

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

Docket No. _____

Natural Resources Board,
Petitioner

ADMINISTRATIVE ORDER

v.

J.M. ROWLEY CORPORATION,
Respondent

Having found that J.M. Rowley Corporation ("Respondent") committed a violation as defined in 10 V.S.A. § 8002(9), the Natural Resources Board ("Board"), pursuant to 10 V.S.A. § 8008, hereby issues the following Administrative Order:

VIOLATIONS

- I. Failure to comply with Condition 19 of Land Use Permit 4C0534-5 (the "-5 Amendment") and 10 V.S.A. § 1259(a) by discharging waste material into surface waters of the State.
- II. Failure to comply with Condition 20 of the -5 Amendment by disturbing the 50-foot buffer between all watercourses and disturbed areas subject to the permit.
- III. Failure to comply with Act 250 Rule 34(A) and Condition 25 of Land Use Permit 4C0534-4 (the "-4 Amendment") by constructing and using a fuel storage area.

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

General Background

1. Respondent is a Vermont corporation with a principal place of business in Milton. Scott Allard is Respondent's president.
2. On November 15, 2012, the District 4 Environmental Commission issued the -5 Amendment to Respondent. The -5 Amendment applies to a project area consisting of 15 acres of a 277-acre tract of land in Milton, Vermont (the "Property"). The Property is included in those lands and premises described in a warranty deed recorded in Book 48, pages 147-49 of the Town of Milton land records.
3. The -5 Amendment authorizes the "continued operation of an existing sand

extraction pit,” tree clearing within the permitted active pit area, and “after-the-fact approval for tree clearing and expansion of the active sand pit at the northwest corner of the pit.”

4. Reggie Smith & Son Trucking & Excavating, Inc. (“Reggie Smith Excavating”) participates in the operation of the permitted sand extraction pit.
5. Reggie Smith Excavating is also a Vermont corporation with a principal place of business in Milton. Reginald Smith is the president and vice president of Reggie Smith Excavating.
6. On December 3, 2009, the District 4 Environmental Commission issued the -4 Amendment to Respondent. The -4 Amendment gave after-the-fact approval for the creation of a three-lot subdivision and the construction of single-family residences on Lots 2 and 3.
7. Exhibit 34 to the -4 Amendment is a site plan titled “Archeological Buffer Plan and Building Record Drawing” and dated November 24, 2009. According to this plan, the Property lies wholly within Lot 1.

Discharging Waste Materials into Surface Waters

8. Condition 19 of the -5 Amendment states, “[T]he Permittees shall not cause, permit or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittees from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont’s Water Pollution Control Law.”
9. 10 V.S.A. § 1259(a) states, “No person shall discharge any waste, substance, or material into waters of the State...without first obtaining a permit for that discharge from the Secretary.”
10. 10 V.S.A. § 1251(13) defines “waters” as “all rivers, streams, creeks, brooks, reservoirs, ponds, lakes, springs, and all bodies of surface waters, artificial or natural, which are contained within, flow through, or border upon the State or any portion of it.”
11. There are two streams adjacent to the sand extraction pit on the Property. One lies along the northwestern border of the pit (“Western Drainage Way”) and the other lies along the eastern border (“Eastern Drainage Way”). Both are identified as drainage ways on Exhibit 14 of the -5 Amendment, which is a site plan titled “Pit Operation Plan, Rowley Farm Sand Pit” and dated April 1, 2012.
12. On September 23, 2014, an Agency of Natural Resources staff member

observed that Respondent had pushed trees and sand over the bank of and into the Eastern Drainage Way. This staff member confirmed that these discharges impacted the Eastern Drainage Way's ability to provide aquatic habitat.

13. On October 1, 2014, and October 20, 2014, the Board's Enforcement Officer and Agency of Natural Resources staff visited the Property. They observed evidence of stormwater and sediment discharges from extraction areas into both drainage ways. They also observed that stumps and woody debris had been discharged into the drainage ways.
14. Through conversations with Mr. Allard and Mr. Smith, the Board's Enforcement Officer learned that in 2012 Respondent discharged stumps and debris into the Western Drainage Way. In 2013 Respondent also caused discharges into approximately 340 linear feet of the Eastern Drainage Way. Finally, in 2014 Respondent caused discharges into approximately 374 linear feet of the Eastern Drainage Way.
15. Respondent did not obtain a permit prior to discharging sand, sediment, and woody debris into the Western and Eastern Drainage Ways.
16. By causing such discharges without a permit, Respondent violated Condition 19 of the -5 Amendment and 10 V.S.A. § 1259(a).

Disturbing the 50-foot Buffer of a Watercourse

17. Condition 20 of the -5 Amendment states, "the Permittees shall maintain a 50-foot undisturbed, naturally vegetated buffer strip between all watercourses on the project site and any disturbed areas."
18. During his site visits, the Board's Enforcement Officer observed that Respondent excavated earth material, pushed over trees with heavy equipment, and deposited sand, stumps and logs within the 50-foot buffers of the Western and Eastern Drainage Ways.
19. Respondent's activities within these 50-foot buffers negatively impacted streamside forested habitat for terrestrial species, reduced tree canopy for shading and cooling aquatic habitat, removed vegetative filter to trap pollutants, and disrupted the drainage patterns of and increased sedimentation of the Western and Eastern Drainage Ways.
20. By disturbing the 50-foot buffer of the Western and Eastern Drainage Ways, Respondent violated Condition 20 of the -5 Amendment.

Construction and Maintenance of the Fuel Storage Area

21. Act 250 Rule 34(A) states, “An amendment shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit. Commencement of construction on a material change to a permitted development or subdivision without a permit amendment is prohibited.”
22. Act 250 Rule 2(C)(6) defines “material change” as “any cognizable change to a development or subdivision subject to a permit under Act 250...which has a significant impact on any finding, conclusion, term or condition of the project’s permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. §§ 6086(a)(1) through (a)(10).”
23. Condition 24 of the -4 Amendment states, “The Permittees will identify the remaining portion of VT-CH-1073, site VT-CH-140, and all other un-tested portions of Lots #1-#3 outside the building areas defined in Lots #2 & #3 and the footprint of the gravel/sand extraction area in Lot #1 as not-to-be disturbed archeological buffer zones.”
24. Condition 25 of the -4 Amendment states, “Topsoil removal, grading, scraping, cutting, filling, stockpiling, or any other type of ground disturbance is prohibited within the archeological buffer zones without written approval of the District #4 Environmental Commission and the DHP.”
25. Exhibit 34 of the -4 Amendment depicts the entire are of Lot #1 outside the Property as an a “not-to-be-disturbed archeological buffer area.”
26. During his site visits, the Board’s Enforcement Officer observed that Respondent had constructed a 150-square foot gravel fuel tank storage area (“Fuel Tank Storage Area”) on the north side of the access road to the Property and within the not-to-be-disturbed archeological buffer area.
27. Respondent confirmed for the Board’s Enforcement Officer that it constructed the Fuel Tank Storage Area in the summer of 2014 to stage and temporarily store propane tanks related to its heating fuel business.
28. Construction of the Fuel Tank Storage Area constitutes a material change to the permitted project. By constructing it without a permit amendment, Respondent violated Act 250 Rule 34(A).
29. In addition, by constructing the Fuel Tank Storage Area in the not-to-be disturbed archeological buffer area without written approval of the District #4 Environmental Commission, Respondent violated Condition 25 of the -4 Amendment.

Notice of Alleged Violation

30. On October 27, 2014, the Board's Enforcement Officer issued Respondent a Notice of Alleged Violation ("NOAV") for the above-described violations except for the violation of Condition 25 of the -4 Amendment.
31. The NOAV mandated various compliance directives and provided an opportunity for Respondent to address the facts concerning the alleged violations and provide any reason that it could not comply with the compliance directives in a timely manner.
32. On November 10, 2014, Respondent responded to the NOAV in writing. It acknowledged the violations and agreed to follow the compliance directives.
33. The Board's Enforcement Officer conducted a site visit of the Property on April 13, 2017. Site conditions indicated Respondent properly followed the temporary compliance directives regarding mitigation of the damaged stream buffers.
34. On March 9, 2015, Respondent filed an application for a land use permit amendment for after-the-fact approval of the Fuel Tank Storage Area. To-date Respondent has not proceeded with the amendment process, apparently due to concerns raised during the Town of Milton's separate review process.

ORDER

- A. Respondent shall comply with the permit series 4C0534 and shall immediately cease all activities that are inconsistent therewith.
- B. No later than **June 30, 2019**, Respondent shall plant approximately 70 white pine trees along the outside edge of the 50-foot riparian buffer along the Western Drainage Way as denoted on **Exhibit A**. All trees planted shall be between 2-6 feet in height and spaced at 10-foot intervals along the approximately 714-foot stretch. Respondent shall replace any damaged or diseased trees immediately for a 5-year period ending June 30, 2024. All previously required mitigation measures (compliance directives) required by the NOAV shall be maintained, and nothing herein limits Respondent's obligations under Land Use Permit series 4C0534 including maintenance of buffer conditions. These plantings will encourage slope stabilization and discourage future encroachment of the 50-foot riparian buffer
- C. No later than **60 days** following the receipt of this Order, the Respondent shall file a revised version of their 4C0534-6 Land Use Permit application (**-6 Application Revised**) with the District 4 Environmental Commission for either:

1. the continued use of the Fuel Tank Storage Area, OR,
 2. the discontinuation of use of the Fuel Tank Storage Area and its proper reclamation given its archeologically sensitive location.
- D. Respondent shall diligently pursue the -6 Application Revised. "Diligently pursue" shall mean that Respondent shall (a) respond to any and all requests for information from the Act 250 District 4 Environmental Commission, the Coordinator for the Commission, or Agency of Natural Resources (as applicable) by the date set by the Commission or Coordinator or Agency; and (b) in good faith meet and comply with all scheduling or other orders or memoranda issued by the Commission or Agency. Respondent shall not be responsible for delays outside their control, including those caused by the Commission or Agency or by other parties to its applications.
- E. No later than **60 days** following the receipt of this Order, Respondent shall submit to the Agency for review and approval, an administratively complete application for all previously unpermitted stormwater discharges from the Property.
- F. No later than **30 days** following the receipt of this Order Respondent shall pay the following:
1. Pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **Twenty-Five Thousand Three Hundred Dollars and Zero Cents (\$25,300.00)**, for the violations noted herein, by check made payable to: "Treasurer, State of Vermont."
 2. Pursuant to 10 V.S.A. §8010(e)(2), the amount of **Three Thousand One Hundred Forty-Two Dollars and Forty-four Cents (\$3,142.44)**, to reimburse the Natural Resources Board and the Agency of Natural Resources for the costs of this enforcement action by check made payable to: "Vermont Natural Resources Board."
 3. The amount of **Ten Dollars and Zero Cents (\$10.00)**, to pay the recording fee for the filing of a notice of this Assurance in the Town of Milton land records, by check made payable to: "Town of Milton, Vermont."
- G. All payments and documents required by this Assurance shall be sent to:
- Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201

- H. The Board reserves the right to augment the above stated penalties through evidence presented at hearing. In accordance with 10 V.S.A. §8010, the penalties may be increased by the costs incurred by the Board for the enforcement of the described violation, the amount of economic benefit gained by Respondent from the violations, the need for deterrence, and all other penalty factors enumerated in 10 V.S.A. § 8010(b), each according to proof at the hearing.
- I. Any payment by Respondent pursuant to this Administrative Order is made to resolve the violations set forth in this Administrative Order and shall not be considered a charitable contribution, business expense, or other deductible expense under the federal or state tax codes. Respondent shall not deduct, nor attempt to deduct, any payments, penalties, contributions or other expenditures required by this Administrative Order from Respondent's state or federal taxes.
- J. The State of Vermont and the Board reserve continuing jurisdiction to ensure compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein.
- K. Nothing in this Order shall be construed as having relieved, modified, waived or otherwise affected the Respondent's continuing obligation to comply with applicable state or local statutes, regulations or directives.

**RESPONDENT'S RIGHT TO A HEARING
BEFORE THE SUPERIOR COURT, ENVIRONMENTAL DIVISION**

Pursuant to 10 V.S.A. §8012, any Respondent has the right to a hearing before the Superior Court, Environmental Division concerning this Administrative Order, if such Respondent files a Notice of Request for Hearing within **fifteen (15) days** of the date the Respondent receives this Administrative Order. The Notice of Request for Hearing must be filed with both the Natural Resources Board and the Environmental Division at the following addresses:

Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201

Vermont Superior Court
Environmental Division
32 Cherry Street, 2nd Floor, Suite 303
Burlington, VT 05401

If a hearing is requested, the Natural Resources Board reserves the right to seek additional penalties for additional costs of enforcement and other relevant penalty factors. 10 V.S.A. §8010(b).

EFFECTIVE DATE OF THIS ADMINISTRATIVE ORDER

This Administrative Order is effective as to a Respondent on the date it is received by such Respondent. However, if such Respondent files a Notice of Request for Hearing within **fifteen (15) days** of the date such Respondent receives this Administrative Order, such filing shall stay all the provisions of this Administrative Order as to such Respondent, pending a hearing by the Environmental Division. Unless a Respondent files a timely Notice of Request for a Hearing, this Administrative Order shall become a Judicial Order as to such Respondent when this Administrative Order is filed with and signed by the Environmental Division.

COMPLIANCE WITH A JUDICIAL ORDER

If this Administrative Order becomes a Judicial Order and a Respondent fails or refuses to comply with the conditions of that Judicial Order, the Natural Resources Board shall have cause to initiate an enforcement action against such Respondent pursuant to the provisions of 10 V.S.A. Chapters 201 and 211.

Dated: _____

Diane B. Snelling, Chair
Natural Resources Board