

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

7011 1570 0003 0363 3871

January 6, 2016

Sherri L.D. Fisher
Assistant Superintendent for Management
Services and Strategic Planning
District Office
South Colonie Central Schools
102 Loralee Drive
Albany, NY 12205-2298

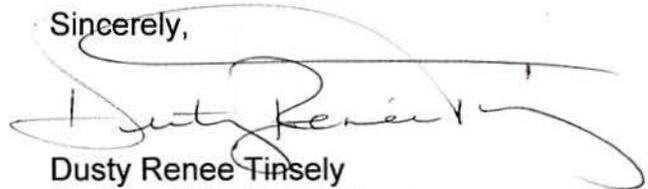
Re: Order of Consent
R4-2015-1026-124

Dear Ms. Fisher:

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

This will also acknowledge receipt of \$5,500 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsely
Assistant Regional Attorney
Region 4

Enclosure

ec: B. Pendell



Department of
Environmental
Conservation

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

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In the Matter of the Violation of
Article 33 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.
R4-2015-1026-124

South Colonie Central School District
102 Loralee Drive
Albany, New York 12205,

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 use and for the enforcement of the provisions of law governing the use of pesticides in the State, pursuant to ECL Article 33 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”) Part 325.
2. Respondent South Colonie Central School District is a school district which owns and/or operates Lisha Kill Middle School located at 68 Waterman Avenue, Colonie, New York 12205 (“Commercial Property”).
3. ECL §33-0101(33) states that “‘Person’ means any individual, partnership, association, corporation, organized group of persons whether incorporated or not, private or public authority, state government or agency, political subdivision, governmental agency or any other legal entity”.
4. 6 NYCRR Part 325.1(a) states that “‘Person’ means any individual, public or private corporation, political subdivision, government agency, department or bureau of the State, municipality, industry, copartnership, association, firm, trust, estate or any other legal entity whatsoever.”
5. Respondent is a person as defined in ECL §33-0101(33) and 6 NYCRR Part 325.1(a).

6. Department staff inspected the Commercial Property on September 24, 2015 and found violations of ECL §33-0301 and 6 NYCRR Part 325.

First Violation

7. 6 NYCRR Part 325.23(a) states that “Each agency that applies pesticide and each business offering, advertising or providing the services of commercial application of pesticides, either entirely or as part of the business, must register annually with the department on forms supplied by the department.”

8. Respondent has not registered with the Department to offer, advertise or provide the services of commercial pesticide application.

9. During the September 24, 2015 inspection, Department staff determined that Respondent engaged in the application of Ultra Kill Wasp and Hornet Spray (EPA Reg. #96188-960), a pesticide, at the Commercial Property without first registering with the Department.

10. Respondent’s failure to register with the Department prior to applying pesticides to the Commercial Property on September 24, 2015 is a violation of 6 NYCRR Part 325.23(a).

Second Violation

11. 6 NYCRR Part 325.23(h) states that “No business or agency providing the services of commercial application of pesticides shall engage in the commercial use of pesticides unless the business has at least one employee who is a certified commercial pesticide applicator or technician, certified in the proper category in which the business intends to engage at each location required to be registered. A registered business using pesticides in category 7 - industrial, institutional, or structural; category 5 - aquatics; category 1 - agriculture; or businesses applying pesticides by aircraft must employ at least one certified commercial pesticide applicator, certified in these categories.”

12. During the September 24, 2015 inspection, Department staff determined that Respondent engaged in the commercial application of Ultra Kill Wasp and Hornet Spray, a pesticide, at the Commercial Property without employing at least one certified commercial pesticide applicator in category 7a-structural and rodent control.

13. Respondent’s actions in engaging in the commercial application of Ultra Kill Wasp and Hornet Spray, a pesticide, at the Commercial Property without employing at least one certified commercial pesticide applicator in category 7a-structural and rodent control is a violation of 6 NYCRR Part 325.23(h).

Third Violation

14. 6 NYCRR Part 325.2(a) states that “Pesticides must be used in such a manner and under such wind and other conditions as to prevent contamination of people, pets, fish, wildlife, crops, property, structures, lands, pasturage or waters adjacent to the area of use.”

15. During the September 24, 2015 inspection, Department staff determined that Respondent applied Ultra Kill Wasp and Hornet Spray, a pesticide, at the Commercial Property in a manner that resulted in the contamination of people at the Commercial Property. The pesticide was applied directly in and around a second floor fresh air intake which drew a portion of the pesticide into a second floor classroom where students and staff were present resulting in fourteen students and two staff members reporting that they felt ill and leaving the location.

16. Respondent’s failure to use the pesticide in such a manner and under such wind and other conditions as to prevent contamination of people, property, and structures, is a violation of 6 NYCRR Part 325.2(a).

Civil Penalty

17. ECL §71-2907(1) provides that “any person who violates any provision of article 33 of this chapter or any rule, regulation or order issued thereunder or commits any offense described in section 33-1301 of this chapter shall be liable to the people of the state for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense.”

18. **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.** In respect to the Order’s violations, a civil penalty for FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500) is assessed against the Respondent for the above violations. FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500) shall be paid to the Department by company or bank check made payable to the Department of Environmental Conservation at the time this Order is signed, notarized, and returned to the Department. 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. **Third Parties.** This Order shall not create any presumption of law or fact that shall inure to the benefit of any person other than the Department, State, or Respondent.

XIV. **Communications.** Communications shall be sent to

For Department:

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

For Respondent:

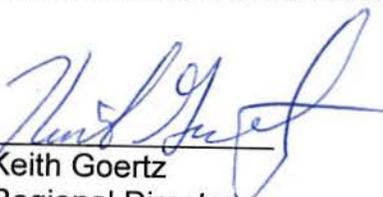
Jonathan W. Buhner
South Colonie Central School District
102 Lorelee Drive
Albany, New York 12205

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

DATED: January 5, 2016
Rotterdam, New York

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

Schedule of Compliance

1. Respondent shall no longer engage in the commercial application of pesticides unless it has complied with all applicable pesticide regulations and laws, including those which were violated as cited in this Order.
2. Respondent shall return the attached Compliance Verification Affidavit, signed and notarized by Respondent, to Brayton Pendell, NYS Department of Conservation – Region 4, Bureau of Pesticides Management, 1130 North Westcott Rd., Schenectady, New York 12306 at the time this Order is returned to the Department signed and notarized.

COMPLIANCE VERIFICATION AFFIDAVIT

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Article 33 of the Environmental Conservation
Law and Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York

COMPLIANCE
VERIFICATION AFFIDAVIT

- By -

Case No.
R4-2015-1026-124

South Colonie Central School District
102 Loralee Drive
Albany, New York 12205,

Respondent.

-----X

I, Jonathan W. Buhner (name), in the position of Superintendent with
South Colonie Central School District, being duly sworn, do depose and say that I
affirm that South Colonie Central School District will not engage in the application of
commercial pesticides unless and until South Colonie Central School District has
complied with all applicable pesticide regulations and laws,

South Colonie Central School District

By:



Signature

JONATHAN W. BUHNER

Print Name

SUPERINTENDENT OF SCHOOLS

Title

12.30.2015

Date



Notary Public

Qualified in the County of: FULTON

My commission expires: January 6, 2018

JAMIE S. MROCZKO
Notary Public, State of New York
Qualified in Fulton County
No. 01MR6295385
Commission Expires January 6, 2018