

**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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CERTIFIED - RETURN RECEIPT REQUESTED  
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December 14, 2018

Mr. Lester A. Sittler, Esq.  
The Law Offices of Lester A. Sittler  
P.O. Box 235  
Fly Creek, NY 13337

Re: Order on Consent  
R4-2018-1119-203  
Seward Sand & Gravel, Inc.

Dear Mr. Sittler:

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,



Stephen Repsher  
Assistant Regional Attorney  
Region 4

Enclosure

ec: J. June

**STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of Violations of Article 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-

R4-2018-1119-203

Seward Sand & Gravel, Inc.  
532 County Highway 58  
Oneonta, NY 13820,

Respondent.

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**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, Seward Sand & Gravel, Inc., is the owner of an approximately 29-acre sand and gravel mine known as the “Rider Gravel Bank,” located on State Route 23, east of County Route 10, in Davenport Center, New York (“Mine”).
3. Respondent was issued a Mined Land Reclamation renewal permit for mining activities (#4-1226-00007/00001) (the “Permit”) for the Mine, effective November 1, 2017 and expiring on October 31, 2022.
4. Respondent is a person as defined by ECL §§ 23-0101(12).

**BACKGROUND**

5. On October 2, 2017, Department staff received Respondent’s Permit renewal application.
6. During the technical review of Respondent’s Permit renewal application, Department staff determined that the mine floor elevation in the southern portion of the mine (Area #1) was approximately nine (9) feet below the final floor elevation of 1,240 feet above mean sea level (“AMSL”) in Respondent’s approved mine land-use plan (“MLUP”).
7. On October 4, 2017, Department staff conducted a site inspection and directed Respondent to dig several test pits in Area #1 to determine the approximate depth to groundwater in that area.

8. Department staff determined the water table to be located between 1,225 and 1,226 feet AMSL in Area #1 at the time of inspection, based on floor elevations provided in Respondent's renewal application.
9. On October 5, 2017, Department staff issued Respondent a Notice of Violation requiring that Respondent either backfill Area #1, or submit a permit modification application by December 1, 2017, proposing to modify the final floor elevation in that area.
10. On December 19, 2017, Department staff received a permit modification application from Respondent which proposed a final floor elevation in Area #1 of 1,210 feet AMSL, with the proposed modified reclamation objective of creating a 15-foot deep, 18.5-acre surface area pond with vegetated slopes.
11. Based on Respondent's December 19, 2017 application, Department staff determined that additional information regarding the local hydrology was required to adequately assess the impact of the proposed pond on the groundwater table elevation of several homes located down-gradient of Area #1.
12. On January 3, 2018, Department staff issued Respondent a Notice of Incomplete Application ("NOIA") based, *inter alia*, on the need for additional hydrological information described above.
13. On June 21, 2018, Department staff conducted a further site inspection and observed two trailers, mining equipment, and a sand stockpile in the buffer area of the Mine adjacent to the Mine entrance ("Area #2"), and that grading and seeding had not occurred in this area.
14. By the terms of its approved MLUP, Respondent was to have completed reclamation in Area #2, including grading and seeding, by June 1, 2018.
15. During the June 21, 2018 site visit, Department staff also observed that the area mined below the final approved floor (in Area #1) had been converted into a settling pond for the on-site processing plant.
16. After the June 21, 2018 site visit, Department staff analyzed the Mining Plan Map and aerial imagery, as well as GPS coordinates taken during the site visit, and confirmed that Respondent had mined partially into the Town of Davenport's Life of Mine ("Area #3").
17. Department staff further determined, subsequent to the June 21, 2018 inspection, that Area #3 had also been mined below the approved final floor elevation as set forth in the Town of Davenport's approved MLUP.
18. On June 25, 2018, Department staff issued Respondent a Notice of Violation which required Respondent either to backfill the affected Areas #1 and 3, or to submit a permit modification application to the Department by July 30, 2018.
19. The June 25, 2018 Notice of Violation also required Respondent to reclaim the Area #2 buffer area, as required by its MLUP, by July 30, 2018.

20. Respondent failed both to submit a permit modification application by July 30, 2018, and to provide evidence to Department staff demonstrating that Areas #1 and 3 had been backfilled as required.

21. On October 9, 2018, Department staff for Environmental Permits sent Respondent a letter requiring Respondent to submit a permit modification application within thirty (30) days.

22. To date, Respondent has failed to submit a permit modification application to the Department, nor has Respondent provided the Department with any evidence to demonstrate that the Area #2 has been reclaimed as required.

### **APPLICABLE STATUTORY / REGULATORY PROVISIONS**

23. 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.”

24. ECL § 71-1305(2) states, in relevant part, that it is unlawful for any person to “[v]iolate any 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.” (Emphasis added).

25. Regulation 6 NYCRR § 422.1(a) likewise states: “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.”

26. Permit Special Condition No. 1 states, in relevant part, “All activities authorized by this permit must be in strict conformance with the approved plans submitted by the applicant or applicant’s agent as part of the permit application.”

### **VIOLATIONS**

27. Respondent’s excavation below the approved final floor elevation in the MLUP of its approved Permit is a violation of ECL §§ 23-2713(1) and 71-1305(2); 6 NYCRR §§ 422.1(a); and Permit Special Condition No. 1.

28. Respondent’s mining activity beyond its approved Life of Mine boundary and onto the Town of Davenport’s Life of Mine is a further violation of ECL §§ 23-2713(1) and 71-1305(2); 6 NYCRR §§ 422.1(a); and Permit Special Condition No. 1.

29. Respondent’s excavation below the approved final floor elevation according to the Town of Davenport’s MLUP constitutes a separate and distinct violation of ECL §§ 23-2713(1) and 71-1305(2); 6 NYCRR §§ 422.1(a); and Permit Special Condition No. 1.

30. Respondent’s failure to reclaim the Area #2 buffer area as required by its approved MLUP is a further violation of ECL §§ 23-2713(1) and 71-1305(2); 6 NYCRR §§ 422.1(a); and Permit Special Condition No. 1.

## WAIVER OF HEARING

31. 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

32. 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.** Respondent is assessed a civil penalty in the amount of SEVENTEEN THOUSAND DOLLARS (\$17,000). FOUR THOUSAND DOLLARS (\$4,000) of the civil penalty shall be paid by company or bank check, or money order, made payable to "NYS Department of Environmental Conservation," when the signed and notarized Order is returned to the Department. Payment of this portion of the civil penalty shall not alter Respondent's obligation to complete performance under the terms of the Order.

The balance of the penalty, THIRTEEN THOUSAND DOLLARS (\$13,000), is suspended and shall not be payable, *provided that* Respondent fully and timely complies with the requirements of this Order on Consent and its Schedule of Compliance. 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, in addition to appropriate penalties for any further violations of this Order.

II. **Schedule of Compliance.** Respondent shall comply with the terms and conditions of this Order, including the attached Schedule of Compliance. 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. 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.

3(a). Respondent's modification application to be submitted pursuant to the Schedule of Compliance shall comply with the Uniform Procedure Act ("UPA") Regulations, 6 NYCRR Part 621, including § 621.4(i) governing applications under the Mined Land Reclamation Law ("MLRL"). The Department's review of Respondent's modification application will be conducted pursuant to the UPA and MLRL regulations.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department reasonably 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: Jami June  
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:

Seward Sand & Gravel, Inc.  
Attn: David Beisler, CEO  
532 County Highway 58  
Oneonta, NY 13820

**XIII. Termination.** The Order shall terminate upon Respondent's full compliance, as determined by the Department, with the terms, provisions and conditions of this Order including its Schedule of Compliance.

DATED: Rotterdam, New York  
December 13, 2018

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.

Seward Sand & Gravel, Inc.  
Authorized Representative

SIGNED:  Beisler

TITLE: Pres.

DATE: 12 12 18

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

On the 12<sup>th</sup> day of December in the year 2018, before me, the undersigned, personally appeared David R Beisler, personally known  
(Full name)

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 s/he executed the same in his/her capacity, and that by his/her signature on said instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Notary Public  
Qualified in the County of: Otsego  
My Commission Expires: 11/10/22

SARAH KRONE  
Notary Public, State of New York  
Reg. No. 01KR6314566  
Qualified in Otsego County  
Commission Expires Nov. 10, 2022

## SCHEDULE OF COMPLIANCE

1. Regarding the areas affected by mining below the approved final mine floor elevation and outside of Respondent's Life of Mine ("LOM"), Respondent shall ***either***:
  - a. **Within sixty (60) days of the effective date of this Order**, Respondent shall submit for Department approval a proposed plan to backfill the affected area within the Town of Davenport's ("Town")'s LOM by May 1, 2019 (as set forth in Item #2 below).
    - i. This plan submitted may be in the form of ***either*** a response to the January 3, 2018 NOIA, ***or*** a permit modification application which proposes a lower mine floor final elevation, but that is above the water table. If Respondent withdraws the modification, a plan to backfill the area within the Town's LOM must still be submitted.
  - b. **By May 1, 2019**, backfill the areas in the Rider Gravel Bank that have been mined below the approved final floor elevation, to the approved reclamation grades for Respondent's and Town's respective Reclamation Plans.
2. **By May 1, 2019**, Respondent shall backfill the areas within the Town's LOM boundary to the reclamation grades shown on the Town's approved Reclamation Plan.
3. **By May 1, 2019**, Respondent shall remove all trailers, equipment, and stockpiled material from the buffer area between Respondent's LOM and the Town's LOM, and shall grade and seed the area per Respondent's approved Reclamation Plan.
4. Compliance with this Schedule shall not be a defense to subsequent violations.