

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 24 of the New York State Environmental Conservation Law (ECL) and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**ORDER**

- by -

DEC Case No.  
R8-2016-1020-97

**HIEU LUONG,**

Respondent.

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This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department) that Hieu Luong (respondent) violated Consent Order No. R8-2016-1020-97 (Consent Order), ECL article 24 and 6 NYCRR part 663. Specifically, Department staff alleges that respondent failed to perform the restoration of a State-regulated freshwater wetland (designated as Freshwater Wetland GT-5)(freshwater wetland or wetland) and adjacent area as required by the Consent Order, placed fill in the freshwater wetland and graded portions of the wetland's adjacent area on respondent's property located at 4254 Lyell Road, Gates, New York (site).

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, respondent failed to file an answer to the complaint and amended complaint served by Department staff in this matter (*see* Default Summary Report at 4 [Finding of Fact No. 14]). The record also demonstrates that respondent was served with a copy of the motion for default judgment and supporting papers and did not oppose the motion.

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (*see* Default Summary Report at 7). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15. Staff's papers submitted in support of its motion for default judgment provide proof of the facts sufficient to support staff's claim that respondent:

- failed to remove soils from the freshwater wetland and adjacent area, plant trees and shrubs in the freshwater wetland and adjacent area, seed and mulch the freshwater wetland and adjacent area and submit documentation to the Department demonstrating that the scheduled compliance activities had been completed, in violation of the Consent Order;
- placed fill in the freshwater wetland without a permit or letter of permission, in violation of ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20); and
- graded portions of the freshwater wetland adjacent area, in violation of ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25).

Department staff delineated the wetland on May 2, 2013 at the request of respondent,<sup>1</sup> and provided respondent with information advising that regulated activities in the wetland or within the 100-foot adjacent area are subject to permit requirements (*see* Default Summary Report at 3 [Finding of Fact 4]; Affidavit of Steven Miller sworn to on May 17, 2018 [Miller Affidavit] ¶ 16 & Exhibit 4). During inspections that Department staff conducted in June and July 2016, Department staff found that respondent had drained, graded and cleared a portion of the regulated freshwater wetland (*see* Default Summary Report at 3 [Finding of Fact 5]). Department staff and respondent subsequently executed the Consent Order (effective June 27, 2017), which required respondent to perform restoration work of the freshwater wetland and adjacent area and assessed a civil penalty on respondent of ten thousand dollars (\$10,000). Respondent was required to pay one thousand five hundred dollars (\$1,500) of the penalty, and the remaining eight thousand five hundred dollars (\$8,500) was suspended so long as respondent completed a schedule of compliance to restore the freshwater wetland and adjacent area (*see* Exhibit 6 to Miller Affidavit at 2).

When Department staff inspected the site on July 28, 2017 and April 4, 2018, staff determined respondent had not performed the restoration work required by the Consent Order. Moreover, staff determined that respondent had placed additional fill in the freshwater wetland and adjacent area and graded portions of the freshwater wetland and adjacent area without a permit, after signing the Consent Order (*see* Default Summary Report at 3 [Findings of Fact Nos. 7 and 8]).

Department staff seeks payment of the eight thousand five hundred dollars (\$8,500) suspended penalty established under the Consent Order and seeks an additional civil penalty in the amount of thirty-three thousand dollars (\$33,000) (*see* Motion for Default Judgment [Wherefore Clause], and Affirmation of Dusty Renee Tinsley, Esq., dated May 17, 2018, ¶ 73 and Wherefore Clause). ECL 71-2303(1), which is applicable here, provides that “[a]ny person who violates ... any provision of [ECL] article twenty-four ... or any rule or regulation, ... or order issued pursuant thereto, shall be liable ... for a civil penalty of not to exceed eleven thousand dollars for every such violation.”

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<sup>1</sup> The wetland was identified on the Monroe County Rochester West Map 7 of 21 which was promulgated on May 29, 1986 (*see* Affidavit of Steven Miller sworn to on May 17, 2018, ¶ 12). *See also* Affirmation of Dusty Renee Tinsley, Esq., dated May 17, 2018, ¶¶ 34, 39).

The suspended penalty of eight thousand five hundred dollars (\$8,500) under the Consent Order is current and owing. Staff's request with respect to the suspended penalty is granted.

Department staff has requested an additional civil penalty of thirty-three thousand dollars (\$33,000) which is below the maximum penalty that could be imposed. Depending upon the actual number of times that respondent undertook additional filling and grading activities and committed violations of the Consent Order, the civil penalty could be substantially higher than what is calculated by Department staff in its papers and by the ALJ in the default summary report. Based on this record, however, Department staff's requested civil penalty of thirty-three thousand dollars (\$33,000) is supported and appropriate.

Department staff also requests that I direct respondent to perform freshwater wetlands restoration work to return the freshwater wetland and its adjacent area to their original state. Staff requests that respondent be directed to conduct various restoration activities including the following:

- install and maintain erosion controls;
- return the freshwater wetland and adjacent area to its original grade, including the removal of all fill deposited in the wetland and adjacent area;
- plant trees and shrubs in the freshwater wetland and adjacent area;
- apply mulch and seed to the freshwater wetland and adjacent area;
- return the eastern end of the freshwater wetland and adjacent area to its original grade, including removal of all fill deposited in the wetland; and
- control invasive species.

Staff's request is supported and appropriate.

I direct that respondent submit the suspended penalty of eight thousand five hundred dollars (\$8,500) and the civil penalty in the amount of thirty-three thousand dollars (\$33,000) to the Department within thirty (30) days of the service of this order upon respondent.

In addition, I direct that respondent submit proof (including but not limited to photographs and other documentation) that respondent has performed the restoration required by this order within ninety (90) days of service of this order on respondent. Department staff, at its discretion, may extend the time required for one or more of the restoration activities upon good cause shown by respondent. Any request by respondent for an extension of time must be submitted in writing with appropriate documentation in support of respondent's request.

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

- I. Department staff's motion for default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Hieu Luong waived his right to a hearing.
- II. Moreover, based upon proof of the facts submitted, respondent Hieu Luong is adjudged to have violated the following:
  - A. Consent Order No. R8-2016-1020-97 for failing to:
    1. remove soils from the freshwater wetland and adjacent area;
    2. plant trees and shrubs in the freshwater wetland and adjacent area;
    3. seed and mulch (with 2 inches of straw) the freshwater wetland and adjacent area; and
    4. submit documentation to the Department demonstrating that the compliance activities had been completed on schedule;
  - B. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20) by placing fill in the freshwater wetland without a permit or letter of permission; an
  - C. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25) by grading portions of the freshwater wetland adjacent area without a permit or letter of permission.
- III. Within thirty (30) days of the service of this order upon respondent Hieu Luong, respondent shall pay the suspended penalty set forth in Consent Order No. R8-2016-1020-97 in the amount of eight thousand five hundred dollars (\$8,500) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- IV. Within thirty (30) days of the service of this order upon respondent Hieu Luong, respondent shall pay the civil penalty in the amount of thirty-three thousand dollars (\$33,000) that is imposed by this order by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. Respondent Hieu Luong shall:
  - A. maintain the erosion control fabric, properly installed at all required locations in Freshwater Wetland GT-5 and its adjacent area and in good condition, until 85% vegetative cover is achieved;

- B. within 30 days of service of this order upon respondent Hieu Luong, return the freshwater wetland and adjacent area to its original state, including removal of all fill deposited in the wetland and adjacent area;
- C. within 60 days of service of this order upon respondent Hieu Luong, plant trees and shrubs consisting of red maple, silver maple, silky and red osier dogwoods, and swamp white oak in the freshwater wetland and adjacent area outside of the pond area as follows:
  - 1. on an 8 x 8 planting plan to allow for maximum growth of the species; and
  - 2. all trees and shrubs are to be protected by tree tubes to prevent browse by deer and damage by other wildlife species;
- D. within 60 days of service of this order upon respondent Hieu Luong, mulch the freshwater wetland and adjacent area remediation areas with two inches of straw and seed the freshwater wetland and adjacent area remediation areas with a commercially available seed mix as follows:
  - 1. the freshwater wetland shall be seeded with a native facultative wet (FACW) seed mix with no invasive species; and
  - 2. the freshwater wetland adjacent area shall be seeded with a native upland conservation seed mix with no invasive species;
- E. within 60 days of service of this order upon respondent Hieu Luong, return the eastern end of the freshwater wetland and adjacent area to its original grade, including removal of all fill deposited in the wetland and adjacent area;
- F. control invasive species in the freshwater wetland and adjacent area by routinely and timely removing invasive species by hand to prevent infestation of invasive species that requires removal by a method other than by hand removal. In limited circumstances where the infestation has become too large to remove by hand, respondent shall hire a licensed applicator to eliminate the invasive species using pesticides. If the use of pesticides is required, respondent shall obtain any and all necessary permits, including Department permits; and
- G. within ninety (90) days of service of the Commissioner's order on respondent, submit proof (including but not limited to photographs and other documentation) to the Department demonstrating that the remedial activities have been performed on schedule.

Department staff, at its discretion, may extend the time required for one or more restoration activities upon good cause shown by respondent. Any request by

respondent for an extension of time must be submitted in writing with appropriate documentation in support of respondent's request.

- VI. The suspended penalty payment of eight thousand five hundred dollars (\$8,500) under Consent Order No. R8-2016-1020-97, the civil penalty payment of thirty-three thousand dollars (\$33,000) imposed by this order and all other submissions shall be sent to the following address:

Dusty Renee Tinsley, Esq.  
Assistant Regional Attorney  
NYSDEC Region 8  
6274 East Avon-Lima Road  
Avon, New York 14414

The suspended penalty payment and the civil penalty payment shall be submitted by separate check.

- VII. Any questions or other correspondence regarding this order shall also be addressed to Dusty Renee Tinsley, Esq. at the address referenced in paragraph VI of this order.
- VIII. The provisions, terms and conditions of this order shall bind respondent Hieu Luong, and his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: Albany, New York  
September 24, 2018

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 24 of the New York State Environmental Conservation Law (ECL) and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

**DEFAULT SUMMARY  
REPORT**

DEC Case No.  
R8-2016-1020-97

**HIEU LUONG,**

Respondent.

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Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Dusty Renee Tinsley, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- No appearance for respondent

By notice of hearing and complaint dated November 8, 2017, staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Hieu Luong (respondent) for alleged violations of Consent Order No. R8-2016-1020-97 (Order), ECL article 24 and 6 NYCRR part 663. Staff personally served the notice of hearing and complaint on respondent on November 15, 2017 (*see* Affirmation of Dusty Renee Tinsley, Esq. [Tinsley Affirmation], dated May 17, 2018, Exhibit 2). Respondent failed to file an answer to the complaint (*see* Tinsley Affirmation ¶ 5).

On April 4, 2018, Department staff sought permission to amend its complaint (*see* Tinsley Affirmation ¶ 7; Exhibit 4). By letter dated April 16, 2018, I granted staff's motion (*see id.*; Exhibit 5). Department staff's request and the ruling were made on notice to respondent (*see id.*). Staff served the amended notice of hearing and complaint on respondent by first class mail on April 18, 2018 (*see* Tinsley Affirmation ¶ 8; Exhibits 6 and 7).

Department staff's amended complaint alleges respondent: (1) failed to complete the requirements of the Order's schedule of compliance; (2) deposited fill in a freshwater wetland

without a permit in violation of ECL 24-0701(1), and 6 NYCRR 663.3(e) and 663.4(d)(20); and (3) graded the freshwater wetland adjacent area in violation of ECL 24-0701(1), and 6 NYCRR 663.3(e) and 663.4(d)(25). The alleged violations occurred on property owned by respondent located at 4254 Lyell Road, Gates, New York.

The amended complaint seeks an order of the Commissioner:

- (i) finding respondent violated the Order, ECL article 24 and 6 NYCRR part 663;
- (ii) directing respondent to pay the suspended penalty of \$8,500 set forth in the Order within 30 days of service of Commissioner's order on respondent;
- (iii) directing respondent to pay a civil penalty in the amount of thirty-three thousand dollars (\$33,000);
- (iv) directing respondent to perform various scheduled activities to restore the freshwater wetland and adjacent area to their original state (discussed in detail below); and
- (v) directing all other and further relief deemed necessary and appropriate.

The amended notice of hearing instructed respondent that a written answer must be filed within twenty (20) days of respondent's receipt of the amended complaint. Respondent failed to file an answer to the amended complaint (*see* Tinsley Affirmation ¶¶ 9 and 10).

On May 17, 2018, Department staff submitted a written motion for default judgment with supporting papers (*see* Appendix A, attached hereto [listing documents submitted on the motion]). Department staff served the motion and supporting papers on respondent by first class mail on June 5, 2018 (*see* Affidavit of Service by Mail of Tammy Schubmehl, sworn to June 18, 2018).

#### Findings of Fact

The following facts are found based upon the documents submitted with and in support of staff's motion for a default judgment:

1. Respondent Hieu Luong owns property located at 4254 Lyell Road in the Town of Gates, Monroe County, New York (site). *See* Tinsley Affirmation Exhibit 1, Complaint Exhibit 1, Consent Order ¶ 3; Exhibit 8, Affidavit of Steven Miller [Miller Affidavit], sworn to May 17, 2018, ¶ 7, Exhibit 1.
2. The site is also known as Monroe County Tax Parcel No. 103.14-1-15 containing a residence and 15.60 acres of land. *See* Miller Affidavit Exhibit 1.
3. A portion of the site includes a regulated freshwater wetland known as Wetland GT-5 on the Monroe County Rochester West Map 7 of 21, New York State Freshwater Wetlands Map, and contains regulated freshwater wetland adjacent areas. *See* Miller Affidavit ¶¶ 12 - 13; Exhibits 2, 3, 4, 5 and 6.

4. The wetland was delineated by Department staff on May 2, 2013 at the request of respondent, and staff provided respondent a Freshwater Wetlands Determination advising respondent that a regulated freshwater wetland was located on or within 100 feet of the site and that regulated activities in the wetland or within the 100-foot adjacent area are subject to permit requirements. *See* Miller Affidavit ¶ 16; Exhibit 4.
5. In June and July 2016, Department staff inspected respondent's site and discovered respondent had drained, graded and cleared a portion of the freshwater wetland and had installed a culvert across the wetland without a permit. *See* Miller Affidavit Exhibit 6, ¶¶ 6 - 7.
6. Department staff and respondent entered into a consent order, dated June 27, 2017, wherein respondent agreed to a payable and suspended civil penalty and also to perform freshwater wetland restoration work. *See* Miller Affidavit ¶¶ 28 – 29; Exhibit 6 ¶¶ I and II.
7. Department staff inspected the site on July 28, 2017 and April 4, 2018 and determined that respondent failed to: remove all soils from the freshwater wetland and adjacent area; plant trees and shrubs; seed and mulch; and submit documentation to the Department demonstrating the restoration had been completed, as required by the Order. *See* Miller Affidavit ¶¶ 30 – 34; Exhibits 6, 7, 8 and 9.
8. Department staff also determined during the July 28, 2017 inspection that respondent had placed fill in the freshwater wetland and adjacent area and graded portions of the freshwater wetland and adjacent area without a permit or letter of permission from the Department after signing the Order. *See* Miller Affidavit ¶¶ 34, 35, 38 and 39; Exhibit 9.
9. On September 7, 2017, Department sent respondent a letter notifying respondent of the violations of the Order and demanded payment of the suspended penalty. *See* Miller Affidavit ¶ 43; Exhibit 10.
10. Respondent did not pay the suspended penalty. *See* Miller Affidavit ¶ 44.
11. Department staff served the notice of hearing and complaint on respondent on November 15, 2017. *See* Tinsley Affirmation Exhibit 2.
12. Department staff served the amended notice of hearing and amended complaint on respondent by first class mail on April 18, 2018. *See* Tinsley Affirmation ¶ 8; Exhibits 6 and 7.
13. Department staff served the motion for default judgment and supporting papers on respondent by first class mail on June 14, 2018. *See* Affidavit of Service by Mail of Tammy Schubmehl, sworn to June 18, 2018.

14. Respondent failed to file an answer to the complaint and failed to file an answer to the amended complaint. *See* Tinsley Affirmation ¶¶ 5 and 10.

### Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint unless extended by staff or ruling of the ALJ (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain: (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1] - [3]).

The record establishes that: (i) Department staff served the notice of hearing and complaint and the amended notice of hearing and amended complaint upon respondent; (ii) respondent failed to file an answer to the complaint and amended complaint, as directed in the notice of hearing and amended notice of hearing served with the complaint and amended complaint; and (iii) Department staff has submitted a proposed order. Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15. Staff also served respondent with a copy of the motion for default judgment and supporting papers (*see* Affidavit of Tammy Schubmehl, sworn to June 18, 2018). Respondent did not oppose the motion.

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (*Matter of Alvin Hunt, d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (*Matter of Queen City Recycle Center, Inc.*, Decision and Order of the Commissioner, December 12, 2013, at 3). Staff is required to support their motion for a default judgment with enough facts to enable the ALJ and the Commissioner to determine that staff has a viable claim (*see Matter of Samber Holding Corp.*, Order of the Commissioner, March 12, 2018, at 1 [citing *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003)]; *see also State v Williams*, 44 AD3d 1149, 1151-1152 [3d Dept 2007] and CPLR 3215[f]).

In this case, Department staff's submissions in support of the motion for a default judgment provide proof of the facts sufficient to enable me to determine that staff has a viable claim that respondent:

- (1) failed to remove soils from the freshwater wetland and adjacent area, plant trees and shrubs in the freshwater wetlands and adjacent area, seed and mulch the freshwater wetlands and adjacent area and submit documentation to the Department documenting that the scheduled compliance activities had been completed, all violations of the Order;
- (2) placed fill in the freshwater wetland without a permit or letter of permission, a violation of ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20); and
- (3) graded portions of the freshwater wetland adjacent area, a violation of ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25).<sup>1</sup>

Based upon the foregoing, the Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

### Penalty and remedial relief

Department staff requests that respondent be directed to pay the suspended penalty of eight thousand five hundred dollars (\$8,500) agreed to in the Order for respondent's failure to comply with the Order. As noted above, staff demanded payment of the suspended penalty, but has not received the payment from respondent. As concluded above, respondent violated the Order. Accordingly, the eight thousand five hundred dollar (\$8,500) suspended penalty is current and owing and supported by staff's submissions.

Department staff seeks an additional penalty in the amount of thirty-three thousand dollars (\$33,000), and staff's submissions on the motion for a default judgment support the requested penalty. Department staff states, "Pursuant to ECL § 71-2303(1), the maximum civil penalty for Respondent's violation of the Order and two additional violations (filling in the Wetland without a permit or letter of permission and grading the Adjacent Area without a permit or letter of permission) is \$33,000" (*see* Miller Affidavit ¶ 45). Staff then applied DEE-1: Civil Penalty Policy (June 20, 1990) and DEE-6, Freshwater Wetlands Enforcement Policy (February 4, 1992) in support of the requested civil penalty. Staff did not find any economic benefit and relies mainly on the gravity of the violations. Staff notes the detrimental impact that filling and grading have on the functions and benefits of a freshwater wetland, as well as respondent's history of non-compliance and lack of cooperation, in support of the penalty requested.

ECL 71-2303(1), which is applicable here, provides that "[a]ny person who violates ... any provision of [ECL] article twenty-four ... or any rule or regulation, ... or order issued pursuant thereto, shall be liable ... for a civil penalty of not to exceed eleven thousand dollars for every such violation." Contrary to staff's position, the maximum penalty in this matter is greater than \$33,000. Each violation of a consent order supports a separate penalty pursuant to ECL 71-

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<sup>1</sup> Staff's proof demonstrates that respondent placed fill in both the freshwater wetland and adjacent area and graded both the freshwater wetland and adjacent area, without a permit or letter of permission, after the Order was executed by the parties (*see* Miller Affidavit ¶¶ 34, 35, 38 and 39). The amended complaint, however, only alleges respondent placed fill in the freshwater wetland (second cause of action) and graded the freshwater wetland adjacent area without a permit (third cause of action).

2303(1). Respondent's violations of the Order and his commission of additional violations with the grading and filling of the freshwater wetland and adjacent area subject respondent to additional penalties pursuant to ECL 71-2303(1). Department staff's proof demonstrates respondent is liable for four violations of the Order. Accordingly, the maximum penalty for those four violations is \$44,000. Add \$22,000 for the violations for filling the freshwater wetland and grading the freshwater wetland adjacent area without a permit as alleged in the second and third causes of action of the complaint and the maximum penalty increases to \$66,000. As noted above, staff's request is for a total civil penalty of thirty-three thousand dollars (\$33,000) for these violations. I conclude that staff's requested penalty is supported and appropriate.

For remedial relief, Department staff requests that the Commissioner direct respondent to:

- (1) maintain the erosion control fabric, properly installed at all required locations in the wetland and adjacent area and in good condition, until 85% vegetative cover is achieved;
- (2) within 30 days of service of the Commissioner's order on respondent, return the wetland and adjacent area to its original grade, including removal of the culvert and all fill deposited in the wetland and adjacent area;
- (3) within 60 days of service of the Commissioner's order on respondent, plant trees and shrubs consisting of red maple, silver maple, silky and red osier dogwoods, and swamp oak in the wetland and adjacent area outside of the pond area as follows:
  - (a) on an 8 x 8 planting plan to allow for maximum growth of the species; and
  - (b) all trees and shrubs are to be protected by tree tubes to prevent browse by deer and damage by other wildlife species;
- (4) within 60 days of service of the Commissioner's order on respondent, mulch the wetlands and adjacent area remediation areas with two inches of straw and seed the wetland and adjacent area remediation areas with a commercially available seed mix as follows:
  - (a) the wetland shall be seeded with a native facultative wet (FACW) seed mix with no invasive species; and
  - (b) the adjacent area shall be seeded with a native upland conservation seed mix with no invasive species;
- (5) within 60 days of service of the Commissioner's order on respondent, return the eastern end of the wetland and adjacent area to its original grade, including removal of all fill deposited in the wetland;
- (6) control invasive species in the wetland and adjacent area by routinely and timely removing invasive species by hand to prevent infestation of invasive species that requires removal by a method other than by hand removal. In limited circumstances where the infestation has become too large to remove by hand, respondent shall hire a licensed applicator to eliminate the invasive species using pesticides. If the use of pesticides is required, respondent shall obtain any and all necessary permits, including Department permits.

Pursuant to the Order, respondent is already required to perform most of the remedial relief requested by staff in the amended complaint. Because respondent placed fill in the freshwater wetlands and graded portions of the freshwater wetland adjacent area after entering into the Order with the Department, Department staff's additional remedial requests relating to

removal of fill and returning the areas to their original grade are supported and appropriate. Staff advises that respondent removed the culvert (*see* Miller Affidavit ¶ 31 footnote 1). Although not requested by staff, I also recommend that the Commissioner direct respondent to submit documentation to the Department demonstrating the remedial activities have been performed on schedule.

#### Conclusions of Law

1. By failing to remove soils from the freshwater wetland and adjacent area, failing to plant trees and shrubs in the freshwater wetland and adjacent area, failing to seed and mulch the freshwater wetland and adjacent area and failing to submit documentation to the Department documenting that the scheduled compliance activities had been completed, respondent violated the Order;
2. By placing fill in the freshwater wetland without a permit or letter of permission, respondent violated ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20); and
3. By grading portions of the freshwater wetland adjacent area, respondent violated ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25).

#### Recommendations

Based upon the foregoing, I recommend the Commissioner issue an order:

1. Granting Department staff's May 17, 2018 motion for default judgment pursuant to 6 NYCRR 622.15.
2. Holding that respondent Hieu Luong violated:
  - a. The Consent Order for failing to:
    - (i) remove soils from the freshwater wetland and adjacent area;
    - (ii) plant trees and shrubs in the freshwater wetland and adjacent area;
    - (iii) seed and mulch (with 2 inches of straw) the freshwater wetland and adjacent area; and
    - (iv) submit documentation to the Department documenting that the scheduled compliance activities had been completed;
  - b. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20) by placing fill in the freshwater wetland without a permit or letter of permission; and
  - c. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25) by grading portions of the freshwater wetland adjacent area without a permit or letter of permission.

3. Directing respondent Hieu Luong to pay the suspended civil penalty of eight thousand five hundred dollars (\$8,500) set forth in the Order by certified check payable to NYSDEC within thirty (30) days of service of the Commissioner's order on respondent.
4. Directing respondent Hieu Luong to pay a civil penalty in the amount of thirty-three thousand dollars (\$33,000), by certified check payable to NYSDEC, within thirty (30) days of service of the Commissioner's order on respondent.
5. Directing respondent to:
  - a. maintain the erosion control fabric, properly installed at all required locations in the freshwater wetland and adjacent area and in good condition, until 85% vegetative cover is achieved;
  - b. within 30 days of service of the Commissioner's order on respondent, return the freshwater wetland and adjacent area to its original state, including removal of all fill deposited in the wetland and adjacent area;
  - c. within 60 days of service of the Commissioner's order on respondent, plant trees and shrubs consisting of red maple, silver maple, silky and red osier dogwoods, and swamp oak in the freshwater wetland and adjacent area outside of the pond area as follows:
    - i. on an 8 x 8 planting plan to allow for maximum growth of the species; and
    - ii. all trees and shrubs are to be protected by tree tubes to prevent browse by deer and damage by other wildlife species;
  - d. within 60 days of service of the Commissioner's order on respondent, mulch the freshwater wetland and adjacent area remediation areas with two inches of straw and seed the freshwater wetland and adjacent area remediation areas with a commercially available seed mix as follows:
    - i. the freshwater wetland shall be seeded with a native facultative wet (FACW) seed mix with no invasive species; and
    - ii. the freshwater wetland adjacent area shall be seeded with a native upland conservation seed mix with no invasive species;
  - e. within 60 days of service of the Commissioner's order on respondent, return the eastern end of the freshwater wetland and adjacent area to its original grade, including removal of all fill deposited in the wetland;
  - f. control invasive species in the freshwater wetland and adjacent area by routinely and timely removing invasive species by hand to prevent infestation of invasive species that requires removal by a method other than by hand removal. In limited circumstances where the infestation has become too large to remove by hand, respondent shall hire a licensed applicator to eliminate the invasive species using pesticides. If the use of pesticides is required, respondent shall obtain any and all necessary permits, including Department permits; and

- g. within 90 days of service of the Commissioner's order on respondent, submit documentation to the Department demonstrating the remedial activities have been performed on schedule;
6. Directing respondent to submit the suspended penalty payment of eight thousand five hundred dollars (\$8,500), civil penalty payment of thirty-three thousand dollars (\$33,000) and all other submissions to:
- Dusty Renee Tinsley, Esq.  
Assistant Regional Attorney  
NYSDEC Region 8  
6274 East Avon-Lima Road  
Avon, New York 14414; and
7. Directing such other and further relief as the Commissioner may deem just and appropriate.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: August 24, 2018  
Albany, New York

## APPENDIX A

*Matter of Hieu Luong*  
DEC File No. R8-2016-1020-97  
Motion for Default Judgment

- A. Cover letter, dated May 17, 2018, addressed to Administrative Law Judge Michael Caruso of the Department's Office of Hearings and Mediation Services, attaching staff's motion papers
- B. Motion for Default Judgment and Order, dated May 17, 2018
- C. Affirmation of Dusty Renee Tinsley, Esq., dated May 17, 2018, attaching Exhibits 1 - 9:
  1. Notice of Hearing and Complaint, dated November 8, 2017, attaching Exhibits 1 – 2:
    1. Matter of Hieu X Luong, Consent Order, Case No. R8-20161020-97, dated June 27, 2017; and
    2. Letter to Hieu Luong from Dusty Renee Tinsley, Esq., dated September 7, 2017, notifying respondent of violation of the consent order and demanding payment of the suspended penalty
  2. Affidavit of Personal Service by Environmental Conservation Officer J.B. Lutz, sworn to November 16, 2017
  3. Correspondence to Dusty Renee Tinsley, Esq. from ALJ Caruso, dated March 29, 2018
  4. Correspondence to ALJ Caruso from Dusty Renee Tinsley, Esq, dated April 4, 2018 requesting permission to amend the notice of hearing and complaint
  5. Correspondence to Dusty Renee Tinsley, Esq. from ALJ Caruso, dated April 16, 2018, granting staff's motion to amend the notice of hearing and complaint
  6. Amended notice of hearing and amended complaint, dated April 16, 2018
  7. Affidavit of service (amended notice of hearing and amended complaint) of Tammy Schubmehl, sworn to May 16, 2018
  8. Affidavit of Steven Miller, sworn to May 17, 2018, attaching Exhibits 1 – 12:
    1. Monroe County Tax Office, property information sheet, generated November 7, 2017 and 2017 Final Assessment Roll for Monroe County, Town of Gates, New York, page 427
    2. New York State Freshwater Wetlands, "Monroe County Rochester West Map 7 of 21"
    3. Map generated by affiant showing location of respondent's property on "Monroe County Rochester West Map 7 of 21"
    4. Freshwater Wetlands Determination, dated May 2, 2013, with attached map

5. Aerial image generated by affiant, depicting wetlands, adjacent area and Luong property as of May 2, 2013
6. Matter of Hieu X Luong, Consent Order, Case No. R8-20161020-97, dated June 27, 2017
7. Photographs (numbered 1 – 6) of areas at respondent's property taken April 4, 2018 by affiant
8. Aerial image generated by affiant, depicting location where photographs were taken on April 4, 2018 and on July 28, 2017
9. Photographs (numbered 1 – 5) taken by affiant during July 28, 2017 inspection
10. Letter to Hieu Luong from Dusty Renee Tinsley, Esq., dated September 7, 2017, notifying respondent of violation of the consent order and demanding payment of the suspended penalty
11. DEE-1, Civil Penalty Policy (June 20, 1990)
12. DEE-6, Freshwater Wetlands Enforcement Policy (February 4, 1992)

9. Proposed order

- D. Correspondence to ALJ Caruso from Dusty Renee Tinsley, Esq, dated June 19, 2018, attaching Affidavit of Service (motion papers) of Tammy Schubmehl, sworn to June 18, 2018