

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
7017 1070 0001 0125 9227

March 15, 2019

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

Re: Order on Consent
R4-2019-0111-3

Dear Mr. Beisler:

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

This will also acknowledge receipt of \$8,206 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: P. Wyckoff
D. Thorsland

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations
of the Environmental Conservation Law
Articles 17 and 23

by

Order on Consent
File No. R4-2019-0111-3

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

Respondent

WHEREAS:

1. The Department of Environmental Conservation ("Department" or "DEC") is an Agency of the State charged with jurisdiction over the protection of water quality of the State pursuant to Article 17 of the Environmental Conservation Law ("ECL") and the rules and regulations promulgated thereto.
2. Respondent is a person as defined at ECL §17-0105(1), and regulations at 6 NYCRR 700.1 (a)(43).
3. 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.
4. Respondent is a person, as that term is defined at ECL 23-2705(12), and regulations at 6 NYCRR 420.1 (p).
5. Respondent was issued a DEC Permit (ID # 4-3640-00010/00003) effective July 5, 2013 through July 4, 2018, modified October 12, 2016 through July 4, 2018 which authorizes "*Continued operation and modification of a 64 acre Life of Mine ("LOM") surface unconsolidated sand and gravel mine for which a previous permit has been issued under Article 23, Title 27, of the Environmental Conservation Law (Mined Land Reclamation) of which 55 acres are authorized to be affected during the permit term, including the use of on-site processing equipment and the importation of sand and gravel from the Centofante (Greenhouse Grocery) Mine, MLF #40658.*". The permit's expiration is extended under State Administrative Procedures Act because the respondent submitted a timely and sufficient application for renewal with modification, which is still in process. The permit authorizes mining of a sand and gravel mine known as Oneonta Bank (Hemlock Road), 532 CO Rte 58, Oneonta, New York ("site").
6. Department staff inspected the mine on January 4, 2019.

Laws, Regulations and Permit Conditions – Water

7. Regulations at 6 NYCRR 750-1.4(b) provides that “*For discharges of storm water that are not to groundwater, permits shall be required in accordance with 40 CFR 122.26 except as provided in section 1069 of the Federal Intermodal Transportation Efficiency Act of 1991.*”

8. ECL Article 17-0803 provides that “*Except as provided by subdivision five of section 17-0701 of this article, it shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant hereto or in a manner other than as prescribed by such permit. The department shall, by rule and regulation, require that every applicant for a permit to discharge pollutants into the waters of the state shall file such information at such times and in such form as the department may reasonably require to execute the provisions of this article. Rules and regulations adopted hereunder may provide that in lieu of issuance of such permit the department may accept as compliance herewith a permit duly issued by the federal government or an agency thereof pursuant to the provisions of the Act.*”

9. 40 CFR 122.26 provides that a permit “*prior to commencement of activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres.*”

WATER VIOLATIONS

10. At the time of the January 4, 2019 inspection, Department staff observed that construction activities at the site, which included grading activities, had disturbed more than one acre of land and have altered the surface of hydrology conditions, without coverage under the State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges from Construction Activity. In addition, no erosion or sedimentation controls were installed to prevent the mobilization and transport of soils from the property nor was a SWPPP available. Respondent’s failure to obtain coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity, prior to commencement of activities that will ultimately disturb one or more acres, is a violation of regulations at 6 NYCRR 750-1.4(b), ECL Article 17-0803, and the Federal Clean Water Act 40 CFR 122.26 (15)(i).

Laws, Regulations and Permit Conditions - MINING

11. Regulations at 6 NYCRR 422.1(a) provide 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.*”

12. 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.”*

13. Special Condition #1 of Respondent’s Mined Land Reclamation Permit requires that mining must be conducted in conformance with plans.

14. Special Condition #7 of Respondent’s Mined Land Reclamation Permit requires with respect to Tree plantings – A double row of pine containerized transplants shall be planted at a spacing of 10 ft along Gersoni Road as shown on the Mining Plan Map no later than May 15, 2017.

MINING VIOLATIONS

First Violation

15. At the time of the inspection, Department staff observed excavation, processing and stockpiling of sand and gravel occurring in a 2 acre area southwest of the office that had not previously been mined. Plans submitted by the Respondent, and approved by the Department in 2016 (including a modified Mined Land Use Plan narrative, Mining Plan Map and Reclamation Plan Map), showed that the area was planned to be removed from the Life of Mine. Despite the Respondent’s contention that excavation was done in aid of onsite construction, none of the required permits and approvals for the construction have been obtained. Therefore, the excavation does not meet the criteria to be considered a construction activity exempt from the jurisdiction of the Mined Land Reclamation Law and therefore is a mining activity in violation of regulations at 6 NYCRR 422.1(a) and Special Condition #1 of Respondent’s Mined Land Reclamation Permit.

Second Violation

16. The proposed Mining Plan Map submitted to support the recent mining permit modification application shows spot elevations in the basin in the center of the mine as low as 1115 ft amsl. The approved Reclamation Plan Map shows the reclamation grade at 1125 ft amsl at that same location, and the approved typical (cross) sections shows the estimated water table at 1112 ft amsl. The Mined Land Use Plan states that all mining will remain 5 ft above the water table. Respondent’s deviation from the Mined Land Use Plan and Reclamation Plan Map is a violation of regulations at 6 NYCRR 422.1(a) and Special Condition #1 of Respondent’s Mined Land Reclamation Permit.

Third Violation

17. At the time of the inspection, Department staff observed that approximately 20 trees have been planted in a double row along Gersoni Road in front of the house formerly owned by Sherbay with a few additional trees planted in the gaps in the existing single row of trees. However, along other sections of the road, the trees have

not been planted, or there is only a single row of trees. Fewer than half of the trees shown on the approved Mining Plan Map have been planted. Failure to plant the number of trees as set forth in the Mining Plan Map by the date specified is a violation of ECL 71-1305(2) and Special Condition #7 of Respondent's Mined Land Reclamation Permit.

Civil Penalty

18. ECL §71-1929 provides for the following civil penalties: *"A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued there under, shall be liable for a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided."*

19. ECL Section 71-1307(1) provides *"Any person who violates any provision of article 23 of this chapter or commits any offense described in action 71-1305 of this title shall be liable to the people of the state for a civil penalty not to exceed eight thousand dollars and an additional penalty of two thousand dollars for each day during which such violation continues, to be assessed by the commissioner after a hearing or opportunity to be heard."*

Waiver of Hearing

20. 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. Civil Penalty

In respect of the aforesaid violations, a civil penalty in the amount of SIXTEEN THOUSAND FOUR HUNDRED TWELVE DOLLARS (\$16,412) of which EIGHT THOUSAND TWO HUNDRED SIX DOLLARS (\$8,206) shall be paid by money order, or check made payable to the order of "New York State Department of Environmental Conservation," with the enclosed invoice and the Case Number of this Order on Consent written in the memo section of the check. The check shall be sent to:

**The Department of Environmental Conservation
Division of Management and Budget Services
625 Broadway
10th Floor
Albany, NY 12233-4900**

In the alternative, payment of the civil penalty can be made by electronic payment at <http://www.dec.ny.gov/about/61016.html#On-Line>

The balance EIGHT THOUSAND TWO HUNDRED SIX DOLLARS (\$8,206) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

The penalty assessed in the Order on Consent constitutes a debt owed to the State of New York. Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order on Consent, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset by the penalty amount any tax refund or other monies that may be owed to you by the State of New York. Any suspended and/or stipulated penalty provided for in this Order on Consent will constitute a debt owed to the State of New York when and if such penalty becomes due.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

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 Respondent.

The signed and notarized Order on Consent shall be sent to:

**New York State Department of Environmental Conservation
Region 4 Main Office
1130 North Westcott Road
Schenectady, NY 12306-2014
ATTN: Karen S. Lavery, Esq.**

II. Communications

All communications or submissions required herein with respect to mining violations shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Psalm Wyckoff, Mined Land Reclamation Specialist II, psalm.wyckoff@dec.ny.gov. All communications or submissions required herein with respect to water violations shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Derek Thorsland, Regional Water Engineer, derek.thorsland@dec.ny.gov. All communications shall include a reference to the Order on Consent Case Number R4-2019-0111-3.

III. 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.

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. Modifications and Extensions

No modifications or extensions of this Order shall be made or become effective except as may be specifically set forth in writing by the Department.

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

XIII. 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.

IX. This Order shall be in full settlement of all claims for civil and administrative penalties that have been or could be asserted by the Department against Respondent, their trustees, officers, employees, successors and assigns for the above-referenced violations.”

X. This Order on Consent is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Unless otherwise allowed by statute or regulation, Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits. Respondent's compliance with this Order on Consent shall be no defense to any action commenced pursuant to any laws, regulations, or permits, except as set forth herein.

XI. The Order on Consent will terminate when all requirements imposed by this Order on Consent are completed to the Department's satisfaction.

DATED: *March 14,* 2019
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:

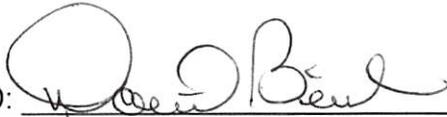


Keith Goertz
Regional Director
Region 4

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.

SIGNED: 
TITLE: Pres
DATE: 3-8-19

STATE OF New York

COUNTY OF Otsego) ss.:
)

On the 8th day of March in the year 2019 before me, the undersigned, a Notary Public in and for the State, personally appeared David Beisler 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.



Notary Public

Qualified in the County of: Otsego
My Commission Expires: 11/10/2022

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

SCHEDULE OF COMPLIANCE

WATER

1. Respondent shall immediately cease all construction activity on the site including any clearing, grading, and excavating and immediately stabilize all areas of disturbance. This directive does not preclude Respondent from stabilization of the site or installation of erosion and sediment controls as deemed necessary by a qualified professional to prevent potential impacts to water quality.
2. Within 20 days of the effective date of this Order, Respondent shall submit to the Department, a written statement of the actions taken to correct the violations and prevent further contravention of standards.
3. Within 30 days of the effective date of this Order, Respondent shall submit a SWPPP, which has been prepared in accordance with the New York State Stormwater Management Design Manual and the New York Standards and Specifications for Erosion and Sediment Control. The SWPPP must accurately reflect all existing and planned construction activity relative to this site. Respondent shall retain a qualified professional/engineer to assist in development of the plan. All appropriate approvals and coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity must be received before any construction can recommence.

MINING

4. Respondent shall **immediately cease** all excavation and grading outside the Life of Mine boundary until all required permits and approvals, including a SPDES general construction permit, a town-approved site plan, and building permit are obtained. The approvals must be submitted to the Department within 15 days of issuance/approval. The Town-approved site plan must be submitted to the Department for review and determination of jurisdiction under the Mined Land Reclamation Law (e.g. is the excavation and grading work to be conducted solely in aid of onsite construction and necessary to prepare the site for approved construction). Excavation shall not recommence until the Department has notified Respondent in writing that the excavation has been deemed an activity solely in aid of onsite construction and is deemed necessary to prepare the site for approved construction, and therefore is not subject to the jurisdiction of the Mined Land Reclamation Law. **If the above described Town approvals are not obtained by September 1, 2019**, All affected areas outside the "Lands to be affected by mining over the Life of Mine" red line shown on the Mining Plan Map dated 10/4/07 and last revised 7/25/2016 must be reclaimed in accordance with the following schedule:
 - 1) **By September 15, 2019**, the site will be regraded so that no slopes are steeper than 1V:2H.
 - 2) **Within 15 days of the completion of grading**, 6" of fertile soil shall be spread over all affected areas,

3) **Within 48 hours of the application of soil**, the following must be applied:

- a) Seed with a conservation seeding mixture that contains at least 2 legumes (ex. red clover, trefoil, etc) at the rate of 80 pounds per acre.
- b) Perform pH test and lime as necessary.
- c) Fertilize with a slow release nitrogen fertilizer at the rate of 300 pounds per acre.
- d) Hay mulch at the rate of 2,000 pounds per acre without bare spots.

The MLRS must be contacted when grading is complete to schedule an inspection.

The vegetation must reach the regulatory requirement of 75% vegetative cover in the summer of 2020. The MLRS will conduct a reclamation inspection in the summer of 2020. If the vegetation does not meet the required cover, the MLRS will require the application of additional fertile soil and seed, fertilizer and mulch.

5. **Within sixty (60) days of the effective date of this Order:** Respondent shall either backfill the basin in the center of the mine and raise the floor to the approved reclamation grades; or, in the alternative, Respondent shall submit a complete mining permit modification application to lower the approved mine floor. Such a permit modification shall include an assessment of the elevation and slope of the groundwater table. The assessment shall be based on no less than three data collection points in and/or around the mine (i.e. wells). The data collection points may include existing wells owned by the Respondent. If existing wells are not suitable for data collection (e.g. wells completed in hydrologically separate water bearing zone, or not properly located), monitor wells shall be installed for data collection. The mine floor must remain 5ft above the water table for grassland or meadow reclamation, or 3 ft above the water table for agricultural reclamation objectives. If the reclamation includes the pond or stormwater basin, the water body must be designed to function properly within the reclamation objective.
6. **By May 31, 2019**, all trees shown on the Mined Land Use Plan shall be planted with containerized transplant pines, per Special Condition #7 of Respondent's Mined Land Reclamation Permit.