

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 15 of
the New York State Environmental Conservation Law and
Part 666 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York,

ORDER

DEC File No.
R1-20090316-32

- by -

KOICHI KUBO AND FLORA KUBO,

Respondents.

This administrative enforcement proceeding concerns alleged violations of the wild, scenic and recreational river system regulations by respondents Koichi Kubo and Flora Kubo at property located at 2622 Montauk Highway, Town of Brookhaven, New York (site).

By notice of hearing and complaint dated September 14, 2011, staff of the New York State Department of Environmental Conservation (Department) alleges that respondents violated section 15-2723 of the Environmental Conservation Law (ECL), and section 666.13(C) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Department staff alleges that these violations arose from respondents' construction of a private dwelling within the Lower Carmans Scenic River Corridor without a permit from the Department. Department staff, in its complaint, requests a twenty-seven thousand dollar (\$27,000) penalty, to be imposed jointly and severally, and requests suspending thirteen thousand five hundred dollars (\$13,500), provided that respondents undertake certain remedial measures.

The matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman who prepared the attached hearing report. I adopt the hearing report as my decision in this matter, subject to the following comments.

The record is clear that respondents' construction of a private dwelling in the Lower Carmans Scenic River Corridor was in violation of 6 NYCRR 666.13(C).¹ Accordingly, I affirm the ALJ's ruling as to liability.

In the ruling, the ALJ concludes that Department staff's penalty request of twenty-seven thousand dollars (\$27,000) is reasonable, but recommends that the suspended amount be increased from thirteen thousand five hundred dollars (\$13,500) to twenty thousand dollars (\$20,000). Based upon my review of the record, including but not limited to the testimony of respondent Flora Kubo, the limited adverse environmental impact of the construction, the lack of

¹ Staff also alleges that respondents violated ECL 15-2723. This section, however, is solely an enforcement provision, and would not be a basis for a violation.

evidence to establish that respondents derived any economic benefit, and the costs of the remedial measures that will be required, a further increase in the amount of the suspended penalty is warranted here.

Accordingly, I am suspending twenty-two thousand dollars (\$22,000) of the twenty-seven thousand dollar (\$27,000) civil penalty. The payable penalty of five thousand dollars (\$5,000) will be due and owing within thirty (30) days of the service of this order upon respondents.

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

- I. Respondents Koichi Kubo and Flora Kubo are adjudged to have violated 6 NYCRR 666.13(C) by constructing a private dwelling within the Lower Carmans Scenic River Corridor without a permit from the Department.
- II. Respondents Koichi Kubo and Flora Kubo are jointly and severally assessed a civil penalty in the amount of twenty-seven thousand dollars (\$27,000), of which twenty-two thousand dollars (\$22,000) shall be suspended, contingent upon respondents complying with the terms and conditions of this order, including but not limited to the remedial measures described in paragraph III. The non-suspended portion of the penalty (five thousand dollars [\$5,000]), shall be due and payable within thirty (30) days after service of this order upon respondents. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Kari E. Wilkinson, Esq.
Assistant Regional Attorney
New York State Department of
Environmental Conservation, Region 1
50 Circle Road
Stony Brook, New York 11790

Should respondents fail to satisfy the terms and conditions of this order, the suspended portion of the penalty (that is, twenty-two thousand dollars [\$22,000]) shall become immediately due and payable upon notice by Department staff and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

- III. No later than sixty (60) days after service of this order upon respondents, respondents are directed to submit to Department staff for its review and approval: (i) an approvable (i.e., approvable as written or with only minimal revision) stormwater drainage plan for all impervious surfaces constructed at the site, sufficient to contain a two inch rain event in a 24 hour period; and (ii) a survey, drawn by a licensed land surveyor, depicting the site boundaries and all structures as built on the site.

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550**

In the Matter

- of -

the Alleged Violations of Article 15 of
the New York State Environmental Conservation Law
and Part 666 of Title 6 of the Official Compilation of Codes,
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- by -

KOICHI KUBO AND FLORA KUBO,

Respondents.

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HEARING REPORT

- by -

/s/

Richard A. Sherman
Administrative Law Judge

February 10, 2012

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, both dated September 14, 2011, by certified mail, on Koichi Kubo and Flora Kubo. The complaint alleges that respondents violated section 15-2723 of the Environmental Conservation Law (ECL), and section 666.13(C) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by constructing a private dwelling within the Lower Carmans¹ Scenic River Corridor (river corridor) without a permit from the Department. Respondents answered the complaint by letter (answer), dated September 30, 2011, wherein they raise various defenses to the allegations and request that the complaint be dismissed.

An administrative enforcement hearing was held on December 7, 2011, at the Department's Region 1 Office in Stony Brook, New York, to consider Department staff's allegations.² The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures (6 NYCRR part 622). Staff was represented by Kari E. Wilkinson, Assistant Regional Attorney, DEC Region 1. Staff called one witness: Robert F. Marsh, Natural Resources Supervisor, DEC Region 1. Flora Kubo testified on behalf of respondents, who appeared pro se.

The parties agreed to forgo written closing briefs and instead made their closing statements on the record at the close of the hearing. No post hearing submissions were authorized or received. Accordingly, the hearing record closed upon my receipt of the transcript on December 29, 2011.

As detailed below, on the basis of the record established in this proceeding, this hearing report recommends that the Commissioner issue an order (i) adjudging respondents to be in violation of the wild, scenic and recreational rivers (WSRR) system law and regulations, as specified below; (ii) directing respondents to provide Department staff with an as built survey and install a Department-approved drainage system for stormwater control; and (iii) assessing a civil penalty of \$27,000 jointly and severally upon the respondents, with \$20,000 suspended provided that respondents comply with all terms and conditions of the Commissioner's order.

FINDINGS OF FACT

1. At all times relevant to these proceedings, respondents Koichi Kubo and Flora Kubo were the owners of property (site) located at 2622 Montauk Highway, Town of Brookhaven,

¹ The spelling of Carmans River used throughout this report is that shown on the maps in evidence (see exhibits 2, 4, 7 at 13) and elsewhere in the hearing record (see e.g. exhibit 3; complaint ¶¶ 6, 10, 16). The spelling in the statute is "Carmens River" (see e.g. ECL 15-2714[2][f]).

² The notice of hearing advised respondents that the hearing would be held at the Department's Region 1 Office on December 9, 2011, at 10:00 a.m. The hearing date and time were subsequently changed to December 7, 2011, at 1:00 p.m. Respondents were advised by staff of this change by letter dated October 31, 2011, and by telephone on November 21, 2011.

New York (Suffolk County Tax Map Number 200-903-1-15) (complaint ¶ 3; exhibit 7 at 3 [joint application for permit, item 6]). Respondents purchased the site in or about 1990 (transcript at 7, 48).

2. The site consists of approximately four acres (exhibit 7 at 3 [joint application for permit, item 9]) and is located entirely within the river corridor (exhibits 2, 3 [Matter of River Area Boundaries for the Carmans and Connetquot Rivers, Decision and Order of the First Deputy Commissioner (1977 Order), March 4, 1977, attached FEIS, Appendix A at iii-iv (establishing the river area boundaries for the "Lower Carmans Scenic River")], 4; transcript at 13-14, 15 [describing markings on exhibit 2]).
3. Commencing in or about October, 2007, respondents constructed a private dwelling and associated structures at the site (exhibits 5, 7 at 3 [joint application for permit, item 9], 8 at 1-4).
4. Little Neck Creek is within the river corridor and is a tributary of the Carmans River (exhibits 2, 3 [1977 Order, attached FEIS at 7], 4).
5. The site is approximately 560 feet from Little Neck Creek (exhibit 4; transcript at 24).
6. The private dwelling constructed by respondents is approximately 700 feet from the nearest bank of Little Neck Creek (exhibits 4; 7 at 10, 14) and is at least partially screened from the creek (exhibits 4, 8 [depicting vegetation on and surrounding the site]; transcript at 46 [respondent Flora Kubo's testimony that she has never seen the creek from her property]).
7. Environmental Conservation Officer (ECO) VerHague issued an Administrative Conservation Appearance Ticket (ACAT) to respondents' contractor, Charles W. Southard, Jr., on October 31, 2007, for "construction of a home" within a "wild/scenic river" corridor without a permit from the Department (exhibit 5; see transcript at 25-27, 46).
8. Department staff issued Notices of Violation to Charles Southard, Jr., on November 5, 2007, and to respondents on December 6, 2007, for construction of a "single family dwelling" within a wild, scenic and recreational river corridor without a permit from the Department (exhibits 6A, 6B).
9. Respondents filed an application for a WSRR permit with the Department, signed only by their agent, which was received by the Department on November 15, 2007 (exhibit 7).
10. Department staff's witness, Mr. Marsh, inspected the site on November 2, 2007, November 8, 2007, December 19, 2007, September 10, 2008, and November 21, 2008 (transcript at 33-35; exhibit 8 at 5-9).

DISCUSSION

Environmental Conservation Law, article 15, title 27 (title 27), establishes the New York State wild, scenic and recreational rivers system (see ECL 15-2701[4]). The purpose of title 27 is to implement the State's policy of protecting rivers that are designated as "possess[ing] outstanding natural, scenic, historic, ecological and recreational values" (ECL 15-2701[1]). Pursuant to ECL 15-2701(3), designated rivers "shall be preserved in free-flowing condition and . . . they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."

Any person who violates any provision of title 27, or any regulation or order issued pursuant thereto, "may be compelled to comply with or obey the same by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation" (ECL 15-2723).

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the complaint (see 6 NYCRR 622.11[b][1]) and must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

Summary of Respondents' Position

Respondents deny that the site is within the river corridor (answer ¶ 4). Respondents argue that, if a WSRR permit was required, they should not be held responsible for their failure to obtain a permit because they had engaged the services of a local permit "expeditor" who was responsible for securing all permits necessary for construction of the dwelling (transcript at 7-9, 45-46). Respondents assert that they applied for and obtained a Town of Brookhaven building permit, a Suffolk County sanitary system permit, and a State "road opening permit" (answer ¶ 1). Respondents assert that none of these permitting authorities advised them that they were also required to obtain a WSRR permit from the Department and further assert that there are no markings or postings in the area of the site to indicate that it is situated within the river corridor (id. ¶¶ 1-2; transcript at 46). Respondents assert that the site is more than two miles from any bank of the Carmans River and is, therefore, well beyond the one-half mile jurisdictional limitation established under title 27 (answer ¶ 13). Respondents request dismissal of the action and further request that the site "be removed from the Scenic River Corridor, which it apparently has been designated to be in because it does not provide any scenic views [of the river], nor [have] any impact on any watercourse within this corridor, and is buffered by a National Park" (id.).

Cause of Action

The sole cause of action set forth in the complaint alleges that "[o]n or before October 31, 2007 and through November 21, 2008, Department Staff documented the Respondents[] continued construction of a residential structure in the Carmans Scenic River Corridor without the required WSRR permit from the Department" (complaint ¶ 16). This, staff alleges, was in violation of 6 NYCRR 666.13(C) and ECL 15-2723 (id. ¶ 17).

Respondents argue that the site is too distant from the bank of the Carmans River to fall within the boundaries of the river corridor. Respondents correctly note that the area of a river corridor is limited by law to no more than one-half mile from a designated river. Because the site is more than one-half mile from the Carmans River, respondents argue that it cannot be within the river corridor. This argument is unavailing.

Pursuant to ECL 15-2703(9), a "river" is defined, in part, as "a flowing body of water or a section, portion or *tributary* thereof" (emphasis supplied), and a "river area" is defined to include "the term river and the land area in its immediate environs as established by the commissioner . . . but not exceeding a width of one-half mile from each bank thereof." Taken together, the definition of river and river area plainly contemplate the inclusion of tributaries within the WSRR system and the Commissioner is authorized to include areas up to one-half mile from the bank of a tributary within a river corridor.

The site is located approximately 560 feet from Little Neck Creek, a tributary of the Carmans River, and is entirely within the river corridor as designated by the Department. Department staff introduced the 1977 Order, which established the boundaries of the river corridor; the official New York State Carmans WSR River Corridor Map; and an aerial photograph depicting the boundaries of the river corridor and of respondents' site (see 6 NYCRR 622.11[a][9] ["All maps, surveys and official records affecting real property, which are on file in the State in the office of . . . any county clerk . . . or any department of the State . . . are *prima facie* evidence of their contents"]). Staff's witness testified to the location of the site in relation to the river corridor boundaries and identified the site on both the official river corridor map and the aerial photograph. The testimony and documentary evidence introduced by staff are probative and uncontroverted. Accordingly, Department staff has met its burden of proof to demonstrate that the site is located within the river corridor.

Pursuant to 6 NYCRR 666.13(C), construction of private dwellings within a scenic river corridor is either a prohibited use or a use which requires a WSRR permit, depending on how close the proposed structure is to the bank of a protected river or tributary. If the proposed private dwelling is 250 feet or less from the bank, it is a prohibited use (designated by an "X" in the regulation). If the proposed private dwelling is within the corridor, but more than 250 feet from the bank, it requires a WSRR permit (designated by a "P" in the regulation).

The record does not establish the precise distance from respondents' dwelling to the bank of Little Neck Creek. However, a map submitted by respondents with their permit application³ depicts the dwelling as being 700 feet from the bank of Little Neck Creek. This distance appears generally consistent with the sum of Department staff's estimate of the distance between the creek and the nearest boundary of the site (i.e., approximately 560 feet [see exhibit 4; transcript at 24]) plus the setback of the dwelling from the relevant site boundary (i.e., 124.5 feet at its

³ Note that the application was not submitted to the Department until November 15, 2007, after respondents' contractor had been cited for construction of the dwelling without a WSRR permit. Staff's witness testified that the Department did not process the application because construction at the site was "most of the way completed" at that time, and the violation needed to be resolved through the enforcement process (transcript at 31).

nearest point [see exhibit 7 at 14]). Additionally, respondent Flora Kubo testified that Little Neck Creek is not visible from the dwelling and that she had never seen the creek from her property (transcript at 46).

As noted above, the site is entirely within the river corridor and is approximately 560 feet from the bank of Little Neck Creek. Because the private dwelling constructed on the site by respondents is more than 250 feet from the bank of the creek, it is not a prohibited use under 6 NYCRR 666.13(C). However, respondents were required to obtain a WSRR permit prior to construction.

Respondents' assertion that they had no notice of the requirement for a WSRR permit to construct a private dwelling in the river corridor is unavailing. Title 27 does not impose an affirmative duty on other permitting authorities, such as towns or counties, to advise applicants that a WSRR permit is needed from the Department. There is also no requirement for river corridors to be posted. Although respondent Flora Kubo's testimony that respondents were unaware of the fact the site was located within the river corridor is credible, this lack of knowledge does not relieve a property owner from the obligations imposed under title 27.

I conclude that Department staff established by a preponderance of the evidence that respondents constructed a private dwelling in the river corridor without a WSRR permit in violation of 6 NYCRR 666.13(C).

Relief

By its complaint, Department staff requests that the Commissioner issue an order assessing a penalty of \$27,000, with \$13,500 payable, and \$13,500 suspended provided that respondents strictly comply with certain remedial measures to be imposed under the order (complaint at 3).⁴ For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of \$27,000, with \$20,000 suspended, and requiring respondents to implement, in part, the remedial actions demanded by staff.

Remedial Measures

By its complaint, Department staff requests an order of the Commissioner directing respondents to (i) provide the Department with an as built survey showing all permanent structures on the site, and (ii) install drainage for all impervious surfaces sufficient to contain a two inch rain event in a twenty-four hour period. Staff also requests authorization to review and approve all structures depicted on the survey, and determine whether they "may remain as built" (complaint at 3).

⁴ The complaint contains inconsistencies in paragraph II of the demand for relief. First, the penalty demand is stated as "thirty eight thousand six hundred dollars (\$27,000)." Second, paragraph II demands compliance with remedial measures set forth in "the attached Appendix A," but there is no appendix attached to the complaint. To avoid any prejudice to respondents, I will limit staff's demand to \$27,000, the lesser of the two penalty amounts stated, and to those remedial measures appearing on the face of the complaint. This approach also appears to be consistent with staff's intent (see complaint at 3; transcript at 36).

Except as discussed below, I conclude that the remedial measures requested by Department staff are authorized and appropriate. Staff's requests for an as built survey of all structures on the site and for the installation of sufficient storm drainage are reasonable and authorized under the facts and circumstances presented here.

However, I cannot recommend that staff be granted authority to approve whether the structures at the site may remain as built. The record is not sufficient to grant such relief. Staff's witness testified that, had respondents applied for permits from the Department prior to the construction of the dwelling, "their permits may have been issued" and that "there was not significant environmental damage" (transcript at 37). The record also reflects that the site is on the northernmost edge of the river corridor boundary, that respondents' dwelling is approximately 700 feet from the bank of Little Neck Creek, and that the dwelling is screened from the creek.⁵ On this record, I recommend denial of staff's request for authority to approve whether structures at the site may remain as built.

Penalty Calculation

Department staff's penalty request is well within the maximum statutory penalty available. For violations of WSRR regulations, ECL 15-2723 provides that a respondent "may be compelled to comply with or obey the [regulation] by injunction, mandamus or other appropriate remedy. In addition, any such person shall pay a civil penalty of not less than one hundred dollars or more than one thousand dollars for each day of such violation."

Staff determined the number of days of violation to be 270 and multiplied that number by \$100, the minimum daily penalty provided for under ECL 15-2723. Staff's witness testified that the 270 days of violation were derived by using a "conservative approach" to estimate the number of work days, excluding weekends and holidays, between October 31, 2007 (the date that ECO VerHague issued an ACAT at the site), and November 21, 2008 (the last date that staff witnessed work at the site) (transcript at 36-37).

Staff's penalty calculation is conservative. Construction of a private dwelling in violation of 6 NYCRR 666.13(C) is an ongoing violation, subject to daily penalties so long as the structure remains in place (see generally Matter of Valiotis, Order of the Commissioner, March 25, 2010, at 5-6 [holding that, until removed, an unauthorized structure in a tidal wetland or its adjacent area is an ongoing violation]; Matter of Sutherland, Order of the Commissioner, June 23, 2010, at 5 [concurring with the ALJ's penalty recommendation for violations of part 666, which was based, in part, upon the duration of the violations]). Using October 31, 2007, as the first day of violation, and September 14, 2011 (the date of the complaint), as the last day of violation, staff could have justifiably charged respondents with violating 6 NYCRR 666.13(C) for a total of 1415 days. This would result in a statutory maximum penalty for the single cause of action

⁵ The use guidelines established under 6 NYCRR 666.13 generally become more restrictive as the use, or proposed use, becomes more near the designated river. Where a permit is issued for construction of a private dwelling within a river corridor, screening and other restrictions are imposed if the dwelling will be within 500 feet of the river bank (6 NYCRR 666.13[C][2][b][note (i)]). Here, none of these restrictions apply.

charged by staff of \$1,415,000 (1,415 days in violation multiplied by the \$1,000 statutory daily maximum).

Although Department staff's penalty calculation is conservative, under the circumstances presented here, I recommend that a greater portion of the requested \$27,000 penalty be suspended. In addition to the lack of environmental impact and other matters discussed above (see supra at 6 [discussion under remedial measures]), staff proffered no evidence to establish that respondents derived any economic benefit from the violation, and none is apparent (see Civil Penalty Policy, Commissioner Policy DEE-1, June 20, 1990, §§ III [stating that "at a minimum, penalties should remove any economic benefit that results from a failure to comply with the law], IV.C [describing various measures of economic benefit]). Additionally, respondents engaged the services of a local permit expeditor to secure the permits necessary for construction of the dwelling. While a site owner is strictly liable for activities undertaken at their site in violation of part 666, respondents' reliance on a local permit expeditor is, to some degree, understandable. This is particularly so in light of respondent Flora Kubo's testimony that, during the relevant timeframe, she was seriously ill and that she and her husband were living in New York City (transcript at 45, 47-48; see also id. at 7-10, 38).

In consideration of the foregoing, I recommend the Commissioner assess a penalty in the amount of \$27,000, with \$20,000 suspended provided that respondents implement the recommended corrective measures.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff established respondents' liability for the violation alleged in the complaint. Specifically, respondents violated 6 NYCRR 666.13(C) by constructing a private dwelling within the Lower Carmans Scenic River Corridor without first obtaining a WSRR permit from the Department.

For the foregoing violation, I recommend that the Commissioner issue an order directing respondents to implement the remedial measures described above, and assessing a civil penalty of \$27,000 jointly and severally upon the respondents. I further recommend that \$20,000 of the penalty be suspended provided that respondents implement the remedial measures and comply with all other terms of the Commissioner's order.

APPENDIX A

EXHIBIT LIST

Matter of Koichi and Flora Kubo
DEC File No. R1-20090316-32

Exhibit No.	Description ⁶
1	Resume of Robert F. Marsh, Natural Resources Supervisor, DEC
2	Carmans WSR River Corridor Map
3	Matter of River Area Boundaries for the Carmans and Connetquot Rivers, Decision and Order of the First Deputy Commissioner, March 4, 1977
4	Aerial Photograph - Lower Carmans Scenic River Corridor
5	ACAT, dated October 31, 2007, issued to Charles W. Southard, Jr.
6A	Notice of Violation, dated November 5, 2007, addressed to Charles Southard, Jr.
6B	Notice of Violation, dated December 6, 2007, addressed to respondents
7	Joint Application for Permit, signed only by respondents' agent, dated November 14, 2007
8	Photographs of site taken by Department staff on or about October 31, November 2, 8, and December 19, 2007; and September 10, and November 21, 2008.

⁶ All of the exhibits were offered into evidence by Department staff, and received without objection.