

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violations of Environmental
Conservation Law ("ECL") Articles
15 and 24 and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR")

- by -

ORDER ON CONSENT
File No. R4-2008-0625-101

John and Barbara Otty
72 The Concourse
Niverville, NY 12310-208

Respondents

WHEREAS:

1. The Department of Environmental Conservation ("Department") is the State agency which has jurisdiction over the environmental law and policy of the State pursuant to, *inter alia*, §3-0301 of the Environmental Conservation Law (ECL). In particular, DEC regulates and controls the water resources of the state pursuant to ECL § 15-0101 *et seq* and the rules and regulations promulgated, in part, under 6 NYCRR Part 608.
2. The Department has jurisdiction over work in regulated wetlands as shown on the Final Freshwater Wetlands Maps filed by county for the State of New York and described in Article 24 of the Environmental Conservation Law and the rules and regulations promulgated pursuant thereto.
3. Respondents, John and Barbara Otty, own property in and within 100 feet of a freshwater wetland (K-109) ("the wetland") located on Kinderhook Lake at 72 The Concourse, Niverville, New York ("site").
4. On June 5, 2008, Department staff inspected the site and observed that Respondents had placed fill below the mean high water level of Kinderhook Lake, clearcut vegetation within 100 feet of the wetland and reconstructed a deck along and into Kinderhook Lake without a permit.

Navigable Waters Violation

5. Regulations at 6 NYCRR 608.5 (a) provide that "no person, local public corporation or interstate authority may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the state or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state, and that are inundated at mean high water level or tide, without a permit issued pursuant to this Part."
6. Respondents' placement of fill in Kinderhook Lake without an Article 15 permit is a violation of regulations at ECL § 15-0505 (1) and 6 NYCRR 608.5 (a).

Freshwater Wetlands Violations

7. Regulations at ECL § 24-0701 (2) and 6 NYCRR 663.4 (d) (20) require that a permit be issued to fill in a regulated wetland or an adjacent area of a regulated wetland.
8. Respondents' placement of fill in the wetland and adjacent area, without a permit, is a violation of regulations at ECL § 24-0701 (2) and 6 NYCRR 663.4 (d) (20).
9. Regulations at 6 NYCRR 663.4 (d) (14) require that a permit be issued to expand or substantially modify an existing functional structure or facility, in a regulated wetland or an adjacent area to a regulated wetland.
10. Respondents' modification of the existing deck, without a permit, is a violation of regulations at ECL § 24-0701 (2) and 6 NYCRR 663.4 (d) (14).
11. Regulations at ECL § 24-0701 (2) and 6 NYCRR 663.4 (d) (23) require that a permit be issued to clear cut vegetation in a regulated wetland or an adjacent area of a regulated wetland.
12. Respondents' clear cutting of vegetation in the wetland adjacent area, without a permit, is a violation of regulations at ECL § 24-0701 (2) and 6 NYCRR 663.4 (d) (23).
13. ECL § 71-1127 provides for a civil penalty of up to \$500 per day for a violation of Article 15 and up to \$100 for each day that such violation continues. Injunctive relief is also available.
14. ECL § 71-2303 (1) provides for up to \$3,000 in civil penalties for each violation of a regulation and the restoration of the affected freshwater wetland to its condition prior to the violation.

Waiver of Rights

15. Respondents have affirmatively waived their right to notice and hearing in the manner provided by law, and have consented to the issuing and entering of this Order and agree to be bound by the terms, provisions and conditions contained herein.

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

Civil Penalty

I.. With respect to the aforesaid alleged violations, a civil penalty in the amount of FIVE THOUSAND DOLLARS (\$5,000) is hereby assessed against the Respondents of which TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department.

The balance (\$2,500) shall be suspended so long as Respondents shall comply with the Schedule of Compliance.

Payment of the above penalties shall not in any way alter Respondents' obligation to complete performance under the terms of this Order.

In the event that Respondents fail to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondents without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondents.

II. The attached Schedule of Compliance and any plans approved thereunder are incorporated into the Order on Consent and enforceable thereunder. Any records submitted to the Department shall have the owner's name, facility name and address, contact and phone number.

III. Respondents shall not be in default of compliance with this Order if 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 Respondents was not a proximate cause. Respondents shall notify DEC in writing immediately upon obtaining knowledge of any such event. Relief under this clause shall not be available if Respondents fail to timely comply with the notice requirement set out in this paragraph.

IV. All communications required herein shall be made to: Department -- DEC Region 4 , 1130 North Westcott Road, Schenectady, NY 12306, Attn: Environmental Permits.

V. Respondents shall allow duly authorized representatives of DEC access to the facility referred to in this Order without prior notice, at such times as may be desirable or necessary in order for DEC to inspect and determine the status of Respondents' compliance with this Order or the ECL.

VI. 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.

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

VIII. 1. All documents which Respondents must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each of the submittals Respondents 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 Respondents 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 Respondents 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 Respondents in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondents 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 Respondents 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 Respondents accept such modifications as may be specified by Department to make it approvable. If Respondents do not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondents 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. Respondents 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.

X. The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondents and their successors (including successors in title) and assigns.

X. 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.

XI. The provisions of this Order constitute the complete and entire Order issued to the Respondents 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 Paragraph X of this 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 Respondents shall be construed as relieving Respondents of their obligations to obtain such formal approvals as may be required by this Order.

XII. The effective date of this Order shall be the date it is signed by the Regional Director.

XIII. 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 Respondents for any other violations of the ECL, rules or regulations promulgated 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 Respondents, their officers, directors, agents, servants, employees, successors and assigns;

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

D. Respondents' 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 Respondents waive 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.

XIV. If more than one Respondent is a signatory to this Order, use of the term "Respondent" in this Order shall be deemed to refer to each Respondent identified in the Order.

XV. Compliance with the terms and conditions of this Order 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

SCHEDULE OF COMPLIANCE

1) Upon receipt of this Order, Respondents shall immediately install a continuous line of silt fence along the shoreline at the downslope edge of the disturbed area. The silt fence shall be properly embedded and the ends of the silt fence shall be tied back into the slope to prevent flow around the ends.

2) Within 15 calendar days of the effective date of this Order, Respondents shall install an erosion control blanket on the disturbed slope. The blanket shall be properly anchored in accordance with the manufacturer's recommendations.

3) At least 5 calendar days prior to the commencement of the activities described in item 4 below, Respondents shall notify the Department.

4) No sooner than 15 calendar days after the commencement of the fall 2008 Kinderhook Lake draw-down, Respondents shall commence restoration of the lake and disturbed slope. All activities described in items 4a through 4d below shall be completed by November 30, 2008.

a) Respondents shall remove fill material that was pushed below the mean high water level of Kinderhook Lake. An excavator or equivalent type equipment shall be used to remove sediment/excess fill from the lake bed. The equipment shall be operated from an upland area so that only the bucket is placed below mean high water. Proper erosion and sediment controls shall be employed to isolate the work area. Fill material shall be fully removed and placed in an upland area outside of the 100 foot adjacent area of Kinderhook Lake, and properly stabilized.

b) Respondents shall restore pre-disturbance contours on the disturbed slope (above mean high water). The excess fill material shall be placed in an upland area outside of the 100' adjacent area and properly contained/stabilized. No equipment shall operate below mean high water.

c) Once pre-disturbance contours have been restored on the slope, Respondents shall seed the disturbed area and install a biodegradable erosion control blanket over the entire disturbed slope. The seed mix shall be composed of native herbaceous species and shall be installed at a rate which will provide uniform coverage of vegetation.

d) Respondents shall plant at least ten (10) conifer trees on the upland slope. The trees shall be at least 3 to 4 feet tall nursery stock condition. The trees shall be spaced at least 6 to 10 feet apart on the slope.

5) Respondents shall notify Department staff within 15 calendar days of completing the work described in item 4.

6) By May 31, 2009, areas on the upland slope which do not have at least 80% vegetative cover shall be re-seeded and mulched with straw.

7) The tree plantings shall be periodically inspected by the Respondents to assess their survivability and general condition. Within two years from the time of tree planting, Respondents shall replace any trees that do not survive.