

In the Matter of the Alleged Violations of
Articles 15, 17 and 24 of the New York
State Environmental Conservation Law, and
Parts 608 and 663 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York

RULING ON MOTIONS

- By -

ANTHONY COSTA a/k/a ANTHONY GAGLIARDI,
TERRYANN GAGLIARDI,
JEANNETTE GAGLIARDI,
KATHLEEN A. KRIEG,
ALFRED GALPINE,
CLOVER DRAINAGE, INC.,
THOMAS J. KEARNS, individually and as
owner of Clover Drainage, Inc.,
L. PETROSINO, INC., and
JOHN IPPOLITO TRUCKING & EXCAVATION, INC.,

DEC File Nos.
R2-20050622-187
R2-20050622-188

June 28, 2006

Respondents.

SUMMARY

Staff of the Department of Environmental Conservation (DEC Staff) initiated this enforcement action against the nine named respondents alleging 71 separate violations related to the installation of a pipe and fill behind two houses located at 123 and 131 Keating Street, Staten Island, New York during the summer of 2005. The first five of the respondents named above are owners of the two homes and the other four are contractors. DEC Staff alleges that without first obtaining a permit, the respondents: (1) disturbed the course of a stream (in violation of ECL 15-0501 and 6 NYCRR 608.2); (2) created a dam or impoundment structure (in violation of ECL 15-0503 and 6 NYCRR 608.3); (3) excavated and filled below the mean high water level of the State's navigable waters (in violation of ECL 15-0505 and 6 NYCRR 608.5); (4) caused a discharge into a stream in contravention of water quality standards (in violation of ECL 17-0501); and (5) excavated and filled in a wetland (in violation of ECL 24-0701 and 6 NYCRR 663.4).

Only Kathleen A. Krieg and Alfred Galpine (Galpine Family), owners of 131 Keating Street have submitted an answer in this matter. No response was received from the owners of 123 Keating Street: Anthony Costa, TerryAnn Gagliardi and Jeanette Gagliardi

(Gagliardi Family). No response was received from Clover Drainage, Inc. or Thomas J. Kearns individually and as owner of Clover Drainage, Inc. No response was received from L. Petrosino, Inc. A copy of a letter from John Ippolito, owner of Ippolito Trucking & Excavation, Inc. (Ippolito) to DEC Staff counsel requesting the case against Ippolito be dropped was in the file when it was assigned to the Administrative Law Judge (ALJ), but no formal answer was filed.

Based on the evidence in the record, DEC Staff has proven a total of 24 of the 71 violations alleged in the complaint. The homeowners, Galpine Family and Gagliardi Family, are each liable for eight violations and contractors Ippolito and Clover Drainage, Inc. are each liable for 4 (DEC Staff has not proven that Thomas J. Kearns, individually, is liable for any violations). Material questions of fact exist regarding the remaining 47 alleged violations as well as those alleged against Thomas J. Kearns, which DEC Staff will have to prove at hearing or abandon.

A recommendation regarding penalty and/or remediation is premature at this time because DEC Staff may request an adjudicatory hearing regarding the unproven alleged violations. In addition, both the Galpine Family and Ippolito have raised issues regarding the amount of the civil penalty, if any, which should be imposed.

PROCEDURAL HISTORY

By complaint dated October 3, 2005, DEC Staff alleged 71 separate violations against the nine respondents. Accompanying the complaint were: a notice of motion for an order without hearing; the affidavit of Environmental Conservation Officer (ECO) Jason DeAngelis with five attached exhibits; the affidavit of Joseph Pane (a member of DEC Staff) with four exhibits; and the affirmation of John K. Urda (DEC Staff counsel) with four exhibits.

On October 5, 2005, a copy of the complaint and motion for order without hearing were delivered by certified mail to 26 Windmere Road in Staten Island. The mail was addressed to L. Petrosino, Inc. and signed for by "Petrosino."

On October 15, 2005, John Ippolito, President of John Ippolito Trucking & Excavating, Inc. wrote to DEC Staff counsel. In this letter, Mr. Ippolito acknowledges receipt of the complaint on October 6, 2005 and asks that DEC Staff withdraw the complaint against his company.

An answer dated October 24, 2005 was filed on behalf of the Galpine Family by Peter Sullivan, Esq. Included in the answer were 22 affirmative defenses. With the answer, Mr. Sullivan filed: a motion to dismiss the complaint and affirmation in support thereof; an affirmation in opposition to motion for an order without a hearing; and an affidavit by Alfred Galpine.

By papers dated October 28, 2005, DEC Staff moved to strike or clarify the affirmative defenses raised by the Galpine Family's answer. With this motion were filed an affirmation in support, as was an affirmation in opposition to the Galpine Family's motion to dismiss.

By papers dated November 1, 2005, the Galpine Family responded with an affirmation in opposition to DEC Staff's motion to strike or clarify affirmative defenses.

This matter was referred to the Office of Hearings and Mediation Services on November 4, 2005 and ALJ P. Nicholas Garlick was assigned on November 10, 2005.

On November 28, 2005, all three members of the Gagliardi Family were personally served at their residence with a copy of the complaint and motion for order without hearing by ECO Jason DeAngelis.

On December 21, 2005, Thomas Kearns, the owner of Clover Drainage, Inc., was personally served with a copy of the complaint and motion for order without hearing by ECO Jason DeAngelis.

By letter dated January 3, 2006, DEC Staff counsel (at the request of the ALJ) responded to Mr. Ippolito's October 15 letter and stated that DEC Staff would not discontinue this matter against his company.

THE GALPINE FAMILY'S MOTION TO DISMISS

Accompanying its answer, the Galpine Family filed a motion to dismiss the complaint. This motion asserts that the complaint must be dismissed because the five causes of action all allege that the Galpine Family undertook an affirmative act in violation of the law. According to the motion, since the "facts" portion of the complaint does not allege that the Galpine Family undertook any affirmative act, the complaint does not contain a factual allegation to support any of the five causes of action.

DEC Staff counsel replies that the Galpine Family cites no authority for its assertion. He continues that a "facts" portion of a complaint is not required, but that a complaint need only contain statements sufficiently particular to give the courts and parties notice of the alleged violation (CPLR 3013).

The Galpine Family's motion to dismiss is denied. The complaint clearly sets forth the legal authority and jurisdiction under which the proceeding is to be held; the dates and place of the alleged violations; and the sections of environmental law and regulation alleged breached are explicitly set forth, as are the alleged actions which constitute the violation. The Galpine Family fails to cite any authority for the motion and the complaint meets the minimum requirements for pleadings set forth in 6 NYCRR 622.3(a)(1) and CPLR 3013.

DEC STAFF'S MOTION TO DISMISS OR CLARIFY AFFIRMATIVE DEFENSES

By papers dated October 28, 2005, DEC Staff moved to strike or clarify the 22 affirmative defenses raised in the Galpine Family's answer pursuant to 6 NYCRR 622.4(f). Counsel for the Galpine Family responded to DEC Staff's motion by an affirmation dated November 1, 2005. In this affirmation, counsel argues that DEC Staff cannot move to strike affirmative defenses because no specific authority for such a motion exists in 6 NYCRR 622 (DEC's Uniform Enforcement Hearing Procedures). Counsel argues that 6 NYCRR 622.4(f) limits the relief available to DEC Staff to a clarification of affirmative defenses, not to seek to have them stricken. To allow an ALJ to strike an affirmative defense prior to discovery, counsel argues, is possibly unconstitutional. According to counsel, any affirmative defense raised forces an adjudicatory hearing. This argument would have the effect of making any motion for order without hearing (DEC's administrative version of summary judgment) ungrantable in instances where a single, ill-pleaded affirmative defense is raised. In fact, in DEC administrative practice motions to strike affirmative defenses are routinely addressed, and when called for, granted (see 6 NYCRR 622.6(c); 622.10(b)(1)(i)). Moreover, Galpine Family has had notice of and a full opportunity to be heard on DEC Staff's motion to dismiss. It is no more a due process violation to dismiss an insufficiently pleaded or unmeritorious affirmative defense in the administrative context than for a court to do so under the CPLR (see CPLR 3211(b)).

The first affirmative defense raised in the Galpine Family's answer is that the complaint fails to state a claim for which relief can be granted. DEC Staff responds by stating that the complaint provides the necessary level of detail as to the time

and nature of the Galpine Family's alleged violations to meet the minimum required by 6 NYCRR 622.3(a)(1) and CPLR 3013. The Galpine Family responds that the complaint fails to allege that the Galpine Family committed a violation and that the alleged violations on its property were the actions of others. The complaint clearly sets forth 24 separate alleged violations committed by the Galpine Family and sets forth the legal authority for bringing this enforcement action in this administrative setting. Accordingly, the first affirmative defense is stricken.

The second affirmative defense raised in the Galpine Family's answer is that the complaint fails to allege facts concerning the respondents Alfred Galpine and Kathleen Krieg-Galpine that constitute a violation of law. DEC Staff responds by stating that the complaint provides detailed facts and legal authority regarding the alleged violations by the Galpine Family. DEC Staff has alleged that the Galpine Family owns 131 Keating Street, and that the parcel contains freshwater wetlands, an adjacent area and a protected stream. DEC Staff further alleges that the Galpine Family violated state laws protecting these features by allowing unpermitted work to be done. As discussed in detail below, DEC Staff has not proven all the causes of action against the Galpine Family in the motion for order without hearing. However, DEC Staff does allege facts that would constitute a violation. Accordingly, the second affirmative defense is stricken.

The third affirmative defense raised in the Galpine Family's answer is that the area cited by DEC is not a wetland or an adjacent area as defined by the law. DEC Staff argues that this affirmative defense is vague and ambiguous. However, Galpine Family's defense is easily understood, that no wetlands under the jurisdiction of DEC exist at the site and if proven would constitute a defense. The motion as to the third affirmative defense is denied. The merits of this claim, however, are discussed later in the report.

The fourth affirmative defense raised in the Galpine Family's answer is that the area cited by DEC does not contain waters, navigable waters, a stream or a stream bed as defined by law. DEC Staff argues that this affirmative defense is vague and ambiguous. However, Galpine Family's defense is easily understood, that no waters, navigable waters, stream or a stream bed under the jurisdiction of DEC exist at the site and if proven would constitute a defense. The motion as to the fourth affirmative defense is denied. The merits of this claim are discussed later in the report.

The fifth affirmative defense raised in the Galpine Family's answer is that the area cited by DEC is not suitable for fish propagation and survival as defined by the law. As argued by DEC Staff, since Lemon Creek and tributaries thereof are classified as Class B fresh surface water of the state (6 NYCRR 890), by definition these waters shall be suitable for fish propagation and survival (6 NYCRR 701.7). To the extent the Galpine Family is challenging the validity of the regulations their challenge is insufficiently pleaded. Accordingly, the fifth affirmative defense is stricken.

The sixth affirmative defense raised in the Galpine Family's answer is that the area cited by DEC does not abut navigable water as defined by the law. As discussed above, DEC Staff has shown that a tributary of Lemon Creek passes through the Galpine Family's property where the violation is alleged. If it is proven that this tributary is not navigable, as that term is defined in 6 NYCRR 608.1(1) a valid defense will be established. The motion as to the sixth affirmative defense is denied.

The seventh affirmative defense raised in the Galpine Family's answer is that the alleged activity is beyond the jurisdiction of DEC. DEC has been tasked by the Legislature to protect streams and wetlands as described in ECL Articles 15, 17 and 24. The violations alleged are within the jurisdiction of DEC and, therefore, the seventh affirmative defense is stricken.

The eighth affirmative defense raised in the Galpine Family's answer is that the allegations do not concern property owned or in the control of the respondent Galpine Family. DEC Staff argues that this affirmative defense is vague and ambiguous. However, Galpine Family's defense is easily understood, that they do not own the property where the violation occurred and proven would constitute a defense. The motion as to the eighth affirmative defense is denied. The merits of this affirmative defense are discussed later.

The ninth affirmative defense raised in the Galpine Family's answer is that any alleged placement of fill constituted the replacement of pre-existing fill as permitted by law. The Galpine Family cites no law that would permit the actions documented by DEC Staff in its papers. The Galpine Family has failed to present a legal theory upon which this defense is based, and accordingly it is stricken.

The tenth affirmative defense raised in the Galpine Family's answer is that the temporary placement of material in a regulated

area does not constitute a violation of law. Again, the Galpine Family cites no law that would permit the actions documented by DEC Staff in its papers. Galpine Family has failed to present a legal theory upon which this defense is based, and accordingly it is stricken.

The eleventh affirmative defense raised in the Galpine Family's answer is that any alleged construction was pursuant to DEC approval. DEC Staff argues that no factual or legal support for this defense is provided. If the Galpine Family had a valid DEC permit for the actions alleged, it would be a valid defense. The motion as to the eleventh affirmative defense is denied. The merits of this defense are discussed later.

The twelfth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken as part of DEC approved work. The Galpine Family subsequently withdrew this affirmative defense as being duplicative of the eleventh affirmative defense, above.

The thirteenth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken to protect the property from DEC approved work on abutting property. DEC Staff argues that no factual or legal support for this defense is provided. However, the question of whether this is a valid affirmative defense is separate from the question of whether or not it has merit. If work on the abutting property were undertaken pursuant to a valid DEC permit for the actions alleged, it may be a valid defense. The motion as to the thirteenth affirmative defense is denied. The merits of this defense are discussed later.

The fourteenth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken to protect the property from erosion. No reference is made to any legal authority to undertake the activities alleged by DEC Staff without a permit to protect a property from erosion. This affirmative defense is stricken.

The fifteenth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken to protect the property from flooding. No reference is made to any legal authority to undertake the activities alleged by DEC Staff without a permit to protect a property from flooding. This affirmative defense is stricken.

The sixteenth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken to

protect the property from contamination by nearby property owners. DEC Staff responds that no factual or legal support is provided to support this affirmative defense. Again, the Galpine Family has failed to place DEC Staff on notice regarding the facts and/or legal theory regarding this affirmative defense. The sixteen affirmative defense is stricken.

The seventeenth affirmative defense raised in the Galpine Family's answer is that any alleged work has improved any wetlands or abutting area cited by DEC. DEC Staff argue that no factual or legal support for this proposition is provided. Again, the Galpine Family has failed to place DEC Staff on notice regarding the facts and/or legal theory regarding this affirmative defense. The seventeenth affirmative defense is stricken.

The eighteenth affirmative defense raised in the Galpine Family's answer is that any alleged work was undertaken in accordance with the criteria set forth in the law. This affirmative defense has been withdrawn.

The nineteenth affirmative defense raised in the Galpine Family's answer is that, in the interest of justice, the DEC must be directed to withdraw the above-titled action due to the arbitrary and capricious nature of the actions of the DEC along the waterfront in the area occupied in the site at issue. Again, the Galpine Family has failed to place DEC Staff on notice regarding the facts and/or legal theory regarding this affirmative defense. The nineteenth affirmative defense is stricken.

The twentieth affirmative defense raised in the Galpine Family's answer is that DEC has named respondents Alfred Galpine and Kathleen Krieg-Galpine as respondents without any evidence to support this action and that the Galpine Family has no legal liability for the acts alleged herein and are simply the wrong respondents. DEC Staff responds that the defense contains no factual or legal support. The motion as to the twentieth affirmative defense is denied. This is a valid defense, claiming not to have any liability, and the merits of this claim are discussed later.

The twenty-first affirmative defense raised in the Galpine Family's answer is that all activity described in the complaint was undertaken as an emergency action, and thereby lawful. DEC Staff responds that the defense contains no factual or legal support. The Galpine Family's papers make no allegation to any facts constituting an emergency, nor is any argument made that a

legal basis exists for an emergency to obviate the need to first obtain a permit before undertaking work such as is alleged in the complaint. Accordingly, this affirmative defense is stricken.

The twenty-second affirmative defense raised in the Galpine Family's answer is that DEC is contractually bound to permit the activity alleged in the complaint. This affirmative defense was subsequently withdrawn.

FINDINGS OF FACT

The facts, determinable as a matter of law on DEC Staff's motion for order without hearing, are as follows.

The Respondents

1. Anthony Costa (also known as Anthony Gagliardi), Terryann Gagliardi and Jeannette Gagliardi own the property at 123 Keating Street, Staten Island, New York. This property is also identified as Richmond County Tax Block 6699, Lot 30.
2. Kathleen A. Krieg and Alfred Galpine own the property at 131 Keating Street, Staten Island, New York, 10309. This property is also identified as Richmond County Tax Block 6699, Lot 35.
3. Clover Drainage, Inc. is a domestic business corporation whose filing with the New York State Department of State, Division of Corporations is currently inactive. Clover maintains offices at 129 Whitman Avenue, Staten Island, New York.
4. L. Petrosino, Inc. is a domestic business corporation licensed to do business in New York with offices at 26 Windmere Road, Staten Island, New York.
5. John Ippolito Trucking & Excavating, Inc. is a domestic business corporation licensed to do business in New York with offices at 87 Delaware Avenue, Staten Island, New York.

The Site of the Violations

6. The properties located at 123 and 131 Keating Street are adjacent to one another and together are the site of the violations.

7. Both the 123 and 131 Keating Street properties contain a portion of regulated freshwater wetland AR-33 and its adjacent area.
8. Both the 123 and 131 Keating Street properties contain portions of a stream that is a tributary of Lemon Creek. Lemon Creek has been classified as a navigable water of the State of New York and a Class B fresh surface water of the state pursuant to 6 NYCRR Part 890. Class B waters are suitable for fish propagation and survival as set forth in 6 NYCRR 701.

Violations

9. On June 6, 2005, ECO DeAngelis observed excavation, dumping and filling in the stream bed and freshwater wetland at the site. He also observed that a concrete pipe approximately 40 inches in diameter and 200 feet long had been placed in the stream bed and covered with a thin layer of fill. Employees of two companies were at the site: a dump truck crew from L. Petrosino, Inc. and an excavator crew from Clover Drainage, Inc.
10. On June 8, 2005, ECO DeAngelis returned to the site and observed an employee of John Ippolito Trucking & Excavating, Inc. grading and leveling fill in the stream bed and freshwater wetland. He also observed that the cleared and excavated areas had expanded since his visit two days earlier and additional fill had been brought to the site.
11. None of the Respondents has the permits necessary on file with the Department for the activities described in findings of fact 10 and 11, above.

DISCUSSION

In its Motion for Order Without Hearing, DEC Staff alleges 71 individual violations against the respondents related to the filling behind 123 and 131 Keating Street, Staten Island. Based on the evidence included with the Motion, DEC Staff has established that 24 violations occurred. As discussed in detail below, DEC Staff has shown that: the Gagliardi Family is liable for eight violations, the Galpine Family is liable for eight violations, Clover Drainage, Inc. is liable for four violations and John Ippolito Trucking & Excavating, Inc. is liable for four violations. Each violation is addressed below. Material

questions of fact exist regarding the remaining 47 alleged violations, which DEC Staff will have to prove at hearing or abandon.

First Cause of Action

DEC Staff allege that the respondents committed nine violations of ECL 15-0501 and 6 NYCRR 608.2. These sections prohibit any person from changing, modifying or disturbing any protected stream, its bed or banks without a permit. Specifically, DEC Staff alleges three violations were committed by the Gagliardi Family, three by the Galpine Family and one each by: Clover Drainage, Inc. and Thomas Kearns individually; L. Petrosino, Inc.; and John Ippolito Trucking & Excavating, Inc.

All of the respondents are persons as that term is defined in 6 NYCRR 608.1(n). In its complaint, DEC Staff alleges that the stream at the site is a tributary of Lemon Creek which is a navigable water of the State of New York and classified as a Class B fresh surface water pursuant to 6 NYCRR 890 (complaint paragraph 8). Attached to DEC Staff counsel's affirmation as Exhibit C is an aerial photograph from the Department's GIS 2004 aerial image data base that shows the stream crossing the site (both the Gagliardi and Galpine Families properties) and flowing into Lemon Creek.

In his affidavit, ECO DeAngelis states he observed excavation, dumping and filling in the stream on June 6, 2005 on both the 123 and 131 Keating Street properties (paragraph 8). Attached as Exhibit B to this affidavit are six photographs taken by ECO DeAngelis. Three of these photos (#1, #2 and #3) show an excavator and employee of Clover Drainage, Inc. at the site.

ECO DeAngelis continues in his affidavit that he again observed grading and leveling of fill in the stream bed on June 8, 2005 (paragraph 17). On this occasion, he observed that an employee of John Ippolito Trucking & Excavating, Inc. was operating a crawler/loader behind 123 and 131 Keating Street.

On August 4, 2005, DEC Staff Biologist Pane visited the site and took more photos and prepared a field drawing (Pane Affidavit paragraphs 11 & 12). Mr. Pane does not allege that additional work had been done at the site since June 8, 2005 and it is impossible to come to such a conclusion from the photographs provided.

The Gagliardi Family has not responded to this motion and, thus, has failed to raise any triable issues of fact in

opposition. DEC Staff has shown that the Gagliardi Family is liable for two violations allegedly occurring on their property, the actions observed by ECO DeAngelis on June 6 and June 8, 2005. DEC Staff has failed to prove liability for the alleged violation occurring on August 4, 2005 because no work was observed on that day.

The Galpine Family did file an answer and other papers responding to DEC Staff's motion. In their answer, the Galpine Family denies that they committed the violations. In his affidavit, Alfred Galpine states that neither he nor his wife "have ever spoken with, met with, written to, called, directed, ordered or controlled any of the contractors" named in DEC Staff's papers. Mr. Galpine does not allege that the violations did not occur on his property nor does he state that they occurred without his permission. Thus, the Galpine family do not raise a triable issue of fact and DEC Staff has shown that the Galpine Family is liable for two violations alleged, the actions observed by ECO DeAngelis on June 6 and June 8, 2005. DEC Staff has failed to prove liability for the alleged violation occurring on August 4, 2005 because no work was observed on that day. Information regarding the Galpine Family's relationship with the contractors may be relevant regarding the appropriate civil penalty amount, but not to the fact that the violation occurred on property owned by the Galpine Family.

Clover Drainage, Inc., and Thomas Kearns individually, did not reply to DEC Staff's motion. DEC Staff alleges in its complaint that Thomas Kearns is responsible for the day-to-day operations of Clover Drainage, Inc. This statement is repeated in DEC Staff counsel's affirmation, however, the basis of this allegation is not disclosed nor is any other proof offered to show that Thomas Kearns is responsible for the day-to-day operations of Clover Drainage, Inc. DEC Staff provided photographs of employees of Clover Drainage, Inc. working in the area of the violations on June 6, 2005 and this evidence is sufficient to conclude that Clover Drainage, Inc. is liable for this violation. Without any proof of Mr. Kearns' control over the corporation, there is insufficient proof that he should be found liable individually.

L. Petrosino, Inc. also did not answer. However, DEC Staff presents no evidence that this respondent committed a violation on June 6, 2005, as alleged. ECO DeAngelis states in his affidavit that he ordered a dump truck crew employed by this respondent to stop work at the site, but never states he saw this crew commit a violation. This statement does not support a claim by DEC Staff counsel that the ECO "observed a dump truck owned

and operated by Petrosino placing fill in the... stream bed" (Urda affirmation paragraph 13). ECO DeAngelis makes no such statement, nor does he state he saw L. Petrosino, Inc. engaged in any activity at the site. Thus, based on the evidence submitted with the motion, DEC Staff has not proved this violation. It remains a matter for hearing.

Accordingly, DEC Staff have shown that the stream bed was altered without a permit on both June 6, and June 8, 2005. Since these violations occurred at both 123 and 131 Keating Street, the owners of both properties are liable for the violations. In addition, on June 6, 2005, an employee of Clover Drainage, Inc. was observed altering the stream bed and on June 8, 2005, an employee of John Ippolito Trucking & Excavating, Inc. was observed altering the stream bed. Therefore, DEC Staff has shown that six of the nine violations alleged occurred.

Second Cause of Action

DEC Staff alleges that the respondents violated ECL 15-0503 and 6 NYCRR 608.3. These sections prohibit the construction or alteration of dams or similar structures that permanently or temporarily impound water. DEC Staff's theory is that the placement of the fill in the stream bed created an impoundment and the pipe placed in the stream bed is used to convey water away from the impoundment.

Section 15-0503(1)(a) reads "no dam or impoundment structure, including any artificial obstruction, temporary or permanent, in or across a natural stream or water course, shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit...." The implementing regulations state that this section "applies to the construction or alteration of dams or similar structures that permanently or temporarily impound water" (6 NYCRR 608.3(a)).

The question is: was a dam or impoundment structure created in this case? DEC Staff provides two different statements regarding this allegation. ECO DeAngelis describes the activities that occurred at the site as the placement of a pipe approximately 200 feet long and 40 inches in diameter in the stream bed and the placement of fill above it (paragraph 8). DEC Staff member Pane states the pipe was placed to convey water which was being impounded by the fill material. The ECO states the pipe was placed first while Mr. Pane indicates that the fill was placed first, creating an impoundment which was drained using the pipe. Thus, DEC Staff has not shown that the waters of the stream were impounded, nor a pond formed. Based on the instant

motion, DEC Staff has not shown that the respondents created a dam or other impoundment structure. Therefore, the nine alleged violations of this section are not proven on this motion.

Third Cause of Action

DEC Staff alleges that respondents violated ECL 15-0505 and 6 NYCRR 608.5. These sections prohibit a person from excavating or placing fill without a permit in (1) any navigable water of the state, or (2) 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. A navigable water of the state means "all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated...." (6 NYCRR 608.1(1)).

In this case, DEC Staff offered no proof that the stream is navigable in fact or that any vessel could operate on it. Accordingly, DEC Staff has not demonstrated that the stream is a navigable water of the state. In addition, while DEC Staff have shown that excavation and fill activities did occur in freshwater wetland AR 33 (see discussion of cause of action #5, below) and that AR 33 is contiguous with Lemon Creek (which is a navigable waterway), DEC Staff has not shown that the wetlands altered in the present case were inundated at mean high water level. Based on the instant motion, DEC Staff has not proven the eighteen alleged violations of this section.

Fourth Cause of Action

DEC Staff alleges that the respondents violated ECL 17-0501. This section states "it shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301."

However, DEC Staff does not identify which water quality standard was contravened by the respondents' action. Accordingly, DEC Staff has not proven the nine alleged violations of this section.

Fifth Cause of Action

DEC Staff alleges a total of twenty-six violations related to the alleged excavation, dumping and filling in regulated

freshwater wetlands and adjacent areas. These alleged violations occurred on three different dates, June 6, 2005, June 8, 2005 and August 3, 2005. As discussed below, DEC Staff has proved eighteen of the alleged twenty-six violations.

June 6, 2005 Alleged Violations

DEC Staff alleges that eleven violations occurred on June 6, 2005: three by the Gagliardi Family; three by the Galpine Family; three by Clover Drainage, Inc. and Thomas Kearns; and two by L. Petrosino, Inc.

In his affidavit, ECO Jason DeAngelis states that on June 6, 2005 he observed "excavation, dumping and filling in the freshwater wetland area" behind the homes at both 123 and 131 Keating Street. Attached to his affidavit are photographs he took of this activity, including photos of an employee of Clover Drainage, Inc. and excavating equipment at the site.

The Gagliardi Family has not responded to DEC Staff's complaint. Based on the evidence provided in ECO DeAngelis' affidavit and accompanying photographs, DEC Staff has proven the three violations alleged on June 6, 2005.

The Galpine Family did answer and denied the allegations made by DEC Staff. Alfred Galpine, in his accompanying affidavit states "neither my wife or I have ever spoken with, met with, written to, called, directed, ordered or controlled any of the contractors described in the DEC affidavits." Mr. Galpine does not address the photographs showing the activity on his property or ECO's statement that he observed excavation, dumping and filling in the freshwater wetland behind his home. Nor does Mr. Galpine assert that he and his wife are innocent victims of the activities on their property. Based on the affidavit of ECO DeAngelis and the accompanying photographs, DEC Staff has proved that the Galpine Family is liable for the three violations of excavating, dumping and filling in a freshwater wetland on June 6, 2005. The degree of control the Galpine Family had over the contractors may be relevant to the determination of the appropriate penalty, but not to whether the violation occurred.

L. Petrosino, Inc. did not answer. ECO DeAngelis states in his affidavit that he ordered a dump truck crew from L. Petrosino, Inc. to stop work immediately, but does not state that he observed any activity by this crew to support the allegation in the complaint that L. Petrosino, Inc. engaged in dumping and filling. No photographs of this crew were included with the motion. Accordingly, DEC Staff has failed to prove that L.

Petrosino, Inc. committed the two violations alleged. DEC Staff may attempt to prove these violations at hearing.

Neither Clover Drainage, Inc. nor Thomas J. Kearns answered. ECO DeAngelis' photographs taken on June 6, 2005 show equipment in the wetland area and he states that this equipment is owned by Clover and that the individuals shown nearby are Clover employees. In his affirmation, DEC Staff counsel asserts that Mr. Kearns had day-to-day control of the operations of Clover, however, as discussed above, the basis for this allegation is not disclosed. Based on this evidence, DEC Staff has proven the three alleged violations of excavating, dumping and filling in a freshwater wetland were committed by Clover Drainage, Inc., however, the evidence is not sufficient to conclude that Mr. Kearns should be found liable individually.

June 8, 2005 Alleged Violations

DEC Staff alleges that nine violations occurred on June 8, 2005; three by the Gagliardi Family, three by the Galpine Family, and three by John Ippolito Trucking and Excavating, Inc.

In his affidavit, ECO DeAngelis states he returned to the site on June 8, 2005 and observed work continuing at the site and additional excavation and placement of fill in the wetland area. He took additional photographs of the work at the site and these were included with his affidavit.

The Gagliardi Family has not responded to DEC Staff's complaint. Based on the evidence provided in ECO DeAngelis' affidavit and accompanying photographs, DEC Staff has proven the three violations alleged on June 8, 2005.

The Galpine Family did answer and denied the allegations made by DEC Staff. As discussed above, Mr. Galpine does not offer proof contradicting the photographs showing the activity on his property or ECO's statement that he observed additional excavation, dumping and filling in the freshwater wetland behind his home. Based on the affidavit of ECO DeAngelis and the accompanying photographs, DEC Staff has proved that the Galpine Family is liable for the three violations of excavating, dumping and filling in a freshwater wetland. Again, the degree of control the Galpine Family had over the contractors may be relevant to the determination of the appropriate penalty, but not to whether the violation occurred.

John Ippolito Trucking & Excavating, Inc. did not answer. On June 8, 2005, ECO DeAngelis observed an employee of the

corporation operating a crawler/loader behind 123 and 131 Keating Street, grading and leveling fill in the wetland and stream bed. The volume of fill, the area cleared and the area excavated had expanded since the ECO's June 6, 2005 inspection. The ECO ordered work stopped and Mr. Ippolito came to the site and removed the crawler/loader. DEC Staff has also provided photographs depicting the site on June 8, 2005.

In his October 15, 2005 letter to DEC Staff counsel, Mr. Ippolito asserts additional facts. He writes that his company hired out a trackloader on an hourly basis and that it was not a contractor or subcontractor at the site. An unidentified owner of the property stated to Mr. Ippolito that there was a large quantity of fill in the side yard. Based on the evidence included with DEC Staff's motion, DEC Staff has proven John Ippolito Trucking & Excavating, Inc. is liable for the three violations alleged.

In his letter, Mr. Ippolito raises several arguments that could be considered to lower the penalty DEC Staff is requesting. He states that his company was a victim in this matter and that he had no reason to believe when the company was hired that the work was illegal. He asserts that the NYC Department of Sanitation allows homeowners to bring in as much as 300 cubic yards of fill, so the rental was not for an obviously illegal purpose. In addition, a smaller earthmover (a bobcat) was also at the site indicating that the work was not illegal. As soon as the ECO informed the employee of Ippolito, all work ceased and the equipment was removed. He continues that DEC Staff should have a duty to somehow inform contractors that there were violations at the site, by perhaps installing a sign or barricade. These arguments may impact the amount, if any, of civil penalty to be assessed in this matter, but do not raise triable issues of fact suggesting that the violations did not occur.

August 3, 2005 Alleged Violations

DEC Staff alleges six violations occurred on August 3, 2005; three by the Gagliardi Family, and three by the Galpine Family.

In his affidavit, DEC Staff member Joseph Pane states he visited the site on August 4, 2005 and "observed that fill material, consisting of rock and soil, had been deposited without any approval or authorization, in the freshwater wetland and regulated adjacent area. In addition, a large concrete pipe had been placed without approval or authorization, in the stream bed at the rear of 123 Keating Street and extending beyond the

boundary of 131 Keating Street. The pipe was placed to convey water which was being impounded by the fill material. I estimated that the depth of fill material ranged from 5 to 15 feet across the site." However, Mr. Pane does not state that he saw any activity at the site, nor does he assert that additional work had been done at the site since the June 8, 2005 visit of ECO DeAngelis. Comparing the photographs taken by Mr. Pane on August 4, 2005 to those taken by ECO DeAngelis on June 8, 2005 is not sufficient to conclude that additional violations had occurred. DEC Staff has not proven these six violations based on the evidence submitted and may introduce additional evidence at hearing regarding these violations.

PENALTY RECOMMENDATION

It is premature at this point to make a recommendation regarding penalty because 47 alleged violations remain unproven at this time. DEC Staff must now either file a statement of readiness for an adjudicatory hearing on these allegations, discontinue some or all of the pending allegations, or take other action before a final order in this matter can be issued by the Commissioner.

June 28, 2006
Albany, New York

_____/s/_____

P. Nicholas Garlick
Administrative Law Judge

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