

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION

Docket No. _____

Natural Resources Board,
Petitioner

ADMINISTRATIVE ORDER

v.

Riverbend Associates Limited Partnership
And Edward C. Childs,
Respondents

Having found that Riverbend Associates Limited Partnership and Edward C. Childs ("Respondents") committed a violation as defined in 10 V.S.A. § 8002(9), the Natural Resources Board, pursuant to 10 V.S.A. § 8008, hereby issues the following Administrative Order:

VIOLATION

- I. Failure to comply with Land Use Permit 2W0866 (the "Permit") condition 5 and Land Use Permit 2W0866-1 (the "-1 Amendment") condition 8 by logging within designated stream buffers.
- II. Failure to comply with -1 Amendment conditions 1 and 32 by logging hemlock trees within critical habitat.
- III. Failure to comply with -1 Amendment condition 33 by harvesting trees within critical habitat without a plan approved in writing by the Vermont Department of Fish and Wildlife (the "Department").
- IV. Failure to comply with -1 Amendment conditions 1 and 30 and Land Use Permit 2W0866-2 (Revised) (the "-2 Amendment") condition 17 by failing to permanently deed restrict 82 acres of the property by December 1, 1996.
- V. Failure to comply with -1 Amendment conditions 1 and 34 by failing to delineate the mitigation area boundary within one year after receipt of the deposit on the first lot.
- VI. Failure to comply with -1 Amendment conditions 1 and 39 by altering a parcel of land without the approval of the District II Environmental Commission (the "Commission").

STATEMENT OF FACTS AND DESCRIPTION OF VIOLATIONS

Background

1. According to the Vermont Secretary of State's Office, Riverbend Associates Limited Partnership ("Riverbend") is a Vermont limited partnership with a principal place of business in Brattleboro, VT. Riverbend's General Partner is Edward C. Childs. Riverbend's six limited partners are: Edward Childs, Starling Childs II, Lorens Fasano, the Estate of David Peipers c/o Lawrence Glenn, Esq., Charles A. Rasmussen, and Michael A. Jemison, Trustee.
2. Riverbend owns approximately 750 acres of land in Rockingham, VT by a deed to it, which is recorded in Book 208, Page 476 of the Town of Rockingham land records. This land is located between Alden Road, Interstate 91, O'Brien Road, Hines Road, and the Williams River in Rockingham.
3. The Commission issued the following Land Use Permits to Riverbend, which apply to the above-referenced land:
 - a. On January 23, 1991, the Permit, which authorizes Riverbend to conduct forest management, related road building, and earth extraction activities.
 - b. On September 6, 1995, the -1 Amendment, which approved a 14-lot subdivision, consisting of 13 house lots and one large lot of remaining land (the "Project Tract"), and gravel extraction activities.
 - c. On January 8, 1999, Land Use Permit 2W0866-1A, which reduced the buffers around two historic dams and authorized the continuation of gravel stockpiling.
 - d. On April 21, 1999, Land Use Permit 2W0866-1B, which authorized the configuration of some of the above-referenced house lots.
 - e. On July 2, 1996, Land Use Permit 2W0866-2, which authorized the sale of gravel and extended the due dates of certain permit conditions. On August 8, 1996, the Commission revised this permit by issuing the - 2 Amendment (Revised).
 - f. On August 5, 1997, Land Use Permit 2W0866-2A, which authorized the sale of additional gravel.
 - g. On November 4, 1998, Land Use Permit 2W0866-3, which extended the deadlines for certain roadwork and on-site gravel stock piling.
4. Each amended permit maintained the original conditions of the Permit except as expressly modified.

I. Logging Within Designated Stream Buffer Zones

5. Permit condition 5 and -1 Amendment condition 8 both state:

All intermittent and permanent streams shall be protected with a 50-foot undisturbed naturally vegetated buffer strip measured from the tops of the stream banks. No timber cutting is allowed within the buffer strip of the permanent streams. Light selective cutting is acceptable in the outer 25 feet of the buffer strip on intermittent streams. In the area of O'Brien Brook where the top of the bank is a few hundred feet from the stream a buffer strip measured from the high-water mark could be substituted as provided as follows:

| <u>Slope of Land %</u> | <u>Width of Buffer Strip (feet)</u> |
|------------------------|-------------------------------------|
| 0-10 | 50 |
| 11-20 | 70 |
| 21-30 | 90 |
| 31-40* | 110 |

*Add 20 feet for each additional 10% slope.

(Emphasis in the -1 Amendment only).

6. On October 7, 2013, the Board's Enforcement Officer and Mary Beth Adler from the Department visited the Project Tract. During this visit, they observed that Respondents had cut down several trees within 50 feet of the top of the bank of a permanent stream.
7. By cutting down these trees, Respondents violated Permit condition 5 and -1 Amendment condition 8.

II. Logging of Hemlock in the Critical Habitat

8. -1 Amendment condition 32 states, "There shall be no logging of hemlock on any portion of the critical habitat on the tract of land."
9. -1 Amendment condition 1 states, "The project shall be completed as set forth in Findings of Fact and Conclusions of Law#2W0988-1 in 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 the written approval of the District Environmental Commission."
10. Findings 1-4 under Criterion 8(A) state:

As outlined in the original permit # 2W0866 the project contains critical deer wintering habitat and the previous permit required the Forest Management Plan for the property to promote the long-term protection of wildlife habitat.

Cutting has occurred in the critical habitat on the property in which consisted of clearing ½ acre to two-acre patches and/or the removal of all merchantable stems of hemlock. This type of cutting represents non-conformance with the existing permit. Exhibit 46.

The proposed Phase I subdivision (thirteen lots) will degrade or destroy 36 acres of critical deer wintering habitat. The applicant will permanently deed restrict 82 acres of critical cover. Additionally, the applicant will provide a 300-foot buffer around the mitigation land. The remaining critical wintering habitat on the parcel (the rest of stands H2, H3, H4, and C1) will be maintained and possibly used as mitigation for future development. Exhibits 80 and 93.

In order to protect the critical habitat there needs to be a prohibition of logging any hemlock.

11. Exhibit 80 is a letter from District Wildlife Biologist Kimberly Royar to Respondents. It states in part, "Any logging of hemlock within critical habitat will require an amendment to the permit."
12. Exhibit 93 is a map that shows all the classifications of deer habitat on the Project Tract. This includes but is not limited to the 82 acres of mitigation land and the 300-foot buffer around it.
13. On August 15, 2013, and August 21, 2013, Ryan Smith and Mary Beth Adler from the Department visited the Project Tract and observed that Respondents cut hemlock trees in areas within the critical habitat.
14. On October 7, 2013, the Board's Enforcement Officer and Adler visited the Project Tract and observed that Respondents cut hemlock trees in areas within the critical habitat.
15. By logging hemlock trees in critical habitat, Respondents violated -1 Amendment conditions 1 and 32.

III. Harvesting Trees within Critical Habitat without the Department's Approval

16. -1 Amendment condition 33 states, "All plans for harvesting of trees in critical habitat on the tract shall be approved in writing by the Department of Fish and Wildlife."
17. As stated above, -1 Amendment condition 1 requires the project to be completed in accordance with the Commission's findings of fact and conclusions of law as well as the approved plans and exhibits.
18. Finding 5 under Criterion 8(A) states, "Given the problems with previous harvesting operations in the critical habitat it is necessary for these activities to be coordinated with the Department of Fish and Wildlife."
19. In July of 2012, Respondents provided the Department with a copy of a 2011 forest management plan that was approved by Vermont's Use Value Appraisal Program. The Department has not approved of this or any other forest management plan either in writing or otherwise.
20. On August 15 and 21, 2013, Mary Beth Adler and Ryan Smith from the Department visited the Project Tract and observed that Respondents harvested trees from critical habitat on the Project Tract.
21. On September 6 and 26, 2013, Act 250 District Commissioner Stephanie Gile notified Respondents that the Department had not approved a forest management plan for the Project Tract and had not authorized any tree harvesting.
22. On September 10, 2013, Respondents acknowledged that the Department had not approved their forest management plan.
23. On October 7, 2013, the Board's Enforcement Officer and Adler visited the Project Tract and observed that Respondents harvested trees from critical habitat on the Project Tract.
24. On May 26, 2016, the Board's Enforcement Officer visited the Project Tract and observed that Respondents harvested trees from critical habitat on the Project Tract.
25. By harvesting trees within critical habitat on the Project Tract without the prior written approval of the Department, Respondents violated -1 Amendment conditions 1 and 33.

IV. Failure to Permanently Deed Restrict 82 Acres of the Project Tract

26. -1 Amendment condition 30 states, "The permittee shall permanently deed

restrict 82 acres of critical habitat for white-tailed deer on the property. The language of the deed restriction shall be approved by the Agency of Natural Resources Land Use Attorney. The permittee shall file the deed restrictions on town records and with the District 2 Environmental Commission by December 1, 1995.”

27. -1 Amendment condition 17 extended the deadline to submit this deed restriction to the Commission to November 1, 1996. It also extended the deadline to file this deed restriction in the land records to December 1, 1996.

28. -1 Amendment condition 31 states, “The permittee shall maintain a 300-foot buffer around the critical habitat mitigation land.”

29. As stated above, -1 Amendment condition 1 requires the project to be completed in accordance with the Commission’s findings of fact and conclusions of law as well as the approved plans and exhibits.

30. Finding 3 under Criteria 8(A) states, in part, “The proposed Phase I subdivision (thirteen lots) will degrade or destroy 36 acres of critical deer wintering habitat. The applicant will permanently deed restrict 82 acres of critical cover. Additionally, the applicant will provide a 300-foot buffer around the mitigation land.”

31. Exhibit 68 states, “The Applicant understands the wildlife biologist will propose permanent forest management easements for approximately eighty-two acres of the remaining intact, deer habitat areas, which, when buffer areas are included, will include approximately one hundred forty acres of permanently protected habitat.”

32. Exhibit 69 is a letter from Respondents to the Department. In it, Respondents state, “Riverbend proposes to set aside approximately eighty-two acres in the north and central ridge areas of the property in perpetuity, to mitigate habitat loss from Phase One of the development. Including buffer strip areas surrounding this critical habitat, the total proposed area for mitigation is approximately one hundred forty acres.”

33. Exhibit 83 is a map that designates 140 acres as “proposed mitigation area.” The areas comprising this area are also depicted on Exhibit 93.

34. On March 4, 1997, Respondents provided the Department with a draft Grant of Development Rights and Conservation Restrictions. On July 24, 1997, the Department requested that the Respondents make changes to the proposed draft. On July 15, 1998, Respondents sent the Department a revised draft that purported to adopt all the Department’s requested changes. It did not actually

adopt all the changes. On August 1, 2012, Respondents executed a copy of the July 15, 1998 draft. The Department did not accept it. Nor has it approved any other conservation easement or deed restrictions. Since 1998, the Department has developed a new form conservation easement. This form, adopted to the facts of this case, is attached to this Order as Exhibit 1 (the "Conservation Easement").

35. To date, Respondents have failed to permanently deed restrict 82 acres of the Project Tract. Therefore, Respondents have violated -1 Amendment conditions 1 and 30 and -2 Amendment condition 17. The Board has not assessed a penalty for this violation.
36. The critical habitat mitigation land depicted on Exhibits 83 and 93 surrounds pockets of land that are not subject to -1 Amendment conditions 1 and 30 or -2 Amendment condition 17. These pockets are included in the Conservation Easement attached to this Order as Exhibit 1 to offset the impacts to the critical habitat from the violations listed in this Order and to facilitate the enforcement of the restrictions. The area of the Conservation Easement in Exhibit 1 totals approximately 172 acres and its approximate location is depicted on the map attached to this Order as Exhibit 2.

V. Delineation of the Critical Habitat Mitigation Land

37. The -1 Amendment states, "The permittee, its assigns, and successors in interest, are obligated by this permit to complete and maintain the project only as approved...."
38. -1 Amendment condition 34 states, "The mitigation boundary for the critical habitat shall be delineated no later than one year after receipt of the deposit the first lot."
39. As stated above, -1 Amendment condition 1 requires the project to be completed in accordance with the Commission's findings of fact and conclusions of law as well as the approved plans and exhibits.
40. In Exhibit 69, Respondents tells the Department, "You suggest the boundaries of mitigation areas be delineated on site. Riverbend does not believe such a delineation is necessary."
41. In Exhibit 80, the Department states, "We would like the mitigation area boundary to be delineated on the ground. However, we are willing to postpone the completion date until one year following the first deposit on a lot."

42. Finding 6 under Criteria 8(A) states, “Additionally, the mitigation area boundary needs to be delineated no later than one year after receipt of the deposit on the first lot. Exhibit 80.” By referencing Exhibit 80 and not Exhibit 69, the -1 Amendment required the mitigation area to be delineated on the ground.
43. Town of Rockingham tax records reveal that as of April 6, 2005, Respondents had sold four lots.
44. On May 26, 2016, the Board’s Enforcement Officer visited the Project Tract. The mitigation area boundary was not delineated on the ground.
45. By failing to maintain delineations of the mitigation area boundary, Respondents violated -1 Amendment conditions 1 and 34.

VI. Altering a Parcel of Land without District 2 Environmental Commission Approval

46. -1 Amendment condition 39 states, “No further subdivision, alteration, or development of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission.”
47. As stated above, -1 Amendment condition 1 requires the project to be completed in accordance with the Commission’s findings of fact and conclusions of law as well as the approved plans and exhibits. Permit condition 1 contains this same requirement.
48. Schedule B to the Permit application states, “No permanent buildings will be erected or utilized; the only structures involved might be temporary shelters for woods workers. These will not be heated.” It also states that, “No buildings are planned.”
49. Schedule B to the -1 Amendment application states, “Buildings which may result from this subdivision will be subject to further review by the Commission when relevant building applications are submitted. Any temporary logging shelters which may be constructed by the applicant will employ wood heat.” It also states, “No permanent buildings are planned by the Applicant....”
50. Neither the Permit nor any amendments thereto authorize construction of a permanent building on the Project Tract.
51. On October 7, 2013, April 4, 2014, and May 26, 2016, the Board’s Enforcement Officer visited the Project Tract. He observed that Respondents

constructed a dwelling on the Project Tract.

52. This dwelling consists of a wood frame camp with an old recreational vehicle attached to it. Both the wood frame camp and recreational vehicle are covered with a permanent corrugated metal roof. The dwelling has an attached stove pipe and appeared to be heated with wood. A separate wooden outhouse had been constructed to serve the camp structure and a small, fenced-in pet burial area had been built next to the camp.

53. During the April 4, 2014 visit, the Board's Enforcement Officer observed signs that the dwelling was actively being occupied despite a snow-covered road that inhibited automobile access. A neighbor to the Project Tract reported to the Board's Enforcement Officer that the dwelling has been occupied year-round for many years.

54. By constructing the dwelling on the Project Tract without written approval from the District Environmental Commission, the Respondents violated -1 Amendment conditions 1 and 39.

ORDER

- A. Respondents shall comply with the Permit and all amendments thereto and shall immediately cease all activities that are inconsistent therewith.
- B. No later than **60 days** following the receipt of this Order, Respondents shall submit to the Commission a Forest Management Plan for the Project Tract approved by the Department. This plan shall include the following:
 - a. A survey map depicting the parcel to be conserved by the Conservation Easement.
 - b. A detailed description of any proposed management activities within the Conservation Easement area. All proposed management activities shall be consistent with the Purposes of the Conservation Easement, the Permit and all amendments thereto, and the long-term conservation of deer wintering habitat.
 - c. A detailed accounting of stocking of all forest stands on the project tract, including qualitative and quantitative data on the present functionality of each stand as critical deer wintering habitat, including but not limited to, percentage of softwood cover measured by stems per acre and percent crown closure.
 - d. Proposed management activities within all forest stands.
- C. No later than **120 days** following the receipt of this Order, Respondents shall record a survey, conducted by a surveyor approved by the Department, of the

parcel to be conserved by the Conservation Easement. Respondents shall provide the Department with electronic and full-size copies of the recorded survey plan.

- D. No later than **120** days following the receipt of this Order, Respondents shall install boundary markings in accordance with Department directives, along the boundary of the parcel to be conserved by the Conservation Easement. Trees along the boundary shall be witnessed with blazes and allowed to dry a minimum of 1 month prior to painting. Blazes must be cut into the sapwood, removing the bark. Blazes shall be approximately 4" long x 2" wide. Red paint shall be applied to blazes by brush. All blazes must be visible from adjacent blazes, but in any case, shall not be set more than fifty (50) feet apart. The Respondents shall witness each of the corners using three blazes, one above the other, facing in the direction of the corner.
- E. No later than **120 days** following the receipt of this Order, Respondents shall execute and record the Conservation Easement. Schedule A to the Conservation Easement, which contains the property description of the conserved lands, shall be finalized upon completion of the above-referenced survey. It shall contain the 82 acres referenced in -1 Amendment condition 30 and -2 Amendment condition 17, as well as the 300-foot buffer referenced in -1 Amendment condition 31. These areas are depicted on Exhibits 93 and 83 to the -1 Amendment. It shall also contain the areas of land needed to fill in the pockets that currently exist between these areas. The approximate area of the parcel of land to be covered by the Conservation Easement will consist of approximately 172 acres and is depicted on the map attached to this Assurance as Exhibit 2. This additional acreage shall serve as partial mitigation for deer wintering habitat that was compromised by the unauthorized logging activities referenced in this Assurance.
- F. No later than **90 days** following the receipt of this Order, Respondents shall hire a qualified consultant to conduct, subject to the Department's direction and approval, a baseline documentation report.
- G. No later than **90 days** following the receipt of this Order, Respondents shall file an application for and diligently pursue an amendment to the Permit for either the removal or approval of all unpermitted structures on the Project Tract, including but not limited to the above-referenced dwelling.
- H. For purposes of this Assurance, "diligently pursue" shall mean that Respondents shall (a) respond to all requests for information from the Commission or the Coordinator for the Commission (as applicable) by the date set by the Commission or Coordinator, and (b) in good faith meet and comply with all scheduling or other orders or memoranda issued by the

Commission. Respondents shall not be responsible for delays outside their control, including those caused by the Commission.

- I. No later than **30 days** following the receipt of this Order Respondents shall pay the following:
 1. Pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **Sixty-Three Thousand Four Hundred Twenty-Five Dollars and Zero Cents (\$59,425.00)**, 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 **Six Thousand Six Hundred Seventy-three Dollars and Forty-three Cents (U.S) (\$6,673.43)**, to reimburse the Natural Resources Board 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 Rockingham land records, by check made payable to: "Town of Rockingham, Vermont."
- J. Respondents are jointly and severally liable for all obligations under this Order.
- K. All payments and documents required by this Assurance shall be sent to:

Natural Resources Board
10 Baldwin Street
Montpelier, Vermont 05633-3201
- L. 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 Respondents from the violation, the need for deterrence, and all other penalty factors enumerated in 10 V.S.A. § 8010(b), each according to proof at the hearing.
- M. Any payment by Respondents 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. Respondents shall not deduct, nor attempt to deduct, any payments, penalties, contributions or other

expenditures required by this Administrative Order from Respondents' state or federal taxes.

- N. 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.
- O. Nothing in this Order 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.

RESPONDENTS' 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

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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