

**STATE OF VERMONT
SUPERIOR COURT
ENVIRONMENTAL DIVISION**

Agency of Natural Resources,
Petitioner,

v.

Town of Bennington
Respondent.

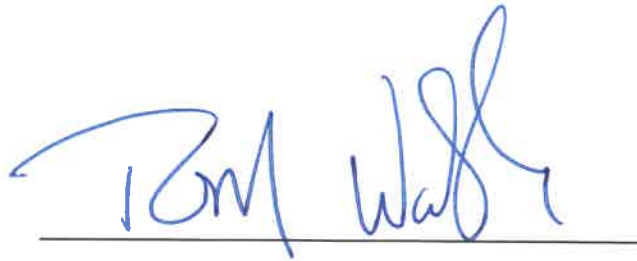
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Docket # 91-8-19 Vtec

ORDER

The Assurance of Discontinuance signed by the Respondent on May 14, 2019, and filed with the Superior Court, Environmental Division, on August 1, 2019, is hereby entered as an order of this Court, pursuant to 10 V.S.A. 8007(c).

Dated this 2nd day of August 2019.



Thomas G. Walsh, Judge
Vermont Superior Court
Environmental Division

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No.

SECRETARY, VERMONT
AGENCY OF NATURAL RESOURCES,
Plaintiff

v.

TOWN OF BENNINGTON,
Respondent

VIOLATIONS

1. Vermont Wetland Rules (VWR), Section 9: Prohibited work in a wetland and/or 50-foot buffer zone without a State Wetlands Permit.
2. Condition 4 of Land Use Permit (LUP) 8B0197-5 and Act 250 Rule 34(A): 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. Section 8007, the Secretary (Secretary) of the Agency of Natural Resources (Agency) and the Town of Bennington (Respondent) hereby enter into this Assurance of Discontinuance (Assurance), and stipulate and agree as follows:

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATION

1. Respondent is a Vermont municipality that owns and operates a salt storage shed located at 78 Bowen Road in Bennington, Vermont, SPAN # 05101566160 (the property).
2. On June 15, 2017, the District 8 Environmental Commission issued LUP Amendment 8B0197-6 authorizing a change in use of an existing industrial building located on the property to a municipal garage and associated office for forty (40) employees, and adjustment to the property line with Gates. No site changes were approved at that time.
3. The property contains a wetland mapped on the Vermont Significant Wetland Inventory Map and is therefore a Class II Wetland under the VWR.

4. On September 7, 2017, the Respondent submitted an application to the Agency for an individual Vermont Wetland Permit for activities in a Class II wetland buffer zone resulting from the proposed construction of a salt storage shed and fuel depot access road on the property.
5. On September 22, 2017, the Respondent advised the Agency that it intended to start construction of the salt storage shed on the following Monday, September 25, 2017.
6. On September 24, 2017, the Agency informed the Respondent that conducting activities that are not an Allowed Use within a Class II wetland or buffer zone without a permit would be a violation of the Vermont Wetland Rules and encouraged the Respondent to obtain all necessary permits before commencing construction of the salt shed.
7. On September 28, 2017, the Agency notified the Respondent that additional information was needed to deem the permit application technically complete.
8. On October 6, 2017, the Agency received a revised Wetland Permit application from the Respondent.
9. On November 3, 2017, the Agency issued a technically incomplete letter to the Respondent requesting additional information, which was provided by the Respondent on November 7, 2017.
10. On November 21, 2017, the Agency issued a technically complete letter to the Respondent.
11. On November 29, 2017, the Wetland permit application was placed on public notice. The public comment period ran from November 30, 2017 to December 29, 2017.
12. On December 11, 2017, the Agency received information that the construction of the salt storage shed had commenced on the property prior to receipt of a Wetland Permit.
13. By commencing construction of the salt storage shed on the property without first obtaining a Wetland Permit, Respondent violated VWR Section 9.
14. Act 250 Rule 34(A) states, in relevant part, "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."

15. Construction of the salt storage shed on the property is a material change to a permitted development requiring a permit amendment under Act 250 Rule 34(A).
16. Condition 4 of Land Use Permit 8B0197-5 states, "No changes shall be made in the design or use of this project without the written approval of the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules."
17. Respondent did not obtain a permit amendment prior to commencing construction of the salt storage shed.
18. By failing to obtain an amendment to the existing LUP prior to a material change to the permitted project, the Respondent violated Condition 4 of LUP 8B0197-5 and Act 250 Rule 34(A).
19. On December 8, 2017, the Respondent received LUP 8B0197-7 which authorized the construction of a gas/diesel fuel depot, an 80' x 80' salt shed, and clearing for propane tanks on the property contingent on the issuance of Wetland Permit 2010-122.
20. On January 3, 2018, the Respondent was issued Wetland Permit 2010-122.
21. On January 19, 2018, the Agency issued the Respondent a Notice of Alleged Violation (NOAV) for the violations above with specific compliance directives.
22. On November 2, 2018, the Agency received an as-built site plan from the Respondent depicting activities in the Class II wetland and/or associated buffer zone that were not authorized in Wetland Permit 2010-122. The unpermitted activities depicted are:
 - a. Pavement installation of 51 square feet;
 - b. Temporary ground disturbance of 1,635 square feet in an existing mowed area for the installation of a gas line;
 - c. Construction of salt shed included an additional impact of 290 square feet;
 - d. Temporary Ground disturbance of 1,092 square feet within wetlands for work associated with construction of salt shed footings;
 - e. Vegetation trimming of 3,064 square feet in wetland;
 - f. Vegetation trimming of 1,958 square feet in wetland buffer;
 - g. Vegetation trimming of 531 square feet in wetland buffer; and
 - h. Temporary ground disturbance of 2,140 square feet for work associated with construction of salt shed footings.

23. The as-built site plan shows that the Respondent's work created 1,986 square feet of restored wetlands buffer, and 4,804 square feet of area that will improve the wetlands' water quality by directing water runoff away from the wetlands. The project reduced the drainage area for salt runoff into the Class II wetland and created a treatment/or associated buffer for the remaining runoff. An existing impervious surface was replaced in part with soil and vegetation, and the total area to be salted in winter was reduced. The violation had no detrimental impact on the public's health, safety or welfare.
24. By conducting activities in a Class II Wetland and/or the associated buffer on the property without first obtaining a Wetland Permit, Respondent violated VWR Section 9.
25. Respondent admits the factual findings described above, solely for purposes of resolving this case.
26. The Agency alleges that the above conduct constitutes a violation of VWR, Section 9; Condition 4 of LUP 8B0197-5; and Act 250 Rule 34(A).

AGREEMENT

Based on the foregoing Statements of Facts and Description of Violations, the parties agree as follows:

- A. For the violations described above, Respondent shall pay a total penalty of \$20,925.00. Payment shall be made in twenty-four (24) monthly installments as follows: The initial payment of \$1,030.00 shall be received no later than thirty (30) consecutive calendar days following the date this Assurance is entered as an Order by signature of the Environmental Court (effective date). All subsequent payments of \$865.00 shall be received no later than the first calendar day of each consecutive month thereafter. Payment shall be by check made payable to the "Treasurer, State of Vermont" and forwarded to:

Administrative Assistant
Agency of Natural Resources
Environmental Compliance Division
1 National Life Drive, Davis 2
Montpelier, VT 05620-3803

In the event the Respondent fails to make any payment on time as set for the above, the Secretary shall have the authority to accelerate all the remaining payments and make them due and payable immediately. The decision to invoke this acceleration provision shall be in the sole discretion of the Secretary, and decision not to invoke this provision shall not be deemed a waiver of the provision's future use.

- B. Pursuant to 10 V.S.A. §8010(e)(2), by no later than thirty (30) consecutive calendar days following the effective date of this Assurance, the Respondent shall pay the amount of \$769.86, to reimburse the Natural Resources Board for the costs of this enforcement action, by good check made payable to the "State of Vermont." This payment shall be sent to the following address:

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

- C. Without formally admitting or denying wrongdoing or liability, Respondent agrees to this settlement of the violations alleged above in order to resolve all outstanding disputes.
- D. Respondent agrees that the violations alleged are deemed proved and established as a "prior violation" in any future state proceeding that requires consideration of Respondent's past record of compliance, such as permit review proceedings and calculating civil penalties under 10 V.S.A. §8010.
- E. No later than thirty (30) consecutive calendar days following the effective date of this Assurance, Respondent shall have its wetland consultant submit a Wetland Permit Amendment application to the Agency for review and approval. The Amendment application shall address each of the unpermitted activities identified in paragraph 22 above.
- F. The Respondent shall comply with any request from the Agency for additional information no later than seven (7) consecutive calendar days following the date of the request.
- G. In the event Respondent's Wetland Permit Amendment application is denied, in whole or in part, then the Respondent shall perform corrective actions to remedy the unpermitted activities and return the property to compliance under the VWR.

- H. The State of Vermont and the Agency reserve continuing jurisdiction to ensure future compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein above.
- I. Nothing in this Assurance shall be construed as having relieved, modified, or in any manner affected the Respondent's on-going obligation to comply with all other federal, state, or local statutes, regulations, or directives applicable to the Respondent in the operation of its business.
- J. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Environmental Court. When so entered by the Environmental Court, this Assurance shall become a judicial order. In the event that such order is vacated, this Assurance shall be null and void.
- K. Respondent shall not be liable for additional civil or criminal penalties with respect to the specific sites and facts described herein occurring before the effective date, provided that Respondent fully complies with the agreements set forth above.
- L. This Assurance sets forth the complete agreement of the parties, and it 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 Environmental Court. 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 be of no legal force or effect.
- M. Any violation of any agreement set forth herein will be deemed to be a violation of a judicial order and may result in the imposition of injunctive relief and/or penalties, including penalties set forth in 10 V.S.A. Chapters 201 and/or 211.
- N. This Assurance is subject to the provisions of 10 V.S.A. §§8007 and 8020.

SIGNATURES

The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted. Further, I, Stuart A. Hurd, the undersigned, hereby state under oath that I am the Town Manager for the Town of Bennington, and an authorized representative of the Town of Bennington, and that I have the power to contract on behalf of that entity, and that I have been duly authorized to enter into the foregoing Assurance of Discontinuance on behalf of that entity.

Dated at Bennington, Vermont, this 14 day of May 2019.

By: Stuart A. Hurd
Stuart A. Hurd, Town Manager
Town of Bennington

STATE OF VERMONT

COUNTY OF Bennington, ss.

At Bennington, Vermont, this 14 day of May 2019, the above-signatory personally appeared and swore to the truth of the foregoing. Before me,

ELIZABETH A. ANTOGNIONI
Notary Public, State of Vermont
Commission No. 157.0000075
My Commission Expires 1/31/21

Elizabeth A. Antognioni
Notary Public
Term expires: 1/31/21

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

Dated at Montpelier, Vermont, this 12 day of June 2019.

SECRETARY, AGENCY OF NATURAL RESOURCES
By: Emily Boedecker
Emily Boedecker, Commissioner
Department of Environmental Conservation