

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of  
Article 15 of the New York State Environmental  
Conservation Law and Regulations Promulgated  
thereunder,

RULING

- by -

DEC Case No.  
R4-2007-1101-154

**FRANK ADAMO,**

Respondent.

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PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this proceeding by service of a motion for order without hearing in lieu of complaint on respondent, Frank Adamo, by certified mail. By its motion, staff alleges that respondent violated section 15-0501 of the Environmental Conservation Law ("ECL") and section 608.2(a) of title 6 of the Official Compilations of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by constructing two ponds in a protected stream without a permit.

Department staff's filing included the following:

- a notice of motion, dated April 13, 2009;
- the motion, dated April 13, 2009;
- an affirmation ("staff affirmation") by staff counsel, Jill T. Phillips, Esq., Assistant Regional Attorney, dated April 13, 2009;
- an affidavit ("Fraine affidavit") in support of the motion by Jerome Fraine, a biologist in the Bureau of Habitat, DEC Region 4, dated March 19, 2009;
- an affidavit ("Bauer affidavit"), with attached photographs, in support of the motion by Vernon Bauer, Environmental Conservation Officer, DEC Region 4, dated April 13, 2009; and
- a reply affidavit by Jerome Fraine, dated May 21, 2009.<sup>1</sup>

Respondent's filing in opposition to the motion included a cover letter ("respondent letter") by respondent's counsel, Terence P. O'Leary, Esq., and an affidavit ("respondent affidavit") by respondent, both dated May 4, 2009. Respondent attached a number of documents to his affidavit, including numerous photographs and a notarized statement by a neighboring property owner.

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<sup>1</sup> Staff's reply affidavit was not authorized (see 6 NYCRR 622.7[c][3] [requiring permission of the ALJ to serve "further responsive pleadings"]) and is not further addressed in this ruling.

Pursuant to 6 NYCRR 622.12(e), because I conclude that substantive disputes of fact exist, a hearing is required and Department staff's motion for order without hearing must be denied.

## POSITIONS OF THE PARTIES

Department staff alleges that respondent owns property ("site") located at 467 Archie Elliott Road, Meredith, New York, and that a portion of protected stream D-71-59-4,<sup>2</sup> a class C(t) stream,<sup>3</sup> runs through the site (staff affirmation ¶ 8; Bauer affidavit ¶ 4). Staff alleges that during an inspection of the site in September 2007, an environmental conservation officer ("ECO") observed that two ponds had been constructed "in the course of" the protected stream (Bauer affidavit ¶ 5). Staff further alleges that respondent failed to obtain the requisite ECL article 15 permit prior to conducting work in the protected stream (Bauer affidavit ¶ 7; Fraine affidavit ¶ 10).

Department staff asserts that the placement of ponds in the course of a stream increases the stream's water temperature and, because trout require cool, clean water to survive, respondent's violations will have an adverse affect the trout population in the stream (Fraine affidavit ¶ 13).

Staff argues that the incontrovertible facts set forth in its filings establish that respondent violated ECL 15-0501 and 6 NYCRR 608.2(a) (staff affirmation ¶¶ 2, 13, 14). Staff requests that the Commissioner issue an order assessing a \$37,000 penalty against respondent and requiring respondent to remove the ponds and return the stream to its pre-disturbance condition.

In response, respondent's counsel lists a number of "legal defenses" to Department staff's allegations, but provides little elaboration or legal argument regarding those defenses (see respondent letter). Instead, respondent relies on his affidavit to establish the basis for his opposition to the motion.

Respondent asserts that his construction of the ponds has prevented damage to his home and possessions (respondent affidavit ¶ 6). Respondent states that, prior to the

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<sup>2</sup> In its papers, Department staff consistently refers to the protected stream at issue in this proceeding as stream D-71-51-4. However, there is no stream D-71-51-4 listed in the Department's table of protected streams in the Delaware River Drainage Basin (see 6 NYCRR 815.6). Additionally, the jurisdictional map filed by staff in support of its motion depicts stream D-71-59-4, a tributary of Peakes Brook, as the only protected stream that crosses Archie Elliot Road (see staff affirmation [attachment 1]; see also 6 NYCRR 815.6, item 900.1 [identifying protected "Tributaries of Peak (sic) Brook"]). On the limited record before me, it appears that the proper designation of the protected stream at issue is stream D-71-59-4 and that designation will be used throughout this ruling.

<sup>3</sup> The Department classifies surface waters in accordance with the provisions of 6 NYCRR part 701. A stream classified as "C" "shall be suitable for fish, shellfish and wildlife propagation and survival" (6 NYCRR 701.8) and a "(t)" designation indicates the subject waters are "trout waters" (6 NYCRR 701.25[a]).

construction of the ponds, his basement flooded in "about eight" of the 11 years he resided at the site (id. ¶ 4). Respondent further states that, with each flood, he had to repair or replace items in his basement, such as his washer, dryer and furnace because of flood damage (id. ¶ 6).

Respondent states that he has never observed "trout or other fish anywhere in the subject waters north of Archie Elliot Road [where the site is located]" (respondent affidavit ¶ 5). Respondent states that the area designated as a protected stream at the site is a "bog" that "dries up by each July, remaining that way until the following Spring thaw except for intermittent summer and autumn rainfalls" (id. 4). Respondent further states that "there has never been any clear, distinct or discernable bank or stream bed of any kind" in the area where he constructed the ponds and that this area is "a grassy bog which range[s] from bone dry to flooded" (id. ¶ 5).

Respondent states that, in the spring of 2009, he twice walked the length of the protected stream. Respondent asserts that, downstream from the site, he observed numerous natural features, such as rock ledges, that would prevent trout from reaching waters at the site (respondent affidavit ¶ 10). With his papers, respondent filed a signed and notarized statement by a neighboring property owner on Archie Elliott Road who lives downstream from the site. The neighboring owner states that, in the nearly 35 years that he lived there, he "ha[s] never seen a fish in the stream next to my house" (respondent affidavit, exhibit E). The downstream neighbor also states that "this area dries up by July. No water even runs through it after that until the snow melts again the following year" (id.). Further downstream, according to respondent, as the stream approaches Peakes Brook, it divides into two streams. Respondent states that these two streams flow into separate ponds, before ultimately emptying into Peakes Brook (respondent affidavit ¶ 11).

With regard to the relief demanded by Department staff, respondent refers to the penalty sought by staff as "draconian" and states that he has limited financial resources (respondent affidavit ¶ 3). Respondent states that he has "bank savings of \$1,500," receives Social Security Disability income, and resides at the site with his unemployed wife and their three minor children (id.).

#### FINDINGS OF FACT

In accordance with 6 NYCRR 622.12(e), the following findings of fact are deemed established for the purposes of the hearing.

1. Respondent owns and resides at the site located at 467 Archie Elliott Road, Meredith, New York (Bauer affidavit ¶ 3; respondent affidavit ¶ 3).
2. Respondent constructed two ponds at the site in 2006 (respondent affidavit ¶ 4).

3. Respondent did not have an ECL article 15 permit to construct the ponds (Fraine affidavit ¶ 10).
4. Respondent's residence flooded numerous times prior to his construction of the ponds (respondent affidavit ¶ 4) and the flooding caused damage to items in respondent's basement, including the washer, dryer and furnace (id. ¶ 6).
5. Respondent's construction of the ponds prevented further damage to his residence (respondent affidavit ¶ 6).

## DISCUSSION

Pursuant to 6 NYCRR 622.12(d), a motion for order without hearing "will be granted if . . . the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party" (see CPLR 3212[b] [providing, in part, that summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"]). However, the motion "must be denied . . . if any party shows the existence of substantive disputes of facts sufficient to require a hearing" (6 NYCRR 622.12[e]).

Disputes of facts must be resolved on the basis of 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. An affidavit in support of the motion "may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof" (Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4 [citations omitted]). An attorney's affidavit "has no probative force" unless the attorney has first hand knowledge of the facts at issue (Siegel, NY Prac § 281, at 442 [3d ed] [citation omitted]).

Additionally, on a motion for order without hearing, the weight of evidence is not considered. Rather, the issue is the sufficiency of the evidence adduced by the parties in favor of, or in opposition to, the motion. In this context of this proceeding, "the test for sufficiency of evidence . . . is the substantial evidence test -- whether the factual finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (Matter of Tractor Supply, Decision and Order of the Commissioner, August 8, 2008, at 3 [internal quotation marks and citations omitted]).

Applying this standard to the evidence proffered by the parties in this proceeding, I conclude that Department staff's motion must be denied.

Department staff alleges that respondent violated 6 NYCRR 608.2(a) and ECL 15-0501 by constructing two ponds in stream D-71-59-4 without an ECL article 15 permit. Pursuant to 6 NYCRR 608.2(a), "no person . . . may change, modify or disturb any protected stream, its bed or banks . . . without a permit issued pursuant to [part 608]." A protected stream is defined as "any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t) or C(t)" (6 NYCRR 608.1[p]). The bed of a stream is defined as the "land area of a watercourse covered by water at mean high water" (6 NYCRR 608.1[b]) and, in relevant part, the banks of a stream are defined as "that land area immediately adjacent to, and which slopes toward, the bed of a watercourse, and which is necessary to maintain the integrity of a watercourse . . . a bank will not be considered to extend more than 50 feet horizontally from the mean high water line" (6 NYCRR 608.1[a]).

Stream D-71-59-4 is classified C(t) and, therefore, it is a protected stream for the purposes of 6 NYCRR part 608. The jurisdictional map attached to the staff affirmation depicts stream D-71-59-4 as proximate to and crossing Archie Elliot Road. Although staff does not identify the location of the site on the jurisdictional map, respondent does not argue that the stream depicted on the map does not cross the site. Rather, respondent argues that, because the stream is dry during large parts of the year and does not provide fish habitat, the Commissioner should "amend and modify DEC's jurisdictional map" (respondent affidavit ¶ 2).

To modify the jurisdictional map as respondent requests, the stream must first be reclassified to eliminate it from the definition of a protected stream (see 608.1[p]; see also 6 NYCRR part 609 [reclassification of waters]). Because stream D-71-59-4 is currently classified as a C(t) stream, it is protected and will remain so unless and until its classification is changed. Accordingly, respondent's argument that the jurisdictional map should be amended has no bearing on respondent's liability.<sup>4</sup>

Nevertheless, respondent has raised a substantive dispute of fact sufficient to require a hearing. To hold respondent liable for the violations alleged by staff, the evidence must establish, as a matter of law, that respondent disturbed the bed or banks of a protected stream. Respondent states, however, that there is no "clear, distinct or discernable bank or stream bed of any kind" in the area where he constructed the ponds and that the area is dry for large parts of the year.

The ECO who inspected the site states that the ponds were constructed "in the course of" the protected stream. The ECO quotes the regulatory definitions of both "bed" and "banks" in his affidavit, but does not specify how he determined the location of the stream bed and banks at the site, nor does he specify whether respondent's activities occurred in the stream bed, banks, or both the bed and banks. Attached to the ECO's affidavit are seven "photographs [that he] took of the stream and the ponds on the site"

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<sup>4</sup> In the event that respondent is held liable for the violations alleged by Department staff, the character of the stream and the environmental impacts of respondent's activities may be properly considered in fashioning appropriate relief.

(Bauer affidavit ¶ 6). The photographs are inconclusive, however. Two of the photographs clearly depict a small stream (*id.* attachments E, G), four clearly depict the ponds (*id.* attachments A, B, C, D) and one depicts part of a culvert (*id.* attachment F). None of the photographs appears to depict a discernable stream bed or bank proximate to the ponds, let alone a stream flowing into or out of the ponds.

Although the weight of the evidence is not considered at this procedural stage, I note that neither respondent nor the ECO who inspected the site were identified as experts in determining the location of protected streams, particularly under circumstances such as those presented here, where the stream may have no discernable bed or banks. Department staff's habitat expert, a biologist with many years of experience in both the Department's Bureau of Fisheries and its Bureau of Habitat, proffered an affidavit in support of the motion, but he does not state that he inspected the site. Rather, he appears to have only reviewed the file (*see* Fraine affidavit ¶ 4).

On this record, I cannot hold as a matter of law that Department staff has established that respondent's construction of the ponds was within the bed or banks of a protected stream. At hearing, the parties will be expected to develop a record regarding the precise location of the bed and banks (as those terms are defined by 6 NYCRR 608.1[b] and [a], respectively) of the protected stream in relation to the location of the ponds that respondent constructed at the site. Among other things, this may entail developing a record with regard to what constitutes the "land area of a watercourse covered by water at mean high water" where the watercourse at issue is dry during certain times of the year and prone to flooding at other times.

With regard to relief, Department staff will be expected to proffer evidence and argument concerning how the relief sought in this proceeding compares with other matters involving similar facts and environmental impacts.

Lastly, I encourage the parties to consider mediation of this matter. Given the nature of the protected stream at issue, including its tendency to flood respondent's basement in the spring and to run dry during other parts of the year, there may be a mutually acceptable resolution that would both deter others from disturbing protected streams without authorization and achieve respondent's objective of preventing the flooding of his home.

#### CONCLUSIONS OF LAW

Department staff failed to establish, as a matter of law, that respondent violated 6 NYCRR 608.2(a) and ECL 15-0501. Accordingly, a hearing is necessary to resolve substantive disputes of fact and staff's motion for order without hearing is denied.

## FURTHER PROCEEDINGS

Department staff's motion and respondent's opposing papers will serve as the complaint and answer, respectively, for the duration of these proceedings (see 6 NYCRR 622.12[e]). I will contact the parties shortly after the issuance of this ruling to schedule the hearing. The parties should be prepared to discuss potential hearing dates and should also be prepared to discuss whether they are amenable to mediation of this matter.

\_\_\_\_\_/s/\_\_\_\_\_  
Richard A. Sherman  
Administrative Law Judge

Dated: November 10, 2009  
Albany, New York