

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

In the Matter of the Alleged Violations of Article 24 of the 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),

ORDER

DEC Index No.
R4-2008-0902-132

- by -

WILLIAM M. SMITH, III,

Respondent.

This matter involves an alleged violation of New York State's freshwater wetland regulations by respondent William M. Smith, III, at property he owns at 1373 State Route 145, Middleburgh, Town of Broome, Schoharie County, New York. Respondent's property is next to a wildlife management area that is centered around Vlaie Pond.

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding against respondent by service of a notice of hearing and complaint dated November 10, 2008. Respondent did not serve an answer at that time, but engaged in discussions with Department staff regarding the alleged violations.

Department staff, in its complaint, alleged that respondent violated 6 NYCRR 663.4(d)(20) by placing fill in a portion of a freshwater wetland (M-10) that is located on his property to create a parking lot of approximately 16 by 20 or 25 feet (impacted area). The complaint alleged that respondent did not have a freshwater wetlands permit for this activity.

Department staff served a motion for default judgment and order dated May 27, 2009 upon respondent, and provided a copy to the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride who denied the motion by ruling dated September 20, 2010. Respondent served an answer to the complaint dated December 17, 2010, and a hearing was held on March 11, 2011.

The ALJ has prepared a hearing report, which is attached. I adopt the hearing report as my decision in this matter, subject to the following comments.

As noted by the ALJ, freshwater wetland M-10 is a Class I wetland. Class I wetlands provide the most critical of the State's wetland benefits, and their reduction is acceptable only in the most unusual circumstances (see 6 NYCRR 663.5[e][2]; see also Hearing Transcript [Tr], at 19-20).

Respondent, having once obtained a freshwater wetlands permit for another project (see Department Exhibit 7), was aware that the Department has permitting requirements related to freshwater wetlands and their adjacent areas. In the pending matter, respondent did not obtain a freshwater wetlands permit. During the proceeding, respondent asserted that activities of the Department had led to flooding of his property, and that, because of the changing water levels on his property, it was unclear how the boundaries of freshwater wetland M-10 could be determined. Department staff, however, through DEC wildlife technician Joshua Choquette, identified the boundaries of the freshwater wetland and established that respondent's placement of fill in the development of the parking lot was within those boundaries (see, e.g., Hearing Tr, at 9, 11, 19-20, and Department Exhibit 1). Thus, respondent placed fill in a regulated freshwater wetland without a permit.¹

The civil penalty of three thousand dollars (\$3,000) requested by Department staff and recommended by the ALJ is authorized and warranted.

Department staff also requested certain remedial relief. Staff requested that respondent be directed to immediately stop all work in the wetland, other than that recommended in writing by a qualified professional as being necessary to stabilize the impacted area and prevent further impact to the freshwater wetland.

In addition, Department staff requested that, within thirty (30) days of the service date of the order, respondent submit a restoration plan with compliance dates for the impacted area to the Department for approval. Department staff seeks restoration of the impacted area to its original state, removal of all fill that was placed for the construction of the parking lot, placement of the fill in a suitable upland location, and reseedling of the disturbed area with a suitable wetland mix. Staff requests that respondent complete the plan within ten (10) days of the Department's approval of the restoration plan.

The remedial relief requested by Department staff is authorized and warranted. However, I am modifying the remedial relief to some extent. In order to ensure sufficient time for the proper restoration of the impacted area, respondent shall have thirty (30) days to complete the restoration work. If Department staff and respondent mutually agree, compliance and completion dates set forth in the restoration plan may be extended.

Because the restoration plan is required to be submitted within thirty (30) days, if respondent proposes to stabilize the impacted area during the implementation of the restoration plan, any such proposal is to be included in the restoration plan that respondent submits to the Department for approval.

¹ Although the cause of action in staff's complaint only alleged illegal filling in the freshwater wetland, respondent conceded during the proceeding that he had placed fill in the wetland's regulated adjacent area (see Hearing Tr, at 79).

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

- I. Based upon the hearing record, respondent William M. Smith, III, is adjudged to have violated 6 NYCRR 663.4(d)(20), by placing fill in regulated freshwater wetland M-10 without a permit.
- II. Respondent William M. Smith, III, is hereby assessed a civil penalty in the amount of three thousand dollars (\$3,000). The penalty shall be due and payable within thirty (30) days of service of this order upon respondent. Payment shall be in the form of a cashier's check, certified check, or money order payable to the order of "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Jill T. Phillips, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 4
1130 North Westcott Road
Schenectady, New York 12306

- III. Upon service of this order upon respondent, respondent shall immediately cease any further violations in the impacted area.
- IV. Within thirty (30) days of the service of this order upon respondent, respondent shall submit a restoration plan to Department staff for approval. The restoration plan shall provide for:
 1. restoration of the impacted area to its original state;
 2. removal of the fill from the impacted area and placement of the fill in a suitable upland area; and
 3. reseedling of the impacted area with a suitable wetland mix.

The restoration plan shall list compliance dates for the completion of these remedial activities, all of which must be completed within thirty (30) days of Department staff's approval of the restoration plan. Department staff and respondent may, by mutual agreement and for good cause, agree to extend any of the compliance dates and the completion date referenced in the restoration plan.

- V. Any questions or other correspondence regarding this order shall be addressed to Assistant Regional Attorney Jill T. Phillips, at the address referenced in paragraph II of this order. The restoration plan provided for in paragraph IV of this order is also to be submitted to Attorney Phillips.

- VI. The provisions, terms, and conditions of this order shall bind respondent William M. Smith, III, and his successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 22, 2011
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violation of Article
24 of the Environmental Conservation Law and
Part 663 at Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of
New York (6 NYCRR), by

WILLIAM M. SMITH, III,

Respondent

DEC INDEX NUMBER R4-2008-0902-132

HEARING REPORT

-by-

_____/s/_____
Molly T. McBride
Administrative Law Judge

PROCEEDINGS

William M. Smith, III (Smith, respondent) owns property located at 1373 State Route 145 in the Town of Broome, Schoharie County, New York (site). Respondent was served with a Notice of Hearing and Complaint on November 10, 2008. The Complaint alleged that respondent placed fill in a wetland to create a parking lot without a permit in violation of the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law. (ECL) Respondent did not timely file a formal answer to the complaint but engaged in discussions with staff of the Department of Environmental Conservation (DEC, Department). By Notice of Motion dated May 27, 2009, Department staff sought a judgment by default against respondent concerning the alleged violation of Title 6 of NYCRR, Part 663. In support of its default motion, DEC submitted an affirmation of assistant regional attorney Jill Phillips, Esq. dated May 27, 2009, a proposed Order, and proof of proper service of the Notice of Hearing and Complaint on respondent. Respondent opposed the motion for default judgment by letter dated June 23, 2009. The motion for default judgment was denied by ruling of Administrative Law Judge (ALJ) Molly T. McBride dated September 20, 2010. Respondent served an answer to the complaint dated December 17, 2010 denying the violations alleged in the complaint. The matter was scheduled for hearing which was held on March 11, 2011 in the Department's Region 4 office in Schenectady, New York.

POSITION OF THE PARTIES

Department

Department staff contends that respondent violated Title 6 of New York Codes, Rules and Regulations, Part 663 when he placed fill in regulated freshwater wetlands without a permit. Title 6 of New York Codes, Rules and Regulations, §663.4(d)(20) prohibits the filling of freshwater wetlands or adjacent area without a permit. DEC Wildlife Technician Joshua Choquette inspected the site, located on Vlaie Pond, on August 26, 2008 and observed fill was brought onto the site and placed in NYS regulated wetland M-10. (T 7)¹ He confirmed that no permit had been issued by the Department for the filling of the wetland and prepared a Wetland Violation Report documenting his observations at the site. The report was marked as Department Exhibit 1 at the March 2011 hearing. Mr. Choquette also documented his observations by photographing the area during his site inspection. Those photos, Department Exhibits 2-5, were identified by Mr. Choquette at the hearing and moved into evidence. The photos show the site with gravel visible on the surface.

Mr. Choquette testified that the fill placed in the wetland "impedes the transition zone between reptiles and amphibians to make any sort of breeding to be established in that area. It also acts as a huge sediment load on the M-10 wetland as well as increasing turbidity levels to the wetland." (T 9) Mr. Choquette estimated the fill depth to be 2 feet. (T 11) He observed a trailer and a pick up truck parked on a portion of the filled area. (T 10) When questioned about

¹ Numbers in parentheses refer to pages in the transcript of the March 11, 2011 hearing.

the sediment load, Mr. Choquette testified that rain causes the loose material to go into the wetlands which increases turbidity levels which in turn “has a huge, significant impact on any sort of micro inverts and reptiles and amphibians” in the area. (T 11) Mr. Choquette identified the wetland map for this wetland and testified that the maps are filed with the Schoharie County Clerk where the protected wetland is located and the maps are available for the public to review. (T 17, 18)

Finally, Mr. Choquette testified as to the value of the wetland at issue, M-10. He stated that it is a very unique and pristine wetland for the area and it is highly visited. (T 18) It is rated a Class 1 wetland as it is considered the most significant type of wetland to be protected. (T 19)

Mr. Choquette testified that respondent was not issued a permit to place fill in the wetland. Mr. Choquette stated the fill must be removed to restore the area to a class 1 wetland. (T 72)

Respondent

Respondent William Smith appeared at the hearing without an attorney. He was the only witness on his behalf. He confirmed that he placed fill in the area depicted in the photos identified by Mr. Choquette as being in the wetland. (T 33, 34) Mr. Smith has acknowledged that he placed the fill at the site and that he did not have a permit for that activity. Mr. Smith testified that he had met with the Department’s Deputy Regional Permit Administrator for the Region, John Feltman, in 2000 when respondent had applied for a freshwater wetlands permit.² (T 40) Mr. Feltman allegedly gave respondent “informal advice” as to where fill placement would be allowed at the site. Mr. Smith acknowledges that he did not have permission to place the fill that is the subject of this proceeding. (T 42) He also acknowledges that he knew his property was in a protected wetland (T 56), but does not believe that the area where he placed fill is in a wetland. (T 59)

Respondent testified that he is aware of actions taken by the Department that have caused the water levels around his property to rise. He questioned how the Department can know the wetland boundaries when certain actions have caused the water levels to change over the years. (T 43) Specifically, he claims that approximately two years ago a new culvert pipe was installed that raised the water level in Vlaie Pond. (T 35, 45, 47) Mr. Smith questioned Joshua Choquette about this but Mr. Choquette was not familiar with the new culverts. (T 36)

Mr. Smith introduced photographs into evidence that show his property with water in his backyard where his children’s swing set is located. (Respondent Exhibit A) Respondent testified that he did not have water in his yard in that area when he installed the swing set in 2002. (T 43)

Respondent summarized his argument that because the water levels have been raised since 2002, he does not know how the Department can accurately identify where the wetlands and buffer zones are located. (T 43, 50)

Respondent suggested that to undertake remediation now would do more harm than good.

² The freshwater wetlands permit applied for in 2000 was issued and expired, without being used, in 2001. The permit was not for fill placement at the site involved in this matter.

(T 52) He claims that he seeded and mulched the filled areas and “everything is stabilized, there isn’t sediment and all that stuff running into the wetland.” (T 52) Respondent did not discuss his seeding and mulching with Department staff before he did it and no one from the Department has seen this work. (T 54)

FINDINGS OF FACT

1) Respondent owns property located at 1373 Route 145, Middleburgh, New York (site). A portion of the site is located in a NYS mapped freshwater wetland, M-10. (T 17)

2) Freshwater wetland M-10, also known as the Franklinton Vlaie wetland is a wildlife management area for the Department (T 18)

3) Respondent placed fill in the M-10 freshwater wetland in August 2008 and no permit was issued by the Department to place the fill. (T 33, 34)

4) The site where the fill was placed is a class 1 wetland. (T 19)

5) The fill placement acts as a barrier to amphibians and reptiles and must be removed for the area to be returned to a class 1 wetland. (T 72)

6) Department staff has requested the following in its complaint:

- (a) That respondent be assessed a penalty of three thousand dollars (\$3,000) and that the penalty be paid within 30 days of service of the order herein;
- (b) That respondent stop all work at the site other than that recommended in writing by a qualified professional as being necessary to stabilize the site and prevent further impact to the wetland;
- (c) That respondent submit for Department approval a restoration plan with compliance dates addressing the filled wetland, and providing for the restoration of the wetland to its original state with all fill removed and placed in a suitable upland area. The disturbed area shall be reseeded with a suitable wetland mix.

DISCUSSION

Environmental Conservation Law Article 24 is known as the Freshwater Wetlands Act. The Act details the invaluable nature of freshwater wetlands and states it is “the public policy of the state to preserve, protect and conserve freshwater wetlands” (ECL 24-0103). Section 663 of 6 NYCRR implements the Act. Section 663.4(d) (20) requires a permit for the placement of fill in a regulated wetland and adjacent area. Respondent acknowledged at the hearing held herein that he placed fill (gravel) in the site identified by Department staff as regulated wetland M-10,

also known as the Franklinton Vlaie wetland. (T 33, 34) He also admitted to having seeded and mulched a portion of the area. (T 53, 54) Respondent further admitted that he did not have a permit for the activity. (T 42) While respondent testified that he does not understand how Department staff can determine the wetland boundaries due to the changing water levels at the site, staff did establish through wildlife technician Joshua Choquette that the site is a mapped wetland and produced the wetland map maintained by the Department and filed with the Schoharie County Clerk's Office. (T 16, 17) The map is available to the public. (T 18) Respondent had applied for a freshwater wetlands permit to place fill on his property in 2000 after the regional permit administrator from the Department's Region 4 office conducted a site visit. (T 40) Respondent acknowledged that in 2000 he was advised by the Department that a permit was required to place fill on his property. (T 39, 40) He was also aware as early as 2000 that his property was in a protected wetland. (T 56) He denies knowing that the fill he placed in 2008 was in the protected wetland itself. (T 61)

CONCLUSIONS OF LAW

1) Environmental Conservation Law Article 24 and Section 663 of Title 6 NYCRR govern freshwater wetlands. Article 24 and 6 NYCRR Section 663.4(d)(20) prohibits filling in a regulated wetland or its adjacent area without a permit.

2) Respondent violated ECL Article 24 and 6 NYCRR 663.4(d)(20) by placing fill in a regulated wetland without a permit.

3) ECL 71-2303 provides that any person who violates any provision in Article 24 (freshwater wetlands) or any regulation issued pursuant thereto, shall be liable for a penalty not to exceed three thousand dollars (\$3,000).³ ECL 71-2303 also provides the Department with the authority to order the wetland to be restored to its original condition.

CONCLUSION AND RECOMMENDATION

Respondent violated ECL Article 24 and 6 NYCRR 663.4(d)(20) by placing fill in a regulated freshwater wetland without a permit. Respondent is liable for a penalty not to exceed three thousand dollars (\$3,000). ECL 71-2303 also provides the Department with the authority to order the wetland to be restored to its original condition.

I recommend that the Commissioner issue an order finding that the respondent violated 6 NYCRR 663.4(d)(20) by placing fill in a regulated wetland without a permit and that respondent pay a penalty of \$3,000 for the violation and that the penalty be paid within 30 days of the order. Department staff also requested that respondent stop all work at the site. This request was not addressed at the hearing and no proof was presented that respondent was continuing any work at the site since 2008. I would recommend that respondent be ordered to stop all work at the site

³ ECL 71-2303 was amended effective May 28, 2010 to provide for a maximum penalty of \$11,000 for a violation of ECL Article 24. At the time of this violation, 2008, the maximum penalty allowed under the ECL for an Article 24 violation was \$3,000.

until remediation is commenced. Further, I recommend that the Commissioner direct respondent to submit a remediation plan with compliance dates addressing the filled wetland and the plan provide for the restoration of the wetland to its original state with all fill removed and placed in a suitable upland area. The disturbed area shall be reseeded with a suitable wetland mix. I further recommend that respondent be ordered to complete the remediation within 30 days of Department staff's approval of the plan.