

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED
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August 31, 2016.

John J. Privitera, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway, Suite 500
Albany, New York 12207

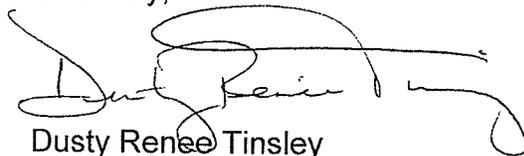
Re: Order on Consent
R4-2015-0929-114
Argus Acres, L.L.C.

Dear Mr. Privitera:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$2500 the civil penalty pursuant to Paragraph I.

Sincerely,



Dusty Renee Tinsley
Assistant Regional Attorney
Region 4

Enclosure

ec: T. Swenson



Department of
Environmental
Conservation

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Violations
of Article 24 of the New York State
Environmental Conservation Law,
and Title 6 Part 663
of the Official Compilation of
Codes, Rules and Regulations
of the State of New York,

-by-

Order on Consent
File No. R4-2015-0929-114

Argus Acres, L.L.C.
428 Schoolhouse Road
Sharon Springs, New York 13459,

Respondent.

WHEREAS:

JURISDICTION

1. The Department of Environmental Conservation ("Department" or "DEC") is a department of the State of New York which pursuant to Article 24 of the Environmental Conservation Law ("ECL"), is authorized to preserve, protect, and conserve freshwater wetlands and the benefits derived therefrom. In particular, DEC regulates and controls the water resources of the state pursuant to ECL Article 24 and the rules and regulations promulgated, in part, under 6 New York Code of Rules and Regulations ("6 NYCRR") Part 663.4.

RESPONDENT

2. Respondent Argus Acres, L.L.C. own a parcel of land located at 428 Schoolhouse Road, Sharon Springs, New York 13459 ("Site") on which contains Class C stream designated as H-240-102 ("Stream") as well as a Class 1 freshwater wetland designated as SS-8 ("Wetland") and its 100 foot adjacent area ("AA").

3. 6 NYCRR Part 663.2 (w) defines a "person" to mean "any corporation, firm, partnership, association, trust, estate, one or more individuals, or any unit of state or local government or any agency or subdivision thereof, including any state department, bureau, commission, board, or other agency; public authority, or public benefit corporation."

Respondent is a person as defined at 6 NYCRR Part 663.2 (w).

**FIRST AND SECOND VIOLATIONS
REGULATED ACTIVITIES IN THE WETLAND AND AA WITHOUT A PERMIT**

4. ECL §24-0701(1) states that “After issuance of the official freshwater wetlands map of the state, or of any selected section or region thereof, any person desiring to conduct on freshwater wetlands as so designated thereon any of the regulated activities set forth in subdivision two of this section must obtain a permit as provided in this title.” Such activities include, but are not limited to: “any form of draining, dredging, excavation, removal of soil, mud, sand, shells, gravel or other aggregate from any freshwater wetland, either directly or indirectly; and any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads, the driving of pilings, or placing of any other obstructions whether or not changing the ebb and flow of the water; . . . and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom which are set forth in section 24-0105 of this article. These activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland.” ECL §24-0701(2).

5. During a September 2, 2015 inspection of the Site, Department staff observed that Respondent undertook regulated activities in the Wetland and AA without a permit.

6. Respondent’s unpermitted actions in the Wetland and AA are violations of ECL §24-0701(1).

**THIRD VIOLATION
FILLING IN THE WETLAND**

7. 6 NYCRR Part 663.4(20) states that a permit is required for “[f]illing, including filling for agricultural purposes” and that this type of activity “is incompatible with a wetland and its functions and benefits.”

8. During a September 2, 2015 inspection of the Site, Department staff observed that Respondent conducted filling in the Wetland.

9. Respondent’s filling in the Wetland without a permit are violations of 6 NYCRR Part 663.4(20).

FOURTH VIOLATION

10. 6 NYCRR Part 663.4(d)(13) states that a permit is required for “restoring, restructuring, expanding or modifying existing functional structures or facilities which involves a temporary disturbance of less than 50 square meters (approximately 540 square feet) of ground surface” as this action is “usually compatible” with a freshwater wetland which means that “a regulated activity may be compatible with a wetland and its functions

and benefits, although in some circumstances the proposed action may be incompatible.” It further states that a letter of permission is required to take these actions within the adjacent area of the wetland.

11. During an April 25, 2016 Site visit, Department staff observed that Respondent restored, restructured, expanded or modified an existing functional structure or facility which involved a temporary disturbance of less than approximately 540 square feet of ground surface in the adjacent area of the Wetland.

12. Respondent’s action in restoring, restructuring, expanding or modifying an existing functional structure or facility which involved a temporary disturbance of approximately 540 square feet of ground surface in the adjacent area of the Wetland was a violation of 6 NYCRR Part 663.4(d)(13).

CIVIL PENALTY

13. ECL §71-2303(1) provides that a person who violates any provision of Article 24 of the ECL or any rule or regulation, local law or ordinance, permit or order issued pursuant thereto, shall be liable to the people of this state for a civil penalty not to exceed \$11,000 and the restoration of the affected freshwater wetland to its condition prior to the violation.

14. **Waiver.** Respondent, without admitting to the violations cited above, affirmatively waived its right to a hearing as provided by law and has consented to the issuing of this Order on Consent and has agreed to be bound by the provisions, terms and conditions of this Order on Consent.

NOW THEREFORE, having considered this matter and having been duly advised, IT IS ORDERED THAT:

I. **Civil Penalty.** In respect to the Order’s violations, a civil penalty of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) is assessed against the Respondent for the above violations. TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) shall be paid to the Department by company or bank check made payable to the Department of Environmental Conservation at the time this Order is signed, notarized, and returned to the Department. Payment of the civil penalty shall not in any way alter Respondent’s obligation to complete performance under the terms of the Order.

II. **Schedule of Compliance.** Respondents shall comply with the terms and conditions of this Order including the Schedule of Compliance. The attached Schedule of Compliance and any plans approved thereunder are incorporated into the Order and are enforceable thereunder. Any records submitted to the Department shall have the owner’s name, facility name and address, and contact and phone number.

III. **Settlement.** This Order settles all violations identified herein as of the effective date of the Order.

IV. **Binding Effect.** This Order is binding upon the Respondent, its agents, employees, successors, assigns and to all persons and firms, and corporations acting subordinate thereto.

V. **Summary Abatement.** This Order shall not be construed to prohibit the Commissioner or his duly authorized representatives from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

VI. **Indemnification.** Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

VII. **Modification.** The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding, or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound pursuant to the provisions of the Order. No informal oral or written advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, comment, or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligation to obtain such formal approvals as may be required by this Order.

VIII. **Access.** Respondent shall allow duly authorized representatives of the Department on foot access to the facility upon reasonable prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondent's compliance with this Order.

IX. **Effective Date.** The effective date of this Order shall be the date upon which it is signed on behalf of the Department.

X. **Scope.** Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State or Department may have against Respondent for any violations not cited in this Order on Consent.

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State or Department may have against anyone other than Respondent, its officers, directors, agents, servants, employees, successors and assigns;

C. The Department's right to enforce this Order against Respondent, its officers, directors, servants, and employees in the event that Respondent shall fail to fulfill any of

the terms or provisions hereof;

D. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

E. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

XI. **Communications.** Communications shall be sent to

For Department:

Peter Innes
New York State Department of Environmental Conservation - Region 4
1130 N. Westcott Road
Schenectady, New York 12306

For Respondent:

John Privitera, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207

Please include entity name, address, and permit number (if applicable) on all correspondence.

XII. **Termination.** This Order shall terminate upon the Department's determination that Respondent has complied with all the terms, conditions, and provisions of the Order.

DATED: August 31, 2016
Rondout, New York

Basil Seggos
Commissioner
New York State Department of Environmental
Conservation

BY:



Keith Goertz
Regional Director
Region 4

SCHEDULE OF COMPLIANCE

1. Area 1 (approximately 1.36 acres) and Area 2 (approximately 4.34 acres) (jointly referred to hereinafter as the "Areas"), identified in **Attachment 1** and totaling 5.7 acres, shall remain in their natural state and any exempt agricultural activities and grazing will be prohibited in the Areas. Respondent shall not interfere with the natural growth in the Areas, including but not limited to cutting, mowing, trimming, weeding, removing, spraying with any chemical, pesticide, fertilizer, etc., or otherwise altering the natural growth.
2. Permanent markers like those shown in **Attachment 2** shall be placed at 50 foot intervals along the landward border of the Areas within 30 days of the effective date of the Order.
3. Within 60 days of the effective date of the Order, Respondent shall provide to Department staff a copy of the deed to the Site which includes the restrictive covenant for Areas 1 and 2 as described in Paragraph 1 above. The restrictive covenant included in the deed shall reference the coordinates contained in **Attachment 3** in defining Areas 1 and 2.
4. An electric fence shall be placed along the bank on the west side of the stream for the full length of the pasture to the start of the forested area south of the pasture, within 30 days of the effective date of the Order.
5. Dogwood trees or sandbar, black, or pussy willow whips shall be placed, within one year of the effective date of the Order and following guidance in the NRCS document for willow planting methods attached as **Attachment 4**, at the bank at three foot intervals along:
 - a. the east side of the stream at the bank from the woody debris pile along the entire length of the farm road, and
 - b. the west side of the stream from the beginning of the pasture to the beginning of the forested area south of the pasture.
6. Grass shall be established along the bank on the east side of the stream from the concrete dam south to the woody debris pile to help stabilize the slope. During the April 25th site visit, Department staff observed that seeding has already occurred. Respondent shall continue its remediation activities until the grass is fully established.
7. Department staff, upon its determination that Respondent has completed all requirements of this Order, including the Schedule of Compliance, will provide written notice to Respondent of the same.