STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 24 of the Environmental Conservation Law ("ECL") and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the the State of New York ("6 NYCRR"),

ORDER

DEC Case Nos. R2-20011119-223 and R2-0179-96-02

- by -

ANTHONY VENDITTI and KATHY VENDITTI,

Respondents.

Pursuant to section 622.3(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Anthony Venditti and Kathy Venditti by service of a notice of hearing and complaint, both dated March 3, 2003, upon respondents.

The complaint alleged violations of the New York State Freshwater Wetlands Act (article 24, title 7 of the Environmental Conservation Law ["ECL"]), and its implementing regulations (6 NYCRR part 663), with respect to property that respondents own near the corner of St. Andrews Road and Aultman Avenue in Staten Island, New York. Respondents' property is in and within 100 feet adjacent to the AR-3 Richmond Creek Class I freshwater wetland designated, mapped and officially adopted by the Department in September 1987 (see Hearing Exhibits 12, 25 and 43; see also Lufrano v Jorling, Freshwater Wetlands Appeal Board, Order and Decision, Index No. 87-220, August 20, 1990 [1990 WL 515950]).

Department staff, in its complaint, claimed that respondents' property, which consists of multiple lots, constituted one single site.[1] The complaint maintained that

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[1] As of March 2003, respondents' property consisted of seven contiguous parcels in Richmond County tax block 2280, identified as lot numbers 45, 47, 51, 53, 55, 57 and 58. According to the

respondents had committed violations of ECL 24-0701 and 6 NYCRR 663.4 in the freshwater wetland or adjacent area on the site, by having:

1. caused or allowed the removal of vegetation to occur at the site without a permit;

2. caused or allowed the deposition of wood chips at the site without approval from the Department;

3. caused or allowed the filling with wood chips at the site without approval from the Department;

4. caused or allowed the grading of the site without approval from the Department; and

5. caused or allowed the placement of soil on the site without approval from the Department.

Respondents timely served an answer to staff's complaint on March 20, 2003 in which they denied the regulatory violations alleged.

The matter was initially assigned to Administrative Law Judge ("ALJ") Molly T. McBride of the Department's Office of Hearings and Mediation Services. The proceeding was later reassigned to ALJ Susan J. DuBois in May 2004. Respondents filed two separate motions to dismiss the matter, both of which were denied by ALJ DuBois (see Matter of Venditti, ALJ Ruling on Motion to Dismiss, June 15, 2004, and Matter of Venditti, ALJ Rulings, May 20, 2005). Respondents also filed a separate motion that Department staff be required to prove its case beyond a

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Department's 1987 map for wetland AR-3, respondents' lots 45, 47, 51 and 53 contain freshwater wetland. Nearly all of lots 45 and 51, and portions of lots 47 and 53, are within Wetland AR-3. In addition those lots contain land within the 100-foot adjacent area to the freshwater wetland. Respondents' lots 55 and 57, as well as a portion of respondents' lot 58, are within the 100-foot adjacent area of freshwater wetland AR-3 (see Hearing Exhibit 25).

The March 3, 2003 complaint originally named other previous owners of the lots comprising respondents' site as additional respondents. These individuals were identified as Tina Sanjour Gough, Peter L. Wohler, and Claudia Sanjour. Staff eventually withdrew the complaint against these individuals (see "Department Staff's Closing Brief" in this matter dated January 12, 2007, at 1).

reasonable doubt (rather than by a preponderance of evidence), which was also denied by ALJ DuBois (see Matter of Venditti, ALJ Ruling, Nov. 15, 2005, and 6 NYCRR 622.11[c]).

Following an adjudicatory hearing and the submission of written closing briefs by the parties, ALJ DuBois prepared the attached hearing report ("Hearing Report"). I hereby adopt the Hearing Report as my decision in this matter, subject to the following comments.

The hearing record demonstrates that Department staff carried its burden of proof by a preponderance of the evidence with respect to the removal of vegetation and the grading of portions of the site without a permit. Respondents caused or allowed clearing of vegetation and grading of soil in a portion of Class I wetland AR-3 on the site, and in some portion of the wetland's adjacent area. Evidence of these activities on lots 51, 53 and 55 was documented by staff's inspection in April 2001.[2] Such activities fall within the definition of "regulated activity" (see 6 NYCRR 663.2[z]) and represent activities for which a permit is required (see 6 NYCRR 663.4[a] & 663.4[d][items 23 and 25]).[3] The Department had not issued a permit to respondents for the clearing and grading that staff observed during its site inspection, nor had the Department issued a permit to anyone else to conduct these activities.

Department staff, in its complaint, sought a civil penalty and an order requiring respondents to remediate the site according to a plan approved by the Department staff. In its closing brief, Department staff specifically requested a civil penalty in the amount of $15,000 (the statutory penalty of $3,000 for each of the five violations alleged).

Pursuant to ECL 71-2303(1), any person "who violates, disobeys or disregards any provision of [ECL article 24] or any rule or regulation, local law or ordinance, permit or order issued pursuant thereto, shall be liable . . . for a civil

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[2] Staff's inspection of the site was undertaken at the written request of respondents' attorneys "for an accurate determination of Wetland boundaries" (see Hearing Exhibit 29.)

[3] Section 663.4(a) of 6 NYCRR requires that "[a]ll persons proposing to conduct, on wetlands or adjacent areas, activities which have not been specifically exempted under section 24-0701 of the [Freshwater Wetlands] act, in the statewide minimum land use regulations or under section 663.3, 663.4(d) or 663.7 of this Part, must obtain either a permit or a letter of permission."

penalty of not to exceed three thousand dollars for every such violation . . . ." Because ALJ DuBois concluded that staff proved only two of the five alleged violations in this matter, she recommended a penalty in the amount of $6,000. Based upon my review of the record, the civil penalty is warranted by the circumstances of this case.

In addition, ECL 71-2303(1) provides that the Commissioner has the power "to direct the violator to cease his violation of the [Freshwater Wetlands] act and to restore the affected freshwater wetland to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the commissioner or local government."

It is the policy of this Department to require restoration of wetland benefits and functions lost as the result of illegal activity (see Freshwater Wetlands Enforcement Guidance Memorandum, § I "Enforcement Objectives," Commissioner Policy DEE-6 [February 4, 1992]). In certain circumstances, however, although full restoration may not be technically achievable, restoration shall be undertaken to the extent possible and alternative site mitigation may be required (see id., at § IV "Sanctions Under State Law", par 3 "Restoration and Mitigation of Wetland Impacts").

In this instance, however, because of specific circumstances relating to the physical nature of the site, ALJ DuBois has not recommended that respondents be required to restore the impacted areas of the freshwater wetland and adjacent area. Specifically, the ALJ referenced the decrease in water flows to the site, an inability to order restoration that would connect a re-established wetland with the rest of wetland AR-3, and a lack of specific information (in particular, information on the depth of excavation needed to restore a wetland on the site) regarding the proposed wetland restoration. However, the ALJ also recommended that, if I ordered respondents to re-establish the wetland, Department staff should be directed to evaluate the potential for damage to existing trees on the site in consideration of any restoration plan (see Hearing Report, at 22).

The ALJ has raised important considerations with respect to the ordering of any restoration. However, based upon my review of the record, I have concluded that ordering restoration is appropriate and warranted in this matter. Respondents caused or allowed removal of vegetation in freshwater wetland and adjacent areas on lots 51, 53 and 55 and caused or

allowed grading in those same areas ("affected areas"), thereby obliterating wetland features. Their activities significantly diminished the values and functions of Wetland AR-3, and have resulted in the growth of mugwort in the affected areas which is of lesser habitat value than the vegetation that was removed (see, e.g., Hearing Transcript, at 203-204, 211).[4]

Wetlands provide numerous benefits, including flood and storm control and wildlife habitat (see ECL 24-0105[7]). Class I wetlands, such as AR-3, provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances (see 6 NYCRR 663.5[e][2]; see also 6 NYCRR 664.5[a]). Such benefits were provided by the wetland at this site (see, e.g., Hearing Transcript, at 199-201 [noting flood and storm water control and wildlife habitat, among other benefits]).

Based on this record, I have concluded that wildlife habitat functions and a limited amount of flood storage could and should be restored in the wetland and adjacent areas where the violations occurred on lots 51, 53 and 55. During the hearing, Department staff witness Joseph Pane outlined the proper approach to restoring wetlands on the affected areas (see, e.g., Hearing Transcript, at 1139 [excavating the affected areas, contouring the topography to retain water and "careful selection" of wetland plants]).

With respect to the ALJ's concerns regarding restoration, the record indicates that some decrease in water flows to the site has occurred as a result of actions caused by parties other than respondents. Specifically, the decrease in flow arises from municipal infrastructure development, that is the comprehensive sewer/flood control project for the Richmond Creek area that the New York City Department of Environmental Protection undertook near respondents' site in the late 1990's (but see Hearing Exhibit 71, at 5-6 [noting measures undertaken as part of municipal infrastructure development to reduce impacts to wetland functions and benefits]).

A diminished flow may affect the selection of the types of wetland vegetation to be re-established, but does not preclude an ability to replant more suitable vegetation to replace the mugwort that has spread following respondents' clearing of the

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[4] As noted in the record, the portion of Wetland AR-3 that is located on the site has not been de-mapped (see Hearing Report, at 10 [Finding of Fact #19]; Hearing Transcript, at 496).

wetland area.

The extent that a surface water connection would be established from the areas to be restored to certain other portions of the wetland is uncertain, due to the present conditions on the lots between the affected areas and those other wetland areas and the ownership of some of those lots by persons other than respondents (see Hearing Report, at 13-14 [Finding of Fact #32]). However, the municipal infrastructure development project has not cut off all surface water flow, and other water flows to the site were identified (see, e.g., Hearing Report, at 12-13 [Finding of Fact #30]). Furthermore, the record demonstrates that replanting the affected areas with wetland-suitable vegetation would benefit Wetland AR-3 and its existing wildlife habitat (see, e.g., Hearing Transcript, at 201-202).

Although the record does not specify the depth of the excavation necessary to restore wetland vegetation, I conclude that the depth of excavation necessary for replanting can and should be determined by respondents in the development of the restoration plan. The depth of excavation to be proposed is to take into consideration the type of vegetation to be planted and the location of the plantings.

Accordingly, I hereby direct respondents, within ninety (90) days of the service of this order, to submit an approvable wetlands restoration plan ("plan") to Department staff for staff's review and approval. For purposes of this order, an approvable wetlands restoration plan shall mean a plan that can be approved by Department staff either as submitted by respondent or subject only to minimal revision. Once the plan is approved, Department staff shall so notify respondents in writing.

The plan is to provide for the replanting of native wetland and other suitable native vegetation in the affected freshwater wetland and adjacent areas on lots 51, 53 and 55. The plan shall address the extent to which those areas shall be modified or recontoured in order to ensure the success of such revegetation and, as appropriate, to retain water. The plan shall also describe the types of native vegetation that will be planted on the site, the reasons for selecting those vegetation types, and the locations for the plantings. As part of revegetating the affected areas, respondents shall remove mugwort growing in those areas and replace it with more suitable native wetland vegetation. Respondents shall complete the restoration work within three months following written notification by Department staff that it has approved the plan, provided that this time period may be extended by Department staff due to

weather conditions.

The ALJ recommended that, if restoration were ordered, the potential damage to existing trees on the site be considered. I concur. In preparing the plan, respondents are to take into account the existing tree cover on the site and avoid any restoration activity that would cause undue damage to the tree cover. Department staff shall also review the plan to ensure that any such damage would be avoided.[5]

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

I. Respondents violated 6 NYCRR 663.4 at their property located in Richmond County tax block 2280 (near the corner of St. Andrews Road and Aultman Avenue) in Staten Island, New York when they caused or allowed the removal of vegetation to occur in a freshwater wetland and adjacent area without a permit from the Department.

II. Respondents violated 6 NYCRR 663.4 at their property located in Richmond County tax block 2280 (near the corner of St. Andrews Road and Aultman Avenue) in Staten Island, New York when they caused or allowed the grading of a freshwater wetland and adjacent area to occur without a permit from the Department.

III. Respondents Anthony Venditti and Kathy Venditti are hereby jointly and severally assessed a civil penalty in the amount of six thousand dollars ($6,000), which is due and payable no later than thirty (30) days after receipt of this order. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the New York State Department of Environmental Conservation, and delivered to the Department at the following address:

New York State Department of Environmental Conservation
Division of Legal Affairs, Region 2
1 Hunter's Point Plaza, 47-40 21st Street

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[5] Department staff in its closing brief requested that respondents be directed to "cease all ongoing violations at the site." However, as the ALJ noted, the closing brief does not identify these "ongoing violations" and it is not clear whether they were encompassed by the causes of action set forth in Department staff's March 2003 complaint (see Hearing Report at 22-23). I note that any additional activities at the site that have been or are being conducted in violation of ECL article 24 or 6 NYCRR part 663 may serve as a basis for further enforcement action.

Long Island City, New York 11101-5407
ATTN: Udo M. Drescher, Assistant Regional Attorney

IV. In addition to the payment of a civil penalty, not later than ninety (90) days after service of this order, respondents Anthony Venditti and Kathy Venditti are hereby directed to submit an approvable wetlands restoration plan to Department staff for its review and approval. The plan shall: provide for the replanting of native wetland and other suitable native vegetation in the affected areas of lots 51, 53 and 55; address the extent to which the affected areas to be revegetated must be modified or recontoured; and describe the types of native vegetation to be planted, the reasons why those vegetation types were selected and the specific areas where the vegetation will be planted. Respondents shall complete the restoration work within three months following Department staff's written notification of its approval of the plan, provided that this time period for the completion of the work may be extended by Department staff due to weather conditions.

V. All communications from respondents to Department staff concerning this order shall be made to Udo M. Drescher, Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 2, Division of Legal Affairs, 47-40 21st Street, Long Island City, New York 11101-5407.

VI. The provisions, terms and conditions of this order shall bind respondents Anthony Venditti and Kathy Venditti, and their heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____
Alexander B. Grannis
Commissioner

Dated: August 7, 2007
Albany, New York

To: Anthony Venditti (By certified mail)
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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violations of article 24 of the Environmental Conservation Law and part 663 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

ANTHONY VENDITTI and KATHY VENDITTI

RESPONDENTS

DEC Case Nos.
R2-20011119-223
and
R2-0179-96-02

HEARING REPORT

by

Susan J. DuBois
Administrative Law Judge

April 17, 2007

PROCEEDINGS

Pursuant to part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 622), an administrative enforcement hearing was held to consider allegations by the New York State Department of Environmental Conservation (DEC or Department) against Anthony Venditti and Kathy Venditti (Respondents), 247 Mace Street, Staten Island. DEC Staff initially alleged that Respondents and three other persons violated Environmental Conservation Law (ECL) article 24 (Freshwater Wetlands) and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 663, Freshwater Wetlands Permit Requirements) at several lots located in Staten Island, Richmond County, New York. The other three persons named as respondents in the complaint were Tina Sanjour Gough, Peter L. Wohler and Claudia Sanjour. As discussed below, DEC Staff did not serve the complaint on Ms. Gough or Mr. Wohler, and withdrew its complaint against Ms. Sanjour.

The complaint in this matter is dated March 3, 2003. In the complaint, DEC Staff alleged that Respondents and the additional three persons violated ECL article 24 and 6 NYCRR part 663 by causing or allowing: removal of vegetation, deposition of wood chips, filling with wood chips, grading, and placement of soil, all without approval from the Department and all within or adjacent to a Class I wetland.

The alleged violations are based upon two sets of observations by DEC Staff, one documented in a notice of violation dated February 13, 1996 and the other made during an April 9, 2001 inspection of the site. The site of the alleged violations is at and near the corner of St. Andrew's Road and Aultman Avenue. The wetland in question is designated by the Department as AR-3 (Richmond Creek).

Respondents Anthony and Kathy Venditti submitted an answer dated March 20, 2003.

In reviewing the March, 2005 motions from DEC Staff and Respondents, I requested that DEC Staff provide copies of any answers submitted by the other three persons who were named as respondents in the complaint. I also requested the addresses of the other three persons and the contact information for anyone who might be representing them. DEC Staff replied, in an electronic mail message dated March 31, 2005, that DEC Staff had not been able to locate Ms. Gough or Mr. Wohler, but had personally served the notice of hearing and complaint on Ms.

Sanjour. DEC Staff provided contact information for Ms. Sanjour. DEC Staff noted that Ms. Gough had "apparently passed away."

On May 9, 2005, Ms. Sanjour submitted a copy of Ms. Gough's death certificate. Ms. Gough was Ms. Sanjour's father's first cousin. On May 11, 2005, DEC Staff withdrew its complaint against Claudia Sanjour, without prejudice. My May 20, 2005 ruling stated, among other things, that if new evidence led DEC Staff to reinstate its complaint against Ms. Sanjour regarding alleged violations of the ECL at the site in question, DEC Staff would need to serve upon her a new complaint. The ruling also asked that DEC Staff clarify how it intended to proceed with regard to Ms. Gough, because DEC Staff's correspondence as of that date dealt only with Ms. Sanjour's status as a respondent, not that of Ms. Gough. On May 27, 2005, DEC Staff responded that it would determine whether there were possible claims against Ms. Gough's estate after reviewing additional information.

At the start of the hearing on December 6, 2005, I asked DEC Staff whether Ms. Gough or Mr. Wohler were still respondents in this case as far as DEC Staff was concerned. DEC Staff stated that the cases against Ms. Gough and Mr. Wohler were withdrawn without prejudice (Transcript, at 7 - 8 (Tr. 7 - 8)).

In the remainder of this hearing report, the term "Respondents" refers only to Anthony Venditti and Kathy Venditti.

Respondents were represented by Richard A. Rosenzweig, Esq., Menicucci, Villa & Associates PLLC, 2040 Victory Boulevard, Staten Island, New York 10314. DEC Staff was initially represented by David S. Rubinton, Esq., Assistant Regional Attorney, DEC Region 2, Long Island City, New York. During and after June, 2004, DEC Staff was represented by Udo Drescher, Esq., Assistant Regional Attorney, DEC Region 2. The case was initially assigned to Administrative Law Judge (ALJ) Molly T. McBride. It was reassigned to ALJ Susan J. DuBois (the undersigned) on May 19, 2004.

Several motions were made prior to and during the hearing, as discussed below. The hearing took place at the DEC Region 2 Office, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York, on the following dates: December 6 and 7, 2005, February 8 and 9, 2006, March 30, 2006, and November 28, 2006.

DEC Staff called as its witness Joseph Pane, Principal Fish and Wildlife Biologist, DEC Region 2. DEC Staff also presented an unsworn statement by Harold Dickey, a staff member of the DEC Division of Environmental Permits.

Respondents called as their witnesses: James A. Schmid, Ph.D., President of Schmid & Company, Inc., consulting ecologists; William Spiezia, licensed land surveyor, Rogers Surveying; Donald McAlpin, nephew of Respondent Anthony Venditti; Harold Donald, Frank Rotger, Michael Giglia, and John Orosz, all of whom are neighbors, former neighbors or business acquaintances of Mr. Venditti. Respondent Anthony Venditti also testified on behalf of Respondents.

The written closing statements of the parties were received on January 11 and 16, 2007, and the hearing record was closed on January 16, 2007.

Charges and relief sought

DEC Staff alleged that Respondents caused or allowed two violations of ECL article 24 and 6 NYCRR part 663: (1) grading and filling with wood chips as observed in 1995; and (2) clearing several lots, filling them with soil, and grading them, as observed in 2001.[1] DEC Staff sought a $15,000 penalty, an order requiring that Respondents cease violations on the site, and an order requiring restoration of the site to a wetland condition.

DEC Staff recommended that Respondents be directed "to remove fill from the lots and to reestablish the wetland topography and grade" so that wetland vegetation could be reestablished and the area could be returned to functioning as a component of the larger wetland system (Tr. 213). DEC Staff proposed that Respondents be required to determine how much excavation would be required and to identify the kinds of wetland plants that would be planted (Tr. 1139, 1187).

Answer

Respondents admitted ownership of the site, but denied they had caused or allowed violations. Respondents asserted that the lots were mistakenly mapped as wetlands by DEC in 1987, that the site did not contain wetland as of early 2001, that fill was not placed on the lots, that others could have committed the alleged violations, and that restoring the wetland would be impossible.

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[1] The complaint identified the allegations as five causes of action: (1) removal of vegetation; (2) deposition of wood chips; (3) filling with wood chips; (4) grading; and (5) placement of soil.

MOTIONS

On January 27, 2004, Respondents Anthony and Kathy Venditti moved to dismiss all allegations against Respondents. The deadline for DEC Staff's response was postponed, by agreement of the parties, to allow for settlement negotiations. The parties did not reach a settlement, and on May 19, 2004, DEC Staff replied in opposition to the motion. On June 15, 2004, I issued a ruling denying the motion. The hearing was to be scheduled after DEC Staff filed a statement of readiness for hearing.

On June 22, 2004, Respondents requested permission, pursuant to 6 NYCRR 622.7(b)(2), to depose Mr. Pane. DEC Staff opposed this request. On June 28, 2004, Respondents withdrew the request, without prejudice, and both parties again expressed an interest in attempting to settle the matter.

On March 17, 2005, Respondents again moved to dismiss "all pending violations" on the basis of State Administrative Procedure Act (SAPA) section 301. This section states, "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." DEC Staff opposed the motion, requested that a schedule be established to complete discovery, and moved for leave to amend the complaint. Respondents replied to the arguments about their motion, opposed the requested schedule, and opposed amendment of the complaint. On April 13, 2005, I notified Ms. Sanjour about the motion to dismiss, and provided her an opportunity to respond. Ms. Sanjour submitted a response on May 2, 2005, that included an answer to the complaint, an affidavit, and a memorandum of law. Ms. Sanjour moved to dismiss the complaint as against herself.

In a ruling dated May 20, 2005, I denied Respondents' second motion to dismiss, without prejudice to considering Respondents' affirmative defense concerning untimeliness after the hearing record is complete. I denied Respondents' request to depose Mr. Pane, and denied DEC Staff's motion for leave to amend the complaint. The May 20, 2005 ruling noted that DEC Staff had withdrawn its complaint against Ms. Sanjour, and stated that if new evidence led DEC Staff to reinstate a complaint against her regarding these violations, DEC Staff would need to serve upon her a new complaint. I notified the parties I would schedule a conference telephone call about the hearing schedule.

Following a postponement for additional settlement discussions, that did not resolve the matter, the hearing was scheduled to begin on December 6, 2005. On November 3, 2005,

Respondents moved for a ruling requiring that DEC Staff prove its case beyond a reasonable doubt. DEC Staff opposed this motion, by a letter dated November 5, 2005. Respondents replied on November 9, 2005. I denied the motion on November 15, 2005. The standard of proof in this matter is proof by a preponderance of the evidence (6 NYCRR 622.11(c)).

On or about December 5, 2005, DEC Staff attempted to serve a subpoena upon Ms. Sanjour. Ms. Sanjour returned the subpoena to Mr. Drescher, stating that it was improperly served. The hearing proceeded on December 6 and 7, 2005. On January 26, 2006, DEC Staff served upon Ms. Sanjour a subpoena and subpoena duces tecum. Respondents moved to quash the subpoena or to "table" it until the end of the hearing. I denied the motion, for the reasons stated in a ruling dated February 3, 2006.

The hearing continued on February 8 and 9, 2006, with the testimony of witnesses other than Ms. Sanjour taking up the two dates, and she was not required to appear at the hearing on those dates. On March 3, 2006, Ms. Sanjour submitted a request "to withdraw and/or modify the...subpoena and subpoena duces tecum." Following additional correspondence, I issued a ruling on March 29, 2006 that quashed the subpoena and subpoena duces tecum.

The hearing continued on March 30, 2006. On March 31, 2006, DEC Staff sent a motion to Denise M. Sheehan, Commissioner of the Department of Environmental Conservation, seeking leave to file an expedited appeal of the March 29, 2006 ruling. Ms. Sanjour responded on April 12, 2006, opposing the motion. On April 21, 2006, Assistant Commissioner Louis A. Alexander notified the parties and Ms. Sanjour that the Commissioner had granted DEC Staff's motion for leave to appeal the March 29, 2006 ruling, and set a schedule for the appeal and replies. DEC Staff submitted its appeal, and both Respondents and Ms. Sanjour replied. On October 10, 2006, prior to issuance of a decision on the appeal, the parties submitted a stipulation under which DEC Staff agreed to withdraw its appeal regarding Ms. Sanjour. The stipulation also included agreements about use of certain photographs as exhibits, the scope of additional testimony, and a schedule for post-hearing briefs.

FINDINGS OF FACT

1. The site of the alleged violations is located on the southwest corner of St. Andrews Road and Aultman Avenue in Staten Island (Richmond County). The site consists of lots 45, 47, 51, 53, 55, 57 and 58 of block 2280. (See map, Appendix A of this

hearing report). All of these lots are currently owned by Respondents, who purchased them from other owners at various times between September 1992 and October 2000, as discussed further below. St. Andrews Road runs approximately east-west and Aultman Avenue runs approximately north-south. Lot 51 is at the corner of St. Andrews and Aultman, southwest of the intersection, and has its longer side parallel to St. Andrews Road. Lots 47 and 45 are west of lot 51, and have their shorter dimensions fronting on St. Andrews Road. The remaining lots have their shorter dimensions fronting on Aultman Avenue and are located south of lot 51, with lot 53 being the northernmost of these lots and lot 58 being the southernmost.

2. With regard to the area around the site, the next road south of, and parallel to, St. Andrews Road is Mace Street. Lot 61 of block 2280 is at the northwest corner of St. Andrews and Mace, and lot 60 is located between lots 61 and 58 of block 2280. Immediately west of the rear of lots 57, 58, 60 and 61 is lot 1, which has its shorter dimension fronting on Mace Street. Immediately west of lot 1 is lot 4 of block 2280, on which Respondents' house is located. A gravel driveway runs from the rear of Respondents' house across lot 45 to St. Andrews Road. Lot 45 and the western part of lot 47 are north of lot 4. The complaint in this matter does not allege any violations on lots 60, 61, 1 or 4. Block 2280 also includes 11 other lots west of the ones described above. St. Andrews Road has a dead end west of lot 45 and the paved road does not continue all the way through to the northwest corner of block 2280.

Ownership of the site

3. Respondents now own all the lots that are the subject of the alleged violations. They acquired the lots in a series of transactions during the period September 1992 through October 2000.

4. Respondents acquired lot 45 by deed dated September 2, 1992, from Robert J., Diane, Robert L. and Linda Lufrano. Respondents acquired lot 47 by deed dated February 8, 1995 from Tina Gough.

5. As of early 1995, lots 51, 53, 55, 57 and 58 were all owned by Ms. Gough. They were sold to Respondents in two transactions, with Claudia Sanjour and Peter Wohler owning some of the lots between Ms. Gough's ownership and that of Respondents. As of October 2000, Respondents owned all five of these lots.

6. On August 9, 1996, Ms. Gough gave lots 53, 55, 57 and 58 to Claudia Sanjour and Peter Wohler as a gift, while reserving a 100 percent life estate (Ex. 9). Ms. Gough's house was on lot 55. On March 5, 1999, Ms. Sanjour, Mr. Wohler and Ms. Gough sold lots 57 and 58 to Respondents, and Ms. Gough extinguished her life estate to these lots (Ex. 11). On October 4, 2000, Ms. Sanjour, Mr. Wohler and Ms. Gough sold the remaining lots to Respondents (Ex. 10).

Wetland boundaries

7. The Department adopted an official wetlands map for Richmond County in 1987. Wetland AR-3 is depicted on this map as occupying a portion of block 2280, as well as other areas along Richmond Creek. The official wetlands map for Richmond County is done at the scale of a United States Geologic Survey quadrangle map (Tr. 275 - 277; Ex. 12; Ex. 44, at 3, 5 - 6). Appendix B of this hearing report shows the section, of the official DEC freshwater wetland map, on which the boundary of wetland AR-3 is depicted.

8. In Richmond County, additional mapping was done at the scale of tax maps, using the tax maps as the base maps. Mapping at this scale was done in preparation for notifying landowners about the proposed wetland map and conducting hearings on the map (Tr. 275 - 277; Ex. 25). The wetland boundary at and near the site as depicted on the "1987 tax map" is shown in Appendix A of this hearing report, a portion of Exhibit 25.

9. DEC Staff conducted inspections in the field at block 2280 in connection with preparing the 1987 official freshwater wetland map and the 1987 tax map (Tr. 79, 259 - 279).

10. After the DEC adopted the freshwater wetlands map for Richmond County, numerous landowners appealed to the Freshwater Wetlands Appeals Board (FWAB), contesting the identification of freshwater wetlands on their property. An appeal was filed concerning lot 45 of block 2280 by Robert J. Lufrano and Diane Lufrano, two of the persons who owned lot 45 at the time the wetlands map was filed. The FWAB found that the DEC had met its burden of demonstrating that lot 45 was properly designated as freshwater wetlands. The FWAB also found that the Lufranos had failed to demonstrate that they had suffered an unnecessary hardship in that case (Lufrano v Jorling, Order and Decision, FWAB No. 87-220 [August 20, 1990], 1990 WL 515950 [NY Fresh. Wet. App. Bd.]). In making its decision, the FWAB relied on field

notes made by DEC staff member Wayne Richter, which notes were not challenged by the Lufranos.

11. An appeal concerning wetlands depicted on lots 47 and 51 of block 2280 was also submitted to the FWAB. This appeal was received by the FWAB on July 2, 1992 and was filed by Tina Sanjour Gough, who owned those two lots at that time. Before the appeal was decided, Ms. Gough sold lot 47 to Respondents and as of October 5, 1995 her appeal only concerned lot 51. On March 22, 1996, Ms. Gough withdrew the remaining portion of her appeal, as communicated to the FWAB by Claudia Sanjour (Ex. 8, 19, 20 and 21).

12. In preparation for a FWAB hearing on a group of lots that included lots 47 and 51, DEC Staff member Joseph Pane visited the lots on November 30, 1993 (Tr. 62 - 80; 84 - 86). At that time, a house that belonged to Ms. Gough existed on lot 55, uphill from lot 51. Mr. Pane's notes described the house as being on fill that formed a ridge adjacent to lot 51. The area sloped downhill from Mace Street towards St. Andrews Road, with lots 51 and 47 at the base of the slope. Lots 51, 53 and 55 were within a fence and the vegetation on those lots was mowed. Lot 47 was outside the fence. Although the vegetation on lot 51 had been cut, lot 51 was wetter than the rest of the mowed area, with darkened soil. The cut grass looked like wetland grasses to Mr. Pane, and was clumped and uneven, characteristics associated with areas that are saturated during parts of the year. Mr. Pane observed pin oak and willow "at rear" (probably on lot 47) and some *Phragmites* and ivy on lot 51. Mr. Pane concluded that the wetland was properly depicted on the 1987 tax map (Tr. 74-78, 84 - 86; Ex. 24).

13. Of the lots that are the subject of the complaint, only lots 45, 47, 51 and 53 are mapped as containing freshwater wetlands, according to the 1987 boundary depicted on the tax map. This map shows nearly all of lots 45 and 51 as wetland and portions of lots 47 and 53 as wetland. According to this map, lots 55 and 57, and a portion of lot 58, would be within the 100 foot adjacent area of the wetland.

14. DEC Staff also visited block 2280 in 1993 in connection with the New York City Department of Environmental Protection's (NYC DEP) Bluebelt project. The Bluebelt is a flood control system, in Staten Island, that uses wetlands to collect and convey storm water in addition to using drainage pipes. As part of the Bluebelt project, NYC DEP condemned or purchased land that would be included in the Bluebelt. In block 2280, NYC DEP purchased several lots. It is unclear from the testimony which lots became

part of the Bluebelt, but a map from the New York City Department of Environmental Protection shows lots 38, 40 and possibly part of 42, as well as lots west of these in block 2280, as "DEP Bluebelt land" (Ex. 73; Tr. 108 - 109, 290 - 293, 320 - 322, 763 - 766). DEC Staff identified the wetland boundary on the parcels that NYC DEP purchased. The NYC DEP Bluebelt System damage and acquisition map shows a wetland line in block 2280 (Ex. 50). This line, however, is shown on several lots in the western part of the block including lots 38 and 40, and ends at approximately the boundary between lots 40 and 42 without closing around a wetland area. It does not depict what the boundary would be in lot 42 and the lots east of it. Although the 1987 tax map's depiction of the boundary showed all of lots 38 and 40 as being within the wetland, the line on the NYC DEP map shows only part of these lots as being within the wetland.

15. In addition to the wetland areas mapped in block 2280, the 1987 official wetlands map, the 1987 tax map and the wetland delineation done in 1993 show regulated freshwater wetlands in block 2273 (Ex. 12, 25 and 50). This is the block immediately north of block 2280, bounded on the south by St. Andrews Road and on the east by Aultman Avenue. Lot 29 of block 2273 is at the northwest corner of the intersection of St. Andrews and Aultman. Lot 28 is north of lot 29, and lot 24 is north of lot 28. The 1987 official map shows the general area of these lots as part of wetland AR-3. The 1987 tax map shows lot 24, but not lots 28 and 29, as part of this wetland. The 1993 mapping shows most of lot 24, plus parts of lots 28 and 29, as part of this wetland.

16. On April 2, 2001, Michael M. Menicucci, Esq. wrote to Mr. Pane and asked that he conduct a site inspection of block 2280, lots 51, 53, 55, 57 and 58 to determine the boundary of the wetland in connection with the proposed development of these lots. Mr. Pane visited the site on April 9, 2001, but observed the conditions that are identified as the second set of violations in this matter and did not conduct a wetland delineation (Ex. 29, Tr. 97 - 101, 120 - 124, 129 - 143).

17. Respondents' consultant, James A. Schmid, Ph.D., made observations at the site in late 2004 or early 2005, and on later dates. At the site, he observed soils, vegetation and the presence or absence of surface water. These observations do not provide a basis for determining where wetlands existed prior to April 2001 because the observations were made after significant disturbance of the site occurred and the observations did not follow a portion of the procedure described in the DEC's 1995 freshwater wetlands delineation manual.

18. The boundary of the DEC's freshwater wetland jurisdiction, on the lots that are the site of the violations alleged in this case, is at the location shown on the 1987 official wetland map, as clarified by the 1987 tax map depiction. The record contains no reliable depiction of a different boundary on these lots at a date later than 1987.

19. The portion of freshwater wetland AR-3 that is located in block 2280 has not been de-mapped by the DEC (Tr. 496).

20. The freshwater wetland area that existed on the site at the time of the 1987 map is part of a considerably larger wetland along Richmond Creek, designated as wetland AR-3 (see map, Appendix B of this report). Wetland AR-3 is a class I wetland. The wetland on the site drained towards the west in block 2280. Within that block, a small pond is located on lots 34, 38 and a portion of lot 40, and the pond is owned by New York City under the Bluebelt program. This section of wetland AR-3 contains areas of deciduous swamp, and occupies several city blocks. It drains towards the west and eventually into a salt water environment (Ex. 12, 43; Tr. 196 -201).

Wood chips allegation

21. On December 6, 1995, a violation report was prepared by Steven Scheiman, who at that time was a staff member of the Department's wetlands program in Region 2. The report described an alleged violation consisting of "fill and wood chips dumped and graded over Tax Block 2280 Lots 40, 42, 43, 45, 47, 51 and 53." The entire area of these lots was marked by Mr. Scheiman with cross-hatching on a copy of the 1987 tax map attached to the report. Also attached to the report was a list of site owners, that listed Kanaga Corporation as owner of lots 40, 42 and 43, Robert Lufrano as owner of lot 45, and Tina Sanjour as owner of lots 47, 51 and 53 (Ex. 26).

22. As of December 6, 1995, Respondents owned lots 45 and 47, and Ms. Gough owned lots 51 and 53 (Ex. 7, 8, 9, 10). The record of this hearing does not contain any deeds or other proof regarding who owned lots 40, 42 and 43, other than the list that is part of Exhibit 26.

23. Mr. Pane visited the site at some time between December 6, 1995, and February 13, 1996, in order to determine whether to approve initiating an enforcement case. Mr. Pane observed two mounds of wood chips, approximately a foot or two high, that were spread out as if they had been dumped off a truck. The

horizontal dimensions of the chip mounds are not identified in the record. The mounds were on or near lot 45, very close to St. Andrews Road. Mr. Pane did not make observations other than to quickly look at the wood chip piles (Tr. 87 - 92, 378 - 379).

24. Mr. Scheiman sent a "cease and desist" letter to Ms. Gough on February 13, 1996 (Ex. 28, addressed to her as "Tina Sanjour"). This letter identified wood chips as the only fill material alleged. On May 18, 1996, Ms. Sanjour, as attorney representing Ms. Gough, sent a letter to Louis P. Oliva, Esq., of DEC Region 2. The letter stated, among other things, that people other than Ms. Gough had dumped various debris, including wood chips on lots 45 and 47, and that Ms. Gough no longer owned those two lots (Ex. 27). This alleged violation was never resolved. Prior to the complaint in the present enforcement hearing, DEC Staff had not issued a notice of violation or served a complaint on Respondents concerning the wood chips (see, January 27, 2004 affidavit of Anthony Venditti, attached with January 27, 2004 motion to dismiss; Ex. 28; Tr. 366).

Allegation concerning April 2001 observations

25. In early 2001, Respondent Anthony Venditti was planning to develop three one-family houses on lots 51, 53, 55, 57 and 58 of block 2280 (Ex. 30). On April 9, 2001, Mr. Pane visited this site, at Mr. Meniccuci's request, to determine the boundary of the wetland. Mr. Pane observed that the lots had been cleared and rough graded. He concluded that fill had been placed on the lots, based upon the change in topography since his earlier visits. Where there had been a low area south of St. Andrews Road, the land was now visibly higher than the road. The land surface was bare dirt, with some trees still standing among the bare dirt. Two trees had been cut. The "ridge" on which Ms. Gough's house had been located was gone and the house had been removed (Tr. 98 - 101, 121 - 125, 128 - 129, 139 - 140; Ex. 29, 33, 34). On November 15, 2001, Mr. Pane returned to the site and took two photographs. At that time, some grass was growing on the graded area, although much of it still appeared nearly bare, and Mr. Pane observed ruts that he attributed to the grading activity (Tr. 137 - 139; Ex. 33, 34).

26. Respondents caused or allowed clearing of vegetation and grading of soil in at least a portion of the wetland on the site, and some part of the wetland adjacent area at the site. While the record does not demonstrate exactly how far south the clearing and grading extended, it does demonstrate that these activities occurred at least in lots 51, 53 and 55. It is

unclear whether and to what extent the clearing and grading extended into lots 47 and 45 (Tr. 154 - 155). The clearing and grading occurred a short time prior to April 9, 2001, by which time Respondents had owned all of the site for over 5 months. There is no evidence supporting the idea that someone other than Respondents caused the clearing and grading, nor that Respondents sought to prevent this work or to pursue someone who did it without their permission.

27. With regard to the fill, it is quite possible that Respondents were responsible for placing some fill in lot 51 prior to or during the grading of the site. The record of the hearing, however, does not contain sufficient evidence to prove that this occurred. Unlike the clearing and grading, which looked recent as of April 2001, Mr. Pane's testimony does not include observations that support findings about when the soil was placed that increased the elevation of the former wetland area.

28. DEC has not issued a permit to Respondents for the clearing, grading and filling observed by Mr. Pane. DEC has not issued a permit to anyone for activities regulated under the Freshwater Wetlands Act to be conducted on lots 45, 47, 51, 53, 55, 57 or 58 of block 2280 in Staten Island (Tr. 124 - 128).

29. Prior to being disturbed, the wetland area on the site would have provided some extent of storm water retention. This function has now been decreased. The wetland area at present has less habitat value than prior to the disturbance because mugwort, an invasive species, has grown on areas that were wetland (Tr. 166 - 167, 200 - 207). Although Mr. Pane observed that two trees had been cut, there were still some trees on the disturbed area as of November 2001 (Ex. 33 and 34). The survey maps in evidence do not provide a sufficiently reliable depiction of the trees on lots 51 and 53 to determine the extent of any additional tree removal. The habitat value of the remaining trees would be similar to that which they provided prior to the disturbance (Tr. 201, 1222 - 1224).

Requested remediation

30. Although Respondents argued that a wetland could not be created at the site, the record does not support this conclusion. The water source for the wetland was a combination of groundwater, storm water runoff coming down Aultman Avenue, and runoff from within block 2280 (Tr. 283 - 286). In the late 1990's, between the time of the 1987 wetland mapping and the

present time, the City of New York installed sanitary sewers and new storm sewers in the streets around the site (Tr. 445 - 475). The contributions of surface water and groundwater to the wetland, either before or after the sewer work, is not reliably quantified in the record of this hearing. The storm sewers have diverted some water from the site, but have not cut off all surface water flow to lot 51. As of November 2005, *Phragmites*[2] was still growing in the northern part of lot 51 along St. Andrews Road, even after the filling and grading (Ex. 39; Tr. 170 - 171). Water accumulated at the edge of St. Andrews Road along the north side of block 2280 after a moderate rainfall in November 2006, and erosion in the soil just off the dead end of St. Andrews Road indicated that water had flowed there (Tr. 1097 -1108, Ex. 86, 87B, 87C). Water would also flow downhill to the former wetland area on the site, from other lots located uphill from it.

31. The proposed remediation would not, however, restore the wetland to the condition depicted on the 1987 map. Even though the former wetland's water sources have not been cut off entirely, they have been reduced by the late-1990's sewer project. A freshwater wetland created on the site would be smaller than the wetland area on the 1987 tax map. The depth to which the area would need to be excavated, in order to establish freshwater wetland vegetation, cannot be determined from the hearing record (Tr. 466 - 499, 614 - 618, 645 - 647, 1139 - 1141, 1187 - 1191).

32. In addition, lots 51 and 47 are now isolated from the rest of the wetland in block 2280 due to elevated ground in lot 43, and water flow to the wetland may also be limited by the gravel driveway on lot 45 (Tr. 640 - 641; 1141 - 1142; 1183 - 1186; Ex. 40). Respondents own lot 45, but there is no indication in the record that they own lot 43 or 42, which lie between Respondents' lot and the Bluebelt lots. The record does not identify who currently owns lots 43 or 42, nor does it provide information about filling that may have occurred on these lots, other than

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[2] *Phragmites communis* (reed) is listed in ECL 24-0107(1)(a)(3) as a freshwater wetlands plant. *Phragmites australis* (reedgrass) is identified in the DEC 1995 freshwater wetlands delineation manual as a facultative wetland plant that usually occurs in wetlands but occasionally is found in non-wetlands (Ex. 46, at 4 and Appendix A; Tr. 1072 - 1074). *Phragmites communis* is an obsolete name for *Phragmites australis* (Ex. 58, at 384).

the observation of an elevated area with bamboo growing on it in lot 43 (Tr. 718, 1183 - 1185).

33. With regard to lot 45, the driveway was not present in 1985 when a survey was done, or in 1987 when DEC Staff visited lot 45 as part of the wetland mapping process. The complaint does not allege that Respondents constructed the driveway, nor that this was done without a permit. Even if Respondents were required to put a pipe under the driveway to allow water to cross it, however, this would not connect lot 42 to the wetland. Connecting a wetland on Respondents' lots to the rest of wetland AR-3 would require permission of the owners of lots 42 and 43 for this work, or permission to route water along the shoulder of St. Andrews Road (Ex. 17B; Tr. 1185 - 1186, 1204 - 1206).

34. The proposed remediation might create an area of wetland that, depending on the depth of excavation and the amount of water available, would be a small area of seasonally-inundated wetland. It would be isolated from the rest of wetland AR-3 and would be similar to a vernal pond. Such a wetland could be habitat for invertebrates and amphibians, if the wetland restoration project were successful, and could provide a limited amount of flood storage volume (Tr. 645 - 646, 1139, 1183-1190, 1216-1221).

35. The wetland values provided by the site, if this proposed remediation were successful, would be intermediate between those that existed prior to the clearing, grading and filling and those that exist at present. Vegetation has grown back on the cleared area, although it differs from the vegetation that was present prior to the clearing, grading and filling, and the tree cover is similar (Tr. 196 - 212; 1216 - 1218; 1220-1224).

DISCUSSION

Respondents asserted, as an affirmative defense, that "[t]he areas in question are not protected areas or wetlands." Respondents' proof in support of this assertion included the testimony of Dr. Schmid, whose observations of the site on behalf of Respondents began in late 2004 or early 2005 (Tr. 564).[3]

With respect to lot 45, Respondents essentially tried to contest the FWAB's decision in Lufrano v Jorling, that upheld the

[3] Dr. Schmid also saw the site in the fall of 2002, while in the area looking at wetland boundaries on other properties.

DEC's mapping of wetlands in that lot. The FWAB relied on "the field notes from Mr. Richter's site specific visit," which are probably the same document as Exhibit 17A of the present hearing record, based upon the FWAB's description of the notes and the contents of Exhibit 17A. The notes are dated February 18, 1987.

Respondents suggested that the reference to "skunk cabbage" in Mr. Richter's notes might have been a reference to a single plant (Tr. 898 - 899, 914 - 915; Respondent's closing brief, at 27).[4] Dr. Schmid testified that, based upon the soil he observed at lot 45, skunk cabbage could not have been a dominant plant at that location. His soil observations, however, were made in late 2005 after lot 45 had been disturbed at least to the extent of installing a gravel driveway. Aside from the question whether the wetland boundary at lot 45 was legally established by the FWAB decision, Dr. Schmid's re-interpretation of Mr. Richter's field notes and Dr. Schmid's late 2005 observations do not provide a basis for concluding the wetland boundary as shown on the 1987 tax map was wrong. Further, Exhibit 17A states "land is partially flooded (frozen)," which is consistent with the lot containing wetland.

On the first day of the hearing, counsel for Respondents objected to receipt of the Lufrano decision (Ex. 18) on the basis that a ruling in the DEC permit hearing on the application of Linus Realty[5] had held that "FWAB decisions do not run with the land." I reserved decision on receiving Ex. 18. On February 1, 2006, after reviewing the Linus Realty ruling, I received the Lufrano decision. On September 20, 2006, the Commissioner upheld the ALJ's ruling that the FWAB Decision does not "run with the land."[6]

In the Linus Realty case, however, the FWAB decision concerned a hardship determination under ECL 24-1104, a provision that expired in 1992 and that applied to landowners (Opal

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[4] Use of the singular, in listing kinds of plants, does not necessarily mean that only one plant of each kind was present. See, for example, Dr. Schmid's testimony at Tr. 632 - 633.

[5] Matter of Linus Realty, LLC, Ruling of the Administrative Law Judge on Issues [November 2, 2005]).

[6] Matter of Linus Realty, LLC, Interim Decision of the Commissioner, September 20, 2006. The FWAB decision at issue in the Linus Realty case was Opal Investments v Zagata, Order and Decision, FWAB No. 92-10 [July 23, 1998], 1998 WL 644761.

Investments, in that situation) who owned property in 1987 and who were adversely affected by the "double mapping process" of wetlands in Richmond County. The Commissioner determined that the hardship provision did not extend relief to successors of the affected property owner (Interim Decision, at 16 - 18). Opal Investments had withdrawn an appeal of the freshwater wetlands designation on its site, and the FWAB did not consider whether to delete from the map the State-regulated wetlands on the Opal site (Interim Decision, at 18).

In contrast, the FWAB's Lufrano decision addressed both hardship and the wetland map designation, and denied the Lufranos' appeal on both questions. The interim decision in the Linus Realty hearing does not support a conclusion that all FWAB decisions become irrelevant when a new owner purchases land the DEC has designated as regulated freshwater wetland. A FWAB decision upholding a mapped wetland has to do with the conditions on the land, independent of who owns it.

With respect to lots 47 and 51, Ms. Gough's appeal was withdrawn and the FWAB did not issue a decision about the wetland boundary on these lots. Mr. Pane visited these lots in November 1993, in preparation for a FWAB hearing on these lots among others, and confirmed that the wetland boundary on the 1987 tax map was accurate with respect to these two lots (Tr. 62 - 86; Ex. 24 and 25). Respondents presented testimony by Dr. Schmid to contest the wetland designation on lots 47 and 51. Dr. Schmid's observations, however, were made in 2002 or later, after lot 51 and some portion of 47 were cleared, graded and at least partially filled. Dr. Schmid testified that lots 51 and 53 "were obviously an upland condition" when he looked at them briefly in 2002, and had "a short cover of herbaceous vegetation which appeared not to have been terribly old" (Tr. 565) is actually consistent with Mr. Pane's observation that the lots had been cleared, graded and filled in or shortly before April 2001.

The statutory definition of freshwater wetlands in ECL section 24-0107 relies primarily on vegetation as an indicator of wetland conditions. The DEC's procedures for delineating wetlands developed between 1986 and 1995 by taking soil conditions into account to a greater extent (Tr. 233 - 265; Ex. 44 [1986 Freshwater Wetlands Mapping Technical Methods Statement], see particularly 7 - 8, 18 - 20; Ex. 46 [Freshwater Wetlands Delineation Manual, July 1995]). The soil observations used under the 1995 method (Ex. 46, at 10 - 15) do not appear in the 1986 method. The lack of soil observations in DEC Staff's notes and other records from the mid-1980's and 1993 is consistent with this evolution of the wetland delineation

process, and does not discredit the boundary identified by DEC Staff during that time period.

Dr. Schmid's observations, of both soil color and vegetation, were made after lots 51, 53 and 55 had been significantly disturbed. Dr. Schmid stated that, if fill had been placed in a wetland, one would expect to find wetland soil under the fill and that he had not found such conditions at locations where DEC Staff alleges fill was placed (Tr. 581 - 590; Ex. 63). This assumes that the fill was deposited directly on a wetland surface without disturbing it or mixing the two materials, which cannot be assumed based on the hearing record.

DEC Staff's argument that identifying soil colors is subjective and that ability to sense color differs among individuals (closing brief, at 8 - 9) does not undercut Dr. Schmid's observations, because DEC's own 1995 wetland delineation manual uses visual observation (as opposed to a machine) as its procedure for identifying colors of mineral soils (Ex. 46, at 12 - 13). DEC Staff noted, however, that the 1995 wetland delineation manual specifies that soil colors should be determined in soils that are or have been moistened (Ex. 46, at 13). There is no indication, in Dr. Schmid's description of how he and his associate identified soil colors, that they followed this step (Tr. 722 - 725). In addition to the soil borings described in Exhibit 63, Dr. Schmid also took numerous soil borings on the site for which he did not make any records of his observations (Tr. 688 - 694) and the hearing record does not document what these additional borings showed about hydric or non-hydric soils.

In support of their position that the site did not contain wetlands, Respondents argued that the dominant plants Dr. Schmid observed on lots 47, 51 and 53 are not obligate hydrophytes and are "either upland or weak facultative." Respondents also argued that "willow," as mentioned in DEC notes, is a meaningless term and that the particular willow species observed is not likely to be an obligate hydrophyte (Respondents' brief, at 27 - 29). According to Dr. Schmid, the willow was most likely black willow or weeping willow (Tr. 632). Identification of wetlands, however, does not depend on the vegetation being obligate hydrophytes (see, Ex. 44 at 9, 18 - 20; Ex. 46, at 3 - 6, 18 - 21). Under the 1995 wetland delineation manual, the quantity of vegetation in several categories (from upland to obligate wetland) is used in determining whether an area should be identified as wetland or not based upon the vegetation, or whether further investigation of hydrology and soils are necessary.

Pin oak, swamp white oak, black willow and weeping willow are all listed in Dr. Schmid's plant list as facultative hydrophytes usually found in wetlands but occasionally found in uplands (Ex. 58, at 14, 90, 127, 128).[7] The definition of freshwater wetlands in ECL section 24-0107 includes, as wetland trees, red maple (*Acer rubrum*), willows (*Salix* spp.), and swamp white oak (*Quercus bicolor*). Facultative upland trees (bitternut hickory, black cherry, white oak and planted fruit trees) were also reported by Dr. Schmid to be on the site as of the time of his observations (Tr. 629 - 633, 919 - 921).[8]

Dr. Schmid speculated that the reason why Mr. Scheiman had marked seven lots as having been filled, on his 1995 violation report, was that all those lots were upland as of 1995. Apart from being speculative, this is unlikely because lot 40, one of the lots marked by Mr. Scheiman, is now part of the Bluebelt. It was marked as being partially wetland in the 1993 wetland delineation on the lots acquired for the Bluebelt (Ex. 50, 73).

Respondents also argued that the wetland delineation on the Bluebelt damages and acquisition map (Ex. 50) demonstrates that there was no wetland on Respondent's lots. The wetland delineation depicted his map, however, was done by DEC in 1993 to identify the wetland boundary on parcels NYC DEP was going to acquire (Tr. 321). Lot 40 was among these parcels, but all or most of lot 42, plus lot 43 and Respondents' lots, were not acquired. The wetland boundary ends, without closing around the wetland, immediately east of the east edge of lot 40 and Exhibit 50 is silent as to the location of the boundary east of this point. There is a discrepancy between Ex. 50 and the 1987 tax map with regard to where the wetland boundary intersects the lots 40 - 42 boundary, but this does not demonstrate that Respondents'

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[7] Dr. Schmid's book also includes two varieties of red maple, one of which it identifies as a facultative hydrophyte and the other as a wet facultative hydrophyte (Ex. 58, at 84 -85). The parties did not identify which variety of red maple was observed at the site, and neither ECL 24-0107 nor the plant list in the DEC 1995 freshwater wetlands delineation manual (Ex. 46, Appendix A) distinguish between these varieties.

[8] Although Respondents' brief (at 28) states, "Even the large, old swamp white oaks along the southern borders of lots 45 and 47 are merely facultative," the brief does not cite where these trees are described in the testimony. Although Dr. Schmid described "oaks" at this location, he did not state if they were pin, white or swamp white oaks (Tr. 921).

lots were all upland as of 1993. The discrepancy suggests that a wetland delineation done on lots 51 and 53 in 2001 might have produced a different boundary location than the one depicted on the tax map, but by the time Mr. Pane went to do a delineation at the request of Mr. Menicucci these lots had recently been cleared and graded. This left the 1987 tax map as the most recent reliable depiction of the wetland boundary on lots 51 and 53.

With regard to the allegation concerning wood chips, DEC Staff did not demonstrate that Respondents caused or allowed the wood chips to be placed. DEC Staff argued that Ms. Sanjour's statement that wood chips "remain rather prevalent" on lots 45 and 47 suggest that they were put there for landscaping materials and used as fill. Because Respondents owned lots 45 and 47 at that time, DEC Staff's inference is that Respondents caused the wood chips to be placed in the wetland.

This is too remote a connection to provide proof that Respondents caused or allowed the wood chips to be placed. Ms. Sanjour's letter (Ex. 27) stated that "during the short period of time when there was no fence [along St. Andrews Road], that area became a convenient dumping ground for various debris by people other than my client [Ms. Gough]. For example, wood chips that remain rather prevalent on the two lots adjoining Lot 51, neither of which my client owns." The two piles of wood chips observed by Mr. Pane in late 1995 or early 1996 were small, a foot or two high and spread out as if they had been dumped from a truck. Despite being asked about the horizontal dimensions of these piles, Mr. Pane did not provide this information (Tr. 90 - 91). A pile of wood chips a foot or two high would probably occupy only a small area, and this amount of wood chips would not begin to cover the wetland area the 1987 tax map depicts as being on lot 45.

Even if Respondents were responsible for placing the two piles of wood chips in the wetland without a permit, this action would not justify a large penalty.

With regard to the allegations concerning clearing and grading as observed in 2001, the record supports a conclusion that these violations did occur and that Respondents caused or allowed them to occur. Mr. Pane testified that, as of his visit in April 2001, the graded area had fresh dirt with no vegetation visible (Tr. 122 - 123). Respondents acquired lot 47 in 1995 and acquired lots 51, 53 and 55 in October 2000. These dates, and the recent appearance of the grading work, support a conclusion that the clearing and grading occurred while Respondents owned these lots.

A site plan for development of three houses on lots 51, 53, 55, 57 and 58 was prepared for Respondent Anthony Venditti in March 2001 (Ex. 30). Mr. Venditti caused the house on lot 55, formerly occupied by Ms. Gough, to be demolished. Although Mr. Venditti testified that the house was demolished in July 2001, Mr. Pane's testimony that the house was gone at the time of his April 2001 site visit is more credible. Mr. Pane's note from the inspection (on Ex. 29) pertains to lots that include 55, and indicates they were cleared and rough graded as of that date. Although Respondents presented a demolition permit issued in July 2001 for demolition of a three story building on lot 55, two buildings were demolished on this lot (the house and a large shed) and Mr. Venditti could not recall whether the City of New York had issued a violation to his demolition contractor (Tr. 1025 - 1029, 1039 - 1043; Ex. 81).[9]

Respondents live in a house on lot 4, immediately uphill from lot 45 and within sight of the area where the violations occurred. It is not credible that this area was cleared and graded without Respondents being aware that the work had taken place, nor is it credible that someone would come onto their property and carry out such extensive work without being compensated for it, much less without Respondents' permission. Respondents denied they caused or allowed the clearing and grading, and asserted that anyone could have committed the alleged violation, in part because there was no fence around the site (Respondents' closing brief, at 48 -49). Despite this assertion, Respondents provided no evidence that the clearing and grading were done by a trespasser, nor that they had sought to prevent the work or to find out who had done it.

Respondents' connection with placement of fill in lot 51 is less clear, however. Mr. Pane observed that the elevation of lot 51 was higher than that of St. Andrews Road, when he was there in April 2001. There had been a slight depression in this location as of 1993 (Tr. 116 - 118; see also Ex. 31). While Mr. Pane's observations in April 2001 support a finding that the clearing and grading had been done a short while before that time, there are no observations that indicate how long the fill had been there. Although fill (in the form of soil from the "ridge" on which the house was located) might have been pushed into lot 51

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[9] Even if the house was demolished in July 2001 and Mr. Pane did not accurately report his April 2001 observations, Exhibits 33 and 34 demonstrate that as of November 2001 the Gough house had been removed and lots 51, 53 and 55 had been cleared and graded.

when the area was graded, it is not clear that this occurred or that other filling had not occurred between 1993 and 2001, producing the elevation difference Mr. Pane observed. The lots along St. Andrews, from lot 51 to lot 42, have undergone disturbances between the mid-1980's and the present, including construction of a driveway on lot 45. Respondents would have had a reason to fill lot 51, in order to build the three houses depicted in Exhibit 30, but the hearing record does not prove that they placed the fill, nor who else placed it. The work done by NYC DEP along St. Andrews was limited to the area immediately next to the road, and the record does not indicate it involved filling of lot 51.

There is no evidence demonstrating that fill was trucked into the site, nor when that would have occurred. The maps of the site that are in evidence provide some information about the topography but are not reliable enough to determine the volume of soil that may have been placed or moved to produce the qualitative changes in elevation observed by Mr. Pane. On the updated survey (Ex. 75), one cannot distinguish the old elevation points from the new ones, and the contour lines are inconsistent with certain spot elevations (Tr. 813 - 821).

In addition, the three drawings that show lots 51 and 53, and that include trees (Ex. 30, 31, and 75), are inconsistent in their depictions of what trees are or were on these lots (for example, large oak trees on the survey as updated on January 5, 2006, that do not appear on the similar survey done by the same company on October 31, 2000).

Although Mr. Venditti called several persons as witnesses about their observations of the site during the time when Ms. Gough lived there, and of the area that includes the site, their observations were casual and were not oriented towards observing the kind of details on which the parties' cases depend.

Neither DEC Staff nor Respondents provided a calculation of how the sewers would have changed the amount of water entering the former wetland area on the site. Although Dr. Schmid estimated that 70 percent of the water had been diverted by the sewer project and described features he took into account in reaching this conclusion (Tr. 877 - 884), he did not provide a calculation. In addition, he may have assumed the site is cut off from runoff by curbs along St. Andrews Road, which it is not (Tr. 874, 931; Ex. 38, 39, 87B). DEC Staff did not attempt to quantify the sewers' effect. Although there was testimony about the amount of watershed area supporting wetlands at other sites, and about some sources of runoff in the area surrounding this

site, the record does not provide enough information to determine how deep an excavation would be needed in order to restore a wetland on the site. DEC Staff's request for remediation is quite general, and does not identify this depth. Removing the fill, to the extent that pre-fill elevations are even known, would not restore the prior wetland conditions because less water is reaching the wetland.

The DEC Enforcement Guidance Memorandum concerning freshwater wetlands (Commissioner Policy DEE-6 [February 4, 1992] www.dec.state.ny.us/website/ogc/egm/fresh_wet.html) discusses restoration of wetlands following violations. One factor that may be taken into account in evaluating wetland restoration is whether such work would result in greater damage to the wetland. Neither party presented arguments about this subject. If the Commissioner orders that Respondents re-establish the wetland, I recommend that the Commissioner also direct DEC Staff to evaluate the potential for damage to existing trees on the site in arriving at a restoration plan.

Based upon the decrease in water flows to the site, the inability to order restoration that would connect a re-established wetland with the rest of wetland AR-3, and the lack of specific information about what DEC Staff is asking the Commissioner to order as wetland restoration, I recommend that the Order not require restoration of the wetland on the site.

Respondents caused or allowed two violations of ECL article 24 and 6 NYCRR part 633 (clearing and grading). The Commissioner should impose the maximum penalty for the two violations. The wetland was depicted on the official wetland map and on the 1987 tax map wetland depiction at the time Respondents bought the lots that are the site of the alleged violations. Respondents cleared and graded the area before DEC Staff could do a wetland delineation, requested by Respondents' attorney, and identify where the wetland boundary was as of early 2001. Even if the sewer construction had completely dried out and eliminated the wetland on Respondents' lots, Respondents would not have been justified in clearing and grading the mapped area prior to a DEC wetland delineation and removal of the area from the map. If landowners can obliterate features used in identifying wetlands, and then argue that DEC cannot prove that their site was still a wetland, this would seriously undercut the ability of DEC to carry out the requirements of the Freshwater Wetlands Act.

DEC Staff's closing brief asked that Respondents be ordered to cease "all ongoing violations discussed during the hearing." The brief does not identify these ongoing violations, but this

may be a reference to the driveway on lot 45 or fill in other places on the lots. The hearing in this matter dealt with the violations alleged in the complaint. If there are additional ongoing activities that violate ECL article 24 or 6 NYCRR part 663, these activities would already be prohibited by this statute and regulation.

Although Respondents' March 20, 2003 answer asserted, as an affirmative defense, that the complaint should be dismissed due to failure to have an opportunity for a hearing within a reasonable time under SAPA section 301(1), the record does not demonstrate that Respondents were prejudiced by delay in holding the hearing. Further, some of the delay after mid-2004 was due to settlement discussions.

CONCLUSIONS

1. The record does not demonstrate that Respondents caused or allowed wood chips to be deposited in the wetland at the site, and does not demonstrate that Respondents caused or allowed filling with wood chips without approval from the DEC (causes of action 2 and 3).

2. Respondents caused or allowed removal of vegetation on at least lots 51, 53 and 55 and caused or allowed grading of at least these same lots. The area in which this occurred is partly freshwater wetlands and partly adjacent area of freshwater wetlands. Clear-cutting of vegetation other than trees, except as part of an agricultural activity, and grading are both activities for which a permit is required if these activities are carried out in either a freshwater wetland or adjacent area (6 NYCRR 663.4(d)(23) and (25)). Respondents did not have a permit for these activities at the site. Respondents violated 6 NYCRR 663.4 and ECL article 24 by causing or allowing these activities (causes of action 1 and 4).

3. The record does not demonstrate who caused or allowed placement of fill, consisting of soil, on the site (cause of action 5).[10]

4. The above conclusions are based upon a preponderance of the evidence in the hearing record.

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[10] Certain findings and conclusions of this report, as they relate to specific lots, are summarized in the table attached as Appendix C of this report.

5. With respect to administrative sanctions, ECL section 71-2303(1) provides that any person "who violates, disobeys or disregards" any provision of ECL article 24 or any regulation issued pursuant to article 24 shall be liable for a civil penalty of not to exceed three thousand dollars for every such violation.

6. For the two violations proved in this matter, Respondents would be liable for a civil penalty of up to six thousand dollars ($6,000).

7. In addition to penalties, ECL section 71-2303(1) provides that the Commissioner shall have power to direct the violator to cease his or her violation of the Freshwater Wetlands Act and "to restore the affected freshwater wetland to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of" the Commissioner.

8. As discussed above, an order in this case could not lead to the wetland being fully restored to its condition prior to the violation. A direction to restore the wetland to the greatest extent possible might produce a small area of wetland and might result in a small increase in wetland functions and values in block 2280, but this restored wetland area would be isolated from the rest of wetland AR-3.

RECOMMENDATION

I recommend that a civil penalty in the amount of $6,000 (six thousand dollars) be imposed on Respondents, for the clearing and grading violations. I recommend that the allegations that Respondents caused or allowed filling of the site in or about early 2001 be dismissed, and that the allegations that Respondents caused or allowed deposition of wood chips and filling a wetland area with wood chips also be dismissed. I do not recommend that Respondents be required to restore the wetland on the site.

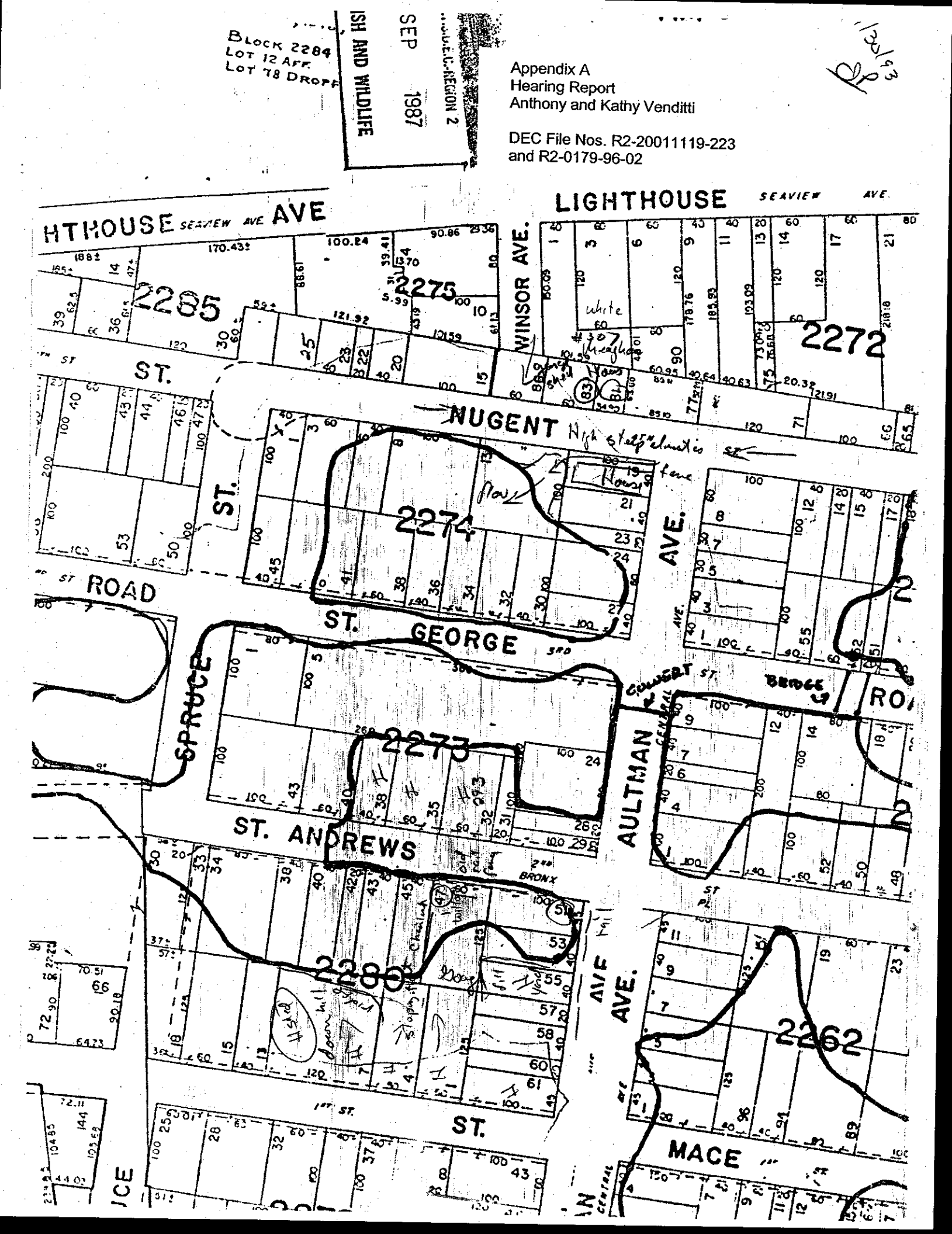
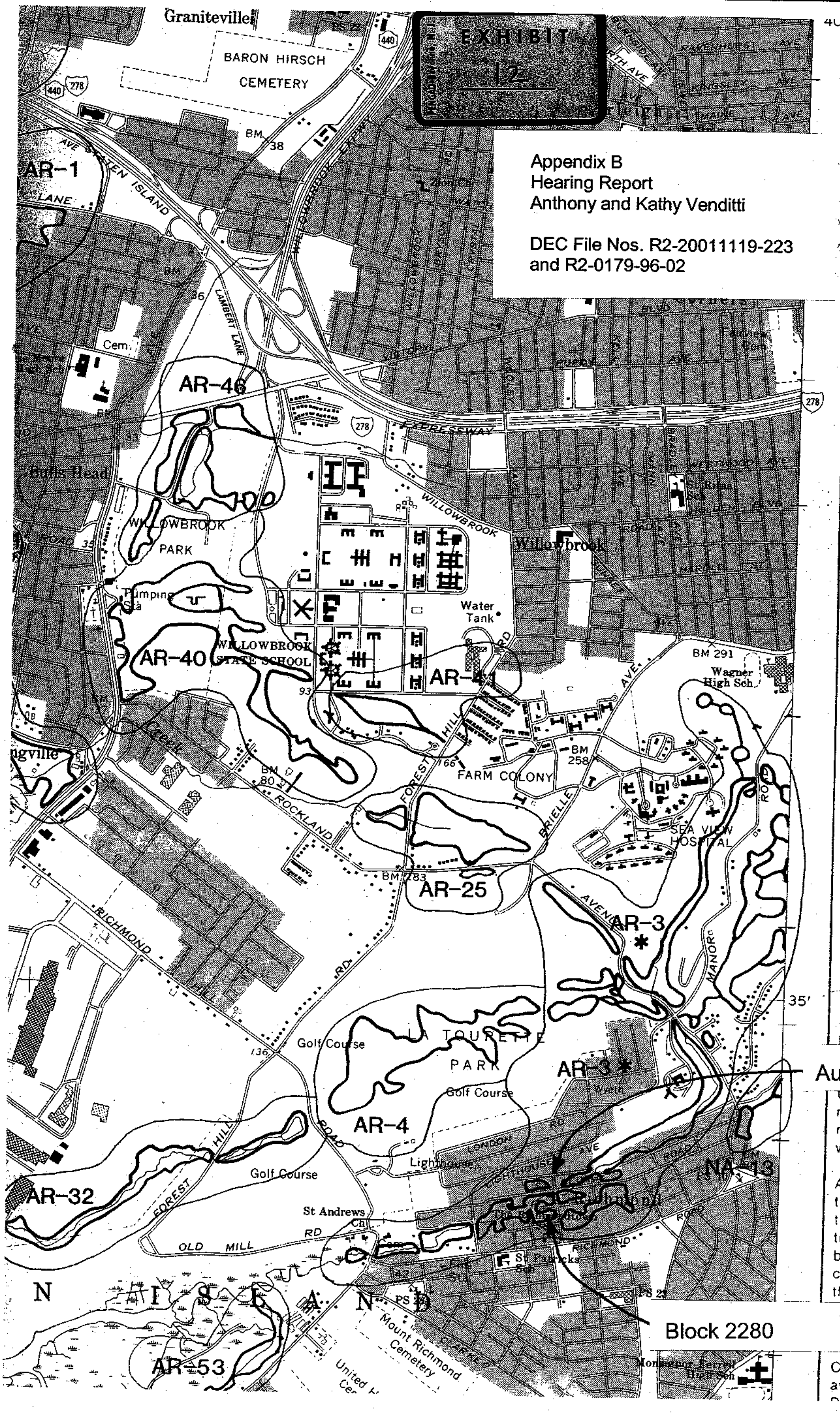

BLOCK 2284
LOT 12 AFF.
LOT 78 DROPP
ISH AND WILDLIFE
SEP 1987
E.C.-REGION 2
Appendix A
Hearing Report
Anthony and Kathy Venditti
DEC File Nos. R2-20011119-223
and R2-0179-96-02
LIGHTHOUSE SEAVIEW AVE.
WINSOR AVE.
NUGENT
ST.
ROAD
ST. GEORGE
SPRUCE
AULTMAN AVE.
ST. ANDREWS
MACE
2285
2275
2272
2274
2273
2280
2262

EXHIBIT 12

Appendix B
Hearing Report
Anthony and Kathy Venditti

DEC File Nos. R2-20011119-223
and R2-0179-96-02



New York State
Freshwater Wetlands Ma

Richmond County

Map 3 of 4

This map was promulgate to Article 24 of the En Conservation Law (The Wetlands Act) on Septemt by the Commissioner of State Department of En Conservation.

LEGEND:

- Approximate wetl. boundary
- U Upland inclusion
- AA-00 Wetland identifica
- This line groups parcel the same wetland ide code. This does not d adjacent area.
- * Denotes extended ad
- As a result of an amen Freshwater Wetlands A of the Environmental Co Law (Chapter 408 of t 1987, effective 7/23/8 parcels within this wetl mapped. The precise b such parcels can not be to the scale of the map. information, contact the City Office of Environme Conservation.

NOTES:

This map indicates the approxir of the actual boundaries of wetla according to the Freshwater Wet

Map information other than boundaries was prepared by th ansporta al Surve tional information provided on th reference only. Marsh symb necessarily indicate the location c wetland.

Adjacent areas of the regulated those areas within 100 feet of the the wetland. These areas are subj tion pursuant to the Freshwater but are not delineated on this m cent area may be extended by sp the Commissioner of the New epartment of Environmental Co e local regulatory authority

Copies of Freshwater Wetland available from the regional off

Hearing Report, Appendix C

Matter of Anthony and Kathy Venditti
DEC File Nos. R2-20011119-223
and R2-0179-96-02

Lot #	FWW[1]	AA[2]	Cause of action 1 (clearing)[3]	Cause of action 2 (depositing chips)	Cause of action 3 (filling with chips)	Cause of action 4 (grading)	Cause of action 5 (fill)	Date bought by Respondents
45	Y	Y	N	-	-	N	N	Sept. 1992
47	Y	Y	N	N	N	N	N	Feb. 1995
51	Y	Y	Y	N	N	Y	N	Oct. 2000
53	Y	Y	Y	N	N	Y	N	Oct. 2000
55	N	Y	Y	-	-	Y	N	Oct. 2000
57	N	Y	N	-	-	N	N	March 1999
58	N	Y	-	-	-	-	-	March 1999

[1] Lot contains freshwater wetlands, Y (yes) or N (no)

[2] Lot contains adjacent area of freshwater wetlands, Y (yes) or N (no)

[3] For each cause of action, Y indicates the allegation was proved, N indicates it was not proved, - indicates the complaint did not allege that cause of action with respect to that lot.