

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violations of Environmental
Conservation Law ("ECL") Articles
15 and 24 and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR")

ORDER ON CONSENT
File No. R4-2008-0624-97

James and Patricia McKay
104 Eberle Road Extension
Valatie, NY 12184

Respondents

WHEREAS:

1. The Department of Environmental Conservation ("Department") is the State agency which has jurisdiction over the environmental law and policy of the State pursuant to, *inter alia*, §3-0301 of the Environmental Conservation Law (ECL). In particular, DEC regulates and controls the water resources of the state pursuant to ECL § 15-0101 *et seq* and the rules and regulations promulgated, in part, under 6 NYCRR Part 608.
2. The Department has jurisdiction over the regulation of work in protected wetlands as shown on the Final Freshwater Wetlands Maps filed by county for the State of New York and described in Article 24 of the Environmental Conservation Law and the rules and regulations promulgated pursuant thereto.
3. Respondents, James and Patricia McKay, own property in and within 100 feet of a freshwater wetland (K-109) ("the wetland") located on Kinderhook Lake at 104 Eberle Road Extension, Valatie, New York ("site").
4. Respondents, James and Patricia McKay, contacted the Department in an attempt to come into compliance with respect to a dock which they had constructed on Kinderhook Lake.

Stream Protection Violation

5. On June 5, 2008, Department staff inspected the site and observed that Respondents had constructed a dock on Kinderhook Lake without a permit. The Department hereby acknowledges that the dock that was constructed without prior authorization, and which is the subject of this Order on Consent, would have met the regulatory standards for issuance of a permit by the Department, had the respondent applied to the Department for a permit prior to construction. This Order shall be considered acknowledgment by the Department that the dock may remain in place and that the Respondent does not require any further authorization from the Department to keep the dock/structure in place, unless modifications to the dock are proposed. This document shall be retained by the Respondent.
6. Regulations at 6 NYCRR 608.5 (I) (a) provide that "no person, local public corporation or interstate

authority may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the state or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state, and that are inundated at mean high water level or tide, without a permit issued pursuant to this Part."

7. Respondents' placement of fill in the lake without an Article 15 permit is a violation of 6 NYCRR 608.5 (I) (a).

Freshwater Wetlands Violation

8. Regulations at 6 NYCRR 663.4 (d) (41) require that a permit be issued to install a dock, pier, wharf, or other structure in a wetland, which is built on floats or open-work supports and having a top surface area of 20 square meters (approximately 200 square feet) or less.

9. Respondents' construction of a dock in the wetland, without a permit, is a violation of 6 NYCRR 663.4 (d) (41).

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

11. ECL § 71-2303 (1) provides for up to \$3,000 in civil penalties for each violation of a regulation and the restoration of the affected freshwater wetland to its condition prior to the violation.

Waiver of Rights

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

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

Civil Penalty

I. With respect to the violations identified in this Order, Respondents are hereby assessed a civil penalty of TWO HUNDRED FIFTY DOLLARS (\$250) which shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department.

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

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

III. Respondents shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondents, their directors, officers, employees, servants, agents, successors or assigns.

IV. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

V. This Order is deemed effective on the date signed by the Department.

VI. Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondents for any other violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondents, their agents, their servants, their employees, their successors and their assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondents and/or any of Respondents' employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

D. Respondents' 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 Respondents waive all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondents.

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

DATED: Rotterdam, New York
2008

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

BY:

Eugene J. Kelly
Regional Director
Region 4

