

STATE OF VERMONT  
SUPERIOR COURT  
ENVIRONMENTAL DIVISION

NRB v Elnicki Aggregate, Inc.

22-ENV-00050

ORDER

The Assurance of Discontinuance, signed by the Respondent(s) on the 30th day of March, 2022 and filed with the Superior Court, Environmental Division, on the 17th day of May, 2022, is hereby entered as an order of this Court, pursuant to 10 V.S.A. 8007(c).

Electronically Signed: 5/19/2022 9:37 AM pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink that reads "Tom Walsh" with a stylized flourish at the end.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division



described is approved as a one-time only event. Any such further debris disposal will require further amendment of Land Use Permit #1R0567." Condition 4 of the amendment further specified that "no debris other than the demolished "Hotel Hamilton" will be disposed of at this site." Condition 8 of the amendment required that the debris disposal project be completed by December 15, 1987.

4. In 2000, Earth Waste Systems, Inc., obtained a Categorical Disposal Facility Certification from the Vermont Department of Environmental Conservation's Solid Waste Management Program (the "Solid Waste Program") to operate a disposal facility for stumps, brush, untreated wood, broken asphalt, concrete, non-recycled glass, bricks, masonry and mortar on the Project Tract, collectively totaling up to 16,600 tons per year (the "Categorical Disposal Facility"). This Certification expired in 2005.
5. Prior to 2013, <sup>Clean Fill</sup> ~~construction~~ debris was deposited on an area of abandoned gravel pit located approximately 400 feet southwest, and outside of the boundaries of the expired Categorical Disposal Facility. It is not known who placed the materials or when the event occurred (the "New Disposal Area"). Elnicki Aggregate, Inc., ~~alleges it~~ did not place the material.
6. Between 2015 and 2017, vegetation was cleared and additional materials were placed in the New Disposal Area, expanding its surface area.
7. No land use permit or land use permit amendment authorized the creation or use of the area for the placing of the aforementioned materials.
8. The placement of the material without written approval from the District Commission or a land use permit amendment, is not permitted by Condition 2 of Land Use Permit 1R0567-3 and condition 4 of Land Use Permit 1R0567-12.
9. Act 250 Rule 34(A) states, in relevant part, that:  
"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."
10. Act 250 Rule 2(C)(6) defines "material change" as:  
"any change to a permitted development or subdivision 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)."

11. The material is located partially within the surveyed boundary line of the Wildlife Habitat Conservation Easement area referenced in Condition 9 of Land Use Permit 1R0567-12, described in Schedule A (the "Conservation Easement Area").
12. The creation and operation of the New Disposal Facility constitutes a material change to the permitted project in violation of Land Use Permit 1R0567-12 and Act 250 Rule 34(A).
13. Though it is unknown who deposited the material, Elnicki Aggregate, Inc. is the current owner of the property and the permittee.

Failure to Maintain Existing Blazes:

14. Condition 3 of Land Use Permit 1R0567-12 states, The project shall be completed, operated and maintained in accordance with: (a) Findings of Fact and Conclusions of Law #1R0567-12, (b) the plans and exhibits on file with the District Environmental Commission, and (c) the conditions of this permit."
15. Exhibit 15 of the 1R0567-12 LUP, a May 12, 2011 memo from Joel Flewelling at the Vermont Fish and Wildlife Department to Frank Parent of Long Trail Engineering, states, in relevant part, "A legal survey of the conserved 90-acre easement area, R.O.W., and painted boundary lines establishment will be executed and maintained by Elnicki Aggregate Inc." These documents will be the basis to define a formal, legal warranty deed to be duly recorded in the town records."

Violations of the Conservation Easement:

16. Condition 9 of Land Use Permit 1R0567-12 states, in relevant part, "In mitigation of impacts upon a mapped deer wintering area, the permittee shall abide by the terms of the permanent conservation easement and access right of way on 90 acres as described in exhibits 15 and 47."
17. Paragraph 4 of Section II (Restricted Uses) of the Conservation Easement states, in relevant part: "The placement, collection or storage of trash or human waste, or any other unsightly or offensive material on the Protected Property shall not be permitted."
18. Paragraph 5 of Section II (Restricted Uses) of the Conservation Easement states, in relevant part: "There shall be no disturbance of the surface of the land, including but not limited to filling, excavation, removal of topsoil, sand, gravel, rocks or minerals, or change of the topography of the land in

any manner, except as may be reasonably necessary to carry out the uses permitted on the Protected Property under the terms of this Grant. In no case shall surface mining of subsurface oil, gas, or other minerals be permitted.”

19. The placement of materials in the area and subsequent activities associated therewith in the Conservation Easement Area violates paragraphs 4 and 5 of the Conservation Easement.

### AGREEMENT

Based on the aforementioned Statement of Facts and Description of Violations, the parties hereby agree as follows:

20. Respondents shall comply with Land Use Permit series 1R0567.
21. No later than 30 days from the entry of this AOD as an Order by the Superior Court, Environmental Division, the Respondents shall pay the following:
- a. pursuant to 10 V.S.A. §8010(e)(2), the amount of \$2,328.92, to reimburse the Natural Resources Board for the costs of this enforcement action by good check made payable to the “State of Vermont.”
  - b. the amount of \$15.00, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Clarendon land records, by good check made payable to the “Town of Clarendon, Vermont.”
  - c. the amount of \$15.00, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Shrewsbury land records, by good check made payable to the “Town of Shrewsbury, Vermont.”
22. All payments and documents required by this Assurance, excepting payments pursuant to paragraph ~~23.a~~23(a) of this Assurance, shall be sent to the following address:
- Natural Resources Board  
10 Baldwin Street  
Montpelier, VT 05633-3201
23. No later than 90 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall perform the following tasks:
- a. In mitigation of adverse impacts to the conservation easement area on the project tract, Respondents shall pay the sum of \$5,000.00 for a

Supplemental Environmental Project (SEP) (10 V.S.A. § 8007(b)(2)). Respondent shall make the SEP payment by check made payable to the Recipient, Vermont Fish & Wildlife, "Species and Habitat Conservation Fund," and shall send payment to:

Steve Gomez  
Species and Habitat Conservation  
Vermont Department of Fish and Wildlife  
1 National Life Drive, Dewey Building  
Montpelier, VT 05620-3208

- i. The Recipient shall use this sum to conserve land pursuant to the goals of the Species and Habitat Conservation Fund, within the same district as the project tract.
  - ii. SEP funds may be used only for the purposes outlined herein.
  - iii. The Recipient agrees:
    1. To provide to the Board a final accounting of all receipts and expenditures in furtherance of the Project within thirty (30) days of the completion of the Project;
    2. SEP funds may not be used for litigation or lobbying purposes, nor may they be used in the preparation or presentation of matters before any state agency or board. The Recipient agrees to these restrictions.
  - iv. The Board, the Respondent and the Recipient agree the SEP as outlined meets the requirements of 10 V.S.A. §8007(b)(2).
- b. Respondent shall repaint the existing blazes along the northern boundary of the Conservation Easement Area on the ground that was originally blazed and painted red in May 2012 according to the Conservation Easement survey by Kittredge Land Surveying, PLLC, dated May 9, 2014 and consistent with Exhibit 15 of Land Use Permit #1R05567-12.
2. No later than 120 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondent shall undertake reasonable steps through planting and barriers to render the area of the deposit inaccessible to vehicles, such as trucks or other equipment.

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24. No later than 120 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall contact the Board to arrange a site inspection or shall permit access to the property by the Board's Enforcement Officer (and/or designee(s)) to confirm that all of the terms of this Assurance have been fully implemented. Respondent shall promptly address deficiencies identified during the site visit, if any.
25. Respondents are jointly and severally liable for all obligations under this Assurance.
26. 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. The Board reserves the right to make reasonable extensions of any deadline contained herein, upon prior request by the Respondents, for good cause beyond either Respondent's control.
32. 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.
33. 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.

34. 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 the imposition of injunctive relief and/or penalties, including penalties under 10 V.S.A. chapters 201 and/or 211.

35. 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.

Dated at Rutland, Vermont, this 30<sup>th</sup> day of March, 2022.

ELNICKI AGGREGATE, INC.

By

  
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KEVIN C. ELNICKI, President,  
Duly Authorized Agent

STATE OF VERMONT  
COUNTY OF Rutland, ss.

BE IT REMEMBERED that on the 30 day of March, 2022, personally appeared KEVIN C. ELNICKI, as the duly authorized agent of ELNICKI AGGREGATE, INC., signer and sealer of the foregoing instrument who is known to me or who satisfactorily established his identity to me and acknowledged the same to be his free act and deed and the free act and deed of ELNICKI AGGREGATE, INC. and that he has the authority to contract on behalf of ELNICKI AGGREGATE, INC. and that he has been duly authorized to enter into the foregoing Assurance on behalf of that entity.

Before me,

  
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Notary Public My Commission

Expires: 1/31/23

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



Dated in Montpelier, Vermont, this 1<sup>st</sup> day of April, 2022.

**NATURAL RESOURCES BOARD**

By: Sabina Haskell

Sabina Haskell, Chair

DATED in Montpelier, Vermont, this 14th day of April, 2022.

**VERMONT FISH & WILDLIFE  
DEPARTMENT**

(As to Paragraphs 23(a) only)

By: Chris Herrick

Chris Herrick, Commissioner