

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 and Parts 608 and 703 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York (NYCRR),

Ruling on Staff's
Motion for Order
Without Hearing

DEC File No. R4-2004-0324-38

-by-

FREDERICK NERONI,

Respondent

Summary of Ruling

The New York State Department of Environmental Conservation (DEC or Department) staff's motion for order without hearing dated April 25, 2006 is denied in part and granted in part.

Proceedings

Department staff commenced this proceeding against respondent Frederick Neroni (Neroni) by service of the motion for order without hearing in lieu of complaint dated April 25, 2006 along with supporting papers: affidavit of DEC Conservation Biologist I Jerome Fraine dated April 20, 2006 with Exhibits 1-8 and affirmation of Ann Lapinski dated April 25, 2006. Staff's motion alleges that in violation of Article 15 of the Environmental Conservation Law (ECL) and Part 608 of 6 NYCRR, the respondent (a) constructed a pond in the course of Tributary 46 of the Delaware River without a permit; (b) installed a culvert without a permit; and (c) caused a substantial visible contrast in a stream in violation of ECL 17-0501 and 6 NYCRR 703.2, on property that he owns in the Town of Hamden, New York.

The Department's Office of Hearings and Mediation Services (OHMS) received staff's motion papers on May 25, 2006. On May 22, 2006 respondent Neroni served an affirmation in opposition to the motion (Respondent is an attorney). By letter dated May 23, 2006 Ann Lapinski requested the opportunity to submit a reply and that request was granted. The reply affidavit of Jerome Fraine dated June 12, 2006 was served on the OHMS and respondent. Respondent submitted an affirmation dated June 16, 2006 in response to the second Fraine affidavit.

Discussion

Section 622.12(d) of 6 NYCRR provides that “[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR [Civil Practice Law and Rules] in favor of any party.” Section 622.12(e) provides that “[t]he motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing.”

CPLR 3212(b) requires that papers in support of a motion for summary judgment must include an affidavit by a person with actual knowledge of the facts, must be based on admissible evidence, and must show that there is no defense to the cause of action. See, Winegrad v. New York University Medical Center, 64 NY2d 851 (1985). The motion should be denied “if any party shall show facts sufficient to warrant a trial on any issue of fact.” Caruso v. New York City Police Dep’t Pension Funds, NYLJ, Dec. 27, 1985 at 6, col. 1 (Sup. Ct. NY Co.).

Department Staff alleges that the respondent violated 6 NYCRR 608.2 by (1) constructing a pond in the path of a protected stream, Tributary 46 of the Delaware River which is classified as a class C stream; and (2) by installing a culvert in the path of said stream. Respondent also allegedly violated 6 NYCRR 703.2 and ECL 17-0501 by creating a “visible contrast” in said stream. Respondent has contested the alleged violations by arguing that no stream is present on his property.

Department staff has submitted two affidavits of Jerome Fraine, conservation biologist, in support of the motion for order without hearing, the respondent has submitted his own affirmations only, in opposition to the motion. Respondent is an attorney and has not indicated that he has any education or training in the field of biology nor has he indicated any expertise with regards to streams.

Department staff submitted photos of the area in question and a map of the tributary taken from 6 NYCRR 815.8, Map M-19, with the site labeled (Fraine affidavit, Exhibit 2) in support of its claim that a protected stream is present on the property. Biologist Fraine also detailed why the stream is classified as a protected stream, as defined in part 608. Respondent has not contested the location of the site as indicated on Exhibit 2. Nor has respondent challenged the map itself. Respondent has argued that no stream is present based solely on his own observations and the alleged observations of others that he refers to (but does not identify by name) in his affirmation.

Respondent acknowledges that he hired a contractor to create a pond in a depressed area on his property. He denies that a stream was present either before or after that time but agrees that there is runoff in the area during times of heavy rainfall. Respondent alleges that runoff created a depression on his property and prompted him to construct a pond.

Department staff acknowledges that the stream in question is intermittent. Respondent challenges Department staff's use of the terminology "intermittent stream" and says that if staff claims it is an intermittent stream then it can not be a stream at all, only run off. Respondent does not provide any legal support for the proposition that if it is intermittent, it can not be a stream.

Department staff submitted a reply affidavit from Jerome Fraine which states that on each of his nine site visits he observed a stream running through the property. Fraine argues that "the intermittent nature of this stream does not impact the fact that it is a classified and protected body of water." (Fraine June 12, 2006 affidavit, paragraph 2) He also notes that he located the stream on the above-referenced map before his first site visit and, at his first site visit visually identified it. He also alleges that he was able to locate the stream at every subsequent visit. Despite the respondent's protests, there is no question of fact with regards to the existence of the stream on respondent's property. There is also no question that the pond was located on the property in such a way as to disturb the stream's flow. Respondent acknowledges that he directed the placement of the pond in the area where the "runoff" traveled.

The affirmation of respondent does raise a question of fact with regards to the second alleged violation, "constructing a culvert without a permit." Department biologist Fraine alleges that during his sixth of nine site visits he observed that a culvert was replaced on the property. Fraine conducted a search of DEC records and the search failed to turn up a permit for this activity. 6 NYCRR 608.2 provides:

(a) Except as provided in subdivision (b) of this section, no person or local public corporation may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part. (b) Exceptions. The requirement of a permit pursuant to subdivision (a) of this section does not apply to the following: (1) a local public corporation that has entered into a written memorandum of understanding with the department establishing the plan of operation that will be followed in conducting any activity described in subdivision (a) of this section that will afford proper protection to the public beneficial uses of protected streams and navigable waters of the state; or (2) any person actively cultivating land devoted to agriculture, whether or not such land is along a protected stream, provided that this exception shall be limited to agricultural activities consisting only of the crossing and recrossing of a protected stream by livestock or wheeled farming equipment normally used for traditional agricultural purposes or of withdrawing irrigation water in a manner which does not otherwise alter the stream.

Respondent alleges in his affirmation of May 18, 2006 that he did not replace the culvert but learned from Department staff that it had been replaced. He claims that his neighbor replaced the culvert after the neighbor's employees damaged the pipe. He claims it was replaced without

his knowledge or consent. Based upon those statements, a question of fact has been raised.

The third cause of action alleges that respondent violated ECL 17-0501 and 6 NYCRR 703.2 by creating a “visible contrast” in Tributary 46. Biologist Fraine stated that he observed sand and gravel had washed into the neighboring property and into the stream below, in contravention of the standards, as a result of the stream being disturbed. He observed a substantial visible contrast on August 10, 2001. Respondent’s only argument is that no stream is present on the property. No question of fact remains.

Conclusion

Staff’s motion for an order without hearing is granted with respect to liability for the first and third causes of action and denied with regards to liability for the second cause of action. The respondent has shown the existence of material issues of fact with respect to the second cause of action.

Ruling

With respect to the relief requested by Department staff, staff has asked that respondent (1) pay a penalty of \$15,000; (2) submit a plan for Department approval to conduct remediation at the site and complete the approved remediation; (3) fill the pond back with original material which is still on site; and (4) re-establish and armor the stream so that it can not easily erode.

The fine can not be established until the second cause of action is resolved. I would ask that Department Staff request a hearing on the second cause of action within 30 days of this ruling or withdraw the cause of action. A recommendation as to the fine will be made after the hearing on that second cause of action, or sooner if the claim is withdrawn.

Department Staff has asked that the respondent submit a plan for remediation at the site and complete that remediation. However, I am unclear as to what Department Staff is seeking in the way of remediation. Staff has requested that the pond be filled with the original material on the site. Respondent has objected to the filling of the pond. There is a question as to the condition of the property before the respondent’s contractor created the pond. Respondent has claimed that the site was eroded from “run off” and that was why he chose to put a pond there. There is not enough fill on the site to completely fill in the area because it was eroded. Jerome Fraine asked that respondent be directed to bring in new fill, if necessary, to fill in the pond completely. Department staff has provided no authority for that request if in fact the site was eroded by the stream. Therefore, I recommend that the respondent be directed to replace the fill his contractor removed and return it to the condition it was in before that work was begun.

As to other remediation, Staff has asked that the stream be re-established and armored so that it can not easily erode. Department Staff has not provided enough information for me to determine if they are requesting that respondent repair the stream to the condition it was in before

the work was done at the site, or if they are asking that respondent do more extensive work than that. Therefore, I request that Department Staff submit a detailed request in writing within 30 days of this ruling identifying what it is seeking by way of repair to the stream, including whether respondent is being asked to repair the stream beyond its condition before the work was done at the site. If Department Staff is asking that respondent conduct more extensive work to repair the stream, I would ask that legal authority be provided in support of that request. Respondent shall have 30 days to respond to the Department's submissions on this issue.

Dated: Albany, New York
July 31, 2006

/s/

Molly T. McBride
Administrative Law Judge

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