special Conditions Nos. 1 and 16.
9. Pursuant to a Mined Reclamation Plan submitted to the Department on May 25, 2016 and subsequently approved, Respondent was required to regrade the slope in the Mine site containing transmission line utility poles to a grade of 1V:2H. Respondent was also required to repair and regrade an access road to the utility poles to a slope of 1V:3H.
10. During a meeting at the Wunderlich facility on May 2, 2016, the Department further required that any soil brought into the Mine to be used for grading was to be tested for contamination, and that the easement and Life of Mine boundaries were to be staked along the western edge.
11. In an email dated May 3, 2016 memorializing the May 2nd meeting, the Department notified Respondent that all work required pursuant to the Grading Plan was to be completed in 2016.
12. Department staff subsequently sent a Notice of Violation to Respondent on June 19, 2017, restating the requirement to complete the grading and apply topsoil, fertilizer, lime, seed, and mulch per the terms of the approved Reclamation Plan by October 1, 2017.
13. On October 25, 2017, Department staff conducted a further inspection and observed that Respondent had applied no topsoil or seed as required; that while most grading was complete, several erosion gullies had formed requiring repair; and that soil mixed with what the Department identified as concrete and possibly asphalt was being graded into the toe of the slope. Additionally, Respondent had constructed a new road into the slope that was not depicted on the grading plan.
14. Special Condition No. 19 of the Permit states:

There shall be no importation of any material(s) of any kind . . . except as outlined in the Mined Land Use Plan or approved by the Mined Land Use Plan or approved by the Mind Land Reclamation Specialist.

No imported material already within the mine shall be used in the reclamation or backfilling of the mine unless written approval of the material for use in the reclamation at the mine has been issued by the Department Mind Land Reclamation Specialist.
15. Respondent’s use of fill material not approved by the Department or as part of the Reclamation Plan is a violation of Permit Special Condition No. 19.
16. Special Condition No. 22 of the Permit requires “the Permittee or his/her agent to submit an annual report to the Regional Permit Administrator during the month of December for each year that this permit is in effect.”

17. Respondent has not submitted an annual report for the year 2016, which is a violation of Permit Special Condition No. 22.

Waiver of Hearing

18. 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

19. ECL § 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 (\$8,000) and an additional penalty of two thousand dollars (\$2,000) for each day during which such violation continues"

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

I. **Civil Penalty.** With respect to the Order's violations, a civil penalty in the amount of NINE THOUSAND, FIVE HUNDRED DOLLARS (\$9,500) is assessed against the Respondent for the above violations. THREE THOUSAND DOLLARS (\$3,000) of the civil penalty shall be paid to the Department by company or bank check made payable to "NYS DEC" at the time this Order is signed, notarized, and returned to the Department. Payment of this portion of the civil penalty shall not in any way alter Respondent's obligation to complete performance under the terms of the Order.

The balance of the penalty, SIX THOUSAND, FIVE HUNDRED DOLLARS (\$6,500), is suspended and shall not be payable, *provided that* Respondent fully complies with the requirements of this Order on Consent in a timely fashion. If Respondent fails to comply with any such requirements, the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent.

II. **Schedule of Compliance.** Respondent shall comply with the terms and conditions of this Order, including the attached Schedule of Compliance, and any plans approved pursuant thereto are incorporated into this Order and are enforceable hereunder. Any records submitted to the Department shall include the owner's name, facility name and address, contact name, and phone number.

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

IV. **Binding Effect.** This Order is binding upon the Respondent, its agents, employees, successors, assigns and to all persons and firms, and corporations acting under or controlled by it.

V. **Summary Abatement.** This Order shall not be construed to prohibit the Commissioner or his duly authorized representatives 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 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 the provisions hereof by Respondent, its directors, officers, employees, agents, successors or assigns.

VII. **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, such change to be made only upon written agreement of the parties.

VIII. **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 for the Department to inspect and determine the status of Respondent's compliance with this Order, Department regulations, and/or the ECL and applicable federal regulations.

IX. **Effective Date.** The effective date of this Order shall be the date upon which it is signed on behalf of the Department. The Department will provide Respondent with a fully executed copy of this Order as soon as practicable thereafter.

X. **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 violations 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 for any other violations of the ECL, rules or regulations promulgated thereunder;

C. The Department's right to enforce this Order against Respondent, its officers, directors, and employees, should Respondent fail to fulfill any of the Order's terms or provisions;

D. Whatever right the Department may have to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, 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.

XI. **Review of Submitted Documentation.** 1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of Respondent's submittals pursuant to this Order to determine whether it was prepared, and whether the work performed 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 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 the Department's stated reasons for disapproving the initial submittal.

3(b). After receipt of a revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submittal is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submittal 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.

XII. **Communications.** Communications shall be sent to:

For Department:

New York State Department of Environmental Conservation
Region 4
Attn: Natural Resources Supervisor
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.

For Respondent:

Joseph R. Wunderlich
Joseph R. Wunderlich, Inc.
P.O. Box 245
Latham, New York 12110-0245

DATED: Rotterdam, New York
December 19, 2017

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:



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.

Joseph R. Wunderlich, Inc.
Authorized Representative

SIGNED: John Wunderlich

TITLE: Manager

DATE: 12/14/2017

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

On the 14th day of December in the year 2017, before me, the undersigned, personally appeared John Wunderlich, personally known (Full name) to me who, being duly sworn, did depose and say that he/she/they reside at:

21 Sparrowbush Rd., Latham NY 12110
(Full mailing address)

and that he/she/they is (are) the Manager (Corporate officer or attorney in fact duly appointed) of Joseph R. Wunderlich Inc. (Full legal name of corporation),

the corporation 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 corporation.

Leslie A. Dota
Notary Public
Qualified in the County of:
My Commission Expires:

Leslie A. Dota
Notary Public, State of N.Y.
No. 01D04959106
Qualified in Albany County
Commission Expires 11/20/21

SCHEDULE OF COMPLIANCE

1. By **May 1, 2018**, Respondent shall apply a minimum of six (6) inches of fertile soil over the slope adjacent to the utility poles. All gullies shall be re-graded and stabilized before soil is applied.
2. **Within forty-eight (48) hours** of the application of fertile soil, the following must be applied:
 - a. Seed with a conservation seeding mixture as set forth in the approved Reclamation Plan;
 - b. Perform pH testing and lime as necessary;
 - c. Fertilize with a slow-release nitrogen fertilizer at the rate of three hundred (300) pounds per acre;
 - d. Apply hay mulch at the rate of two thousand (2,000) pounds per acre with no bare spots;
3. A Department Mined Land Reclamation Specialist (“MLRS”) will conduct an inspection during summer 2018. If at that time the vegetation has not met the regulatory requirement of 75% vegetative cover, the MLRS will require Respondent to apply additional soil, seed, fertilizer and mulch.
4. **Within thirty (30) days of the Effective Date of this Order or by May 1, 2018 (whichever occurs sooner)**, the area in which concrete and/or asphalt was intermixed with soil and graded must be dug up and the concrete and/or asphalt removed from the Life of Mine.
5. **Within thirty (30) days of the Effective Date of this Order**, an annual report containing all the requirements outlined in Special Condition No. 22 of the Mining Permit shall be submitted to the Department.
6. Compliance with this Schedule shall not be a defense to subsequent violations.