

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
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CERTIFIED - RETURN RECEIPT REQUESTED
7017 1070 0001 0125 8879

August 21, 2018

Douglas H. Zamelis, Esq.
7629A State Highway 80
Cooperstown, New York 13326

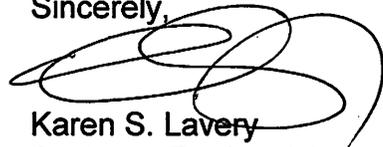
Re: Order on Consent
R4-2017-0929-247
Portabello's Banquet & Conference
Center, LLC

Dear Mr. Zamelis:

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

This will also acknowledge receipt of \$10,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: J. Rider
K. Goertz
C. VanMaaren
T. Swenson
D. Thorsland



Department of
Environmental
Conservation

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged
Violations of Environmental
Conservation Law Articles 17
and 24

-by-

ORDER ON CONSENT
File No. R4-2017-0929-247

Portabello’s Banquet & Conference Center LLC
6708 State Hwy 28
Hartwick, NY 13348

Respondent

WHEREAS:

Jurisdiction

1. The Department of Environmental Conservation (“Department” or “DEC”) is an agency of the State charged with jurisdiction over the protection of water quality of the State pursuant to Article 17 of the Environmental Conservation Law (“ECL”) and the rules and regulations promulgated thereto.
2. The Department has jurisdiction over the regulation of work in protected 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. Respondent, Portabello’s Banquet & Conference Center LLC owns Portabello’s Too, located at 6708 NYS Route 28, Hartwick, New York (“site”).
4. Respondent is a person as defined at ECL §17-0105(1) and ECL § 24-0107(2).

Facts

5. On October 25, 2016, June 12, 2017, and June 30, 2017, Department staff inspected the site.
6. Respondent operates pursuant to a State Pollution Discharge Elimination System (“SPDES”) permit #NYR10L897 and a General Permit for Stormwater Discharges from Construction Activity (GP-0-15-002).
7. The site contains NYS Freshwater Wetland (“FWW”) SY-5.

8. On December 5, 2006, the Department issued a Freshwater Wetlands Permit (4-3650-00196/00001-00002) which authorized *“...the Construction of a 5,000 square foot Banquet hall with parking for 83 vehicles, covered drop off area and landscaped grounds with lighting in the adjacent area of FWW #SY-5. Project will create approx. 45,000 square feet of impervious surface and include a 2,000 gallon per day sub-surface discharge septic system outside of the wetland adjacent area.”*

9. The Freshwater Wetlands Permit (4-3650-00196/00001-00002) permit expired on December 31, 2008.

Violations of Permit GP-0-15-002

10. Permit condition VII.A requires the operator to comply with all conditions of GP-0-15-002.

11. ECL Article 17-0501 provides that *“It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.”*

12. ECL Article 17-0803 provides that *“Except as provided by subdivision five of section 17-0701 of this article, it shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant hereto or in a manner other than as prescribed by such permit. The department shall, by rule and regulation, require that every applicant for a permit to discharge pollutants into the waters of the state shall file such information at such times and in such form as the department may reasonably require to execute the provisions of this article. Rules and regulations adopted hereunder may provide that in lieu of issuance of such permit the department may accept as compliance herewith a permit duly issued by the federal government or an agency thereof pursuant to the provisions of the Act.”*

13. Regulations at 6 NYCRR Part 750-1.4(b) provide that *“For discharges of storm water that are not to groundwater, permits shall be required in accordance with 40 CFR 122.26 except as provided in section 1069 of the Federal Intermodal Transportation Efficiency Act of 1991.”*

14. At the time of the June 12, 2017 inspection, the following violations were noted:

a. The permit requires that a complete, up to date Stormwater Pollution Prevention Plan (“SWPPP”) be readily accessible on the site. At the time of the June 12, 2017 inspection, the SWPPP was not available however was subsequently provided to the Department.

b. The permit requires that complete, current site inspection reports be readily accessible at the site. At the time of the June 12, 2017 inspection, the inspection reports were not available.

c. The permit states that the owner/operator must ensure that the provisions of the SWPPP are implemented and that all erosion and sediment control practices are maintained in effective operating condition at all times. The technical standards require that for active construction areas, a perimeter sediment control system shall be installed and maintained to contain soil. At the time of the June 12, 2017 inspection, the site did not have a perimeter control system installed along the edge of the disturbance.

d. The General Permit and technical standards state that fourteen days shall be the maximum exposure period and maintenance must be performed as necessary to ensure continued stabilization. The depth of the rills and gulleys along with the soil piles deposited on the property indicate that no construction activities have been conducted on site for an extended period of time. Additionally, previous grading and filling activities have encroached onto and impacted adjacent wetlands that are under the jurisdiction of the US Army Corp of Engineers.

15. Based upon the violations cited in paragraph No. 14 above, Respondent violated Permit condition VII.A, regulations at 6 NYCRR Part 750-1.4(b), ECL Article 17-0501, ECL Article 17-0803.

Freshwater Wetland Violations

16. On October 25, 2016 and June 30, 2017, Department staff observed that grading had occurred in the wetland area and adjacent area and that fill material and construction debris was placed in the wetland and adjacent area.

17. ECL 24-0701(1) provides 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.”*

18. Regulations at 6 NYCRR 663.4 (d) (20) require that a permit be issued to fill in a protected wetland or an adjacent area to a protected wetland.

19. Regulations at 6 NYCRR 663.4 (d) (25) require that a permit be issued before grading and dredging in a wetland and an area adjacent to a protected wetland.

20. Respondent had not obtained a permit prior dredging in the wetland area or placing fill material and construction debris in the wetland and adjacent area, which was in violation of ECL 24-0701(1), regulations at 6 NYCRR 663.4 (d) (20), and 6 NYCRR 663.4 (d) (25). The permit expired in 2008.

Penalties

21. ECL §71-1929 provides for the following civil penalties: *“A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued there under, shall be liable for a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided.”*

22. ECL § 71-2303 (1) provides for up to \$11,000 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 Hearing

23. Respondent has affirmatively waived its 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 HEREBY ORDERED THAT:**

I. In respect of the aforesaid violations, a civil penalty in the amount of TWENTY THOUSAND DOLLARS (\$20,000) of which TEN THOUSAND DOLLARS (\$10,000) shall be payable to the New York State Department of Environmental Conservation by money order, or check at the time this Order is signed, notarized and returned to the Department.

The balance TEN THOUSAND DOLLARS (\$10,000) shall be suspended so long as Respondent shall comply with the Schedule of Compliance.

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

In the event that Respondent fails to comply with the requirements of this Order by the dates set forth in the Schedule of Compliance, the Department shall, within 30 days, notify the Respondent of the failure to comply and provide the Respondent with 30 days to comply with the Schedule of Compliance. In the event that the Respondent does not comply within that 30 days, the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

II. As it pertains to future permitting associated with Environmental Conservation Law, Article 24, impacts to a site are viewed cumulatively. As such, given the history of both permitted and unpermitted impacts to this wetland and regulated adjacent area (Article 24 of NY Environmental Conservation Law define adjacent area as the 100' buffer around the regulated wetland proper), it is unlikely that any subsequent application(s) requesting additional impacts to NYS FWW SY-5 will be approved in the future.

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

IV. 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.

V. 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, its directors, officers, employees, servants, agents, successors or assigns.

VI. 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.

VII. Respondent shall allow duly authorized representatives of the DEC access to the site without prior 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.

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

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

For Department:
 Regional Water Engineer
 New York State Department
 of Environmental Conservation
 Region 4
 1130 N. Westcott Road
 Schenectady, New York 12306

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

XI. 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, its agents, its servants, its employees, its successors and its 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 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.

XII. 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.

XIII. 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.

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. This Order shall not create any presumption of law or fact which shall inure to the benefit of any person other than the Department, State or Respondent.

DATED: *August 21* 2018
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:

A handwritten signature in black ink, appearing to read "Keith Goertz", written over a horizontal line.

Keith Goertz
Regional Director
Region 4

Schedule of Compliance

1. Respondent shall immediately retain a qualified professional (as defined in GP-0-15-002) to oversee the stabilization of the site and the installation of erosion controls as deemed necessary to prevent potential impacts to water quality.
2. Respondent shall immediately cease all activity in the Wetland, adjacent area, and Stream except as specifically provided for in this Schedule of Compliance.
3. Within 30 days of the effective date of this Order, Respondent shall direct a qualified consultant to implement the approved project plan labeled L004 – Remediation and Monitoring (“Plan”) and received May 25, 2018 for the Site.
The Plan shall include;
 - a) Implementation of Plan L004 – Remediation and Monitoring which includes fill removal, site stabilization, and invasive species management.
 - b) Removal of onsite asphalt piles, concrete wash outs, and other garbage fill to an authorized facility with receipts provided to the Department within 10 days of disposal.
 - c) A schedule for completing major milestones of the Plan.
4. Within 90 days of the date on the effective date of the Order on Consent, Respondent shall implement the Plan. If implementation is impracticable due to weather conditions, implementation should begin as soon as practicable but shall be completed no later than 180 days following approval of the Plan.
5. Respondent shall provide pre-construction notification to the Department at least 5 days prior to implementation.
6. Within 15 days of completed implementation of the Plan, Respondent shall notify the Department to arrange for a site inspection.
7. During the post-remediation monitoring period, remediated portion of the Wetland shall display the following; aerial coverage of invasive plant species less than 5%, dominant hydric vegetation coverage, and at least 85% aerial coverage of vegetation.
8. One year of post-remediation monitoring that includes invasive species monitoring, hydric vegetation cover and hydrology, etc shall be conducted with a monitoring report submitted to the Department by December 31, 2019. If the Site is not meeting the objectives of the remediation Plan, then monitoring could be extended and additional action could be requested.
9. Within five days of the effective date of this Order and prior to any sale of this property, Respondent shall file a copy of this Order on Consent with the Otsego County Clerk’s Office against the Section, Block and Lot number of the property referred to in this case as the “site”. Respondent shall submit to the Department within 10 days of filing the Order on Consent, proof of filing authenticated by the County Clerk.

10. Any future proposed impacts within previously impacted portions of the regulated area will be looked at cumulatively.