

**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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CERTIFIED - RETURN RECEIPT REQUESTED  
7016 0340 0000 4616 6338

April 17, 2018

Michael P. DeGroat, of Counsel  
Coughlin & Gerhart, LLP  
38 West Street, Suite 3  
Walton, NY 13856

Re: Order on Consent  
R4-2017-1107-269  
Town of Colchester

Dear Mr. DeGroat:

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

This will also acknowledge receipt of \$2,500 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: S. Preston, Capt.  
J. Rider  
B. Schongar  
B. Ellis  
D. McCartney, Forest Ranger

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Violations  
of the Environmental Conservation Law  
("ECL") Article 9 and  
Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of  
New York

**ORDER ON CONSENT**  
R4-2017-1107-269

-by-

Town of Colchester  
P.O. Box 321  
Downsville, NY 13755

Respondent

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WHEREAS:

1. Article 9 of the Environmental Conservation Law grants the New York State Department of Environmental Conservation ("Department") care, custody, and control of the Forest Preserves of the state. Pursuant to that authority, the Department promulgated Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") Parts 190 and 196.
2. By letter dated July 8, 2013, Department staff advised the Town of Colchester Supervisor that the Department manages the State Forest Preserve lands located in the town and that the "*Town has a prescriptive right to maintain the town roads that run through these lands.*" The letter further documents that in recent years the town has been pushing road material over the shoulder of the banks of several roads as well as piling woody debris and large stump onto State lands, which constitutes an encroachment onto the Forest Preserve lands and was directed to "*discontinue the practice of placing material onto Forest Preserve lands or widening any Town roads as they run through State lands.*" The letter also provides that "*the Department reserves the right to initiate legal action and require restoration if these practices continue.*" A copy of this letter is attached as Exhibit 1.
3. In September of 2016, after similar issues regarding road work along Morton Hill Road were observed, Department staff advised the Town of Colchester Highway Superintendent of the need to get a Temporary Revocable Permit ("TRP") before any work was conducted outside of the prescriptive right of way on roads bordered by forest preserve.

4. In early September 2017, Department staff observed recently completed road work on Campbell Mountain Road and Campbell Brook Road located in the Town of Colchester which had been conducted by the Colchester Highway Department. Additional work on Morton Hill Road was observed in late October 2017. Campbell Mountain Road, Campbell Brook Road, and Morton Hill Road are all bordered by New York State Forest Preserve. The Town of Colchester has prescriptive rights to maintain these roads from “ditch line to ditch line” based on the historic (existing) width of the road when the State first acquired the lands bordering these roads. Lands outside this maintained width are considered “forever wild” and are protected by Article 14 of the NYS Constitution. Any necessary safety improvements outside of the historic width of the road require a TRP before work can be conducted.
5. The Town of Colchester did not request or obtain a TRP for the recent road work that was observed on Campbell Mountain Road, Campbell Brook Road, or Morton Hill Road.

#### FIRST VIOLATION and SECOND VIOLATIONS

6. At the time of the inspections, Department staff determined that road work occurred at multiple locations along all three roads, and involved road ditching, depositing fill outside maintained road width, water diversion ditches outside the maintained area allowed, and cut and/or damaged 19 trees.
7. ECL 9-0303 (1) provides that *“Except as provided in subdivision 2 of section 9-0107 and in sections 9-0501 through 9-0507 of this article no person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon such lands with intent to do so.”*
8. Regulations at 6 NYCRR 190.8(g) provides that *“No person shall deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, fungi or other plant like organisms, moss or other plant, rock, soil, fossil or mineral or object of archaeological or paleontological interest found or growing on State land, except for personal consumption or under permit from the Commissioner of Environmental Conservation and the Commissioner of Education, pursuant to section 233 of the Education Law.”*
9. Respondent violated ECL 9-0303 and regulations at 6 NYCRR 190.8(g) by cutting and/or damaging 19 trees on state lands.

#### THIRD VIOLATION

10. Regulations at 6 NYCRR 196.1 provides that *“(a) No person shall operate a motorized vehicle in the forest preserve except as permitted in subdivisions (b) and (c) of this section.*

- (b) Operation of motorized vehicles is permitted on roads:
- (1) that are under the jurisdiction of the State Department of Transportation or a town or county highway department, in accordance with applicable State and local laws;
  - (2) where a temporary revocable permit has been issued by the department for motorized vehicle use by those persons to whom the permit has been issued and only in the accomplishment of the purpose of the permit;
  - (3) specifically marked by the department for motorized vehicle use;
  - (4) on public campgrounds operated by the department, in accordance with regulations for use of motorized vehicles at such facilities; or
  - (5) where a legal right-of-way exists for public or private use.
- (c) Operation of motor vehicles is permitted on the Limekiln Lake-Cedar River Road in accordance with section 196.3 of this Part.”

11. Respondent violated regulations at 6 NYCRR 196.1 by operating a motorized vehicle in the forest preserve at multiple locations along all three roads for the purpose of road ditching, depositing fill outside maintained road width, and constructing water diversion ditches outside the historic footprint of the roads.

#### FOURTH VIOLATION

12. Regulations at 6 NYCRR 190.2(b) provide that “No person shall throw, dump, deposit or place or cause to be thrown, dumped, deposited or placed on or in any department lands or structures any refuse, trash, garbage, rubbish, litter or any nauseous or offensive matter.”

13. Respondent’s depositing of fill material into forest preserve is a violation of regulations at 6 NYCRR 190.2(b).

#### Civil Penalty

14. ECL §71-0703 (6)(a) provides that:

*“In addition to any other penalty provided by law, any person who violates subdivision 1 of section 9-0303 of this chapter shall be liable to a civil penalty of two hundred fifty dollars per tree or treble damages, based on the stumpage value of such tree or both. Where the order or decision finds that the defendant established by clear and convincing evidence, that when such defendant committed the violation, he or she had cause to believe that the land was his or her own, or that he or she had an easement or right of way across such land which permitted such action, damages shall be awarded on the basis of the stumpage value of such tree or trees in the market as if they were privately owned. Notwithstanding the foregoing, this section shall not be construed to authorize the cutting of timber or removal of trees where such action would otherwise be violative of any provision of the state constitution or law.*”

(c) For purposes of this subdivision, "stumpage value" shall mean the current fair market value of a tree as it stands prior to the time of sale, cutting, or removal. Stumpage value shall be determined by one or more of the following methods: the sale price of the tree in an arm's-length sale, a review of solicited bids, the stumpage price report prepared by the department of environmental conservation, comparison with like sales on trees on state or private lands, or other appropriate means to assure that a fair market value is established within an acceptable range based on the appropriate geographic area.

15. ECL § 71-0703(7) provides that "In addition to the penalties otherwise provided, any person who violates any of the provisions of subdivision 1 of section 9-0303 or section 9-1501 of this chapter may be ordered by the commissioner or the court to make reparations for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation. Such reparations shall be of such kind, nature and extent as will reasonably restore the lands affected by the violation to their condition immediately before the violation and may be made by physical restoration of such lands and/or by the assessment of a monetary payment to make such restoration."

16. ECL 71-4003 provides that "Except as otherwise specifically provided elsewhere in this chapter, a person who violates any provision of this chapter, or any rule, regulation or order promulgated pursuant thereto or the terms or conditions of any permit issued thereunder, shall be liable to a civil penalty of not more than one thousand dollars, and an additional civil penalty of not more than one thousand dollars for each day during which each such violation continues. Any civil penalty provided for by this chapter may be assessed following a hearing or opportunity to be heard."

#### Waiver of Hearing

17. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

NOW, having considered this matter and being duly advised, it is ORDERED that:

I. In respect of the aforesaid violations, a civil penalty in the amount of TWELVE THOUSAND SEVEN HUNDRED FIFTY DOLLARS (\$12,750) of which TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) 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 TEN THOUSAND TWO HUNDRED FIFTY DOLLARS (\$10,250) shall be suspended so long as Respondents shall comply with the Schedule of Compliance.

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

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

II. The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or for him.

III. Respondent shall indemnify and hold harmless the Department, the State of New York, and its representatives and employees 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.

IV. 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.

V. This Order is deemed effective on the date signed by the Department.

VI. 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 or permits issued 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 agents, its servants, its employees, its successors and its assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's 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 or any other third party, provided, however, that Respondent waive 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.

VII. 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 Paragraph IV of this Order. No informal oral or written advice, 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 obligations to obtain such formal approvals as may be required by this Order.

VIII. For the purpose of monitoring or determining compliance with this Order, employees and agents of the Department shall be provided access to any facility, site or records owned, operated, controlled or maintained by Respondent, which relate to the site, in order to inspect and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility.

IX. Compliance with the terms and conditions of this Order shall be in full civil settlement of the violations cited in this Order.

DATED: *April 16*, 2018  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:



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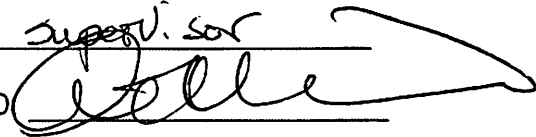
Keith Goertz  
Regional Director  
Region 4



CONSENT BY RESPONDENT

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

Town of Colchester


TITLE: Superv. Sor  
SIGNED: 

DATE: 4-10-18

STATE OF New York )

COUNTY OF ) ss.:  
)

On the 10<sup>th</sup> day of APRIL in the year 2018 before me, the undersigned, a Notary Public in and for the State, personally appeared ARTHUR M MERRILL 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.

  
Notary Public  
Qualified in the County of:  
My Commission Expires:

ARTHUR C. EDEL  
NOTARY PUBLIC STATE OF NEW YORK  
DELAWARE COUNTY  
LIC. #01ED6237023  
COMM. EXP. 03/14/2019

## SCHEDULE OF COMPLIANCE

1. By June 30, 2018, Respondent shall remove all fill piles which were deposited on state land as a result of maintenance at locations 2, 6, 7, 9, 14, 15, 16, 17, 22, 23, 24, 25, 30, 31 **identified on the accompanying map** (A copy of this map is attached as Exhibit II) and directed by NYS DEC Lands and Forests staff. All disturbed areas shall be seeded and covered with straw to prevent future erosion and help re-establish vegetation in these areas.
2. By June 30, 2018, Respondent shall re-establish the historic road width where the maintained road width has been widened at locations 2, 4, 9, 10, 11, 14, 15, 22 **identified on the accompanying map** and directed by NYS DEC Lands and Forests. Boulders with a minimum diameter of 3 feet and spaced maximum of 4 feet apart, will be placed along the road to designate the original maintained width. The road will be re-ditched, and areas will be covered with straw and re-seeded and allowed to return to a natural state.
3. By June 30, 2018, Respondent shall rehab site 12 to use as forest preserve and overflow parking. Other larger encroachments will be evaluated to determine their use as parking areas. The boundary of site 12 will be defined using rocks with a diameter of at least 3 feet with maximum of 4 feet between rocks.
4. All work outside the road footprint, and outlined in this Schedule of Compliance must be authorized through a Temporary Revocable Permit ("TRP"), which the applicant must obtain through submitting a TRP application to DEC Lands and Forests.

**DEC Representatives Bryan Ellis and Ranger Dylan McCartney must be notified before work begins AND after work is completed.**