

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED
7015 0640 0000 2327 0384

November 30, 2015

Joseph Wunderlich
27 Sparrowbush Road
Latham, NY 12110

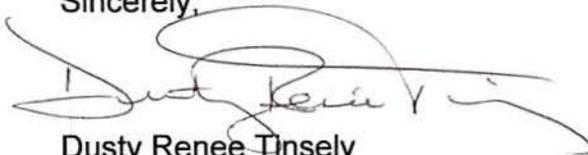
Re: Order of Consent
R4-2015-1001-116
Spill# 1504910

Dear Mr. Wunderlich:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$2,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsely
Assistant Regional Attorney
Region 4

Enclosure

ec: M. Franklin



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violation of the Navigation
Law Article 12

ORDER ON CONSENT

File No. R4-2015-1001-116
Spill #1504910

Joseph Wunderlich
27 Sparrowbush Road
Latham, NY 12110

Respondent,

WHEREAS:

JURISDICTION

1. New York State Department of Environmental Conservation ("DEC") has administrative jurisdiction to abate and prevent the pollution of water of the State pursuant to Article 12 of the Navigation Law and ECL Article 17.

RESPONDENT

2. Respondent Joseph Wunderlich d/b/a Wunderlich Sand & Gravel owns and/or operates the business out of property located at 27 Sparrowbush Road, Latham, New York 12110 ("Site").

SPILL

3. On August 6, 2015, Department staff received a call regarding an oil spill originating from the Site.

4. Respondent drove equipment from the Site and continuing down Sparrowbush Road. The equipment was leaking petroleum the entire route. Respondent noticed that the equipment was leaking petroleum and pulled over into an apartment complex on Oxford Road and parked the equipment next to a storm drain.

5. On August 6, 2015, Department staff observed that the oil spill started at the Site, continued down Sparrowbush Road, and turning into an apartment complex at Oxford Road ("Spill Trail"). The oil spill stops at a storm drain on Oxford Road ("Oxford Drain").

FIRST VIOLATION

6. Navigation Law §12-173 provides that: "The discharge of petroleum is prohibited."
7. On August 6, 2015, Department staff inspected the Site, Site Trail, and Oxford Drain and observed that a discharge of petroleum had occurred.
8. Respondent's discharge of petroleum at the Site, Spill Trail, and Oxford Drain are violations of Navigation Law §12-173.

SECOND VIOLATION

9. Navigation Law §12-175 provides that: "Any person responsible for causing a discharge shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge. Failure to so notify shall make persons liable to the penalty provisions of section 192 of this article."
10. On or about August 6, 2015, Department staff determined that Respondent failed to notify the Department of the Site, Site Trail, and Oxford Drain petroleum discharge no later than two hours after the discharge.
11. Respondent's failure to notify the Department of the petroleum discharge no later than two hours after the discharge is a violation of Navigation Law §12-175.

THIRD VIOLATION

12. Navigation Law §12-176 provides: "Any person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge."
13. On August 6, 2015, Department staff inspected the Site, Site Trail, and Oxford Drain and observed that Respondent had not taken immediate action to clean up the petroleum spill.
14. Respondent's failure to take immediate action to clean up the petroleum spill at the Site, Site Trail, and Oxford Drain is a violation of Navigation Law §12-176.

FOURTH VIOLATION

15. ECL §17-0501(1) states: "It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301."

16. On August 6, 2015, Department staff observed that Respondent discharged petroleum into the waters of the state through the Oxford Drain.

17. Respondent's discharge of petroleum into the waters of the state through the Oxford Drain is a violation of ECL §17-0501(1).

CIVIL PENALTIES

18. Navigation Law §12-192 provides for a civil penalty of up to \$25,000 per day for violations of any provisions of Article 12 of Navigation Law. If the violation is of a continuing nature each day during which it continues shall constitute an additional, separate and distinct offense.

19. ECL §17-1929(1) states that "A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided."

20. **Waiver of Hearing.** Respondent has affirmatively waived its right to a hearing as provided by law and has consented to the issuing of this Order and has agreed to be bound by the provisions, terms and conditions of this Order.

NOW THEREFORE, having considered this matter and having been duly advised, IT IS ORDERED THAT:

I. **Civil Penalty.** With respect to the violations identified in this Order, Respondent is hereby assessed a civil penalty of FIVE THOUSAND DOLLARS (\$5,000) of which TWO THOUSAND DOLLARS (\$2,000) shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department. THREE THOUSAND DOLLARS (\$3,000) of the civil penalty is suspended conditioned on Respondent's compliance with the Schedule of Compliance. Payment of the suspended civil penalty shall be due within 30 days receipt of notice from the Department setting forth the nature of the violations. The civil penalties shall be paid by check made payable to the Department of Environmental Conservation.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

II. **Schedule of Compliance.** Respondents shall comply with the terms and conditions of this Order including the Schedule of Compliance. The attached Schedule of Compliance any plans approved thereunder are incorporated into the Order and are enforceable thereunder. Any records submitted to the Department shall have the owner's name, facility name and address, and contact and phone number.

III. **Settlement.** This Order settles all violations identified herein as of the effective date of the Order.

IV. **Binding Effect.** This Order is binding upon the Respondent, its agents, employees, successors, assigns and to all persons and firms, and corporations acting subordinate thereto.

V. **Summary Abatement.** This Order shall not be construed to prohibit the Commissioner or his duly authorized representatives from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VI. **Indemnification.** Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

VII. **Modification.** The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding, or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound pursuant to the provisions of the Order. No informal oral or written advise, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, comment, or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligation to obtain such formal approvals as may be required by this Order.

VIII. **Access.** Respondent shall allow duly authorized representatives of the Department access to the facility without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondent's compliance with this Order, Department regulations, and/or the ECL and applicable federal regulations.

IX. **Effective Date.** The effective date of this Order shall be the date upon which it is signed on behalf of the Department.

X. **Scope.** Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State or Department may have against Respondent for any violations not cited in this Order on Consent.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State or Department may have against anyone

other than Respondent, its officers, directors, agents, servants, employees, successors and assigns;

C. The Department's right to enforce this Order against Respondent, its officers, directors, servants, and employees in the event that Respondent shall fail to fulfill any of the terms or provisions hereof;

D. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

E. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

XI. Review of Submitted Documentation. 1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3.a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

XII. **Default.** Respondent shall not be in default of compliance with this Order if they are unable to comply with any provision of this Order solely because of an action of a national government or court, or an act of nature, war strike, riot, or catastrophe, as to any of which the negligence or willful misconduct of Respondent was not a proximate cause. Respondent shall notify the Department in writing immediately upon obtaining knowledge of any such event. Relief under this clause shall not be available if Respondent fails to timely comply with the notice requirement set out in this paragraph.

XIII. **Communications.** Communications shall be sent to

For Department:

Matt Franklin
New York State Department of Environmental Conservation - Region 4
1130 N. Westcott Road
Schenectady, New York 12306

For Respondent:

John Wunderlich
27 Sparrowbush Road
Latham, New York 12110

Please include entity name, address, and permit number (if applicable) on all correspondence.

DATED: November 30, 2015
Rotterdam, New York

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

DATED: _____, 2015
Rotterdam, New York

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:

Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent Joseph Wunderlich hereby consents to the issuance and entry of the foregoing Order, waives his rights to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

Joseph Wunderlich

Date

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

On the ___ day of _____ in the year _____ before me, the undersigned, a Notary Public in and for the State, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of the which the individual acted, executed the instrument.

Notary Public
Qualified in the County of: _____
My commission expires: _____

Schedule of Compliance

1. Within 45 days from the effective date of this Order, Respondent shall retain a qualified consultant to:
 - a. evaluate the Site to ensure that all spills and other petroleum discharges have been properly remediated;
 - b. remediate any spills and other petroleum discharges at the Site;
 - c. submit disposal receipts to the Department indicating that the excavated material from the Site has been disposed of properly;
 - d. evaluate the PBS facility at the Site to ensure that it is compliant with all PBS regulations;
 - e. take any actions necessary to return the PBS facility to compliance if a deficiency is noted during the evaluation; and
 - f. provide a report to the Department stating the findings of the PBS facility evaluation and actions taken as a result of the evaluation.
2. Within 30 days from the effective date of this Order, Respondent shall repair any and all equipment at the Site which utilize petroleum to ensure that none of the equipment are leaking petroleum.
3. Within 30 days from the effective date of this Order, Respondent shall notify the Department, in writing, that all equipment at the Site which utilize petroleum has been repaired, if necessary, and is not leaking petroleum.