

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4  
1130 North Westcott Road, Schenectady, NY 12306-2014  
P: (518) 357-2048 | F: (518) 357-2087  
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**CERTIFIED - RETURN RECEIPT REQUESTED**  
7017 1070 0001 0125 8961

October 2, 2018

Mr. Andrew W. Gilchrist  
Gilchrist Tingley, P.C.  
251 River Street, Suite 201  
Troy, New York 12180

Re: Order on Consent  
R4-2018-0628-151  
Troy Sand & Gravel Co., Inc.

Dear Mr. Gilchrist:

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

This will also acknowledge receipt of \$5,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Stephen Repsher  
Assistant Regional Attorney  
Region 4

Enclosure

ec: P. Wyckoff



Department of  
Environmental  
Conservation

# STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of  
Article 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-

R4-2018-0628-151

Troy Sand & Gravel Co., Inc.  
P.O. Box 171  
Watervliet, NY 12189,

Respondent.

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### 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. Respondent Troy Sand & Gravel Co., Inc., is the owner of a 150.9-acre sand, gravel, and shale mine known as “West Sand Lake Pit,” located near State Route 43 in West Sand Lake, New York (“Mine”).
3. Respondent was issued a Mined Land Reclamation renewal permit for mining activities (#4-3840-00008/00001) (the “Permit”) for the Mine, effective June 19, 2014 and expiring on June 18, 2019.
4. Respondent also owns a 17.44-acre parcel of land (Tax ID #135.-9-16.1) containing a 3-acre affected area known as the “Stop 13 Road Site,” located adjacent to the Mine.
5. Respondent is a person as defined by ECL §§ 23-0101(12).

#### BACKGROUND

6. The Department’s Division of Minerals guidance provides that when determining whether an activity is exempt from obtaining a mining permit, the Department will consider the following:
  - 1) Whether all necessary local, state, and federal approvals have been obtained (including but not limited to: subdivision and/or site plan approvals and building permits);
  - 2) Whether the excavation is conducted solely in aid of onsite construction and deemed necessary to prepare the site for the approved construction;

- 3) Whether the excavation takes place within the construction project area and is an integral part of the construction activities;
- 4) That the construction project is not speculative; and
- 5) Construction activities should commence within 6 months and be completed within 2 years of the excavation.

7. In or about September 2014, the previous owner of the Stop 13 Road Site property (Lawrence Dickenson) requested an exemption from the requirement of a mining permit for the excavation necessary to the construction of two homes on a two-lot subdivision at the Site.

8. On February 12, 2015, the Department issued Mr. Dickenson a letter granting mining permit exempt status, listing Respondent as the exempted miner, and containing, in relevant part, the following parameters and requirements:

- Estimated project start dates: February 20, 2015 to July 20, 2015;
- Estimated project end dates: February 20, 2017 to July 20, 2017;
- Estimated amount of material to be removed: approximately 45,000 cubic yards;
- Grading of 1V:2H slopes or gentler with flat areas for homes;
- Access to homes through the West Sand Lake Mine;
- Subsoil (if any) to be replaced to a depth of 6 inches of fertile soil, and seeded with a conservation mix at a rate of 80 lbs./acre; applications of fertilizer and, if necessary, lime; and mulch at 2,000 lbs./acre;
- All necessary local, state, and federal approvals and permits to be obtained prior to beginning excavation;
- Submission of a copy of a local building permit to be submitted prior to initiating construction;
- All local, state, and federal required stormwater protection to be implemented and maintained during the construction project;
- The requirement to notify the Department were the parameters of exemption to change or be exceeded.

9. At some point between 2014 and 2016, ownership of the Stop 13 Road site was transferred from Mr. Dickenson to Respondent, as evidenced by 2018 Rensselaer County tax rolls and 2016 GIS parcel data.

10. On April 4, 2015, Department staff inspected the Stop 13 Road Site and observed no activity.

11. On April 14, 2016, Department staff inspected the Stop 13 Road Site and observed excavation activity had commenced.

12. On October 20, 2017, Department staff issued a letter to Respondent stating that if the two planned homes were not under construction by April of 2018 (two years from the Department's initial observation of excavation activities), the Department would reconsider whether the activity at the Stop 13 Road Site was exempt from the requirement to obtain a mining permit.

## **VIOLATIONS ALLEGED**

13. On June 22, 2018, Department staff inspected the Stop 13 Road Site and observed that no homes were under construction.

14. Both ECL§ 23-2705(8) and regulation 6 NYCRR § 420.1(k), in relevant part, include in their respective definitions of “Mining,” “the extraction of overburden and minerals from the earth;” and exclude “excavation, removal and disposition of minerals from construction projects.”

15. ECL § 23-2711(1) provides, in relevant part, that “any person who mines . . . more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months . . . or one hundred cubic yards of minerals from or adjacent to any body of water . . . shall not engage in such mining unless a permit for such mining operation has been obtained from the department.”

16. Department staff allege that Respondent’s excavation of three acres from the Stop 13 Road Site was not a construction activity, and thus is not exempt from the requirement of a mining permit.

17. Department staff allege that Respondent’s excavation of three acres from the Stop 13 Road Site without an approved mined land-use plan is a violation of ECL §§ 23-2711(1).

18. Also during the June 22, 2018 inspection, Department staff observed that Respondent had disposed of settling pond fines (i.e., spoil) from the Mine site as backfill to the excavation at the Stop 13 Road Site.

19. Department staff allege that Respondent’s disposition of pond fines at the Stop 13 Road Site constitutes mining activity as defined by regulations at 6 NYCRR § 420.1(k) (“Mining” includes “disposition of overburden, tailings and waste at the mine location”).

20. Regulation 6 NYCRR § 422.1(a) 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.”

21. ECL § 71-1305(2) states that it shall be unlawful for any person to violate “any duty imposed by article 23 of this chapter or any rule or regulation promulgated thereunder or any order or condition of any permit of the department made pursuant thereto.”

22. Department staff allege that Respondent’s disposition of pond fines from the permitted West Sand Lake Mine outside the Life of Mine is a violation of ECL 6 NYCRR § 422.1(a) and ECL § 71-1305(2).

## **Waiver of Hearing**

23. 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**

24. 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 . . . ."

25. Defendant neither admits nor denies the allegations set forth in this Order, but consents to the issuing and entering of this Order in full resolution of all alleged violations described within it.

**NOW**, being duly advised and having considered this matter, it is **ORDERED THAT**:

I. **Civil Penalty.** Respondent is assessed a civil penalty in the amount FIVE THOUSAND DOLLARS (\$5,000). Payment of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by company or bank check, or money order, payable to the NYS Department of Environmental Conservation. Payment of the civil penalty shall not alter Respondent's obligation to complete performance of the terms 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 alleged 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 alleged Mined Land Reclamation violations shall have the following information: owner's name, facility name and address, and the MLF identification number.

For Respondent:

Troy Sand & Gravel Co., Inc.  
Attn: Jude Clemente  
P.O. Box 171  
Watervliet, NY 12189

**XIII. Termination.** The Order shall terminate upon Respondent's full compliance, as determined by the Department, with the terms, provisions and conditions of this Order including its Schedule of Compliance.

**XIV. Unrelated Proceedings.** This Order shall not be construed in any respect to inure to the benefit of any third party.

DATED: Rotterdam, New York  
October 1, 2018

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

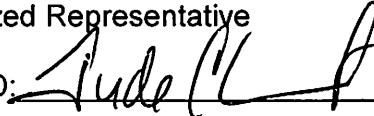


Keith Goertz  
Regional Director  
Region 4

## CONSENT BY RESPONDENT

Respondent 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.

Troy Sand & Gravel Co., Inc.  
Authorized Representative

SIGNED: 

TITLE: Jude Clemente, President

DATE: 9-27-2018

STATE OF NEW YORK )  
COUNTY OF RENSSELAER ) ss.:  
)

On the 27 day of September in the year 2018, before me, the undersigned,  
personally appeared Jude Clemente, personally known  
(Full name)

to me or proved to me on the basis of satisfactory evidence to be the individual whose  
name is subscribed to the within instrument and acknowledged to me that s/he executed  
the same in his/her capacity, and that by his/her signature on said instrument, the  
individual, or the person upon behalf of which the individual acted, executed the  
instrument.

  
Notary Public

Qualified in the County of:  
My Commission Expires:

Andrew W. Gilchrist  
Notary Public – The State of New York  
No. 4944018  
Qualified in Rensselaer County  
My Commission Expires: November 14, 2022

## **SCHEDULE OF COMPLIANCE**

1. **Within sixty (60) days of the effective date of this Order**, Respondent shall regrade the Site so that no slopes are steeper than 1V:2H. Any fertile soil/topsoil already applied to the slopes shall be stripped and reserved for use in reclaiming the Site.
2. **Within fifteen (15) days of the completion of grading**, Respondent shall deposit fertile soil to a depth of six (6) inches on top of all affected areas.
3. **Within forty-eight (48) hours of the application of fertile soil**, Respondent shall:
  - a. Apply seed of a conservation seeding mixture containing at least two (2) legumes (e.g., red clover, trefoil, etc.), at a rate of eighty (80) pounds/acre;
  - b. Perform pH test(s) and lime as necessary;
  - c. Fertilize with a slow release nitrogen fertilizer at the rate of three hundred (300) pounds/acre; and
  - d. Hay mulch at a rate of two thousand (2,000) pounds/acre, with no bare spots.

Respondent shall contact Department mining staff (“MLRS”) when grading is complete to schedule an inspection.

4. Vegetation in areas graded must reach the regulatory requirement of seventy-five percent (75%) vegetative cover by summer of 2019. MLRS will conduct a reclamation inspection during summer of 2019. If vegetation does not meet the required cover, MLRS will require the application of additional fertile soil, seed, fertilizer, and mulch.
5. Compliance with this Schedule shall not be a defense to subsequent violations.