

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violation of Environmental
Conservation Law ("ECL") Article 15
and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR")

ORDER ON CONSENT

File No. R4-2008-0407-47

- by -

TBJ Land Corp
61 Flints Crossing Road
Canaan, NY 12029

Respondent

WHEREAS:

Jurisdiction

1. The Department of Environmental Conservation ("Department") is the State agency which has jurisdiction over the environmental law and policy of the State pursuant to, *inter alia*, §3-0301 of the Environmental Conservation Law (ECL). In particular, DEC regulates and controls the water resources of the state pursuant to ECL § 15-0101 *et seq* and the rules and regulations promulgated, in part, under 6 NYCRR Part 608.
2. Regulations at 6 NYCRR 608.1(p) defines a protected stream as: "any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t) or C(t). Streams designated (t)(trout) also include those more specifically designated (ts)(trout spawning)."
3. Respondent is a person as defined at 6 NYCRR 608.1(n).
4. Respondent, TBJ Land Corp, previously owned property adjacent to the end of Gingras Road in the Town of Hillsdale through which a protected Class C (ts) stream runs and currently owns an adjacent area in the Town of Austerlitz("sites").
5. Respondent, TBJ Land Corp alleges that he no longer owns the property adjacent to the end of Gingras Road in the Town of Hillsdale and has arranged for access from the current owner to

complete the terms stated in the Schedule of Compliance.

Violation of ECL Article 15

6. Regulations at 6 NYCRR 608.2(a) provide that: "no person or local public corporation may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part."

7. On June 19, 2007, Department Staff inspected Respondent's property in the Town of Hillsdale and observed that Respondent placed twin culverts ("culverts") in the protected Class C (ts) stream, as part of a culvert replacement associated with an existing road.

8. Respondent has no permit to disturb the stream.

9. Respondent's placement of culverts in the protected Class C (ts) stream without first obtaining a permit is a violation of 6 NYCRR 608.2(a).

Civil Penalty

10. ECL § 71-1127 provides that any violator of the provisions of sections 15-0501 of the ECL cited in this Order, is subject to penalties of up to Five Hundred Dollars (\$500) for each violation and an additional penalty of not more than One Hundred Dollars (\$100) per day for each day that such violation continues and authorizes the Commissioner to enjoin such violations.

Waiver of Hearing

11. 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 agree to be bound by the terms, provisions and conditions contained herein.

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

I. With respect to the violation identified in this Order, Respondent is hereby assessed a civil penalty of FIVE HUNDRED DOLLARS (\$500) which 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. Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

II. The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or for it.

III. The terms of 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.

IV. 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, his directors, officers, employees, servants, agents, successors or assigns.

V. 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.

VI. Respondent shall allow duly authorized representatives of the DEC access to the Hillsdale property without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

For Department:
Regional Natural Resources Supervisor
New York State Department of Environmental Conservation
Region 4
1130 N. Westcott Road
Schenectady, New York 12306

IX. This Order is deemed effective on the date signed by the Department.

X. 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 or permits issued 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, his agents, his servants, his employees, his successors and his assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's 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.

XI. A. Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal 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 applicable state and federal regulations and laws 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 plans and reports shall be incorporated into and become an enforceable part of this Order.

B. 1. If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within thirty (30) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department reserves its right to take whatever action it deems necessary after the second disapproval of a submittal.

XII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations alleged in this Order.

XIII. 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, state or local government or court, or an act of a 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 DEC 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.

On the ____ day of _____ in the year 200__, before me, the undersigned,
personally appeared _____,
(Full name)

personally known to me who, being duly sworn, did depose and say that he/she/they reside at

(Full mailing address)

and that he/she/they is (are) the _____
(President or other officer or director or attorney in fact duly appointed)

of the _____,
(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.

Notary Public, State of New York

SCHEDULE OF COMPLIANCE

1. By August 15, 2008, Respondent shall submit to the Department, a plan for approval, prepared by a qualified professional, to either replace the culverts with a single span design capable of handling a minimum of a 50 year flood or a culvert with 20 % of its diameter embedded so as to allow for a natural stream bottom.
2. By September 15, 2008, Respondent shall remove the culverts and replace them with the approved design as specified in paragraph #1 above, while utilizing erosion control measures to prevent turbidity. Respondent reserves the right to assert an affirmative defense in any action or proceeding brought by or on behalf of the Department against Respondent for violations of Article 15 herein or of this Order based on a denial of access (or any other acts or omissions) by the landowner of the property adjacent to the end of Gingras Road in the Town of Hillsdale. Respondent has the burden of proof in asserting an affirmative defense.