

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 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
(Penalties and Remediation)

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 was denied in part and granted in part by ruling dated August 17, 2006. The ruling requested further information from Department Staff regarding the request for remediation. That supplemental information was provided on September 28, 2006 and respondent was given 30 days to respond. Respondent has not submitted any response to the supplemental submission of Department Staff. Questions of fact remain on the issues of remediation and penalties and a hearing shall be held on those issues.

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. 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 NYCCRR 703.2.

The Department's Office of Hearings and Mediation Services (OHMS) received staff's motion papers and the matter was assigned to Administrative Law Judge Molly T. McBride. The motion was granted in part by ruling dated August 17, 2006. The ruling directed Department Staff to submit further support for its request that respondent remediate the site. Department Staff requested additional time to make the submission and the request was granted. Department Staff submitted a supplemental affidavit of Jerome Fraine dated September 22, 2006 to support the request for remediation at the site.

Department Staff's request for remediation in the motion for order without hearing was that respondents: (1) submit a plan for Department approval to conduct remediation at the site and complete the approved remediation; (2) fill the pond back with original material which is still on site; and (3) re-establish and armor the stream so that it can not easily erode. The Fraine September 22, 2006 affidavit outlined the remediation request as follows: (1) within 30 days of the order respondent shall submit a remediation plan for review and approval; (2) before any work is initiated, respondent's contractor shall meet with Department staff to review all work and when each milestone is completed, the contractor shall notify staff so inspections can be arranged; (3) the pond shall be filled back with original material and if additional fill is needed to re-establish the stream, it can be scraped off an area from the north side of the pond on the property; (4) the stream shall be re-established and be armored so that it can not easily erode; (5) shrubs shall be planted every 6 feet along both restored stream banks where there is no rip-rap (the shrub types were identified); (6) all exposed soil shall be seeded and mulched; and (7) all work to be completed by September, 2007.

The issues to be resolved by this Ruling are related to Department Staff's request that respondent remediate the site, including re-establish and armor the stream so that it can not easily erode and the penalty request. The August 17, 2006 ruling stated, in part,

“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.”

The Fraine affidavit of September 22, 2006 asks that respondent return the stream in question to a condition similar to a nearby stream. Mr. Fraine notes that Department Staff did not see the respondent's property before the contractor did his work so they are unsure of the condition of the area before that work was done. Photos were provided to show the condition of the nearby stream. Mr. Fraine notes that replacing the sand and gravel that the contractor removed will not be sufficient to armor the stream and prevent future erosion. He notes that the area is mostly sand and gravel and that alone is not sufficient to stabilize the area. He has asked that respondent place additional fill in the area and place stone rip-rap on the banks to hold the material in place. To support the request for the plantings, he stated that he believes that shrubs and plants were removed by the respondent's contractor but the basis for that belief was not stated.

The ruling of August 17, 2006 did ask Department Staff to provide legal authority to

support any request that respondent do more than return the stream to its condition prior to his contractor's work. Although a fairly detailed plan was submitted by Department Staff, no legal authority was provided to support the request that respondent do more than return the site to the conditions that existed before the contractor began his work. Respondent has been adamant in his position that the stream was eroding regularly before he did any work and claims that the stream was not stable and that the remediation exceeds what was present before he did any work.

We are still left with the question of what authority does the Department have to order additional work be done. There is an unanswered question of whether the actions of the respondent created more damage than existed before he began his work and therefore he must rearmor the stream to prevent any further damage.

Mr. Fraine states in his supplemental affidavit "Although there may have been some kind of depression caused by run-off, it is important that the stream be restored so that it fully functions and sand and gravel no longer flows over to the neighbor's property". (Fraine affidavit dated September 22, 2006) He suggests that respondent could scrape down material he has on the north side of the pond to fill in the depression. The rip-rap would be new material as may be some of the plants/shrubs and the seeding and mulching.

Too many questions remain, even after the supplemental affidavit of Mr. Fraine. Therefore, I will convene a hearing to clarify the questions.

PENALTY

Department Staff has also asked that respondent pay a penalty. The ruling on the motion for order without hearing issued on August 24, 2006 granted the Department's motion in part, and requested additional information on the second cause of action, related to a culvert, before issuing a ruling with respect to liability on that issue. Department Staff, by letter dated September 1, 2006, has withdrawn the second cause of action and has requested that a ruling on the penalty request for the first and third causes of action be issued. Department staff requested a total penalty of \$15,000.00 in the motion, \$5,000.00 for each of the three causes of action. Now that the second cause of action has been withdrawn, the penalty request has been reduced to \$10,000.00, \$5,000 per violation.

Department Staff stated that the maximum penalty allowed by the applicable statutes is \$37,500.00 per violation for the Article 17 violation (water quality standards violation) and an additional \$37,500 for each day the violation continued, one day according to staff. Staff calculates that the Article 15 violation, construction of the pond, continued for 1681 days, August, 2001 until March, 2006. The article 15 violation has a penalty of \$500 for the violation and \$100 for each day it continued for a total penalty of \$1,681,500.00. The amount requested, \$5,000 per violation is significantly less than the maximum penalty. However, without a clear understanding of the remediation to be completed at this site, I am not in a position to make a recommendation on a penalty amount until after the hearing is held.

CONCLUSION

Questions of fact remain as to what conditions existed at the property prior to the pond construction being commenced. Therefore, I am directing that a hearing be held on the issue of Department Staff's request for remediation and penalties. I will contact the parties by telephone on December 18, 2006 at 10:00 a.m. to schedule the hearing.

Dated: Albany, New York
December 11 2006

Molly T. McBride
Administrative Law Judge

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