

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

Office of General Counsel, Region 4  
1130 North Westcott Road, Schenectady, NY 12306-2014  
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www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED  
7013 1090 0002 3365 2581

November 4, 2016

Donald Zee  
Donald Zee, P.C.  
1 Winners Circle, Suite 140  
Albany, NY 12205

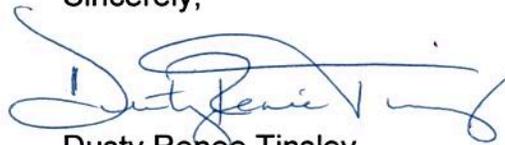
Re: Order on Consent  
R4-2016-0714-125  
S.M. Gallivan Aggregates, LLC

Dear Mr. Zee:

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

This will also acknowledge receipt of \$5,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsley  
Assistant Regional Attorney  
Region 4

Enclosure

ec: B. Maglienti

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Violation of  
Article 27 of the Environmental Conservation  
Law and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the  
State of New York

**ORDER ON  
CONSENT**

- By -

Case No.  
R4-2016-0714-125

S.M. Gallivan Aggregates, LLC

Respondent.

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WHEREAS:

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 §33-0301 of the Environmental Conservation Law (“ECL”). In particular, DEC is and has been responsible for the regulation of the operation of solid waste management facilities, pursuant to ECL Article 27 and the rules and regulations promulgated thereunder at Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (“NYCRR”).
2. Respondent S.M. Gallivan Aggregates, LLC, is the owner and operator of the yard waste composting facility located at 191 Watervliet-Shaker Road, Watervliet, New York, 12189 (Albany County)(“Facility”).
3. The Facility operates pursuant to Registration #01Y69 issued on April 15, 2014.
4. From April 14, 2016 to the present Department staff received numerous complaints from residents of neighborhoods adjacent to the Facility regarding the alleged offensive nature of odors emanating from the Facility. A log of these complaints is maintained by Department staff as part of their regular course of business.

**Inspections**

5. Department staff conducted inspections of the Facility on May 31, 2016 and June 6, 2016 and visited nearby residential areas on May 26 and 31, 2016 and June 6, 2016. During these inspections and visits, Department staff determined that there were violations of Article 27 of the ECL and 6 NYCRR Part 360 at the Facility.

### **First Violation**

6. 6 NYCRR Part 360-1.14(m) states “Odors must be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property.”
7. On May 26, 2016 and June 6, 2016, Department staff visited the area of Vine Street and Chestnut Street, a residential area adjacent to the Facility, and verified off-site odors. The odors were indicative of vegetative matter decomposing under anaerobic conditions which generates offensive odors. Department staff determined that the odors were migrating from the Facility.
8. On May 31, 2016, Department staff visited the area of Vine Street and 12<sup>th</sup> Street, a residential area nearby to the Facility, and verified off-site odors. The odors were indicative of vegetative matter decomposing under anaerobic conditions which generates offensive odors. Department staff determined that the odors were migrating from the Facility.
9. On May 31, 2016 and June 6, 2016, Department staff inspected the Facility and determined that Respondent failed to effectively control odors causing offensive odors to migrate to the adjacent neighborhoods of Vine Street and Chestnut Street and Vine and 12<sup>th</sup> Street on these dates.
10. Respondent’s failure to effectively control odors so that they do not constitute nuisances or hazards to health, safety or property are violations of 6 NYCRR Part 360-1.14(m).

### **Second Violation**

11. 6 NYCRR Part 360-5.3(b)(2)(ii) states “A registered facility must be constructed and operated in compliance with the following conditions . . . the process uses acceptable amendments or bulking agents and follows an acceptable method of composting that minimizes odor generation and results in a mature product”.
12. On May 31, 2016 and June 6, 2016, Department staff observed yard waste material stockpiled in one large, unaerated pile at the Facility.
13. Stockpiling yard waste in one large, unaerated pile is not an acceptable method of composting that minimizes odor generation and results in a mature product.
14. Respondent’s failure to use acceptable amendments or bulking agents and follow an acceptable method of composting that minimizes odor generation and results in a mature product are violations of 6 NYCRR Part 360-5.3(b)(2)(ii).

## Civil Penalty

15. ECL §71-2703(1)(a) provides that “Any person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the commissioner made pursuant to this title shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues, to be assessed by the commissioner after an opportunity to be heard pursuant to the provisions of section 71-1709 of this article, or by the court in any action or proceeding pursuant to section 71-2727 of this title, and, in addition thereto, such person may by similar process be enjoined from continuing such violation and any permit or certificate issued to such person may be revoked or suspended or a pending renewal application denied.”

16. **Waiver of Hearing.** Respondent, without admitting to the violations stated above, 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.** In respect to the Order’s violations, a civil penalty for TWENTY TWO THOUSAND FIVE HUNDRED DOLLARS (\$22,500) of which FIVE THOUSAND DOLLARS (\$5,000) 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. SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500) 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 civil penalty shall not in any way alter Respondent’s obligation to complete performance under the terms of the 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 and 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:

Regional Materials Management Engineer  
New York State Department of Environmental Conservation - Region 4  
1130 N. Westcott Road  
Schenectady, New York 12306

For Respondent:

S.M. Gallivan Aggregates, LLC  
215 Oakwood Avenue  
Troy, New York 12182

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

XIV. **Termination.** This Order shall terminate one year from the effective date of this Order.

DATED: November 3, 2016  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

  
Keith Goertz  
Regional Director  
Region 4

COMMISSIONER EXEMPT  
Qualified in Hamilton County  
No. 012260278  
New York State of New York  
TANIA M. CLATER

CONSENT BY RESPONDENT

Respondent S.M. Gallivan Aggregates, LLC, 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.

BY: *Jean Gallivan S.M. Gallivan*

TITLE: *Member*

DATE: *11/1/16*

STATE OF NEW YORK )  
COUNTY OF *Rensselaer* ss.:

On the *1<sup>st</sup>* day of *November* in the year 20*16*, before me, the undersigned, personally appeared *Jean Gallivan* (full name) personally known to me who, being duly sworn, did depose and say that he/she/they reside at *215 Oakwood Avenue Troy, NY* (full mailing address) and that he/she/they is (are) the *member* (president or other officer or director or attorney in fact duly appointed) of the *S.M. Gallivan Aggregates, LLC* (full legal name of corporation) the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by the authority of the board of directors of said corporation.

*Tanya M Slater*  
Notary Public, State of New York  
**TANYA M SLATER**  
Notary Public, State of New York  
No. 01SL6035746  
Qualified in Rensselaer County  
Commission Expires January 03, 2018

### **Schedule of Compliance**

1. Respondent shall take immediate measures to mitigate odors and prevent odor migration off-site, including, but not limited to, using sufficient quantities of acceptable amendments or bulking agents and following acceptable methods of composting that minimizes odor generation and results in a mature product. Grass clippings must be mixed with sufficient quantities of bulking agent on the day the clippings are received.
2. Within 10 days from the effective date of this Order, Respondent shall submit to Department staff a summary of the quantities of yard waste received to date at the Facility during calendar year 2016.
3. Within 30 days from the effective date of this Order, Respondent shall submit to Department staff and implement an Operations Plan ("Plan"), prepared by an independent party with expertise in yard waste composting practices. The Plan shall:
  - a. include the qualifications of the independent party;
  - b. describe in detail:
    - i. the procedures that will be used to ensure that aerobic, thermophilic conditions are maintained throughout the composting process; and
    - ii. the methods used for minimizing odor generation by following acceptable methods of composting;
  - c. describe measures that will be used to mitigate odors and prevent odor migration off-site; and
  - d. include all applicable items contained in 6 NYCRR Part 360-5.4(e), (f), (g), and (n).
4. This Order shall terminate one year from the effective date of the Order.