

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
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CERTIFIED - RETURN RECEIPT REQUESTED

7015 0640 0005 8292 2373

April 14, 2017

Terresa M. Bakner
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260

Re: Order of Consent
R4-2016-0601-106
Timothy Cahill

Dear Ms. Bakner:

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

This will also acknowledge receipt of \$667 1st of 3 payments of the civil penalty pursuant to Paragraph I. Your second payment of \$667 is due on or before August 15, 2017.

Sincerely,

Dusty Renee Tinsley / jv

Dusty Renee Tinsley
Assistant Regional Attorney
Region 4

Enclosure

ec: T. Swenson

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Violations
of Articles 15 and 24 of the New York State
Environmental Conservation Law,
and Title 6 Parts 663 and 608
of the Official Compilation of
Codes, Rules and Regulations
of the State of New York,

-by-

Order on Consent
File No. R4-2016-0601-106

Timothy Cahill,
5456 NY 7
Hoosick, New York 12090,

Respondent.

WHEREAS:

JURISDICTION

1. The Department of Environmental Conservation (“Department” or “DEC”) is a department of the State of New York which,
 - a. 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.
 - b. is charged with jurisdiction over the regulation and control of the water resources of the state of New York pursuant to ECL Article 15 and the rules and regulations promulgated thereto, including Title 6 NYCRR, Part 608.

RESPONDENT

2. Respondent Timothy Cahill own a parcel of land located at 5456 NY 7, Hoosick, New York, 12090 (“Site”) which contains a freshwater wetland designated as HF-3 and its 100 foot adjacent area (“AA”). Additionally, the Site contains Browns Brook

("Stream"), a class C(T) stream.

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

FIRST VIOLATION

5. 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).
6. 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 and is usually incompatible with the functions and benefits of wetland adjacent area".
7. On April 1, 2016 Department staff observed that Respondent placed fill in the Wetland and AA in construction of an earthen roadway. Placement of fill in the Wetland and AA is a regulated activity. Respondent did not have a permit for the placement of fill in the Wetland or AA.
8. Respondent's placement of fill in the Wetland and AA without a permit is a violation of ECL §24-0701(1) and 6 NYCRR Part 663.4(d)(20).

SECOND VIOLATION

9. ECL §15-0501(1) states "Except as provided in subdivisions 4, 5, 6 and 7 of this

section, no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit issued pursuant to subdivision 3 of this section. “

10. 6 NYCRR Part 608.2 states 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.”
11. On April 1, 2016 Department staff determined that Respondent built an earthen roadway through the Stream, changing, modifying or disturbing the Stream and/or its bed and banks, without a permit.
12. Respondent's actions in changing, modifying or disturbing the protected Stream, its bed or banks, and removing from its bed or banks sand, gravel or other material, without a permit are violations of ECL §15-0501(1) and 6 NYCRR Part 608.2.

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. ECL §71-1127 provides that a person who violates Article 15 of the ECL or any rule or regulation promulgated pursuant to article 15 shall be liable for a civil penalty of not more than two thousand five hundred dollars for such violation and an additional civil penalty of not more than five hundred dollars for each day during which such violation continues, and, such person may be enjoined from continuing such violation as otherwise provided in article 15.
15. **Waiver.** Respondent affirmatively waived his 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. With respect to the violations identified in this Order, Respondent is hereby assessed a civil penalty of TEN THOUSAND DOLLARS (\$10,000) of which TWO THOUSAND DOLLARS (\$2,000) shall be payable to the New York State Department of Environmental Conservation by money order, or certified check in three installments as follows: the first installment in the amount of \$667 is due no later than April 14, 2017 and shall be submitted at the time the Order is returned to the Department

signed and notarized; the second installment in the amount of \$667 is due on or before August 15, 2017; and the third installment in the amount of \$666 is due on or before December 29, 2017. EIGHT THOUSAND DOLLARS (\$8,000) of the civil penalty is suspended conditioned on Respondent's compliance with the Schedule of Compliance. Payment of the suspended civil penalty shall be due within 30 days receipt of notice from the Department setting forth the nature of the violations. The civil penalties shall be paid by check made payable to the Department of Environmental Conservation.

Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this 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 access to the facility without 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, Department regulations, and/or the ECL and applicable federal regulations.

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. **Review of Submitted Documentation.** 1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondent makes pursuant to this Order 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 generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3.a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

XII. **Default.** Respondent shall not be in default of compliance with this Order if they are unable to comply with any provision of this Order solely because of an action of a national government or court, or an act of nature, war strike, riot, or catastrophe, as to any of which the negligence or willful misconduct of Respondent was not a proximate cause. Respondent shall notify the Department in writing immediately upon obtaining knowledge of any such event. Relief under this clause shall not be available if Respondent fails to timely comply with the notice requirement set out in this paragraph.

XIII. **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:

Timothy Cahill
5456 NY 7
Hoosick, New York 12090

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

DATED:

4/13, 2017
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of Environmental
Conservation

BY:



Keith Goertz
Regional Director
Region 4

SCHEDULE OF COMPLIANCE

1. Respondent shall immediately cease all activity in the Wetland, AA, and Stream except as specifically provided for in this Schedule of Compliance.
2. Within 60 days of the effective date of this Order, Respondent's retained and qualified consultant shall develop and submit to Department staff for approval a detailed restoration/mitigation plan for the Site ("Plan") which shall include, but shall not be limited to:
 - a. decreasing the width of the driveway on the Site the entirety of its length to twenty feet (the width required by the Town of Hoosick). Within this area, impacted wetland shall be restored where practicable.
 - b. mitigation in the form of wetland creation in other areas on Site that are contiguous with the existing wetland, mitigating direct wetland impacts at a ratio totaling 2:1.^{1 2}
 - c. an increase in wetland plantings to 500 stems per acre while also diversifying species in the wetland by adding species other than willows, but excluding ash. Annual survival of the initial plantings must exceed 85% or be replaced within one year after planting continuing until 85% survival of the plantings is maintained for one year from completion of the initial planting or the most recent replacement planting, whichever is later.
 - d. invasive species management which shall include initial management for invasive species by October 31, 2017, and thereafter annual assessments of and implementation of invasive species management continuing until invasive species have been eradicated in the wetland and adjacent areas on the Site. If herbicide is proposed as part of invasive species management, appropriate permits must be obtained prior to implementation of the invasive species management plan.
 - e. erosion repair at the bend of the Stream just west of the culvert crossing. This repair shall conform to the live revetment standard which includes the application of rock, filling in interstitial spacing with soil, and densely planting with appropriate native species such as willow and dogwood.
3. Respondent shall initiate restoration pursuant to the Plan within 60 days of

¹ All mitigation work shall be completed on the Site. Mitigation work completed on the property of the Cahill Garage will not be included in the 2:1 ratio of mitigation required to be completed on the Site. Additionally, Respondent is required to obtain any and all necessary authorization to conduct mitigation work to be completed on property that is owned by the state of New York (adjacent to the Site between the Wetland and Route 7).

² The mitigation of wetlands shall not in any way impact wetland and/or adjacent area boundaries presently existing on any property adjacent to the Site that is not owned by the Respondent, including the property to the east of the Site.

Department staff's written approval of the Plan but no later than October 31, 2017.

4. Monitoring of mitigation areas at the Site shall be conducted for a minimum of two years from October 31, 2017 to ensure mitigation areas are functioning as freshwater wetland post-construction. If mitigation objectives are not achieved during this two year monitoring period, extended monitoring and/or additional restoration activities may be required at the discretion of Department staff.
5. Post-mitigation monitoring reports shall be submitted to Department staff no later than December 31st of 2017, 2018, and 2019.
6. Following mitigation, Respondent shall allow the Wetland, remaining functional Adjacent Area, and Stream to remain in their natural states. Respondent shall not interfere with natural growth including but not limited to filling, grading, mowing, trimming, weeding, removing, spraying with any chemical, pesticide, fertilizer, etc., or otherwise altering the natural growth.
7. Within 30 days of the effective date of this Order, Respondent shall update the delineation map attached as **Attachment 1** to accurately reflect the present status of the wetland and adjacent area, including revising the map to address the items in red on Attachment 1.
8. By October 31, 2019, Respondent shall submit to Department staff:
 - i. a wetland delineation map updated to reflect implementation of the mitigation activities set forth in this Order; and
 - ii. a copy of the recorded deed restriction placed on the Wetland, the remaining functional Adjacent Area, and the Stream located at the Site consistent with the updated delineation map.