

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of
Environmental Conservation Law (ECL)
article 24 and Title 6 of the Official
Compilation of Codes, Rules and
Regulations (6 NYCRR) part 663 on
property located in the Town of
Alexandria, Jefferson County by

Ruling on Department
Staff's Motion for Order
without Hearing

DEC Case No.:
R6-2287-99-02

H. Gordon Ganter,
Respondent.

August 8, 2006

Proceedings

Staff from the Region 6 Office of the New York State Department of Environmental Conservation (Department staff) commenced the captioned matter by duly serving a notice of motion for order without hearing dated February 28, 2006 and other supporting papers upon H. Gordon Ganter (Respondent) (see 6 NYCRR 622.12[a]). With the notice of motion for order without hearing, Department staff filed a motion for order without hearing and a memorandum in support of the motion by James T. King, Esq., Regional Attorney, both dated February 28, 2006.

Attached to the supporting memorandum were Exhibits A, B, C and D, as well as Attachments 1, 2 and 3. Exhibit A is a copy of the combined Water Quality Certification and Freshwater Wetlands Permit (No. 6-2222-00184/00003-0), effective February 12, 1993, that Department staff issued to Mr. Ganter. Exhibit B is an affidavit by Alice P. M. Richardson sworn to January 13, 2006 who, as a Fish and Wildlife Technician II at the Department's Region 6 Office, visited Mr. Ganter's property on November 19, 1999. Exhibit C is an affidavit by George E. Mead sworn to January 9, 2006. Mr. Mead was the Regional Attorney at the Department's Region 6 Office from February 1999 until February 2001.

Exhibit D consists of two affidavits of service by Beth Anne Widrick sworn to April 26, 2006. The first affidavit of service states that on April 6, 2006, Ms. Widrick sent copies of the notice of motion and motion via certified mail return receipt requested to Mr. Ganter at 3432 State Road, 580 Lot 421, Safety Harbor, Florida 34695-4970. The second affidavit of service states that on April 6, 2006, Ms. Widrick sent copies of the notice of motion and motion via certified mail return receipt requested to Mr. Ganter at 44038 Charles point, Alexandria Bay, New York 13601-3787. With Exhibit D, Department staff included

copies of the signed domestic return receipts from both addresses.

As noted above, Department staff offered three attachments with the motion papers. Attachment 1 is a copy of a letter dated February 8, 1993 from Kent P. Sanders, Senior Fish & Wildlife Technician in the DEC Region 6 Office to Mr. Ganter. Attachment 2 is a copy of a letter dated February 8, 1993 from Mr. Ganter to Mark Wiggins at the DEC Region 6 Office. Attachment 3 is a copy of a portion of a letter dated May 20, 1998 from Mr. Sanders to Mr. Ganter.¹

In the motion, Department staff contends that Mr. Ganter owns property off Collins Landing Road in the Town of Alexandria, Jefferson County near the St. Lawrence River. The February 12, 1993 permit authorized Mr. Ganter to construct a roadway, 12 feet wide, across two sections, identified in the permit as crossings "A" and "B," of regulated Freshwater Wetland F-13. The approximate length of each authorized crossing was 40 feet. Department staff alleges that Mr. Ganter failed to comply with the terms of Special Condition Nos. 2, 3 and 5 of the February 12, 1993 freshwater wetlands permit. For the alleged noncompliance, Staff requested a total civil penalty of \$15,000. Also, Staff requested an order from the Commissioner that would direct Mr. Ganter to remove all the fill associated with the crossings and to restore Freshwater Wetland F-13 to preconstruction conditions.

Mr. Ganter timely filed an answer dated May 17, 2006, and attached nine exhibits identified as A through J (excluding I). Exhibit A to Mr. Ganter's May 17, 2006 answer is an unsigned copy of a consent order concerning alleged violations by Mr. Ganter of the referenced permit in Freshwater Wetland F-13. Exhibit B is a copy of a portion of a letter from Department staff to Mr. Ganter dated August 26, 2004. Exhibit C is a set of photographs of Freshwater Wetland F-13. Exhibit D is a copy of the Department's mission statement from the website (no access date provided). Exhibit E is a copy of a letter from St. Lawrence-Lewis Insurance to Mr. Ganter dated November 9, 1995. The letter includes a photograph of Phyllis Ganter's twisted ankle. Exhibit F is a set of photographs showing the "Posted" signs on the Ganter property.

¹ Although Department staff did not provide the signature page of the May 20, 1998 letter, Mr. King identifies Mr. Sanders as the letter's author in his memorandum supporting the motion for order without hearing.

Exhibit G is a list of permit applications and permits from the DEC Region 6 Office dating from 1980 to 2004. Exhibit H is a list of permits issued by Staff from the Region 6 Office, which Mr. Ganter characterizes as "blunders and inconsistencies." There is no Exhibit I.

Exhibit J to Mr. Ganter's May 17, 2006 answer is a set of three affidavits. The first is by Timothy Wright sworn to May 2006. The second affidavit is by Warren P. Ganter sworn to May 5, 2006. The third affidavit is by Phyllis Jean Ganter sworn to May 10, 2006.

With a cover letter dated February 28, 2006, Department staff provided the Chief Administrative Law Judge (ALJ) with a copy of its motion papers. Subsequently, with a cover letter dated April 26, 2006, Department staff provided the Chief ALJ with the affidavits of service (Exhibit D to Department staff's motion). Subsequently, the Office of Hearings and Mediation Services received Mr. Ganter's answer.

Discussion

Motion for Order without Hearing

To commence an administrative enforcement action, Department staff may serve a motion for order without hearing in lieu of a complaint pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the New York Civil Practice Law and Rules (CPLR) in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Amanda J. Bice*, VISTA Index No. CO7-20050322-2, Order dated April 19, 2006 with attached Hearing Report on Motion for Order without Hearing dated April 11, 2006, at 6; *Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order dated June 16, 2003 at 4).

As noted above, the Office of Hearings and Mediation Services received an answer from Mr. Ganter wherein he contests Department staff's motion for order without hearing. Mr. Ganter

argues that staff's motion should be denied, and requests that the Commissioner dismiss the charges alleged in the motion.

Statute of Limitation

Absent a precise reference to any statutory provision and without further elaboration, Mr. Ganter states in his May 17, 2006 answer as Fact #4 that "[t]he statute of limitations (CPLR) has been exceeded."

The Commissioner noted in *Locaparra* (*supra* at 4) that a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof (*see Hanson v Ontario Milk Producers Coop., Inc.*, 58 Misc 2d 138, 141-142 [Sup Ct, Oswego County 1968]). Mr. Ganter's claim that the statute of limitations has been exceeded absent a precise statutory reference and without any legal argument is not sufficient either to grant summary judgment in Mr. Ganter's favor or to raise an issue for adjudication.

Finally, I note that the Civil Practice Law and Rules (CPLR) does not apply to administrative proceedings such as the captioned matter (*see Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 84 AD2d 318, 325, *affd* 59 NY2d 401). Consequently, Mr. Ganter's reliance on the CPLR for a statute of limitation is misplaced.

Liability

Department staff alleges that Mr. Ganter did not comply with the terms and conditions of Special Condition Nos. 2, 3 and 5 of the February 13, 1993 freshwater wetlands permit. Each special condition is address below.

1. Culverts at Wetland Crossing "B"

Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit states that:

"[a]t wetland crossing 'B' two 36" culverts will be installed in the roadway in the old channel area to allow water flow past the roadway."

In 1999, Alice M.P. Richardson was employed as a Fish and Wildlife Technician II at the Region 6 Office. As a Fish and Wildlife Technician II, Ms. Richardson conducted numerous site inspections to determine compliance with permits issued pursuant

to ECL article 15 (Protection of Waters) and article 24 (Freshwater Wetlands Act).

Ms. Richardson visited Mr. Ganter's property on November 9, 1999 to determine whether he had complied with the terms and conditions of the February 12, 1993 freshwater wetlands permit. During the site visit, Ms. Richardson observed that three 12-inch diameter culverts had been installed at wetland crossing "A" in compliance with the permit. Ms. Richardson observed further that at wetland crossing "B," Mr. Ganter had installed four 12-inch diameter culverts rather than the two 36-inch diameter culverts required by the February 13, 1993 freshwater wetlands permit.

In his May 17, 2006 answer, Mr. Ganter acknowledges that the February 12, 1993 freshwater wetlands permit required the installation of two 36-inch diameter culverts at wetland crossing "B," and describes the required culverts as "big." Mr. Ganter states that he "installed four 12" culverts" at crossing "B."

Mr. Ganter's admission supports Ms. Richardson's observations. Consequently, there are no disputed facts about the number and size of the culverts installed at freshwater wetland crossing "B." Moreover, the culverts that Mr. Ganter installed are not the ones authorized by the February 12, 1993 permit. Therefore, Mr. Ganter violated Special Condition No. 2 of the permit by installing four 12-inch diameter culverts at freshwater wetlands crossing "B" rather than installing two 36-inch diameter culverts.

2. Excavation of the Main Channel

Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit states that:

"[t]o mitigate the loss of wildlife habitat and to extend the longevity of the marsh, the main channel from Swan Bay past crossing "B" up to or beyond the existing foot bridge will be deepened by two feet x a width of ten feet with excavated material disposed of on an upland location. This work will take place concurrent with or prior to road construction."

A drawing is attached to the February 12, 1993 freshwater wetland permit, and section C of the drawing depicts the proposed roadway, wetland crossings "A" and "B," as well as Rood's Bay and Swan Bay. Based on the drawing, Rood's Bay is to the right of wetland crossing "B" and Swan Bay is to the left of the wetland

crossing. Special condition No. 3 of the February 12, 1993 wetlands permit required Mr. Ganter to dredge an area from wetland crossing "B" toward Swan Bay. When Ms. Richardson inspected the site on November 9, 1999, however, she observed that dredging had occurred on the Rood's Bay side of the roadway near wetland crossing "B" rather than on the Swan Bay side of the roadway. Therefore, Mr. Ganter did not comply with this permit condition.

According to Mr. Ganter, he could not dredge the wetland toward Swan Bay because he does not own that property. Mr. Ganter states that he dredged the area toward Rood's Bay because he owns that property. To support his position further, Mr. Ganter referred to Exhibit B attached to his May 17, 2006 answer, which is a copy of a portion of a letter dated August 26, 2004 to Mr. Ganter from Region 6 Department staff. Mr. Ganter did not provide the entire letter, and it cannot be determined who signed the letter. The portion of the letter provided, nonetheless, states, in pertinent part, that

"Because it has been determined that you [*i.e.*, Mr. Ganter] do not have the authority to clear the ditch on your brother's property, the Department has determined that the channel clearing on the west side of your roadway will be accepted as mitigation for the road fill."

The dredged area toward Rood's Bay is west of freshwater wetland crossing "B," according to the drawing attached to the February 12, 1993 freshwater wetlands permit.

General Condition No. 7 of the February 12, 1993 freshwater wetlands permit states that:

"[t]his permit does not convey to the permittee any right to trespass upon the lands or interfere with the riparian rights of others in order to perform the permitted work nor does it authorize the impairment of any rights, title, or interest in real or personal property held or vested in a person not a party to the permit."

Although Ms. Richardson's affidavit establishes that Mr. Ganter did not comply with Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit, Mr. Ganter's claim that he does not own that property, Department staff's acknowledgment of that claim in the August 26, 2004 letter, and

General Condition No. 7 of the February 12, 1993 freshwater wetlands permit identify a fundamental issue about the validity of Special Condition No. 3. Accordingly, I deny Department staff's motion for order without hearing with respect to this allegation, and find that a hearing will be necessary to determine whether the Department has the authority to require the mitigation required by Special Condition No. 3.

3. Disposal of Dredged Material

Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit states that:

"[a]ll dredged or excavated material shall be disposed of outside the wetland boundary and be suitably stabilized so that it cannot re-enter any water body or wetland area."

According to Ms. Robinson's January 13, 2006 affidavit, the material that Mr. Ganter dredged from the wetland on the Rood's Bay side of crossing "B" was "distributed along the side of the channel and leveled out instead of being removed outside of the wetland boundary."

Mr. Ganter states, however, that the excavated material was placed "on upland next to the canal and is now in very stable condition." According to Mr. Ganter, the Department has no authority to direct where he must place the dredged material because the canal is not part of a naturally occurring freshwater wetland. Rather, the canal is man-made, and was dug out around 1900, which predates the Freshwater Wetlands Act (see ECL article 24).

Department staff has failed to establish as a matter of law that Mr. Ganter placed the dredged material within the regulated freshwater wetland. Staff did not offer any evidence to show where the freshwater wetland boundary is located, and where Mr. Ganter allegedly placed the dredged material in relationship to the freshwater wetland boundary. Absent such proof and Mr. Ganter's statement that he placed the dredged material on an upland area demonstrate substantive factual disputes that require a hearing. Accordingly, I deny Department staff's motion for order without hearing with respect to this allegation, and find that a hearing will be necessary to determine whether Mr. Ganter violated Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit.

Relief

Department staff seeks a civil penalty, and an order from the Commissioner directing Mr. Ganter to restore Freshwater Wetland F-13 to its preconstruction condition. In the motion papers, Department staff included several conditions related to the remediation, which Staff would like incorporated into the order.

1. Civil Penalty

Department staff's penalty calculation is based on the economic benefits that Mr. Ganter allegedly gained by not complying with the permit conditions, and a gravity component related to the actual or potential environmental harm associated with the violations. According to Department staff, the total cost to purchase and install two 36-inch diameter culverts would be \$1,000. Staff estimated that the cost associated with dredging the channel would be \$2,000. As a result, Mr. Ganter realized a total economic benefit of \$3,000, according to Department staff.

With respect to the gravity component, Department staff identified four aggravating factors that would justify a significant civil penalty. They are: (1) Mr. Ganter installed culverts not authorized by the February 12, 1993 permit; (2) he failed to install the proper culverts; (3) Mr. Ganter failed to dredge the channel according to the permit; and (4) he improperly disposed of dredged material. Staff argued that each factor warrants a civil penalty of \$3,000 for a total gravity component of \$12,000. Therefore, the total requested civil penalty is \$15,000. Staff requested that at least \$12,000 of the total be collected now, and that \$3,000 could be suspended pending Mr. Ganter's compliance with the remediation requirements.

To support its arguments concerning these aggravating factors, Department staff offered an affidavit by George E. Mead sworn to January 9, 2006. According to his affidavit, Mr. Mead was the Regional Attorney at the Department's Region 6 Office from February 1999 to February 2001. In the affidavit, Mr. Mead relates his recollection of a telephone conversation held on May 25, 1999 with Mr. Ganter about the alleged violations. According to Mr. Mead, Mr. Ganter said, among other things, that he did not think that a wetlands permit was needed and that he would do whatever he wanted to do with respect to the wetland crossings.

2. Remediation

Mr. Ganter opposes Department staff's request for remediation. Mr. Ganter argues that it would be "morally wrong" for the Commissioner to order the wetland crossings to be removed, and that such a directive would be contrary to the Department's mission. Mr. Ganter adds that people could be physically injured if the road had to be removed.

According to his May 17, 2006 answer, Mr. Ganter studied engineering at Clarkson University, and education, mathematics and science at St. Lawrence University. Mr. Ganter states that the two 36-inch diameter culverts required by the February 12, 1993 permit were oversized for the anticipated annual rainfall and seasonal changes to the water elevation of the St. Lawrence River. Mr. Ganter explained that a half inch of rain in the dead-end pond at wetland crossing "B" would result in about 40 cubic feet of flow to the river. Mr. Ganter explained further that if the rain event lasted 40 minutes, the flow would be one cubic foot per minute. Mr. Ganter concludes that requiring two 36-inch diameter culverts demonstrates "a lack of research, knowledge, expertise and negligence" on the part of Department staff.

Because there are outstanding factual disputes related to Mr. Ganter's liability for the violations alleged against him, I reserve ruling on Department staff's requests concerning relief.

Findings of Fact

The following facts established as a matter of law are:

1. H. Gordon Ganter owns property off Collins Landing Road in the Town of Alexandria, Jefferson County near the St. Lawrence River. Portions of this property are regulated freshwater wetlands identified as F-13.
2. On February 12, 1993, Department staff issued Mr. Ganter a combined Water Quality Certification and a Freshwater Wetlands Permit identified by permit No. 6-2222-00184/00003-0, and effective from February 12, 1993 through December 31, 1995.
3. The permit identified in the preceding finding authorized Mr. Ganter to construct a roadway, 12 feet wide, across two sections, identified as crossings "A" and "B," of regulated

Freshwater Wetland F-13. The approximate length of each authorized wetland crossing was 40 feet.

4. For crossing "A," Special Condition No. 1 of the February 12, 1993 wetlands permit required the installation of three 12-inch diameter culverts. For crossing "B," Special Condition No. 2 of the February 12, 1993 wetlands permit required the installation of two 36-inch diameter culverts.
5. Alice P. M. Richardson is currently a Biologist I at the Department's Central Office. From November 1999 until March 2000, Ms. Richardson was a Fish and Wildlife Technician II at the Department's Region 6 Office. Ms. Richardson visited Mr. Ganter's property on November 19, 1999 and March 9, 2000.
6. During the November 19, 1999 site visit, Ms. Richardson observed that three 12-inch diameter culverts had been installed at wetland crossing "A" in compliance with the permit. Ms. Richardson observed further that, at wetland crossing "B," Mr. Ganter had installed four 12-inch diameter culverts rather than the two 36-inch diameter culverts required by the February 12, 1993 wetlands permit.

Conclusions

1. Department staff establishes as a matter of law that Mr. Ganter violated the terms and conditions of Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit when he installed four 12-inch diameter culverts rather than two 36-inch diameter culverts.
2. Department staff failed to establish as a matter of law that Mr. Ganter violated the terms and conditions of Special Condition No. 3. There are factual issues requiring an adjudicatory hearing to determine, among other things, the validity of this permit condition.
3. Department staff failed to establish as a matter of law that Mr. Ganter violated the terms and conditions of Special Condition No. 5. There are factual issues requiring an adjudicatory hearing to determine, among other things, the location of the boundary of Freshwater Wetland F-13, and the location of the dredged material with respect to the wetland boundary.

Rulings

I grant in part, and deny in part Department staff's motion for order without hearing. I grant Department staff's motion with respect to the alleged violation of Special Condition No. 2 of the February 13, 1993 freshwater wetlands permit concerning the required installation of two 36-inch diameter culverts at crossing "B." I deny Department staff's motion with respect to the alleged violations of Special Condition Nos. 3 and 5 of the February 12, 1999 wetlands permit. I reserve ruling on the relief requested by Department staff until after a complete record is developed at hearing.

Further Proceedings

A hearing is necessary to resolve disputed issues related to Mr. Ganter's liability with respect to his compliance with certain Special Conditions in the February 12, 1993 wetlands permit. I would like to hold a telephone conference call with the parties after 11:00 a.m. on August 22, 23 or 24, 2006 to discuss the schedule for the hearing. By 4:30 p.m. on August 18, 2006, the parties shall advise me about their availability on August 22, 23 or 24, 2006 for a telephone conference call. If a party is not available on these dates, then the party shall provide alternative times and dates for the conference call by August 18, 2006.

_____/s/_____
Daniel P. O'Connell
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Dated: Albany, New York
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