

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 25 of the New York State Environmental Conservation Law, and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

- by -

NYSDEC File No.
R2-20120830-563

**KRIS GOUNDEN, and
SONA GOUNDEN,**

Respondents.

PROCEEDINGS

This ruling addresses a motion for order without hearing (motion), filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department). The matter was assigned to me on May 16, 2018.

Pursuant to section 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), staff may serve a motion for order without hearing in lieu of or in addition to a notice of hearing and complaint. Here, staff served the motion on respondents in lieu of a notice of hearing and complaint. As authorized by 6 NYCRR 622.3(a)(3) and 622.12(a), staff served the motion by certified mail.¹

By its motion and supporting papers, Department staff alleges that respondents Kris Gounden and Sona Gounden violated the tidal wetlands law at a site (site) located at 1 Bayview Avenue and 152 Broadway, Queens, New York. Specifically, staff alleges that respondents violated provisions of New York State Environmental Conservation Law (ECL) § 25-0401 and 6 NYCRR 661.8.

In support of its motion, Department staff filed an affirmation of James L. Simpson, Esq. (Simpson affirmation), Assistant Regional Attorney, DEC Region 2, dated February 23, 2018. Attachments to the Simpson affirmation include a memorandum of law (MOL), dated February 26, 2018, and several exhibits, including:

- photographs of the site depicting a dock (exhibits C, E) and two partially sunken vessels (exhibits F, G);
- aerial photographs depicting the site and surrounding area (exhibits L, M, N); and
- several notices of violations (exhibits D, H, I).

¹Respondents received the motion on March 8, 2018 (*see* affirmation of service of James L. Simpson, dated Mar. 23, 2018 [with attached USPS tracking information]).

Also attached to the Simpson affirmation are: an affidavit of Tamara Greco (Greco affidavit), Deputy Regional Permit Administrator, Division of Environmental Permits, DEC Region 2, sworn to August 1, 2017; an affidavit of Shea Mathis (Mathis affidavit), Environmental Conservation Officer (ECO), DEC Region 8 (and, formerly, DEC Region 2), sworn to August 7, 2017; and an affidavit of Matthew James (James affidavit), Biologist 1, DEC Region 2, sworn to February 26, 2018.

Respondents did not file a response to the motion. Accordingly, the motion is unopposed.

As detailed below, I conclude that Department staff has met its burden and established as a matter of law that respondents committed some, but not all, of the violations set forth in the motion. Because there are outstanding factual disputes that require adjudication, further proceedings are necessary, and I make no recommendations regarding staff's request for relief.

Department Staff's Allegations

By its motion, Department staff alleges that respondents violated ECL 25-0401 and 6 NYCRR 661.8 by:

- "a) Constructing a dock on pilings in a regulated tidal wetland and tidal wetland adjacent area without a DEC permit; and
- b) Constructing an overwater deck in a regulated tidal wetland and tidal wetland adjacent area without a DEC permit; and
- c) Disposing of two vessels in a regulated tidal wetland"

(motion at 2).

Department staff requests that the Commissioner issue an order (i) holding respondents liable for violating ECL 25-0401 and 6 NYCRR 661.8; (ii) assessing a civil penalty against respondents in the amount of \$30,000; and (iii) directing respondents to remove the dock, overwater deck, and sunken vessels (motion at 2).

FINDINGS OF FACT

Based upon the papers filed by Department staff, I make the following findings of fact:

1. The site is located at 1 Bayview Avenue and 152 Broadway, Queens, New York (James affidavit ¶ 4; Mathis affidavit ¶ 4). The site includes four parcels (Queens County Tax Block 14228, Lots 161, 759, 760, and 762 [lot 161, lot 759, lot 760, and lot 762, respectively]), and extends into Hawtree Basin (*id.*, exhibits A, B, M).

2. Respondent Kris Gouden owns two parcels (lots 161 and 759) on the northern portion of the site (exhibits A, M).

3. Respondent Sona Gounden owns two parcels (lots 760 and 762) on the southern portion of the site (exhibits B, M).

4. The four parcels owned by respondents at the site are located within the adjacent area of the State regulated tidal wetland in Hawtree Basin and the western portion of the site extends into the tidal wetland itself (James affidavit ¶¶ 4-6, 8, 9; Mathis affidavit ¶¶ 4-7; exhibits M, N; *see also* http://s3.amazonaws.com/opdgig/twmaps3/598_500.jpg [DEC Tidal Wetlands Map (Map 598-500)] [accessed Mar. 6, 2019] [designating Hawtree Basin in the area adjacent to the site as "LZ" (littoral zone)]).

5. Respondents did not submit an application to the Department to undertake activities in the tidal wetland or adjacent area at the site (Greco affidavit ¶¶ 4, 5, 8), and the Department did not issue any permits authorizing activities in the tidal wetland or adjacent area at the site (Greco affidavit ¶¶ 6, 7).

6. On or before July 15, 2012 respondents commenced construction of a wooden dock extending to the south of lot 762 (Mathis affidavit ¶¶ 4-7 [describing his observation of the dock under construction and discussions with respondent Kris Gounden during site visits on July 15 and 21, 2012]; exhibit C [photograph of dock under construction taken by Mathis on July 15, 2012]; exhibit E [seven photographs of dock under construction and related structures taken by Mathis on July 21, 2012]; James affidavit ¶¶ 6.d, 6.e [describing the addition of a dock on the southern end of the site as depicted in exhibit L at 4, 5]; exhibit L at 3 [aerial photograph dated June 23, 2012 depicting a small light-colored dock at the southern end of the site extending to a vessel in Hawtree Basin]; exhibit L at 4, 5 [aerial photographs dated Nov. 4 and 5, 2012, respectively, depicting a long narrow dock at the southern end of the site running generally parallel to, and extending south of, the western shoreline of the site]).

7. Beginning on or before October 11, 2014 respondent Kris Gounden maintained a partially sunken vessel in the tidal wetland adjacent to his property (exhibit L at 6, 7 [aerial photographs dated Oct. 11, 2014 and Apr. 19, 2016, respectively, depicting a partially sunken vessel adjacent to the northern end of the site²]; James affidavit ¶ 5 [describing his observation of the partially sunken vessel at the northern end of the site on Apr. 29, 2016, and referencing exhibit G]; exhibit G at 3 [photograph of the partially sunken vessel at the northern end of the site taken by James on Apr. 29, 2016]).

8. Beginning on or before January 4, 2016 respondent Sona Gounden maintained a partially sunken vessel in the tidal wetland adjacent to her property (James affidavit ¶¶ 4, 5 [describing his observation of the partially sunken vessel at the southern end of the site on Jan. 4

² Earlier aerial photographs in the record depict a partially sunken vessel near the northern end of the site, but it is unclear whether that vessel is the same as the partially sunken vessel observed by Mr. James on April 29, 2016. The aerial photographs taken in November 2011 depict a partially sunken vessel near, but to the south of, the location where Mr. James observed the partially sunken vessel on April 29, 2016 (*see* exhibit L at 4, 5). I also note that the bow of the vessel depicted in the November 2011 photographs is facing in the opposite direction as the bow of the partially sunken vessel observed by Mr. James on April 29, 2016 (*id.* at 4, 5, 7). Accordingly, I do not rely on the November 2011 aerial photographs with regard to the date that the alleged disposal of this vessel began.

and Apr. 29, 2016, and referencing exhibits F and G]; exhibit F [photograph of the partially sunken vessel at the southern end of the site taken by James on Jan. 4, 2016]; exhibit G at 1, 2 [photographs of the partially sunken vessel at the southern end of the site taken by James on Apr. 29, 2016]; exhibit L at 7 [aerial photograph dated Apr. 19, 2016 depicting a partially sunken vessel at the southern end of the site]).

DISCUSSION

Summary Judgment Standard

Pursuant to 6 NYCRR 622.12(d), a motion for 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 CPLR in favor of any party.

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [holding that summary judgment is "to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted)]).

Where, as here, a motion for order without hearing is uncontested, the motion may be granted if Department staff proffers sufficient evidence in admissible form to establish each element of the claims alleged in the motion (*see Matter of Alvin Hunt d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 7 n 2).

As discussed below, applying the summary judgment standard to Department staff's motion, I conclude that staff's motion for order without hearing should be granted in part, and denied in part, against both respondents.

First Cause of Action: Construction of a Dock

Department staff alleges that "[r]espondents violated ECL § 25-0401 and 6 NYCRR § 661.8 when they constructed an open pile catwalk/dock not greater than 4 feet in width in a regulated tidal wetland and tidal wetland adjacent area without a DEC permit" (staff MOL at 9; *see also* motion at 2).

The provisions cited by Department staff, ECL 25-0401 and 6 NYCRR 661.8, provide that no person may conduct a regulated activity in a tidal wetland or tidal wetland adjacent area without a permit from the Department. Pursuant to 6 NYCRR 661.5(b)(14), construction of an open pile catwalk or dock of no greater than four feet in width in a tidal wetland is designated as a "Generally Compatible" regulated activity and requires a permit from the Department.

In support of this allegation, Department staff proffered affidavits of ECO Shea Mathis, biologist Matthew James, and permit administrator Tamara Greco. ECO Mathis attests that on July 15, 2012 he observed individuals constructing a dock at the site (Mathis affidavit ¶ 4 [describing his observation of the dock under construction]). He further attests that he spoke with respondent Kris Gounden and that Mr. Gounden admitted that he was constructing a dock at the site (*id.*; *see also* exhibit C [photograph of dock under construction taken by Mathis on July 15, 2012]).

On July 21, 2012, ECO Mathis returned to the site accompanied by another ECO and again observed respondent Kris Gounden constructing the dock (Mathis affidavit ¶ 6; *see also* exhibit E [photographs of dock under construction and related structures taken by Mathis on July 21, 2012]). Lastly, ECO Mathis attests that on July 21, 2012 he (i) issued a notice of violation (NOV) to respondent Kris Gounden, and (ii) directed Respondent Kris Gounden to cease construction of the dock until he obtained a DEC permit (*id.* ¶ 7; *see also* exhibit D [copy of the NOV]).

Matthew James attests that he became interested in the site after observing derelict vessels there while inspecting a nearby property in January and April 2016, and that he subsequently reviewed aerial images of the site from the years 2010, 2012, 2014, and 2016 (James affidavit ¶¶ 4-6; *see also* exhibit L [aerial photographs of the site taken between June 17, 2010 and Apr. 19, 2016]). On the basis of his review of the aerial photographs, Mr. James concluded that the dock was constructed at the site sometime between June 23, 2012 and November 4, 2012 (James affidavit ¶¶ 6.c-6.e; *see also* exhibit L at 3-5 [aerial photographs]). He further attests that the dock was constructed "in the wetland along the southern half of the Site" (*id.* ¶ 6.g; *see also* exhibits M, N [maps prepared by DEC depicting the dock extending into the wetland from lot 762]). Lastly, Mr. James attests that the "catwalk/dock" is no greater than four feet wide (*id.* ¶ 7).³

Tamara Greco attests that no application was filed with the Department, and no permit was issued by the Department, to conduct any activity in the tidal wetland or tidal wetland adjacent area at the site (Greco affidavit ¶¶ 4-8).

On the basis of the foregoing, I conclude that Department staff established that, beginning on or before July 15, 2012, respondents constructed a dock at the site without a permit. Respondent Kris Gounden was observed constructing the dock by ECO Mathis on July 15, 2012 and again on July 21, 2012. Further, Mr. Gounden admitted to ECO Mathis that he was constructing a dock at the site.

Respondent Sona Gounden owns the parcels that comprise the southern portion of the site (*see* findings of fact ¶ 3) and the dock extends into the tidal wetland from the southernmost parcel at the site. Accordingly, Ms. Gounden may be held liable for the construction of the dock (*see Matter of Francis*, Order of the Commissioner, Apr. 26, 2011, *adopting* Hearing Report at 12 [holding that "[t]he benefits derived from [unlawful] activities at the site, inured to the fee

³ By his affidavit, Mr. James also relates his observations concerning "floating docks" at the site (*see e.g.* James affidavit ¶¶ 6.g, 7). Department staff did not, however, allege violations concerning the floating docks in its motion. Accordingly, the floating docks are not further discussed in this ruling.

owners. As such, and absent evidence to the contrary, a reasonable inference may be drawn that the [activities were] done at the direction, or with the consent, of the fee owners"]; *Matter of Zatarain*, Order of the Commissioner, July 17, 1992, at 2 [rejecting a respondent's argument that she should not be held liable for the actions of a contractor, and holding that the respondent was liable "as the owner of the property and in her role as supervisor of the work").

Accordingly, both respondents are liable for the construction of the dock as alleged under the first cause of action.

Second Cause of Action: Construction of a Deck

Department staff alleges that "[r]espondents violated ECL § 25-[0]401 and 6 NYCRR § 661.8 when they constructed an overwater deck in a regulated tidal wetland and tidal wetland adjacent area without a DEC permit" (staff MOL at 9; *see also* motion at 2).

As noted previously, ECL 25-0401 and 6 NYCRR 661.8 provide that no person may conduct a regulated activity in a tidal wetland or adjacent area without a permit from the Department. Pursuant to 6 NYCRR 661.5(b)(49), construction of an accessory structure, such as a deck, for a single or multi-family dwelling in a tidal wetland is a "Presumptively Incompatible" regulated activity, and such construction in a tidal wetland adjacent area is a "Generally Compatible" regulated activity. In either case, the activity requires a permit from the Department.

In support of this allegation, Department staff proffered affidavits of biologist Matthew James, and permit administrator Tamara Greco. Mr. James attests that he reviewed aerial images of the site from the years 2010, 2012, 2014, and 2016 (James affidavit ¶ 6; *see also* exhibit L [aerial photographs of the site taken between June 17, 2010 and Apr. 19, 2016]). Mr. James attests that, on the basis of his review of these aerial photographs, he concluded that an overwater deck was constructed at the site sometime between November 5, 2012 and October 11, 2014 (*id.* ¶¶ 6.f, 9; *see also* exhibit L at 5, 6 [aerial photographs]).

Tamara Greco attests that no application was filed with the Department, and no permit was issued by the Department, to conduct any activity in the tidal wetland or tidal wetland adjacent area at the site (Greco affidavit ¶¶ 4-8).

I conclude that Department staff failed to establish that respondents constructed a deck at the site without a permit. Nothing in the affidavits proffered by staff indicates that respondents were observed constructing a deck at the site. More importantly, the aerial photographs relied upon by staff to establish this violation are inconclusive.

On the basis of his review of aerial photographs, Mr. James concluded that an overwater deck was constructed at the site sometime between November 5, 2012 and October 11, 2014 (James affidavit ¶ 6.f). The October 11, 2014 aerial photograph depicts what appears to be decking along most of the shoreline of the site, including along the shoreline of the southern portion of the site (*see* exhibit L at 6). The November 5, 2012 aerial photograph also depicts what appears to be decking along much of the shoreline of the site; however, the shoreline along

the southern portion of the site appears to be covered with debris (*see* exhibit L at 5).⁴ It is not clear whether there is decking at that location (*id.*).

I take official notice that the remnants of Hurricane Sandy caused significant flooding and damage along tidal areas of Queens County in late October 2012, particularly along the southern shoreline (*see e.g.* <http://www.nytimes.com/newsgraphics/2012/1120-sandy/survey-of-the-flooding-in-new-york-after-the-hurricane.html> [accessed Feb. 27, 2019] [map depicting flooding and damage caused by Hurricane Sandy]). Accordingly, the debris that appears to be strewn about the southern portion of the site in aerial photographs taken in early November 2012 may have been a result of that storm.

Moreover, a comparison of the earliest and most recent aerial photographs included in exhibit L does not support Department staff's allegations regarding the construction of a deck. The earliest aerial photograph, dated June 17, 2010, depicts decking along most of the shoreline of the site, including along the shoreline of the southern portion of the site (exhibit L at 1; *see also id.* at 2, 3 [aerial photographs, dated Mar. 14, 2012 and June 23, 2012, respectively, depicting the decking]). The most recent aerial photograph in exhibit L, dated April 19, 2016, depicts decking in the same configuration along the shoreline of the site (*id.* at 7; *see also* exhibit M [depicting respondents' lots (outlined in blue) and the subject decking (outlined in red)]).

On this record, I conclude that Department staff failed to establish that there are no material issues of fact to be adjudicated in relation to the allegations set forth under the second cause of action. Specifically, staff failed to establish that respondents constructed an overwater deck in a regulated tidal wetland or tidal wetland adjacent area.

Third Cause of Action: Disposal of Vessels

Department staff alleges that "[r]espondents violated ECL § 25-[0]401 and 6 NYCRR § 661.8 when they disposed of two vessels in Hawtree Basin, a tidal wetlands littoral zone" (staff MOL at 10; *see also* motion at 2).

ECL 25-0401 and 6 NYCRR 661.8 provide that no person may conduct a regulated activity in a tidal wetland or adjacent area without a permit from the Department. Pursuant to 6 NYCRR 661.5(b)(56), disposal of solid waste⁵ in a tidal wetland is an "Incompatible Use" that requires a permit (*see* 6 NYCRR 661.5[a][4] [providing that any use that is designated as incompatible "is subject to the permit requirements of this part"]).

In support of this allegation, Department staff proffered affidavits of biologist Matthew James, and permit administrator Tamara Greco. Mr. James attests that he became interested in the site because he observed derelict vessels at the site in January and April 2016, and that he

⁴ The aerial photographs contained in exhibit L are of relatively low resolution and, therefore, details are sometimes difficult to discern.

⁵ The regulation incorporates by reference the definition for solid waste set forth at ECL 27-0501(7), which provides a broad definition of solid waste to include: "all materials or substances discarded . . . as being spent, useless, worthless, or in excess to the owners at the time of such discard."

subsequently reviewed aerial images of the site (James affidavit ¶ 6; *see also* exhibit L [aerial photographs of the site taken between June 17, 2010 and Apr. 19, 2016]). Mr. James attests that, on the basis of his site visits and his review of aerial photographs, he concluded that two vessels were abandoned at the site (*id.* ¶¶ 6.e-6.g; *see also* exhibit L at 4-7 [aerial photographs depicting one or more partially sunken vessels at the site]). He further attests that one of the abandoned vessels was tied to a dock on the northern portion of the site and the other vessel was tied to a dock at the southern portion of the site (*id.* ¶¶ 5.a, 5.c; *see also* exhibit G [photographs taken by James on Apr. 19, 2016]).

Tamara Greco attests that no application was filed with the Department, and no permit was issued by the Department, to conduct any activity in the tidal wetland at the site (Greco affidavit ¶¶ 4-8).

On the basis of the foregoing, I conclude that Department staff established that each respondent disposed of one vessel in the tidal wetland at the site without a permit. Although staff alleges that respondents jointly disposed of two vessels in the tidal wetland at the site, for the reasons discussed below, I decline to hold respondents jointly liable for both of the vessels that were disposed of at the site.

There are two partially sunken vessels in the tidal wetland at the site (*see* exhibit M [2016 aerial photograph of the site (the two vessels are outlined in purple)]). Respondent Kris Gounden owns lots 161 and 759 on the northern portion of the site (*see* findings of fact ¶ 2). Mr. James attests that one of the partially sunken vessels [northern vessel] is "tied to a dock at the northern end of the Site" (James affidavit ¶ 5.c). Mr. James took a photograph of the partially sunken northern vessel on April 29, 2016 that depicts the vessel in the tidal wetland in front of respondent Kris Gounden's property (exhibit G at 3 [photograph of the northern vessel next to lot 161]).

Respondent Sona Gounden owns lots 760 and 762 on the southern portion of the site (*see* findings of fact ¶ 3). Mr. James attests that one of the partially sunken vessels [southern vessel] is "tied to a dilapidated wooden dock at the southern end of the Site" (James affidavit ¶ 5.a). Mr. James took two photographs of the partially sunken southern vessel on April 29, 2016 that depict the vessel in the tidal wetland next to respondent Sona Gounden's property (exhibit G at 1, 2 [photographs of the southern vessel next to lot 762]).

Department staff did not proffer evidence with regard to who holds legal title to the two partially sunken vessels. Nevertheless, I conclude that the record is sufficient to hold each respondent liable for the disposal of a vessel.

The northern vessel has remained partially sunken at its current location at the site since on or before October 11, 2014 (*see* findings of fact ¶ 7) and is tied to a dock on respondent Kris Gounden's property. The southern vessel has remained partially sunken at its current location at the site since on or before January 4, 2016 (*see* findings of fact ¶ 8) and is tied to a dock on respondent Sona Gounden's property. Accordingly, a reasonable inference may be drawn that respondent Kris Gounden is liable for the disposal of the northern vessel, and respondent Sona Gounden is liable for the disposal of the southern vessel.

Respondent Kris Gouden is liable for the disposal of the northern vessel in the tidal wetland, and respondent Kris Gouden is liable for the disposal of the southern vessel in the tidal wetland as alleged under the third cause of action.

Relief

Department staff requests that the Commissioner issue an order that, among other things, (i) holds respondents liable for the violations alleged in the motion, (ii) imposes a civil penalty in the amount of \$30,000, and (iii) directs respondents "to remove the dock, overwater deck, and sunken vessels" (motion at 2).

Because there are outstanding material issues of fact, I make no determinations with respect to relief.

CONCLUSION OF LAW

As detailed above, I conclude that Department staff's motion must be granted, in part, and denied, in part. Specifically, I conclude that (i) respondents are jointly and severally liable for the violations alleged under the first cause of action; (ii) respondent Kris Gouden is liable for disposing of the northern vessel as alleged in the third cause of action; and (iii) respondent Sona Gouden is liable for disposing of the southern vessel as alleged in the third cause of action.

There are material issues of fact that require adjudication relating to the second cause of action and, assuming Department staff maintains that both respondents should be held liable for the disposal of both the northern and southern vessels, the third cause of action. Accordingly, I make no determinations herein regarding the civil penalty or injunctive relief requested by staff.

FURTHER PROCEEDINGS

A hearing is necessary to resolve issues of material fact relating to the second and third causes of action and to determine the appropriate relief. This office will contact the parties shortly after this ruling is issued to establish hearing dates.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: March 8, 2019
Albany, New York