

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

Office of General Counsel, Region 4  
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CONFIRMATION BY EMAIL ORDER RECEIVED

August 29, 2018

Kevin Bernstein, Esq.  
Bond, Schoeneck & King PLLC  
One Lincoln Center  
110 West Fayette Street  
Syracuse, NY 12302-1355  
[BernstK@bsk.com](mailto:BernstK@bsk.com)

Re: Order on Consent  
R4-2018-0228-27  
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 \$50,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery  
Regional Attorney  
Region 4

Enclosure

ec: P. Wyckoff  
V. Schmitt  
N. Baker



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 19, 23 and 27 and  
Parts 422 and 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. R4-2018-0228-27

- by -

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

Respondent  
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WHEREAS:

Jurisdiction

1. The New York State Department of Environmental Conservation (DEC or Department) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to § 3-0301 of the Environmental Conservation Law (ECL). In particular, DEC is and has been responsible for the protection of air resources of the State pursuant to ECL Article 19 and the rules and regulations promulgated there under.
2. The Department has administrative jurisdiction pursuant to Environmental Conservation Law ("ECL") Title 27 of Article 23 to regulate surface mining and reclamation.
3. 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.*
4. ECL 71-1305(2) provides that it shall be unlawful for any person to: "*Violate any of the provisions of or fail to perform any duty imposed by article 23 of this chapter or any rule or regulation promulgated thereunder or any order or condition of any permit of the department made pursuant thereto.*"

5. Regulations at 6 NYCRR 422.1(a) provides that *“Every applicant for a mining permit shall submit to the department a mined land-use plan which shall set forth in detail an outline of the mining property and the affected land, the applicant's mining plan and the applicant's reclamation plan. After the department has issued a mining permit, the permittee shall not deviate or depart from the mined land-use plan without approval by the department of an alteration or amendment thereto.”*

### Permits and Conditions

6. Respondent possesses a Mined Land Reclamation Permit, #4-3899-00006/00001 (Modification #7 Effective 9/9/16 – 7/19/22) (“mined land permit”) for continued operation of an existing 73-acre life of mine, sand and gravel mine, known as the Dunn Facility located on Partition Street Extension, Rensselaer, NY, for which a previous permit had been issued (“mine”). The current permit continues to allow crushing, screening and washing in the mine area.

7. In addition to the Mined Land Reclamation Permit cited in Paragraph No. 6 above, Respondent also 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.

8. Special Condition No. 3 of Respondent’s Mined Land Reclamation Permit provides that *“All activities authorized by this permit must be in strict conformance with the approved plans submitted by the applicant or the applicant’s agent as part of the permit application.”*

9. Pursuant to Special Condition No. 3 of Respondent’s Mined Land Reclamation Permit under the heading *“Approved Mine Plans”* on page 3 of 10 of the Mined Land Reclamation Permit, Respondent must strictly comply with the 3 (D) approved May 2011 Mined Land Use Plan.

10. Special Condition No. 5 of Respondent’s Mined Land Reclamation Permit provides that *“The facility is limited to receiving a maximum of 100 truck round trips per day, inclusive of C&D deliveries, mining traffic and leachate collection trucks. By the 28<sup>th</sup> of each month, the permittee shall submit a report to the Regional Permit Administrator which provides the daily scale data and a summary listing the number of trucks entering and leaving the site (including both mining and C&D traffic) during the previous month. Except for leachate trucks, only trucks capable of carrying more than 2.5 yards must be reported.”*

11. Special Condition No. 35 of Respondent's Mined Land Reclamation Permit provides that there shall be no features capable of discharging waters offsite or outside the Life of Mine except as explicitly provided in the approved Mined Land Use Plan.
12. Special Condition No. 33 of Respondent's Mined Land Reclamation Permit prohibits dust from leaving the site.
13. Regulations at 6 NYCRR 360-9(b)(2)(ii) prohibit the operation of a solid waste management facility in violation of a permit condition.
14. ECL 71-1305(2) prohibits the violation any of the provisions of or failure to perform any duty imposed by Article 23 of this chapter or any rule or regulation promulgated thereunder or any order or condition of any permit of the department made pursuant thereto.

#### First Violation

15. On January 31, 2018 and February 15, 2018, Department staff inspected the mine site and observed the use of the two access points by mine haul trucks, on Partition Street Extension that are not included in Respondent's approved Mined Land Use Plan. The access points are not shown on the approved Mine Plan Map.
16. The construction and use of the two access points on Partition Street Extension is a deviation and departure from the approved mine land use plan and a violation of permit Special Condition No. 3 of Respondent's Mined Land Reclamation Permit and regulations at 6 NYCRR 422.1(a).

#### Second Violation

17. On January 31, 2018 and February 15, 2018, Department staff inspected the mine site and observed approximately 205,000 cubic yards of mined material placed on the adjoining East Albany Capital, LLC property.
18. The East Albany Capital, LLC property is not located within the mine's life of mine boundary.
19. Respondent violated permit Special Condition No. 5 of Respondent's Mined Land Reclamation Permit by exceeding the maximum 100 truck limit due to the delivery of material to the adjacent East Albany Capital, LLC site.

#### Third Violation

20. On February 15, 2018, Department staff observed silt laden stormwater discharging from the mine flowing onto Partition Street Extension.
21. Respondent's Mined Land Reclamation Permit Special Condition No. 35 prohibits the discharge off-mine of stormwater.

22. Respondent violated permit Special Conditions No. 35 of the Respondent's Mined Land Reclamation Permit and by the February 15, 2018 discharge of stormwater offsite of the mine and by the gully formed on the surface of a vehicular access not described or shown in the Mined Land Use Plan.

#### Fourth Violation

23. On April 5, 2018, April 7, 2018, April 8, 2018 and April 9, 2018, dust was observed leaving the site.

24. Each such date when Respondent failed to contain dust within the site are separate violations of Special Condition 33 of Respondent's Mined Land Reclamation Permit, regulations at 6 NYCRR 360-9(b)(2)(ii), and ECL 71-1305(2).

#### Civil Penalty and Injunctive Relief

25. Section 71-2103 generally provides for a civil penalty of not less than \$500 and not more than \$18,000 for each violation of Article 19 or any code, rule or regulation which was promulgated thereto.

26. ECL Section 71-1307(1) provides in general that any person who violates any provision of Article 23 of the ECL or commits any offense described in Section 71-1305 of this title shall be liable to the people of this state for a civil penalty not to exceed eight thousand dollars (\$8,000) and an additional penalty of two thousand dollars (\$2,000) for each day during which such violation continues. In addition, the violator may be ordered to cease the violation and reclaim and repair the affected site to a condition acceptable to the Department.

27. 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

28. 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 ONE HUNDRED THOUSAND DOLLARS (\$100,000) of which FIFTY THOUSAND DOLLARS (\$50,000) shall be payable to the New York State Department of Environmental Conservation by money order, or check at the time this Order is signed, notarized and returned to the Department.

The balance FIFTY THOUSAND DOLLARS (\$50,000) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

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.

II. Environmental Benefit Project

Respondent shall pay TWO HUNDRED TWENTY- FIVE THOUSAND DOLLARS (\$225,000) toward Environmental Benefit Project ("EBP") primarily for the benefit of the Rensselaer City School District (Van Rensselaer Elementary School and Rensselaer Jr/Sr High School) and the local community in the vicinity of the landfill. The specific project(s) to be implemented shall be determined by the Department. The Department shall provide the Respondent with the name(s) and address(es) of the EBP recipient(s) and the amount to be paid. Respondent shall provide the EBP recipient with a certified check within 10 business days of the Department's notification to the Respondent of the intended EBP recipient(s). The Department retains the sole authority to designate the recipient(s) of an EBP. Respondent shall not use the cost of the EBP to reduce its tax liability. Within 30 days of the effective date of the Order, Respondent shall establish an escrow account in the amount of \$225,000 to cover the EBP ("EBP account"). The EBP account shall be established for the sole purpose of administering the EBP funds.

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. Communications

All communications required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Psalm Wyckoff, psalm.wyckoff@dec.ny.gov. All communications shall include a reference to the Order on Consent Case Number R4-2018-0228-27.

#### V. 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 for DEC to inspect and determine the status of Respondent's compliance with this Order or the ECL.

#### VI. 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.

#### VII. 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.

#### VIII. 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 required by this Order's Schedule of Compliance, 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 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.

IX. 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.

X. Modification

No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

XI. Entire Order

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

XII. Effective Date

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

XIII. 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;

D. 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.

#### XV. Termination

This Order on Consent shall terminate upon the Department's receipt of the payable penalty specified above; evidence that payment of funds has been made into an EBP escrow account; written acknowledgment that any suspended penalty which may have come due was paid to the Department, and satisfaction of work required under the Schedule of Compliance.

DATED: *August 29,* 2018  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:



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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: \_\_\_\_\_



SIGNED: Patrick J. Shea

TITLE: Senior V.P. - General Counsel

DATE: 8/23/18

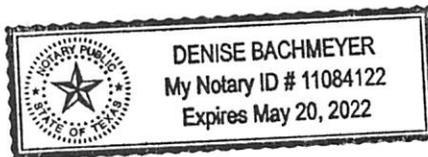
STATE OF TEXAS )

)  
)ss.:  
COUNTY OF MONTGOMERY

On the 23<sup>rd</sup> day of August in the year 2018 before me, the undersigned, a Notary Public in and for the State, personally appeared Patrick J. Shea 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: Montgomery  
My Commission Expires: 5/20/22



## SCHEDULE OF COMPLIANCE

1. Within 30 days of the effective date of this Order, Respondent shall install a stabilized construction entrance at the access point near the garage. The area surrounding the stabilized construction entrance must be graded to contain all stormwater at the site.
2. Within 30 days of the effective date of this Order, Respondent shall submit to the Department, a fugitive dust control plan detailing how dust will be controlled at all areas of the site to prevent dust from migrating offsite. The plan may include updates to an existing dust control plan but shall include, but not be limited to:
  - (a) Discussion of all dust sources in the C&D landfill and the active mine areas;
  - (b) Evaluation of methods and provisions to mitigate fugitive dust;
  - (c) Evaluation of available options to minimize internal truck traffic to minimize dust within the site;
  - (d) Methods and provisions to mitigate or avoid dust generated by the off-loading of C&D, including potential misting equipment or other measures;
  - (e) Means to reduce tracking from truck tires before leaving the site;
  - (f) Evaluation of any areas that would benefit from additional evergreen tree plantings for effective dust and visual control.
  - (g) Evaluation of other mitigation measures to be employed at the site, including but not limited to applying palliatives other than water (a comparison of the effectiveness of the various palliatives must be included), applying dust suppression agents on long-term stockpiles, installation of perimeter berms, and/or vegetation. Upon written approval by the Department, all measures shall be immediately implemented.
3. Within 45 days of the effective date of this Order, Respondent shall apply 6" of a mixture of Uniform #1 and #2 crushed stone on the perimeter road, where it currently exists at the final location and grades (As shown on the Proposed Final Cover grades and Land Fill Gas Management System, Drawing C302, dated March 2016), and the primary internal haul road that is used to transport sand and gravel from the active excavation to the stockpile areas. The road surface shall be wide enough to allow two haul trucks to pass each other and remain on crushed stone surface. When the void spaces in the crushed stone layer is filled with sand and/or silt such that it reduces the road's ability to mitigate fugitive dust from becoming airborne, an additional 2" of uniform #2 crushed stone shall be applied, as needed. The trucks loads of crushed stone necessary to complete the requirement of paragraph #3 will count toward the *maximum of 100 truck round trips per day* as set forth in Special Condition No. 5 of Respondent's Mined Land Reclamation Permit.
4. Within 60 days of the effective date of this Order, Respondent shall submit a letter to the Department amending its Mined Land Use Plan describing the road surfacing with crushed stone and the continued maintenance of the road surface for the life of the mine and all measures to be employed to mitigate fugitive dust.

5. Respondent has undertaken the following dust mitigation measures and shall include such measures in the dust control plan required under this Order's Schedule of Compliance and continue to implement them pursuant to this Order on Consent (unless the Department concurs, in writing, that such mitigation measures are no longer needed or effective):

- a) Spray mulch and growing medium on wind sided slopes;
- b) Install truck tipper sprayer;
- c) Hire contractor to twice daily sweep Partition Street;
- d) Implement procedures to control dust on the working face of the site's C&D section;
- e) Place gravel on all major internal haul roads;
- f) Install hydrant on landfill to expedite filling water trucks;
- g) Construct two litter control fences around perimeter;
- h) Install truck washing device. Upon prior request to and approval by the Department, including a specific date and time parameters in which to complete the work, the Department shall permit the installation of the truck washing device to occur on a Saturday and on that one designated Saturday only, Respondent shall be permitted to make no more than 6 truck trips onto the site for the purpose of completing the installation.

6. Once the above plans are approved by the Department, they will be incorporated into the Permit.

7. Compliance with the Order on Consent's Schedule of Compliance shall not be an affirmative defense to any subsequent ECL violations occurring at or from the site.