

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations
of Articles 15 and 25 of the Environmental
Conservation Law and Parts 608 and 661
of Title 6 of the Official Compilation of
Codes, Rules and Regulations (6 NYCRR)
of the State of New York,

RULING

-by-

DEC File No.
R2-20120807-484

SALVATORE ACCARDI,

Respondent.

Summary

This ruling denies a motion made by the staff of the Department of Environmental Conservation (DEC Staff) for an order without hearing finding the respondent Salvatore Accardi liable for eight alleged violations of the Environmental Conservation Law and implementing regulations. These violations are alleged to have occurred on property owned by the respondent located at 99-34 164th Avenue, Queens, New York, Queens County, Tax Block 14250 Lots 1461 and 1463 (site), which abuts Hawtree Basin, Jamaica Bay. The alleged violations involve the construction of decks, paving, and installation of a floating dock at the site without the proper permits. In addition to a finding of liability, DEC Staff seeks an order of the Commissioner imposing a payable civil penalty of thirty thousand dollars (\$30,000) and requiring that the respondent undertake certain remedial actions. The parties will be contacted to schedule an administrative hearing.

Proceedings

On July 12, 2012, DEC Staff member Peter Malaty inspected the site. On August 1, 2012 DEC Staff issued a notice of violation which was personally served on the respondent on August 29, 2012 by Environmental Conservation Officer Christopher Lattimer (Malaty Affidavit [Aff.], July 28, 2014, Exh. C).

DEC Staff initiated this administrative enforcement proceeding by serving the respondent, via certified mail, with a notice of hearing and complaint dated September 12, 2013 (Malaty Aff., July 28, 2014, Exhs. D & E).

By letter dated September 27, 2013, the respondent contacted DEC Staff to request an extension of time to respond, due to the fact that he was incarcerated (Malaty Aff., July 28, 2014, Exh. F).

By letter dated October 8, 2013, DEC Staff granted the respondent's request to be allowed to respond after he was released (Malaty Aff., July 28, 2014, Exh. G). An answer was not timely received.

By papers dated July 30, 2014, DEC Staff moved for an order without hearing. DEC Staff's papers included: (1) a notice of motion; (2) the affirmation of DEC Staff counsel Jessica Steinberg Albin; (3) the affidavit of DEC Staff member Peter Malaty; and (4) an affidavit of service by certified mail (no mailing receipts attached).

On August 11, 2014, DEC Staff received a hand-written response from the respondent and forwarded it to the Chief Administrative Law Judge (ALJ) with a cover letter dated August 14, 2014.

On September 9, 2014, this matter was assigned to me.

Discussion

In its motion for order without hearing, DEC Staff alleges eight separate violations in five causes of action. In addition to a finding of liability, DEC Staff seeks an order of the Commissioner imposing a payable civil penalty of thirty thousand dollars (\$30,000) and requiring that the respondent undertake certain remedial actions.

First cause of action. In this cause of action, DEC Staff alleges two violations, specifically that the respondent constructed approximately eight hundred eighty (880) square feet of deck on Lot 1461 without a permit in violation of: (1) ECL 15-0505 and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

These violations cannot be determined on the current record for two reasons. First, in her affirmation, DEC Staff counsel Albin states that this area of the site is either in a tidal wetland adjacent area or in the tidal wetland itself (Hawtree Basin, Jamaica Bay, map number 598-500). DEC Staff does not expressly allege that Hawtree Basin is a navigable water of the State and does not argue any basis for concluding it is a

navigable water as a matter of law under either the statute or the regulations.

Second, as proof of these violations, DEC Staff offers one sentence in the affidavit of DEC Staff member Peter Malaty which reads: "I reviewed aerial photographs of 99-34 164th Avenue, Queens County Tax Block 14250 Lots 1461 and 1463 (the "Site"), from 2002 to 2004, and discovered that between 2002 and 2004, a deck was built on Lot 1461 with an approximate area of 880 square feet in a regulated tidal wetland and tidal wetland adjacent area" (Malaty Aff., July 28, 2014, ¶ 5). There are no photographs of the site, diagrams, surveys, or other information in the record at this point. Mr. Malaty states that during a July 12, 2012 inspection of the site, the respondent stated that he built all the decks on the site (Malaty Aff., July 28, 2014, ¶ 6¹). Mr. Malaty also states that the respondent has not obtained a permit for this construction (Malaty Aff., July 28, 2014, ¶ 7).

The respondent's response is a handwritten, unsworn, two-page letter with one photo attached. He does not appear to be represented by counsel and most of the letter is not relevant to DEC Staff's allegations. He does, however, claim in the letter that he purchased his land the way it is and just cleaned it up, which can be interpreted as a denial of DEC Staff's allegations and an assertion that these alleged violations predate his ownership of the parcel 1461, August 29, 2003.

The information in DEC Staff's papers does not establish a prima facie case that the first alleged violation occurred because no allegation is made that the site is in a navigable water. It may be possible to conclude that DEC Staff has shown a prima facie case with respect to the second alleged violation, however, in this case the respondent has included a denial in his response. While generally an unsworn and unsubstantiated denial would not be adequate to raise a triable issue of fact, in this case, respondent's submission is entitled to the liberal construction generally afforded to papers submitted by pro se parties in administrative proceedings (Matter of Segreto, Ruling of the ALJ, October 12, 2008, at 11). Therefore, a hearing on this alleged violation is appropriate.

Second cause of action. In this cause of action, DEC Staff alleges that the respondent paved approximately three hundred forty (340) square feet of the southwest portion of Lot 1461, in

¹ There are two paragraphs numbered 6 in this affidavit, this reference is to the first.

a regulated tidal wetland adjacent area without a permit in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(30).

As proof of this violation, DEC Staff offers the affidavit of DEC Staff member Peter Malaty. There are no photographs of the site, diagrams, surveys, or other information in the record at this point. One sentence in Mr. Malaty's affidavit addresses this alleged violation which reads: "An area of 340 square feet in the southeast portion of the lot [Lot 1461] and in a tidal wetland adjacent area was paved with asphalt and/or other impervious material" (Malaty Aff., July 28, 2014, ¶ 5). This sentence may be referring to his review of aerial photos.

The respondent claims in his letter that he purchased his land the way it is and just cleaned it up, which can be interpreted as a denial of DEC Staff's allegations and an assertion that these alleged violations predate his ownership of the parcel, August 29, 2003.

The information in DEC Staff's papers is not adequate to conclude that DEC Staff has established a prima facie case that this violation occurred. It is not clear from the information in the record if the violations occurred before or after the respondent purchased the property.

Third cause of action. In this cause of action, DEC Staff alleges two violations, specifically that the respondent installed a set of floating docks with a combined area of approximately two-hundred sixty four (264) square feet without a permit in violation of: (1) ECL 15-0505 and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(17). There does not appear to be any proof of these alleged violations in DEC Staff's papers. The affidavit of DEC Staff member Peter Malaty does not mention them and there are no photographs of the site, diagrams, surveys, or other information in the record at this point. There is a passing reference to a floating dock in the August 1, 2012 Notice of Violation (Malaty Aff., July 28, 2014, Exh. C) and a statement in DEC Staff counsel Albin's affirmation stating that the site contains a floating dock (Albin Affirm., July 30, 2014, ¶ 6), but there is insufficient evidence to establish a prima facie case that the violation occurred.

Fourth cause of action. In this cause of action, DEC Staff alleges that the respondent paved approximately nine hundred fifty square feet of the eastern portion of Lot 1463 in a regulated tidal wetland adjacent area without a permit in

violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b) (30).

As proof of this violation, DEC Staff offers the affidavit of DEC Staff member Peter Malaty, in which he states the following. "On July 12, 2012, I inspected the Site. I observed that the eastern portion of Lot 1463 was paved with asphalt and/or other impervious material. This portion of Lot 1463, totaling 950 square feet, is regulated as tidal wetland adjacent area" (Malaty Aff., July 28, 2014, ¶ 6²). Mr. Malaty also states that the respondent has not obtained a permit for this construction (Malaty Aff., July 28, 2014, ¶ 7). There are no photographs of the site, diagrams, surveys or other information in the record at this point.

The respondent claims in his letter that he purchased his land the way it is and just cleaned it up, which can be interpreted as a denial of DEC Staff's allegations and an assertion that these alleged violations predate his ownership of parcel 1463, which began in September 2008.

The information in DEC Staff's papers is not adequate to conclude that DEC Staff has established a prima facie case that this violation occurred. It is not clear from the information in the record if the violations occurred before or after the respondent purchased the property.

Fifth cause of action. In this cause of action, DEC Staff alleges two violations, specifically that the respondent constructed a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of Lot 1463 without a permit in violation of: (1) ECL 15-0505 and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b) (49).

As proof of this violation, DEC Staff offers the affidavit of DEC Staff member Peter Malaty who states that on his July 12, 2012 inspection he observed that "a deck with an area of 715 square feet was built on the western portion of Lot 1463 in a regulated tidal wetland and tidal wetland adjacent area. While conducting the Site visit, Respondent informed me that when he purchased Lot 1463, it consisted of nothing but tall weeds and garbage, which he cleared. Respondent further stated that he

² There are two paragraphs numbered 6 in this affidavit, this reference is to the first.

built all the decks on Site" (Malaty Aff., July 28, 2014, ¶ 6³). Mr. Malaty also states that the respondent has not obtained a permit for this construction (Malaty Aff., July 28, 2014, ¶ 7). There are no photographs of the site, diagrams, surveys, or other information in the record at this point.

In his response the respondent claims that he purchased his land the way it is and just cleaned it up, which can be interpreted as a denial of DEC Staff's allegations and an assertion that these alleged violations predate his ownership of the parcel.

The information in DEC Staff's papers does not establish a prima facie case that the first alleged violation occurred because no allegation is made that the site is in a navigable water. It may be possible to conclude that DEC Staff has shown a prima facie case with respect to the second alleged tidal wetlands law violation, however, in this case the respondent has included a denial in his response. As noted above, respondent's submission is entitled to the liberal construction generally afforded to papers submitted by pro se parties in administrative proceedings. Therefore, a hearing on this alleged violation is appropriate.

Conclusion

As discussed above, DEC Staff has failed to show it is entitled to summary judgment for six of the alleged violations. With respect to the remaining two alleged violations, the denials contained in the respondent's letter are sufficient, in this case, to raise triable issues of fact. The parties will be contacted shortly and an administrative hearing convened in this matter.

/s/

P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York
March 2, 2015

³ There are two paragraphs numbered 6 in this affidavit, this reference is to the first.