

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 15 and 17 of the New York State Environmental Conservation Law ("ECL") and Parts 608 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC File No.
R4-2004-0324-38

- by -

FREDERICK NERONI,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Frederick Neroni by service of a motion for order without hearing in lieu of complaint dated April 25, 2006, together with supporting papers.

Respondent owns property located off of New York State Route 10 in the Town of Hamden, New York (the "site"). A portion of Tributary 46 to the West Branch of the Delaware River crosses the site. The tributary is a protected stream subject to the Department's jurisdiction, classified as C(t) (trout waters).

Department staff alleges that respondent made significant alterations to the bed and banks of Tributary 46 on the site by constructing a pond in the protected stream and by installing a culvert in the stream without a permit from the Department, thereby violating ECL 15-0501 and 6 NYCRR 608.2. Department staff also alleges that respondent caused turbidity in the stream, in violation of the applicable water quality standards (see ECL 17-0501 and 6 NYCRR 703.2).

Department Staff filed its motion for an order without hearing with the Department's Office of Hearings and Mediation Services in May of 2006. The matter was assigned to Administrative Law Judge ("ALJ") Molly McBride. Respondent Frederick Neroni served an affirmation dated May 18, 2006 in opposition to Department staff's motion.

By ruling dated August 17, 2006, ALJ McBride found that respondent violated ECL 15-0501 and 6 NYCRR 608.2 by constructing

a pond in the course of Tributary 46 of the Delaware River without a permit. The ALJ also found that respondent violated ECL 17-0501 and 6 NYCRR 703.2 by causing a visible contrast to the stream as a result of sand and gravel erosion and flow into the stream from overflow from the pond that respondent constructed. The ALJ, however, denied the motion for order without hearing with respect to the installation of the culvert without a permit in Tributary 46. Department staff subsequently withdrew that cause of action by letter dated September 1, 2006.

On December 11, 2006, the ALJ issued a ruling directing that a hearing be held on Department staff's request for penalties and remediation. Following unsuccessful attempts to mediate the dispute, an adjudicatory hearing was held on June 5, 2007, and the ALJ prepared the attached hearing report. I hereby adopt the ALJ's Ruling dated August 17, 2006 on respondent's liability and the findings of fact, conclusions of law and recommendation in the attached hearing report dated April 17, 2009 as my decision in this matter, subject to my comments below.

Based on the record, I conclude that the proposed civil penalty of ten thousand dollars is appropriate and authorized.

With respect to remediation, Department staff requested, among other things, that respondent partially fill and bench the pond area, restore the stream channel, armor portions of the channel to prevent future erosion, and remove a culvert at the site, in addition to seeding and mulching (see, e.g., Hearing Exhibit 2; see also Hearing Transcript, at 147-150).

The ALJ properly rejected respondent's objections to the remediation of the site. As provided in ECL 15-0511(2), where an illegal excavation has occurred in or on the waters of the State, removal, replacement or correction of the excavated or filled materials may be ordered. Respondent's activities have resulted in a highly erodible situation on the site and have impacted stream flow. In order to limit erosion, correct the water quality violations and restore the stream to its proper functioning, such remedial activities as the benching of the pond area, armoring the stream and removing a culvert at the site are warranted (see, e.g., Hearing Transcript at 149-50, 213). Otherwise, respondent's site activities would continue to cause ongoing violations particularly with respect to turbidity.

ECL 15-0501(3) (b) provides that in considering a permit application for stream disturbance, the Department may approve the manner and extent to which a stream bed or channel may be changed and may limit the removal of material from the stream to

minimize disturbance to the stream and to prevent, among other things, increased turbidity of the waters and unreasonable soil erosion. If respondent had filed a permit application, the Department would have considered conditions to avoid erosion and turbidity. Respondent's undertaking site work without a required permit does not preclude the Department from imposing the necessary remedial relief to address ongoing or future erosion and turbidity problems arising from respondent's site activities (see also ECL 71-1127[1][providing that a person may be enjoined from continuing a violation under ECL 15-0501, among other provisions]; ECL 71-1929 [providing that a person may be enjoined from continuing a violation under ECL 17-0501, among other provisions]).

The remediation activities requested by Department staff in Exhibit 2 to the adjudicatory hearing record (a copy of which is attached to the ALJ's hearing report) are both authorized and appropriate in the factual circumstances of this matter. Those activities are set forth in paragraph IV of this order.

Recognizing the interest in respondent's immediately undertaking the remediation activities and the cost that such activities may entail, I conclude that suspending half of the civil penalty (that is, five thousand dollars) is appropriate, contingent upon respondent's full compliance with the remediation plan and timely payment of the unsuspended portion of the penalty.

Also pending before me is respondent Frederick Neroni's undated appeal from a letter ruling dated September 30, 2008 in which ALJ McBride denied respondent's motion seeking her recusal in this proceeding ("Respondent Appeal"). Department staff responded to respondent's appeal by letter dated October 27, 2008 ("Staff Response").¹

In its appeal, respondent accuses the ALJ of bias and prejudice arising from her denial of respondent's motion to vacate her August 17, 2006 ruling. That ruling found respondent

¹ Section 622.10(b)(2) of 6 NYCRR provides that "[a]ny party may file with the ALJ a motion . . . requesting that the ALJ be recused on the basis of personal bias or other good cause" (6 NYCRR 622.10[b][2][iii]). A denial of such a motion is appealable as of right to the Commissioner, either on an expedited, interlocutory basis, or after the conclusion of the adjudicatory proceeding before the ALJ (see 6 NYCRR 622.10[d]; see also State Administrative Procedure Act § 303).

liable for violating the ECL and its implementing regulations. Respondent, in part, alleges that the ALJ based her ruling on "maps attached to the [Department's] motion papers" that were "altered by drawing lines on them and creating jurisdiction where no jurisdiction existed" (Respondent Appeal, at 2). Respondent also accuses Department staff and its attorney of falsifying public records and other delinquencies, focusing in part on the Department of Transportation ("DOT") quad map that was attached to the motion for order without hearing. Respondent also makes various allegations about the relationship of a neighboring resident to this proceeding and further contends that the proceeding is meant to harass respondent for refusing to grant DEC a "timbering prohibition" on other property (see Respondent Appeal, at 3).

Department staff, in its response, indicates that the DOT quad map was simply used to show where the stream was located, and was not submitted to prove the status of the stream as classified. Department staff disputes the other allegations that respondent raises in its appeal, noting that none of them have any relevance to the issue of bias or prejudice of the ALJ (see Staff Response, at 2).

Respondent transmitted a telecopy reply dated October 30, 2008 to Department staff's response ("Respondent Reply"). Respondent, in its telecopy, again contended that the ALJ should be disqualified because of her use of a "falsified" map to establish jurisdiction over respondent ("Respondent Reply", at 4). Although no authorization had been granted to respondent to file this reply, and the reply could be excluded on that ground, I have considered it for purposes of this appeal.

On this appeal, I have reviewed the submissions before me, and the underlying record. I find no demonstration of any personal bias with respect to the ALJ or any other cause that would require her recusal. I have reviewed the ALJ's September 30, 2008 ruling in which she details her handling of this proceeding including the use of the DOT quad map. Nothing in this record supports respondent's claims that recusal is warranted, and I find that the ALJ conducted the hearing in a fair and impartial manner, carefully weighing the evidence presented and being objective in her analysis. Sufficient evidence was presented in this proceeding to establish jurisdiction over respondent (see, e.g., Affidavit of Jerome Fraine, DEC Conservation Biologist I [Ecology] dated April 20, 2006, at ¶5; 6 NYCRR part 815). Accordingly, the ALJ's letter ruling dated September 30, 2008 denying respondent's motion for recusal is affirmed.

I have also reviewed the accusations that respondent raises with respect to Department staff including the staff attorney, and Department staff's response. Based on my review of the papers submitted on this appeal and the underlying record, I find that respondent's accusations challenging Department staff's honesty and staff's actions in this proceeding to be baseless, and respondent's related arguments to be lacking in merit.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Pursuant to 6 NYCRR 622.12, Department staff's motion for an order without hearing is granted in part and denied in part.

II. Respondent Frederick Neroni is adjudged to have violated ECL 15-0501, ECL 17-0501, 6 NYCRR 608.2 and 6 NYCRR 703.2.

III. Respondent Frederick Neroni is hereby assessed a civil penalty in the amount of ten thousand dollars (\$10,000) of which five thousand dollars (\$5,000) is suspended on the condition that respondent timely pay the non-suspended portion of the civil penalty and fully undertake the remedial relief set forth in Paragraph IV of this order. The non-suspended portion of the civil penalty (that is, five thousand dollars [\$5,000]) shall be due and payable within thirty (30) days after service of this order upon respondent. 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: Ann Lapinski, Esq., Office of General Counsel, New York State Department of Environmental Conservation, 14th Floor, 625 Broadway, Albany, New York 12233-1500. Should respondent fail to timely pay the non-suspended portion of the civil penalty or fully undertake the remedial relief set forth in Paragraph IV of this order, the suspended portion of the penalty shall become immediately due and payable and is to be submitted in the same manner and to the same address as the non-suspended portion of the penalty.

IV. Within thirty (30) days after service of this order upon respondent, respondent shall submit a site remediation plan to Department staff for its review and approval ("remediation plan"). The remediation plan shall include the following items, and include a schedule for completion for each of the items:

A. Prior to the commencement of any work at the site,

respondent's contractor shall meet with Department staff at the site to review the work to be undertaken. When each milestone in the schedule of compliance is met, respondent or its contractor shall contact Department staff and notify staff of the completion of the milestone so that additional inspections may be arranged;

B. The pond shall be partially filled in and benched in accordance with the remediation plan. The channel of Tributary 46 in the area of the pond shall be restored to a width of approximately five feet;

C. The south side of Tributary 46 in the pond area shall be armored in order to prevent erosion;

D. The culvert in the area of Crossing A, on the east end of the property, shall be removed;

E. The south side of the stream, in the culvert area of Crossing A, shall be armored to prevent erosion;

F. With respect to Crossing B, the existing pipes in this area shall be removed and replaced with a five foot diameter culvert which is twenty feet in length. The culvert shall be placed one foot below the existing downstream grade. Alternatively, the dam and existing pipes in this area may be removed and the north side of Tributary 46 armored to prevent erosion;

G. All exposed soil shall be seeded with a conservation mix and mulched as soon as the remediation is complete; and

H. All work shall be completed no later than November 1, 2009.

Modifications to the items in the remediation plan may be made only upon the written approval of Department staff.

V. The ruling of ALJ Molly McBride dated September 30, 2008, which denied respondent's motion for recusal of the ALJ, is affirmed.

VI. All communications from respondent to the Department concerning this order shall be made to Ann Lapinski, Esq., Office of General Counsel, New York State Department of Environmental Conservation, 14th Floor, 625 Broadway, Albany, New York 12233-1500.

VII. The provisions, terms and conditions of this order shall bind respondent Frederick Neroni, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: June 10, 2009
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233-1550

In the Matter of the Alleged Violations of
Articles 15 and 17 of the New York State Environmental
Conservation Law and Parts 608 and 703 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York (NYCRR),
-by-

FREDERICK NERONI,

Respondent

DEC File No. R4-2004-0324-38

HEARING REPORT

/s/

Molly T. McBride
Administrative Law Judge
April 17, 2009

PROCEDURAL BACKGROUND

The New York State Department of Environmental Conservation (DEC or Department) staff moved for an order without hearing by motion dated April 25, 2006 against Frederick Neroni (respondent). By ruling dated August 17, 2006 the motion was denied with respect to one cause of action and granted with respect to two causes of action. Respondent was found to have violated Article 15 of the Environmental Conservation Law (ECL) and Part 608 of 6 NYCRR by constructing a pond in the course of Tributary 46 of the Delaware River without a permit; and ECL 17-0501 and 6 NYCRR 703.2 by causing a substantial visible contrast to the stream in question as a result of sand and gravel erosion and flow into the stream. The violations occurred on property that respondent owns in the Town of Hamden, New York (site). The August 2006 ruling requested further information from Department Staff regarding a request for remediation at the site. Department Staff submitted additional information and respondent did not reply to those submissions. A ruling dated December 11, 2006 was issued that directed that a hearing be held with respect to Department Staff's request for penalties and remediation as questions of fact remained.

Prior to the hearing on penalties and remediation, the parties agreed to mediate the outstanding issues. Mediation took place but was unsuccessful. On June 5, 2007 a hearing was held at the Department's Region 4 office in Schenectady, New York regarding Department Staff's request for penalties and remediation. Department Staff appeared by Ann Lapinski, assistant regional attorney. Respondent, an attorney, appeared on his own behalf.

At the hearing on June 5, 2007 respondent brought two motions on the record. He did not have motion papers and he did not put Department Staff on notice of the motions. He moved to vacate the August 2006 ruling on the grounds that an exhibit attached to one of Department Staff's supporting affidavits dated April 2006 was improper and inaccurate. He also moved to vacate the August 2006 ruling because his wife, Tatiana Neroni, was not named as a respondent. During the discussion on the record regarding the second motion Mrs. Neroni, who was present in the hearing room, stated that the second motion was in fact her motion and that she would be representing herself with regard to that motion. Mrs. Neroni then argued that because she was not afforded an opportunity to oppose the motion for order without hearing. It was disclosed for the first time that both respondent and Mrs. Neroni held title to the property in question, as tenants by the entirety.¹ Mrs. Neroni took title after the motion was commenced by Department Staff and three weeks prior to the ruling being issued. Mr. Neroni acknowledged that he did not notify Department Staff or the Office of Hearings that there had been a change in title after the commencement of the proceeding.

The motion to vacate the August 2006 ruling based upon respondent's argument that an exhibit to the motion papers is improper and inaccurate was denied before the start of the hearing on June 5, 2007. I reserved decision on the motion regarding Mrs. Neroni's ownership of the

¹ Mr. Neroni presented a Warranty deed dated July 26, 2006 wherein he transferred title to the property in question from himself to himself and his wife Tatiana Neroni, as tenants by the entirety. This transfer took place after the date of the alleged violations and after the commencement of the action against respondent.

property to allow Department Staff and Mrs. Neroni to make written submissions on the motion. The hearing then went forward after the motions were argued. Mr. Neroni objected to going forward with the hearing but he did participate. The hearing was completed on June 5, 2007.

Both Department Staff and Mrs. Neroni did submit further argument on their respective positions on the motion to vacate the hearing based upon Mrs. Neroni's ownership of the property. Mrs. Neroni's motion was denied by ruling dated September 30, 2008.

The September 2008 ruling allowed Mrs. Neroni to submit legal argument with regard to Department Staff's request for remediation at the site. Mrs. Neroni submitted two letters regarding remediation. Her first submission was a one line letter wherein she stated that she would not consent to any remediation on the site. Mr. Neroni made an identical submission. Department Staff responded to Mrs. Neroni's letter by letter of Ann Lapinski dated October 15, 2008. Mrs. Neroni's second submission, undated but received in my office on October 20, 2008, opposed remediation and responded to Ms. Lapinski's October 2008 submission.

DEPARTMENT'S POSITION

Department Staff alleged that the respondent violated 6 NYCRR 608.2 by (1) constructing a pond in the course of a protected stream, Tributary 46 of the Delaware River which is classified as a class C stream; and (2) violated 6 NYCRR 703.2 and ECL 17-0501 by creating a visible contrast in said stream. After several site inspections beginning in 2001, DEC Conservation Biologist I Jerome Fraine stated that he located a portion of Tributary 46 of the West Branch of the Delaware River on the Neroni property. Mr. Fraine stated in his affidavit of April 20, 2006 that the intermittent stream located on the site is a Class C stream as defined in 6 NYCRR 701.8. He identified the location of the classification for the Tributary.² He also stated in his affidavit that the standard for Tributary 46 is C(t) which means that it supports a trout population. Mr. Fraine visited the site and observed that a pond had been constructed on the property in the course of the Tributary and that sand and gravel from the dam that had been used to construct the pond had washed into respondent's and a neighbor's yards and into the stream below, causing a visible contrast. Respondent was found liable for the two violations in the August 2006 ruling.

Department Staff requested a total penalty of \$10,000, \$5,000 per violation. Department Staff has also requested that the site be remediated. Department Staff submitted a proposed remediation plan at the hearing, it is marked as Exhibit 2 in the hearing record and attached hereto as Schedule A. Department Staff is requesting, in part, that respondent: (1) partially fill and bench the pond area; (2) restore the stream channel; (3) armor portions of the channel to prevent future erosion; (4) remove a culvert on the property; (5) remove some pipes that were installed in the pond area and replace them with a culvert or remove the existing dam and pipes and armor that portion of the stream bed as well. Also, seeding and mulching would be required.

² Item 889, waters index D-71-46 at 6 NYCRR 815.6.

RESPONDENT'S POSITION

Respondent contested the alleged violations by arguing that no stream is present on his property. He argued that runoff on his property was causing erosion and he had a depression on his property from the erosion. He acknowledged that he hired a contractor to construct the pond on his property, but argues that the pond is in the location of the depression created by the runoff and denies that any stream, intermittent or otherwise, is present on his property. He has testified that the water in the pond is from springs that are on the property. He opposes remediation but has offered no legal support for his position.

PENALTY

Violations of ECL Article 15 and/or 17 are subject to penalties pursuant to ECL Article 71. For violations of Article 17, ECL Article 71 provides for a maximum penalty of \$37,500 per day per violation. The amount requested by Department Staff, \$10,000, is significantly less than the maximum penalty. The Department has a Civil Penalty Policy (Policy). It serves as guidance in calculating a penalty in an enforcement case. The Department has two main goals; punish the violator and deter future violations. The Policy states that the penalty should equal the gravity component, plus the benefit component, plus or minus any adjustments. It is agreed that respondent did have an area that was eroded before he began his work. He has testified under oath and affirmed in affidavits that he was not aware that his actions were disturbing a stream. He expanded the depression and created the dam and pond to avoid further damage to his property from what he thought was runoff. However, a stream has been disturbed and there is a continuing problem of the stream being diverted to the pond and the pond subsequently overflowing and causing sand and gravel to migrate to the neighboring property and into the stream, downstream. Department Staff cited several cases that established that ten thousand dollars (\$10,000) is in line with previous Commissioner's decisions for similar violations.

REMEDICATION

ECL 17-0101 states "It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof ... and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York." ECL 15-0103 states, in part, the following: "(9) The unreasonable, uncontrolled and unnecessary interference with or defilement and disturbance of water courses create hazards to the health, safety and welfare of the people of the state causing great economic loss by erosion of soil, increased costs of water purification and treatment, the loss of crop lands and forests by flooding, the destruction and failure of natural propagation of fish and aquatic resources and the loss of water for domestic, industrial, navigational, municipal, agricultural, recreational and other beneficial uses and purposes". The Department must fulfill its duty of protecting the waters of

the state by using all known available and reasonable methods, including having a property owner remediate their property when a stream disturbance has occurred.

The request for remediation by Department Staff is to return the property to the condition it was in before the respondent committed the violations, and also the additional remediation of armoring the stream to prevent future pollution of the waters of the State. The respondent has been quite clear about the problems he has encountered on his property due to the stream overflow. If the stream is not armored, the overflow problems will continue as will the continued discharge of sand and gravel into the stream. It will serve to protect the stream and respondent's property to complete the additional remediation of armoring the stream.

ECL 17-0101 declares it to be "the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wildlife, ... and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York". To allow the continued pollution of the waters from overflow would be in direct conflict with this public policy. Therefore, to implement ECL 17-0101, the armoring must be done.

The Department issues permits to change, modify or disturb the course, channel or bed of streams in New York only after it has closely examined the possible effects and any permit, if issued, permit conditions are included that minimize the disturbance of a stream and the unreasonable erosion of soil, increased turbidity of the waters, as well as several other factors. (ECL 15-0501[3][b]) Assuming for arguments sake that respondent had applied for a permit to undertake the work he did on the property, the Department would not have authorized the work in the manner completed. Either the permit application would have been denied or it would have included conditions that allowed for the armoring of the stream channel to avoid the very problems that occurred.

Both respondent and Mrs. Neroni have argued against compulsory remediation. Mrs. Neroni argued in her letter submission received in October 2008 that remediation constitutes unreasonable search and seizure. Mrs. Neroni cited the case of *Matter of John Ames, 1994 WL 734482 (Order, December 29, 1994)* in support of her argument that the Department can not order remediation on property without the owner's permission. *Ames* involved work done on private property without the owner's notice or consent. In *Ames*, Department Staff sought an order directing the non-owner respondents to remediate the site owned by Ames, a non-party. However, the innocent bystander owner did not give permission for access to remediate and Department Staff's motion seeking the nonparty owner to allow access was denied. Here, the respondent is the owner and the party responsible for the work on the property. He directed the work that was done, namely disturbing the protected stream. *Ames* is not applicable here.

FINDINGS OF FACT

1. Respondent Frederick Neroni was the sole owner of the site at the time that the motion for order without hearing was commenced by Department Staff in April 2006.
2. Respondent was the sole owner of the site when the violations occurred.
3. As per the Ruling of August 2006, liability with regard to the violations of ECL Articles 15 and 17 and 6 NYCRR Parts 608 and 703 has been established.
4. ECL 17-0101 and ECL 15-0501[3][b] entrusts the Department with the duty of maintaining reasonable standards of water purity consistent with public health and public enjoyment thereof.
5. ECL 17-0101 and ECL 15-0501[3][b] entrusts the Department with the authority to require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.
6. If the stream channel is not reinforced and armored, as requested by Department Staff, the stream channel will fail resulting in further discharge downstream creating a visible contrast in said stream in violation of 6 NYCRR 703.2 and ECL 17-0501.

CONCLUSIONS OF LAW

1. As per the Ruling of August, 2006, it was found that a portion of tributary 46 of the Delaware River is located on the site and it is a protected stream, as defined in 6 NYCRR 608.
2. As per the Ruling of August, 2006, it was found that respondent violated ECL 15-0501 and 6 NYCRR 608.2 by disturbing the protected stream by constructing a pond in the course of the stream.
3. As per the Ruling of August, 2006, respondent was found to have violated ECL 17-0501 and 6 NYCRR 703.2 by causing a substantial visible contrast to the stream in question as a result of sand and gravel erosion and flow into the stream from overflow of the pond.

4. Pursuant to ECL 17-0101 and ECL 15-0501[3][b], the Department has the duty and authority to maintain reasonable water quality standards for the waters of the state of New York; and the duty and authority to require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.

5. Requiring the requested remediation is within the Department's authority as authorized by ECL 17-0101 and ECL 15-0501[3][b] .

RECOMMENDATION

I recommend the Commissioner order that the respondent pay the requested penalty of \$10,000. I recommend that the Commissioner grant Department Staff's motion with respect to remediation as detailed in the attached schedule A which is Department Staff's Schedule of Compliance, with the dates of compliance modified and updated.