

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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CONFIRMATION BY EMAIL ORDER RECEIVED

March 21, 2019

Adam Schultz, Esq.
Couch White LLP
540 Broadway, 7th Floor
Albany, NY 12207
aschultz@couchwhite.com

Re: Order on Consent
R4-2018-0806-166
Rifenburg Construction Inc.

Dear Mr. Schultz:

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
Regional Attorney
Region 4

Enclosure

cc: P. Wyckoff
N. Baker
P. Pinder



Department of
Environmental
Conservation

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. R4-2018-0806-166

- by -

Rifenburg Construction Inc.
159 Brick Church Road
Troy, NY 12180

Respondent

WHEREAS:

Jurisdiction

1. The Department has jurisdiction pursuant to ECL Article 23 to regulate surface mining and reclamation.

Permits and Conditions

2. Respondent’s Mined Land Reclamation Permit, #4-3840-00020/00003 (“permit”) for a 142.5 acre sand and gravel mine, known as the Hoffay Farm Pit, located on ST RTE 150 & Sheer Road, West Sand Lake, New York (“mine”), expires on May 12, 2021.

3. Condition #1 of Respondent’s **Mined Land Reclamation Permit Conditions** require that *“All activities authorized by this permit must be in strict conformance with the approved plans submitted by the applicant or the applicant’s agent as part of the permit application.”*

4. 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.”*

5. Regulations at 6 NYCRR 422.1(a) 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.”*

First Violation

6. On May 8, 2014, April 15, 2015 and June 29, 2018, Department staff inspected the site and observed a maintenance road located under the conveyer between the east and west sides of the mine. The maintenance road is not shown on the plans, nor is a road discussed in the approved Mine Land Use Plan. The road crosses the class C(t) stream and federal wetlands that connects NYS Wetlands AP-21 and AP-32 (as shown on the mining plan map) (Attached as Exhibit “A”) via culverts that were placed in the stream without appropriate wetland and stream disturbance permits. At various locations along the maintenance road, holes under the concrete curbing is evidence that stormwater from the road surface left the road and discharged into the stream.

7. The construction of the maintenance road is a deviation and departure from the approved mine land use plan and a violation of permit Special Condition No. 1 of Respondent’s Mined Land Reclamation Permit, regulations at 6 NYCRR 422.1(a), and ECL 71-1305(2).

Second Violation

8. At the time of the inspections, Department staff measured the edge of clear cutting of vegetation in preparation of mining of the Foley Parcel, which is 35 ft of the stone wall that marks the eastern property line. The Life of Mine (“LOM”) in this portion of the mine is setback 50 ft from the property line, as required by town zoning.

9. The failure to adhere to the 50 ft setback in the Foley Parcel is a deviation and departure from the approved mine land use plan and a violation of permit Special Condition No. 1 of Respondent’s Mined Land Reclamation Permit, regulations at 6 NYCRR 422.1(a), and ECL 71-1305(2).

Third Violation

10. At the time of the inspections, Department staff observed that clear cutting of vegetation appears to have occurred in the Buffer Area shown on the Mining Plan Map.

11. Clear cutting of vegetation in the buffer area as shown on the Mining Plan Map is a deviation and departure from the approved mine land use plan and a violation of permit Special Condition No. 1 of Respondent’s Mined Land Reclamation Permit, regulations at 6 NYCRR 422.1(a), and ECL 71-1305(2).

Fourth Violation

12. At the time of the inspections, Department staff observed that additional clear cutting of vegetation had occurred in the "Future Excavation Area," which is outside the authorized permit term affect area of the permit, as shown on the mining map.

13. Clear cutting of vegetation and excavation in the "Future Excavation Area," which is outside the authorized permit term affect area of the permit, is a deviation and departure from the approved mine land use plan and a violation of permit Special Condition No. 1 of Respondent's Mined Land Reclamation Permit, regulations at 6 NYCRR 422.1(a), and ECL 71-1305(2).

14. 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.

15. 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:

I. Civil Penalty

With respect to the aforesaid alleged violation, a civil penalty in the amount of EIGHT THOUSAND DOLLARS (\$8,000) is hereby assessed against the Respondent of which FOUR THOUSAND DOLLARS (\$4,000) 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.

The balance FOUR THOUSAND DOLLARS (\$4,000) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

In the event that Respondent fails to comply with the requirements of this Order, 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 by the Respondent.

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. Communications

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 R4-2018-0806-166.

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.

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.

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;

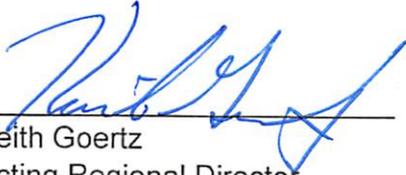
C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

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.

DATED: *March 20* 2019
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. **Within 30 days of the effective date of this Order**, Respondent shall consult with a qualified professional to assess the culvert(s) and the maintenance road to determine if the culvert(s) are adequately sized and properly installed, including a hydrology analysis of the contributing drainage basin and a hydraulic analysis of the culvert(s), and if the maintenance road is adequately constructed to prevent stormwater from entering the stream.
 - a. **Within 60 days of the effective date of this Order**, Respondent shall submit a report on the adequacy of the culvert(s) for Department review and approval. If the culvert(s) are inadequately sized or improperly installed, or if the maintenance road is discharging stormwater to areas outside the permitted Life of Mine area, the report shall include a plan to remediate the culvert (size and or installation) and stormwater controls on the maintenance road. If modifications are required for the culvert, an Article 15 Permit application must be submitted.
 - b. **Within 90 days of the effective date of receipt of Department approval of the report**, Respondent shall complete all work detailed in the report.
 - c. **Within 15 days of the completion of work**, Respondent shall notify the Department to arrange for a site inspection.

2. **Within 30 days of the effective date of this Order**, Respondent shall engage a qualified professional to conduct the following activities:
 - a. Accurately locate via survey the property line, the edge of the affected area (e.g. edge of clear cutting), and the property line in the southeast corner of the mine site, and along the eastern perimeter of the stream.
 - b. Install accurately located permit term markers around the current permit term affected area in the eastern portion of the mine (i.e. east of the stream). Current permit term markers that are inaccurately located must be moved to the correct locations (e.g. along the stream north of the conveyor, 50 ft from the eastern boundary of the Foley Property and near the Future Excavation Area).
 - c. Install accurately located permit term markers around the proposed permit term affected area that will be the subject of a permit modification application (described in Item No. 4 below).
 - d. Photographs of above described and installed permit term markers shall be submitted to the Mined Land Reclamation Specialist.

3. **Within 90 days of the effective date of this Order**, Respondent must submit to the Department for review and approval, a reforestation plan developed by a professional consulting forester for any areas that have been clear cut in the property line setbacks (eastern side of the attached map where the property line is 50 feet) and in the buffer area in the southeastern corner of the mine. The reforestation plan must include an assessment of the condition of the areas to be reforested and details on the measures to be implemented to reestablish sustainable tree growth. A schedule to complete the reforestation plan must be included. The approval restoration plan and schedule shall be incorporated into the mining permit.

4. **Within 90 days of the effective date of this Order**, Respondent shall submit to the Department, a permit modification application, to include the conveyor and maintenance road in the current Life of Mine area and any other affected areas identified outside the LOM through the survey work required in Item No. 2 (excluding property line setbacks that will be addressed in the reforestation plan set forth in Item No. 3 above). The modification application shall also include all areas affected by mining activity in the Future Excavation Area (including clear cutting) in the Permit Term Affected Area.