

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
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CERTIFIED - RETURN RECEIPT REQUESTED
7016 0340 0000 4616 5966

January 25, 2018

Theodore Kilmer
443 State Route 374
Nicholson, PA 18446

Re: Order on Consent
R4-2017-1115-274

Dear Mr. Kilmer:

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

This will also acknowledge receipt of \$6,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Stephen Repsher
Assistant Regional Attorney
Region 4

Enclosure

ec: P. Wyckoff
D. Thorsland
T. Brady
M. Barrie



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations of
Articles 17 and 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-

R4-2017-1115-274

Theodore Kilmer
443 State Route 374
Nicholson, PA 18446,

Respondent.

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. The Department is also charged with responsibility for the protection of water resources of the State, pursuant to ECL Article 17, and the rules and regulations promulgated there under at 6 NYCRR, Part 750, *et seq.*
3. Respondent Theodore Kilmer is the owner of a bluestone mine known as Savino Quarry, and located at 9511 County Road 20 in Masonville, New York (“Mine”).
4. Respondent was issued a Mined Land Reclamation renewal permit for mining activities (#4-1242-00063/00001) (the “Permit”) for the Mine, effective December 1, 2016 and expiring on November 30, 2021.
5. Respondent is a person as defined by ECL §§ 23-0101(12) and § 17-105(1).

Background

6. On September 13, 2017, Department staff inspected the Mine site and observed that Respondent had constructed a new access road approaching the Mine from the north. The original access road approached the Mine from the east.
7. The new access road is not depicted on Respondent’s approved Mining Plan Map, nor is it included or mentioned in the approved plans.

8. Department staff took Global Positioning System (“GPS”) coordinates along the road and, following the September 13, 2017 site inspection, uploaded them into the Department’s Geographic Information System (“GIS”) software.
9. GIS imaging confirmed that the new access road is located outside the Life of Mine (“LOM”).
10. GIS imaging further confirmed that the new access road crosses a stream identified by the Department as a sub-tributary of the Susquehanna River (Water Index # SR-139-4-2) and designated as a Class “C” stream pursuant to 6 NYCRR § 701.8.
11. The new access road crosses said stream at two points, one involving a prior diversion of the stream, and one in a previously undisturbed area further downstream.
12. During the September 13, 2017 inspection, Department staff also observed a large drainage trench constructed adjacent to the entrance road to the Mine which extends outside the LOM and which discharges to the diverted stream.
13. Department staff subsequently sent Respondent a Notice of Violation, dated September 19, 2017, stating that Respondent as permittee of the Mine, was in violation of its Permit.
14. On November 6, 2017, Department staff from the Mining, Water, and Fish & Wildlife Divisions, as well as the Office of General Counsel and staff from the U.S. Army Corps of Engineers, conducted a site visit at the Mine to determine the extent of violations.
15. During the November 6, 2017 site visit, Department staff confirmed that construction activities for the access road had disturbed more than one acre of land without coverage under the State Pollutant Discharge Elimination System (“SPDES”) General Permit for Stormwater Discharges from Construction Activity.
16. Also during the November 6, 2017 site visit, Department staff observed runoff from an existing retention point in the eastern portion of the Mine site discharging turbid water outside the LOM.
17. During the November 6, 2017 site visit, Department staff further observed runoff from the Mine causing turbidity in the diverted stream previously identified as Class “C” stream SR-139-4-2.

VIOLATIONS

Life of Mine Violations

18. 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.”
19. Regulation 6 NYCRR § 422.1(a) likewise requires that “[a]fter 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.”
20. ECL § 71-1305(2) states, in relevant part, that it shall be unlawful for any person to violate “any order or condition of any permit of the department made pursuant [to ECL

Article 23].”

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

22. Special Condition No. 9 of the Permit states, “There shall be no natural swales or channels or constructed features such as ditches, pipes, etc., that are capable of discharging waters to any offsite areas outside of the Life of mine except those explicitly described and shown in the narrative and graphic portions of the approved Mined Land Use Plan. All silt laden water and storm water generated on, or running across, the site shall be retained within the approved project area.”

23. Respondent’s construction of a new access road extending outside the LOM is an ongoing violation of ECL § 23-2713(1), 6 NYCRR § 422.1(a), and Special Condition #1 of the Permit.

24. Respondent’s construction of a drainage trench adjacent to the access road, extending outside the LOM is an ongoing violation of ECL § 23-2713(1), 6 NYCRR § 422.1(a), and Special Conditions #1 and #9 of the Permit.

Turbid Discharge Violations

25. ECL § 17-0501 states that “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.”

26. ECL § 17-0803 states, in relevant part, 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”

27. Regulation 6 NYCRR § 750-1.4 states, in relevant part, that “For discharges of storm water that are not to groundwater, permits shall be required in accordance with [federal law].”

28. Regulation 6 NYCRR § 703.2 prohibits any increase in the turbidity of a classified water body “that will cause a substantial visible contrast to natural conditions.”

29. Respondent’s construction of a drainage trench adjacent to the access road, which discharges turbid water into a Class “C” stream is an ongoing violation of ECL § 17-0501, ECL § 17-0803, 6 NYCRR § 750-1.4, 6 NYCRR § 703.2, and Permit Special Condition #9 of the Permit.

30. The unpermitted discharge of turbid waters from Respondent’s existing retention pond in the eastern portion of the Mine Site to an area outside the LOM is also an ongoing violation of ECL § 17-0501, ECL § 17-0803, 6 NYCRR § 750-1.4, 6 NYCRR § 703.2, and Permit Special Condition #9 of the Permit.

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.** With respect to the Order’s violations, a civil penalty in the amount of EIGHTEEN THOUSAND DOLLARS (\$18,000) is assessed against the Respondent for the above violations. SIX THOUSAND DOLLARS (\$6,000) of the civil penalty shall be paid to the Department by company or bank check made payable to “NYS Department of Environmental Conservation” at the time this Order is signed, notarized, and returned to the Department. Payment of this portion of the civil penalty shall not in any way alter Respondent’s obligation to complete performance under the terms of the Order.

The balance of the penalty, TWELVE THOUSAND (\$12,000), is suspended and shall not be payable, *provided that* Respondent fully complies with the requirements of this Order on Consent and its Schedule of Compliance in a timely fashion. 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, and any plans approved pursuant thereto are incorporated into this Order and are enforceable hereunder. 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. Whatever right the Department may have to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, 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 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. 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 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 the Department's stated reasons for disapproving the initial submittal.

3(b). After receipt of a revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submittal 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 submittal 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. **Communications.** Communications shall be sent to:

For Department:

New York State Department of Environmental Conservation
Region 4
Attn: Psalm Wyckoff
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:

Theodore Kilmer
443 State Route 374
Nicholson, PA 18446

DATED: Rotterdam, New York
January 25, 2018

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent, ^{PA.} ~~Theodore~~ Kilmer, 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.

SIGNED: Theodore Kilmer

PRINTED: THEODORE KILMER

DATE: 1-22-18

STATE OF ~~NEW YORK~~ ^{PA.})
COUNTY OF Wyoming) ss.:

On the 22nd day of January in the year 2018, before me, the undersigned,

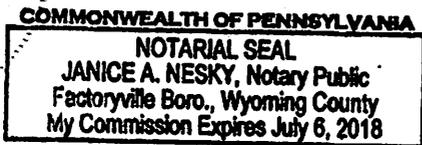
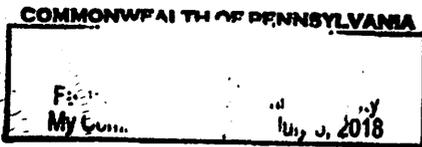
personally appeared Theodore Kilmer, personally known
(Full name)

to me who, being duly sworn, did depose and say that he resides at:

443 State route 374 Nicholson Pa 18446
(Full mailing address)

and who executed the above instrument.

Janice A. Nesky
Notary Public
Qualified in the County of:
My Commission Expires:



SCHEDULE OF COMPLIANCE

1. **Respondent shall immediately** cease all construction activity associated with the access road, including any clearing, grading, and excavating, and shall immediately stabilize all areas of disturbance. (*This directive shall not preclude Respondent from stabilizing the area or installing erosion and sediment controls as deemed necessary by a qualified professional to prevent further impacts to water quality*).

2. **Within thirty (30) days of the effective date of this Order**, Respondent shall consult a qualified professional to develop a plan to remediate the undersize culverts along the access road in conformance with all requirements of the General Conditions of the Clean Water Act, Section 401 Nationwide Permit for Blanket Water Quality Certification.
 - a. **Within sixty (60) days of the effective date of this Order**, Respondent shall submit the plan to the Department for approval.

 - b. **Within ninety (90) days of receipt of Departmental approval**, Respondent shall complete all work related to the replacement of the undersized culverts under the access road.

 - c. **Within fifteen (15) days of completion of work** related to the replacement of the culverts, Respondent shall notify the Department to arrange for a site inspection.

3. **Within thirty (30) days of the effective date of this Order**, Respondent shall submit to the Department a plan to remediate the turbid discharge from the Life of Mine, including the existing retention pond in the northeastern portion of the Mine, and the recently-constructed drainage trench on the northern Mine perimeter.

The plan must be reviewed and approved by the Department prior to implementation, and must include a schedule for completion of the remediation work by **May 31, 2018**.

To effectuate this remediation, Respondent shall either:

- a. Contain all stormwater onsite, with no discharges, by:
 - i. Enlarging the existing retaining pond northeastern portion of the Mine; AND

 - ii. Creating a new retaining pond of sufficient size to contain the water from the recently-constructed drainage trench;

Or, in the alternative, Respondent shall:

- b. Evaluate all potential discharges and submit an appropriate SPDES permit application.
4. **Within ninety (90) days of the effective date of this Order**, Respondent shall submit to the Department a permit modification application, to include all affected area outside the current Life of Mine (LOM), including the diverted stream crossing and all portions of the access road south of the diverted stream crossing, as well as the drainage trench.

NOTE: Respondent will be required to post additional funds to its surety bond, at an approximate rate of \$7,000 per acre of additional area to be included within the LOM as modified.

- a. **Within thirty (30) days of receipt of the Notice from the Department of receipt of Respondent's permit modification application**, Respondent shall pay forth any such additional bond increase to the custodian of the bond to cover the additional area specified in Respondent's modification application to be added to the LOM.
5. Compliance with this Schedule shall not be a defense to subsequent violations.