Brattleboro, VT August 30, 2018

Response to Natural Resources Board Proposed Administrative Order from

Riverbend Associates Limited Partnership and
Edward C. Childs, Respondents.

In general, it is the true belief of Respondent: that it is the failure of State Agency personnel to communicate openly and honestly, in a forthright manner with Respondent relative to his compliance status over the last twenty-four years, which lies at the root of the present "VIOLATION" Order.

With regards to the alleged violations individually:

I. Tree harvesting which occurred within regulated stream buffers was not significant in scale nor intentional, except at major skid road crossings. This logging was supervised by a subcontracted forestry professional, as required by previous ACT 250 conditions to my permit. Some of the felled trees shown to Respondent by Investigators during the 2016 site visit with Peter Gill were along an "intermittent stream," not a "permanent stream" as stated in the Violation.

At all times more than adequate closed canopy percentage remained over the length of stream channels.

II. Harvesting of hemlock trees within stands shown as "potential critical habitat"* designation was discussed with Agency personnel including a documented site visit by ANR Investigator, Mary Beth Adler, in July of 2012, and regular phone follow up with Sam Schneski, County Forester. Agency personnel, including Chris Bernier of ANR, stated in 2013 "(he) knew what we were doing in the hemlock stands all during 2012, but (he) didn't issue a stop work order because it would have caused the logger a financial hardship." Meanwhile Respondent and Respondent's forester assumed the ongoing harvesting operations had been approved, as necessary, since full disclosure of the cutting operations proposed had been made to agency personnel, including Mary Beth Adler, during the July 2012 site visit, when the initial hemlock harvesting had begun. Respondent and his forester were totally unaware of any perceived problems with the operations until the meeting at ANR offices at Springfield the following September in 2013.

* "Potential critical habitat" refers to a 1994 mapping effort to show areas which could offset habitat affected by future development activities, which between 1994 and 2012 had failed to materialize. It was not some absolute "critical … never alter in any way" kind of indication.

The September 2013 meeting, with Stephanie Gile (NRB) and Forrest Hammond of ANR took place at Respondent's behest, in order to finally facilitate the Department's understood need to grant written permission to harvest hemlock and other species within the deed restricted acreage of the critical habitat reserve. Respondent entered that meeting with his forester, Stephen Hardy, of Green Mountain Forestry, totally unaware of any outstanding or impending violations of his permits from the previous year's harvesting activities.

Extensive logging in hemlock stands which are next in line to be deeply affected by the Hemlock Wooly Adelgid (HWA) infestation is both prudent and "silviculturally indicated" in order to reduce crown closure, as a major pathway for tree infestation is from branch to branch contact with infected trees.

III. Respondent never knew that the adopted and approved forest management plan for use with the Current Use program was insufficient for the purposes of Vermont Department of Fish and Wildlife. At the 2013 meeting in Springfield, at the ANR office, Forrest Hammond of ANR/Forestry said he knew the required forestry plan was "missing" as early as 2007, when he visited the site to review it for possible Verizon Cell Tower use. Respondent had always assumed that the UVA plan, signed by State officials and accepted, was sufficient forest management plan for the subject parcel and duly approved. Failure on the part of several State officials to inform Respondent otherwise would seem to satisfy conditions of a "waiver" of this requirement and violation.

IV. Failure to permanently deed restrict 82 acres. This has remained an ongoing issue over the years, and much effort was expended in 2007 time frame to consider moving the critical habitat to a "square" near the interstate, including with Jeffrey Wallin, wildlife biologist under contract with Verizon. Respondent believes Verizon worked with Chris Bernier and Forrest Hammond on this matter. As early as 1998 Respondent sent proposed covenants to State officials, who repeatedly sat on the documents and didn't respond. The relevant acres were clearly also protected by permit conditions, so Respondent believed this matter could wait for final adjudication as part of the next permit amendment effort, which was always "right around the corner." Lately, (these last five years,) NRB staff (Stephanie Gile) has thwarted efforts of Respondent to bring issues into compliance by claiming Respondent is "out of compliance, under investigation and 'not allowed' to submit new permit amendments."

V. Clearly the "delineation on the ground" of the 'deed restricted acres' cannot be completed when the actual covenant of the has still not been perfected, either through insufficient efforts of Respondent or "stonewalling of the matter" on behalf of the District Coordinator (April Hensel, Stephanie Gile) or people under their supervision or whatever. This "violation" is merely a technicality and should be waived until permit amendment Hearings take place…which is expected to happen soon.

VI. Alteration of a parcel without approval.

Respondent states that the land has not been altered in any significant fashion, and that the "dwelling" with "wood heat" is really a seasonal camp, used sometimes in the winter, for purposes of maintaining a site presence by a "watchman" type person who provides some site security to abate vandalism etc. Norman Woodbury approached respondent about camping on the site around the time of 9/11 terrorist attacks (2001,) and it seemed prudent to have some presence near the interstate and the local infrastructure (railroad, major dam upstream from operating nuclear power plant.) State officials (State Police, NRB investigators, ANR wildlife personnel, Town employees) have known of this temporary "security personnel" arrangement for the last almost twenty years, and no one has ever complained before.

Discussions between Respondent and NRB enforcement personnel, prior to the filing of the Proposed A.O., always presumed the future of this temporary "seasonal" housing arrangement would be made a subject of the next permit amendment application, which for years had been expected to occur around the "Caer Coburn" housing project, during the 2005- 2007 time frame. Permitting efforts would be expected to follow any A.O. or A.O.D.

IN CONCLUSION:

Respondent firmly believes all issues recorded as “VIOALTIONS” should and could be settled within scope of renewed permit amendment application Hearings before the District Commission.

Further notes to the individual alleged violations:

II. Logging of hemlock. Language cited is from the -1 permit from 1995. Prohibition of logging any hemlock was not a good idea in 1995, and it had become a critical blunder from a hemlock preservation standpoint in 2012. Respondent engaged with ANR personnel to revisit this condition by and through his professional forester representative, Mr. Stephen Hardy of Green Mountain Forestry. Respondent rejects the notion that this logging was done without permission or “implied consent” of ANR personnel. ANR personnel was consulted and informed prior to the hemlock harvesting, and both Respondent and his representative were satisfied that permit conditions had been met as far as logging on “potential hemlock critical habitat” not lying within the deed restricted acreage. Actual withholding of “required written consent” by ANR officials was unreasonable and not disclosed to Respondent.

The proposed AO omits any mention of the visit to the site by Mary Beth Adler, the ANR investigator, in July 2012. This detailed site visit led Respondent to believe he was in compliance and that the harvesting program was duly authorized.

III. Lack of Approval in writing for harvesting hemlock in critical habitat. #21. Proposed AO states Stephanie Gile informed Respondents Department had not approved tree harvesting, eight months after the tree harvesting had occurred. Yet Forrest Hammond said he knew the plan was not sufficient as early as 2007. Respondent believed the submitted and approved UVA plan was sufficient for all purposes and accepted by Fish and Wildlife the entire time. Stephanie Gile or April Hensel did not send a letter or contact Respondent at any time over the previous 18 years stating that the project’s forest management plan was not the necessary forest management plan. Failure on the part of State personnel for almost twenty years, to insist on a different plan should be sufficient grounds to grant Respondent a waiver on this matter of the plans.

This behavior of NRB personnel (Hensel and Gile) to attempt to find potential issues of non-compliance by subject permittees, and then to withhold this information from permittees is counter-productive, financially damaging and unprofessional.

IV. Lack of permanent deed restrictions. The deed restricted critical habitat (82 acres) has always (since 1995) been “protected” by ongoing permit conditions. Respondent tried numerous times to engage in a negotiation to produce a covenant (1998, 2012) and NRB personnel continually dropped the ball in this matter, almost as if to cost Respondent unnecessary legal fees to continue to engage in a one-sided negotiation. NRB assumes some responsibility for this failure as #35 states “Board has not assessed a penalty for this violation.” This hollow point is moot since the penalty proposed is so draconian and over-sized.

V. Delineation cannot happen until the covenants are perfected. This condition is moot.

VI. Crude camp-style structure is clearly not a permanent dwelling and ANR personnel have known about this arrangement since at least 2007 and probably earlier. Respondent is willing to make a review of this temporary situation part of the permit amendment action once the project is allowed to proceed on a "going forward" basis.

NRB needs to understand that the referral for violation in this matter dated from October 2013, when Stephanie Gile issued a "stop work" order by email. Not until February 2016 did the NRB issue a formal letter of violation, almost two and a half years after the referral. This evident violation of due process by itself ought to invalidate the proposed fines and expenses.

Negotiations had been ongoing on with Peter Gill until they bogged down in 2017, as the forester was unable to work on the forestry plan at the time and other matters intervened.

ORDER

Requiring a survey map of the covenanted acres will constitute an unreasonable expense to Respondent who believes a sufficiently accurate map can be produced with survey grade GPS used in a forestry mapping effort.

Fines are prohibitively high and will cause Respondent to face insolvency.

General Problems/Issues

For almost thirty years, with little or no financial gain, Respondent has attempted to protect this land and to follow regulations. The Riverbend Associates land has been kept in an environmentally compliant and healthy condition. Instead of receiving the advice and support of Agency personnel, Respondent has met with inefficient communications from a hostile regulator, in spite of paying out some $250,000 in property taxes and all application fees etc. Respondent has not engaged in illegal activities and does not pollute the land. Respondent merely wishes State personnel would negotiate in good faith, and Respondent does not believe his good faith efforts have been requited.

It would appear from Respondent's personal experience that Act 250 is all bad cop and no good cop; the original authors of the law insisted Act 249, the "planning component" of Act 250 be passed simultaneously to avoid this type of compliance trap. In this case NRB personnel were assumed to have sanctioned the hemlock logging, since they never asked for it to stop, only to later have these same personnel turn around and try to collect exorbitant fines, after the logging had already occurred.

The proposed fine for this innocent mix up is almost half of total fines collected by NRB for all settlements in a given year, on a five year moving average basis. This is an excessive levy for an honest "mistake" which NRB personnel didn't even try to correct when they knew "all about it" in real time.

Instead of $63,425 the five year average fine collected is $5,543.

Instead of $6,673.43 to reimburse costs, the five year average for costs collected is $494.31

2012 Vermont Statutes

Penalties: Amount of penalty shall consider "degree of actual or potential impact on public health, safety, welfare and environment from the 'violation.' In actual fact: the impact on anyone or any white tailed deer from logging activities on the project are close to nil. The cutting is beneficial and the remaining hemlock stands are vigorous and healthy. Long term damage to functioning habitat is non-existent if not in fact beneficial.

The original delay by the Secretary in seeking enforcement (28 months from October 2013 to February 2016) is totally unreasonable and evidence of violation of due process. Another exonerating factor is that Respondent did not know any violation existed regarding the 2012 hemlock harvest. Why else would Respondent have scheduled a meeting with ANR and NRB personnel to discuss the permit requirements for the proposed logging in the deed restricted habitat if we had known we were in a VIOLATION standing from the prior year's harvest?

Respondent understood Covenant was outstanding, but Respondent assumed this matter could be attended to in the next permit amendment action, which was always expected to occur at any moment, over the last twenty years.

Generally, NRB personnel (Hensel, Gile, McMenemy) have engaged in a pattern of harassing this particular Respondent. This may be due to Respondent's letter to ANR Chief, Alan Elser, from 1994, asking for somebody to encourage April Hensel and Jay McMeneny to be a little more helpful. Respondent supposes this effort was not appreciated, especially since the nicely worded letter was made an Exhibit of the 1995-1 permit application. This old, ill-considered (perhaps) letter, from 1994, may go a long way to explaining the political nature of this particular conflict.

Submitted by Edward C. Childs, Respondent and Managing General Partner Riverbend Associates Limited Partnership