

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations  
of Articles 24 and 71 of the New York  
State Environmental Conservation Law  
(ECL) and Part 663 of Title 6 of the  
Codes, Rules and Regulations of the  
State of New York (6 NYCRR),

**ORDER**

DEC Case No.  
R2-20070216-84

- by -

**FRANCES BASILE AND JOSEPH BASILE,**

Respondents.

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This administrative enforcement proceeding concerns alleged violations of New York State's freshwater wetlands law and regulations and Order on Consent No. R2-20070216-84 effective July 20, 2015 (2015 Consent Order) by Frances Basile and Joseph Basile (respondents) at property owned by Frances Basile. The property is located at 9 Prague Court, Staten Island, New York (Richmond County Tax Block 6699 Lots 48 and 51). The property lies in the freshwater wetland known as AR-33 on the New York State Freshwater Wetlands Map, which is a Class I freshwater wetland, and its adjacent area.<sup>1</sup>

2014 Enforcement Proceeding and 2015 Consent Order

Staff of the New York State Department of Environmental Conservation (Department or DEC) served respondents with a notice of hearing and complaint dated December 12, 2014. Staff in its complaint alleged that, pursuant to DEC Freshwater Wetlands Permit No. 2-6405-00021/00001-0 which was issued to a former owner of the site, Block 6699 Lot 51 (Lot 51) is subject to a restrictive declaration. The restrictive declaration, which was recorded in the Richmond County Clerk's Office on December 23, 1992, requires Lot 51 to remain undeveloped and in

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<sup>1</sup> Class I wetlands provide "the most critical of [New York] State's wetland benefits" (6 NYCRR 665.7[e][2]). "Adjacent area" is defined as "those areas of land or water that are outside a wetland and within 100 feet" of the wetland's boundary (6 NYCRR 665.2[b]).

its natural state, and prohibits gardening and agricultural activity as well as cutting, removing or disturbing vegetation.<sup>2</sup>

Staff's complaint further alleged that respondents constructed a basketball court, placed fill, erected fencing, clear-cut vegetation, erected a shed, erected a jungle gym (children's play set) and were maintaining a lawn in a regulated freshwater wetland adjacent area to AR-33 and deed-restricted area without a permit. Staff also alleged that respondents constructed an in-ground swimming pool in the regulated freshwater wetland adjacent area. In order to undertake such activities, respondents would be required to obtain permits or letters of permission from the Department (see ECL 24-0701 and 6 NYCRR 663.4[d][listing procedural requirements for various activities]).

Respondents served an answer dated January 14, 2015. The matter was scheduled for hearing on July 15, 2015 but Department staff and respondents then settled the matter by the 2015 Consent Order (see Affidavit of Joseph Basile in support of Motion to Vacate Consent Order sworn to September 30, 2016, Exhibit 10 [2015 Consent Order]).

Pursuant to the 2015 Consent Order, respondents admitted placing various structures and fill in a regulated freshwater wetland adjacent area and deed-restricted area, as well as maintaining a lawn thereon, without a permit or letter of permission in violation of ECL 24-0701 and 6 NYCRR part 663. Respondents agreed to be jointly and severally liable for the violations and pay a civil penalty of fifteen thousand dollars (\$15,000). Five thousand dollars (\$5,000) of this penalty was suspended, contingent on respondents' compliance with the 2015 Consent Order. With respect to the payable penalty, respondents were to make four equal payments of two thousand five hundred dollars (\$2,500). The first payment was submitted together with the signed 2015 Consent Order, and the remaining payments were to be made on September 15, October 15 and December 15, 2015.

Respondents also agreed to obtain a permit for any future work on the property, except for the work required to be performed by the 2015 Consent Order. As part of the work required by the 2015 Consent Order, respondents agreed to:

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<sup>2</sup> See Summary Report of Administrative Law Judge Michael Caruso, dated December 2, 2016 [Summary Report], at 8-9 [Findings of Fact Nos. 4 and 5]).

- remove all structures installed within Lot 51 including “the children’s play set, shed, and chain-link fence” (see Schedule of Compliance Schedule A to the 2015 Consent Order, ¶ 2);
- plant eight (8) trees and ninety-five (95) shrubs in the portion of Lot 51 that had been landscaped and maintained as a lawn area. Plantings were to be completed between September 1, 2015 and November 1, 2015 (see id. ¶¶ 3, 3.1 and 3.2);
- by November 15, 2015, submit to the Department itemized receipts for the plants purchased (see id. ¶ 3.3);
- monitor the survival of the plantings for two (2) years and report to the Department as to their condition and any actions taken in the planting area (see id. ¶ 4[a] & [b]); and
- notify the Department in writing of the date of the commencement and the completion of the required work (see id. ¶ 5).

2016 Motion for Order Without Hearing

By notice of motion for order without hearing dated June 3, 2016, Department staff proceeded against respondents for violations of the 2015 Consent Order and for additional violations relating to the erecting of a new children’s play set in the deed-restricted area<sup>3</sup> and the placing of gym equipment in the regulated freshwater wetland adjacent area and deed-restricted area without a permit or letter of permission.

Department staff served its notice of motion, supporting affidavits and exhibits on respondents and respondents’ former attorney by certified mail return receipt requested. After retaining new counsel, respondents served and filed a notice of motion dated September 29, 2016 to vacate the 2015 Consent Order with a supporting affidavit and exhibits.

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<sup>3</sup> The original play set was to be removed within thirty (30) days of the effective date of the 2015 Consent Order (that is, August 19, 2015) but was still present on November 20, 2015 (see Affidavit of Yoshiaki Higashide sworn to June 3, 2016 [Higashide Aff], ¶ 5 D.). The children’s play set was subsequently removed and “a new children’s play set was erected closer to [a] basketball hoop” (see Higashide Aff, ¶ 7; see also id. ¶ 8.F).

Department staff incorporated its motion for order without hearing in a memorandum of law<sup>4</sup> by which Department staff alleged that respondents Frances Basile and Joseph Basile violated:

- the 2015 Consent Order and ECL 71-2303(1), by failing to pay the remaining amount of the civil penalty due under the 2015 Consent Order;
- the 2015 Consent Order, ECL 24-0701(2) and 71-2303(1), and 6 NYCRR 663.4, by failing to remove the children's play set from the freshwater wetland adjacent area and deed-restricted area;
- the 2015 Consent Order, ECL 24-0701(2) and 71-2303(1), and 6 NYCRR 663.4, by failing to remove the shed from Richmond County Tax Block 6699 Lot 51;
- the 2015 Consent Order, ECL 24-0701(2) and 71-2303(1), and 6 NYCRR 663.4, by failing to remove the chain-link fence from Richmond County Tax Block 6699 Lot 51;
- the 2015 Consent Order and ECL 71-2303(1), by failing to comply with the planting and monitoring requirements in the 2015 Consent Order;
- ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission; and
- ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission.

In their motion to vacate the 2015 Consent Order, respondents make a number of arguments, including:

- respondents were not properly advised by their former attorney, as the attorney misrepresented the contents of the 2015 Consent Order and incorrectly advised respondents of the consequences and conditions of the 2015 Consent Order;

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<sup>4</sup> See Summary Report at 4, n 1. I concur with the ALJ that the causes of action should have been pled in a motion and not a memorandum of law.

- respondents signed the 2015 Consent Order by mistake because they were misinformed by their former attorney, and as a result, respondents' consent was not willingly, knowingly or competently given;
- respondents are being treated unfairly;
- respondents' former attorney convinced respondents to settle when respondents wanted to go to hearing; and
- there had been ineffective assistance of counsel.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso who prepared the attached summary report on the motion for order without hearing. I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

#### Respondents' Motion to Vacate the 2015 Consent Order

Respondents' motion to vacate the 2015 Consent Order is based on section 5015 of the Civil Practice Law and Rules (CPLR). The ALJ reviewed the grounds under CPLR 5015 for vacating an order: excusable default; newly-discovered evidence (which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial); fraud, misrepresentation or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification or vacatur of a prior judgment or order upon which the judgment or order was based. The ALJ concludes that respondents made no showing that these grounds apply, and I concur (see Summary Report at 12-13).

The ALJ also addressed and properly rejected other objections that respondents raised to the 2015 Consent Order (see Summary Report at 13-15). The ALJ noted the contractual and binding nature of a consent order which is supported by judicial and administrative precedent (see id. at 15). Respondents have provided no basis to vacate the 2015 Consent Order, and their motion is denied.

#### Department Staff's Motion for Order Without Hearing

The record demonstrates that respondents entered into the 2015 Consent Order with the Department and failed to perform their obligations under the 2015 Consent Order (see Summary Report at 16-17).

In addition to respondents' failure to comply with the 2015 Consent Order, respondents committed additional violations by installing gym equipment and a new children's play set in the freshwater wetlands adjacent area and deed-restricted area without a permit or letter of permission (see Affidavit of Sam Yee Chan sworn to June 3, 2016, ¶ 14; Summary Report at 18-19).

### Civil Penalty

Department staff requests a civil penalty of fifty-two thousand five hundred dollars (\$52,500) comprised of the following three components:

- 1) twelve thousand five hundred dollars (\$12,500) that was imposed by the 2015 Consent Order and remains unpaid. This amount includes five thousand dollars (\$5,000) that was suspended contingent on compliance with the 2015 Consent Order, which compliance did not occur, and seven thousand five hundred dollars (\$7,500) of the payable penalty under the 2015 Consent Order that respondents never paid;
- 2) a civil penalty of thirty thousand dollars (\$30,000) for numerous violations of the 2015 Consent Order; and
- 3) a civil penalty of ten thousand dollars (\$10,000) for violating ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by the installation of a new children's play set and gym equipment in the freshwater wetland adjacent area and the deed-restricted area without a permit or letter of permission.

With respect to the first component, the twelve thousand five hundred dollar (\$12,500) portion of the penalty is an obligation pursuant to the terms of the 2015 Consent Order that respondents signed. That obligation is current and owing.

Regarding the remaining two components of staff's civil penalty request, ECL 71-2303(1) provides that "[a]ny person who violates . . . any provision of [ECL] article twenty-four . . . or any rule or regulation, . . . or order issued pursuant thereto, shall be liable . . . for a civil penalty of not to exceed eleven thousand dollars for every such violation." Each violation of a consent order supports a separate penalty pursuant to this statutory provision. Respondents' violations of the 2015 Consent Order and their commission of additional violations with the installation of new equipment subject them

to additional penalties pursuant to ECL 71-2303(1). As noted above, staff's request is for a total civil penalty of forty thousand dollars (\$40,000) for these violations.

Respondents have failed to remove the structures from the property as directed by the terms of the 2015 Consent Order, have failed to restore the impacted areas and have avoided the payment of most of the penalty agreed to in the 2015 Consent Order. Respondents have also committed additional violations, subsequent to their execution of the 2015 Consent Order, by installing a new children's play set and gym equipment in the freshwater wetland adjacent area and the deed-restricted area without a permit or letter of permission.

The record clearly illustrates respondents' history of non-compliance and non-responsiveness in addressing the violations, as well as their commission of new violations by installing additional structures since the effective date of the 2015 Consent Order. Staff's requested penalty is authorized and appropriate on this record.

#### Remedial Relief

Much of the remedial relief that staff requests represents continuing obligations of respondents pursuant to the 2015 Consent Order including but not limited to the removal of certain structures and the planting of trees and shrubs. In addition to those obligations, which I am reiterating in this (Commissioner) order, I am also directing respondents to remove the new gym equipment and new children's play set that they erected without a DEC permit or letter of permission. Respondents are hereby directed to submit photographs to the Department that demonstrate that the shed, gym equipment, new children's play set and chain link fence have been removed.

Respondents are directed to comply with the schedule for completion of these activities as set forth in this (Commissioner) order.

In consideration of the cost of the remedial relief being requested by staff and directed by this (Commissioner) order in order to restore environmental conditions on the property, I am hereby suspending fifteen thousand dollars (\$15,000) of the thirty thousand dollar (\$30,000) civil penalty assessed for violations of the 2015 Consent Order, contingent upon respondents' compliance with this (Commissioner) order. If respondents fail to comply, this suspended amount will

immediately become due and payable. Accordingly, of the fifty-two thousand five hundred dollar (\$52,500) due and owing to the Department, the payable portion is thirty-seven thousand five hundred dollars (\$37,500).

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

- I. Respondents' motion to vacate Order on Consent R2-20070216-84 is denied.
- II. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted, and respondents Frances Basile and Joseph Basile are adjudged to have violated:
  - A. Order on Consent R2-20070216-84, by failing to pay the remaining payable civil penalty of seven thousand five hundred dollars (\$7,500);
  - B. Order on Consent R2-20070216-84, ECL 24-0701(2) and 6 NYCRR 663.4, by failing to timely remove the children's play set;
  - C. Order on Consent R2-20070216-84, ECL 24-0701(2) and 6 NYCRR 663.4, by failing to remove the shed;
  - D. Order on Consent R2-20070216-84, ECL 24-0701(2) and 6 NYCRR 663.4, by failing to remove the chain-link fence;
  - E. Order on Consent R2-20070216-84, by failing to comply with the planting and monitoring requirements in Order on Consent No. R2-20070216-84;
  - F. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission; and
  - G. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission.
- III. Respondents Frances Basile and Joseph Basile are hereby assessed a civil penalty in the amount of forty thousand



dollars (\$40,000), of which fifteen thousand dollars (\$15,000) shall be suspended contingent upon respondents' compliance with the terms and conditions of this order. This amount is comprised of:

- A civil penalty of thirty thousand dollars (\$30,000) assessed for respondents' violation of Order on Consent R2-20070216-84, of which fifteen thousand dollars (\$15,000) is suspended; and

- A civil penalty of ten thousand dollars (\$10,000) assessed for respondents' violation of ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), by erecting new gym equipment and a new children's play set.

In addition, respondents owe an additional twelve thousand five hundred dollars (\$12,500) under Order on Consent R2-20070216-84, including:

- Seven thousand five hundred dollars (\$7,500), representing the outstanding unpaid amount of the non-suspended civil penalty under Order on Consent R2-20070216-84;

- Five thousand dollars (\$5,000), representing the suspended portion of the civil penalty under Order on Consent R2-20070216-84 which I am hereby unsuspending because of respondents' failure to comply with Order on Consent No. R2-20070216-84;

Respondents shall submit payment of thirty-seven thousand five hundred dollars (\$37,500) in the form of a cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation." This payment shall be due and payable within thirty (30) days after service of this order upon respondents. Payment shall be mailed or hand-delivered to the Department at the following address:

Karen Mintzer, Esq.  
Regional Attorney  
NYSDEC Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407

If respondents fail to comply with the terms and conditions of this order, the suspended penalty of fifteen thousand

dollars (\$15,000) shall be immediately due and payable, and shall be submitted to the Department in the same manner as the payable penalty.

- IV. The terms and conditions of Order on Consent No. R2-20070216-84 remain in effect, and respondents Frances Basile and Joseph Basile continue to be responsible for complying with Order on Consent No. R2-20070216-84 provided that the timeframes governing respondents' remedial activities shall be as follows:
- A. Within thirty (30) days of service of this order on respondents, respondents Frances Basile and Joseph Basile shall remove the shed, new children's play set, gym equipment and the chain-link fence;
  - B. Within sixty (60) days of service of this order on respondents, or, if directed by Department staff, at a later date based on seasonal or weather conditions, respondents Frances Basile and Joseph Basile shall plant a minimum of eight (8) trees and ninety-five (95) shrubs as detailed in the 2015 Consent Order;
  - C. Within ten (10) days of the completion of the planting of the trees and shrubs referenced in paragraph IV.B. of this order, respondents Frances Basile and Joseph Basile shall submit itemized receipts to the Department for the trees and shrubs (plants) purchased; and
  - D. Respondent Frances Basile and Joseph Basile shall provide the plant monitoring set forth in the 2015 Consent Order, and shall provide an annual report at the end of calendar year 2018 and calendar year 2019 that describes the plant species, the number of plants and photographs of the plants. If any of the plants do not survive during these first two years, respondents must notify the Department and replace the affected plants as directed by the Department.
- V. Immediately upon service of this order on respondents Frances Basile and Joseph Basile, respondents shall cease maintaining the landscaping and lawn area on Richmond County Tax Block 6699 Lot 51.
- VI. Respondents Frances Basile and Joseph Basile shall submit all submissions to Regional Attorney Karen Mintzer, at the

address referenced in paragraph III of this order, including photographs that indicate that the shed, new children's play set, gym equipment and chain link fence have been removed and the information required by the 2015 Consent Order and this order with respect to the plantings.

VII. The provisions, terms and conditions of this order shall bind respondents Frances Basile and Joseph Basile, and their agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: January 9, 2018  
Albany, New York

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations  
of Articles 24 and 71 of the New York  
State Environmental Conservation Law  
(ECL) and Part 663 of Title 6 of the  
Codes, Rules and Regulations of the  
State of New York (6 NYCRR),

**SUMMARY REPORT ON  
MOTION FOR ORDER  
WITHOUT HEARING**

- by -

DEC Case No.  
R2-20070216-84

**FRANCES BASILE AND JOSEPH BASILE,**

Respondents.

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Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General  
Counsel (Jessica Steinberg Albin, Assistant Attorney, of  
counsel), for staff of the Department of Environmental  
Conservation

-- Menicucci Villa Cilmi, PLLC (Jeremy Panzella of  
counsel) for respondents Frances Basile and Joseph Basile

Proceedings

By notice of hearing and complaint dated December 12, 2014,  
staff of the New York State Department of Environmental  
Conservation (DEC or Department) commenced this enforcement  
proceeding against respondents Frances Basile and Joseph Basile  
(respondents) for alleged violations of ECL article 24 and 6  
NYCRR part 663 at 9 Prague Court, Staten Island, New York  
(Richmond County Tax Block 6699 Lots 48 and 51 and the area  
immediately adjacent thereto [site]).

The complaint alleged that pursuant to DEC Freshwater  
Wetlands Permit No. 2-6405-00021/00001-0 issued to a former  
owner of the site, Block 6699 Lot 51 (Lot 51) is subject to a

restrictive declaration recorded in the Richmond County Clerk's Office on December 23, 1992 requiring Lot 51 to remain undeveloped and in its natural state, and prohibits gardening and agricultural activity as well as cutting, removing or disturbing vegetation. The site lies adjacent to and within freshwater wetlands known as AR-33 on the New York State Freshwater Wetlands Map, which is a Class I freshwater wetland. The complaint alleged that respondents constructed a basketball court, placed fill, erected a fence, constructed an in-ground swimming pool, clear-cut vegetation, erected a shed, erected a jungle gym and maintained a lawn in a regulated freshwater wetland adjacent area and deed-restricted area without a permit.

On December 12, 2014, Department staff served its notice of hearing and complaint on respondents and respondents' former attorney by certified mail return receipt requested.

Respondents served an answer dated January 14, 2015 on Department staff. Department staff filed and served a statement of readiness dated February 23, 2015 on respondents. By letter dated March 9, 2015, Chief Administrative Law Judge (CALJ) James T. McClymonds (McClymonds) advised the parties that the matter had been assigned to me. By notice of hearing dated March 30, 2015, the matter was set for hearing on May 18, 2015. At the request of respondents, the hearing was adjourned until July 15, 2015, as memorialized in a notice of hearing dated May 18, 2015.

By email dated July 14, 2015 Department staff advised me that the matter had been settled and provided me with a copy of Order on Consent No. R2-20070216-84 (2015 Order) signed by respondents. Subsequently, Department staff provided me with a copy of the fully executed 2015 Order. The matter was thereafter removed from the hearing docket.

Pursuant to the 2015 Order, respondents admitted placing various structures and fill in a regulated freshwater wetland adjacent area and deed-restricted area, as well as maintaining a lawn therein, without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4. Respondents agreed to be jointly and severally liable for the violations and pay a civil penalty of fifteen thousand dollars (\$15,000) with five thousand dollars (\$5,000) suspended provided respondents complied with the 2015 Order. Respondents were to make four equal payments of two thousand five hundred dollars (\$2,500). The first payment was submitted with the signed 2015 Order, and the remaining payments were to be made on September 15, October 15 and December 15, 2015. Respondents also agreed to obtain a permit for any future work

on the site, except for the work required by the 2015 Order. Pursuant to the 2015 Order, respondents agreed to: remove all structures on Lot 51 including a children's play set, shed, and chain-link fence; plant eight trees and ninety-five shrubs in the portion of Lot 51 that had been landscaped and maintained as a lawn by November 1, 2015; submit itemized receipts for the plants purchased by November 15, 2015; monitor the survival of the plantings for two years and report to the Department; and notify the Department in writing of the date of the commencement and completion of the required work.

By notice of motion for order without hearing in lieu of complaint dated June 3, 2016, Department staff recommenced this enforcement proceeding against respondents for violations of the 2015 Order and for erecting a new children's play set and gym equipment in the regulated freshwater wetland adjacent area and deed-restricted area. On June 3, 2016, Department staff served its notice of motion, supporting statements and exhibits on respondents and respondents' former attorney by certified mail return receipt requested.

By letter dated July 20, 2016, CALJ McClymonds advised the parties the present matter had been assigned to me. On August 9, 2016, I convened a conference call with respondent Joseph Basile and DEC Region 2 assistant attorney Jessica Steinberg Albin wherein respondents requested time to retain a new attorney. The parties agreed that a response to staff's motion would be due from respondents on or before September 23, 2016, which was later extended to September 30, 2016 by staff at the request of respondents' new counsel, Jeremy Panzella.

Respondents served and filed a notice of motion to vacate consent order, dated September 29, 2016, with a supporting affidavit and exhibits.

Department staff filed and served papers dated October 27, 2016 in opposition to respondents' motion to vacate.

#### Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion; memorandum of law, dated June 3, 2016; the affidavit of Sam Lee Chan (Chan Affidavit), sworn to June 3, 2016; and the affidavit of Yoshiaki Higashide (Higashide Affidavit), sworn to June 3, 2016. The memorandum of law sets forth seven counts against respondents: five counts for violation of the 2015 Order and two counts for erecting

structures in the freshwater wetland adjacent area and deed-restricted area without a permit or letter of permission.<sup>1</sup> Staff enclosed a "Compendium of Exhibits" with staff's motion papers as follows:

- Exhibit A - Deed conveying 9 Prague Court, Staten Island, New York to Joseph Basile and Frances Basile dated August 30, 1999 (Richmond County Tax Block 6699 Lot 48).
- Exhibit B - Deed conveying 9 Prague Court, Staten Island, New York to Joseph Basile and Frances Basile dated August 30, 1999 (Richmond County Tax Block 6699 Lot 51).
- Exhibit C - Deed conveying 9 Prague Court, Staten Island, New York from Joseph Basile and Frances Basile to Frances Basile dated July 1, 2013 (Richmond County Tax Block 6699 Lot 48).
- Exhibit D - Deed conveying 9 Prague Court, Staten Island, New York from Joseph Basile and Frances Basile to Frances Basile dated July 1, 2013 (Richmond County Tax Block 6699 Lot 51).
- Exhibit E - Article 24 Freshwater Wetlands Permit No. 2-6405-00135/00001-0 effective November 30, 1992 (modifying permit No. 2-6405-00021/00001-0) with Declaration attached.
- Exhibit F - Declaration dated December 22, 1992 and recorded in the Richmond County Clerk's Office on December 23, 1992 at Reel 4028 Page 0016.
- Exhibit G - Joint Application for Permit (Freshwater Wetlands) of Joseph Basile dated January 16, 2007.
- Exhibit H - DEC Notice of Violation dated February 25, 2007.
- Exhibit I - Photographs (3) of basketball court, children's play set and shed at 9 Prague Court, Staten Island, NY taken on March 5, 2007.
- Exhibit J - DEC Region 2 Meeting Roster Logs for May 8, 2007, March 13, 2008, January 28, 2009, July 10, 2014, October 24, 2014 and January 15, 2015;
- Exhibit K - Photographs (6) of 9 Prague Court, Staten Island, NY taken on April 8, 2014.

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<sup>1</sup> Although it is irregular to plead causes of action in a memorandum of law rather than in a motion (or affirmation as staff is want to do), there has been no objection from respondents. Accordingly, staff's pleadings (and the relief requested) in the memorandum of law are considered on staff's motion for an order without hearing.

- Exhibit L - Emails and correspondence from Department staff to respondents' attorney dated July 25, 2014, August 14, 2014, September 17, 2014 and October 31, 2014.
- Exhibit M - Notice of hearing and complaint dated December 12, 2014.
- Exhibit N - Affidavit of service of notice of hearing and complaint.
- Exhibit O - Answer dated January 14, 2015.
- Exhibit P - Statement of readiness for adjudicatory hearing with affidavit of service, both dated February 23, 2015.
- Exhibit Q - Notice of Hearing dated March 30, 2015 with service list attached.
- Exhibit R - Emails between counsel and ALJ Caruso dated May 14, 2015 and May 12, 2015.
- Exhibit S - Correspondence from respondents' counsel to ALJ Caruso and Ms. Albin dated May 15, 2015 re: need for adjournment.
- Exhibit T - Notice of Hearing dated May 18, 2015.
- Exhibit U - Order on Consent dated July 20, 2015.
- Exhibit V - Photographs (6) of 9 Prague Court, Staten Island, NY taken on November 20, 2015.
- Exhibit W - Notice of Non-Compliance with Consent Order dated January 25, 2016.
- Exhibit X - Photographs (7) of 9 Prague Court, Staten Island, NY taken on May 31, 2016.<sup>2</sup>

Department staff alleges that respondents violated the following:

1. The 2015 Order and ECL 71-2303(1) for failing to pay the civil penalty;
2. The 2015 Order, ECL 24-0701(2) and 71-2303(1), and 6 NYCRR 663.4 for failing to remove the children's play set from the freshwater wetland adjacent area and deed-restricted area;

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<sup>2</sup> The Chan Affidavit references and discusses exhibits F, G, H, I, J, K, U and V. The Higashide Affidavit references and discusses exhibits V and X. The remaining exhibits are referenced in staff's memorandum of law. Although it is irregular for a party to reference exhibits that have not been introduced through an affirmation or affidavit, there has been no objection from respondents. Accordingly, Exhibits A, B, C, D, E, L, M, N, O, P, Q, R, S, T and W are considered in determining staff's motion for order without hearing. Exhibits A, B, G, O, T, U, L and R have also been provided by respondents as Exhibits 1, 2, 4, 8, 9, 10, 11 and 12 respectively.



3. The 2015 Order, ECL 24-0701(2) and 71-2303(1), and 6 NYCRR 663.4 for failing to remove the shed from Richmond County Tax Block 6699 Lot 51;
4. The 2015 Order, ECL 24-0701(2) and 71-2303(1) and 6 NYCRR 663.4 for failing to remove the chain-link fence line from Richmond County Tax Block 6699 Lot 51;
5. The 2015 Order and ECL 71-2303(1) for failing to comply with the planting and monitoring requirements in the 2015 Order;
6. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) for erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission; and
7. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) by erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission.

Based upon these alleged violations, Department staff seeks an order: finding respondents in violation of the 2015 Order, the ECL and 6 NYCRR part 663; finding respondents have a continuing obligation to comply with the 2015 Order; assessing a penalty of fifty-two thousand five hundred dollars \$52,500; directing respondents to remove the shed, children's play set and chain-link fence from Richmond County Tax Block 6699 Lot 51 within 30 days of the Commissioner's Order; directing respondent to comply with a DEC directed planting and monitoring plan; and granting such other and further relief as may be deemed just, proper and equitable.

In opposition to respondents' motion to vacate the 2015 Order, Department staff submitted the affirmation of Jessica Steinberg Albin (Albin Affirmation), dated October 27, 2016, and the affidavit of Sam Yee Chan (Chan Affidavit 2), sworn to on October 27, 2016.

The Albin Affirmation attached the following:

- Exhibit A - Emails and correspondence from Ms. Albin to respondents' attorney, dated July 23, 2016, forwarding the fully executed order on consent.
- Exhibit B - Email from respondents' attorney to Ms. Albin, dated May 15, 2015, with photograph attached.

Department staff argues that respondents' motion to vacate should be denied because the motion is untimely, respondents failed to state any permissible grounds for vacating an order,

and respondents signed the order on consent agreeing to be bound by its terms, conditions and provisions. Moreover, Department staff argues that respondents did not respond to staff's motion for order without hearing, the time to do so has expired and staff's motion should be granted in its entirety.

#### Respondents' Position

In response to Department staff's motion, respondents move to vacate the 2015 Order. Respondents submitted the affidavit of Joseph Basile (Basile Affidavit), sworn to September 29, 2016, in support of respondents' motion. The Basile Affidavit has the following exhibits attached:

- Exhibit 1 - Deed conveying 9 Prague Court, Staten Island, New York to Joseph Basile and Frances Basile dated August 30, 1999 (Richmond County Tax Block 6699 Lot 48).
- Exhibit 2 - Deed conveying 9 Prague Court, Staten Island, New York to Joseph Basile and Frances Basile dated August 30, 1999 (Richmond County Tax Block 6699 Lot 51).
- Exhibit 3 - Photographs (4) taken at 9 Prague Court, Staten Island, NY.
- Exhibit 4 - Joint Application for Permit (Freshwater Wetlands) of Joseph Basile dated January 16, 2007.
- Exhibit 5 - Photographs (4) of properties neighboring 9 Prague Court, Staten Island, NY.
- Exhibit 6 - Map entitled "Boulevard Estates" Hylan Boulevard, Staten Island, NY.
- Exhibit 7 - Photograph taken at 9 Prague Court, Staten Island, NY.
- Exhibit 8 - Answer dated January 14, 2015.
- Exhibit 9 - Notice of Hearing dated May 18, 2015.
- Exhibit 10 - Order on Consent, dated July 20, 2015 with receipt for payment #1 of 4 attached.
- Exhibit 11 - Emails and correspondence from Department staff to respondents' attorney dated July 25, 2014, August 14, 2014, September 17, 2014 and October 31, 2014.
- Exhibit 12 - Emails between the parties and ALJ Caruso dated May 14, 2015 and May 12, 2015.

Respondents argue that staff's motion should be denied for the following reasons:

1. Respondents were not properly advised by their former attorney, who misrepresented what the contents of the 2015 Order were, and incorrectly advised respondents of the consequences and conditions of the 2015 Order;
2. Respondents signed the 2015 Order by mistake because they were misinformed by their former attorney, and as a result, respondents' consent was not willingly, knowingly or competently given;
3. The 2015 Order results in a taking of respondents' Lot 51;
4. Respondents are being treated unfairly;
5. Respondents' former attorney convinced respondents to settle when respondents wanted to go to hearing; and
6. Ineffective assistance of counsel.

Respondent did not otherwise address staff's motion or the violations alleged by Department staff.

#### **FINDINGS OF FACT**

1. Since August 30, 1999, respondent Frances Basile has owned the property located at 9 Prague Court, Staten Island, New York consisting of Richmond County Tax Block 6699 Lots 48 and 51 (site). (See Chan Affidavit, Exhibit U; Basile Affidavit, Exhibits 1, 2 and 10; see also Exhibits A, B, C, and D.)
2. Respondent Joseph Basile owned the site jointly with Frances Basile until July 1, 2013. (See Chan Affidavit, Exhibit U; Basile Affidavit, Exhibit 10; see also Exhibits C and D.)
3. The site contains a regulated freshwater wetland known as AR-33, which is a class 1 freshwater wetland, and contains regulated freshwater wetland adjacent areas. (See Chan Affidavit ¶ 4; see also Exhibits U and 10 ¶ 6, Exhibits G and 4 at box #7.)
4. Pursuant to DEC Freshwater Wetland Permit Nos. 2-6405-00021/0001-0 and 2-6405-00135/00001-0, issued to a former owner of the site, a declaration of "restrictions, covenants, obligations and agreements" (Declaration) was recorded in the Richmond County Clerk's Office on December 23, 1992 restricting any development of Richmond County Tax Block 6699 Lot 51. The Declaration runs with land in perpetuity, binding the declarant and his successors and

assigns. (See Chan Affidavit ¶ 4; Exhibit F ¶ 8; see also Exhibit E.)

5. Pursuant to the Declaration, Lot 51 is to remain in its then existing natural state with gardening and agricultural activity as well as cutting, removing or disturbing vegetation prohibited. (See Chan Affidavit ¶ 4, Exhibit F ¶¶ 1 and 2.)
6. Respondent Joseph Basile submitted a Joint Application for Permit to the Department to construct a two-family home on Lot 51 in January 2007. (See Chan Affidavit ¶ 5, Exhibit G.)
7. The Department determined at that time that respondents had violated the freshwater wetlands law by constructing a basketball court, installing fence and placing fill within a regulated freshwater wetlands adjacent area and deed-restricted area without a permit and sent respondent Joseph Basile a notice of violation dated February 25, 2007. (See Chan Affidavit ¶ 5, Exhibit H.)
8. As of March 5, 2007, respondents had constructed a basketball court, placed fill and erected fencing on Lots 49 and 51, the regulated freshwater wetland adjacent area and deed-restricted area; constructed an in-ground swimming pool on Lot 49 in the regulated freshwater wetland adjacent area; and clear-cut vegetation on Lot 51, the regulated freshwater wetland adjacent area and deed-restricted area; without a permit or letter of permission. (See Chan Affidavit ¶¶ 6 and 7, Exhibit I.)
9. Department staff met with respondent Joseph Basile and respondents' former attorney in 2007, 2008, and 2009 to resolve the violations, but did not reach a settlement. (See Chan Affidavit ¶8, Exhibit J.)
10. As of April 28, 2014, Department staff observed that respondents had placed fill and erected fencing on Lots 49 and 51, the regulated freshwater wetland adjacent area and deed-restricted area; and erected a shed and jungle gym and maintained a lawn on Lot 51, the regulated freshwater wetland adjacent area and deed-restricted area. (See Chan Affidavit ¶¶ 9 and 10, Exhibit K.)
11. Department staff again met with respondent Joseph Basile and respondents' former attorney in 2014 to resolve the

violations, but did not reach a settlement. (See Chan Affidavit ¶11, Exhibit J.)

12. After the Department commenced formal enforcement proceedings and the matter was set for hearing, respondents Frances Basile and Joseph Basile signed Order on Consent No. R2-20070216-84 (2015 Order) on July 14, 2015. (See Chan Affidavit ¶ 12, Exhibit U; Basile Affidavit, Exhibit 10.)
13. The 2015 Order became effective on July 20, 2015 when it was signed by the Regional Director, Venetia A. Lannon. (Id.)
14. Pursuant to the 2015 Order, respondents admitted conducting the following regulated activities in the regulated freshwater wetland adjacent area and deed-restricted area without a DEC permit:
  - A. Constructing a basketball court;
  - B. Placing fill;
  - C. Erecting a chain-link fence;
  - D. Constructing an in-ground swimming pool;
  - E. Clear-cutting vegetation;
  - F. Erecting a shed;
  - G. Maintaining a lawn; and
  - H. Erecting a jungle gym. (Id., Exhibit U ¶¶ 8, 10 and 17; see also Chan Affidavit ¶¶ 6-10; Exhibits I and K.)
15. Respondents agreed to pay a civil penalty of \$15,000 with \$5,000 suspended provided respondents complied with the 2015 Order. The remaining amount of \$10,000 was payable in four equal payments of \$2,500 due on July 15, September 15, October 15 and December 15, 2015. (See Chan Affidavit ¶ 12, Exhibit U; Basile Affidavit, Exhibit 10.)
16. Respondents made the first payment of \$2,500. (See Chan Affidavit ¶ 12, Exhibit U; Basile Affidavit, Exhibit 10.)
17. Respondents, by the 2015 Order, agreed to:
  - A. remove all structures installed within Block 6699 Lot 51, including the children's play set, shed and chain-link fence line within thirty (30) days from the effective date of the 2015 Order (by August 19, 2015);
  - B. plant the following trees and shrubs, between September 1, 2015 and November 1, 2015, on the portion of Lot 51

that has been landscaped and maintained as a lawn area:

- i. 8 trees, at least 5 to 6 feet tall consisting of a mixture of 3 species selected from the following - white oak, American beech, black birch, sweet gum and red maple;
  - ii. 95 shrubs, a minimum 18 inches in height, consisting of a mixture of 4 species selected from the following - maple leaf viburnum, nannyberry viburnum, black haw, witch hazel, lowbush blueberry, red-panicled dogwood, black chokeberry, Canadian serviceberry and sweet pepperbush;
- C. submit an itemized receipt to the Department for the plants purchased by November 15, 2015;
- D. notify the Department of the dates of commencement and completion of the work;
- E. monitor the plants for a minimum of two years to ensure a 90% survival rate, replacing dead plants as needed; and
- F. submit an annual monitoring report for two years identifying the plant species, number of plants and photographs of the planting area with the reports due no later than December 31st of 2016 and 2017. (See Chan Affidavit, Exhibit U, Schedule of Compliance ¶¶ 2-5; Basile Affidavit, Exhibit 10.)
18. Respondents failed to pay the remaining three \$2,500 penalty payments. (See Albin Affirmation ¶ 16.)
19. Respondents failed to remove the structures from Lot 51 by August 19, 2015. (See Higashide Affidavit ¶¶ 4 and 5, Exhibit V; Chan Affidavit ¶¶ 13-14.)
20. Respondents failed to plant the trees and shrubs, submit an itemized receipt or perform any other of the agreed upon requirements of the 2015 Order. (See Higashide Affidavit ¶¶ 4-8, Exhibits V and X; Chan Affidavit ¶¶ 13-14.)
21. Respondents continued to maintain the lawn on Lot 51. (See Higashide Affidavit ¶¶ 4-8, Exhibits V and W; Basile Affidavit ¶ 12, 13 and 16, Exhibits 3 and 7.)
22. Respondents removed the children's play set from its previous location before May 31, 2016 but erected a new children's play set within the freshwater wetland adjacent area and deed-restricted area without a permit. (See

Higashide Affidavit ¶ 7, Exhibit X; Chan Affidavit ¶ 14.)<sup>3</sup>

23. Prior to May 31, 2016, respondents erected gym equipment in the freshwater wetland adjacent area and deed-restricted area without a permit. (See Higashide Affidavit ¶ 7, Exhibit X; Chan Affidavit ¶ 14.)
24. As of May 31, 2016, respondents had not performed the obligations of the 2015 Order. (See Findings of Fact ¶¶ 18-21.)

## DISCUSSION

Rather than addressing Department staff's motion for order without hearing, respondents have moved to vacate the 2015 Order upon which staff's motion is largely based. Accordingly, respondents' motion to vacate will be addressed first.

### I. Respondents' Motion to Vacate

As noted above, in support of their motion to vacate the 2015 Order, respondents argue:

1. Respondents were not properly advised by their former attorney, as the attorney misrepresented what the contents of the 2015 Order were and incorrectly advised respondents of the consequences and conditions of the 2015 Order;
2. Respondents signed the 2015 Order by mistake because they were misinformed by their former attorney, and as a result, respondents' consent was not willingly, knowingly or competently given;
3. That the 2015 Order results in a taking of respondents' Lot 51;
4. Respondents are being treated unfairly;
5. Respondents' prior attorney convinced respondents to settle when respondents wanted to go to hearing; and
6. Ineffective assistance of counsel.

Respondents base the motion to vacate on the application of CPLR 5015. CPLR 5015 sets forth the following grounds for

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<sup>3</sup> Staff inspected the site on November 20, 2015 and noted the children's play set had not been removed from Lot 51 (see Finding of Fact No. 19). When staff inspected the site on May 31, 2016, the children's play set had been removed, but replaced by a new play set. (See Higashide Affidavit ¶¶ 4, 5, 7, and 8.)

vacating an order: excusable default; newly-discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification, or vacatur of a prior judgment or order upon which the judgment or order is based (see CPLR 5015 [a][1]-[5]).

No previous decisions, orders or rulings have addressed a motion to vacate an order on consent and there is no express authority in 6 NYCRR part 622 or the ECL for the Department to reconsider an order of consent. The Department has, however, recognized its inherent authority to reopen a hearing or reconsider a final decision pursuant to CPLR 5015 (see e.g. Matter of RO Acquisition Corp., Ruling of the Commissioner, July 23, 2012, at 4; Matter of RGLL, Inc., Ruling of the Commissioner, Nov. 21, 2006, at 2; Matter of Risi, Ruling of the Assistant Commissioner on Motion for Reconsideration, April 5, 2005, at 4-5; Matter of Mohawk Valley Organics, LLC, Commissioner's Ruling on Motion to Suspend Order and Reopen the Hearing Record, Sept. 8, 2003, at 5).

Even if CPLR 5015 is applied to vacate a settled order, respondents have made no showing that any of the five CLPR 5015 grounds is applicable here. Respondents' attempts to fault the advice of their previous attorney do not fall within any of the CPLR 5015 grounds. Respondents do not allege an excusable default; newly discovered evidence; fraud, misrepresentation or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification, or vacatur of a prior judgment or order, upon which the 2015 Order was based.

Generally, respondents are not aggrieved by an order that was reached by agreement of the parties (see Matter of Saraf v Vacanti, 223 AD2d 836, 837 [3rd Dept 1996], citing Matter of Mastanduono v Department of Educ., 159 AD2d 752, 753 [3d Dept 1990]; Matter of Anderson v Ambach, 89 AD2d 657, 658 [3d Dept 1982], ly denied 57 NY2d 609 [1982]). In this proceeding, respondents wish to withdraw from a settled order because, as respondents argue, they were unable to appreciate the reality, obligations and consequences of the 2015 Order until the Department decided to enforce the settled order.

Respondents admitted the violations asserted in the 2015 Order (see Finding of Fact No. 14, Exhibits U and 10 ¶ 17) and confirm many of the underlying facts leading to that order in



the Basile Affidavit (see Basile Affidavit ¶¶ 6, 12, 16 and 32). Moreover, Department staff submitted proof of the violations underlying the 2015 Order (see Chan Affidavit ¶¶ 4-10).

Respondent Joseph Basile admits he was aware of the obligations contained in the 2015 Order and expressed his objections regarding some of those provisions such as the required plantings to his attorney prior to signing the order (see Basile Affidavit ¶ 23). The fact that respondents made the first of four civil penalty payments indicates they were also aware of the financial obligations and consequences of the 2015 Order. The 2015 Order represents a settlement of respondents' civil liability for various freshwater wetlands violations, and respondents agreed to be bound by the provisions, terms and conditions of the consent order (see 2015 Order [Exhibits U and 10], at 3, ¶ 17). The 2015 Order expresses the obligations agreed to by respondents in plain English. Respondents signed the consent order requiring respondents to pay a penalty, remove structures from Lot 51, and plant trees and shrubs on Lot 51. Respondents failed to do so and offered no explanation for their failure to satisfy those obligations other than it was their attorney's fault. Respondents have disregarded their obligations under the 2015 Order.

In short, respondents signed the 2015 Order with advice of counsel and now want to be relieved of their obligations because respondents either never intended or expected to be required to comply with the 2015 Order (see Basile Affidavit ¶ 23). Respondents do so notwithstanding the fact that above each of their signatures the 2015 Order states respondents consent "to the issuance and entry of this Order without further notice, waives [his or her] right to a hearing in this matter, and agrees to be bound by the terms, conditions and provisions of this Order." Allowing the 2015 Order to be vacated on these facts would open all settled orders to reconsideration without a showing of any of the CPLR 5015 grounds.

Respondents' variously worded arguments that they signed the 2015 Order due to their previous attorney's failure to render effective assistance or that respondents were otherwise misled or misinformed by their former attorney are unconvincing and are not appropriately heard in this administrative proceeding. Simply put, if respondents' rights were compromised by respondents' prior legal representation, "the fault must be laid at the door of [their] former attorney, and not at the door of the State" (see e.g. Walston v Axelrod, 103 AD2d 769, 771 [2d Dept 1984]). Moreover, claims of ineffective assistance of

counsel are only cognizable "in criminal proceedings, not in regulatory proceedings before an administrative agency" (Perk v Commodity Futures Trading Comm'n, 8 Fed Appx 46, 48 [2d Cir 2001], citing United States v Coven, 662 F2d 162, 176 [2d Cir 1981], cert denied 456 US 916 [1982])).

It is also well settled that a consent order is a contract and binds the parties signing the consent order (see State v Wallkill, 170 AD2d 8, 10 [3d Dept 1991]; United States v ITT Continental Baking Co., 420 US 223, 236-237 [1975]; United States v Armour & Co., 402 US 673, 681-682 [1971]; 19th Street Assocs. v State of New York, 79 NY2d 434, 442 [1992]; Callahan v Carey, 307 AD2d 150, 153 [3d Dept], lv dismissed 100 NY2d 615 [2003]; see also Matter of Zahav Enter. LLC, Order of the Commissioner, October 24, 2011, at 5). Inasmuch as respondents argue that they entered into the consent order by mistake, it is a claim of unilateral mistake. Unilateral mistake, standing alone, is not sufficient basis for rescinding or reforming a contract (see e.g. Barclay Arms, Inc. v Barclay Arms Associates, 74 NY2d 644, 646 [1989]). The general rule is that one who signs a document, absent a showing of fraud or other wrongdoing by the other contracting party, is bound by its contents (see e.g. Da Silva v Musso, 53 NY2d 543, 550 [1981]; Barclay Arms, Inc. v Barclay Arms Associates, 74 NY2d 644).

Respondents' claim of unilateral mistake does not allege any fraud, misrepresentation or wrongdoing of the Department. I conclude that respondents' claim of unilateral mistake is insufficient to vacate the 2015 Order.

Respondents also allege that the 2015 Order results in an unconstitutional taking of respondents' Lot 51. It has been previously ruled that takings claims are not to be raised at the agency level and consequently are not a defense to an administrative proceeding (see Matter of Cobbleskill Stone Prods., Inc., Rulings of Chief ALJ on Motions, January 18, 2012, at 13, citing Matter of Haines v Flacke, 104 AD2d 26, 32-33 [2d Dept 1984]).

Respondents' remaining arguments are without merit. For the reasons stated above, respondents' motion to vacate the 2015 Order is denied.

## II. Department Staff's Motion for Order Without Hearing

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR (see 6 NYCRR 622.12[d]). "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law" (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (see Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003 at 4).

In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. Pursuant to 6 NYCRR 622.12(a), staff has supported its motion for an order without hearing with an affidavit from the Habitat Manager in the Department's Region 2 office and an affidavit from a Region 2 Fish and Wildlife Technician that describe the violations of the 2015 Order and new violations of the freshwater wetland law and regulations. I conclude that in this proceeding staff has met its initial burden.

### A. The 2015 Order

Staff and respondents' papers demonstrate that respondents Frances Basile and Joseph Basile entered into the 2015 Order with the Department, and respondents have failed to perform the obligations of that order (see Findings of Fact Nos. 15-21, 24). Respondents did not pay the remaining seven thousand five hundred dollar (\$7,500) civil penalty, did not remove the shed, the chain-link fence and children's play set as agreed, and did not plant the required trees and shrubs, but continue to mow and maintain Lot 51 as a lawn (see Findings of Fact Nos. 18-21).

Inasmuch as Department staff has made a prima facie showing on the violations of the 2015 Order noted above, the burden shifts to respondent to raise triable issues of fact. A respondent opposing staff's motion for an order without hearing must also lay bare its proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). General denials are insufficient to raise an issue of fact on a summary judgment motion (see Gruen v Deyo, 218 AD2d 865, 866 [3d Dept 1995]; Bronowski v Magnus Enters., Inc., 61 AD2d 879 [4th Dept 1978]).

Respondents do not deny Department staff's allegations, otherwise refute the violations, or demonstrate that the violations have been corrected. Respondents have not addressed the Department's prima facie showing that respondents have violated the 2015 Order. Instead, respondents argue that they never would have signed the 2015 Order had they known they would actually have to comply with the order (see Basile Affidavit ¶ 23). Respondent Joseph Basile believes he should be able to do what he wants regarding Lot 51 at the site (see Basile Affidavit ¶ 32).

Respondents had the burden of raising a triable issue of fact. I conclude that respondents failed to do so. Moreover, respondent did not deny any facts alleged by Department staff. "The failure of a responding party to deny a fact alleged in the moving papers, constitutes an admission of fact" (Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003 at 4; see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]). Because respondents did not deny any of the facts constituting the violations of the 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4 alleged by staff, those facts are deemed admitted. Respondents' remaining arguments are without merit.

Accordingly, Department staff has met its burden in showing that respondents violated the 2015 Order, and due to the continued placement of structures within the freshwater wetland adjacent area without a permit, respondents also violated ECL 24-0701(2) and 6 NYCRR 663.4.

I conclude that respondents are liable for:

1. violating the 2015 Order for failing to pay the three remaining \$2,500 civil penalty payments;
2. violating the 2015 Order, ECL 24-0701(2), and 6 NYCRR 663.4 for failing to remove the children's play set from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51);
3. violating the 2015 Order, ECL 24-0701(2), and 6 NYCRR 663.4 for failing to remove the shed from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51);
4. violating the 2015 Order, ECL 24-0701(2), and 6 NYCRR 663.4 for failing to remove the chain-link fence from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51); and
5. violating the 2015 Order for failing to plant eight (8) trees and ninety-five (95) shrubs and monitor the plants growth and survival.

#### B. Additional Violations

Department staff's motion also alleges respondents have installed a new children's playset and gym (exercise) equipment in the freshwater wetlands adjacent area and deed-restricted area without a permit in violation of ECL 24-0701(2) and 6 NYCRR 663.4(d)(42). Staff has made a prima facie showing that respondents replaced the children's playset with a new children's playset, which was installed within the freshwater wetlands adjacent area and deed-restricted area without a permit (see Finding of Fact No. 22). Staff also made the prima facie showing that respondents installed gym equipment in freshwater wetlands adjacent area and deed-restricted area without a permit (see Finding of Fact No. 23).

Prior decisions have concluded that the benefits derived from wetland violations inure to the fee owners, and that the fee owners are liable for the violations regardless of whether the fee owners actually performed the act constituting the violation (see e.g. Matter of Francis, Hearing Report at 12, adopted by Order of the Commissioner, April 26, 2011). The evidence demonstrates that respondent Frances Basile owned the

site during 2015 and 2016 when the additional violations were witnessed by staff. Respondent has not raised any triable issue of fact. Accordingly, respondent Frances Basile is liable for the two violations of ECL 24-0701(2) and 6 NYCRR 663.4(d)(42).

Although respondent Joseph Basile's affidavit states he owns Lot 51, he has not been a fee owner of the site since July 1, 2013 (compare Basile Affidavit ¶ 5 with Exhibits C, D and U). Accordingly, Department staff must demonstrate that respondent Joseph Basile performed the work or directed its performance (see Matter of Pfennig, Hearing Report at 6 n5, adopted by Order of the Commissioner, May 27, 2010). Staff alleges that respondents violated ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) by installing a new children's playset and gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission. As discussed above, respondents have not denied the allegations so they are deemed admitted. In addition, respondent Joseph Basile's affidavit demonstrates that although he may no longer be a fee owner of the site, he exercises control over what occurs within the freshwater wetland adjacent area and deed-restricted area (see e.g. Basile Affidavit ¶¶ 12, 13, 16, and 32). Absent evidence to the contrary, I conclude that a reasonable inference may be drawn that the new children's play set and gym equipment were installed by, or at the direction of, respondent Joseph Basile.

Respondents have not addressed staff's prima facie showing. For the reasons stated above, I conclude that respondents are liable for violating:

- ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) for erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission; and
- ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) by erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission.

### C. Penalties

Department staff requests that respondents be assessed a civil penalty of fifty-two thousand five hundred dollars (\$52,500) consisting of:

1. Twelve thousand five hundred dollars (\$12,500) that was imposed by the 2015 Order and remains unpaid (\$5,000 that was suspended and \$7,500 that respondents failed to pay);
2. Thirty thousand dollars (\$30,000) for violating the 2015 Order; and
3. Ten thousand dollars (\$10,000) for violating ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) (new children's playset and gym equipment).

ECL 71-2303 sets forth a civil penalty not to exceed \$11,000 for every violation of ECL article 24 or any rule or regulation, local law or ordinance, permit or order issued pursuant thereto. The twelve thousand five hundred dollar (\$12,500) penalty requested by staff was agreed to by respondents in the 2015 Order. Seven thousand five hundred (\$7,500) represents the payable penalty that respondents agreed to, but failed to pay. The remaining five thousand dollar (\$5,000) penalty was suspended so long as respondents complied with the order. As concluded above, respondents violated the 2015 Order. Accordingly, the five thousand dollar (\$5,000) suspended penalty is supported. Department staff's request for payment of the twelve thousand five hundred dollar (\$12,500) penalty agreed to by the parties in the 2015 Order is authorized and appropriate.

Department staff requests an additional penalty of thirty thousand dollars (\$30,000) for respondents' violation of the 2015 Order. Department staff references DEE-1: Civil Penalty Policy (June 20, 1990) and DEE-6: Freshwater Wetlands Enforcement Policy (February 4, 1992) in support of the additional penalty for violations of the 2015 Order. Staff alleged and proved five violations of the 2015 Order for a maximum statutory penalty of fifty-five thousand dollars (\$55,000).

For the two additional violations of ECL 24-0701(2) and 6 NYCRR 663.4(d)(42), Department staff requests a civil penalty of ten thousand dollars (\$10,000). The maximum penalty for these two violations is twenty-two thousand dollars (\$22,000).

In support of these penalties Department staff notes respondents have avoided the costs of compliance by failing to remove the regulated structures, by failing to restore the regulated areas with plantings of trees and shrubs, and by avoiding the payment of the civil penalty. Staff also cites respondents' history of non-compliance, non-responsiveness and

delay in support of the fifty-two thousand five hundred dollars (\$52,500) penalty.

Respondents have demonstrated their recalcitrance by refusing to comply with a settled order on consent. Respondents do not deny any of the alleged violations. Respondents believe they should be able to do whatever respondents want with Lot 51 in total disregard of the law, regulations, and Declaration making it unlawful to do anything on Lot 51 without a DEC permit and in total disregard of a settled order signed by both respondents. Moreover, respondents have placed additional structures in the freshwater wetlands adjacent area and deed-restricted area after entering into an order on consent with the Department and with full knowledge that doing so was not permitted by law, regulation or deed restriction.

I also note that the AR-33 wetland provides several benefits, including wildlife habitat, recreation, and pollution treatment (see Matter of Costas, Decision and Order of the Commissioner, February 19, 2009, at 11 referencing ALJ Hearing Report, Findings of Fact Nos. 10 and 11). Pursuant to the Declaration (Exhibit F), Lot 51 was intended to benefit the AR-33 freshwater wetland, but respondents' continued maintenance of Lot 51 as a manicured lawn with structures placed on it for the past nine years has insured Lot 51 does not benefit the wetland.

Based on the discussion above, I conclude that a total penalty of \$52,500 is supported and appropriate.

#### D. Remedial Relief

Department staff requests that respondents be directed to remove the shed, children's play set and chain-link fence within thirty days from the date of a Commissioner's order. As this relief was required by the 2015 Order, respondents' obligation is continuing, and the Commissioner need not direct compliance with the 2015 Order (see Matter of West 63 Empire Associates LLC, Order of the Commissioner, August 9, 2012, at 2; Matter of 35-60 74th Street Realty LLC, Order of the Commissioner, June 4, 2013, at 2-3). Staff also requests that respondents be directed to comply with a DEC-directed planting and monitoring plan. As the 2015 Order already expresses planting and monitoring requirements, those requirements are an ongoing obligation of respondents. Again, the Commissioner need not direct compliance with the 2015 Order.



### CONCLUSIONS OF LAW

1. By failing to pay the three remaining \$2,500 civil penalty payments, respondents violated the 2015 Order.
2. By failing to remove the children's play set from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51), respondents violated the 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4.
3. By failing to remove the shed from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51), respondents violated the 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4.
4. By failing to remove the chain-link fence from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51), respondents violated the 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4.
5. By failing to plant eight (8) trees and ninety-five (95) shrubs and monitor their growth and survival, respondents violated the 2015 Order.
6. By erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission, respondents violated ECL 24-0701(2) and 6 NYCRR 663.4(d)(42).
7. By erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission, respondents violated ECL 24-0701(2) and 6 NYCRR 663.4(d)(42).

### RECOMMENDATIONS

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. denying respondents' motion to vacate consent order;
2. granting Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12;

3. holding that respondents violated the following:
  - a. The 2015 Order for failing to pay the remaining seven thousand five hundred dollar (\$7,500) civil penalty;
  - b. The 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4 for failing to remove the children's play set from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51);
  - c. The 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4 for failing to remove the shed from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51);
  - d. The 2015 Order, ECL 24-0701(2) and 6 NYCRR 663.4 for failing to remove the chain-link fence line from the freshwater wetland adjacent area and deed-restricted area (Richmond County Tax Block 6699 Lot 51);
  - e. The 2015 Order for failing to comply with the planting and monitoring requirements in the order;
  - f. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) for erecting gym equipment in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission; and
  - g. ECL 24-0701(2) and 6 NYCRR 663.4(d)(42) by erecting a new children's play set in the freshwater wetland adjacent area and deed-restricted area without a DEC permit or letter of permission.
4. directing respondents to pay a civil penalty of fifty-two thousand five hundred dollars (\$52,500) for the above referenced violations within thirty (30) days of service of the Commissioner's order on respondents;
5. holding that the terms and conditions of Order on Consent No. R2-20070216-84 remain in effect, and respondents Frances Basile and Joseph Basile continue to be responsible for complying with the consent order;
6. directing respondents to remove the shed, children's play set, and chain-link fence from Richmond County Tax Block 6699 Lot 51, freshwater wetland adjacent area and deed-restricted area within thirty (30) days of service of the Commissioner's order on respondents;
7. directing respondents to plant a minimum of eight trees and ninety-five shrubs on Richmond County Tax Block 6699 Lot 51 as detailed in the 2015 Order within sixty (60)

days of service of the Commissioner's order on respondents;

8. directing respondents to submit itemized receipts within sixty (60) days of the service of the Commissioner's order on respondents for the plants purchased;
9. directing respondents to remove the new children's play set and gym equipment from Richmond County Tax Block 6699 Lot 51, freshwater wetland adjacent area and deed-restricted area within thirty (30) days of service of the Commissioner's order on respondents;
10. directing respondents to cease maintaining the landscaping and lawn area on Richmond County Tax Block 6699 Lot 51 immediately upon service of the Commissioner's order on respondents;
11. directing respondents to provide the plant monitoring and notifications detailed in the 2015 Order;
12. directing respondents to submit the penalty payment and all other submissions to the following:

Jessica Steinberg Albin, Esq.  
Assistant Attorney  
NYSDEC Region 2  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101-5407; and
13. directing such other and further relief as may be deemed just, proper and equitable under the circumstances.

\_\_\_\_\_/s/  
Michael S. Caruso  
Administrative Law Judge

Dated: December 2, 2016  
Albany, New York