

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged
Violations of Article 24 of the New
York State Environmental Conservation
Law ("ECL") and Part 663 of Title 6 of
the Official Compilation of Codes,
Rules and Regulations of the State of
New York ("6 NYCRR")

RULING

DEC Case No.
R1-20070830-252

by

EDIVANE FRANCO AND UBIRAJARA FRANCO,

Respondents.

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General
Counsel (Kari E. Wilkinson and Jennifer M. Ukeritis of
counsel), for staff of the Department of Environmental
Conservation

-- Judith N. Berger, for respondents Edivane Franco and
Ubirajara Franco

In this administrative enforcement proceeding, New York
State Department of Environmental Conservation (DEC or
Department) staff charges respondents Edivane Franco and
Ubirajara Franco with placing fill into a regulated freshwater
wetland (wetland) and regulated freshwater wetland adjacent area
(adjacent area), clear-cutting vegetation other than trees in a
wetland and adjacent area, and constructing structures or
facilities in a wetland and adjacent area without a permit or in
violation of a permit on property owned by respondents in the
Town of Riverhead, Suffolk County. Department staff filed a
motion for an order without hearing addressed to the alleged
violations and respondents oppose staff's motion. This ruling
addresses the Department staff's motion and respondents'
opposition thereto.

Proceedings

A brief history is called for in this case. In May 2003, respondent Ubirajara Franco applied for an ECL article 24, freshwater wetlands permit for the property located at 970 East Main Street, Riverhead, New York (the site). In July 2003, Department staff inspected the site, noted violations of the freshwater wetlands regulations and subsequently sent a notice of violation to respondent. Respondent Edivane Franco executed a consent order with the Department in March 2004 to resolve those violations and paid a \$500 penalty.

Department staff issued freshwater wetlands permit #1-4730-01202/0001 on April 8, 2005 (2005 Permit) to Ubirajara Franco allowing respondent to construct a pool, driveway, garage and fence as conditioned in the permit. The 2005 Permit also authorized the cleaning of a specified area to remove garbage, junk and dead trees. The 2005 Permit had an expiration date of April 8, 2010. In May 2006, respondent Edivane Franco was issued a notice of violation related to cutting of vegetation and trees within the wetland and adjacent area. In 2007, noting new violations at the site, Department staff served respondent Edivane Franco with a notice of pre-hearing conference, hearing and complaint dated October 3, 2007. By correspondence dated December 27, 2007, respondents advised the Department that no agent or employee of the Department may enter the site without the express consent of respondents.

On or about February 1, 2008, respondent Edivane Franco served an answer and counterclaims on the Department. By motion dated March 14, 2008, Department staff moved to strike or clarify affirmative defenses and to dismiss counterclaims. By cross-motion dated April 21, 2008, respondent Edivane Franco moved to dismiss the complaint and opposed staff's motion. By notice of motion dated May 6, 2008, Department staff moved to amend or supplement its pleadings to add Ubirajara Franco to the complaint and provided the amended pleadings dated May 12, 2008. Respondents opposed this motion on May 14, 2008.

On May 15, 2008, Department staff served a notice of intent to revoke the 2005 Permit on respondent Ubirajara Franco because of respondent's December 27, 2007 correspondence denying the Department access to conduct inspections of the site, and respondent's alleged failure to comply with the conditions of the 2005 Permit related to the placement of the dock and fence. By letter dated May 30, 2008 from Michael J. Kaper, Esq., respondents notified the Department that respondents would

provide the Department access upon notice of the time and purpose of the inspection. Respondents did not request a hearing on the notice of intent to revoke the 2005 Permit, but advised Department staff that respondents had received verbal permission from staff to assemble the dock in a different location than shown on the permit before moving the dock to its permitted location. Respondents noted that the dock had been moved to its permitted location and that issues pertaining to the 2005 Permit and property were currently the subject of pending administrative enforcement proceedings.

On June 18, 2008, Administrative Law Judge (ALJ) Kevin J. Casutto issued a ruling on the pre-hearing motions that granted Department staff leave to amend and supplement its complaint, thus rendering the remaining motions moot. Respondents served an amended answer dated July 29, 2008. ALJ Casutto left the service of the Office of Hearings and Mediation Services in January 2009.

As a result of additional violations noted by Department staff in 2008 and 2014, Department staff served respondents with the present motion for order without hearing dated December 19, 2014, which adds several counts to the counts alleged in the amended complaint. The amended complaint alleged two counts of placing fill in the wetland without a permit, two counts of placing fill in the adjacent area without a permit, one count of clear-cutting vegetation in the wetland without a permit, one count of clear-cutting vegetation in the adjacent area without a permit, and one count for failing to record a deed covenant in violation of the permit for a total of seven counts. The motion for order without hearing adds one count for placing fill in the wetland without a permit, one count of clear-cutting vegetation in the wetland without a permit, three counts for violation of the permit related to the white vinyl fence, dock and pool (one count each), one count for installing chain link fence around the pool without a permit and one count for installing a patio around the pool without a permit. The motion for order without hearing, in effect, amended the complaint to bring the counts and causes of action up to date. Staff's notice of motion advised respondents that additional violations were alleged in the motion for order without hearing.

In support of its motion for order without hearing, Department staff provided the affirmation of Kari E. Wilkinson dated December 19, 2014 with Exhibits A - K; the affidavit of Robert Marsh, sworn to December 19, 2014 (Exhibit B to the Wilkinson Affirmation) with Exhibits 1 - 13; the affidavit of

Mark Carrara, sworn to December 4, 2014 (Exhibit C to the Wilkinson Affirmation) with Exhibits 1 - 5; and a memorandum of law.¹ The exhibits to the affirmation and affidavits are noted in the attached exhibit list and include the deed to the property in question, the 2005 Permit, and various inspection reports, notices of violations and photographs.

Respondents oppose Department staff's motion for order without hearing through the affirmation of Judith N. Berger dated February 20, 2015 with Exhibits A - C; the affidavit of Edivane Franco, sworn to February 20, 2015; and the affidavit of Ubirajara Franco, sworn to February 20, 2015. Respondents' response to the motion constitutes their answer to the additional violations alleged by staff in the motion for order without hearing (see 6 NYCRR 622.12[e]).

By correspondence from Jennifer M. Ukeritis dated February 27, 2015, Department staff addressed respondents' arguments related to the 2005 Permit and the notice of intent to revoke the 2005 Permit and noted that the staff's supporting papers demonstrate violations of the 2005 Permit and permit conditions.

By correspondence dated March 9, 2015, Chief Administrative Law Judge James T. McClymonds advised the parties that the matter had been assigned to me.

By correspondence dated March 23, 2015, Jennifer M. Ukeritis corrected staff's information regarding the May 30, 2008 correspondence from Michael J. Kaper, and otherwise reiterated staff's position that the notice of intent to revoke and respondents' reply thereto are irrelevant to the merits of the instant proceeding.

Respondents, by correspondence from Judith N. Berger dated March 23, 2015, argue that staff's February 27, 2015 reply raised new issues and requested leave to serve a sur-reply. By correspondence dated March 25, 2015, Department staff objected to respondents' request for leave to serve a sur-reply.

By letter dated April 1, 2015, I denied respondents' request to serve a sur-reply.

¹ The motion papers also include staff's notice of motion. The attorney's affirmation also constitutes staff's motion as it contains staff's causes of action and demand for relief.

I. Summary of the Parties' Positions

A. Department Staff

In Department staff's amended complaint and motion for order without hearing, staff alleges that respondents violated the ECL, Department regulations and permit # 1-4730-01202/0001 over the course of several years.² The Wilkinson Affirmation contains six causes of action, each related to violations noted during specific inspections.

1. The site and ownership

Department staff alleges the violations occurred on the site, which staff defines as 970 East Main Street, Riverhead, New York and more particularly identified on the Suffolk County Tax Map as District 600, Section 106, Block 4, Lot 11.1. The site is owned by Ubirajara Franco and Edivane Franco.

Staff alleges that the site contains freshwater wetlands mapped as regulated freshwater wetland R-3 on Official Wetland Map 18 of 39, Riverhead Quadrangle, New York State Freshwater Wetland Map, Suffolk County, which is a class 1 wetland. In addition, the site contains freshwater wetland adjacent area.

2. Wetlands Violations

Staff asserts that respondents violated ECL 24-0701 and 6 NYCRR part 663. In its first cause of action, staff alleges that respondents caused or allowed fill to be placed in a regulated freshwater wetland without a permit in violation of 6 NYCRR 663.4(a) and (d)(20). The alleged violations were noted by inspections occurring on July 21, 2006, May 11, 2007 and May 7, 2008.

In its second cause of action, staff alleges that respondents caused or allowed fill to be placed in an adjacent area to a regulated freshwater wetland without a permit in violation of 6 NYCRR 663.4(a) and (d)(20). The alleged violations were noted by inspections occurring on May 11, 2007 and May 7, 2008.

² Staff does not move for an order without hearing on the allegations contained in the twelfth, fourteenth or sixteenth paragraphs of staff's amended complaint. Therefore, those alleged violations are not considered on this motion.

In its third cause of action, staff alleges that respondents caused or allowed the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit in violation of 6 NYCRR 633.4(a) and (d)(23). The alleged violations were noted by inspections occurring on April 19, 2006 and July 21, 2006.

In its fourth cause of action, staff alleges that respondents caused or allowed the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit in violation of 6 NYCRR 633.4(a) and (d)(23). The alleged violations were noted by inspection occurring on April 19, 2006.

In its fifth cause of action, staff alleges that respondents caused or allowed an activity in noncompliance with the 2005 Permit constituting a violation of the ECL article 24 permit. Staff specifically cites the construction of a fence beyond the boundary allowed by special condition 14 of the 2005 Permit. This alleged violation was noted by inspection occurring on July 21, 2006. Staff alleges the dock was constructed in a location that was not the location approved by the Department and in violation of general condition 10 of the 2005 Permit. This alleged violation was noted by inspection occurring on May 7, 2008. Staff also alleges construction of the swimming pool was in a location other than that approved by the 2005 Permit and a violation of general condition 10 of the 2005 Permit. This alleged violation was noted by inspection occurring on March 14, 2014.

In its sixth cause of action, staff alleges that respondents caused or allowed a regulated activity within the adjacent area without a permit in violation of 6 NYCRR 663.4. Specifically, staff alleges that the fence and patio surrounding the pool were constructed in the adjacent area without a permit. The alleged violations were noted by inspection occurring on March 14, 2014.

3. Penalty and Remedial Relief

Department staff is seeking a civil penalty in the amount of \$25,500 with \$15,000 suspended leaving a payable penalty of \$10,500. In addition, staff is seeking an order directing respondents to perform remediation at the site to restore the portions of wetlands and adjacent areas that were adversely affected by respondents' unpermitted activities, under the

direction of the Department. Staff requests that an order direct respondents to:

- a. Submit an approvable restoration plan to the Department within 60 days of the order;
- b. Remove fill back to the pre-existing grade within the wetland and the wetland's upland buffer as shown on previously approved plan attached to the 2005 Permit;
- c. Remove the vinyl fence along the south property line from the flagged wetland; and
- d. Remove the dock and associated fill without prejudice to respondents to apply for a permit for a dock that meets permit standards.

Department staff also lists the minimum number and type of plantings and seeding that should be included in the restoration plan as well as prohibited activities.

B. Respondents

Respondents oppose staff's motion. Respondents deny Department staff's allegations of violations of ECL article 24, 6 NYCRR part 663 and the 2005 Permit. Respondents take issue with the staff's position that the 2005 Permit was revoked as of June 1, 2008. Respondents argue that because the permit was not revoked, no basis for the current motion exists. Respondents dispute staff's position that respondents did not respond to the notice of intent to revoke the permit.

In addition to the general denials provided by respondents, respondents assert that the dock was originally assembled in a different location on the property, after discussion with Department staff, and later moved to the permitted location. Respondents also assert that the patio surrounding the pool was part of the 2005 Permit approval. Respondents point out that the additional fencing around the pool was required by the town and argue that they did not need Department approval to construct the patio. Respondents also assert that the Department verbally advised them that respondents could cut the bamboo growing on their property as it had been planted. Respondents contend that part of the area photographed, as proof of the clear-cutting of vegetation, is where a house used to be and where vegetation continues to be.

Respondents also claim that the current proceeding is barred by the statute of limitations.

Respondent also argues that the "conditioning of a permit upon a warrantless search" is illegal and unconstitutional, and complain that Department staff trespassed during an inspection in July 2008.

II. Discussion

A. Staff's Motion For Order Without Hearing

1. Staff's Burden

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR. (See 6 NYCRR 622.12[d].) In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. Department staff has the initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff.

2. The Site and Ownership

Staff's papers demonstrate that respondents Edivane and Ubirajara Franco own the property located at 970 East Main Street, Riverhead, New York, known as Suffolk County Tax Map, District 600, Section 106, Block 4, Lot 11.1. (See Wilkinson Affirmation Exhibit A.) Department staff has made a prima facie showing of respondents' ownership of the site.

Department staff has also demonstrated that the site contains freshwater wetlands mapped as regulated freshwater wetland R-3 on Official Wetland Map 18 of 39, Riverhead Quadrangle, New York State Freshwater Wetland Map, Suffolk County, which is a class 1 freshwater wetland, and contains regulated freshwater wetland adjacent areas. (See Marsh Affidavit at ¶ 9 and Exhibit 2; Carrara Affidavit Exhibit 3.) Department staff has made a prima facie showing that the site contains regulated freshwater wetlands and adjacent areas.

3. Regulated Freshwater Wetlands Violations

a. Violation of 6 NYCRR 663.4(d)(20)

Staff's papers demonstrate that fill has been placed in the wetland and adjacent area. Notably, the affidavit of Robert

Marsh explains and demonstrates that fill was placed in the wetlands and adjacent area. (See Marsh Affidavit at ¶¶ 27a, 28, 29, 30, 31, 32, 37a, 37b, 38, 39, 40, 44b, 44c, 46 and Exhibits 8, 9 and 10 supporting staff's first and second causes of action.) Department staff has made a prima facie showing that fill was placed in the wetland and adjacent area without a permit. Moreover, respondents admitted placing topsoil in the area of the regulated freshwater wetland R-3 during the calendar years 2006 through 2008 "to improve appearances of the property." (See Edivane Franco Affidavit at ¶ 7; Ubirajara Franco Affidavit at ¶ 10.)

b. Violation of 6 NYCRR 663.4(d)(23)

Department staff's papers also show that clear-cutting of vegetation other than trees in the wetland has occurred as explained and demonstrated in the affidavit of Robert Marsh. (See Marsh Affidavit at ¶¶ 16a, 17, 19, 20, 21, 22, 27b, 33, 34, 35 and Exhibits 6 and 8 supporting staff's third cause of action.) The survey attached to the 2005 Permit shows the area within the wetland where garbage, junk and dead trees may be removed. The fifteen-foot buffer east of the flagged wetland delineates the western boundary of the area where clearing, grading and ground disturbance can occur. Department staff's proof demonstrates that these activities occurred well beyond that line and outside the area to be cleaned of garbage, junk and dead trees. Department staff has made a prima facie showing that vegetation other than trees was clear-cut from the wetlands without a permit.

Department staff's papers also show that clear-cutting of vegetation other than trees in the adjacent areas has occurred as explained and demonstrated in the affidavit of Robert Marsh. (See Marsh Affidavit at ¶¶ 16b, 18, 23, 24, 25, 27b, 33, 34, 35 and Exhibit 6 supporting staff's fourth cause of action.) Department staff has made a prima facie showing that vegetation other than trees was clear-cut from the adjacent area without a permit.

c. Violation of 2005 Permit

(1) White Vinyl Fencing

Department staff offered proof to demonstrate that the white vinyl fencing extends further west than the fence that was approved in the 2005 Permit. (See Marsh Affidavit at ¶¶ 36, 18, 23, 24, 25, 27b, 33, 34, 35 and Exhibits 8h and 8i; Carrara

Affidavit Exhibit 3.) The photographs contained in Exhibits 8h and 8i show the new fence extending beyond the flagged wetland marker. Special Condition 14 of the 2005 Permit reads, "New fence cannot extend any further west than existing fence on south side of property or concrete wall on north side of property." Staff contends that the new fence as built extends beyond the point approved by Special Condition 14. The survey attached to the 2005 Permit, however, does not clearly demonstrate where the existing fence terminated. Staff does not point to the location where the old fence terminated in its papers, but merely alleges the new fence extends beyond the terminus of the old fence.

Respondent Ubirajara Franco's permit application shows that respondents wanted to extend the fence all the way to Saw Mill Brook. The survey attached to the 2005 Permit references where the proposed new fence is to be located, but does not otherwise define its length or end point. Department staff has not made a prima facie showing on staff's fifth cause of action, count (a), that the fence was constructed in violation of the 2005 Permit.

(2) Dock

It is undisputed that the dock was, for a time in 2008, located south of the location approved in the 2005 Permit. (See Marsh Affidavit at ¶ 45 and Exhibit 10b; Edivane Franco Affidavit at ¶ 13; Ubirajara Franco Affidavit at ¶ 16.) Staff also alleges that the dock was not constructed as approved in that the Department approved a 4 feet by 50 feet fixed wood dock, but respondents installed a 4 feet by 20 feet floating dock and a 4 feet by 30 feet access path made of fill and wood located in the wetland and adjacent area. (See Marsh Affidavit at ¶ 45, referring to the placement of the dock in 2008.) The 2005 Permit approved a 4 feet by 50 feet wood dock, but otherwise does not define how the dock is to be constructed. The permit also approves a 4 feet wide access path of undefined length within the wetland boundary. The access path is otherwise undefined. Mr. Marsh explains what he believes was permitted for the dock, but the 2005 Permit itself is not as definitive. Staff has made a prima facie showing on staff's fifth cause of action, count (b), that the dock was placed in an unapproved location in 2008 in violation of the 2005 Permit, but has not made a prima facie showing that the dock as constructed and then moved in 2008 is in violation of the 2005 Permit.

(3) Pool

Department staff's proof demonstrates that the swimming pool was constructed in the adjacent area in a different orientation than approved by the 2005 Permit. Staff's proof also shows the pool is situated closer to the flagged wetland boundary than approved by the 2005 Permit. (See Marsh Affidavit at ¶¶ 51a and 52 and Exhibits 12a and 12d compared with the survey attached to the 2005 Permit as part of Exhibit 3 to the Carrara Affidavit.) I conclude that staff has made a prima facie showing on staff's fifth cause of action, count (c), that the swimming pool was constructed in violation of the 2005 Permit.

d. Violation of 6 NYCRR 663.4(d)(42)

It is undisputed that respondents constructed additional fencing and a patio around the swimming pool. (See Marsh Affidavit at ¶¶ 51b and 51c and Exhibits 12a, 12b, 12c and 12d; Edivane Franco Affidavit at ¶¶ 16 and 17; Ubirajara Franco Affidavit at ¶¶ 19 and 20.) The permit application and 2005 Permit do not reference either the fencing or the patio. I conclude that Department staff has made a prima facie showing on staff's sixth cause of action, counts (a) and (b), that the fencing and patio were constructed in the adjacent area without a permit.

e. Owner Liability

It has been held in numerous wetlands proceedings that the owners are responsible for the acts of their agents. (See Matter of Francis, Hearing Report at 12, adopted by Order of the Commissioner, April 26, 2011; Matter of Valiotis, Hearing Report at 7-8, adopted by Order of the Commissioner, March 25, 2010.)

Whether or not the owners themselves actually committed the violations in the wetlands or adjacent area is irrelevant. Respondents did not have a permit to place fill in the wetlands or adjacent area, and the 2005 Permit that was issued to respondents limited the size and placement of structures, and limited the amount of cleaning (removal of garbage, junk and dead trees) in the wetlands and adjacent area. Respondents are the fee owners of the property comprising the site. I agree with prior analysis that the benefits derived from filling, placing structures and clearing vegetation in these areas inure to the respondents as fee owners. (See Matter of Francis,

Hearing Report at 12, adopted by Order of the Commissioner, April 26, 2011) Respondents have not provided any evidence that they are not the fee owners, or that the 2005 Permit issued to respondents authorized respondents to place fill in wetlands and adjacent areas, clear cut vegetation or otherwise act in contravention of the terms of the 2005 Permit. Absent that or any other evidence to the contrary, I conclude that a reasonable inference may be drawn that the violations were caused or conducted at the direction, or with the consent, of respondents.

f. Summary

Accordingly, Department staff has made a prima facie showing of entitlement to summary judgment on the issue of liability against respondents on the first, second, third, fourth and sixth causes of action, and counts (b) and (c) of the fifth cause of action.

4. Penalty and Relief Requested

As previously stated, Department staff is seeking a civil penalty in the amount of \$25,500 with \$15,000 suspended leaving a payable penalty of \$10,500. Department staff's papers demonstrate that the penalty requested falls within the statutory provisions of ECL 71-2303(1) and penalty guidance established in DEE-6 Freshwater Wetlands Enforcement Policy. Staff's papers demonstrate the benefits provided by freshwater wetlands and adjacent areas and the importance and relevance of the regulatory scheme to protect the wetlands and the environmental impacts when the regulations are ignored. In addition to the economic benefit derived from noncompliance, Department staff demonstrates the gravity of harm for each type of violation. The extent and duration of the violations proven, however, is unclear, as is the cost of restoring the site when the areal extent of violations is uncertain.

I conclude that Department staff has not made a prima facie showing of entitlement to summary judgment on the penalties and remediation requested for the violations found on the first, second, third, fourth and sixth causes of action, and counts (b) and (c) of the fifth cause of action.

B. Respondents' Opposition to Staff's Motion for Order Without Hearing

1. Respondents' Burden on Opposing Staff's Motion for Order Without Hearing

Inasmuch as Department staff has made a prima facie showing on the freshwater wetland and permit violations noted above, the burden shifts to respondents to raise triable issues of fact. Respondents opposing staff's motion for an order without hearing must also lay bare their proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) General denials are insufficient to raise an issue of fact on a summary judgment motion. (See Gruen v Deyo, 218 AD2d 865, 866 [3rd Dept 1995]; Bronowski v Magnus Enterprises, Inc., 61 AD2d 879 [4th Dept 1978].)

2. Respondents' Opposition to Staff's Motion

Respondents' papers are reviewed to determine whether respondents have provided evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Respondents provide general denials to the allegations regarding the freshwater wetlands violations. (See e.g. Edivane Franco Affidavit at ¶¶ 5, 6, 8, 9, 12, 13, 14, and 15, and Ubirajara Franco Affidavit at ¶¶ 8, 9, 11, 12, 15, 16, 17, and 18.) These general denials are not sufficient to overcome staff's prima facie showing on those violations. Moreover, respondents admit the following: that they placed fill in the wetlands during 2006, 2007 and 2008, that they constructed the fence and patio around the pool, and that the dock was assembled in a different location than the one permitted.

Respondents argue at length that the 2005 Permit was never revoked. In support, respondents point to the letter from attorney Kaper to staff regarding the notice of intent to revoke. (See Berger Affirmation Exhibit A.) While respondents never requested a hearing on the notice, the Kaper letter did argue the merits underlying staff's intent to revoke. As such, respondents were entitled to a response to the Kaper letter.

(See 6 NYCRR 621.13[g][1].) None has been provided on this record. Moreover, nothing in the record demonstrates that the notice of intent to revoke was sent to the permittee by certified mail, return receipt requested, or by personal delivery as required by 6 NYCRR 621.13(c). With that jurisdictional predicate not having been demonstrated, I conclude that the 2005 Permit was never revoked as alleged by staff. That conclusion, however, does not affect staff's prima facie showings, discussed above, as the violations that occurred without a permit (e.g. placement of fill or clear-cutting) were not covered by the permit issued or were in excess of the permission granted. The remaining violations are for violation of the 2005 Permit.

Respondents argue that because the permit was still valid and had not been revoked, the motion for order without hearing must be denied and "sanctions be imposed, including costs and attorney's fees, against the Department of Environmental Conservation and its employees involved herein for the filing of this motion pursuant to ECL § 21-0701(14.8)(d)." Respondents fail to understand that the violations asserted by Department staff have nothing to do with the permit being revoked, or not. Department staff has not explained its position that no response to the notice of intent to revoke was received from respondents when clearly there was. Nor has staff explained why the letter provided by respondents was not provided by staff, but once the mistake was realized, Department staff provided a letter to correct its position related to the response to the notice of intent to revoke the permit. As troubling as all that may be, it has no bearing on the current motion or its outcome. Moreover, respondents' request for sanctions based on ECL 21-0701(14.8)(d) is misplaced, as that section only relates to the Delaware River Basin Commission, and officers and employees of that Commission.

3. Regulated Freshwater Wetlands Violations

a. Violation of 6 NYCRR 663.4(d)(20)

As discussed above, respondents admitted placing topsoil in the area of the regulated freshwater wetland R-3 during the calendar years 2006 through 2008. (See Edivane Franco Affidavit at ¶ 7; Ubirajara Franco Affidavit at ¶ 10.) Respondents otherwise generally deny the allegations. (Id. at ¶¶ 5 and 6; 8 and 9 respectively.) Accordingly, respondents have not raised a material issue of fact related to the violations contained in the first and second causes of action.

b. Violation of 6 NYCRR 663.4(d)(23)

As to the violations for clear-cutting vegetation other than trees, respondents assert that the Department verbally advised them that respondents could cut the bamboo growing on their property as it had been planted. Staff, however, did not cite the cutting of bamboo in support of staff's prima facie showing on these violations. Particularly, staff noted the clear cutting of red maple saplings, phragmites, buttonbush, arrowwood, and pussy willow and provided photographic evidence of such. (See Marsh Affidavit at ¶¶ 17, 19, 20, 21, 22, 23, and 24 and Exhibits 6a, 6b, 6d, 6e, 6f, 6g, 6i, 6j, and 6k.)

Contained in respondents' general denials are the assertions that respondents did not cause or allow clear-cutting during 2006 that was not in the plans attached to the permit. (See Edivane Franco Affidavit at ¶¶ 8 and 9; Ubirajara Franco Affidavit at ¶¶ 11 and 12.) The plans attached to the permit, however, do not show any area within the wetlands where clear-cutting is allowed. There is an "area to be cleaned" where respondents are permitted to remove "garbage, junk and dead trees". This is not a license to clear-cut vegetation within the wetlands. Clearing, if any were allowed, would be easterly of the 15 feet buffer east of the flagged wetland boundary marked as "Limit of Clearing, Grading and Ground Disturbance". The Marsh Affidavit notes that all clearing in the adjacent area was within 30 feet of the freshwater wetland boundary. (See Marsh Affidavit at ¶¶ 23, 24 and 25.)

Respondents also contend that part of the area photographed, as proof of the clear-cutting of vegetation, is where a house used to be and where vegetation continues to be. These contentions and respondents' attempts to discredit Mr. Marsh's observations fail to raise a material issue of fact related to the staff's third cause of action (clear-cutting vegetation in the wetland area).

The permit, however, shows the western limit of an area where clearing, grading and ground disturbance may occur. That area overlaps the area (by 15 feet) where staff claims clear-cutting occurred within the adjacent area without a permit. I conclude that respondents have raised a material issue of fact related to the fourth cause of action (clear-cutting in the adjacent area).

c. Violation of 2005 Permit

(1) White Vinyl Fencing

Respondents only provide general denials to the staff's allegations, but as I conclude above, staff did not make a prima facie showing on all the elements of this alleged violation.

(2) Dock

Respondents argue that after discussion with Department staff they were allowed to assemble the dock in a different location than the one permitted and later move it to the permitted location. Respondents' discussion with staff regarding the assembly of the floating dock is also memorialized by the aforementioned Kaper letter. The Kaper letter addressed the violation noted by staff's May 7, 2008 inspection and advised staff that the dock was moved to its permitted location. I conclude that respondents have raised a material issue of fact relating to staff's fifth cause of action, count (b).

(3) Pool

Again, respondents only offer general denials related to placement of the pool. Staff has made a prima facie showing that the swimming pool was constructed in violation of the 2005 Permit. Respondents have failed to raise a material issue of fact.

d. Violation of 6 NYCRR 663.4(d)(42)

Respondents assert that the fencing surrounding the pool was required by the town and that the patio surrounding the pool was included on the plans submitted for the 2005 permit. Respondents argue further that the patio is structurally necessary to support the pool. Respondents do not provide any documentation in support of these assertions. The permit application provided by staff only demonstrates where a proposed 20 feet by 40 feet inground pool is to be located. There is nothing indicating a proposed patio. The photographs attached to the Marsh Affidavit as Exhibit 12 demonstrate that the patio is comprised of two perimeter concrete aprons. Department staff did not respond to the position taken by respondents regarding the fencing and patio. I conclude that respondents have raised material issues of fact on the sixth cause of action regarding the fencing and patio.

e. Respondents' Legal Arguments

Respondents raise two legal arguments addressed to staff's current motion in the form of affirmative defenses.³ First, respondents claim that the current proceeding is barred by the statute of limitations. Respondents cite the one year statute of limitations for misdemeanors as barring Department staff's proceeding on the first five causes of action. Respondents do not identify what law is being referenced. If respondents are referring to Criminal Procedure Law § 30.10(2)(c), the statute of limitations for a misdemeanor is two years not one. This proceeding, however, is a civil proceeding not a criminal one. Respondents have not been charged with a misdemeanor. Additionally, it is well settled that the CPLR statute of limitations provisions only apply to civil judicial proceedings. None of the CPLR statute of limitations provisions have been incorporated into 6 NYCRR part 622 nor have any provisions of the Criminal Procedure Law ("CPL"). In short, the limitation periods established by the CPLR and CPL are not applicable to this administrative enforcement proceeding. (See Matter of Stasack, Ruling of the Chief ALJ, December 30, 2010 at 9; see also Matter of Steinberg, ALJ Ruling, October 11, 2006 at 4.) Respondents' argument that the proceeding herein is barred by the statute of limitations is without merit or legal support.

Respondents also argue that the "conditioning of a permit upon a warrantless search" is illegal and unconstitutional and complain that Department staff trespassed during an inspection in July 2008. Respondents cite Sokolov v Freeport, 52 NY2d 341 (1981) and Camera v Municipal Court of San Francisco, 387 US 523 (1967) in support of this argument. Both of those cases were distinguished in Palmieri v Lynch, 392 F3d 73 (2d Cir 2004), cert denied 546 U.S. 937 (2005), wherein the Second Circuit found the special needs exception to warrantless searches applied to DEC tidal wetlands permits and inspections. I find Palmieri to be controlling in the context of freshwater wetland permits and the inspections required thereby.⁴

³ Respondents' response to staff's motion does not argue the first, second, third, fifth, sixth, seventh or ninth affirmative defenses contained in respondents' amended answer. Therefore, those alleged affirmative defenses are not considered on this motion.

⁴ In 2009, the Department established guidance on accessing private property that should be followed by staff. (See e.g. OGC-7: Staff Access to Property or Premises [June 4, 2009] citing ECL 24-1301[2].)

f. Summary

In sum, Department staff has established its entitlement to summary judgment on the issue of liability on the first, second, and third causes of action and count (c) of the fifth cause of action. Department staff's motion should be denied on counts (a) and (b) of the fifth cause of action and on the fourth and sixth causes of action for the reasons stated above.

III. RULING

Based upon the foregoing discussion, my ruling on Department staff's motion for order without hearing is as follows.

A. Department staff's December 19, 2014 motion for order without hearing is granted on the issue of liability against respondents Edivane Franco and Ubirajara Franco on the following violations:

1. ECL 24-0701 and 6 NYCRR 663.4(a) and (d)(20) for causing or allowing the placement of fill in a regulated freshwater wetland without a permit (First cause of action - three violations);
2. ECL 24-0701 and 6 NYCRR 663.4(a) and (d)(20) for causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit (Second cause of action - two violations);
3. ECL 24-0701 and 6 NYCRR 663.4(a) and (d)(23) for causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit (Third cause of action - two violations); and
4. ECL article 24 permit for causing or allowing the construction of an inground pool in nonconformance with the permit (Fifth cause of action - count [c]).

B. Department staff's motion for order without hearing on staff's fifth cause of action, counts (a) and (b), and the fourth and sixth causes of action is denied.

C. The civil penalty and remedial relief requested in Department staff's motion for order without hearing is denied.

D. Pursuant to 6 NYCRR 622.12(e), staff's amended complaint and motion papers and respondents' amended answer and responsive papers are deemed to be the complaint and answer, respectively, for the purposes of this proceeding.

Accordingly, Department staff's motion for order without hearing is granted in part, as detailed herein. A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on the remaining causes of action and relief requested in this matter.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: April 20, 2015
Albany, New York

Exhibit List

NYSDEC

v.

Edivane Franco and Ubirajara Franco

Case No. R1-20070830-252

Department Staff

Affirmation of Kari E. Wilkinson, dated December 19, 2014

- A. Copy of a deed, dated September 28, 2001, transferring the real property known as 970 East Main Street, Riverhead, New York to Ubirajara Franco and Edivane Franco.
- B. Affidavit of Robert Marsh.
- C. Affidavit of Mark Carrara.
- D. Order on Consent between the Department and Edivane Franco dated March 12, 2004 with compliance schedule and payment.
- E. Matter of Franco, ALJ Ruling on Pre-Hearing Motions, June 18, 2008.
- F. Notice of Pre-Hearing Conference, Hearing and Complaint dated October 3, 2007.
- G. Amended Notice of Hearing and Complaint dated May 12, 2008.
- H. Amended Answer dated July 30, 2008.
- I. Correspondence from Judith N. Berger to Kari E. Wilkinson dated April 18, 2014 with a partial copy of the Permit attached.
- J. Correspondence from Kari E. Wilkinson to Judith N. Berger dated April 29, 2014.
- K. Correspondence from Judith N. Berger to Kari E. Wilkinson dated May 9, 2014.

Affidavit of Robert Marsh, sworn to December 19, 2014

- 1. Resume of Robert F. Marsh.
- 2. Copy of Official Freshwater Wetland Map.
- 3. Six Aerial Photographs of the Site labeled a-f.
- 4. Three Photographs from July 2003 Site Inspection labeled a-c.
- 5. Notice of Violation dated July 17, 2003.

6. Eleven Photographs from April 2006 Site Inspection labeled a-k.
7. Notice of Violation dated May 11, 2006.
8. Nine Photographs from July 2006 Site Inspection labeled a-i.
9. Three Photographs and an Inspection Report from ECO inspection dated May 14, 2007.
10. Six Photographs from May 2008 Site Inspection labeled a-f.
11. Three Photographs from April 2011 Site Inspection labeled a-c.
12. Four Photographs from March 2014 Site Inspection labeled a-d.
13. Notice of Violation dated March 27, 2014.

Affidavit of Mark Carrara, sworn to December 4, 2014

1. Resume of Mark Carrara
2. Notification of Availability for Review with Article 24 Freshwater Wetlands Permit Application
3. Article 24 Freshwater Wetlands Permit No. 1-4730-01202/00001
4. Correspondence from Edivane and Ubirajara Franco to NYSDEC Region 1 dated December 27, 2007.
5. Notice of Intent to Revoke from Mark Carrara to Ubirajara Franco dated May 15, 2008.

Additional Documents provided

Correspondence from Jennifer M. Ukeritis to Chief ALJ James T. McClymonds, dated February 27, 2015.

Correspondence from Jennifer M. Ukeritis to ALJ Michael Caruso, dated March 23, 2015.

Correspondence from Jennifer M. Ukeritis to ALJ Michael Caruso, dated March 25, 2015.

Respondents

Affirmation of Judith N. Berger, dated February 20, 2015

- A. Correspondence from Michael J. Kaper to Mark Carrara dated May 30, 2008.
- B. Correspondence from Michael J. Kaper to Mark Carrara dated June 25, 2008.
- C. Matter of Franco, ALJ Ruling on Pre-Hearing Motions, June 18, 2008.

Affidavit of Edivane Franco, sworn to February 20, 2015.

Affidavit of Ubirajara Franco, sworn to February 20, 2015.

Additional Documents provided

Correspondence from Judith N. Berger to ALJ Michael Caruso, dated March 23, 2015.