

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER RESOURCES
)	
)	
DUNLAP STONE, INC.,)	
)	
)	
RESPONDENT.)	CASE NO. WPC20-0086

COMMISSIONER’S ORDER AND ASSESSMENT

NOW COMES David W. Salyers, P.E., the Commissioner of the Tennessee Department of Environment and Conservation (“Department”), and states:

PARTIES

I.

The Commissioner is responsible for administering and enforcing the Water Quality Control Act, Tennessee Code Annotated §§ 69-3-101 to -148 (“Act”).

II.

Dunlap Stone, Inc. (“Respondent”) operates a limestone quarry in Bledsoe County, Tennessee, at 42995 State Highway 30 (“Site”). The Respondent is properly registered to conduct business in Tennessee. Service of process may be made on the Respondent through its Registered Agent, J. W. Thomas III, 5139 W. Valley Rd., Dunlap, TN 37327-4951.

JURISDICTION

III.

Whenever the Commissioner has reason to believe that a violation of the Act has occurred, is occurring, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken. Tenn. Code Ann. § 69-3-109(a). Further, the

Commissioner has authority to assess civil penalties against any violator of the Act, Tenn. Code Ann. § 69-3-115, and has authority to assess damages incurred by the State resulting from the violation, Tenn. Code Ann. § 69-3-116. The Board of Water Quality, Oil and Gas (“Board”) has promulgated rules governing general water quality criteria and use classifications for surface waters. Tenn. Comp. R. & Regs. Chapters 0400-40-03 and 0400-40-04.

IV.

The Respondent is a “person” under the Act. Tenn. Code Ann. § 69-3-103.

V.

The unnamed tributary to Skillern Creek (“Stream”) constitutes “waters” of the state and a “stream.” Tenn. Code Ann. § 69-3-103. All streams have been classified by the Board for suitable uses. Tenn. Comp. R. & Regs. Chapter 0400-40-04. The unnamed tributary to Skillern Creek is classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VI.

Any person engaged in or planning to engage in the discharge of sewage, industrial wastes, or other wastes into waters, or to a location from which it is likely that the discharged substance will move into waters must obtain and comply with a permit from the Department. Tenn. Code Ann. § 69-3-108. Each permit requires a set of effluent limitations to indicate adequate operation of performance of treatment units used and to appropriately limit those harmful parameters present in the wastewater. Tenn. Comp. R. & Regs. 0400-40-05-.08. The permittee shall at all times properly operate and maintain all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee to achieve compliance with the conditions of the permit. Tenn. Comp. R. & Regs. 0400-40-04-.07. It is unlawful for any person

to violate the conditions of a discharge permit issued by the Department. Tenn. Code Ann. §§ 69-3-108(b) and -114(b).

FACTS

VII.

On June 10, 2015, the Division issued coverage under NPDES permit No. TN0071331 to the Respondent for the discharge of treated wastewater and stormwater in accordance with effluent limitations, monitoring requirements, and other conditions set forth in the permit.

VIII.

On July 14, 2020, Division personnel inspected the Site and observed that limestone gravel had been stockpiled outside of the permitted boundary in the Northwest corner of the Site and a significant amount of gravel had eroded from the stockpiles and had deposited in the Stream.

IX.

On July 30, 2020, Division personnel conducted a Natural Resource Damage Assessment at the Site to determine the extent of damage caused by the illicit discharge of gravel into the Stream. Inspectors observed that erosion began at the base of the stockpile; gravel inundated the stream head and flowed approximately 4,930 feet downstream. The Stream was assessed in two reaches based upon similarity of severity of impacts within each separate reach. Stream Reach 1 was approximately 1,155 feet long and gravel deposits were measured to be up to four feet deep and 42 feet wide, averaging approximately 23 feet wide. Stream Reach 2 was approximately 3,775 feet long; gravel deposits were approximately one to four inches deep on bars and benches within the Stream, but the Stream retained its natural streambed strata under these bars.

X.

On September 1, 2020, the Division issued a Notice of Violation (NOV) to the Respondent for conducting mining activity outside the permitted area, failing to install/maintain best management practices (BMPs), and causing a condition of pollution. The NOV required the Respondent to submit a Corrective Action Plan (CAP) for review and approval no later than September 15, 2020, including improved BMPs, steps to remove gravel, and steps to reconstruct the Stream.

XI.

The Division received an NOV response dated September 11, 2020. The response indicated that the Respondent planned to implement temporary stabilization measures within 30 to 60 days, weather permitting, had engaged an engineering firm to develop a plan for stormwater BMPs and gravel removal, and had engaged a separate environmental consultant to develop a CAP for stream restoration. The letter requested a 120-day extension of the CAP submission deadline.

XII.

During the course of the investigation the Division incurred damages of \$1,588.50.

XIII.

The Department calculated Natural Resource Damages (NRD) based upon the Stream's quality, length of the impact, gravity of impact, and duration of loss in the absence of successful restoration. Because of the nature of the disturbance, Division investigators used a downstream reference to determine that the tributary to Skillern Creek was fully supporting of its classified uses. The NRD was calculated to be \$426,767.25 as a result of the damage to 4,930 feet of the

unnamed tributary to Skillern Creek. For Reach 1, the gravity of impact was determined to be severe, the impact duration was determined to be between 5 and 100 years, and the NRD was calculated to be \$292,792.50. For Reach 2, the gravity of impact was determined to be minor, the impact duration was determined to be between 1 and 5 years, and the NRD was calculated to be \$133,974.75. Upon the successful completion of a Division-approved Stream Restoration Plan, the NRD may be recalculated based on temporal loss of resource value, calculated at a rate of 3% per year.

VIOLATIONS

XIV.

By causing a condition of pollution, and violating the terms of its NPDES Permit and unlawfully discharging gravel, the Respondent has violated the Act:

Tenn. Code Ann. § 69-3-108(b)(3), (4), and (6):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;

(4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

and

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters.

Tenn. Code Ann. § 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree that is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the Board of any permits or orders issued pursuant to this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the Board or the Commissioner under this part.

ORDER AND ASSESSMENT

XV.

Pursuant to the authority vested by sections 69-3-109, -115, and -116 of the Act, I, David W. Salyers, P.E., hereby issue the following Order and Assessment (“Order”) to the Respondent. The case number WPC20-0086, should be written on all correspondence regarding this matter. All documentation relating to corrective action items in this Order shall be received by the Division by the date(s) specified herein. Such documents should be sent electronically to DWRWater.Compliance@tn.gov AND TDEC.Mining@tn.gov **OR** in duplicate to both addresses below:

Bryan Epperson, Manager
Mining, Land Reclamation, and Oil &
Gas Unit
Division of Water Resources
3711 Middlebrook Pike
Knoxville, Tennessee 37921

AND

Jessica Murphy, Manager
Enforcement and Compliance Unit
Division of Water Resources
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Ave., 11th Floor
Nashville, Tennessee 37243

1. The Respondent is assessed a total civil penalty of \$50,000.00 to be paid to the Division as outlined below. All payments should be sent to the following address:

Treasurer, State of Tennessee
Division of Fiscal Services – Consolidated Fees Section
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Ave., 10th Floor
Nashville, Tennessee 37243

2. **The Respondent shall pay \$12,500.00 to the Division on or before the thirty-first day after receipt of this Order.**

3. **The Respondent shall pay damages of \$1,588.50 to the Division on or before the thirty-first day after receipt of this Order.**
4. The Respondent shall submit a corrective action plan / engineering report (CAP/ER) no later than 90 days after receipt of this Order. The CAP/ER shall specify what steps will be taken to stop the unpermitted discharge of gravel to the Stream, as described herein, and shall include a schedule with specific dates to complete each step with final completion not to exceed six months. If the Division requests modifications of the CAP/ER the Respondent shall submit the revision no later than 30 days after receipt of comments. If the Respondent fails to comply with Item 4, the Respondent shall pay \$165.00 to the Division for each day the CAP/ER is late, not to exceed a total of \$4,950.00.
5. The Respondent shall complete each step of the CAP/ER no later than the date in the Division-approved schedule. The Respondent shall submit progress reports on completion of each step, to include a summary and photographs, no later than 30 days after each scheduled completion date. If the Respondent fails to comply with Item 5, the Respondent shall pay \$165.00 to the Division for each day a progress report is late, not to exceed a total of \$4,950.00.
6. The Respondent shall submit a final report no later than 30 days after completion of the CAP/ER. The final report shall include an evaluation of the CAP/ER toward achieving compliance with the Permit, including photographs. If the Respondent fails to comply with Item 6, the Respondent shall pay \$165.00 to the Division for each day the final report is late, not to exceed a total of \$4,950.00.
7. The Respondent shall submit a Stream Restoration Plan no later than 90 days after receipt of this Order. The Steam Restoration Plan shall specify what steps will be taken to remove

quarried gravel from the 4,930 feet of the unnamed tributary to Skillern Creek, to restore the Stream to its natural bed and banks, and to monitor the success of the stream restoration at a minimum of three locations for at least five years. The schedule for completion of gravel removal and stream restoration shall be not be later than 12 months from receipt of Division approval. If the Division requests modifications of the Stream Restoration Plan the Respondent shall submit the revision no later than 30 days after receipt of comments. If the Respondent fails to comply with Item 7, the Respondent shall pay \$165.00 to the Division for each day the Stream Restoration Plan is late, not to exceed a total of \$4,950.00.

8. The Respondent shall complete each step of the Stream Restoration Plan no later than the date in the Division-approved schedule. The Respondent shall submit progress reports on completion of each step, to include a summary and photographs, no later than 30 days after the scheduled completion date. If the Respondent fails to comply with Item 8, the Respondent shall pay \$165.00 to the Division for each day a progress report is late, not to exceed a total of \$4,950.00.
9. The Respondent shall submit a final report no later than 30 days after completion of the Stream Restoration Plan. The final report shall include an evaluation of the Stream Restoration Plan and its implementation, including photographs. If the Respondent fails to comply with Item 9, the Respondent shall pay \$165.00 to the Division for each day the final report is late, not to exceed a total of \$4,950.00.
10. The Respondent shall submit five annual monitoring reports documenting the progression of the Stream restoration. Monitoring shall take place between January and March each year, and the monitoring report due no later than April 30, beginning the first year after completion of the Stream Restoration Plan. The first monitoring report shall be due on

April 30, shall consist of upstream and downstream pictures and narrative description taken according to the schedule and locations approved in Item 7. If, based upon the findings of a report, the Division requests additional corrective actions be taken, the Respondent shall submit documentation of completion no later than 30 days after receipt of comments. If the Respondent fails to comply with Item 10, the Respondent shall pay \$212.00 to the Division for each day a report is late, not to exceed \$5,300.00.

11. The Respondent shall maintain substantial compliance with the Permit for a period of five years after completion of the CAP/ER. If the Respondent fails to comply with Item 11, as evidenced by its receipt of a NOV, the Respondent shall pay \$500.00 to the Division for each violation, not to exceed \$2,500.00.

12. If the Stream Restoration Plan is not implemented in accordance with this Order (including applicable deadlines), the Respondent shall pay natural resource damages of \$426,767.25, not later than 30 days after receipt of a demand for payment from the Department. If the Respondent successfully completes gravel removal and stream restoration in accordance with this Order (including applicable deadlines), the Respondent shall pay natural resource damages for temporal loss based on the Department's recalculation, not later than 30 days after receipt of a demand for payment from the Department.

This Order shall be considered closed no later than five years after completion of the Stream Restoration Plan, provided the Respondent has complied with all of the above requirements, all penalties owed have been paid, and the facility is in substantial compliance with the Permit.

The Division may, for good cause shown, extend the compliance dates contained within this Order. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventative measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated civil penalty shall become due 30 days thereafter.

Failure to comply with any of the requirements of this Order could lead to further enforcement actions, which may include additional civil penalties, assessment of damages, and/or recovery costs.

RESERVATION OF RIGHTS

In issuing this Order, the Department does not implicitly or expressly waive any provision of the Act or the regulations promulgated thereunder or the authority to assess costs, civil penalties, and/or damages incurred by the State against the Respondent. The Department expressly reserves all rights it has at law and in equity to order further corrective action, assess civil penalties and/or damages, and to pursue further enforcement action including, but not limited to, monetary and injunctive relief. Compliance with this Order will be considered as a mitigating factor in determining the need for future enforcement action(s).

NOTICE OF RIGHTS

The Respondent may appeal this Order. Tenn. Code Ann. §§ 69-3-109, -115, and -116. To do so, a written petition setting forth the reasons for requesting a hearing must be received by the

Commissioner within 30 days of the date the Respondent received this Order or this Order will become final.

If an appeal is filed, an initial hearing of this matter will be conducted by an Administrative Law Judge (ALJ) as a contested case hearing. Tenn. Code Ann. § 69-3-110; Tenn. Code Ann. §§ 4-5-301 to -325 (the Uniform Administrative Procedures Act); Tenn. Comp. R. & Regs. 1360-04-01 (the Department of State's Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies). Such hearings are legal proceedings in the nature of a trial. Individual Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. No one may represent another person in a contested case proceeding unless they are an attorney licensed to practice law in Tennessee. Governments and artificial persons (corporations, limited partnerships, limited liability companies, etc.) cannot engage in the practice of law and therefore may only pursue an appeal through an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at a reduced or no cost through a local bar association or legal aid organization.

At the conclusion of any initial hearing, the ALJ has the authority to affirm, modify, or deny the Order. Furthermore, the ALJ on behalf of the Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of the ALJ and a court reporter.

Any petition for review must be directed to the Commissioner of the Department of Environment and Conservation, c/o Jenny L. Howard, General Counsel, Department of Environment and Conservation, William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Ave., 2nd Floor, Nashville, Tennessee 37243. Attorneys should contact the undersigned counsel of

record. An appeal may also be filed by sending the petition to the following email address:

TDEC.Appeals@tn.gov.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation as of this 16th day of October, 2020.

David W Salyers

David W Salyers (Oct 16, 2020 10:40 CDT)

David W. Salyers, P.E.

Commissioner

TN Department of Environment and Conservation

Reviewed by:

Stephanie A Durman

.. (Oct 16, 2020 11:34 CDT)

Stephanie A. Durman (BPR #027783)

Senior Associate Counsel

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