

**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  
7013 1090 0002 3365 3724

May 28, 2015

Mike Kerwin  
2165 Hamden Hill Rd  
Hamden, NY 13782

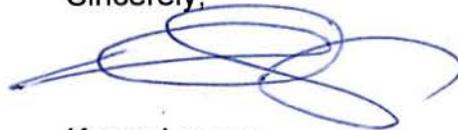
Re: Order of Consent  
R4-2014-1119-170

Dear Mr. Kerwin:

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

This will also acknowledge receipt of \$3,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: P. Wyckoff



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  
Article 23

-by-

Order on Consent  
File No. R4-2014-1119-170

Mike Kerwin  
2165 Hamden Hill Rd  
Hamden, NY 13782

Respondent  
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WHEREAS:

1. New York State Department of Environmental Conservation ("Department or DEC") has administrative jurisdiction pursuant to Environmental Conservation Law ("ECL") Title 27 of Article 23 to regulate surface mining and reclamation.
2. Respondent operates a bluestone mine located at 203 Ideuma Road, Unadilla, New York ("site").
3. On November 5, 2014, Department staff inspected the site.

First Violation

4. At the time of the inspection, Department staff determined that mining at the site was ongoing.
5. Respondent did not have a permit to operate the mine.
6. ECL 23-2711 (1) provides that "*After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months or who mines or proposes to mine over one hundred cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article fifteen of this chapter or to the public lands law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site.*"
7. Respondent violated ECL 23-2711.1 by operating the mine without a permit.

8. ECL 71-1307 (1) provides that any person who violates any provision of ECL Article 23 of this chapter or commits any offense described in Section 71-1305 of this title shall be liable to the people of the state for a civil penalty not to exceed \$5,000 and an additional penalty not to exceed \$1,000 for each day during which such violation continues.

9. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law, has consented to the issuance and entry of this Order, and agrees 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. Penalty

With respect of the aforesaid alleged violations, a civil penalty in the amount of EIGHT THOUSAND DOLLARS (\$8,000) of which THREE THOUSAND DOLLARS (\$3,000) 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.

The balance (\$5,000) 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. Compliance Schedule

Respondent shall commence implementation of the activities described in the Attached Compliance Schedule, which is an enforceable part of this Order, in accordance with its terms. Respondent shall meet the schedule therein.

### III. Force Majeure

If Respondent cannot comply with a deadline or requirement of this Order, because of an act of God, war, strike, riot, catastrophe or other condition which is not caused by the negligence or misconduct of Respondent and which could not have been avoided by Respondent through the exercise of due care, Respondent shall make his best effort to comply nonetheless and shall, within seventy-two hours (unless notice is required sooner by State or Federal law), notify the Department by telephone and in writing, pursuant to the communications provision of this Order, after it obtains knowledge of any such condition or event and request an appropriate extension or modification of this Order.

### IV. Reports

All reports required herein shall be made to the Region 4 office of DEC, 1130 North Westcott Road, Schenectady, NY 12306, Attn: Natural Resources Supervisor.

### V. Access

Respondent shall allow duly authorized agents and employees of DEC access to any facility, site, or records owned, operated, controlled, or maintained by Respondent, without prior notice, at such times as may be desirable or necessary, and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility.

### VI. Indemnification

Respondent shall indemnify and hold harmless the Department, the State of New York, and their 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 this Order by Respondent, their employees, servants, agents, successors or assigns.

### VII. Successors and Assigns

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

### VIII. Effective Date

The effective date of this Order shall be the date that the Commissioner or his designee signs it. The Department will provide Respondent (or the Respondent's Counsel) with a fully executed copy of this Order as soon as practicable after the Commissioner or her designee signs it.

IX. Default

The failure of Respondent to comply fully and in timely fashion with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to Respondent by DEC.

X. Entire Agreement; Modification

This Order constitutes the entire agreement of the parties, and no provision of the agreement shall be deemed waived or otherwise modified except as is specifically set forth in a writing executed by the Commissioner or Regional Director of DEC indicating an intent to modify this Order.

XI. Other Rights

Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting (1) any legal, administrative or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that the Department may have against anyone other than Respondent; (2) any right of the Department to enforce administratively or at law or in equity, the terms, provisions and conditions of this Order; (3) any right of the Department to bring any future action, either administrative or judicial, for any other violations of the ECL, the rules and regulations promulgated thereunder, or conditions contained in orders or permits, if any, issued by the Department to Respondent; (4) the summary abatement powers of the Department, either at common law or as granted pursuant to statute or regulation.

DATED: *May 28* 2015  
Rotterdam, New York

Joseph J. Martens  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

  
\_\_\_\_\_  
Keith Goertz  
Regional Director  
Region 4

CONSENT BY RESPONDENT

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

Mike Kerwin

SIGNED: \_\_\_\_\_

DATE: \_\_\_\_\_

STATE OF New York

) ss.:  
COUNTY OF Delaware

On the 19<sup>th</sup> day of May in the year 2015 before me, the undersigned, a Notary Public in and for the State, personally appeared Mike Kerwin 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.

Amber M Cohen  
Notary Public  
Qualified in the County of: Delaware  
My Commission Expires: 12/24/15

AMBER M COHEN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO 01CO6179078  
QUALIFIED IN DELAWARE COUNTY  
COMMISSION EXPIRES 12/24/ 2015

## SCHEDULE OF COMPLIANCE

1. Respondent shall immediately cease mining at the site and reclaim it OR cease mining until such time as a mining permit is obtained.
2. By June 30, 2015, Respondent shall submit to the Department, a completed mining permit application.
3. In the event that Respondent elects not to comply with Paragraph 2, Respondent must initiate reclamation. By July 30, 2015, Respondent shall use the spoil rock for the purposes of back filling the excavation and placement so as to minimize the exposed rock faces. All ridges, peaks and slopes shall be left no steeper than 1V:2H. Vertical walls in competent bedrock are permissible. Remaining rock faces must not exceed 10 ft in height or must not exceed pre-existing rock face heights, according to the authorization in documents. Overburden/topsoil amended with sufficient organic material such that it can support plant growth shall be spread all over the floor and slopes of the mine to a minimum depth of six inches.
4. By August 15, 2015, the site shall be fertilized, seeded and mulched<sup>1</sup>. Respondent shall conduct pH testing and lime as necessary and fertilizing with a slow release nitrogen fertilizer at the rate of 300lbs per acre. Respondent shall utilize a conservation seeding mixture which contains at least two legumes (ie: red clover, trefoil, etc) at the rate of 80lbs per acre. Respondent shall mulch the seeded area with hay mulch at the rate of 2,000 lbs per acre without bare spots.

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<sup>1</sup> The criteria for approving reclamation includes 75% vegetative cover attained by the second growing season without rills or gullies. (NYCRR Part 422.3(d)(2)(vi)(a). DEC staff will inspect the former mine in the late summer of 2015 to insure these steps have been completed. In the spring of 2016, DEC staff will inspect the site again to determine if the reclamation can be approved.