

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

)	Enforcement Document Number: 00014618
In the matter of:)	Issuing Bureau: BAW
Town of Southborough)	Issuing Region/Office: CERO
)	Issuing Program: SW
		FMF # 626408

**ADMINISTRATIVE CONSENT ORDER
AND
NOTICE OF NONCOMPLIANCE**

I. THE PARTIES

1. The Department of Environmental Protection ("Department" or "MassDEP") is a duly constituted agency of the Commonwealth of Massachusetts established pursuant to M.G.L. c. 21A, § 7. The Department maintains its principal office at 100 Cambridge Street, Suite 900, Boston, Massachusetts 02114, and its Central Regional Office at 8 New Bond Street, Worcester, Massachusetts 01606.
2. The Town of Southborough ("Respondent") is the owner of the real property located on Woodland and Breakneck Hill Roads in Southborough, Massachusetts, pursuant to a deed recorded on June 20, 1980, at the Worcester District Registry of Deeds in Book 6996, Page 313 (the "Site"). Respondent's mailing address for purposes of this Order is 17 Common Street, Southborough, Massachusetts 01772.

II. STATEMENT OF FACTS AND LAW

3. The Department is responsible for the implementation and enforcement of M.G.L. c. 111 §§ 150A and 150A½, the Solid Waste Management Regulations at 310 CMR 19.000, and the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.00. The Department has authority under M.G.L. c. 21A § 16, and the Administrative Penalty Regulations at 310 CMR 5.00, to assess civil administrative penalties to persons in noncompliance with the laws and regulations set forth above.
4. The following facts and allegations have led MassDEP to issue this Consent Order:
 - A. Respondent acquired the Site from Raymond B. Davis and Eleanor M. Davis on June 20, 1980, as evidenced by the deed referenced in Paragraph 2 above. The

Site, which is undeveloped, comprises approximately 87.66 acres of land, and currently consists of conservation land.

- B. On September 28, 2021, the Southborough Conservation Agent submitted a formal notification, via email correspondence, to MassDEP of the presence of a “farm dump” located on a portion of the Site and potentially extending onto a portion of the adjoining private property located at 60 Breakneck Hill Road in Southborough, Massachusetts that is owned by Alexis Fallon, as evidenced by a deed recorded on November 18, 2019 at the Worcester District Registry of Deeds in Book 21018, Page 248 (“Fallon Property”). Evidence of surficial waste and debris has been observed on portions of the Site and also on the Fallon Property. Respondent asserts that the “farm dump” existed prior to Respondent’s taking title to and possession of the Site.
- C. On November 1, 2021, the Southborough Conservation Agent voluntarily submitted to MassDEP a report prepared by Respondent’s environmental consultant, TRC Environmental Corporation (“TRC”), titled: “Draft Solid Waste Assessment Work Plan, Breakneck Hill Farm Dumping Site” (“Draft Plan”). The Draft Plan, which was dated October 2021, was prepared to outline proposed initial assessment activities for the Site and the Fallon Property which includes an approximate 1.0-acre area containing surficial solid waste debris. The Draft Plan was submitted for MassDEP’s review, comment, and approval to initiate the necessary actions required to assess and then clean up the Site.
- D. On January 25, 2022, the Southborough Conservation Agent submitted to MassDEP a report prepared by Respondent’s environmental consultant, TRC, titled: “Proposed Final Solid Waste Assessment Work Plan, Breakneck Hill Farm Dumping Site” (“Proposed Final Plan”). The Proposed Final Plan, which was dated January 2022, addressed MassDEP’s comments on the Draft Plan.
- E. On January 27, 2022, MassDEP approved Respondent’s Proposed Final Assessment Plan for the Site and the Fallon Property (“Final Assessment Plan”).
- F. Respondent established, constructed, operated or maintained a dumping ground at the Site, and disposed or contracted for the disposal of solid waste at a facility that is not approved to manage the particular type of solid waste being disposed, in violation of 310 CMR 19.014. Specifically, when Respondent took title to and possession of the Site, and subsequently did not remove and dispose of the solid waste, Respondent became the entity that operated and/or maintained a dumping ground at the Site. The solid waste disposed of at the Site includes but is not limited to old tires, machine parts, rusted 55-gallon drums, asphalt shingles, appliances, heavy equipment, broken ceramics, plastic objects, and general trash, thereby creating a dumping ground at the Site, which is not a location authorized to accept solid waste.

5. On May 5, 2022, MassDEP issued an Administrative Consent Order, Enforcement Document Number 00012348, to Respondent ("May 2022 ACO"). In paragraph 8.A. of the May 2022 ACO, Respondent agreed to provide MassDEP within 120 calendar days with a copy of a signed access agreement with Ms. Fallon that would grant to Respondent or Respondent's environmental consultant, contractors, and subcontractors access to the Fallon Property for the purpose of performing site assessment activities as outlined in the Final Assessment Plan and to perform cleanup actions to remediate the Site and the Fallon Property as outlined in paragraph 8.C. of the May 2022 ACO. Paragraphs 8.B., 8.C., and 8.D. of the May 2022 ACO set forth deadlines for Respondent to commence assessment of the Site and the Fallon Property, submit a solid waste cleanup plan for the Site and the Fallon Property, and commence solid waste cleanup actions at the Site and the Fallon Property in accordance with an approved cleanup plan.

6. Respondent has represented to MassDEP that it engaged in good-faith negotiations with Ms. Fallon from February 2022 through January 2023 in order to obtain a signed access agreement in accordance with paragraph 8.A. of the May 2022 ACO and that Respondent and Ms. Fallon were unable to execute a mutually agreeable access agreement. Due to the legal impossibility of Respondent accessing the Fallon Property without an access agreement signed by Ms. Fallon, MassDEP is issuing this Administrative Consent Order (ACO), which applies only to the Site and which supersedes the May 2022 ACO (Enforcement Document Number 00012348) in its entirety.

7. Respondent has voluntarily agreed to enter into this Consent Order in order to proceed with assessment and cleanup of the Site to return the Site to compliance with the statutes and regulations referenced in paragraph 3 above.

III. DISPOSITION AND ORDER

For the reasons set forth above, MassDEP hereby issues, and Respondent hereby consents to, this Order:

8. The parties have agreed to enter into this Consent Order because they agree that it is in their own interests, and in the public interest, to proceed promptly with the actions called for herein rather than to expend additional time and resources litigating the matters set forth above. Respondent enters into this Consent Order without admitting or denying the facts or allegations set forth herein. However, Respondent agrees not to contest such facts and allegations for purposes of the issuance or enforcement of this Consent Order.

9. MassDEP's authority to issue this Consent Order is conferred by the statutes and regulations cited in Part II of this Consent Order.

10. Respondent shall perform the following actions:

A. Revised Final Assessment Plan.

Within thirty (30) calendar days of the effective date of this Consent Order, Respondent shall provide MassDEP, for its review and approval, a revised Final Assessment Plan for the Site to complete the necessary actions required to assess and then clean up the Site.

B. Commencement of Site Assessment.

1.) **Within one hundred eighty (180) calendar days** of MassDEP's approval of the revised Final Assessment Plan, Respondent shall commence the site assessment actions as outlined in the approved Final Assessment Plan. Respondent shall provide MassDEP **no less than ten (10) calendar days** notification prior to the commencement of site assessment actions to allow MassDEP the opportunity to observe the site assessment actions.

2.) Respondent shall complete the site assessment actions at the Site as outlined in the Final Assessment Plan **within ninety (90) calendar days** after the commencement of the site assessment actions.

3) MassDEP acknowledges that on September 13, 2022 through September 16, 2022, Respondent's consultants conducted site assessment activities at the Site, and that MassDEP personnel were in attendance to observe. Respondent shall submit a revised Final Assessment Plan for approval by MassDEP that removes activities previously proposed on the Fallon Property due to the legal impossibility of accessing that site.

C. Submission of Cleanup Plan.

Within one hundred eighty (180) calendar days of the completion date of the site assessment actions outlined above in Section III.10.B., including approval of the revised Final Assessment Plan by MassDEP, Respondent shall submit to MassDEP for written approval a cleanup plan for the Site ("Cleanup Plan") prepared by a Massachusetts Registered Professional Engineer knowledgeable in solid waste management and that bears the seal, signature and discipline of said engineer. The Cleanup Plan shall specify proposed methods, procedures, and removal actions to be performed at the Site to remove all waste materials. Respondent shall include a time schedule for implementation of the Cleanup Plan and include at a minimum the following information:

1.) A written approval from the Southborough Conservation Commission to perform work as proposed in the Cleanup Plan within areas of the Site under its jurisdiction.

2.) A description of the cleanup procedures to remove the solid waste from the Site that shall include at a minimum: methods and procedures to segregate and stockpile solid waste debris and measures to protect adjacent wetland resource areas from adverse impacts during Site cleanup efforts. The cleanup plan shall also identify the disposal/recycling facility or facilities proposed for shipment of all solid waste generated from the cleanup activities at the Site.

D. Commencement of Cleanup

1. **Within one hundred eighty (180) calendar days** of the date of MassDEP's written approval of the Cleanup Plan as required above in Section III.10.C., Respondent shall commence cleanup actions at the Site as detailed in the approved Cleanup Plan.
2. Respondent shall notify the Department in writing at least **fourteen (14) calendar days** before the commencement of the cleanup actions as outlined in the Cleanup Plan to allow MassDEP the opportunity to observe the cleanup actions.
3. Respondent shall complete the cleanup actions at the Site as outlined in the Cleanup Plan within **one hundred eighty (180) calendar days** after the commencement of the cleanup actions, unless mutually extended by MassDEP and the Respondent. Extensions for good cause shall not be unreasonably denied. MassDEP shall determine what constitutes "good cause."
4. **Within seven (7) calendar days** of completing the removal of all solid waste from the Site, Respondent shall submit to James McQuade, or his successor, of MassDEP copies of all shipping records, manifests, or other documentation as proof of appropriate processing or disposal of the solid waste removed from the Site. Respondent shall submit appropriate processing or disposal documentation to MassDEP for all of the solid waste removed from the Site. Respondent shall only allow the solid waste to be brought to a facility that is authorized to process or dispose of the solid waste.

11. This Administrative Consent Order supersedes the May 2022 ACO (Enforcement Document Number 00012348) in its entirety.

12. Except as otherwise provided, all notices, submittals and other communications required by this Consent Order shall be directed to:

James A. McQuade
Solid Waste Management Program
Section Chief
MassDEP Bureau of Air & Waste
8 New Bond Street
Worcester, MA 01606

Such notices, submittals and other communications shall be considered delivered by Respondent upon receipt by MassDEP.

13. Actions required by this Consent Order shall be taken in accordance with all applicable federal, state, and local laws, regulations, and approvals. This Consent Order shall not be construed as, nor operate as, relieving Respondent or any other person of the necessity of complying with all applicable federal, state, and local laws, regulations, and approvals.

14. For purposes of M.G.L. c. 21A, § 16 and 310 CMR 5.00, this Consent Order shall also serve as a Notice of Noncompliance for Respondent's noncompliance with the requirements cited in Part II above. MassDEP hereby determines, and Respondent hereby agrees, that any deadlines set forth in this Consent Order constitute reasonable periods of time for Respondent to take the actions described.

15. Force Majeure

A. MassDEP agrees to extend the time for performance of the requirements in paragraph 8 of this Consent Order if MassDEP determines that such failure to perform is caused by a Force Majeure event. The failure to perform the requirements in paragraph 10 of this Consent Order shall be considered to have been caused by a Force Majeure event if the following criteria are met: (1) an event delays performance of the requirements in paragraph 10 of this Consent Order beyond the deadline established herein; (2) such event is beyond the control and without the fault of Respondent and Respondent's employees, agents, consultants, and contractors; and (3) such delay could not have been prevented, avoided or minimized by the exercise of due care by Respondent or Respondent's employees, agents, consultants, and contractors.

B. Financial inability and unanticipated or increased costs and expenses associated with the performance of the requirements in paragraph 10 of this Consent Order shall not be considered a Force Majeure Event.

C. If any event occurs that delays or may delay the performance of the requirements in paragraph 10 of this Consent Order, Respondent shall immediately, but in no event later than 5 days after obtaining knowledge of such event, notify MassDEP in writing of such event. The notice shall describe in detail: (i) the reason for and the anticipated length of the delay or potential delay; (ii) the measures taken and to be taken to prevent, avoid, or minimize the delay or potential delay; and (iii) the timetable for taking such measures. If Respondent intends to attribute such delay or potential delay to a Force Majeure event, such notice shall also include the rationale for attributing such delay or potential delay to a Force Majeure event and shall include all available documentation supporting a claim of Force Majeure for the event. Failure to comply with the notice requirements set forth herein shall constitute a waiver of Respondent's right to request an extension based on the event.

D. If MassDEP determines that Respondent's failure to perform the requirements in paragraph 10 of this Consent Order is caused by a Force Majeure event, and Respondent otherwise complied with the notice provisions set forth in paragraph C above, MassDEP agrees to extend in writing the time for performance of such requirement. The duration of this extension shall be equal to the period of time the failure to perform is caused by the Force Majeure event. No extension shall be provided for any period of time that Respondent's failure to perform could have been prevented, avoided or minimized by the exercise of due care. No penalties shall become due for

Respondent's failure to perform a requirement of this Consent Order during the extension of the time for performance resulting from a Force Majeure event.

E. A delay in the performance of the requirements in paragraph 10 of this Consent Order caused by a Force Majeure event shall not, of itself, extend the time for performance of any other requirement of this Consent Order.

16. Respondent understands, and hereby waives, its right to an adjudicatory hearing before MassDEP on, and judicial review of, the issuance and terms of this Consent Order and to notice of any such rights of review. This waiver does not extend to any other order issued by the MassDEP.

17. This Consent Order may be modified only by written agreement of the parties hereto.

18. The provisions of this Consent Order are severable, and if any provision of this Consent Order or the application thereof is held invalid, such invalidity shall not affect the validity of other provisions of this Consent Order, or the application of such other provisions, which can be given effect without the invalid provision or application, provided however, that MassDEP shall have the discretion to void this Consent Order in the event of any such invalidity.

19. Nothing in this Consent Order shall be construed or operate as barring, diminishing, adjudicating or in any way affecting (i) any legal or equitable right of MassDEP to issue any additional order or to seek any other relief with respect to the subject matter covered by this Consent Order, or (ii) any legal or equitable right of MassDEP to pursue any other claim, action, suit, cause of action, or demand which MassDEP may have with respect to the subject matter covered by this Consent Order, including, without limitation, any action to enforce this Consent Order in an administrative or judicial proceeding. Respondent reserves any rights it may have to appeal or defend any such order, claim, action, suit, cause of action, or demand, except that Respondent shall not challenge the validity, terms and binding nature of this Consent Order. Notwithstanding the foregoing, MassDEP agrees that it will not seek to assess Respondent civil administrative penalties beyond those assessed in this Consent Order for the violations identified in Part II above, provided that Respondent satisfies the terms and conditions of this Consent Order and any permit or approval issued hereunder.

20. This Consent Order shall not be construed or operate as barring, diminishing, adjudicating, or in any way affecting, any legal or equitable right of MassDEP or Respondent with respect to any subject matter not covered by this Consent Order.

21. This Consent Order shall be binding upon Respondent and upon Respondent's successors and assigns. Respondent shall not violate this Consent Order and shall not allow or suffer Respondent's employees, agents, contractors or consultants to violate this Consent Order. Until Respondent has fully complied with this Consent Order, Respondent shall provide a copy of this Consent Order to each successor or assignee at such time that any succession or assignment occurs.

22. If Respondent violates any provision of this Consent Order, Respondent shall pay stipulated civil administrative penalties to the Commonwealth in the amount of \$500.00 per day for each day, or portion thereof, each such violation continues.

Stipulated civil administrative penalties shall begin to accrue on the day a violation occurs and shall continue to accrue until the day Respondent corrects the violation or completes performance, whichever is applicable. Stipulated civil administrative penalties shall accrue regardless of whether MassDEP has notified Respondent of a violation or act of noncompliance. All stipulated civil administrative penalties accruing under this Consent Order shall be paid within thirty (30) days of the date MassDEP issues Respondent a written demand for payment. If simultaneous violations occur, separate penalties shall accrue for separate violations of this Consent Order. The payment of stipulated civil administrative penalties shall not alter in any way Respondent's obligation to complete performance as required by this Consent Order. MassDEP reserves its right to elect to pursue alternative remedies and alternative civil and criminal penalties which may be available by reason of Respondent's failure to comply with the requirements of this Consent Order. In the event MassDEP collects alternative civil administrative penalties, Respondent shall not be required to pay stipulated civil administrative penalties pursuant to this Consent Order for the same violations.

Respondent reserves whatever rights it may have to contest MassDEP's determination that Respondent failed to comply with the Consent Order and/or to contest the accuracy of MassDEP's calculation of the amount of the stipulated civil administrative penalty. Upon exhaustion of such rights, if any, Respondent agrees to assent to the entry of a court judgment if such court judgment is necessary to execute a claim for stipulated penalties under this Consent Order.

23. In the event Respondent fails to pay in full any civil administrative penalty as required by this Consent Order, then pursuant to M.G.L. c. 21A, § 16, Respondent shall be liable to the Commonwealth for up to three (3) times the amount of the civil administrative penalty, together with costs, plus interest on the balance due from the time such penalty became due and attorneys' fees, including all costs and attorneys' fees incurred in the collection thereof. The rate of interest shall be the rate set forth in M.G.L. c. 231, § 6C.

24. Failure on the part of MassDEP to complain of any action or inaction on the part of Respondent shall not constitute a waiver by MassDEP of any of its rights under this Consent Order. Further, no waiver by MassDEP of any provision of this Consent Order shall be construed as a waiver of any other provision of this Consent Order.

25. To the extent authorized by the current owner, Respondent agrees to provide MassDEP, and MassDEP's employees, representatives and contractors, access at all reasonable times to the Site for purposes of conducting any activity related to its oversight of this Consent Order. Notwithstanding any provision of this Consent Order, MassDEP retains all of its access authorities and rights under applicable state and federal law.

26. Respondent's obligations under this Consent Order shall cease upon Respondent's completion of all actions and payments required pursuant to paragraphs 10, 12, 22 and 23 of this Consent Order and MassDEP's issuance of a return to compliance letter stating that Respondent has completed the requirements of said paragraphs.

27. The undersigned certify that they are fully authorized to enter into the terms and conditions of this Consent Order and to legally bind the party on whose behalf they are signing this Consent Order.

28. This Consent Order shall become effective on the date that it is executed by MassDEP.

SPECIAL INSTRUCTIONS:

Your two signed copies of the Administrative Consent Order (ACO) must be delivered, for execution (signature) by MassDEP, to the following address:

Douglas E. Fine
Deputy Regional Director
Bureau of Air and Waste
MassDEP
Central Regional Office
8 New Bond Street
Worcester, MA 01606

MassDEP will return one signed copy of the ACO to you after MassDEP has signed, provided you have followed the above instructions.

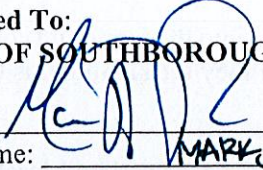
SIGNED ACOs ARE TO BE SENT TO THE ABOVE ADDRESS.

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Please call James McQuade at 508-767-2759 if you have questions regarding payment and/or instructions.

Consented To:
TOWN OF SOUTHBOROUGH

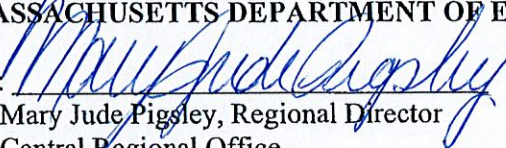
By: 
Print Name: MARK J. PURPLE
Title: TOWN ADMINISTRATOR
Address: 17 COMMON ST.

SOUTHBOROUGH, MA 01772

Federal Employer Identification No.: 016 001 305

Date: 2-2-2023

Issued By:
MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: 
Mary Jude Pigsley, Regional Director
Central Regional Office
8 New Bond Street
Worcester, MA 01606

Date: 2/9/23