

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,

by

ANTHONY COSTA
TERRY ANN GAGLIARDI
KATHLEEN A. KRIEG, and
ALFRED GALPINE

RULING ON MOTIONS

DEC# R2-20060718-296

December 11, 2007

Respondents.

SUMMARY

This ruling is the fourth in a series of administrative enforcement matters brought by Staff of the Department of Environmental Conservation (DEC Staff) for unpermitted activities on two adjoining properties, 123 and 131 Keating Street (the site), Staten Island. This ruling addresses three outstanding motions. The first, a motion to dismiss, brought by counsel for respondents Kathleen Krieg and Alfred Galpine, is denied. The second motion, brought by DEC Staff counsel to clarify or strike the twenty-two affirmative defenses raised in the answer of respondents Krieg and Galpine, is granted in part. The third motion, DEC Staff's motion for order without hearing, seeks summary judgment against the owners of the two properties, Terry Ann Gagliardi (owner of 123 Keating Street) and Kathleen Krieg and Alfred Galpine (owners of 131 Keating Street) and Ms. Gagliardi's husband, Anthony Costa, for his role in directing and supervising the violations, is granted in part. Based on the evidence in the administrative record, DEC Staff has established it is entitled to summary judgment on seventeen of the twenty-four violations alleged.

HISTORY

This is the fourth ruling in this case and the companion consolidated actions. For an extensive discussion of the earlier procedural history of this case, see my rulings of June 28, 2006, December 13, 2006, and April 6, 2007. Briefly, the June 28, 2006

ruling addressed DEC Staff's first complaint (dated October 3, 2005) and found DEC Staff was entitled to summary judgment on 24 of 71 alleged violations against seven respondents (including the four named in the instant complaint) for actions at the site. The December 13, 2006 ruling determined that a question of fact existed as to whether or not Terry Ann Gagliardi had been served with the October 3, 2005 complaint. DEC Staff subsequently served her. The April 6, 2007 ruling denied Ms. Gagliardi's request for additional time to answer and found her liable for eight violations alleged in the October 3, 2005 complaint.

PROCEEDINGS

This enforcement action was commenced by DEC Staff by complaint dated February 22, 2007. The complaint alleged three causes of action, consisting of twenty-four separate violations against four respondents: Anthony Costa and Terry Ann Gagliardi and Kathleen A. Krieg and Alfred Galpine. The three causes of action alleged are that the respondents: (1) changed, modified or disturbed a stream bed in violation of ECL 15-0501 and 6 NYCRR 608.2; (2) illegally discharged organic or inorganic matter into the waters of the state in violation of ECL 17-0501; and (3) excavated, dumped and filled, and conducted other unpermitted activities in a regulated freshwater wetland in violation of ECL 24-0701 and 6 NYCRR 663.4. DEC Staff alleges that these violations occurred on May 26, 2006, May 31, 2006 and January 17 and 19, 2007.

By answer dated March 8, 2007, respondents Krieg and Galpine denied the allegations and raised 22 affirmative defenses.

No answer was timely received from either respondent Gagliardi or respondent Costa.

By motion dated March 23, 2007, DEC Staff moved for an order without hearing against all four respondents based on the allegations in the February 22, 2007 complaint. Accompanying this motion was the affirmation of DEC Staff counsel John Urda, Esq. (with three exhibits attached), the affidavit of Environmental Conservation Officer (ECO) Brandon Chamberlin (with two exhibits, consisting of six photographs, attached), and the affidavit of DEC Staff biologist Joseph J. Pane (with five exhibits attached).

DEC Staff filed a second motion on March 23, 2007, seeking to strike or clarify the 22 affirmative defenses raised by respondents Krieg and Galpine in their answer.

By letter dated March 29, 2007, Mr. Costa informed me that because he was currently serving his sentence in federal prison, his receipt of DEC Staff's February 22, 2007 complaint was delayed. He requested an additional 20 days to answer.

By letter dated April 2, 2007, DEC's Chief Administrative Law Judge (ALJ) acknowledged receipt of the case in DEC's Office of Hearings and Mediation Services (OHMS) and consolidated this matter with a previous enforcement matter involving the same respondents at the same site for similar violations (DEC File #R2-20050622-187 and #R2-20050622-188).

Counsel for Kathleen Krieg and Alfred Galpine responded to DEC Staff's motions by papers dated April 19, 2007. To oppose DEC Staff's motion to strike or clarify the affirmative defenses, counsel filed an affirmation. To oppose DEC Staff's motion for order without hearing, counsel filed a second affirmation entitled "Cross-motion to dismiss and affirmation in opposition to motion for an order without hearing." No separate motion papers were filed by counsel for Krieg and Galpine.

By affirmation dated April 25, 2007, DEC Staff counsel opposed the cross-motion to dismiss filed by counsel for Krieg and Galpine.

By letter dated May 8, 2007, I extended Mr. Costa's time to answer until May 25, 2007. I also wrote to the parties and reminded them that since this case was consolidated with the earlier enforcement matter, respondents from the earlier case that are not respondents in this matter must also receive all communications. An updated service list was provided.

By an undated letter received on May 23, 2007, Mr. Costa requested an additional 30 to 60 days to answer, because he had been transferred to a different federal prison and was awaiting bed space at this facility. Because of his situation he did not have access to his files, legal work or other papers.

By letter dated June 4, 2007, I again extended Mr. Costa's time to answer until July 15, 2007.

By papers dated July 6, 2007, respondent Costa moved for a third extension, this time 30 days. Among the reasons cited was the distance between the federal prison in White Deer, PA and the site of the violations, his inability to afford an attorney, and the limited hours of the prison's law library. DEC Staff opposed this extension request by letter dated July 12, 2007 as being excessive.

By letter dated July 18, 2007, I again granted Mr. Costa an extension to answer until August 6, 2007, and indicated in this letter that this extension would be his last.

On August 8, 2007, I received an Affidavit of Anthony Costa as well as a Brief of Anthony Costa and Terry Ann Gagliardi from Mr. Costa. In his brief, Mr. Costa states that he received DEC Staff's papers but was not in possession of any papers submitted by counsel for respondents Krieg and Galpine. This may have been due to the fact that Mr. Costa had been moved through the federal prison system and he did not receive his mail.

On September 12, 2007, I wrote to Mr. Costa and enclosed copies of papers he had not received.

KRIEG and GALPINE'S MOTION TO DISMISS

As part of the submissions in opposition to DEC staff's motion for order without hearing, counsel for Kathleen Krieg and Alfred Galpine filed a "Cross-Motion to Dismiss and Affirmation in Opposition to Motion for an Order Without Hearing." This document was not accompanied by a separate motion and despite its title, the text is in the form of an affirmation in opposition to DEC staff's motion for order without hearing.

DEC Staff counsel responded to the motion to dismiss by affirmation dated April 25, 2007. DEC staff counsel raises several objections to the cross motion: first, the affirmation was not accompanied by separate motion papers; and second, the cross-motion fails to cite proper grounds or legal authority. DEC staff counsel argues that the complaint sets forth the elements and allegations necessary to state each claim and meets the minimum requirements for pleadings in 6 NYCRR 622.3(a)(1) and CPLR 3013 and, therefore, the cross-motion to dismiss should be denied.

The cross-motion to dismiss is denied. Without addressing the procedural issue that no actual cross-motion was filed, on the merits, the complaint clearly sets forth the legal authority and jurisdiction under which the proceeding is to be held, as well as the dates and place of the alleged violations. Moreover, the sections of environmental law and regulation allegedly breached are explicitly set forth, as are the alleged actions which constitute the violation. The merits of the arguments raised in the cross-motion/affirmation are addressed below, in the discussion of the individual causes of action.

DEC STAFF'S MOTION TO DISMISS OR CLARIFY AFFIRMATIVE DEFENSES

By papers dated March 23, 2007, DEC Staff moved to strike or clarify the 22 affirmative defenses raised in the answer provided by Kathleen Krieg and Alfred Galpine, pursuant to 6 NYCRR 622.4(f). Counsel for these respondents responded to DEC Staff's motion by an affirmation dated April 19, 2007. Both parties recognize that these affirmative defenses and objections were raised with respect to the violations alleged in the first complaint (dated October 3, 2005).

In his affirmation, respondents' 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. 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, these respondents have had notice of and a full opportunity to be heard on DEC Staff's motion. 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)).

In his brief, Mr. Costa also addresses the affirmative defenses and provides additional background. While he did not have a copy of the answer provided by counsel for Kathleen Krieg and Alfred Galpine or the counsel's affirmation in opposition to DEC Staff's motion, Mr. Costa did have a copy of DEC Staff's motion before he wrote his brief. Despite not possessing the complete file, Mr. Costa's brief demonstrates he understood the arguments being made. Although, nothing in Mr. Costa's brief affects the rulings below, other information he discusses may be relevant in a future hearing on the amount of civil penalty and/or possible remediation to be required at the site, and is discussed at the end of this ruling.

The first affirmative defense raised in the answer is that the complaint fails to state a claim for which relief can be granted. In his affirmation in opposition to DEC Staff's motion, respondents' counsel argues that because the complaint fails to allege any action by the respondents, such as "permitting" or

"allowing," in this cause of action, the complaint fails to state a claim. DEC Staff responds by stating that the complaint provides the necessary level of detail as to the time and nature of the alleged violations to meet the minimum standards of 6 NYCRR 622.3(a)(1) and CPLR 3013. The complaint clearly sets forth the separate alleged violations committed by the respondents (see paragraphs 35, 38, and 45 through 51) and articulates 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 answer is that the complaint fails to allege facts concerning the respondents Alfred Galpine and Kathleen Krieg that constitute a violation of law. DEC Staff responds by stating that the complaint provides detailed facts and legal authority regarding the alleged violations. DEC Staff has alleged that Kathleen Krieg and Alfred Galpine own 131 Keating Street, and that the parcel contains a portion of regulated freshwater wetland AR-33, its adjacent area and a protected stream. DEC Staff further alleges that the respondents 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 respondents 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 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 contains no factual or legal support and that the defense fails to place DEC Staff on notice of any legal theory upon which it is based. The defense is easily understood, that no wetlands under the jurisdiction of DEC exist at the site. The merits of this claim are discussed later in the report. The motion as to the third affirmative defense is denied.

The fourth affirmative defense raised in 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 contains no factual or legal support and is meritless. Again, the defense is easily understood, that no waters, navigable waters, stream or a stream bed under the jurisdiction of DEC exist at the site. The merits of this claim are discussed later in the report. The motion as to the fourth affirmative defense is denied.

The fifth affirmative defense raised in the 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 waters of the state (6 NYCRR 890), by definition these waters are suitable for fish propagation and survival (6 NYCRR 701.7). Since this is a challenge to the classification of the stream and, therefore, the validity of the regulations, an administrative hearing is not the proper forum. Rather, the respondents would have to petition to reclassify the stream through the appropriate administrative process. Accordingly, the fifth affirmative defense is stricken.

The sixth affirmative defense raised in the answer is that the area cited by DEC does not abut navigable water as defined by the law. As discussed above, the twenty-two affirmative defenses raised in the answer are identical to those raised in the earlier enforcement action; however, there are fewer causes of action and violations alleged in this case than in the earlier case. In this case, DEC Staff has not alleged a violation of ECL 15-0505 as it did in the earlier case. A valid defense to an alleged violation of ECL 15-0505 would be that no navigable water exists at the site, as I held in my June 28, 2006 ruling. However, since DEC Staff alleges no violation involving a navigable water, this affirmative defense is misplaced and the sixth affirmative defense is stricken.

The seventh affirmative defense raised in the 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 answer is that the allegations do not concern property owned or in the control of the respondents. DEC Staff argues that this affirmative defense contains no factual or legal support. The defense is easily understood, that the respondents do not own the property where the violation occurred. The merits of this affirmative defense are discussed later. The motion as to the eighth affirmative defense is denied.

The ninth affirmative defense raised in the answer is that any alleged placement of fill constituted the replacement of pre-existing fill as permitted by law. The answer and subsequent affirmation by counsel cite no law that would permit the actions documented by DEC Staff in its papers. The respondents have

failed to present a legal theory upon which this defense is based, and accordingly it is stricken.

The tenth affirmative defense raised in the answer is that the temporary placement of material in a regulated area does not constitute a violation of law. Again, the respondents cite no law that would permit the actions documented by DEC Staff in its papers. Respondents have failed to present a legal theory upon which this defense is based, and accordingly it is stricken.

The eleventh affirmative defense raised in the 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. However, the question of whether this is a valid affirmative defense is separate from the question of whether or not it has merit. If the respondents had a valid DEC permit or other approval for the actions alleged, it would be a valid defense. The merits of this defense are discussed later. The motion as to the eleventh affirmative defense is denied.

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

The thirteenth affirmative defense raised in the 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 or other approval for the actions alleged, it would be a valid defense. The merits of this defense are discussed later. The motion as to the thirteenth affirmative defense is denied.

The fourteenth affirmative defense raised in the 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 answer is that any alleged work was undertaken to protect the property from flooding. This affirmative defense seems to refer to the respondents' claim of emergency in response to the violations alleged on January 17 and 19, 2007. If proven, this may be a

valid defense to these alleged violations, as discussed later. The motion as to the 15th affirmative defense is denied.

The sixteenth affirmative defense raised in the answer is that any alleged work was undertaken to protect the property from contamination by nearby property owners. Respondents' counsel explains that his clients' actions were "pursuant to an emergency and is either not a violation or equitably relevant". DEC Staff responds that no factual or legal support is provided to support this affirmative defense and neither the type of contamination or the identity of the nearby property owners is disclosed. Again, the respondents have failed to place DEC Staff on notice regarding the facts and/or legal theory regarding this affirmative defense. This affirmative defense may be referring to alleged contamination from the Staten Island University Hospital that Mr. Costa refers to in his papers. However, this is not a valid affirmative defense, but rather, as discussed later it may be a mitigating factor to be considered in the determination of the civil penalty amount and/or possible remediation. The sixteenth affirmative defense is stricken.

The seventeenth affirmative defense raised in the answer is that any alleged work has improved any wetlands or abutting area cited by DEC. Respondents' counsel explains that his clients actions were "pursuant to an emergency and is either not a violation or equitably relevant". DEC Staff argues that no factual or legal support for this proposition is provided. Again, the respondents have 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 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 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 petitioner along the waterfront in the area occupied in the site at issue. Respondents' counsel explains his clients' contention that DEC Staff repeatedly failed to address contamination of the area by third parties. DEC Staff responds that the respondents have failed to identify which actions of DEC Staff are at issue or what contamination is at issue. Again, the respondents have failed to place DEC Staff on notice regarding the facts and/or

legal theory regarding this affirmative defense. This affirmative defense may again be referring to alleged contamination from Staten Island University Hospital. As discussed above in sixteenth affirmative defense, this may be a factor relevant to possible civil penalty amount and/or possible remediation. The nineteenth affirmative defense is stricken.

The twentieth affirmative defense raised in the answer is that DEC has named respondents Alfred Galpine and Kathleen Krieg as respondents without any evidence to support this action and that the respondents have 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. This is a valid defense, claiming not to have any liability, and the merits of this claim are discussed later. The motion as to the twentieth affirmative defense is denied.

The twenty-first affirmative defense raised in the 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 respondents' papers do make reference to two sections of the ECL, 15-0501(6) and 15-0505(6) which authorize unpermitted emergency actions and to flooding that took place on January 17, 2007. The merits of these claims are discussed below. The motion as to the twenty-first affirmative defense is denied.

The twenty-second affirmative defense raised in the 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, demonstrable as a matter of law on DEC Staff's motion for order without hearing, are as follows.

The Respondents

1. Terry Ann Gagliardi owns the property at 123 Keating Street, Staten Island, New York. This property is also identified as Richmond County Tax Block 6699, Lot 30.
2. Anthony Costa is Terry Ann Gagliardi's husband. Mr. Costa has been incarcerated continuously from June 9, 2006 until the present (Costa 9).

3. 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.

The Site of the Violations

4. The properties located at 123 and 131 Keating Street are adjacent to one another and together are the site of the violations.
5. Both the 123 and 131 Keating Street properties contain a portion of regulated freshwater wetland AR-33 and its adjacent area.
6. 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

7. On Friday, May 26, 2006, Environmental Conservation Officer (ECO) Brandon C. Chamberlin responded to a report of unpermitted activity at the site. At the site, ECO Chamberlin observed that the site had been newly filled and graded and that plywood foundation forms had been placed in the filled area.
8. On Wednesday, May 31, 2006, ECO Chamberlin returned to the site with ECO Kurt Bush, and two DEC Staff biologists, Joseph Pane and Dawn McReynolds. At the site, ECO Chamberlin observed that additional fill had been deposited and graded and continued installation of foundation forms.
9. On January 17, 2007, DEC Staff member Joseph Pane inspected the site and observed additional fill had been placed and spread in the regulated wetland area at 123 Keating Street. He also observed on 131 Keating Street: a plastic bucket set in a depression in the wetland area attached to a hose discharging into the wetland; grass planted in the wetland area; a trench dug through the wetland area; and a pipe installed in the trench. Mr. Pane returned to the site on January 19, 2007 and took photos.

10. None of the Respondents has the necessary permits on file with the Department for the activities described in findings of fact 7, 8 and 9, above.

DISCUSSION

DEC Staff's February 22, 2007 complaint alleges three causes of action and a total of twenty-four violations. DEC Staff asserts that half of the violations were committed by Kathleen Krieg and Alfred Galpine, as owners of 131 Keating Street. DEC Staff asserts that the remaining violations were committed by Terry Ann Gagliardi, who owns 123 Keating Street, and by her husband Anthony Costa, for his role in supervising and directing the illegal filling, excavation and construction activities at the site. As discussed more fully below, based on the evidence in the record, DEC Staff has demonstrated it is entitled to summary judgment on liability on seventeen of the twenty-four violations alleged.

The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (see Matter of Richard Locaparra, d/b/a L&L Scrap Metals, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003). The Commissioner's discussion includes numerous citations to case law, the Department's enforcement regulations, and CPLR 3212.

The party moving for summary judgment has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])" (Friends of Animals v. Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 [1979]). The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact (see Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]). The affidavit 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 (see Hanson v. Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 [Sup Ct, Oswego County 1968]). The failure of a responding party to deny a fact alleged in the moving papers constitutes an admission of the fact (see Kuehne & Nagel, Inc. v. Baiden, 36 NY2d 539, 544 [1975]).

First Cause of Action

In the first cause of action in the February 22, 2006 complaint, DEC Staff alleges that three violations of 15-0501 and 6 NYCRR 608.2 were committed by Anthony Costa and Terry Ann Gagliardi and three by Kathleen Krieg and Alfred Galpine. Specifically, on various dates, May 26, 2006, May 31, 2006 and January 17-19, 2007, the respondents changed, modified or disturbed the stream bed behind 123 and 131 Keating Street.

In its motion for order without hearing, DEC Staff provides copies of the deeds of the two parcels. The deed for 123 Keating Street demonstrates that Terry Ann Gagliardi owns this portion of the site (Exh. A to Urda affirmation) and the deed for 131 Keating Street demonstrates that Alfred Galpine and Kathleen Krieg own this portion of the site (Exh. B to Urda affirmation). DEC Staff cites ownership of the site as the basis for liability for these three respondents. Anthony Costa's liability is based on his alleged role in directing and supervising the activities that constitute the violations.

As discussed above, 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 (Finding of Fact #6). This stream is now apparently buried in a pipe below fill at the site. In his affirmation in opposition, counsel for respondents Krieg and Galpine argues that because the stream is now buried and the photos produced by DEC Staff show no waterway, that DEC Staff's first cause of action is not supported by fact. This argument is strictly a legal one and no evidence is provided. This argument must fail, however, because there is in fact a protected stream at the site and its stream bed continues to exist, despite being buried. The continued filling and grading on land where the stream bed is located is a violation. This argument is rejected.

Alleged Violations on May 26, 2006

With respect to the first two violations in the first cause of action, DEC Staff alleges that the respondents conducted unpermitted grading and filling in the stream bed on May 26, 2006. As evidence of these violations, DEC Staff includes with its motion for order without hearing the affidavit of ECO Chamberlin who states that on the evening of May 26, 2006, he responded to a report of unpermitted activity at the site. In

his affidavit, ECO Chamberlin states he observed that the area behind the houses at 123 and 131 Keating Street had been newly filled and graded (Chamberlin 10). This is the area above where the stream is buried. The ECO took several photographs which are attached to his affidavit; Exhibits A-1 and A-2 show the newly placed and graded fill. Exhibit B to Mr. Pane's affidavit is a map showing where the stream was before the filling and grading began at the site. This exhibit shows the stream running through the wetland. Thus, while the ECO does not explicitly state he saw filling in the stream area, it is reasonable to conclude from the photos and the maps in the record that the filling occurred in the area where the stream bed was prior to the illegal activities of the respondents. The ECO states he spoke to Mr. Costa, and that Mr. Costa denied responsibility for the construction activities at the site (Chamberlin 9).

Based on this evidence, DEC Staff has made a prima facie case that the violation was committed by Terry Ann Gagliardi based upon her ownership of 123 Keating Street. Similarly, DEC Staff has made a prima facie case that Kathleen Krieg and Alfred Galpine are liable for the violation, based on their ownership of 131 Keating Street. Since no evidence has been submitted by the respondents that raises a material question of fact regarding these alleged violations, DEC Staff is entitled to summary judgment. Respondent Terry Ann Gagliardi is liable for a single violation and respondents Kathleen Krieg and Alfred Galpine are also liable for a single violation, as alleged in DEC Staff's complaint.

However, DEC Staff has not made a prima facie case against Anthony Costa because he is neither the owner of the site nor was he observed performing any work at the site. DEC Staff offers no proof that Mr. Costa was directing or supervising this filling and grading on this date.

Alleged Violations on May 31, 2006

With respect to the second two violations alleged in the first cause of action, DEC Staff alleges that respondents conducted unpermitted grading and filling in the stream bed on May 31, 2006. As evidence of these violations, DEC Staff includes with its motion for order without hearing the affidavits of ECO Chamberlin and DEC Staff member Pane. ECO Chamberlin states in his affidavit that, on May 31, 2006, he returned to the site with three other DEC Staff members: ECO Kurt Bush, Joseph Pane and Dawn McReynolds. ECO Chamberlin states that on May 31, 2006 he observed additional deposition and grading of fill in the wetland and adjacent areas at both 123 and 131 Keating Street

(Chamberlin 14). During this site visit, ECO Chamberlin took additional photos, three of which were attached to his affidavit (Exh. B). These photos, when compared to those taken on May 26, 2006, show additional grading and filling behind both residences. According to DEC Staff member Pane's affidavit, he also took photos at the site on May 31, 2006 (Exh. D). Exhibit B to Mr. Pane's affidavit is a map showing where the stream was before the filling and grading began at the site. This exhibit shows the stream running through the wetland. Thus, while the ECO does not explicitly state he saw filling in the stream area, it is reasonable to conclude from the photos and the maps in the record that the filling occurred in the area where the stream bed existed prior to the illegal activities of the respondents.

With respect to the alleged violation by Mr. Costa, ECO Chamberlin states that he again spoke to Mr. Costa and issued him ECL administrative summons #523740. According to ECO Chamberlin, Mr. Costa stated during this visit that he did not have any permits for the work being conducted at the site and that he was going to finish the job, despite being told it would subject him to potentially greater penalties. These statements create a prima facie case against Mr. Costa for directing and supervising the activities which constitute the violations. In his affidavit, Mr. Costa states he did not participate in the violations, was not observed participating in or directing the violations and has no idea who is responsible for the fill (Costa 23). This evidence contradicts ECO Chamberlin's evidence and creates a fact question, which a hearing is necessary to resolve. An evaluation of the veracity of Mr. Costa's statement is not appropriate on a motion for order without hearing, which is the administrative equivalent of a motion for summary judgment pursuant to CPLR 3212.

Based upon the evidence in the record, DEC Staff has made a prima facie case that the violation was committed by Terry Ann Gagliardi based upon her ownership of 123 Keating Street. Similarly, DEC Staff has made a prima facie case that Kathleen Krieg and Alfred Galpine are liable for the violation, based on their ownership of 131 Keating Street. Since no evidence has been submitted by these respondents that raises a material question of fact regarding these alleged violations, DEC Staff is entitled to summary judgment. Respondent Terry Ann Gagliardi is liable for a single violation and respondents Kathleen Krieg and Alfred Galpine are liable for a single violation.

Alleged Violations on January 17 and 19, 2007

With respect to the third pair of violations alleged in the

first cause of action, DEC Staff alleges that the respondents conducted unpermitted grading and filling in the stream bed on January 17 and 19, 2007. DEC Staff member Pane conducted a site visit on January 17, 2007 and according to his affidavit, observed additional fill placed and spread in the regulated wetland area at 123 Keating Avenue (Pane 9(i)). On January 19, 2007 Mr. Pane returned to the site and took a photo of this fill (Exh. E-1). Exhibit B to Mr. Pane's affidavit is a map showing where the stream was before the filling and grading began at the site. This exhibit shows the stream running through the wetland. Thus, while Mr. Pane does not explicitly state he saw filling in the stream area, it is reasonable to conclude from the photos and the maps in the record that the filling occurred in the area where the stream bed was prior to the illegal activities of the respondents.

Based on the evidence in the record, DEC Staff has made a prima facie case against the owner of 123 Keating Street, Terry Ann Gagliardi. DEC Staff has failed to make a prima facie case against any other respondent because no proof is offered of additional filling and grading behind 131 Keating Street on this date. Further, the allegation that Mr. Costa directed and supervised this activity is countered by the fact that he was incarcerated at the time of the violation and there is no allegation or proof that he directed this violation from his prison cell. Because no evidence has been submitted by the respondent Gagliardi, there is no material question of fact regarding the alleged violation and DEC Staff is entitled to summary judgment. Respondent Terry Ann Gagliardi is liable for a single violation.

Second Cause of Action

In its second cause of action, DEC Staff alleges that respondents placed fill in the ravine and stream bed at the site, and thereby violated ECL 17-0501 by discharging organic or inorganic matter into waters of the state contributing to a condition in contravention of water quality standards, including but not limited to, the parameters for deleterious substances, turbidity and solids as set forth at 6 NYCRR 703. Specifically, DEC Staff alleges a single, continuing violation by Kathleen Krieg and Alfred Galpine and a second continuing violation by Anthony Costa and Terry Ann Gagliardi. This violation is alleged to have begun on May 26, 2006 and continued to the date of the complaint on February 22, 2007, for a total of 272 days.

However, DEC Staff has not made a prima facie case in its motion papers to show these violations occurred. None of the

evidence included with the motion for order without hearing addresses this violation. The only mention of the stream is in the affidavit of DEC Staff member Pane, who states that the stream is buried (Pane 5). No proof is offered of any discharge to the stream or waters of the state. Because of DEC Staff's failure to prove a prima facie case with respect to this cause of action, it is not necessary to discuss the arguments raised by counsel for respondents Krieg and Galpine at this time.

Since DEC Staff has not established a prima facie case that these violations were committed, DEC Staff's motion for summary judgment for these violations is denied.

Third Cause of Action

In its third cause of action, DEC Staff alleges a total of sixteen violations of ECL 24-0702 and 6 NYCRR 663.4 for excavating, dumping, filling and other prohibited activities in regulated freshwater wetland areas. Specifically, eight violations are alleged against Anthony Costa and Terry Ann Gagliardi and eight against Kathleen Krieg and Alfred Galpine. The basis for liability is similar to that alleged in the first cause of action and based either on ownership of a portion of the site or, in the case of Mr. Costa, alleged direction and supervision of the activities constituting the violation. Each violation is discussed below.

Alleged Violations at 123 Keating Street

DEC Staff alleges that three violations of ECL 24-0702 and 6 NYCRR 663.4 occurred on May 26, 2006 at 123 Keating Street, specifically, that fill was placed in the wetland (in violation of 6 NYCRR 663.4(d)(20)), that fill was graded in the wetland (in violation of 6 NYCRR 663.4(d)(25)) and that plywood forms were constructed in the wetland (in violation of 6 NYCRR 663.4(d)(42)). The evidence included with DEC Staff's motion for order without hearing includes the affidavit of ECO Chamberlin who inspected the site on the evening of May 26, 2006. In his affidavit, ECO Chamberlin states he observed that the area behind the houses at 123 and 131 Keating Street had been newly filled and graded and that plywood forms of the sort used for pouring a concrete foundation were in the process of being placed in the filled area (Chamberlin 10). The ECO took several photographs which are attached to his affidavit. Exhibits A-1 and A-2 show the newly placed and graded fill. Exhibit A-3 shows the plywood forms behind 123 Keating Street. The ECO states he spoke to Mr. Costa, and that Mr. Costa denied responsibility for the

construction activities at the site (Chamberlin 9). Based on this evidence, DEC Staff has made a prima facie case that these violations were committed by Terry Ann Gagliardi based upon her ownership of the site of the violations. However, DEC Staff has not made a prima facie case against Anthony Costa because he is not the owner of the site and ECO Chamberlin does not state that he observed Mr. Costa performing any work at the site or directing or supervising such work. Since no evidence has been submitted by the respondents that raises a material question of fact regarding the liability of respondent Gagliardi for these alleged violations, DEC Staff is entitled to summary judgment against Terry Ann Gagliardi for these three violations.

DEC Staff alleges that three violations of ECL 24-0702 and 6 NYCRR 663.4 occurred at 123 Keating Street on May 31, 2006, specifically, that fill was placed in the wetland (in violation of 6 NYCRR 663.4(d)(20)), fill was graded in the wetland (in violation of 6 NYCRR 663.4(d)(25)) and that plywood forms were constructed in the wetland (in violation of 6 NYCRR 663.4(d)(42)). The evidence included with DEC Staff's motion for order without hearing includes the affidavit of ECO Chamberlin who inspected the site again on the afternoon of May 31, 2006, this time in the company of another ECO and two DEC Staff biologists. ECO Chamberlin states that on this second visit, he again spoke to Mr. Costa and issued him an administrative summons (#523740) for conducting a regulated activity in the wetland without a permit (Chamberlin 16). According to ECO Chamberlin, Mr. Costa stated that he would finish the job despite the summons (Chamberlin 18). During this visit, ECO Chamberlin took another set of photographs which were attached to his affidavit. Photograph B-2 shows additional construction work on the plywood forms and B-3 shows newly placed fill behind 123 Keating Street. This fill and plywood forms are also shown in photos attached to DEC Staff member Pane's affidavit as Exhibit D. Based on these photos and the statement of ECO Chamberlin that he observed continued installation of the concrete foundation forms and further deposition and grading of fill in the wetland and adjacent areas on both properties (Chamberlin 14), DEC Staff has made a prima facie case that these violations were committed. The prima facie case for Ms. Gagliardi's liability is based on her ownership of the 123 Keating Street and Mr. Costa's liability is based on his alleged statements indicating he was responsible for the violations at the site. In his affidavit, Mr. Costa states he did not participate in the violations, was not observed participating or directing the violations and has no idea who is responsible for the fill (Costa 23). This evidence contradicts ECO Chamberlin's evidence and creates a fact question, which a hearing is necessary to resolve. An evaluation of the veracity

of Mr. Costa's statement is not appropriate on a motion for order without hearing, which is the administrative equivalent of a motion for summary judgment pursuant to CPLR 3212. Since no evidence has been submitted by the respondents that raises a material question of fact regarding the liability of respondent Gagliardi for these alleged violations, DEC Staff is entitled to summary judgment against Terry Ann Gagliardi for these three violations.

DEC Staff alleges that two violations of ECL 24-0702 and 6 NYCRR 663.4 occurred at 123 Keating Street on January 17 and 19, 2007, specifically, that fill was placed (in violation of 6 NYCRR 663.4(d)(20)) and graded (in violation of 6 NYCRR 663.4(d)(25)) in the wetland. The evidence included with DEC Staff's motion for order without hearing includes the affidavit of DEC Staff member Pane who inspected the site on January 17, 2007 and on January 19, 2007. On January 17, 2007, Mr. Pane observed additional fill placed and spread in the regulated wetland area on 123 Keating Street (Pane 9(i)). When he returned two days later, he took photographs, which were attached to his affidavit as Exhibit E. Photograph E-1 shows this additional fill placed and spread behind 123 Keating Street. Based on this evidence, DEC Staff has made a prima facie case that Terry Ann Gagliardi is liable for these two violations. Since no evidence has been submitted by the respondents that raises a material question of fact regarding the liability of respondent Gagliardi for the alleged violations, DEC Staff is entitled to summary judgment against Terry Ann Gagliardi for these two violations.

DEC Staff has failed to make a prima facie case against Mr. Costa since no proof of his involvement in these violations is provided and Mr. Costa was incarcerated at the time of these violations.

Alleged Violations by at 131 Keating Street

DEC Staff alleges that two violations of ECL 24-0702 and 6 NYCRR 663.4 occurred at 131 Keating Street on May 26, 2006, specifically, that fill was placed (in violation of 6 NYCRR 663.4(d)(20)) and graded (in violation of 6 NYCRR 663.4(d)(25)) in the wetland. The evidence included with DEC Staff's motion for order without hearing includes the affidavit of ECO Chamberlin who inspected the site on the evening of May 26, 2006. In his affidavit, ECO Chamberlin states he observed that the area behind the houses at 123 and 131 Keating Street had been newly filled and graded (Chamberlin 10). The ECO took several photographs which are attached to his affidavit, Exhibits A-1 and A-2 show the newly placed and graded fill. Based on this

evidence, DEC Staff has set forth a prima facie case that the two violations were committed by Kathleen Krieg and Alfred Galpine based upon their ownership of the site of the violations. Since no evidence has been submitted by the respondents that raises a material question of fact regarding liability for the violations alleged on this date, DEC Staff is entitled to summary judgment against Kathleen Krieg and Alfred Galpine for these two violations.

DEC Staff alleges that two violations of ECL 24-0702 and 6 NYCRR 663.4 occurred at 131 Keating Street on May 31, 2006, specifically, that fill was placed in the wetland (in violation of 6 NYCRR 663.4(d)(20)) and that fill was graded in the wetland (in violation of 6 NYCRR 663.4(d)(25)). The evidence included with DEC Staff's motion for order without hearing includes the affidavit of ECO Chamberlin who inspected the site again on the afternoon of May 31, 2006, this time in the company of another ECO and two DEC Staff biologists. ECO Chamberlin states that he observed further deposition and grading of fill in the wetland and adjacent areas on both properties (Chamberlin 14). During this visit, ECO Chamberlin took another set of photographs which were attached to his affidavit. Photograph B-1 shows additional graded fill behind 131 Keating Street. This fill is also shown in photos attached to DEC Staff member Pane's affidavit as Exhibit D. Based on this evidence, DEC Staff has made a prima facie case that Kathleen Krieg and Alfred Galpine are liable for the two violations, based on their ownership of 131 Keating Street. Since no evidence has been submitted by the respondents that raises a material question of fact regarding liability for these violations alleged on this date, DEC Staff is entitled to summary judgment against Kathleen Krieg and Alfred Galpine for these two violations.

DEC Staff alleges four violations of ECL 24-0702 and 6 NYCRR 663.4 occurred at 131 Keating Street on January 17 and 19, 2007: (1) planting lawn grass in the regulated wetland area and thereby attempting to make permanent the filling of a protected wetland area; (2) excavating a trench in a regulated wetland area; (3) installing a pipe in the trench in the regulated wetland area; and (4) installing an electric sump pump in a plastic bucket set in the soil in a regulated wetland area and draining the standing water via a hose which discharged into the regulated wetland area. The evidence included with DEC Staff's motion for order without hearing includes the affidavit of DEC Staff member Pane who inspected the site on January 17, 2007 and again two days later on January 19, 2007. On January 17, Mr. Pane observed grass planted and growing on the illegally filled area on 131 Keating Street (Pane 9(iii)) and on January 19, 2007 he took a

photo of it (Exhibit E-2). Also on January 17, 2007, Mr. Pane states he observed a trench dug in the regulated wetland adjacent area running lengthwise across 131 Keating Street (Pane 9(iv)) and on January 19, 2007 he took a photo of it (Exhibit E-3). Also on January 17, 2007, Mr. Pane states he observed a pipe installed in the trench (Pane 9(v)) and on January 19, he took a photo of it (Exhibit E-4). Also on January 17, 2007, Mr. Pane states he observed a plastic bucket set in a depression within the filled portion of the regulated wetland area on 131 Keating Street containing a garden hose discharging into the undisturbed wetland area (Pane 9(ii)) and on January 19, 2007 he took a photo of it (Exhibit E-2).

Based on this evidence, DEC Staff has established a prima facie case that respondents Krieg and Galpine excavated a trench in a regulated wetland area (in violation of 6 NYCRR 663.4(d)(19)), and drained and pumped water in a regulated wetland area (in violation of 6 NYCRR 663.4(d)(17)). DEC Staff has not made a prima facie case that the installation of the pipe in the wetland is a separate violation rather than a part of one of either the trenching or pumping violations, above. In addition, DEC Staff has not established that the planting of lawn grass in the wetland area on the fill is a violation, since there is no explicit prohibition of this in 6 NYCRR 663. For these last two alleged violations, DEC Staff has failed to establish a prima facie case and if DEC Staff wishes to prove the respondents liable for these last two violations a hearing must be convened.

In his affirmation in opposition, counsel for Kathleen Krieg and Alfred Galpine admits the facts set forth by DEC Staff with respect to these four alleged violations (Montgomery 15-18). Counsel states that these actions were undertaken with the specific purpose of preventing damage to the respondents' personal and real property. Respondents' counsel states that attached to his affirmation are photographs of flooding that occurred in the backyard of 131 Keating Street on or about January 17, 2007 (however, no such photos are included with his papers). His affirmation does include narrative, based on conversations with his clients and sworn to be true, describing the flooding. This flooding led to water leaking into the basement and in order to prevent damage to the house and its contents, a sump pump was placed in bucket in the backyard and a trench dug and pipe placed therein to speed the runoff of the rainwater. Counsel argues that these actions are authorized by ECL 15-0501 and 15-0505 as emergency work to prevent damage to personal and real property. Counsel admits that the respondents did not give DEC Staff the 48 hour notice required by these statutes.

The statutes cited by counsel, ECL 15-0501(6) and ECL 15-0505(6), provide an emergency exception from the requirement of obtaining an ECL Article 15 permit prior to undertaking certain actions in and around streams. The violations alleged in DEC Staff's third cause of action are violations of ECL Article 24 and counsel does not refer to 6 NYCRR 663.7, which authorizes emergency actions in freshwater wetlands provided written approval is obtained in advance or notification occurs within 24 hours of the commencement of such emergency action.

A question of fact is raised by respondents' counsel's assertion that his clients took the only action they could to prevent further damage from the flooding to their home and property. If a valid emergency did exist, the alleged violations relating to trenching and pumping in the wetland may be excused, however, by his own admission, his clients may be liable for failing to timely notify DEC Staff in violation of 6 NYCRR 663.7. These factual issues need to be the subject of a fact hearing.

Because respondents' counsel has submitted a sworn statement regarding the existence of flooding at the time of the violations and asserts an emergency existed, a material question of fact regarding liability for the two violations of trenching and pumping in the wetland is raised. DEC Staff is not entitled to summary judgment against Kathleen Krieg and Alfred Galpine for the four alleged violations. The circumstances involving these alleged violations may also be relevant in the determination of a potential civil penalty and/or possible remediation at the site.

CIVIL PENALTY AMOUNT AND POSSIBLE REMEDIATION

In its February 22, 2007 complaint, DEC Staff seeks a civil penalty of \$61,500 from Anthony Costa and Terry Ann Gagliardi and \$61,500 from Kathleen Krieg and Alfred Galpine. In addition DEC Staff seeks an order requiring respondents to undertake actions to restore the site to the conditions that existed there before the unauthorized activities began.

As discussed above, DEC Staff has failed to prove liability for all the alleged violations and so an evidentiary hearing must be held on these alleged violations. Therefore, it is not possible now to make a recommendation on the amount of civil penalty and possible remediation at the site. In addition, a hearing must be held regarding the amount of civil penalty and possible remediation for the violations found in the earlier, consolidated enforcement matter.

While not relevant to the findings of liability in this ruling, both Anthony Costa and counsel for Kathleen Krieg and Alfred Galpine raise facts in their papers which they may wish to expand upon at the hearing regarding the amount of civil penalty to be assessed and/or possible remediation at the site.

In his affidavit, Mr. Costa states that for all the years he and his wife lived at 123 Keating Street, there was "an almost continuous discharge of hospital effluents that included tainted blood, bandages, needles" from a culvert which was linked to the Staten Island University Hospital (Costa 15). According to Mr. Costa, the hospital's septic tank was not properly maintained and an overflow conduit was surreptitiously dug to dump the waste in the stream at the site. Mr. Costa then states he complained to the hospital's director, but the complaint went unanswered (Costa 17). Mr. Costa believes the hospital was subsequently cited by DEC for the discharge to the stream and although the discharge ceased, the odor from the discharges remained for years (Costa 19).

In his brief, Mr. Costa expands on the statements in his affidavit. He states that the odor from the discharges from the culvert made the backyards in the neighborhood unusable. After personally observing raw sewage and other medical waste pouring from a conduit into the ravine behind his home and determining that the waste was coming from the Staten Island University Hospital, Mr. Costa met with a Mr. Smith, the Hospital's Director, who apparently acknowledged the problem. According to Mr. Costa, the hospital had not been connected to the sewer system in the area and was on a septic system, which was failing and allowing waste to flow through an overflow conduit into the ravine. Mr. Costa states that he is concerned that if remediation is ordered at the site to restore the ravine, any excavation could unearth buried medical waste and other noxious or toxic contaminants. Mr. Costa also wonders if his wife's exposure to the odors could have contributed to her medical problems.

CONCLUSION AND NEXT STEPS

As discussed above, DEC Staff failed to prove it is entitled to summary judgment on seven of twenty-four violations alleged in its February 22, 2007 Complaint. Accordingly, a hearing on liability of these unproven violations needs to be scheduled as well as a hearing on the civil penalty and possible remediation at the site. In addition, this hearing on civil penalty amount and remediation will also address the 24 violations addressed in my June 28, 2006 ruling.

DEC Staff must now either file a statement of readiness for an adjudicatory hearing on the unproven allegations of liability, or indicate that it is withdrawing these allegations and indicate it is ready for the hearing on civil penalty amount and remediation at the site.

Following receipt of DEC Staff's decision, a hearing will be scheduled.

December 11, 2007
Albany, New York

_____/s/_____

P. Nicholas Garlick
Administrative Law Judge

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(DEC# R2-20060718-296)

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DEC file # R2-20050622-187
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