

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Violation of Article 24  
of the New York State Environmental Conservation  
Law , and Regulations promulgated thereunder,

**ORDER ON CONSENT**

- by -

Case No. R4-2009-0730-121

Robert S. Moore  
857 Whitney Dr.  
Niskayuna, New York 12309

Respondent

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**WHEREAS:**

**JURISDICTION**

1. The New York State Department of Environmental Conservation (the “Department”) is a department of the State of New York charged with the following responsibilities: preserve, protect and conserve freshwater wetlands and the benefits derived therefrom pursuant Environmental Conservation Law (“ECL”).
2. Respondent, Robert S. Moore, resides at 857 Whitney Dr., Niskayuna, New York and this property is located, in part, within the adjacent area of freshwater wetland S-116 (“wetland”)
3. Respondent is a person as that term is defined at 6 NYCRR 608.1(n); 6 NYCRR 360-1.1(b)(117) ; and 6 NYCRR 663.2(w).

ECL Article 24 Freshwater Wetland Violations

4. On June 8, 2009 and June 12, 2009, Department staff observed that Respondent that had filled and graded the adjacent area of the wetland on his property and the wetland area on the adjoining property owned by the Town of Niskayuna . On June 8, 2009, Respondent was also observed using a backhoe in the wetland and stream with a backhoe.
5. Regulations at 6 NYCRR 663.4 provides that: “ (a) All persons proposing to conduct, on wetlands or adjacent areas, activities that have not been specifically exempted under section 24-0701 of the Act, in the statewide minimum land-use regulations or under sections 663.3, 663.4(d), or 663.7 of this Part, must obtain either a permit or a letter of permission.”
6. Regulations at 6 NYCRR 663.4(20) prohibits filling in a regulated wetland or its adjacent area without a permit.
7. Regulations at 6 NYCRR 663.4(d)(25) list the activity of grading and dredging in a wetland or adjacent area as requiring a permit.

### Filling Wetland Cause of Action

8. Respondent has placed fill on his property and the Town of Niskayuna property of approximately 165 feet by 30 feet with the height of the fill about 6 to 8 feet above the nearby stream that is located within the 100 foot adjacent area of the wetland and the wetland. Attachment 1 contains a drawing of the areas filled.

9. Respondent violated 6 NYCRR 663.4(20) by filling the adjacent area of the wetland and the wetland without a permit.

### Grading Wetland Cause of Action

10. Respondent graded the adjacent area of the wetland and the wetland also in the area described in Paragraph 8 and has depicted in Attachment 1.

11. Respondent violated 6 NYCRR 663.4(d)(25) by grading the adjacent area of the wetland and wetland without a permit.

### Civil Penalties

12. ECL Section 71-2303(1) provides for up to \$3,000 in civil penalties for each violation of ECL Article 24 and the restoration of the affected freshwater wetland to its condition prior to the violation.

### Waiver of Hearing

13. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law, has consented to the issuance and entry of this Order, and agrees to be bound by the terms, provisions and conditions contained herein.

NOW, being duly advised and having considered this matter, **IT IS HEREBY ORDERED THAT:**

I. Respondent is hereby assessed a civil penalty in the amount of TWENTY THOUSAND DOLLARS (\$20,000) for the violations stated herein. FIVE THOUSAND DOLLARS (\$5,000) of the civil penalty is payable as follows:

#### Payable Penalty

\$416.67 with the return of the signed and notarized Order; and  
\$416.67 on or before the 1<sup>st</sup> day of the month on November 1, 2009; December 1, 2009; January 1, 2010; February 1, 2010; March 1, 2010; April 1, 2010; May 1, 2010; June 1, 2010; July 1, 2010; and August 1, 2010. The last payment on September 1, 2010 shall be \$416.63.

The failure to make a timely payment may cause at the Department's discretion, the entire balance of the civil penalty and the suspended penalty to become due within 15 days of the issuance of a notice of violation.

All payments shall be made by bank or certified check or money order made out to the Department of Environmental Conservation.

### Suspended Penalty

FIFTEEN THOUSAND DOLLARS (\$15,000) of civil penalty is suspended conditioned on Respondent's compliance with the terms, conditions and provisions of this Order on Consent. Payment of the suspended penalty shall be due within fifteen (15) calendar days of the receipt by the Respondent of a notice of violation from the Department which sets out the violations of the Order.

This provision shall not limit the Department's right to seek other remedies provided by law and the applicable regulations for violations of this Order on Consent and ECL Article 24 and regulations, respectively.

II. The provisions of this Order shall be deemed to bind Respondent, his family, agents, employees, contractors, successors and assigns, and all persons, firms and corporations acting under or for it.

III. The attached Schedule of Compliance and all plans approved thereunder are incorporated and made part of the terms, conditions and provisions of this Order on Consent.

IV. All violations alleged by the Department in this Order to have been committed by Respondent shall constitute continuing violations. However, the Department shall not institute an action or proceeding for penalties or other relief pursuant to law on account of any such violations as long as Respondent adheres to and fully complies with the terms, provisions and conditions of this Order.

V. A. Upon completion of all obligations created in this Order, this Order settles only all claims for civil, criminal and administrative penalties concerning the violations described in Paragraphs 1 through 80 of this Order against Respondent and its successors (including successors in title) and assigns.

B. Except as provided in Subparagraph V.A. of this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or his designee (including, but not limited to, nor exemplified by, the rights to recover natural resources damages and to exercise any summary abatement powers) or authorities with respect to any party, including Respondent.

VI. If, for any reason, Respondent desires that any provisions of this Order be changed, Respondent shall make timely written application to the Department's Region 4 Regional Director setting forth reasonable grounds for the relief sought. No change or modification of this Order shall be made or be effective except as may be specifically set forth in writing by the Department.

VII. All communications to the Department shall be sent to:

For Department:  
Regional Natural Resources Supervisor  
New York State Department  
of Environmental Conservation  
Region 4  
1130 N. Westcott Road  
Schenectady, New York 12306

All communications to the Respondent shall be sent to:

Robert Moore  
857 Whitney Dr.  
Niskayuna, New York 12309

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

IX. For the purpose of insuring compliance with this Order, duly authorized representatives of this Department shall be permitted access to the facility in order to inspect and/or require such tests as may be deemed necessary to determine the status of Respondent's compliance with this Order.

X. Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless 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 Respondent, their directors, officers, employees, servants, agents, successors or assigns.

XI. The failure of Respondent to comply fully and in timely fashion with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to the Respondent by the Department.

XII. (A) Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and applicable state and federal regulations and laws and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(B) (1) If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within twenty (20) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

(2) After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. This shall be considered a violation of the Order. The Respondent reserve its right to contest the allege violation.

XIII. 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 Respondent for any other violations of the ECL , rules or regulations promulgated thereunder or permits issued thereunder based upon other than existing contamination.

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

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

D. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent 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 on Consent and whether or not this Order on Consent has been entered into voluntarily by Respondent.

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

BY:

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Eugene J. Kelly  
Regional Director  
Region 4

DATED: \_\_\_\_\_

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order, waives his right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

\_\_\_\_\_  
Robert Moore

Date : \_\_\_\_\_

STATE OF NEW YORK     )  
  )ss.:  
COUNTY OF                    )

On the \_\_\_ day of \_\_\_\_\_ in the year 2009 before me, the undersigned, a Notary Public in and for the State, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public  
Qualified in the County of:  
My Commission Expires:

## SCHEDULE OF COMPLIANCE

1. Respondent shall immediately cease any work in a wetland or its adjacent area or a stream unless the work is authorized and approved pursuant to this Order on Consent.
2. Within 45 days of the effective date of this Order, Respondent shall submit a restoration plan (“restoration plan”) prepared by a qualified professional (such as a licensed New York State professional engineer or landscape architect) for the removal of the solid waste and the restoration of the wetland and its adjacent area and the stream as described below. The restoration plan shall include the following: a) diagrams and narrative establishing a protocol and sequence for erosion and sediment control, b) removal of all fill down to original grade from the Town of Niskayuna property, c) removal of fill and tapering the edge of such fill on respondents property to achieve a stable slope, d) restoration of the stream channel, and e) a planting plan to restore trees, shrubs and other vegetation on the Town of Niskayuna property and on Respondent’s property within 100 feet of the toe of the restored bank of the stream. The restoration plan shall also present information as to the intended deposition site of the removed fill.
3. Within 30 days of approval of the restoration plan, Respondent shall commence implementation of the restoration plan and complete all restoration by no later than 365 days from the effective date of the Order.
4. Erosion and sediment controls must be in place prior to commencement of restoration work and must remain in functional condition throughout the restoration project. If work is shut down during the winter, all areas of exposed soil must be heavily mulched to prevent erosion.
5. Progress reports shall be submitted monthly during the period of restoration. Following completion of restoration, a monitoring report prepared by a professional engineer or professional wetland biologist shall be submitted at month 6 and at month 12. The report shall assess success of the restoration efforts and make recommendations for work necessary to correct any deficiencies or problems. Any trees or shrubs established pursuant to the approved restoration plan, that die within the period of restoration and monitoring shall be replaced.