

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

**ORDER ON CONSENT**

- by -

File No. R4-2009-0508-81

Brian Powell  
d/b/a The Powell Company  
108 Main Street  
Franklin, New York 13775

Respondent

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WHEREAS:

1. The Department of Environmental Conservation ("Department") is the State agency which has jurisdiction over the environmental law and policy of the State pursuant to, *inter alia*, §3-0301 of the Environmental Conservation Law (ECL). In particular, DEC regulates and controls the water resources of the state pursuant to ECL § 15-0101 *et seq* and the rules and regulations promulgated, in part, under 6 NYCRR Part 608.
2. Respondent, Brian Powell, owns and/or operates The Powell Company, a commercial and industrial building contracting business located at 4 Railroad Ave, Oneonta, NY (Otsego County)("site").
3. Respondent is a "person," as defined in 6 NYCRR § 360-1.2(b)(108).
4. ECL Section 15-0501(2) provides that "*For the purposes of this section, stream shall mean that portion of any fresh surface watercourse, except lakes or ponds having a surface area greater than ten acres at mean low water level, for which the department has adopted or may hereafter adopt pursuant to section 17-030l, any of the following classifications or standards: AA and AA (T), A and A (T), B and B (T), C (T).*"
5. On April 7, 2009, Department staff inspected the site and observed that Respondent had placed fill below the mean high water level of the Susquehanna River, a class B water body.
6. Respondent did not have an Article 15 permit.

7. Regulations at ECL Section 15-0505 (1) provide that "no person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section."

8. Respondent violated regulations at ECL Section 15-0505 (1) by placing fill below the mean high water level at the site without a permit.

#### Civil Penalty

9. Regulations at ECL Section 71-1127 provides for a civil penalty of up to \$500 per day for a violation of Article 15 and up to \$100 for each day that such violation continues. Injunctive relief is also available.

#### Waiver of Rights

10. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law, and have consented to the issuing and entering of this Order and agree to be bound by the terms, provisions and conditions contained herein.

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

#### Civil Penalty

I. With respect of the aforesaid alleged violations, a civil penalty in the amount of FIVE HUNDRED DOLLARS (\$500) is hereby assessed against the Respondent. Payment of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by certified or bank check made payable to the NYS DEC.

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

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

III. 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 the provisions hereof by Respondent, his 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, his agents, his servants, his employees, his successors and his 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 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.

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

DATED: 2009  
Rotterdam, NY

Alexander B. Grannis  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

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Eugene J. Kelly  
Regional Director  
Region 4

**CONSENT BY RESPONDENT**

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

Brian Powell/d/b/a The Powell Company

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

TITLE: \_\_\_\_\_

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

STATE OF \_\_\_\_\_)

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)ss.:

COUNTY OF \_\_\_\_\_)

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On the \_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_ before me, the undersigned, a Notary Public in and for the State, personally appeared \_\_\_\_\_ 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:

## SCHEDULE OF COMPLIANCE

1. Respondent must immediately cease all filling activities at the site.
2. Within 60 days of the effective date of this Order, Respondent shall remove all new fill placed below the mean high water line (ends to be flagged by DEC staff), returning the shoreline its original (pre-construction) condition. Respondent shall maintain erosion and sedimentation controls (silt fence) to prevent any turbid discharges to the river (mill race). The exposed shoreline must be seeded and mulched. The fill must be placed in a suitable upland location where it cannot be washed back into the water.