

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations
of the Environmental Conservation
Law (ECL) Article 15

ORDER ON CONSENT

File No. R4-2008-0324-38

- by -

Leo Brenna
5460 Holliday Brook Road
Roscoe, NY 12776

Respondent

WHEREAS:

1. Respondent, Leo Brenna, 5460 Holliday Brook Road, Roscoe, New York, owns property along the banks of Holliday Brook (D-70-51), which is classified as a C(t) stream, and a tributary to Holliday Brook (D-70-51-1), which is classified as a C(ts) stream.

2. Respondent is a person as defined at 6 NYCRR 608.1(n).

3. Regulations at 6 NYCRR 608.1(p) define a protected stream as: “any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t) or C(t). Streams designated (t)(trout) also include those more specifically designated (ts)(trout spawning).”

4. Regulations at 6 NYCRR 608.1(a) and (b) define banks and bed as the following:

(a) Banks means that land area immediately adjacent to, and which slopes toward, the bed of a watercourse, and which is necessary to maintain the integrity of a watercourse. For purposes of this Part, a bank will not be considered to extend more than 50 feet horizontally from the mean high water line; with the following exception: Where a generally uniform slope of 45 degrees (100 percent) or greater adjoins the bed of the watercourse, the bank is extended to the crest of the slope or the first definable break in slope, either a natural or constructed (i.e. road or railroad grade) feature, lying generally parallel to the watercourse.

(b) Bed means that land area of a watercourse covered by water at mean high water.

5. Regulations at 6 NYCRR 608.2(a) provide that: “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.”

6. As a result of the June 2007 flood event, Respondent was issued an emergency Article 15 permit, effective July 9, 2007, to remove debris and re-channel Holliday Brook to its original condition using gravel to fill eroded drop-offs.

7. On October 1, 2007, Department staff conducted an inspection of the project, which is located off of Berg Brook Road from Berg Brook Road to Gulf Brook Road, and observed that Respondent had gone beyond the work approved by the permit and had re-routed Holliday Brook around the original channel in 2 locations for approximately 300 feet in each section.

8. On January 1, 2008, Department staff observed that Respondent had disturbed a tributary to Holliday Brook by installing a concrete bridge over the tributary without an Article 15 permit.

9. Respondent's work in Holliday Brook (D-70-51), which was beyond that approved in the Article 15 permit, and the bridge built by Respondent over the tributary (D-70-51-1) without an Article 15 permit are violations of 6 NYCRR 608.2(a).

10. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

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

I. In respect of the aforesaid violations, a civil penalty in the amount of FIVE HUNDRED DOLLARS (\$500) is hereby assessed against the Respondent. Payment of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by certified or bank check made payable to the NYS DEC.

II. The provisions of this Order shall be deemed to bind Respondent, his agents, employees, and all persons, firms, corporations acting under or for it.

III. The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

IV. Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees 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, his directors, officers, employees, servants, agents, successors or assigns.

V. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

VI. Respondent shall allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

Jerry Fraine
Regional Fisheries Office
New York State Department
of Environmental Conservation
Region 4 - Stamford Office
65561 State Highway 10, Suite 1
Stamford, NY 12167-9503
607-652-2645

IX. This Order is deemed effective on the date signed by the Department.

X. Upon completion of all obligations created in this Order, this Order settles only all claims for civil and administrative penalties concerning the violations described in this Order against Respondent and its successors (including successors in title) and assigns.

This Order is made strictly for the purposes of the Department and the State and is not intended for use by any third party.

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 may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

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

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

D. 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. A. Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and applicable state and federal regulations and laws and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved plans and reports shall be incorporated into and become an enforceable part of this Order.

B. 1. If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within thirty (30) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department reserves its right to take whatever action it deems necessary after the second disapproval of a submittal.

XII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations alleged in this Order.

DATED: _____, 2008
Rotterdam, New York

Alexander B. Grannis
Commissioner
New York State Department of
Environmental Conservation

BY:

Eugene J. Kelly
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives his right to a hearing herein, and agrees to be bound by the provisions, terms and conditions contained herein.

Leo Brenna

DATE: _____

STATE OF NEW YORK)
)ss.:
COUNTY OF)

On the ___ day of _____ in the year ____ before me, the undersigned, a Notary Public in and for the State, personally appeared, _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public
Qualified in the County of:
My Commission Expires:

SCHEDULE OF COMPLIANCE

1. Respondent shall return Holliday Brook back to its original channel in both locations where the new channels were created. The Department will identify with stakes and flags the exact location to which Holliday Brook shall be returned and such location shall be considered the “original channel”.

The original channel of Holliday Brook must be excavated and shaped to the same width and depth as upstream and downstream before the stream is allowed to flow there. Once flow is moved back to the original channel, the other channel must be filled in with the excavated material.

Erosion control measures must be implemented to prevent turbidity in the stream.

2. All remedial work in Holliday Brook shall commence no sooner than June 15, 2008 and be completed no later than 30 days after the Department identifies the original channel set forth in paragraph 1 above.
3. Within 7 days of project completion all exposed soil shall be seeded with a conservation mix and mulched.