

STATE OF NEW YORK:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Violations of Environmental
Conservation Law (ECL) Article
15 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. R4-2009-0409-64

Scott Wheaton
1215 Flanders Road
Riverhead, New York 11901

Respondent

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. Respondent, Scott Wheaton, owns property located at 116 Silliman Cove Road, Milford, New York (Otsego County) ("site").
3. The site is on the shore of Goodyear Lake which is a "Class B" waterbody.
4. Respondent is a "person," as defined in 6 NYCRR § 360-1.2(b)(108).

Navigable Waters Violation

5. On April 2, 2009, Department staff inspected the site and observed that Respondent had placed fill below the mean high water level at the site.
6. Respondent was not issued a permit to place fill at the site.

7. Regulations at ECL Section 15-0505 (1) provide that "no person, local public corporation or interstate authority shall excavate or place fill below the mean high water level 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 subdivision 3 of this section."

8. Respondent violated regulations at ECL § 15-0505 (1) by placing fill below the mean high water level at the site without a permit.

Civil Penalty

9. Regulations at ECL Section 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.

Waiver of Rights

10. Respondent has affirmatively waived his 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 of the aforesaid alleged violations, a civil penalty in the amount of TWO HUNDRED FIFTY DOLLARS (\$250) 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.

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

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. 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.

IV. 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.

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

VI. 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.

VII. Compliance with the terms and conditions of this Order shall be in full civil settlement of the violations alleged in this Order.

DATED: _____, 2009
Rotterdam, NY

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.

Scott Wheaton

DATE: _____

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

On the ____ day of _____ in the year 200__, before me, the undersigned, 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/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public, State of New York

SCHEDULE OF COMPLIANCE

1. Within 30 days of the effective date of this Order, Respondent must secure erosion control measures (silt fence) to ensure that no fill enters the water. Respondent must remove all new fill placed below the mean high water line, returning the shoreline to its original (pre-construction) condition. The fill may be placed in a suitable upland location where it cannot be washed back into the water.