



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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DOVER, DELAWARE 19901

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**NOTICE OF ADMINISTRATIVE PENALTY ASSESSMENT,
CEASE AND DESIST AND SECRETARY'S ORDER**

Pursuant to 7 Del. C. Chapters 40, 60 & 66

Order No. 2010-DW-DWS-0027

***Personally Served By an Environmental Protection Officer,
By U.S. Certified Mail and By U.S. First Class Mail to:***

Respondent

Personally Served by an Environmental Protection Officer
Riverbend Community, LLC
Joseph L. Capano, Sr.
North Heron Road
New Castle, DE 19702

By U.S. Mail
Joseph L. Capano, Sr.
P.O. Box 4373
Wilmington, DE 19803

Registered Agent:

By U.S. Mail, and U.S. Certified Mail
Riverbend Community, LLC
1601 Concord Pike, Ste. 42B
New Castle, DE 19702

Dear Joseph L. Capano, Sr. and Riverbend Community, LLC:

This is to notify Joseph L. Capano Sr. and Riverbend Community, LLC (Respondent) that the Secretary of the Department of Natural Resources and Environmental Control (Department) determined that Respondent is in violation of 7 Del. C. Chapters 40, 60, and 66, 7 Del. Admin. C., § 5101 et seq., (Sediment and Stormwater Regulations), 7 Del. Admin. C., § 7502 et seq., (Wetlands Regulations), and 7 Del. Admin. C., § 7201 et seq., (Water Pollution Regulations). Accordingly, the Department is issuing this Notice of Administrative Penalty Assessment, Cease and Desist and Secretary's Order.

Delaware's Good Nature depends on you!

BACKGROUND

Respondent and Parkway Gravel, Inc. own or have owned property in New Castle, Delaware, more fully described in the "Property" section *infra*, where Respondent has been building an over 55 community called "Riverbend at Old New Castle Subdivision." The community, which is adjacent to State-regulated wetlands, will consist of single family and townhouse units, as well as a community clubhouse.

Parkway Gravel, Inc. received an approved Sediment and Stormwater Management Plan (Plan) on December 7, 2006, and National Pollutant Discharge Elimination System (NPDES) General Permit Notice of Intent (NOI) No. 2201 on October 17, 2006. The NOI General Permit coverage was transferred to Riverbend Community, LLC effective November 1, 2007. However, Riverbend Community, LLC failed to submit a revised Plan as required by the Sediment and Stormwater Regulations and in the Department's Notice of Violation (NOV) issued on December 24, 2008, via certified mail and facsimile. The NOV was issued in response to a site inspection conducted by the Department and New Castle Conservation District on December 3, 2008.

Additionally, numerous Department site reviews conducted in 2009 found violations that were formally documented to and/or communicated verbally to Riverbend Community, LLC, including:

1. Construction in State-regulated wetlands without a permit.
2. Lack of Stabilization of construction entrances.
3. Sediment accumulation and lack of vegetative stabilization in bioswales.
4. Inadequate inlet protections.
5. Inadequate or absent vegetative stabilization.
6. Improper maintenance of silt fences.
7. Lack of the required Certified Construction Reviewer (CCR) reports.

Several NOV's were issued by the Department without Riverbend Community, LLC implementing any effective correction of the violations. The following is a list of the items enumerated on the NOV's; items in bold remain currently out of compliance:

1. Placement of approximately 0.37 acres of fill in the form of an earthen causeway in State-regulated wetlands without a permit. Recommendation was made to suspend any further work in State-regulated wetlands. Remediation remedies were discussed with Riverbend Community, LLC's current and former consultants. **The causeway is still present in State-regulated wetlands.**
2. Stabilize all disturbed areas that have not been worked for over 14 calendar days per the temporary and permanent seeding tables in the *Erosion and Sediment Control Handbook*. Stabilization must include the slopes on all the existing sediment traps; erosion matting is required on all slopes 3:1 or greater. **Stabilization has not been achieved.**

3. Stabilize all building lots with temporary vegetation or soil stabilizer. This includes the repair of all gullies and rills associated with the disturbed areas and building lots. **Stabilization has not been achieved.**
4. Install erosion and sediment controls at each active building lot as indicated on the approved plan.
5. Install a stabilized construction entrance at the edge of the asphalt base by the “bridge.”
6. Clean all impervious roadways of sediment.
7. Install silt fence as indicated on the approved plan.
8. Install inlet protection at all inlets Type 1 or Type 2.
9. Perform maintenance on the existing inlet protection. **Inlet protections have not been repaired.**
10. Provide repairs to the steep slopes on the north side of the roadway in Phase 2; the stability of the road base is threatened. **The roadway has not been repaired and continues to erode.**
11. Relocate concrete wash-out area so that washed material does not enter into sediment trap #3.
12. At all areas where sediment exited the site via silt fence failures, clean up the sediment and return it to the site.
13. Provide a revised Plan to the Department with the current conditions of the site on the plan that will include stormwater management for the two areas being used as “pseudo-sediment traps” in Phase 1. Account for the “bleeder trenches” cut behind building lots 2-6 and 19-21. The site is out-of-phase with the current Plan and a revised sequence of construction is required. Stormwater quality management must be provided for all impervious areas on the site, including areas that have already been developed. **There is no Plan for the site.**
14. Provide the Department with a copy of the Record Plan. **Record Plan has not been received.**

The wetlands violations continue and remediation of the State- regulated wetlands area where fill was placed has not occurred. Riverbend Community, LLC has continued land-disturbing activities despite the lack of an approved Plan and the lack of a NPDES General

Construction Permit. Additionally, the non-compliance continues at the site, and there is neither a Plan nor NPDES General Permit coverage.

LIST OF TERMS

CCR: Certified Construction Reviewer

DNREC: Department of Natural Resources and Environmental Control

DSWC: Division of Watershed Stewardship, formerly Division of Soil and Water Conservation

Department: Department of Natural Resources and Environmental Control

NCCD: New Castle County Conservation District

NOI: Notice of Intent

NOV: Notice of Violation

NPDES: National Pollutant Discharge Elimination System

S&S Regulations: Delaware's Sediment and Stormwater Regulations

Water Pollution Regulations: Delaware Regulations Governing the Control of Water Pollution

Wetlands Regulations: Delaware Wetlands Regulations

WSLS: Wetlands and Subaqueous Lands Section

FINDINGS OF FACT

A Notice of Intent (NOI) was received on October 17, 2006, from Parkway Gravel, Inc.

An approved Plan was issued to Parkway Gravel, Inc. on December 7, 2006, and construction activities commenced shortly thereafter.

On November 21, 2008, the site was referred to the Department by the New Castle County Conservation District (NCCD).

On December 17, 2008, the Department received a Transfer of Authorization of the NOI from Parkway Gravel, Inc. to Riverbend Community, LLC for stormwater discharges associated with construction activity under a NPDES General Permit. The Transfer of Authorization was

effective on November 1, 2007, when the transfer from Parkway Gravel, Inc. to Riverbend Community, LLC for operational control actually occurred but the required form was not submitted until December 17, 2008.

On December 22, 2008, the Department's Wetlands and Subaqueous Lands Section (WSLS) conducted a site review based on information received from the Division of Soil and Water Conservation (now the Division of Watershed Stewardship; See H.B. 480 signed by the Governor on July 23, 2010), stating that it appeared fill had been placed in State-regulated wetlands on the site and that the Division discovered approximately 0.40 acres of fill had been placed in the State-regulated wetlands within the subject property without a permit. This fill had occurred during the construction of a causeway that provides access to the subdivision and while placing fill around a sanitary sewer line. The fill placed around the sewer line was later removed voluntarily. The remaining fill in the State-regulated wetlands constitutes approximately 0.37 acres.

On December 24, 2008, the Division of Watershed Stewardship issued a Notice of Violation (the 2008 NOV) to Riverbend Community, LLC via facsimile transmission and certified mail. The 2008 NOV addressed issues concerning sediment and stormwater violations and stated that the site was in violation of 7 *Del. C. Ch. 60* and the Federal NPDES requirements as well as 7 *Del. C. Chapter 40* (Delaware's Sediment and Stormwater Law), and Delaware's Sediment and Stormwater Regulations. The return receipt for the certified mail indicated the item was undeliverable, but the facsimile transmission went through successfully. On June 18, 2009, the 2008 NOV was hand-delivered to Riverbend Community, LLC during a site visit.

On January 2, 2009, a NOV (the 2009 NOV) was issued from the WSLS to Riverbend Community, LLC. This NOV informed the Riverbend Community, LLC that violations occurred during construction of an earthen causeway because a substantial amount of fill material was placed in State-regulated wetlands without a permit to do so. WSLS asked Riverbend Community, LLC to initiate a contact to discuss the issues and strongly recommended that Riverbend Community, LLC suspend any further work in State-regulated wetlands. This letter was returned to the WSLS due to an invalid address. The 2009 NOV was then re-sent via certified mail to a different address. This second letter was returned to the WSLS because it remained unclaimed. This letter was sent a third time on March 11, 2009, to Riverbend Community, LLC's consultant at the time, Ron Sutton, who hand-delivered the letter to Riverbend Community, LLC. Riverbend Community, LLC did contact the WSLS upon the receipt of the letter.

The Riverbend Community, LLC received the Division of Watershed Stewardship's Sediment and Stormwater Inspection Report dated January 14, 2009, enumerating the site non-compliances, which included the violation for not having the required weekly Certified Construction Reviewer reporting as required by 7 *Del. Admin. C. §7201- 9.2.4.2* of the *Water Pollution Regulations*.

Riverbend Community, LLC submitted revisions to the Plan for approval on February 13, 2009, which the Department rejected due to legal inadequacies. Riverbend Community, LLC was to submit further revisions to the Department by June 26, 2009. However, the Department received no further revisions, and thus the previously approved Plan expired on December 6, 2009.

Riverbend Community, LLC received the Division of Watershed Stewardship's Sediment and Stormwater Inspection Report dated March 6, 2009, enumerating the site non-compliances, which included many of the issues from the January 19, 2009, report. The required Certified Construction Reviewer (CCR) reporting began on January 23, 2009.

Riverbend Community, LLC received a Sediment and Stormwater Inspection Report dated May 1, 2009, enumerating the site non-compliances, which included many of the outstanding issues from the previous reports.

The final CCR report is dated July 22, 2009 and the required weekly reports were not being submitted and the site is in violation of 7 *Del. Admin. C.* §7201- 9.2.4.2 of the *Water Pollution Regulations*.

Riverbend Community, LLC received the Division of Watershed Stewardship's Sediment and Stormwater Inspection Report dated August 14, 2009, enumerating the site non-compliances, which included many of the same issues from the previous reports.

Additionally, Riverbend Community, LLC's NPDES General Construction Permit was terminated on December 11, 2009, because no revised Plan was ever received and approved.

The Department issued an NOV on January 21, 2010, (the 2010 NOV) via certified mail and facsimile that mandated the following:

The Plan for the Riverbend at Old New Castle Subdivision expired on December 11, 2009

The NPDES General Permit NOI coverage for Construction Activity was terminated

Until completion of State-regulated wetland investigation and remediation there can be no further land disturbing activities

On March 12 and March 19, 2010, there is documentation of sediment discharge from the Riverbend at Old New Castle Subdivision site.

On March 26, 2010, the Department approved a Plan and an NOI. These documents addressed the following limited activities by Riverbend Community, LLC : (1) remediation of 0.03 acres of the State-regulated wetland violation (0.37 acres of violation remain), (2) partial

remediation of certain federal wetlands violations, and (3) installation of water mains for fire suppression.

On April 7, 2010, a letter was hand-delivered to Riverbend Community, LLC identifying unaddressed stabilization issues from the 2008 NOV and a deadline of April 21, 2010, was set for completion. All areas have not been stabilized.

Riverbend Community, LLC received the Division of Watershed Stewardship's Sediment and Stormwater Inspection Report dated April 27, 2010, enumerating the site non-compliances, which included many of the same issues from the previous reports dating back to May 1, 2009.

On or about September 1, 2010, the Department received information from Riverbend Community, LLC's consultant (Civil Engineering Associates), in the form of drawings and plans of the Riverbend Community site, that contended that Parkway Gravel continues to own certain parcels at the site where violations have occurred. As this information alone was not enough for the Department to determine ownership or liability by Parkway Gravel at the site, further information or agreements provided by the Respondent or Parkway Gravel may assist in determining further appropriate action.

STATUTORY, REGULATORY AND PERMIT REQUIREMENTS

STATE WETLANDS PROGRAM

7 *Del. C.* § 6602 states:

“[I]t is declared to be the public policy of this State to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands.”

7 *Del. C.* § 6607(d)(3) states that the Secretary shall adopt regulations:

“Controlling or prohibiting activities on lands designated or proposed for designation as wetlands, which regulations may vary from area to area according to the ecological value of the subject wetlands and the threat to the health and welfare of the people of this State which their alteration would pose.”

Pursuant to this authority, the Secretary of the Department of Natural Resources and Environmental Control adopted the *Wetlands Regulations*.

A permit is required for the commencement of any activity in the wetlands (7 *Del. C.* § 6604 and 7 *Del. Admin C.* § 7502-6.1.2) including “any expansion or extension of a preexisting use....” (7 *Del. C.* § 6605).

Activity is defined as “any dredging, draining, filling, bulkheading, construction of any kind....” (7 Del. C. § 6603).

A “preexisting use” within the meaning of 7 Del. C. § 6603(f) is “any use of land, or water, or subaqueous lands, or a structure or any combination of these which was lawfully in existence prior to and in active use on July 17, 1973....” 7 Del. C. § 6607(e) states: “If an on-site evaluation by the Department establishes that an error exists in a wetlands map that has been adopted by the Department, the wetlands map containing this error may be corrected by the Department after the Department documents, in writing, the results of the on-site evaluation, and the Department gives the public notice of any proposed correction.”

SEDIMENT AND STORMWATER PROGRAM

7 Del. C. § 4001 states, in relevant part:

“[T]he policy of this chapter [is] to strengthen and extend the present erosion and sediment control activities and programs of this State for both rural and urban lands and to provide for control and management of stormwater runoff consistent with sound water and land use practices.... This policy, to be carried out by establishing and implementing by the Department of Natural Resources and Environmental Control...a statewide comprehensive and coordinated erosion and sediment control and stormwater management program to conserve and protect land, water, air and other resources of the State.”

7 Del. C. § 4006(b)(2) states that one of the Department’s responsibilities is to:

“Develop and publish, as regulation components, minimum standards, guidelines and criteria for delegation of sediment and stormwater program components, and model sediment and stormwater ordinances for use by districts, counties and municipalities.”

Pursuant to this authority, the Secretary of the Department of Natural Resources and Environmental Control adopted the *Sediment & Stormwater Regulations*.

“Sediment and stormwater approvals are required for land changes or construction activities for residential, commercial, industrial, or institutional land use which are not exempted or waived by these Regulations.” 7 Del. Admin. C. § 5101-1.2.

As Riverbend Community, LLC was not exempt, it was required to obtain and remain under an approved Plan during all land disturbing activities pursuant to 7 Del. Admin. C. § 5101-8.1.

The Plan that previously was approved on December 7, 2006, expired on December 6, 2009, pursuant to 7 Del. Admin. C. § 5101-8.7 (“approved plans remain valid for 3 years from the date of an approval, unless specifically extended or renewed by the appropriate plan approval agency”). Riverbend Community, LLC submitted no acceptable revised Plan but continued land

disturbing activities after the expiration of the Plan approved December 7, 2006 in violation of 7 *Del. Admin. C.* § 5101-8.1.

The *Sediment and Stormwater Regulations* require that all erosion and sediment control plans and practices be consistent with the Delaware Erosion and Sediment Control Handbook¹ (the Handbook). See the *Sediment and Stormwater Regulations*, 7 *Del. Admin. C.* §§. 5101-10.2.2 and 15.1. Standards and specifications for such vegetative Stabilization are provided in Section 3.4.3 of the Handbook.

7 *Del. Admin. C.* § 5101-10.2.1 of the *Sediment and Stormwater Regulations* states: “[f]ollowing soil disturbance or redisturbance, permanent or temporary stabilization shall be completed within 14 calendar days as to the surface of all perimeter sediment controls, topsoil stockpiles, and all other disturbed or graded areas on the project site.” Riverbend Community, LLC at no time during the construction process has been in full compliance with this regulation.

NPDES PERMITTING PROGRAM

7 *Del. C.* § 6001(b)(2) states that “[t]he State, in the exercise of its sovereign power, acting through the Department should control the development and use of the land, water, underwater and air resources of the State so as to effectuate full utilization, conservation and protection of the water and air resources of the State.”

7 *Del. C.* § 6003(a)(2) states that “No person shall, without first having obtained a permit from the Secretary, undertake any activity: In a way which may cause or contribute to discharge of a pollutant into any surface or ground water....”

Pursuant to 7 *Del. C.* § 6010(a), “[t]he Secretary may adopt, amend, modify or repeal rules or regulations or plans, after public hearing, to effectuate the policy and purposes of this chapter.” Pursuant to this authority, the *Water Pollution Regulations* were duly promulgated.

7 *Del. Admin. C.* §7201- 6.12 of the *Water Pollution Regulations* requires a NPDES permit for the discharge of a “pollutant” from any “point source” to “State waters.” Although discharges related to construction activities are covered in §7201- 9.2 of the *Water Pollution Regulations* and fall under the “General Permit Program,” a Notice of Intent must be filed with the Department, which will be considered “the equivalent of an NPDES Permit application for a General NPDES Permit.” See §7201- 9.1 of the *Water Pollution Regulations*.

7 *Del. Admin. C.* §7201- 6.10.1 of the *Water Pollution Regulations* requires “[a]ny person who discharges or proposes to discharge pollutants from any point source subject to NPDES program requirements and who does not have an effective permit or equivalent authorization from the Secretary shall submit a complete application to the Department in

¹ The Handbook is readily available at <http://www.swc.dnrec.delaware.gov/Pages/SedimentStormwater.aspx>. A paper copy can also be requested on the same page.

accordance with this section.” Riverbend Community, LLC is a “person” who participated in “construction activity” that likely resulted in “Discharge of Storm Water Associated with Construction Activity” pursuant to § 7201-9.2 of the *Water Pollution Regulations*.

Del. Admin. C. § 7201-9.2.1.4 of the Water Pollution Regulations states:

“To be authorized to discharge stormwater under this Part, a person planning a construction activity must submit, in accordance with the requirements of §9.1.2.3, an NOI form prior to commencement of any construction activities. Unless notified by the Secretary to the contrary, persons who submit such notification and have either obtained approved Sediment and Stormwater Plans or have been deemed exempt in accordance with the *Delaware Sediment and Stormwater Law and Regulations*, are authorized to discharge storm water associated with construction activity under the terms and conditions of this Part.”

7 Del. Admin. C. § 7201- 9.2.2.3. of the Water Pollution Regulations states:

“Any person subject to this Subsection shall at all times properly operate and maintain all facilities, systems and practices of pollution control which are installed, or implemented to achieve compliance with the requirements of this Subsection and with the measures of the Sediment and Stormwater Plan.”

7 Del. Admin. C. §7201- 9.2.2.9 of the Water Pollution Regulations states:

“Any person who violates conditions of this Subsection may be subject to penalties in accordance with *7 Del. C. Chapter 60*. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.”

7 Del. Admin. C. §7201- 9.2.4.2.2 of the Water Pollution Regulations states:

“For the purposes of monitoring, persons subject to this Part must:

- “2. Conduct the following:
 - a. weekly maintenance inspections of erosion and sediment controls, and constructed storm water management measures; and
 - b. inspections of erosion and sediment controls and storm water management practices the next business day after a rainfall event that results in runoff.”

7 *Del. Admin. C.* § 7201-9.2.5.1 of the *Water Pollution Regulations* states:

“A. Persons covered by this Part shall develop, fully implement, and maintain at the site, the approved Sediment and Stormwater Plan (Plan) and any other records that are required in accordance with 7 *Del. C.* Chapter 40 and the *Delaware Sediment and Stormwater Regulations*. The Plan shall cover all site activities from the date of initiation of construction activity to the date of project completion. Pollution prevention measures, in accordance with Delaware Erosion and Sediment Control Handbook standard and specification for Construction Site Pollution Prevention, shall be incorporated into the Plan for construction activity.

B. The Plan shall be signed in accordance with this Part and kept at the facility.

C. Persons covered by this Part shall retain records of all information required by the Plan for a minimum of five (5) years.

D. Keeping the Plan Current

1. Persons covered by this Part shall amend the Plan whenever:

a. There is a change in the design, construction, operation, or maintenance of erosion and sediment controls or storm water management measures on the site; or

b. The Plan proves to be ineffective in eliminating or significantly minimizing the discharge of pollutants, or in otherwise achieving the general objectives of controlling pollutants in storm water discharges associated with construction activity; or

c. To address any sources or potential sources of pollution identified as a result of a site inspection pursuant to 7 *Del. Admin. C.* §7201-9.2.4.2.2.; or

d. Upon notification by the Department or the appropriate plan approval agency that the Plan does not adequately address the requirements of this Part. The notification from the Department or the appropriate plan approval agency shall list and describe the deficiencies of the Plan.

2. Persons subject to 7 *Del. Admin. C.* §7201-9.2.5.4.1.1 shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments prior to construction or modification of the erosion and sediment controls or storm water management measures on the site.

3. Persons subject to 7 *Del. Admin. C.* §§7201-9.2.5.4.1.2, 3 and 4 shall amend the Plan and submit these amendments to the Department or appropriate plan approval agency and receive approval for the amendments within 30 days of notification by the persons subject to this Part, inspector, Certified Construction Reviewer, Department, or appropriate plan approval agency that the current Plan is inadequate. The Department may grant additional time for amending the Plan. A written request for an extension shall be made by the person subject to this Part to the Department.

4. Under the requirements of the *Delaware Sediment and Stormwater Law and Regulations*, the Plan remains valid for three (3) years following the date of approval. If construction continues beyond that three-year time period, an extension or renewal of the Plan may be granted by the Department or the appropriate plan approval agency. Unless the plan is extended or renewed, the plan is considered expired and any construction activity that occurs after the expiration date occurs in violation of the *Delaware Sediment and Stormwater Law and Regulations* and this Part. For the purposes of this Part, permit coverage is only valid within the three (3) year period as long as construction activity is taking place.

E. Failure to Prepare or Amend Plan

In no event shall failure to complete or update a Plan in accordance with this Part relieve any persons covered under this Part of responsibility to implement actions required to protect the waters of the State, complete any actions that would have been required by such Plan, and to comply with all conditions of this Part.”

CONCLUSIONS

Based on the foregoing facts, the Department has determined that Respondent has violated 7 *Del. C.* Chapters 40, 60, and 66, the *Sediment and Stormwater Regulations*, the *Water Pollution Regulations*, and the *Wetlands Regulations*:

1. Respondent violated the Wetlands Act and the *Wetlands Regulations*, commencing on or before December 22, 2008, in that it was required to obtain a Wetlands Permit to place fill and structure in State-regulated wetlands. Furthermore, as part of the permitting process and prior to construction activities, Respondent should have obtained the Department’s prior acknowledgement of the presence of any existing fill in State-regulated wetlands, if that area was mapped in error as “wetlands,” by seeking a change in the State Wetland Maps pursuant to 7 *Del. C.* § 6607(e).

2. Respondent violated *7 Del. C. § 6003(a)(2)* by discharging sediment into waters of the state as witnessed in March 2010 and the implication of previous sediment discharges due to the lack of vegetative stabilization and maintenance of erosion and sediment controls.
3. Respondent at no time during the construction process has been in full compliance with *7 Del. Admin C. § 5101-10.2.1*, and the *Sediment and Stormwater Regulations*, commencing on or before December 23, 2008.
4. Respondent violated *7 Del. Admin C. §7201 - 9.2.1.3* of the *Water Pollution Regulations*, commencing on or before December 23, 2008, in that it was required to obtain a NPDES permit for stormwater discharges, including submitting a Notice of Intent form pursuant to the *Water Pollution Regulations §§ 9.2.1.4* prior to the initiation of construction activities. After the 2010 NOV, Respondent continued construction activities behind the club house in March 2010 without a Plan or a NPDES General Permit NOI.
5. Respondent violated *7 Del. Admin C. § 7201- 9.2.5* of the *Water Pollution Regulations*, in that the Respondent continued construction and land-disturbing activities without an approved Plan beginning on December 11, 2009. In addition the Respondent submitted no acceptable revised plan as required in §§ *7201-9.2.5.1, 9.2.5.4* and *9.2.5.5* of the *Water Pollution Regulations* and *7 Del. C. § 4003(a)*.
6. Respondent violated *7 Del. Admin. C., Section 5101-10.2.1* (Sediment and Stormwater Regulations) by not performing the required stabilization as indicated on the 2008 NOV, the April 7, 2010 letter, CCR reports, and Department inspection reports.
7. Under *7 Del. Admin C. §7201- 9.2.2.3.* of the *Water Pollution Regulations*, the Respondent failed to properly operate and maintain all the facilities on site as directed in the formal documentation of inspection reports from the Sediment and Stormwater Program.
8. Respondent failed to perform the required weekly inspections and the inspections after rainfall events as required by *7 Del. Admin C. §7201- 9.2.4.2* of the *Water Pollution Regulations* and *7 Del. C. § 4013(a)(3)(g)*.

CEASE AND DESIST ORDERS

IT IS HEREBY ORDERED, based upon the foregoing findings and conclusions, and pursuant to 7 *Del. C.* § 4012(c)(1), that Respondent shall immediately cease and desist from any site work activity other than those actions necessary to achieve compliance with this Order and the violations identified herein.

IT IS HEREBY ORDERED, based upon the foregoing findings and conclusions, and pursuant to 7 *Del. C.* § 6018, that Respondent shall immediately cease and desist from all violations stated in this Order.

CONTINUING WETLANDS VIOLATIONS

Within five (5) days of receipt of this Order, the Respondent shall obtain Department approval of a conceptual plan for the earthen causeway depicting a design that utilizes sound engineering principles and that significantly increases the wetlands continuity from one side of the causeway to the other while minimizing fill in State-regulated wetlands. Respondent may be able to accomplish this by spanning a significant portion of the State-regulated wetlands by the use of bottomless arch or box culverts as already discussed with Respondent's consultant. Additionally, within thirty (30) days of receipt of this Order, the Respondent shall obtain Department approval of the engineered plans and specifications for the causeway depicting the approved conceptual plan and an implementation schedule for completion of all work associated with the reconstruction of the causeway.

Notwithstanding the foregoing paragraph, Respondent continues daily violations by having placed fill and structure in state-regulated wetlands. Respondent remains subject to all appropriate enforcement actions for past, future, and on-going violations, including without limitation, pursuant to 7 *Del. C.* § 6617.

CONTINUING SEDIMENT AND STORMWATER VIOLATIONS

1. Within thirty (30) days of receipt of this Order, Respondent shall obtain Department approval of a Sediment and Stormwater Management Plan and an NPDES General Permit NOI for all work associated with the reconstruction of the causeway.
2. Within seven (7) days of receipt of this Order, the Respondent will complete the required vegetative stabilization of the following areas:
 - a. The building lots 140 through 143, including the swale between the lots that discharges into the wetlands. The swale conveyance must be seeded and matted.
 - b. The building lots 7 through 15, including the entire swale behind the lots that discharges into the wetlands. The swale conveyance must be seeded and

matted;

- c. The building lots 73 through 75.
 - d. The slopes of sediment traps 1 and 3.
 - e. Building lot 1.
3. Approval of a Sediment and Stormwater Plan for construction of homes will not be issued until all violations of Chapters 40, 60, and 66 cease.

Notwithstanding the foregoing three numbered paragraphs, Respondent continues daily violations of the Sediment and Stormwater Regulations and the Water Pollution Regulations. Respondent remains subject to all appropriate enforcement actions for past, future, and on-going violations, including without limitation, pursuant to 7 *Del. C.* §§ 6005 and 4015.

ASSESSMENT OF ADMINISTRATIVE PENALTY

Pursuant to the provisions of 7 *Del. C.* § 6005(b)(3), the Department is assessing the Respondent an administrative penalty in the amount of \$ 50,000.00 for the Sediment and Stormwater violations delineated in and as the date of this Order.

In addition to the penalty assessment, Respondent is hereby assessed estimated costs in the amount of \$7,500.00 pursuant to 7 *Del. C.* § 6005(c), which were incurred by the Department in the investigation of the noted violations.

Respondent shall submit one check to the Department in the amount of \$50,000.00 to pay the penalty and one check to the Department in the amount of \$7,500.00 to pay the estimated costs within 30 days from the receipt of this Order. The checks shall be made payable to the "State of Delaware" and shall be directed to: David L. Ormond, Jr., Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street-3rd Floor, Dover, Delaware 19904.

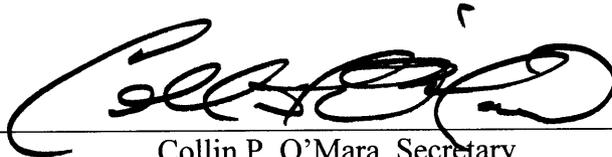
The administrative penalty Order shall become effective and final unless the Department receives from Respondent, no later than 30 days from the receipt of this Notice, a written request for a public hearing on these matters as provided in 7 *Del. C.* § 6005(b)(3) and (c). In the event Respondent request a hearing, the Department reserves the right to withdraw this Assessment and/or part or all of this Order and take additional enforcement actions regarding these and other violations, including without limitation, the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to hold a public hearing but reserves the right to do so at its discretion.

Respondent may prepay the administrative penalty of \$50,000.00 and the Department's estimated costs in the amount of \$7,500.00 in the manner described in the assessment section above. By doing so, Respondent waives their rights to a hearing and the opportunity to appeal or contest the Assessment which shall become a final Order.

This action does not preclude the Department from commencing additional enforcement action.

The foregoing is so Ordered.

Date : 9/20/10



Collin P. O'Mara, Secretary

CPO:DLO:jmb/50-25.doc

cc: David L. Ormond, Jr., Deputy Attorney General
Katherine Bunting-Howarth, Director, Division of Water
Frank Piorko, Director, Division of Watershed Stewardship
Jamie Rutherford, Env. Program Manager II
Laura Herr, Env. Program Manager II
Scott Figurski, Env. Scientist I
Cheryl Gmuer, Program Manager I
Roy Heineman, Paralegal
Jennifer Bothell, Enforcement Coordinator
Nicholis J. Ferrara, Jr., President
Parkway Gravel, Inc.
4048 New Castle Avenue
New Castle, DE 19720

WAIVER OF STATUTORY RIGHT TO A HEARING

Respondent hereby waives its right to a hearing and its opportunity to appeal or contest this Assessment and Order and agrees to the following:

1. **Respondent** will pay the administrative penalty in the amount of \$50,000.00 by sending a check payable to the "State of Delaware" to be received within 30 days of receipt of this Assessment and Order. The check shall be directed to David L. Ormond, Jr., Deputy Attorney General, Department of Justice, 102 W. Water Street- 3rd Floor, Dover, DE 19904.
2. **Respondent** will reimburse the Department in the amount of \$7,500.00, which represents the Department's estimated costs. The reimbursement shall be received within 30 days of receipt of this Assessment and Order. The check shall be made payable to the "State of Delaware" and be directed to David L. Ormond, Jr., Deputy Attorney General, Department of Justice, 102 W. Water Street - 3rd Floor, Dover, DE 19904.

Date: _____

By: _____
(Signature)

Name: Joseph L. Capano, Sr.

RIVERBEND COMMUNITY, LLC

Date: _____

By: _____
(Signature)

Title: _____

Name: _____
(Print)