

**STATE OF VERMONT**  
**SUPERIOR COURT**  
**ENVIRONMENTAL DIVISION**

Vermont Natural Resources Board, )  
Petitioner, )  
v. )  
D&P Hawk North Management, LLC., )  
David Harvey, and Patricia Harvey )  
Respondents. )

Docket # 44-5-20 Vtec

**ORDER**

The Assurance of Discontinuance signed by the Respondent on April 14, 2017, and filed with the Superior Court, Environmental Division, on May 27, 2020, is hereby entered as an order of this Court, pursuant to 10 V.S.A. 8007(c).

Dated this 27th day of May 2020.



Thomas S. Durkin, Judge  
Vermont Superior Court  
Environmental Division

STATE OF VERMONT

Superior Court

Environmental Division  
Docket No.

Natural Resources Board,  
Petitioner

ASSURANCE OF DISCONTINUANCE

v.

D&P Hawk North Management LLC and  
David and Patricia Harvey,  
Respondents

**VIOLATIONS**

1. Violation of Land Use Permit 3W0294-4 Condition 2 – Changing a permitted project without written approval of the District Environmental Commission.
2. Violation of Land Use Permit 3W0294-4 Condition 6 – Unpermitted development within regulatory floodway and disturbance of the Tweed River’s 50-foot buffer.
3. Violation of Land Use Permit 3W0294-4 Condition 18 – Additional development without written approval of the District Environmental Commission.
4. Violation of Act 250 Rule 34 – Commencement of construction on a material change to a permitted development without a permit amendment.

**ASSURANCE OF DISCONTINUANCE**

Pursuant to the provisions of 10 V.S.A. § 8007, the Natural Resources Board (“Board”), D&P Hawk North Management LLC, and David and Patricia Harvey hereby enter into this Assurance of Discontinuance (“Assurance”), and stipulate and agree as follows. D&P Hawk North Management LLC and David and Patricia Harvey are referred to herein as “Respondents.”

**STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS**

1. Respondents own certain lands and premises located at 106 VT Route 107 in Stockbridge, VT (the “Property”).
2. The Property is subject to Land Use Permit Series 3W0294.
3. On May 4, 1988, the District 3 Environmental Commission issued Land Use Permit 3W0294-4, which “authorize[d] the permittees to construct a 1600 square foot structure for use as a real estate office on 2.9 acres off Route 107 in Stockbridge, Vermont.”
4. Condition 2 of Land Use Permit 3W0294-4 provides: “The project shall be completed, in

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accordance with the plans and exhibits stamped 'Approved' and on file with the District Environmental Commission and in accordance with the conditions of this Permit. No changes shall be made in the project without written approval of the District Environmental Commission."

5. Condition 6 of Land Use Permit 3W0294-4 provides: "No development shall occur on or within the regulatory floodway. A fifty foot buffer strip shall be established and maintained along the Tweed River. This strip shall be maintained in its natural condition and be undisturbed so that it can follow natural succession processes."
6. Exhibit 17 to Land Use Permit 3W0294-4 is a map that depicts the regulatory floodway with a line running diagonally and in between the Tweed River and Route 107. The river side of this line states "NO BUILDING BEYOND THIS SIDE OF LINE."
7. Condition 18 of Land Use Permit 3W0294-4 provides: "No further subdivision and/or development of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission."
8. Act 250 Rule 34 states, "A permit amendment shall be required for any material change to a permitted development or subdivision, or 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."
9. 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 or findings and conclusions under 10 V.S.A. § 6086b, 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)."
10. Act 250 Rule 2(C) defines "cognizable change" as "any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project's permit."
11. On July 22, 2014, the Board's Compliance and Enforcement Officer conducted a site visit of the Property. On August 12, 2014, Act 250 District Coordinator Warren Foster visited the Property. On August 20, 2014, the Agency of Transportation's Assistant Construction Environmental Engineer conducted a site visit of the Property. On September 24, 2014, the Department of Environmental Conservation's Regional Floodplain Manager and Regulatory Policy Analyst conducted a site visit of the Property. During these site visits, it was observed that:
  - a. Respondents had constructed a 3-bay commercial garage without a Land Use Permit Amendment and that a portion of this garage was in the regulatory

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floodway;

- b. Respondents had allowed the storage of commercial construction equipment, including dump trucks, a backhoe, a front loader, and a bulldozer within the regulatory floodway, including portions of the 50-foot buffer strip;
  - c. Respondents had allowed the stockpiling of construction materials, construction and demolition debris, scrap metal, junk, gravel, and riprap, and soil/fill material within the regulatory floodway, including portions of the 50-foot buffer strip;
  - d. Respondents had managed vegetation within the 50-foot buffer strip along the Tweed River by mowing and cutting woody vegetation;
  - e. Some junk vehicles were in the regulatory floodway, including portions of the 50-foot buffer strip; and
  - f. Respondent David Harvey was operating Xcav8, LLC, a commercial excavation company, based out of the Project Tract, and was parking commercial vehicles and stockpiling and screening topsoil and stone within the regulatory floodway, including portions of the 50-foot buffer strip.
12. The Board alleges that Respondents violated Conditions 2 and 18 of Land Use Permit 3W0294-4, as well as Act 250 Rule 34(A) by constructing the 3-bay garage and maintaining the materials referenced in Paragraphs 11(b), (c), (e), and (f) on the Property without written approval from the District Environmental Commission.
  13. The Board alleges that Respondents violated Condition 6 of Land Use Permit 3W0294-4 by constructing the 3-bay garage and maintaining the materials referenced in Paragraphs 11(b), (c), (e), and (f) within the regulatory floodway, as well as managing vegetation within the Tweed River's 50-foot buffer.
  14. The Board alleges that Respondents violated Condition 2 of Land Use Permit 3W0294-4, as well as Act 250 Rule 34(A), by operating a commercial excavation company, based out of the Project Tract.
  15. One August 25, 2014, the Board issued Respondents a Notice of Alleged Violation for the aforementioned violations. This Notice, in part directed Respondents to "apply for a Land Use Permit Amendment to authorize the 3-bay commercial garage and any activities that are not currently authorized by the Permit."
  16. Respondents replied to the August 25, 2014 Notice of Alleged Violation on September 11, 2014. In its response, Respondents stated:
    - a. That they built the 3-bay garage because in 2011 Tropical Storm Irene destroyed

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- their old garage.
- b. The 3-bay garage was built farther away from the Tweed River and at a higher elevation than the old garage.
  - c. The other materials they stored in the regulatory floodway are inventory used in their property management business.
  - d. That the two junk vehicles within the 50-foot buffer strip had been washed downstream and ruined during Tropical Storm Irene, and that they had subsequently dragged them back onto the Project Tract to aid in the Irene clean-up.
  - e. The fill material was deposited on the Property because Respondents agreed that two contractors working for the Vermont Agency of Transportation could put it there as part of projects to restore Vermont Routes 100 and 107.
17. On October 14, 2014, Respondents applied for a Land Use Permit Amendment as directed in the August 25, 2014 Notice of Alleged Violation. On October 17, 2014, the District Coordinator deemed Respondents' application incomplete.
  18. On December 5, 2018, Respondents resubmitted their application for a Land Use Permit as directed in the August 25, 2014 Notice of Alleged Violation.
  19. On January 16, 2020, the District Environmental Commission issued Respondents Land Use Permit 3W0294-4A. This permit amendment authorized "the after-the-fact/as-built construction approval of a commercial garage and continued use of storage of excavation and property management related materials as the existing real estate office and garage."
  20. Condition 10 of Land Use Permit 3W0294-4A provides: "The soil stockpile shall be removed by May 1, 2020 with the underlying lands returned to original grades."
  21. Condition 15 of Land Use Permit 3W0294-4A provides: "The Permittee shall maintain an undisturbed, naturally vegetated riparian zone along the Tweed River, except as otherwise allowed in Exhibit 012 – Riparian Buffer Plan and Exhibit 013 – Site Plan. The riparian zone shall begin at the water's edge at base flow conditions and shall further extend 50 feet and 100 feet measured inland from, perpendicular to, and horizontally from the top of bank, as depicted on Exhibits 012 and 013. The term 'undisturbed' means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth moving activities, storage of materials, tree trimming or canopy removal, tree, shrub or groundwater removal; plowing or disposal of snow, grazing or mowing."

**AGREEMENT**

Based on the aforementioned Statement of Facts and Description of Violations, the parties

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hereby agree as follows:

- A. Respondents shall comply with Land Use Permit Series 3W0294.
- B. Except for the soil stockpile governed by Condition 10 of Land Use Permit 3W0294-4A, no later than **120 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Respondents shall remove all remaining unpermitted materials from the regulatory floodway, including all portions of the 50-foot buffer strip.
- C. By no later than **120 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Respondents shall contact the Board's Compliance & Enforcement Officer to schedule an inspection to confirm the following: 1) that all remaining unpermitted materials have been removed from the regulatory floodway, including all portions of the 50-foot buffer strip; and 2) that the riparian buffer zone has been demarcated on the ground with physical barriers, identified with signage, and plantings have been installed in accordance with Exhibit 012 - Riparian Buffer Plan and Exhibit 013 – Site Plan.
- D. For the violations noted herein and pursuant to 10 V.S.A. Ch. 201, the Board has calculated a civil penalty in the amount of **Eleven Thousand Two Hundred Fifty Dollars and Zero Cents (\$11,250.00)**. If Respondents fully comply with Paragraphs B and C, to the Board's satisfaction, this penalty will be reduced to **Five Thousand Dollars and Zero Cents (\$5,000.00)**, which Respondents shall pay, by check made payable to the "State of Vermont," as follows:
1. The amount of **Two Thousand Five Hundred Dollars and Zero Cents (\$2,500.00)** no later than August 25, 2021; and
  2. The amount of **Two thousand Five Hundred Dollars and Zero Cents (\$2,500.00)** no later than August 25, 2022.
- If Respondents fail to fully comply with Paragraphs B and C, to the Board's satisfaction, Respondents shall pay the remaining **Six Thousand Two Hundred Fifty Dollars and Zero Cents (\$6,250.00)** no later than **60 days** after receiving written notice, via U.S. Mail to the address listed on Land Use Permit 3W0294-4A, from the Board that Paragraphs B and C have not been fully complied with.
- E. No later than **30 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Respondents shall pay, by separate checks, the following:
1. Pursuant to 10 V.S.A. §8010(e)(2), the amount of **Two Hundred Seventeen Dollars and Sixty-Seven Cents (\$217.67)**, to reimburse the Natural Resources Board for the costs of this enforcement action by check made payable to the "Natural Resources Board."

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2. The amount of **Fifteen Dollars (\$15.00)**, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Stockbridge land records, by check made payable to the “Town of Stockbridge, Vermont.”
- F. Without formally admitting or denying wrongdoing or liability, Respondents agree to this settlement of the violations alleged above to resolve all outstanding disputes.
- G. Respondents agree that the violations alleged are deemed proved and established as a “prior violation” in any future state proceeding that requires consideration of Respondents’ past record of compliance, such as permit review proceedings and calculating civil penalties under Title 10, section 8010.
- H. No later than **30 days** following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Respondents shall mail the Board a notarized, written acknowledgement of receipt of the Court’s Order.
- I. All payments and documents required by this Assurance shall be sent to the following address unless otherwise noted:  
  
Natural Resources Board  
10 Baldwin Street  
Montpelier, Vermont 05633-3201
- J. Respondents shall not deduct, nor attempt to deduct, any payment made to the State pursuant to this Assurance from Respondents’ reported income for tax purposes or attempt to obtain any other tax benefit from such payment.
- K. The State of Vermont and the Natural Resources Board reserve continuing jurisdiction to ensure compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein.
- L. Nothing in this Assurance shall be construed as having relieved, modified, waived or otherwise affected the Respondents’ continuing obligation to comply with applicable state or local statutes, regulations or directives.
- M. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Superior Court, Environmental Division. When so entered by the Superior Court, Environmental Division, this Assurance shall become a judicial order pursuant to 10 V.S.A. § 8007(c). In the event that such order is vacated, the Assurance shall be null and void.
- N. Pursuant to 10 V.S.A. § 8007(d), the Respondents shall not be liable for additional civil or criminal penalties with respect to the specific facts set forth herein, provided that the Respondents fully comply with this Assurance.

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- O. The Board reserves the right to make reasonable extensions of any deadline contained herein, upon prior request by the Respondents, for good cause beyond Respondents' control.
- P. This Assurance sets forth the complete agreement of the parties, and except as provided herein, may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated in an order issued by the Superior Court, Environmental Division.
- Q. Alleged representations not set forth in this Assurance, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall have no legal force or effect.
- R. When this Assurance is entered as a judicial order, violation of any provision of this Assurance shall be deemed to be a violation of a judicial order and may result in further enforcement action, including contempt proceedings, the imposition of injunctive relief, and/or the imposition of penalties, including penalties under 10 V.S.A. chapters 201 and/or 211.
- S. This Assurance is subject to the provisions of 10 V.S.A. §§ 8007 and 8020.

**SIGNATURES (4 pages)**



The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at , 4/17 , this day of , 2020.

**D&P Hawk North Management LLC**

By Patricia Harvey

Duly Authorized Agent

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at, 4/19/2020, this day of, 2020.

**David Harvey**

David Harvey

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at , 4/17/2020 , this day of , 2020.

**Patricia Harvey**

Patricia Harvey

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The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated in Montpelier, Vermont, this 26 day of M a y, 2020.

Natural Resources Board

By:



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Diane B. Snelling, Chair