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,[1]

ORDER

DEC File No.
R2-20110824-333

- by -

BLOCK 7346 LOT 1, LLC, and GRACE M. FUSCO, Individually and as President and Managing Member of Block 7346 Lot 1, LLC,

Respondents.

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service on respondents Block 7346 Lot 1, LLC (respondent LLC) and Grace M. Fusco (respondent Grace Fusco) (collectively respondents) of a motion for order without hearing in lieu of complaint.

Staff's motion asserts one cause of action, alleging that respondents have violated an order on consent and New York State Environmental Conservation Law (ECL) § 24-0703(1) by failing to comply with the schedule of compliance in the order on consent relating to freshwater wetlands at a site located along Englewood Avenue between Gaynor Street and Bloomingdale Road in Staten Island, New York (see Affirmation of Karen L. Mintzer in Support of Motion for an Order Without a Hearing, dated October 8, 2015 [Mintzer Aff.], at 11-12, ¶¶ 59-60; see also Mintzer Aff., Exhibit [Exh.] F [Order on Consent No. R2-20110824-333, effective December 22, 2014 (2014 Consent Order)]).

Department staff seeks an order:

- finding that respondents violated the 2014 Consent Order and ECL 71-2303(1);
- ordering respondents to pay a civil penalty of "no less than $15,000," and holding respondents jointly and severally liable for the penalty;
- ordering respondents to comply with the removal and restoration requirements of paragraphs 8-10 of the 2014 Consent Order "immediately;" and
- granting such other and further relief as may be deemed just, proper and equitable

(see Mintzer Aff. at 12-13).

[1] The original caption in this matter referenced alleged violations of ECL articles 24 and 71 and part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (see Affirmation of Karen L. Mintzer dated October 8, 2015, at caption). Other than in the caption, there is no mention of 6 NYCRR part 663 in the motion. Accordingly, the caption has been modified to delete the reference to 6 NYCRR part 663.

Respondents filed papers in opposition to staff's motion. Administrative Law Judge (ALJ) Richard A Sherman, to whom this matter was assigned, prepared the attached summary report (Summary Report), in which he denied staff's motion with respect to respondent Grace Fusco, and recommended that I:

- issue an order finding respondent LLC liable for the alleged violation;
- assess against respondent LLC a civil penalty in the amount of $15,000; and
- require respondent LLC to comply with the requirements of paragraphs 8-10 of the 2014 Consent Order. Paragraphs 8-10 require removing a foundation, fill, debris and other materials from the site, planting of vegetation, and complying with various notification requirements (see Mintzer Aff., Exh. F [Schedule A: Schedule of Compliance, ¶¶ 8-10]).

(see Summary Report at 14). I adopt the ALJ's summary report as my decision in this matter, subject to my comments below.

Background

As discussed in the summary report, respondents have a long-standing history with the Department regarding this site. In 1994, the Freshwater Wetlands Appeals Board (FWAB) rejected a challenge by respondent Grace Fusco's late husband Pasquale Fusco to the Department's delineation of a freshwater wetland that included the site (see Summary Report at 4-5; see also Mintzer Aff., Exh. A [FWAB Order and Decision, dated November 8, 1994]). The FWAB Order and Decision specifically addressed wetland delineations in and around Block 7346 that began in the mid-1980's (see FWAB Order and Decision at 1-7).

In 1997, Pasquale Fusco was found liable for statutory and regulatory violations relating to clearing vegetation, excavating and otherwise altering grades, and constructing a building foundation at the site without a permit (see Summary Report at 5; see also Mintzer Aff., Exh. E, Matter of Fusco, Order of the Acting Commissioner, June 12, 1997 [1997 Commissioner Order]). The Acting Commissioner directed that Mr. Fusco complete a permit application for the site activities within fifty-five (55) days of the issuance of the 1997 Commissioner Order. In the event that Mr. Fusco did not complete his permit application, Mr. Fusco was directed to submit a restoration plan for staff's review and approval that would include the removal and disposal of the building foundation. The Acting Commissioner assessed a total civil penalty of $9,000, of which $6,000 was due and payable and the remaining $3,000 was suspended contingent upon Mr. Fusco's compliance with the terms and conditions of the 1997 Commissioner Order (see id.).

Other than paying the payable portion of the civil penalty assessed by the 1997 Commissioner Order (that is, $6,000), Mr. Fusco did not comply with the 1997 Commissioner Order (see Mintzer Aff., ¶¶ 23-24). Upon Mr. Fusco's death, the property passed to respondent Grace Fusco, who thereafter conveyed the property to respondent LLC, the current owner of the site (see Summary Report at 3, Finding of Fact No. 3). In 2014, both respondents LLC and Grace Fusco entered into the 2014 Consent Order. Respondent Grace Fusco signed the 2014 Consent Order in her individual capacity and as a member of respondent LLC (see id., Finding of Fact No. 4). At the time of the 2014 Consent Order, the conditions at the site remained

substantially the same as they were at the time of the 1997 Commissioner Order: the un-permitted building foundation remained in place at the site, and site remediation had not been done (see 2014 Consent Order at 3, ¶¶ 15-18).

The 2014 Consent Order required that "[r]espondent LLC shall carry out its obligations set forth in the attached Schedule of Compliance," id. at 5, ¶ I [entitled "Schedule of Compliance"]), and "[r]espondent LLC is assessed a civil penalty in the amount of Eleven Thousand ($11,000) Dollars," comprised of:

a) the $3,000 that had been suspended under the 1997 Commissioner Order; and
b) $8,000 for violation of the 1997 Commissioner Order.

The entire $11,000 penalty assessed in the 2014 Consent Order, however, was suspended contingent on respondents' compliance with the terms of that Order (see id. at 5, ¶ II. [entitled "Penalty"] A & B).

The schedule of compliance in the 2014 Consent Order provided that, within 90 days of the effective date of the Order, "Respondent" may submit a permit application for the Site to the Department (see id. at 10, Schedule A, Schedule of Compliance [Schedule of Compliance], ¶ 3 [underline added]). If "Respondent" did not submit a permit application within that time frame, however, respondent was required to "immediately comply with" paragraphs 8-10 of the schedule of compliance including, among other things, submitting a survey and removal plan for the site, removing the foundation and fill, complete planting of appropriate vegetation, and providing information and various notifications to the Department (see Schedule of Compliance ¶¶ 4, 8-10).

Although the Schedule of Compliance itself did not specify the "Respondent" to which its provisions apply, the language in the body of the 2014 Consent Order clearly requires only respondent LLC to implement the activities set forth in the Schedule of Compliance (see 2014 Consent Order at 5, ¶ I ["Respondent LLC shall carry out its obligations set forth in the attached Schedule of Compliance"]). The 2014 Consent Order and its Schedule of Compliance did not direct respondent Grace Fusco individually to implement anything.

The 2014 Consent Order contained additional timing provisions that are relevant to this proceeding. Under the 2014 Consent Order,

- If respondent chooses to apply for a permit, but the Department determines that the application is incomplete, respondent has 30 days after receipt of a notice of incomplete application (NOIA) to respond to the NOIA (see Schedule of Compliance ¶ 5);

- If respondent fails to submit a response to the NOIA within 30 days of receiving it, or if the Department determines that the application is still incomplete following receipt of respondent's response to the NOIA, the Department shall submit a written "final request" for missing or incomplete items, and respondent shall respond to such request within 30 days. If respondent fails or refuses to submit any incomplete or

missing items or materials within that time frame, respondent is required to "immediately comply with" paragraphs 8-10 of the Schedule of Compliance (see Schedule of Compliance ¶ 6);

- Respondent has 30 days after receiving written notice from the Department that respondent is in violation of the 2014 Consent Order to cure such violation. If respondent fails to cure "within 30 days of actual receipt of such notice," respondent must pay the entire $11,000 penalty assessed under the 2014 Consent Order (see 2014 Consent Order at 5, ¶ II).

Liability

I concur with the ALJ's determination that Department staff is not entitled to judgment with respect to respondent Grace Fusco. The relevant terms of the 2014 Consent Order apply only to respondent LLC, and do not impose on respondent Grace Fusco individually the obligation to implement the Schedule of Compliance or to pay the civil penalty imposed in the Order (see 2014 Consent Order at 5, ¶ I ["Respondent LLC shall carry out its obligations set forth in the attached schedule of compliance"]; see also id. ¶ II [assessing the civil penalty only against respondent LLC, and providing that respondent LLC has 30 days to cure violations of the order and, if not cured, respondent LLC is to pay the entire penalty]). Because respondent Grace Fusco is not individually liable under the 2014 Consent Order, the claims against her individually should be dismissed.

I also concur with the ALJ's conclusion that respondent LLC violated the 2014 Consent Order, and Department staff is entitled to judgment on its cause of action. Under the 2014 Consent Order, respondent LLC had the option of submitting a permit application to the Department within 90 days of the effective date of the 2014 Consent Order. As the ALJ found, the effective date of the 2014 Consent Order was December 22, 2014, and the due date for submission of a permit application was thus Monday, March 23, 2015 (see 2014 Consent Order at 7; see also Summary Report at 3, Finding of Fact No. 6).

Because respondent LLC did not submit a permit application within 90 days of the effective date of the 2014 Consent Order, respondent LLC was required to comply with paragraphs 8-10 of the schedule of compliance "immediately" (see Schedule of Compliance ¶ 4). Respondent's election not to submit a permit application within 90 days of the effective date of the 2014 Consent Order was not a violation of the 2014 Consent Order. Upon passage of that permit application deadline, however, respondent's failure to comply immediately with paragraphs 8-10 of the schedule of compliance was a violation of the 2014 Consent Order.

Department staff sent respondents a notice of noncompliance dated April 10, 2015, stating that, pursuant to paragraph 4 of the schedule of compliance, respondent LLC was required to comply immediately with paragraphs 8-10 of the schedule of compliance (see Mintzer Aff., Exh. G). Rather than immediately comply with paragraphs 8-10, however, respondent LLC submitted a permit application on May 8, 2015. I agree with the ALJ that respondent could not "cure" its violation of paragraph 4 of the schedule of compliance by

submitting a permit application at that point in time (see Summary Report at 7). The only "cure" available to respondent was to comply "immediately" with paragraphs 8-10.

Staff nevertheless accepted and considered respondent LLC's untimely permit application, and sent a notice of incomplete application to respondent LLC on May 21, 2015 (see id. at 7-8; see also id. at 4, Finding of Fact No. 9; Affidavit of Tamara A. Greco in Support of Motion for an Order Without a Hearing, sworn to October 7, 2015 [Greco Aff.], Exh. C). After receiving no response to the NOIA, staff, pursuant to ¶ 6 of the schedule of compliance, sent a "final request" to respondents on August 3, 2015, identifying materials needed to complete the application (see Greco Aff., ¶ 17; see also Mintzer Aff., ¶ 47).

Respondent LLC submitted some materials in response to staff's "final request" (see Greco Aff., Exh. D), but respondent's application remained incomplete in several critical respects (see Mintzer Aff., Exh. K [letter dated September 28, 2015]). Department staff stated that, because respondent's application was incomplete even after staff's August 3, 2015 "final request," respondent was required to immediately implement paragraphs 8-10 of the schedule of compliance (see id.).

In a letter also dated September 28, 2015, respondents claimed that staff's September 28, 2015 letter was the "final request" triggering another 30-day period during which respondent could make an additional submission (see Mintzer Aff., Exh. L [letter submitted by attorney Jeremy Panzella on behalf of respondents]). I agree with the ALJ's conclusion that staff's August 3, 2015 letter – which clearly stated that it was staff's "final request" under paragraph 6 of the schedule of compliance – was indeed staff's "final request" (see Summary Report at 10-11). Because respondent LLC failed to complete its application within 30 days after receipt of staff's "final request," respondent LLC was required to comply with paragraphs 8-10 of the schedule of compliance.

The record establishes that respondent LLC has not complied with paragraphs 8-10 of the schedule of compliance, and is in violation of the 2014 Consent Order. Department staff is entitled to judgment on its cause of action.[2]

Civil Penalty

Department staff seeks a civil penalty of "no less than $15,000" (Mintzer Aff. at 13 [Wherefore Clause (¶ 2)]; see also Mintzer Aff. second numbered ¶ 60). Staff states that respondents are liable for a civil penalty of up to eleven thousand dollars ($11,000) for each violation of the 2014 Consent Order, "in addition to the $11,000 civil penalty that was formerly suspended by the 2014 Consent Order and is now due" (Mintzer Aff. first numbered ¶ 61

[2] I note that respondent LLC's most recent permit-related submissions state that no portion of the site of the proposed action, or lands adjoining the proposed action, contain wetlands, or would physically alter or encroach into an existing wetland (see Greco Aff. Exh. D, Short Environmental Assessment Form [submitted by respondent LLC], at 2, ¶¶ 13[a] and [b]). Respondent's position is without merit, and is directly contrary to the FWAB determination more than twenty years ago that the site was properly designated as a freshwater wetland.

[emphasis added]). Department staff also cites the Department's Civil Penalty Policy and Order on Consent Enforcement Policy in support of its requested penalty.

ECL 71-2303(1) provides:

> "Any person who violates, disobeys or disregards any provision of article twenty-four … or any … order issued pursuant thereto, shall be liable … for a civil penalty of not to exceed eleven thousand dollars for **every such** violation" (emphasis added).

Respondent LLC violated the 2014 Consent Order, including at least three separate provisions in the schedule of compliance to that order. These multiple violations of the schedule of compliance alone would each trigger a civil penalty of not to exceed eleven thousand dollars (see Matter of Bradley Corporate Park, Decision and Order of the Commissioner, January 21, 2004, at 2), and would aggregate to a total penalty that is higher than the total penalty that is referenced in the summary report (see Summary Report at 13).

Under the 2014 Consent Order, respondent LLC was assessed a civil penalty in the amount of eleven thousand dollars ($11,000), consisting of the suspended three thousand dollars ($3,000) under the 1997 Commissioner Order and a civil penalty of eight thousand dollars ($8,000) for subsequent violations of the 1997 Commissioner Order. No penalty was assessed against Grace Fusco. The civil penalty was suspended contingent upon compliance with the terms of the 2014 Consent Order.

In addition to reinstatement of the previously suspended civil penalty of eleven thousand dollars ($11,000), staff is requesting a civil penalty of fifteen thousand dollars ($15,000) for violations of the 2014 Consent Order, which would include respondent LLC's violation of various provisions of the schedule of compliance to the 2014 Consent Order.

Staff's request is authorized and is supported by the record. I am hereby directing respondent LLC to pay a total of twenty-six thousand dollars ($26,000), which includes eleven thousand dollars ($11,000) for the civil penalties suspended by the 2014 Consent Order and fifteen thousand dollars ($15,000) for respondent LLC's violations of the 2014 Consent Order.

Remedial Relief

I agree with the ALJ's recommendations with respect to implementing paragraphs 8-10 of the schedule of compliance in the 2014 Consent Order (see Summary Report at 13). Within sixty (60) days of service of this order on respondents, respondent LLC shall submit to Department staff for its approval a site survey and a removal plan, as set forth in paragraph 8 of the schedule of compliance. The removal plan must be in approvable form such that it can be approved by Department staff with only minimal revision.

Respondent LLC shall complete all removal work in accordance with a Department-approved removal plan within one hundred twenty (120) days of the Department's approval of the removal plan.

Respondent LLC is also required to comply with the planting requirements set forth in paragraph 9 of the schedule of compliance, with the following change: plantings are to be completed between March 15, 2018 and May 15, 2018 at a time after completion of the removal plan, rather than after "acceptance" of the removal plan by the Department (see Summary Report at 13).

Finally, respondent must comply with the monitoring and notification requirements set forth in paragraph 10 of the schedule of compliance.

Department staff may modify any of the time frames for remedial relief set forth in this order or in the approved remedial plan upon good cause shown by respondent LLC. Any request by respondent LLC to modify the time frames must be submitted to Department staff in writing, and is to include an explanation of the reasons for the request.

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

I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12(a) is granted with respect to respondent Block 7346 Lot 1, LLC. Respondent Block 7346 Lot 1, LLC is adjudged to have violated Order on Consent No. R2-20110824-333 and ECL 24-0703(1) at property it owns located on Englewood Avenue, Richmond County, New York, designated as Tax Block 7346, Lot 1.

II. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12(a) is denied with respect to respondent Grace M. Fusco individually, and the claims against Ms. Fusco individually are dismissed.

III. Respondent Block 7346 Lot 1, LLC is directed to comply with paragraphs 8, 9 and 10 of Schedule A, the Schedule of Compliance, of Order on Consent No. R2-20110824-333 (Schedule of Compliance), as follows:

A. Within sixty (60) days of service of this order upon respondent Block 7346 Lot 1, LLC, respondent shall submit to the Department for its approval a site survey and a removal plan that incorporates the removal, remedial, and notification requirements set forth in paragraphs 8, 9 and 10 of the Schedule of Compliance;

B. Within one hundred twenty (120) days of the Department's approval of the removal plan submitted by respondent Block 7346 Lot 1, LLC pursuant to paragraph II.A of this order, respondent Block 7346 Lot 1, LLC shall complete all of the removal work in accordance with the plan approved by the Department;

C. Respondent Block 7346 Lot 1, LLC shall complete all the planting requirements set forth in paragraph 9 of the Schedule of Compliance between March 15, 2018 and May 15, 2018 after completion of the removal plan;

D. Respondent Block 7346 Lot 1, LLC shall comply with the monitoring and notice requirements set forth in paragraph 10 of the Schedule of Compliance; and

E. Department staff may modify any of the time frames for remedial relief set forth in this order or in the approved remedial plan upon good cause shown by respondent LLC. Any request by respondent LLC to modify the time frames must be submitted to Department staff in writing, and is to include an explanation of the reasons for the request.

IV. Within thirty (30) days of service of this order on respondent Block 7346 Lot 1, LLC, respondent shall submit to the Department a certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation in the amount of twenty-six thousand dollars ($26,000). This amount includes:

(A) the civil penalty of eleven thousand dollars ($11,000) relating to the 1997 Commissioner Order that had been suspended under the 2014 Consent Order, and

(B) the assessment of a civil penalty in the amount of fifteen thousand dollars ($15,000) for respondent's multiple violations of the 2014 Consent Order.

V. The submissions required by this order and the Schedule of Compliance, and the penalty payment, shall be sent to the following address:

NYS Department of Environmental Conservation
Office of General Counsel, Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, NY 11101
Attn: Karen L. Mintzer, Esq., Regional Attorney

VI. Any questions or other correspondence regarding this order shall also be addressed to Karen L. Mintzer, Esq. at the address referenced in paragraph V of this order.

VII. The provisions, terms and conditions of this order shall bind respondent Block 7346 Lot 1, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: October 17, 2017
Albany, New York

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

SUMMARY REPORT

NYSDEC File No.
R2-20110824-333

- by -

BLOCK 7346 LOT 1, LLC,

- and -

GRACE M. FUSCO,
Individually and as President and
Managing Member of Block 7346 Lot 1, LLC,

Respondents.

PROCEEDINGS

This summary report addresses a motion for order without hearing (motion), filed with the Office of Hearings and Mediation Services by staff of the New York State Department of Environmental Conservation (DEC or Department) under cover letter dated November 4, 2015.[1] The matter was assigned to me on November 18, 2015.

Pursuant to section 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), staff may serve a motion for order without hearing in lieu of or in addition to a complaint. Here, staff served the motion on respondents in lieu of a notice of hearing and complaint. As authorized by 6 NYCRR 622.3(a)(3) and 622.12(a), staff served the motion by certified mail.

By its motion, Department staff alleges that respondent Block 7346 Lot 1, LLC (respondent LLC), and respondent Grace M. Fusco (respondent Fusco) violated the freshwater wetlands law at a site (site) located on Englewood Road in Richmond County (Staten Island). Specifically, staff alleges that respondents violated provisions of a 2014 order on consent and New York State Environmental Conservation Law (ECL) § 24-0703(1).

---

[1] Staff served the motion on respondents on October 9, 2015. The motion was received by respondent Fusco on October 10, 2015 and by respondent Block 7346 Lot 1, LLC on October 13, 2015 (see affirmation of service of Grace H. Nam, dated November 4, 2015 [with attached USPS tracking information]).

In support of its motion, Department staff filed an affirmation of Karen L. Mintzer, Esq. (Mintzer affirmation), Regional Attorney, DEC Region 2, dated October 8, 2015. Attached to the Mintzer affirmation are several exhibits, including:

- an order on consent executed by respondents and the Department in 2014 (2014 consent order) (exhibit F);
- a notice of noncompliance with the 2014 consent order, dated April 10, 2015 (exhibit G); and
- several items of correspondence between staff counsel and counsel for respondents (exhibits H, I, J, K, L).

Department staff also filed an affidavit of Tamara A. Greco (Greco affidavit), Environmental Analyst II, Division of Environmental Permits, DEC Region 2, sworn to October 7, 2015. Attached to the Greco affidavit are several exhibits relating to an application submitted to the Department on behalf of respondent LLC and notices from the Department advising respondent LLC that the application was incomplete.

In response to the motion, respondents filed an affirmation of Jeremy Panzella, Esq. (Panzella affirmation), counsel for respondents, dated October 26, 2015. Attached to the Panzella affirmation are an affidavit of Grace M. Fusco (Fusco affidavit), sworn to October 27, 2015 (executed both in her capacity as a member of respondent LLC and as an individual); and an affidavit of Alan Christoffersen (Christoffersen affidavit), sworn to October 27, 2015.

I note that Department staff filed a reply affirmation, dated November 4, 2015, in response to respondents' filing in opposition to the motion. Pursuant to 6 NYCRR 622.6(c)(3), filings on a motion are limited to the moving papers and responses thereto filed by other parties. Further responsive filings are not allowed without the permission of the assigned ALJ. Department staff did not request permission to file a response and, accordingly, the reply affirmation is not considered herein.

Department Staff's Allegations

By its motion, Department staff asserts a single cause of action (see Mintzer affirmation ¶¶ 59-61). Staff alleges that respondents failed to fulfill certain obligations set forth under the schedule of compliance (schedule of compliance) established under the 2014 consent order. Specifically, staff alleges that respondents violated the 2014 consent order by "their failure to immediately comply with paragraphs 8-10 of the Schedule of Compliance after failing to complete their permit application within 30 days after receipt of final written notice of missing materials in support thereof" (id. ¶ 59). Staff argues that "[r]espondents are not entitled to any additional time within which to comply with the requirements of the 2014 [Consent] Order, and must immediately comply with paragraphs 8-10 of the Schedule of Compliance" (id. ¶ 60).

Department staff requests that the Commissioner issue an order (i) holding respondents liable for violating the 2014 consent order and ECL 71-2303(1); (ii) assessing a penalty against respondents of "no less than $15,000" jointly and severally; and (iii) directing respondents "to comply with the removal and restoration requirements of paragraphs 8-10 of the [schedule of compliance] immediately" (Mintzer affirmation at 12-13).

Respondents' Position

Respondents oppose the motion and assert they have at all times complied with the provisions of the 2014 consent order (Panzella affirmation ¶¶ 8, 27, 37). Respondents also argue that liability, if any, for the violations alleged by Department staff may only be imposed against respondent LLC. This, respondents argue, is because the provisions of the 2014 consent order that are at issue in this proceeding imposed obligations only upon respondent LLC and not on respondent Fusco (Panzella affirmation ¶ 28-37).

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondents, I make the following findings of fact:

1. The site is located on Englewood Road, Richmond County, and is designated as Tax Block 7346, Lot 1 (Mintzer affirmation ¶ 5, exhibits B, F ¶ 5; Panzella affirmation ¶ 3).

2. The site contains a portion of State regulated freshwater wetland AR-10 (Mintzer affirmation ¶¶ 9-11; exhibits A [Fusco v Jorling, Freshwater Wetlands Appeals Board Order and Decision, Index No. 92-5, Nov. 8, 1994 (affirming the freshwater wetland designation at the site)], D [DEC Freshwater Wetlands Map, Richmond County, Map 3 of 4 (AR-10 is depicted in the lower left portion of the map)]).

3. Respondent LLC owns the site (Mintzer affirmation, exhibit F ¶ 5; Panzella affirmation ¶ 3).

4. Respondent Fusco executed the 2014 consent order on behalf of both respondents; signing the order both as a member of respondent LLC (Mintzer affirmation, exhibit F at 8) and as an individual (id. at 9).

5. The 2014 consent order states that respondent LLC "shall carry out its obligations" under the schedule of compliance (Mintzer affirmation, exhibit F at 5 [¶ I]). The 2014 consent order does not contain a similar provision with respect to respondent Fusco (id.).

6. The 2014 consent order affords respondent LLC the opportunity to submit a freshwater permit application to the Department within 90 days of the effective date of the order (Mintzer affirmation, exhibit F at 10 [¶ 3]). The 2014 consent order became effective on December 22, 2014 (id. at 7) and, accordingly, respondent LLC had the option to submit an application until on or before March 23, 2015.

7. Respondent LLC did not submit an application to the Department on or before March 23, 2015, but did file an application on May 8, 2015 (May 8 application) (Panzella affirmation ¶ 8 [stating respondent LLC submitted the application on May 8, 2015]; Greco affidavit ¶ 4, exhibit A).

8. Respondent LLC has not implemented paragraphs 8 to 10 of the schedule of compliance which, among other things, require removal of fill material from the site (Panzella affirmation ¶¶ 8, 26 [asserting that respondent LLC complied with the 2014 consent order by filing the May 8 application and, therefore, the provisions of paragraphs 8 to 10 are not yet enforceable]).

9. Department staff commenced a review of the May 8 application and that review included numerous communications with respondent LLC concerning deficiencies in the application that were identified by staff (see Greco affidavit ¶¶ 5-7, 13-14, 17-18, exhibits B, C, D; Mintzer affirmation ¶¶ 37-39, 43-45, 47-50, 54-55, exhibits G-L).

DISCUSSION

Summary Judgment Standard

Pursuant to 6 NYCRR 622.12(d), a contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.

Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated (see e.g. Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [holding that summary judgment is "to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted)]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [holding that summary judgment "should not be granted where there is any doubt as to the existence" of material issues of fact]).

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. Importantly, where a moving party establishes a prima facie case in its favor, the burden shifts to the responding party to proffer competent evidence in rebuttal (see Ramos v Howard Indus., Inc., 10 NY3d 218, 224 [2008] [stating that once the movant has "met its initial burden, in order to defeat summary judgment, [the non-moving party] must raise a triable question of fact by offering competent evidence which, if credited by the jury, is sufficient to rebut [the movant's] evidence" (internal quotation marks and citations omitted)]).

As discussed below, applying the summary judgment standard to Department staff's motion, I conclude that staff's motion for order without hearing must be denied as against respondent Fusco and granted as against respondent LLC.

Enforcement Background

The site has been the subject of long-standing disputes between the Department and the current and former owners of the site. In 1994, the Freshwater Wetlands Appeals Board

(FWAB) affirmed the freshwater wetland designation at the site after it was challenged by Pasquale Fusco,[2] a previous owner of the site (see Mintzer affirmation, exhibit A [Fusco v Jorling, FWAB Order and Decision, Index No. 92-5, Nov. 8, 1994]). In 1997, then Acting Commissioner Cahill held Pasquale Fusco liable for clearing vegetation, excavating, and constructing a foundation at the site without a permit (id. exhibit E at 1 [Matter of Fusco, Order of the Acting Commissioner, June 12, 1997]). As set forth in the Acting Commissioner's order, the foundation was constructed "on or before April 14, 1986" (id.). The foundation remains in place today and is again at issue in this proceeding.

Respondents' Obligations under the 2014 Consent Order

The cause of action set forth in Department staff's motion concerns the alleged failure of respondents to fulfill obligations set forth in the schedule of compliance that was established under the 2014 consent order (see Mintzer affirmation ¶¶ 59-60). Staff charges both respondent LLC and respondent Fusco with this violation. For the reasons set forth below, I conclude that only respondent LLC may be held liable for the violation alleged in the motion.

The 2014 consent order was signed by Grace M. Fusco, both in her capacity as a member of respondent LLC and as an individual (Mintzer affirmation, exhibit F at 8-9). Accordingly, both respondent LLC and respondent Fusco are bound by the terms of the 2014 consent order. However, where an obligation under the 2014 consent order is imposed upon only one of the respondents, only that respondent may be held liable for failing to fulfill the obligation.

The first decretal paragraph of the 2014 consent order states that "Respondent LLC shall carry out its obligations set forth in the attached [schedule of compliance] which is hereby made part of this Order" (Mintzer affirmation, exhibit F at 5 [¶ I]). Consistent with this provision, the schedule of compliance expressly imposes obligations upon respondent LLC (see id. at 11 [¶¶ 8.1, 8.2]) and makes no reference to respondent Fusco (id., at 10-13). Because the sole cause of action set forth in the motion seeks to impose liability for respondents' alleged failure to implement provisions of the schedule of compliance, and only respondent LLC is obligated to "carry out" those provisions, respondent Fusco may not be held liable as charged in the motion.

In light of the foregoing, Department staff's motion for order without hearing against respondent Fusco is denied. The remainder of this summary report will discuss the motion only in relation to respondent LLC.

Violation of Paragraph 4 of the Schedule of Compliance

Although not set forth as a cause of action in Department staff's filing on the motion, Respondent LLC has been in violation of paragraph 4 (paragraph 4 violation) of the schedule of compliance since on or about March 23, 2015, the last date on which respondent LLC could opt to file an application under the terms of the 2014 consent order (see findings of fact ¶¶ 6, 7). The paragraph 4 violation is discussed below.

[2] Pasquale Fusco was respondent Fusco's husband (see Mintzer affirmation, exhibit F ¶¶ 3-4 [2014 consent order, stating that respondent Fusco inherited the site from her husband and subsequently transferred ownership of the site to respondent LLC]).

The decretal portion of the 2014 consent order states that "[r]espondent LLC shall carry out its obligations set forth in the attached Schedule of Compliance" (2014 consent order at 5 [¶ I]). The schedule of compliance does not require respondent LLC to submit a permit application to the Department. Rather, the schedule of compliance states that, within 90 days of the effective date of the 2014 consent order, respondent LLC "may submit a permit application" (schedule of compliance ¶ 3 [emphasis supplied]). Plainly, respondent LLC was not required to submit a permit application and its failure to do so does not constitute a violation of the 2014 consent order.

In the event, however, that respondent LLC did not submit a permit application within 90 days, the schedule of compliance states that respondent LLC "shall immediately comply with paragraphs Eight (8) to Ten (10) of this Schedule of Compliance" (schedule of compliance ¶ 4 [emphasis supplied]). Among other things, paragraphs 8 to 10 of the schedule of compliance require respondent LLC to submit a removal plan (removal plan) to the Department for approval (id. ¶ 8.1). The removal plan must provide for the removal of fill material, including an existing foundation for a residential structure, from the site.

It is uncontroverted that respondent LLC did not file a permit application within 90 days of the effective date of the 2014 consent order (findings of fact ¶ 7). As noted above, this does not constitute a violation of the 2014 consent order because the order did not obligate respondent LLC to submit a permit application. It is also uncontroverted that respondent LLC failed to immediately comply with paragraphs 8 to 10 of the schedule of compliance after the date to file a permit application had passed (findings of fact ¶ 8). This failure does constitute a violation of the 2014 consent order. Having not submitted a permit application, respondent LLC was obligated under paragraph 4 of the schedule of compliance to immediately comply with paragraphs 8 to 10. These uncontroverted facts establish that respondent LLC is in violation of paragraph 4 of the schedule of compliance.

Department staff sent a notice of noncompliance (notice of noncompliance), dated April 10, 2015, to respondents (Mintzer affirmation, exhibit G). The notice of noncompliance noted the paragraph 4 violation and stated that "Respondent LLC must submit to NYSDEC a survey of the Site and removal plan" as required under paragraph 8 of the schedule of compliance (id. at 1). The notice of noncompliance further stated that if respondents did not "immediately comply with paragraphs 8 to 10 of the [the schedule of compliance], NYSDEC will pursue further enforcement" (id. at 2).[3] Notably, the notice of noncompliance did not state that respondent LLC could cure the paragraph 4 violation by submitting a permit application (id.).

[3] Department staff did not pursue the paragraph 4 violation in its motion papers, but staff did include allegations relating to the paragraph 4 violation (see Mintzer affirmation ¶¶ 32 [stating that "[i]n the event that the Respondents did not submit a permit application . . . Respondents were required to immediately comply with paragraphs 8 to 10 of the Schedule of Compliance" (citing the schedule of compliance ¶ 4)], 37 [stating that staff advised respondents' counsel in April 2015 that "Respondents had violated the 2014 Order"]).

Respondent LLC asserts that the following statement, from paragraph 32 of the Mintzer affirmation, is "demonstrably false":

> "In the event that the Respondents did not submit a permit application within 90 days of the effective date of the [2014 consent] [o]rder, Respondents were required to immediately comply with paragraphs 8-10 of the Schedule of Compliance"

(Panzella affirmation ¶ 6). Respondents argue that paragraph 32 is false because the 2014 consent order provided respondents with "30 days to cure" any "claim by [staff] that the Respondents had failed to comply with the [2014 consent order]" (id. ¶ 7).

Respondent LLC is correct that the 2014 consent order provides for 30 days to cure an alleged violation. This does not, however, render the quoted text from paragraph 32 false. As discussed above, respondent LLC had the option to submit a permit application within 90 days of the 2014 consent order but, having not done so, respondent LLC was required to comply with paragraphs 8 to 10 of the schedule of compliance.

The April 10, 2015 notice of noncompliance advised respondents' counsel that respondent LLC was in violation of the 2014 consent order. Staff further advised respondents' counsel that unless respondents "immediately comply with paragraphs 8 to 10 of [the schedule of compliance] NYSDEC will pursue further enforcement" (Mintzer affirmation, exhibit G at 2). As the notice of noncompliance makes clear, the only "cure" available to respondents was to immediately comply with paragraphs 8 to 10 of the schedule of compliance.

In reply, respondents' counsel asserted, incorrectly, that the 2014 consent order provides respondents with 30 days from the date of staff's letter to submit a permit application to the Department (Mintzer affirmation, exhibit H at 1). Although respondent LLC's position is inconsistent with the terms of the 2014 consent order, and with Department staff's demand in the notice of noncompliance, staff did not object to respondent's untimely submittal of a freshwater wetlands permit application on May 8, 2015 (id. ¶¶ 39-45; Greco affidavit ¶¶ 4-13), 47 days after the permit application was due under the terms of the 2014 consent order.

The Alleged Violation of the 2014 Consent Order

Notwithstanding the paragraph 4 violation discussed above, Department staff elected to consider respondent LLC's untimely permit application and commenced the application review process (findings of fact ¶ 9).

On May 21, 2015, as part of the application review process, Department staff issued a notice of incomplete application (NOIA) to respondent LLC (Greco affidavit ¶ 13, exhibit C). Staff did not receive a reply to the NOIA and, on August 3, 2015 staff sent respondent LLC a "final request" for the materials needed to complete the application (Mintzer affirmation ¶¶ 46-47, exhibit I). Staff alleges that respondent LLC's failure to respond to the final request within 30 days obligated respondent LLC to comply with paragraphs 8 to 10 of the schedule of compliance, and that respondent LLC's failure to do so constitutes a violation of the 2014

consent order (see id. ¶ 59 [alleging respondent LLC violated the 2014 consent order by its "failure to immediately comply with paragraphs 8-10 of the Schedule of Compliance after failing to complete their permit application within 30 days after receipt of final written notice of missing materials in support thereof"]).

Respondent LLC's counsel attempts to portray Department staff's mailing of the NOIA as inappropriate because it was not mailed to him (Panzella affirmation ¶ 10 [stating that "the alleged May 22 [sic] NOIA was curiously [not sent] to my office"]). The NOIA, however, was mailed to the person identified by respondent LLC as the "contact/agent" on the joint application form submitted to the Department (Greco affidavit ¶ 12, exhibits A, B). There is nothing "curious" about the Department's permit staff mailing an NOIA to the individual identified by an applicant as the contact point. Neither the application submitted by respondent LLC nor the 2014 consent order require that communications from the Department concerning the application be sent to respondent LLC's counsel (id.; Mintzer affirmation, exhibit F at 6 [¶ X], 10 [¶ 1] [communications provisions of the 2014 consent order]). If respondents' counsel wanted to ensure his receipt of the NOIA, or other correspondence concerning the application, he was free to direct that such communications be sent to him, either by including an appropriate provision in the 2014 consent order or by indicating same on the joint permit application form. He did neither.

I note that respondent LLC, appropriately, mailed the application to the Regional Permit Administrator, not to staff counsel (Greco affirmation, exhibit A at 1 [letter addressed to Regional Permit Administrator and indicating that it was copied only to respondent LLC]), and sent follow-up materials regarding the application to the Division of Environmental Permits without copying staff counsel (id. exhibit B at 1 [email addressed to Tamara Greco and copied only to Lauren Wohlstetter[4]]). As with communications from the Department concerning the application, I find nothing curious in how these communications from respondent LLC were transmitted.

The next issue raised by respondent LLC concerns whether it received the NOIA at or about the time that the NOIA was issued by the Department. The contact person named by respondent LLC on its joint application filed an affidavit attesting that he "ha[s] not received a 'Notice of Incomplete Application' . . . in relation to [this] matter by mail at any time" (Panzella affirmation [attached affidavit of Alan Christoffersen (Christoffersen affidavit), sworn to October 27, 2015, ¶ 1]). Although the Christoffersen affidavit denies receipt of the NOIA, it does not provide any basis to question whether the Department mailed the NOIA to respondent LLC. Moreover, the Christoffersen affidavit acknowledges that Mr. Christoffersen is "listed as the Contact/Agent" on respondent LLC's joint application form and confirms that his mailing address on the application is correct (id.).

With its motion, Department staff filed the affidavit of Tamara A. Greco. Ms. Greco attests that, as part of her regular duties with the Department, she reviews permit applications and processes permits (Greco affidavit ¶ 3). She further attests that she reviewed respondent LLC's application, consulted with Department staff, and determined that the application was

[4] Ms. Wohlstetter works in the office of respondent LLC's counsel (see Panzella affirmation [attached affidavit of service of Ms. Wohlstetter]).

incomplete (id. ¶¶ 4-11). Additionally, Ms. Greco attests that she prepared the NOIA "and sent it by mail on May 21, 2015 to Alan Christoffersen at the address set forth in the application" (id. ¶ 13; see also id. exhibit C [copy of the NOIA]).

I conclude that the Greco affidavit creates a presumption that the NOIA was received by Mr. Christoffersen (see e.g. Matter of Rodriguez v Wing, 673 NYS2d 734, 735 [2d Dept 1998][stating that "[a]s a general rule of evidence, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee" (internal quotation marks and citations omitted)]). Further, respondent LLC's mere denial of receipt, as set forth in the Christoffersen affidavit, is not sufficient to rebut the presumption of delivery (see e.g. Kihl v Pfeffer, 94 NY2d 118, 122 [1999][holding that an affiant's "mere denial of receipt is not enough to rebut this presumption"]; Rodriguez at 736 [holding that "the conclusory assertions of the petitioner of lack of receipt were insufficient to rebut the presumption of mailing" (citations omitted)]). Accordingly, I hold that the NOIA was received by respondent LLC.

By letter dated August 3, 2015 (August 3 letter), Department staff sent respondent LLC another request for the information that had been requested under the NOIA (Mintzer affirmation ¶ 47, exhibit I [August 3 letter enclosing a copy of the NOIA]). The August 3 letter expressly states that "this letter constitutes the final request" for the missing information and that, if respondent LLC did not provide the requested information within 30 days, "[respondent LLC] shall immediately comply with paragraphs 8 through 10 of the Schedule of Compliance" (id. exhibit I). Counsel for respondent LLC acknowledged receipt of the August 3 letter on that same day (id. exhibit J).

In response to the August 3 letter, respondent LLC submitted additional application materials under cover letter dated September 1, 2015 (September 1 reply) (see Greco affidavit exhibit D). By letter dated September 28, 2015 (September 28 letter), Department staff advised respondent LLC that the application remained incomplete for numerous reasons (Mintzer affirmation, exhibit K at 1-2 [enumerating eight deficiencies in the application]). The September 28 letter invokes paragraph 6 of the schedule of compliance and states that respondent LLC "must immediately comply with paragraphs 8 through 10 [of the schedule of compliance]" (id. at 2).

In response to the September 28 letter, respondent LLC advised that, despite the express language in the August 3 letter, it considered the September 28 letter to be the "'final' notice" required under the 2014 consent order and, therefore, respondent LLC argued that it "ha[d] 30 days to reply to [the September 28 letter]" (Mintzer affirmation, exhibit L at 2). As of October 26, 2015, the date of respondent LLC's affirmation in opposition to staff's motion, respondent LLC had not submitted a reply to the September 28 letter (Panzella affirmation ¶ 26). Rather, respondent LLC argues that it "had, and continues to have, until at least October 28, 2015 to respond to the final notice of an incomplete response to the NOIA" (id.).[5]

[5] Although respondent LLC argues that it had "until at least October 28, 2015 to respond to the final notice," respondent does not state that it has responded or that it will respond. This is surprising given that respondent LLC had until at least October 30, 2015 to respond to the motion for order without hearing (see n 1, supra [noting that the first respondent to receive the motion received it on October 10,

Because I hold that the August 3 letter constitutes the final written notice required under the 2014 consent order, respondent LLC was obligated under the 2014 consent order to submit the missing or incomplete application materials requested by staff (Mintzer affirmation, exhibit F at 10 [¶ 6]). Department staff alleges that respondent LLC failed to meet this obligation and, therefore, was required to immediately comply with paragraphs 8 to 10 of the Schedule of Compliance (Mintzer affirmation ¶ 59).

As set forth in the affidavit of Tamara Greco, Department staff asserts that the September 1 reply submitted by respondent LLC left the freshwater wetlands application woefully incomplete (Greco affidavit ¶¶ 18-23). Chief among the deficiencies identified by staff were respondent LLC's denial of the existence of freshwater wetlands at or near the site, failure to provide detailed site plans, and failure to demarcate the wetland boundaries on site plans (id.). Staff also alleges that the site plans submitted by respondent LLC failed to depict (i) the location or dimensions of accessory structures and utility connections, (ii) cross-sections of the site, (iii) existing and final grades, (iv) mechanisms to maintain the wetland water balance, and (v) erosion control measures (id. ¶ 23).

Respondent LLC does not refute Department staff's allegations regarding the deficiencies of the freshwater wetland application. Rather, respondent LLC asserts that it has additional time under the terms of the 2014 consent order to complete the application (Panzella affirmation ¶¶ 23-26). As discussed above, I reject respondent LLC's position that the August 3 letter does not constitute final written notice under the provisions of the 2014 consent order. Accordingly, staff's allegations concerning the continuing deficiencies of the freshwater wetlands application are unrefuted.

Finally, Department staff alleges that respondent LLC has not implemented paragraphs 8 to 10 of the schedule of compliance (Mintzer affirmation ¶¶ 14-15, 28, 36, 59; see also Greco affidavit exhibit D, Short Environmental Assessment Form at 1 [signed by respondent LLC's representative and stating that a "custom home" will be built using the "existing foundation" at the site]; photographs at 5-6 [photograph submitted by respondent LLC and labeled "Existing Foundation East"]). Again, respondent LLC does not refute staff's allegation, but argues that it has more time to correct the deficiencies in the freshwater wetlands application (Panzella affirmation ¶¶ 23-26).

It is the alleged failure to comply with paragraphs 8 to 10 that underlies the cause of action charged by Department staff (Mintzer affirmation ¶ 59-60). As discussed above, I hold that staff's August 3 letter constitutes the final written notice required under the 2014 consent order. I further hold that respondent LLC's September 1 reply failed to cure the deficiencies identified by staff in respondent LLC's freshwater wetlands application. Accordingly, respondent did not timely cure the deficiencies in its freshwater wetlands application and, pursuant to paragraph 6 of the schedule of compliance, respondent LLC was required to immediately comply with paragraphs 8 to 10 of the schedule of compliance. Among other things, paragraphs 8 to 10 require that respondent LLC submit to the Department for approval a

---

2015]; 6 NYCRR 622.12[c][providing 20 days from receipt of a motion for order without hearing for the filing of a response]).

removal plan to remove the existing foundation and other fill at the site. Respondent did not file a removal plan with the Department and, therefore, is in violation of the 2014 consent order.

Respondent LLC's freshwater wetlands application remains woefully incomplete. It is simply inexcusable that respondent LLC's application still does not include project plans that depict the freshwater wetland boundary, particularly in light of the regulatory history of the site (see supra at 4-5). Respondent LLC's failure to acknowledge that freshwater wetlands exist on the site demonstrates the futility of affording respondent LLC another opportunity to correct the deficiencies in its May 8 application.

The Department's application procedures for the freshwater wetlands permit program, which respondent LLC should have familiarized itself with prior to filing the May 8 application, expressly state that the application must include:

"**Project Plans:**

- Draw project plans at a scale of 1" = 50' or larger, including topography at a contour interval prescribed by the DEC Regional Permits Office.
- The plan must show existing conditions and the work to be performed.
- The wetlands boundary verified by DEC staff must also be shown on the plans.
- The extent of all fills or excavations and the dimensions of all proposed buildings or structures must be shown on the plans.
- If a septic system is part of the proposed project, the plan must show the location of the system including the test hole location and data and the elevation of the system above seasonal high ground water.
- Refer to Sample Plans (PDF) [hyperlink] (4 MB) available on the Department's website page"

(http://www.dec.ny.gov/permits/6277.html [accessed July 8, 2016]). As indicated by the final bullet item, the application procedures include a hyperlink to sample freshwater wetland project site plans (id.).

Even with this explicit guidance from the Department, respondent LLC failed to demarcate the location of freshwater wetland AR-10 on the project plan submitted with the application (see Greco affidavit ¶ 14.i, exhibits A, B). As discussed previously, on May 21, 2015, Department staff sent a notice of incomplete application to the contact person identified in the application. Among other things, the NOIA identified several deficiencies in the project plan submitted by respondent LLC. These deficiencies generally related to the lack of detail included in the project plan and expressly advised applicant that the plan must depict the "Wetland Boundary" and "[p]rovide details concerning the origin of this information" (Greco affidavit, exhibit C at 2).

Notwithstanding the express directive contained in the NOIA issued by the Department, respondent LLC failed to demarcate the wetland boundary in its response to the NOIA (see Greco affidavit ¶ 23.h). Specifically, the project plan that respondent LLC submitted with the September 1 reply does not depict any wetland boundary at the site (see id., exhibit D [attached

project site plan, entitled "Preliminary Site Diag."]). Moreover, in its September 1 reply, applicant LLC now affirmatively denies the existence of freshwater wetlands on the project site (id. exhibit D [attached Short Environmental Assessment Form, Part 1, items 13, 14; attached "Additional information" sheet, item 6]).

The NOIA identifies several other deficiencies in respondent LLC's application, the majority of which remained unaddressed in the September 1 reply. Among these deficiencies were respondent LLC's failure to: provide two sets of cross sections through the proposed development (Greco affidavit, exhibit C at 2 [item 2]); depict final grades for all homes and lots (id. [item 3]); show the location of all catch basins, yard drains, and stabilization of the existing wetland system (id. [item 5]); show how the project will maintain the water balance to the wetland (id. [item 6]); and depict the location of erosion controls to protect the wetlands (id. [item 8]). The September 1 reply failed to remedy any of these deficiencies (see Greco affidavit ¶ 23.b, c, d, e, g; exhibit D).

Under the terms of the consent order, respondent LLC had the option of submitting an application for a freshwater wetlands permit to the Department within 90 days of the effective date of the consent order. The consent order became effective on December 22, 2014 and, therefore, if respondent LLC opted to pursue a freshwater wetland permit, it was required to submit the permit application on or before March 23, 2015. Respondent LLC did not timely submit a permit application and, when respondent LLC did submit the permit application, the application was grossly deficient. The September 1 reply, which was submitted to the Department more than 250 days after the consent order became effective and more than 160 after the deadline for submission of a permit application, now expressly denies the very existence of freshwater wetlands on the site.

On this record, I conclude that requiring further proceedings in this matter to afford respondent LLC yet another opportunity to cure the long-standing and gross deficiencies in its May 8 application would be an exercise in futility.

Relief

Department staff requests that the Commissioner issue an order (i) holding respondent LLC liable for the violation charged by Department staff, (ii) assessing a penalty against respondent LLC in the amount of $15,000, and (iii) requiring respondent LLC to comply with the requirements of paragraphs 8 to 10 of the schedule of compliance (Mintzer affirmation at 12-13). In support of its penalty request, Staff cites the suspended penalty due under the 2014 consent order and the provisions of ECL 71-2303(1).

The 2014 consent order provided for "settlement of Respondents' civil liability for the pre-2011 violations" described under the order (Mintzer affirmation, exhibit F ¶ 24). In settlement of those violations, respondent LLC was assessed a civil penalty in the amount of $11,000, with the entire amount suspended "provided that Respondents' [sic] strictly comply with the terms of the [2014 consent order]" (id. at 5 [¶ II.B]). As discussed herein, Department staff has established that respondent LLC has not complied with the provisions of the 2014 consent order. Accordingly, the suspended penalty is now due and payable.

Additionally, pursuant to ECL 71-2303(1):

> "Any person who violates, disobeys or disregards any provision of article twenty-four . . . or any rule or regulation . . . or order issued pursuant thereto, shall be liable to the people of the state for a civil penalty of not to exceed eleven thousand dollars for every such violation . . . In addition, the commissioner . . . shall have power . . . to direct the violator to cease his violation of the 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."

As discussed herein, Department staff has established that respondent LLC violated the 2014 consent order. For this violation the maximum statutorily authorized penalty is $11,000.

Combining the $11,000 penalty suspended under the 2014 consent order with $11,000 penalty authorized under ECL 71-2303(1), respondent LLC may be assessed a total penalty of $22,000. Given the long history of the violations at issue in this proceeding and respondent LLC's failure to address numerous deficiencies in its May 8 application, I conclude that Department staff's penalty request of $15,000 is authorized and supported by the record.

With regard to Department staff's request for corrective action, as noted above, ECL 71-2303(1) empowers the Commissioner to order that respondent LLC restore the affected freshwater wetland to its condition prior to the violation. The provisions of the 2014 consent order that Department staff seeks to enforce (i.e., paragraphs 8 to 10 of the schedule of compliance) require, inter alia, (1) the removal of fill material, including an existing foundation for a residential structure; and (2) planting of appropriate vegetation in the area disturbed by the construction of the foundation and other activities at the site (see Mintzer affirmation, exhibit F at 11-13 [¶¶ 8-10]). These provisions are consistent with restoration of the wetland to its condition prior to the violations.

I recommend that the Commissioner direct respondent LLC to implement the provisions of paragraphs 8 to 10 of the schedule of compliance. I also recommend that the Commissioner direct respondent LLC to submit the site survey and removal plan, described in paragraph 8 of the schedule of compliance, to the Department for approval within 60 days of respondent LLC's receipt of the Commissioner's order. I further recommend that the planting requirements, set forth under paragraph 9 of the schedule of compliance, be implemented after completion of the removal plan rather than after "acceptance by the Department of the removal plan" as stated in the schedule of compliance. This will avoid the possibility that the Commissioner's order would require planting to occur during ongoing removal activities.

CONCLUSIONS OF LAW

I conclude that Department staff's motion must be denied as to respondent Fusco and granted as to respondent LLC. Specifically, I conclude that respondent LLC violated the 2014

consent order by its failure to timely comply with paragraphs 8 to 10 of the schedule of compliance as required under paragraph 6 of the schedule of compliance.

RECOMMENDATION

I recommend that the Commissioner issue an order (i) holding respondent LLC liable for the violation charged by Department staff, (ii) assessing a penalty against respondent LLC in the amount of $15,000, and (iii) requiring respondent LLC to comply with the requirements of paragraphs 8 to 10 of the schedule of compliance, as modified above with respect to the planting requirements.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: October 19, 2016
Albany, New York