STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law (ECL), and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by

Richard Steinberg and Barbara Steinberg, Respondents.

Ruling on Department Staff's Motion to Amend the Complaint and Respondents' Motion to Dismiss

DEC Case No. 3-20030718-97

October 11, 2006

Proceedings

Department staff commenced the captioned enforcement action with service of a notice of hearing, and complaint both dated February 2, 2006 upon Richard and Barbara Steinberg (Respondents) by certified mail return receipt requested. The February 2, 2006 complaint asserted that Respondents own a parcel of property identified as Lot #97 (Tax Map No. 52K/3/18) on a map entitled "Plan of Subdivision #11, Emerald Green," filed on April 27, 1971 in the Town of Thompson, Sullivan County. The complaint asserted further that the Steinberg's property abuts Treasure Lake, which Staff contended is a navigable water of the State. According to the February 2, 2006 complaint, Respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 when they allegedly placed fill in Treasure Lake without first obtaining a permit from the Department. Department staff requested a civil penalty of $5,000, and an order from the Commissioner directing Respondents to remove the fill from Treasure Lake.

By their attorney, Donald S. Tracy, Esq. (New City, New York), Respondents timely filed an answer dated February 21, 2006. Subsequently, with a cover letter dated March 24, 2006, Respondents filed an amended answer of the same date. In the March 24, 2006 amended answer, Respondents admitted that they own Lot #97, denied that they placed any fill in Treasure Lake, and argued, among other things, that they did not violate the ECL or its implementing regulations.

With a cover letter dated March 27, 2006, Respondents' subsequently filed a notice of motion and an affirmation by Respondents' counsel, Mr. Tracy. The notice of motion and the affirmation were both dated March 27, 2006. In his affirmation, Mr. Tracy argued that the February 2, 2006 complaint failed as a matter of law, and moved to dismiss the charges alleged therein.

With a cover letter dated April 11, 2006, Department staff filed an affirmation by Steven Goverman, Esq., Assistant Regional Attorney, opposing Respondents' motion to dismiss, and argued that Respondents' motion should be denied.

With a cover letter dated April 14, 2006, Respondents filed a reply affirmation by Mr. Tracy with two attachments. Respondents disputed Department staff's assertion concerning the meaning of the term "navigable waters of the State," and the exclusion of certain waters that are surrounded by land held in single, private ownership (*see* 6 NYCRR 608.1[l]). Respondents repeated their request to dismiss the charges alleged in the February 2, 2006 complaint because Treasure Lake is not a navigable water of the State, as that term is defined at 6 NYCRR 608.1(l). Though provided the opportunity, Mr. Goverman advised, in an e-mail message dated May 1, 2006, that Staff was not filing a response to Respondents' April 14, 2006 reply affirmation.

In a ruling dated May 31, 2006, I denied Respondents motion because their submissions raised a triable issue of fact concerning the ownership of the property surrounding Treasure Lake. A resolution of this fact issue is necessary to determine whether Treasure Lake is a navigable water of the state, as that term is defined in 6 NYCRR 608.1(l).

Department staff's Motion to Amend the Complaint

With a notice of motion to amend the complaint dated August 16, 2006, Mr. Goverman filed an affirmation dated August 15, 2006 in support of Department staff's motion to amend the complaint. Staff also provided a copy of the proposed amended complaint.

In the proposed amended complaint, Staff alleges that Treasure Lake, in addition to being a navigable water of the state pursuant to 6 NYCRR 608.1(l), is also a regulated freshwater wetland (YL-1). Staff alleges further that on April 3, 2003 Environmental Conservation Officer (ECO) Scott Steingart observed Respondents placing 60 truck loads of fill in, and adjacent to, wetland YL-1, without a permit from the Department. For the alleged freshwater wetland violation, Department staff seeks a total civil penalty of $180,000 (60 x $3,000), and an order directing Respondents to remove the fill and to restore the freshwater wetland to its original condition.

Based on newly discovered information, Staff argued that the alleged filling and grading activities undertaken by the Steinbergs in 2003 were not "grandfathered" pursuant to ECL 24-1305. According to Staff, although the Town of Thompson Planning Board approved the subdivision plat, that includes Respondents' lot in 1971, before the effective date of the Freshwater Wetlands Act (ECL article 24), the actual plan of development was later changed in 1979, which limited the residential property to areas above the mean high water level of Treasure Lake.

Respondent's Reply and Cross Motion to Dismiss

With a cover letter dated September 25, 2006, Respondents' counsel, Mr. Tracy, filed an affirmation also dated September 25, 2006 in opposition to Staff's motion. Mr. Tracy attached Exhibits A, B, C, C1, D, and D1 to his affirmation. Respondents oppose the proposed amended

complaint because they contended that their property is exempt from the permit requirements of the Freshwater Wetlands Act (ECL article 24).

Respondents argued that the proposed amended complaint would "resurrect" a cause of action that ECO Steingart initiated on April 4, 2003 with service of an appearance ticket upon Mr. Steinberg. Exhibit A to Mr. Tracy's affirmation is a copy of the appearance ticket. Respondents explained that the alleged activity was "grandfathered" pursuant to ECL 24-1305, and in 2003 the Steinbergs provided Staff with a copy of a map filed with the Sullivan County Clerk that verified the exemption status (*see* Exhibit B to Mr. Tracy's September 25, 2006 affirmation). According to Respondents, Jonah Treibwasser, Esq., the former Deputy Regional Attorney, acknowledged in letters dated December 2, 2003 and January 5, 2004 that the activities undertaken by the Steinbergs were grandfathered pursuant to ECL 24-1305 (*see* Exhibits C and C1 to Mr. Tracy's September 25, 2006 affirmation).

Respondents contended that changes to the development plan referred to in Staff's motion are irrelevant because such changes did not modify the original subdivision approval filed with the Sullivan County Clerk. To support this contention, Respondents provided copies of letters dated January 24, 1991 and February 6, 1991 from William G. Little, Esq., the former DEC freshwater wetlands program attorney, which confirmed that the grandfather determination applied to certain lots (*see* Exhibit D and D1 to Mr. Tracy's September 25, 2006 affirmation).

Respondents argued that the violations alleged in the original complaint and the proposed amended complaint occurred in December 2003 and January 2004. Referring to ECL 71-1107(1), Respondents characterized the alleged violations as criminal misdemeanors, and that Criminal Procedure Law (CPL) § 30.30 requires a speedy trial within ninety days when charged with a misdemeanor. Respondents observed that Staff initiated the captioned matter after more than ninety days from the date of the alleged violations, which they argued requires dismissal of the charges alleged in the original complaint and the proposed amended complaint.

Discussion and Ruling

1. Respondents' Cross Motion to Dismiss

For the violation of ECL 15-0505(1) (*also see*, 6 NYCRR 608.5) alleged in the original complaint and proposed amended complaint, Department staff requests a civil penalty of $5,000 pursuant to ECL 71-1107 and 71-1127. ECL 71-1107(1) (Punishment for violations of title 5 of article 15) states that:

> "[a] violation of section 15-0501, 15-0503 or 15-0505, shall constitute a misdemeanor, punishable by a fine of not to exceed ten thousand dollars, or by imprisonment not to exceed one year or by both such fine and imprisonment and, in addition thereto, by a civil penalty of not more than five thousand dollars."

Furthermore, ECL 71-1127(1) (Violations; civil liability) states that:

> "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by article 15 except section 15-1713, or who violates or who fails to comply with any rule, regulation, determination or order of the department heretofore or hereafter promulgated pursuant to article 15 except section 15-1713, or any condition of a permit issued pursuant to article 15 of this chapter, or any determination or order of the former water resources commission or the Department of Environmental Conservation heretofore promulgated pursuant to former article 5 of the Conservation law (footnote omitted), shall be liable for a civil penalty of not more than five hundred dollars for such violation and an additional civil penalty of not more than one hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation as otherwise provided in article 15 except section 15-1713."

Now, Respondents have moved to dismiss the charges alleged in the original complaint because CPL 30.30 requires a speedy trial within ninety days when charged with a misdemeanor. Respondents' reliance on the Criminal Procedure Law, however, is misplaced. The captioned matter is an administrative enforcement action conducted pursuant to 6 NYCRR part 622. Respondents have not been charged with a misdemeanor. Although ECL 17-1107(1) outlines the punishment for violations of ECL 15-0501, 15-0503 and 15-0505 when such violations are misdemeanors, this same provision provides for civil penalties, which may be assessed administratively by the Commissioner. The 90-day time limit in CPL 30.30 does not apply to this administrative enforcement action.

2. Respondents' Reply

Respondents argued that Staff's request for leave to amend the complaint must be denied because the Department had previously determined that certain activities in and adjacent to Treasure Lake, a regulated freshwater wetland (YL-1), would not be regulated pursuant to ECL 24-1305(a). To support their position, Respondents point to correspondence from Jonah Treibwasser, Esq., the former Deputy Regional Attorney dated December 2, 2003 (Exhibit C) and January 5, 2004 (Exhibit C1), as well as correspondence from William G. Little, Esq., the former DEC freshwater wetlands program attorney dated January 24, 1991 (Exhibit D) and February 6, 1991 (Exhibit D1). According to Respondents, these correspondence show that Respondents actions in and adjacent to Treasure Lake, vis-a-vis the Freshwater Wetlands Act, are "grandfathered." Accordingly, whether any freshwater wetland violations have occurred on Respondents' property are irrelevant.

At this point in the proceeding, Respondents' reliance on the correspondence identified above as a bar to preventing Department staff from amending the complaint is misplaced. In his

December 2, 2003 and January 5, 2004 letters, Mr. Triebwasser did not expressly state that Respondents' property was grandfathered pursuant to ECL 24-1305(a). In the December 2, 2003 letter, Mr. Treibwasser stated that Department staff was evaluating Respondents' claim with respect to ECL 24-1305(a). In the January 5, 2004 letter, Mr. Treibwasser stated that Department staff contended that Respondents allegedly violated ECL 15-0505 and 6 NYCRR 608.5. The January 5, 2004 letter is silent about the applicability of ECL 24-1305(a) to the Respondents' property.

More significant are the correspondence from Mr. Little. In the January 24, 1991 letter, Mr. Little stated that Emerald Green subdivision #10 was exempt from obtaining a freshwater wetlands permit pursuant to ECL 24-1305(a). In closing, Mr. Little expressly stated that the determination was an informal determination and "not a declaratory ruling made pursuant to 6 NYCRR Part 619." Mr. Little's February 6, 1991 letter appears to provide further clarification of the previous letter. In it, Mr. Little stated that the "grandfathering determination applies to the property within lot lines of lots 74-81 of subdivision section 10."

Paragraph 8 of the Department's original complaint dated February 2, 2006 alleges that Respondents own property in the Town of Thompson, Sullivan County, known as Lot #97 on the map entitled Subdivision #11 (¶12 of the proposed amended complaint alleges the same). According to their amended answer dated March 24, 2006 (¶8), "Respondents admit the decretal paragraph designated '8' in the Complaint." In their second set of motion papers, Respondents did not explain how the property identified in Mr. Little's January 24, 1991 and February 6, 1991 correspondence related to the property identified in the original complaint, which Respondents admit to owning. Therefore, at this point in the proceeding, it appears that Respondents' property, as described in the original and proposed amended complaint, is different from the properties identified in the January 24, 1991 and February 6, 1991 correspondence, which are exempt from permitting requirements pursuant to ECL 24-1305(a).

Based on the foregoing discussion, I deny Respondents' motion to dismiss the charges alleged in the February 2, 2006 complaint. As with Respondents' previous motion, Respondents' current motion has identified additional factual disputes that can only be resolved at an adjudicatory hearing.

3. Staff's Motion to Amend the Complaint

As noted above, Department staff has requested leave to amend the February 2, 2006 complaint. With its August 16, 2006 notice of motion, Staff provided a copy of the proposed amended complaint. In the proposed amended complaint, Staff would add a second cause of action. Staff would allege that Treasure Lake is a regulated freshwater wetland (YL-1), and that on April 3, 2003 ECO Scott Steingart observed Respondents placing 60 truck loads of fill in, and adjacent to, wetland YL-1, without a permit from the Department. In addition to the civil

penalty requested for the alleged violation of ECL 15-050, Department staff seeks a separate civil penalty of $180,000 (60 x $3,000) for the alleged violation of ECL article 24.

Pursuant to 6 NYCRR 622.5, pleadings may be amended. A party may amend its pleading once without the ALJ's permission at any time before the period for responding expires, or if no response is required, at least 20 days before the hearing commences (*see* 6 NYCRR 622.5[a]). With the ALJ's permission, a party may amend its pleading at any time prior to the Commissioner's final decision absent prejudice to the ability of any other party to respond (*see* 6 NYCRR 622.5[b]).

I grant Department staff's request for leave to amend the February 2, 2006 complaint as proposed with Staff's August 16, 2006 motion. As noted above, Department staff has already provided Respondents and me with copies of the proposed amended complaint. Although Respondents allege that their activities in Freshwater Wetland YL-1 were exempt from the permitting requirements pursuant to ECL 24-1305(a), Respondents will not be prejudiced by this amendment. Rather, Respondents will have an opportunity, as provided by 6 NYCRR 622.4(a) to file a second amended answer and to include additional affirmative defenses related to the second cause of action. At the adjudicatory hearing, the Respondents will have the opportunity to develop a record about any newly alleged affirmative defenses related to the second cause of action.

Therefore, Staff's motion for leave to amend the February 2, 2006 complaint is granted. Respondents may file an amended answer, which must be served upon Department staff and me within 20 calendar days from receipt of this ruling via telefax.

Further Proceedings

I would like to convene a telephone conference call during the week of November 13, 2006 to set a date for the adjudicatory hearing. Counsel shall advise me of their availability by November 3, 2006. Meanwhile, upon receipt of this ruling, counsel shall confer with their respective witnesses about their availability for the adjudicatory hearing in preparation for the forthcoming telephone conference call.

In prior correspondence, I had set October 13, 2006 as the control date for this matter. I will adjourn this matter from October 13, 2006 until November 17, 2006. A date certain for the adjudicatory hearing will be identified after the telephone conference call.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
October 11, 2006

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