

**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**  
7017 1070 0001 0188 9851

February 26, 2019

Kevin Bernstein, Esq.  
Bond, Schoeneck & King PLLC  
One Lincoln Center  
110 West Fayette Street  
Syracuse, NY 13202-1355

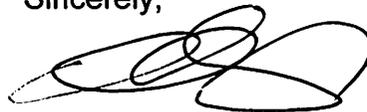
Re: Order on Consent  
R4-2019-0129-7  
S.A. Dunn & Company, LLC

Dear Mr. Bernstein:

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

This will also acknowledge receipt of \$1000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: J. Whitcomb  
B. Maglienti  
V. Schmitt



Department of  
Environmental  
Conservation

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Violations of the Environmental  
Conservation Law (“ECL”) Article and 27 and  
Part 360 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations  
of the State of New York (“6 NYCRR”),

ORDER ON CONSENT  
File No. R4-2019-0129-7

- by -

S.A. Dunn & Company, LLC  
1319 New Loudon Road  
Cohoes, NY 12047

Respondent  
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WHEREAS:

Jurisdiction

1. Pursuant to authority granted to the Department under ECL Article 27, rules respecting the permitting, registration and operation of solid waste management facilities were promulgated at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), Part 360 *et seq.*
2. Respondent possesses a Solid Waste Management Permit, No. 4-3899-00006/00006 (Modification #2 Effective 9/9/16 – 7/19/22) (“solid waste permit”) which authorizes conversion of the mine site to a C&D disposal site under regulations at 6 NYCRR Part 360, to be constructed in 10 phases as mining is completed. This permit modification authorizes construction of the C&D landfill in Phases 1-3, as depicted in the engineering drawings prepared by Civil & Environmental Engineers, Land Surveyors and Landscape Architects, PLLC, dated July 21, 2015 and the conversion of Phases 4-10, during this permit term. Collectively the entire landfill and mining areas are referred to as the site.

Regulations

3. Regulations at 6 NYCRR 360-2.13(j)(1)(ii) provides that “*Secondary composite liner. The soil component of the secondary composite liner must be at least 24 inches in compacted thickness and must have a maximum remolded coefficient of permeability of  $1 \times 10^{-7}$  centimeters per second throughout its thickness and must be directly overlain by and in contact with a geomembrane. The soil material particles must be able to pass a one inch screen.*”

## Violation

4. On October 4, 2018 and October 10, 2018 Department staff inspected the site.
5. As required by regulations at 6 NYCRR 360-2.13(j), the soil component of the liner system must be a continuous layer of low permeability soil constructed to control fluid migration. Since this is a single composite liner, the soil component must meet the requirements for the secondary composite liner in subparagraph 360-2.13(j)(1)(ii), which requires a 24-inch compacted thickness with a maximum permeability of  $1 \times 10^{-7}$  cm/sec throughout the layer. The low permeability soil must be directly overlain by and in contact with the geomembrane. In addition, the soil particles must be able to pass a 1-inch screen. Source verification sampling was conducted and 10 of 12 quality control samples met the project specifications and Part 360 regulatory requirements however two quality control samples taken in the final lift of Phase 6B construction failed to meet the particle size requirements. After receiving the failed sample results, the certifying engineer for the project elected to have the construction contractor rework and process (in place) the final lift of soil in an attempt to meet the soil particle requirement.
6. Although processing removed a large amount of stone from the layer, Department staff required additional visual verification that the material was acceptable. Several random areas were selected for test pitting and the results indicated that stones larger than 1-inch in size were still present in the top 12 inches of low permeable soil.
7. Respondent was notified that the top 12 inches of soil did not meet the part 360 regulatory requirements, and that this material would either have to be removed and replaced with soil meeting the requirements, or a variance from the regulation would have to be obtained. Respondent elected to apply for a variance from Part 360-2.13(j)(1)(ii) and submitted the variance application to the Department on October 26, 2018. The variance application was forwarded to Central Office on November 6, 2018 for consideration.
8. On November 7, 2018, prior to receiving the Department's determination with respect to the variance application, Respondent notified Department staff that they would be proceeding at their own risk with continuing the construction of the Phase 6B liner system using the in-place low permeable soil material that did not meet the regulatory requirement.
9. On January 3, 2019, CO Division of DMM confirmed that the variance was denied."
10. Therefore, as the variance was denied, Respondent did not meet the conditions of regulations at 6 NYCRR 360-2.13(j)(1)(ii), and thus in in violation of that regulation.

11. ECL 71-2703 provides that any violator of Articles 3 or 7 of the provisions of Article 27 of the ECL cited in this Order, or any rule or regulation issued pursuant thereto, is subject to penalties of up to Seven thousand five hundred dollars (\$7,500) for each violation and an additional penalty of not more than One thousand five hundred dollars (\$1,500) per day during which the violation continues and may be enjoined from continuing such violation.

Waiver of Hearing

12. Respondent has affirmatively waived its right to a hearing in the manner provided by law and has consented to the issuing of this Order on Consent and has agreed to be bound by the terms, provisions, and conditions contained herein.

**NOW, being duly advised and having considered this matter, IT IS HEREBY ORDERED THAT:**

I. Civil Penalty

In respect of the aforesaid violations, a civil penalty in the amount of TWO THOUSAND SEVEN HUNDRED DOLLARS (\$2,700) of which ONE THOUSAND DOLLARS (\$1,000) shall be paid by money order, or check made payable to the order of "New York State Department of Environmental Conservation," with the enclosed invoice and the Case Number of this Order on Consent written in the memo section of the check. The check shall be sent to:

**The Department of Environmental Conservation  
Division of Management and Budget Services  
625 Broadway  
10<sup>th</sup> Floor  
Albany, NY 12233-4900**

In the alternative, payment of the civil penalty can be made by electronic payment at <http://www.dec.ny.gov/about/61016.html#On-Line>

The balance ONE THOUSAND SEVEN HUNDRED DOLLARS (\$1,700) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

The penalty assessed in the Order on Consent constitutes a debt owed to the State of New York. Failure to pay the assessed penalty, or any part thereof, in accordance with the schedule contained in the Order on Consent, may result in referral to the New York State Attorney General for collection of the entire amount owed (including the assessment of interest, and a charge to cover the cost of collecting the debt), or referral to the New York State Department of Taxation and Finance, which may offset by the penalty amount any tax refund or other monies that may be owed to you by

the State of New York. Any suspended and/or stipulated penalty provided for in this Order on Consent will constitute a debt owed to the State of New York when and if such penalty becomes due.

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

In the event that Respondent fails to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

The signed and notarized Order on Consent shall be sent to:

**New York State Department of Environmental Conservation  
Region 4 Main Office  
1130 North Westcott Road  
Schenectady, NY 12306-2014  
ATTN: Karen S. Lavery, Esq.**

## II. Communications

All communications or submissions required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention-Victoria Schmitt, [victoria.schmitt@dec.ny.gov](mailto:victoria.schmitt@dec.ny.gov), Regional Water Engineer. All communications shall include a reference to the Order on Consent Case Number R4-2019-0129-7.

## III. Schedule of Compliance

Respondent shall comply with the Schedule of Compliance set forth in this Order on Consent which is incorporated and made part of the terms, provisions, and conditions of this Order on Consent.

## IV. Access

Respondent shall allow duly authorized representatives of DEC access to the facility referred to in this Order 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 or the ECL.

## V. Summary Abatement

This Order shall not be construed to prohibit the Commissioner or his duly authorized representative 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 DEC, New York State, and their representatives and employees harmless for all claims, suits, 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. Review of Submittals

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 accepts 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.

VIII. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent and its successors (including successors in title) and assigns.

IX. Modifications and Extensions

No modifications or extensions of this Order shall be made or become effective except as may be specifically set forth in writing by the Department.

X. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein.

XI. Effective Date

The effective date of this Order shall be the date it is signed by the Regional Director.

XII. Reservation of Rights

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 may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, its officers, directors, agents, servants, employees, successors and assigns;

C. 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

XIII. 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.

IX. This Order shall be in full settlement of all claims for civil and administrative penalties that have been or could be asserted by the Department against Respondent, their trustees, officers, employees, successors and assigns for the above-referenced violations.”

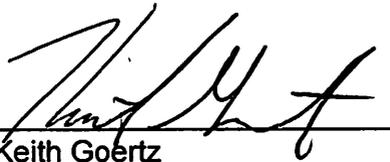
X. This Order on Consent is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Unless otherwise allowed by statute or regulation, Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits. Respondent’s compliance with this Order on Consent shall be no defense to any action commenced pursuant to any laws, regulations, or permits, except as set forth herein.

XI. The Order on Consent will terminate when all requirements imposed by this Order on Consent are completed to the Department’s satisfaction.

Dated *February 22* 2019  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

A handwritten signature in black ink, appearing to read "Keith Goertz", written over a horizontal line.

Keith Goertz  
Regional Director  
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

S.A. Dunn & Company, LLC

Authorized Representative: James M. Little

SIGNED: [Signature]

TITLE: Sr. V. P. - Engineering + Disposal

DATE: 2/15/19

STATE OF TEXAS )

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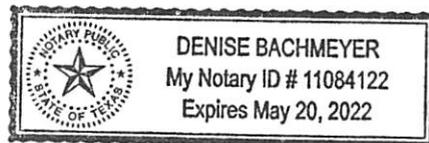
)ss.:

COUNTY OF MONTGOMERY)

On the 15<sup>th</sup> day of February in the year 2019 before me, the undersigned, a Notary Public in and for the State, personally appeared James M. Little 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 which the individual acted, executed the instrument.

Denise Bachmeyer  
Notary Public

Qualified in the County of:  
My Commission Expires: 5/20/22



## SCHEDULE OF COMPLIANCE

1. Respondent shall implement the liner enhancement plan within SEVEN (7) days following Department approval of such plan.