

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

September 9, 2015

Adam Schultz
540 Broadway, 7th Floor
Albany, NY 12207
aschultz@couchwhite.com

Re: Interim Order on Consent
R4-2015-0820-100
Normanskill Creek LLC

Dear Mr. Schultz:

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

Sincerely,



Richard Ostrov
Regional Attorney
Region 4

Enclosure

ec: Angelo Trichilo, NYSDOT – angelo.trichilo@dot.ny.gov
George Casey, USACE- geroge.d.casey@usace.army.mil
John Reilly, City of Albany Corporation Counsel – jreilly@albanyny.gov
Randall Milano, City of Albany Engineer – rmilano@albanyny.gov
Jim Potter, Bethlehem Town Attorney – jpotter@hinmanstraub.com
Paul Penman, Bethlehem Town Engineer – ppenman@townofbethlehem.org
Paul Marthy, Counsel for Larkin – pmarthy@break-all.com



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Environmental
Conservation Law Articles 15 and 17

INTERIM
ORDER on CONSENT

File No.
R4-2015-0820-100

NORMANSKILL CREEK LLC
150 SALISBURY ROAD
DELMAR, NEW YORK, 12054

Respondent

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 § 3-0301 of the Environmental Conservation Law (ECL). In particular, DEC is and has been responsible for the protection of water resources and water quality of the State pursuant to ECL Articles 15 and 17, respectively.
2. Respondent, Normanskill Creek LLC, owns and operates the Normanside Country Club in the Town of Bethlehem ("Town") which is contiguous to the Normans Kill ("site").
3. Normans Kill is a protected stream as defined at 6 NYCRR 608.1(aa) and has a "B" classification.
4. On April 19, 2015, a landslide originated on the site that blocked the channel of the Normans Kill ("landslide").
5. On April 20, 2015, the City of Albany conducted an emergency action to partially unblock the Normans Kill to prevent flooding of residences.
6. The purpose of this Interim Order on Consent is to authorize the Respondent to further widen the Normans Kill in accordance with the CHA interim stream work engineering plan ("interim plan") as referenced in the Schedule of Compliance and submitted to the Department on behalf of the Town.
7. The widening of the channel on an interim basis will increase the flow capacity of the Normans Kill channel and provide further protection in the event of a 50 year storm event.
8. The Department reserves its rights to subsequently address Respondent's liability for violations of ECL Sections 15 and 17 and regulations promulgated thereunder related to the landslide including but not limited to seeking civil penalties, natural resources damages, and injunctive relief for the further widening of the Normans Kill to restore the flow capacity of the Normans Kill channel to levels prior to the landslide and any other applicable relief.

Waiver of Hearing

9. 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 Interim Order on Consent and agrees to be bound by the terms, provisions and conditions contained herein.

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

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

I. Schedule of Compliance - Respondent shall comply with the Interim Order on Consent and the Interim Order on Consent’s Schedule of Compliance and all Department approved submittals which are incorporated and made part of this Interim Order on Consent.

II. Stipulated Penalties- Respondent shall pay the following stipulated penalties for failing to comply with this Interim Order on Consent, including the Schedule of Compliance milestone dates and requirements. The stipulated penalties shall be paid within 30 days of the receipt of a written determination from the Department setting forth the violations and referencing this provision. Stipulated penalties begin to accrue on the day the violation occurs and continue to accrue through the last day on which the violation is corrected. If Respondent fails to pay stipulated penalties, the Department may institute proceedings to collect the penalties. However, nothing in this section shall be construed as prohibiting, altering, or in any way limiting the ability of the Department to seek any other remedies or sanctions available based upon Respondent's violation of this Interim Order on Consent or of the statutes and regulations upon which it is based.

Violations of Schedule of Compliance Paragraphs	Period of Noncompliance	Stipulated Penalty
Paragraph 1	1-10 days 11-30 days >30 days	\$500 per day \$1,000 per day \$2,500 per day
Paragraph 2	1-10 days 11-30 days >30 days	\$100 per day \$250 per day \$500 per day
Paragraph 3	1-10 days 11-30 days >30 days	\$500 per day \$1,000 per day \$2,500 per day

III. Reservation of Rights

Except as specifically provided in this Interim Order on Consent, nothing contained in this Interim Order on Consent 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 violations of the ECL, rules or regulations promulgated thereunder related to the landslide including but not limited to civil penalties and injunctive relief to restore the Normans Kill channel to its flow capacity prior to the landslide.

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 officers, directors, agents, servants, employees, successors and assigns;

C. 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;

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 Interim Order on Consent and whether or not this Interim Order on Consent has been entered into voluntarily by Respondent.

IV. Effective Date - The effective date of this Interim Order on Consent shall be the date upon which it is signed on behalf of the Department.

V. Communications - All communications required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, and Attn: Regional Engineer; and Respondent – Adam Schultz, counsel for Respondent at aschultz@couchwhite.com.

VI. Access - Respondent shall allow duly authorized representatives of the Department, Army Corps of Engineers and New York State access to the site without prior notice at such times as may be desirable or necessary to inspect and determine the status of Respondent's compliance with this Interim Order on Consent and the ECL and regulations promulgated there under.

VII. Summary Abatement - This Interim Order on Consent shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VIII. Indemnification - Respondent shall indemnify and hold Department, New York State, and their representatives and employees harmless for all claims, suits, 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.

IX. Modification - No provision of the Interim Order on Consent shall be deemed waived or otherwise modified except as is specifically set forth in a writing executed by the Commissioner or Regional Director of Department indicating an intent to modify this Interim Order on Consent.

X. Termination - This Interim Order on Consent shall terminate upon the Department's determination that Respondent has complied with all the terms, conditions and provisions of this Interim Order on Consent's Schedule of Compliance.

DATED: Rotterdam, New York
September 9, 2015

Marc Gerstman
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

Schedule of Compliance

1. By no later than September 30, 2015, Respondent shall complete all stream work described in the CHA interim stream work engineering plan ("interim plan") submitted to the Department on behalf of the Town of Bethlehem which is attached to this Interim Order on Consent as Attachment A and incorporated by referenced and enforceable as part of this Interim Order on Consent.
2. By no later than October 15, 2015, Respondent shall submit to the Department a certification by a New York State licensed professional engineer that all work has been completed in accordance with the interim plan.
3. By no later than January 31, 2016, Respondent shall submit to the Department for review and approval an ECL Article 15 permit application with environmental assessment form for the final design plans for the location of a final channel restoration project to restore the original flow capacity of the Normans Kill prior to the landslide ("permit application"). The final design shall address the removal of all fill placed along the City of Albany side of the Normans Kill resulting from work conducted under this Order on Consent and the emergency action conducted by the City of Albany. Respondent shall ensure that the permit application complies with all the requirements imposed by the United States Army Corps of Engineers ("ACOE") pursuant to their Clean Water Act ("CWA") permitting and approval authority.