

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

In the matter of:)
)
W. L. French Excavating Corp.)
)
and)
)
Roman Catholic Archdiocese of Boston)
)

File No.: ACO-NE-13-3R002

ADMINISTRATIVE CONSENT ORDER

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. MassDEP maintains its principal office at One Winter Street, Boston, Massachusetts 02108, and its Northeast Regional Office at 205 B Lowell Street, Wilmington, MA 01887.
2. W. L. French Excavating Corp. (“French Excavating”) is a Massachusetts Corporation with its principal offices located at 3 Survey Circle, North Billerica, MA 01862. French’s mailing address for purposes of this Consent Order is 3 Survey Circle, North Billerica, MA 01862. William L. French, Jr. is the President of French Excavating.
3. The Roman Catholic Archdiocese of Boston (the “RCAB”) is a Religious Entity pursuant to M.G.L. c. 180 registered with the Massachusetts Secretary of State and has its principal office at 66 Brooks Drive, Braintree, MA 01284. The Archdiocese’s mailing address for the purpose of this Consent Order is 66 Brooks Drive, Braintree, MA 02184. Cardinal Sean Patrick O’Malley, Ordo Fratrum Minorum is the President of the Archdiocese.
4. French Excavating and the RCAB are hereafter collectively referred to herein as the Respondents.

II. STATEMENT OF FACTS AND LAW

5. MassDEP is responsible for the implementation and enforcement of M.G.L. c. 21E and the Massachusetts Contingency Plan (“MCP”) at 310 CMR 40.0000. MassDEP 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.

6. Respondent RCAB is the current owner and/or operator of the Property commonly known as St. Mary's Cemetery that is located at River Road, Tewksbury, MA ("Property" or "Site"), at which a filling program is being proposed to allow for the expansion of future cemetery use.
7. The following facts and allegations have led MassDEP to issue this Consent Order:
 - A. M.G.L. c. 21E, § 6 provides the department with the authority to specify reasonable requirements to regulate activities which may cause, contribute to, or exacerbate a release of oil or hazardous materials, to prevent and control, and to counter the effects of such releases.
 - B. M.G.L. c. 21E, §5 sets out liability for the release or any threat of release of oil or hazardous material. This liability includes the owner or operator of a site from or at which there is a threat of release as well as any person who at the time of storage or disposal of any hazardous material owned or operated the site at or on which such hazardous material is stored or disposed of and from which there's a threat of release and any person who contracts to arrange for the transport, disposal, storage or treatment of hazardous material to or in a site from or at which there is a threat of a release.
 - C. Pursuant to M.G.L. c. 21E, §3, MassDEP promulgated the regulations found at 310 CMR 40.0000, commonly known as the "Massachusetts Contingency Plan" ("MCP").
 - D. 310 CMR 40.0032(3), known as the "anti-degradation" section of the MCP, states:

Soils containing oil or waste oil at concentrations less than an otherwise applicable Reportable Concentration and that are not otherwise a hazardous waste, and soils that contain one or more hazardous materials at concentrations less than an otherwise applicable Reportable Concentration and that are not a hazardous waste, may be transported from a disposal site without notice to or approval from the Department under the provisions of...[the MCP], provided that such soils:

 - (a) Are not disposed or reused at locations where the concentrations of oil or hazardous materials in the soil would be in excess of a release notification threshold applicable at the receiving site, as delineated in 310 CMR 40.0300 and 40.1600; and
 - (b) Are not disposed or reused at locations where existing concentrations of oil and/or hazardous material at the receiving site are significantly lower than the levels of those oil and/or hazardous materials present in the soil being disposed or reused.

- E. 310 CMR 40.0006 contains the following useful definitions:

Contaminated soil means soil containing oil and/or hazardous material at concentrations equal to or greater than a release notification threshold established by 310 CMR 40.0300 and 40.1600.

Hazardous material means material, including, but not limited to, any material in whatever form which, because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare or to the environment, when improperly stored, treated, transported, disposed of, used, or otherwise managed. ... The terms shall also include, but is not limited to, material regulated as hazardous waste or recyclable material under 310 CMR 30.000.

No Significant Risk means a level of control of each identified substance of concern at a site or in the surrounding environment such that no such substance of concern shall present a significant risk of harm to health, safety, public welfare or the environment during any foreseeable period of time.

Oil means insoluble or partially soluble oils of any kind or origin or in any form, including, without limitation, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils and white oil. The term shall not include waste oil, and shall not include those substances which are included in 42 U.S.C. § 9601(14).

Reportable Concentration and RC each means the concentration of oil or hazardous material in soil or groundwater which requires notification to the Department under MGL c. 21E, § 7 and/or 310 CMR 40.0360 through 310 CMR 40.0362.

- F. Commencing in 2013 and ending by no later than December 31, 2017, the Respondents propose to move approximately 450,000 cubic yards of material to the Property to expand the capacity of the existing cemetery for future use. These fill materials may include soils originating from sites where a release of oil or hazardous materials have or may have occurred.

III. DISPOSITION AND ORDER

For the reasons set forth above, MassDEP hereby issues, and Respondents hereby consent to, this Order:

Page 4

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. Respondents enter into this Consent Order without admitting or denying the facts or allegations set forth herein. However, Respondents agree 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. Respondents shall perform the following actions:

- A. Upon the effective date of this Consent Order, the Respondents shall ensure that any and all activities it undertakes related to the proposal discussed above in Section II, Paragraph F. are performed in compliance with M.G.L. c.21E and the MCP, and all other applicable local, state and federal laws and regulations.
- B. Upon the effective date of this Consent Order, the Respondents shall ensure that any and all activities it undertakes related to the proposal discussed above in Section II, Paragraph F. are performed in compliance with the Fill Management Plan ("FMP") by French Excavating and dated July 31, 2013, a copy of which is attached hereto as Attachment A.
- C. Upon the effective date of this Consent Order, the Respondents shall ensure that any and all activities it undertakes related to the proposal discussed above in Section II, Paragraph F. are performed in compliance with the Stormwater Pollution Prevention Plan ("SWPPP") by Tighe & Bond, Inc. and dated July 12, 2013, a copy of which is attached hereto as Attachment B.
- D. The activities agreed to in this Consent Order shall be conducted under the overall supervision of a Licensed Site Professional ("LSP") to provide field supervision of the work described in the Fill Management Plan and to (i) review soil packages as that term is used in the Fill Management Plan and (ii) conduct monthly inspections, sampling, and analysis pursuant to the Fill Management Plan.
- E. Respondents shall submit to MassDEP and the Town of Tewksbury Board of Health each month a status report ("Construction Status Report") on the status of construction activities at the Property. The initial Construction Status Report shall be submitted to MassDEP and the Town of Tewksbury Board of Health within thirty (30) days of the issuance of this Consent Order but not later than seven (7) days before the date Respondents start construction at the Property. The initial Construction Status Report shall include, without limitation:

Page 5

- a. The projected schedule for the project including, but not limited to:
 - i. Commencement of construction,
 - ii. Major construction milestones,
 - iii. Completion of construction, and
 - iv. The name and contact information of an on-property contact.

- F. After submittal of the initial Construction Status Report, Respondents shall submit each subsequent monthly Construction Status Report to MassDEP, and the Town of Tewksbury Board of Health on or before the 15th day of the month. Each such monthly Construction Status Report shall, without limitation:
 - a. Summarize the filling activities conducted at the Property during the prior thirty (30) days;
 - b. Identify the major activities Respondent French Excavating anticipates to perform during the next thirty (30) days; and
 - c. Identify any changes to the design of the project, the project schedule, and the on-property contact information.

- G. **Independent Third Party Inspections:** The Respondents shall have the Property inspected monthly, at a minimum, by a qualified, independent LSP for compliance with the requirements of this Consent Order including, but not limited to, the Fill Management Plan.
 - a. The Independent Third Party Inspections shall be unannounced and randomly timed;
 - b. During each inspection the LSP shall, at a minimum:
 - i. Observe the receipt and/or placement of soil at the Property, to the extent such activities are occurring or have occurred since the previous inspection;
 - ii. Collect one or more samples of soils and/or other materials placed at the Property since the last inspection, focusing on soils and/or materials with visual, olfactory, or other signs of contamination, if present, for analysis of the parameters specified in the Fill Management Plan; and
 - iii. Submit the collected sample(s) for laboratory analysis of the parameters specified in the Fill Management Plan.
 - c. The LSP shall prepare an inspection report documenting the findings for each inspection, and shall submit a copy of such report on a quarterly (i.e., every

three months) basis to MassDEP and the Town of Tewksbury Board of Health, or before the 15th day of the month. Said report shall include, but not be limited to:

- i. A comparison of the Property's operation relative to this Consent Order and the Fill Management Plan;
 - ii. Any deviations from the Consent Order and the Fill Management Plan;
 - iii. Actions the operator has taken or intends to take to correct such deviations with a schedule for completing such actions;
 - iv. A tabular summary of the quantities of soil and other fill materials received and placed at the Property and the number of truck loads and quantity of materials rejected at the Property, since the last inspection;
 - v. The analytical results of the sample(s) collected during the inspections in a tabular format with the laboratory analytical reports and chain-of-custody documents as attachments, provided that analytical results for a given inspection may be submitted to MassDEP separately no later than forty-five (45) days after the date of such inspection, if not available for submittal with the inspection report.
- d. The Inspection Report shall be signed by the LSP and shall include the following certification signed by the LSP, and an authorized representative of the Respondents:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate and complete. I am aware that there are significant penalties both civil and criminal for submitting false information.

- H. MassDEP reserves the right to require Respondents to take any and all actions necessary to ensure that activities conducted at the Property do not cause any nuisance conditions including, but not limited to, dust, noise, odor or wetlands impacts.

11. Unless submitted via eDEP or except as otherwise provided, all notices, submittals and other communications required by this Consent Order shall be directed to:

Eric S. Worrall
Acting Regional Director
MassDEP-Northeast Regional Office
205 B Lowell Street
Wilmington, MA 01887

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

12. 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 Respondents or any other person of the necessity of complying with all applicable federal, state, and local laws, regulations and approvals.

13. Respondents understand, and hereby waive, their rights 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.

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

15. MassDEP hereby determines, and Respondents hereby agree, that any deadlines set forth in this Consent Order constitute reasonable periods of time for Respondents to take the actions described.

16. 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.

17. 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: (a) enforce this Consent Order in an administrative or judicial proceeding; (b) recover costs incurred by MassDEP in connection with response actions conducted at the Site; and (c) recover damages for injury to and for destruction or loss of natural resources pursuant to M.G.L. c. 21E, § 5 or 42 U.S.C. 9601, et seq.

18. Nothing in this Consent Order shall be construed or operate as barring, diminishing, adjudicating or in any way affecting MassDEP's authority to: (a) perform response actions at the Property or (b) require Respondents to conduct response actions at the Property or take other actions beyond those required by this Consent Order in order to comply with all applicable laws and regulations including, without limitation, M.G.L. c. 21E and the MCP.

19. 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 Respondents with respect to any subject matter not covered by this Consent Order.

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

21. Respondent shall pay stipulated civil administrative penalties to the Commonwealth in accordance with the following schedule if Respondent violates any provision of this Consent Order:

For each day, or portion thereof, of each violation, Respondent shall pay stipulated civil administrative penalties in the following amounts:

| <u>Period of Violation</u> | <u>Penalty per day</u> |
|--|------------------------|
| 1 st through 15 th days | \$250.00 per day |
| 16 th through 30 th days | \$500.00 per day |
| 31 st day and thereafter | \$1,000.00 per day |

Stipulated civil administrative penalties shall begin to accrue on the day a violation occurs and shall continue to accrue until the day Respondents correct the violation or completes performance, whichever is applicable. Stipulated civil administrative penalties shall accrue regardless of whether MassDEP has notified Respondents 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 Respondents 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 Respondents' 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 Respondents' failure to comply with the requirements of this Consent Order. In the event MassDEP collects alternative civil administrative penalties, Respondents shall not be required to pay stipulated civil administrative penalties pursuant to this Consent Order for the same violations.

Respondents reserve whatever rights they may have to contest MassDEP's determination that Respondents 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, Respondents agree 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.

22. Failure on the part of MassDEP to complain of any action or inaction on the part of Respondents 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.

23. To the extent authorized by the current owner, Respondents agree to provide MassDEP, and MassDEP's employees, representatives and contractors, access at all reasonable times to the Property 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.

24. This Consent Order may be executed in one or more counterpart originals, all of which when executed shall constitute a single Consent Order.

25. The undersigned certify that they are full 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.

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

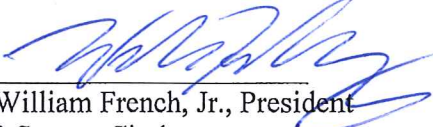
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In the Matter of: W. L. French Excavating Corp. and Roman Catholic Archdiocese of Boston
ACO No. ACO-NE-13-3R002

Page 10

Consented To By:

W. L. French Excavating Corp. by



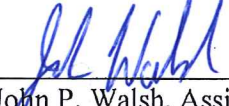
William French, Jr., President
3 Survey Circle
Billerica, MA 01862

Federal Employer Identification No.: 043484285

Date: September 20, 2013

And

Roman Catholic Archdiocese of Boston by

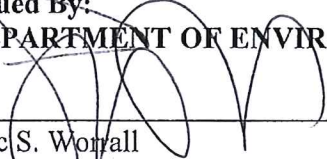


John P. Walsh, Assistant Executive Director
Catholic Cemetery Association Corp.
226 North Street
Salem, MA 01970

Federal Employer Identification No.: 04-3569236

Date: September 20, 2013

Issued By:
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Eric S. Worrell
Acting Regional Director
MassDEP-Northeast Regional Office
205 B Lowell Street
Wilmington, MA 01887

Date: September 20, 2013