

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
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CERTIFIED - RETURN RECEIPT REQUESTED

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March 7, 2017

Mr. Tim Johncox
Stewart's Shops Corp.
PO Box 435
Saratoga Springs, NY 12866

Re: Order on Consent
R4-2016-1116-163

Dear Mr. Johncox:

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

This will also acknowledge receipt of \$1500 the civil penalty pursuant to Paragraph I.

Sincerely,

Dusty Renee Tinsley / JV

Dusty Renee Tinsley
Assistant Regional Attorney
Region 4

Enclosure

ec: J. McCullough



Department of
Environmental
Conservation

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

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In the Matter of the Violation of
Article 17 of the Environmental Conservation
Law and Title 6 Part 750 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York (6 NYCRR)

**ORDER ON
CONSENT**

DEC Case
R4-2016-1116-163

By

Stewart Shops Corp.
P.O. Box 435
Saratoga Springs, New York 12866,

Respondent.

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WHEREAS:

JURISDICTION

1. The New York State Department of Environmental Conservation (“DEC” or “Department”) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to §3-0301 of the Environmental Conservation Law (“ECL”). In particular, DEC is and has been responsible for the protection of water resources of the State, pursuant to ECL Article 17 and the rules and regulations promulgated there under at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”), Part 750, et seq.

RESPONDENT

2. Respondent, Stewart Shops Corp., is constructing a new Stewart Shops store on property including 307 Main Street, Middleburgh, New York 12122 (Schoharie County)(“Property”). Located on the Property was a building that was a contributing component of the National Register eligible (since 2002) Main Street-Railroad Avenue Historic District (“Building”).

3. 6 NYCRR Subpart 750-1.2(a)(64) defines the term “person” or “persons” as “any individual, public or private corporation, political subdivision, government agency, municipality, partnership, association, firm, trust, estate or any other legal entity whatsoever.” Respondent is a person pursuant to 6 NYCRR Subpart 750-1.2(a)(64).

4. Respondent is a person pursuant to 6 NYCRR Subpart 750-1.2(a)(64).

VIOLATION

5. EPA's regulations for the permitting of stormwater discharges are found at 40 CFR §122.26.
6. Pursuant to Section 402 of the Clean Water Act ("CWA"), stormwater discharges from certain construction activities are unlawful unless they are authorized by a National Pollutant Discharge Elimination System ("NPDES") permit or by a state permit program.
7. New York's State Pollutant Discharge Elimination System ("SPDES") program is a NPDES-approved program with permits issued in accordance with the Environmental Conservation Law ("ECL").
8. ECL §17-0501 states "It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301."
9. ECL §17-0803 states "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."
10. Department regulations at 6 NYCRR Subpart 750-1.4(b) require that stormwater discharges from construction activities require a permit issued in accordance with 40 CFR §122.26.
11. Department regulations at 6 NYCRR Subpart 750-1.21(b)(2) authorize "a general permit for ... Stormwater from construction activities as defined under 40 CFR 122.26(b)(14) (x) (see section 750-1.24 of this Part)".
12. The Department issued a SPDES General Permit for Stormwater Associated with Construction Activity (GP-0-15-002), effective January 29, 2015, that is consistent with the federal permit requirements under 40 CFR §122.26 ("General Permit").
13. The General Permit states "This permit authorizes stormwater *discharges* to *surface waters of the State* from the following *construction activities* identified within 40 CFR Parts 122.26(b)(14)(x), 122.26(b)(15)(i) and 122.26(b)(15)(ii), provided all of the eligibility provisions of this permit are met: *Construction activities* involving soil disturbances of one (1) or more acres". General Permit at Part I (A)(1).

14. Parks, Recreation, and Historic Preservation Law Article 14 and 9 NYCRR Part 428 require that state agencies take into account the effect of their actions on significant historic properties and to the fullest extent practicable, avoid or mitigate impacts to such resources.

15. Pursuant to Part I (F)(8) of the Permit, “construction activities that have the potential to affect an historical property” are not authorized by this permit “unless there is documentation that such impacts have been resolved”.

16. In a July 27, 2016 letter sent from the New York State Office of Parks, Recreation, and Historic Preservation (“OPRHP”), Respondent was notified that the Building was historic, that “demolition of a historic building constitutes an Adverse Impact to the resource”, and that demolition “is an action that can only move forward after all prudent and feasible alternatives to demolition have been considered.” The July 27th letter urged Respondent to reconsider the proposed demolition and requested the following documentation be submitted to OPRHP so that the office “could continue its review of [the] project”: 1) “Further consideration of alternatives to demolition to avoid an Adverse Impact determination. Expand the alternatives analyses to include other possible uses. Perhaps the building could be used for the bank rental portion of the project. 2) Plans and elevations of the proposed new construction that will be sufficient for us to assess the potential impacts to the adjacent eligible historic district and listed and eligible properties.”

17. In or about July, 2016, Respondent demolished the Building. The Building was demolished prior to Respondent responding to the OPRHP July 27th letter and prior to the issues regarding demolition of the Building being resolved.

18. Respondent did not comply with the requirements of Part I (F)(8) of the Permit prior to demolition of the Building.

19. Respondent’s failure to resolve the issues regarding demolition of the Building resulted in Respondent not being authorized under the Permit.

20. The Respondent’s failure to obtain coverage under the Permit prior to commencement of construction activities at the Property which will disturb more than one acre of soil are violations of ECL §17-0803 and 6 NYCRR Part 750-1.4(b).

Civil Penalty

21. ECL Section 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 thereunder, shall be liable to 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. Violation of a

permit condition shall constitute grounds for revocation of such permit, which revocation may be accomplished either as provided in paragraph f of subdivision 4 of section 17-0303 or by order of judgment of the supreme court as an alternate or additional civil penalty in an action brought pursuant to subdivision 3 of this section.”

22. **Waiver of Hearing.** Respondent has affirmatively waived its right to a hearing as provided by law and has consented to the issuing of this Order and has agreed to be bound by the provisions, terms and conditions of this Order.

NOW THEREFORE, having considered this matter and having been duly advised, IT IS ORDERED THAT:

I. **Civil Penalty.** In respect to the Order’s violations, a civil penalty of FIVE THOUSAND DOLLARS (\$5,000) is assessed against the Respondent for the above violation of which ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500) 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. THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500) of the civil penalty is suspended conditioned on Respondent’s compliance with the Schedule of Compliance. Payment of the suspended civil penalty shall be due within 30 days receipt of notice from the Department setting forth the nature of the violations. The civil penalties shall be paid by check made payable to the Department of Environmental Conservation.

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

II. **Schedule of Compliance.** Respondents shall comply with the terms and conditions of this Order including the Schedule of Compliance. The attached Schedule of Compliance any plans approved thereunder are incorporated into the Order and are enforceable thereunder. Any records submitted to the Department shall have the owner’s name, facility name and address, and contact 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 subordinate thereto.

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 the Department, the State of New York, and their representatives and employees harmless 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, servants, agents, successors or assigns.

VII. **Modification.** The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding, or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound pursuant to the provisions of the Order. No informal oral or written advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, comment, or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligation to obtain such formal approvals as may be required by this Order.

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 in order for DEC 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.

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

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

D. 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

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 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 accept 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.

XII. **Default.** Respondent shall not be in default of compliance with this Order if they are unable to comply with any provision of this Order solely because of an action of a national government or court, or an act of nature, war strike, riot, or catastrophe, as to any of which the negligence or willful misconduct of Respondent was not a proximate cause. Respondent shall notify the Department in writing immediately upon obtaining

knowledge of any such event. Relief under this clause shall not be available if Respondent fails to timely comply with the notice requirement set out in this paragraph.

XIII. **Third Parties.** This Order shall not create any presumption of law or fact that shall inure to the benefit of any person other than the Department, State, or Respondent.

XIV. **Communications.** Communications shall be sent to

For Department:

Regional Water Engineer
New York State Department of Environmental Conservation - Region 4
1130 N. Westcott Road
Schenectady, New York 12306

For Respondent:

Stewart's Shops Corp.
PO Box 435
Saratoga Springs, New York 12866

Please include entity name, address, and permit number (if applicable) on all correspondence.

DATED: Rotterdam, New York
March 6, 2017

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:

A handwritten signature in black ink, appearing to read "Keith Goertz", is written over a horizontal line.

Keith Goertz
Regional Director
Region 4

Schedule of Compliance

1. Within 90 days of the effective date of this Order, Respondent shall submit to DEC staff and OPRHP staff a report that meets the requirements of the Historic American Building Survey – Historic American Engineering Record Documentation Level II as defined in the Secretary of the Interior’s Standards for Architectural and Engineering Documentation (https://www.nps.gov/history/local-law/arch_stnds_6.html) regarding the building previously located at 307 Main Street, Middleburgh, NY. The report shall be generated by an individual who meets the Secretary of the Interior’s professional qualification standard set forth in Historic Architecture or Architectural History (https://www.nps.gov/history/local-law/gis/html/table_of_contents.html).