NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 24 and 25 of the New York Environmental Conservation Law and Parts 663 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

ARTHUR FRANCIS and
MAUREEN MICHELE FRANCIS,

Respondents.

ORDER

DEC File No.
R1-20060130-20

This administrative enforcement proceeding concerns alleged violations of the freshwater and tidal wetlands laws and regulations by respondents Arthur Francis and Maureen Michele Francis at a residential property located at 68 South Howells Point Road, Bellport, Suffolk County, New York (site).

The site, which is approximately 1.04 acres, includes a portion of New York State regulated freshwater wetland HP-3, and corresponding regulated adjacent area. Freshwater wetland HP-3 is designated as a Class I freshwater wetland, which is the most protective wetland classification. The site also includes New York State regulated tidal wetlands and corresponding regulated adjacent area. The tidal wetland adjacent area encompasses that portion of freshwater HP-3 and its adjacent area which is on the site. Staff of the New York State Department of Environmental Conservation (Department or DEC) issued a freshwater wetlands/tidal wetlands permit (DEC permit number 1-4722-02893/00001) to respondent Maureen Michele Francis in 1998. The permit, which was amended the following year, authorized construction of a single family dwelling, septic system and driveway at the site (DEC permit).

In a notice of hearing and complaint dated March 26, 2010, Department staff alleged that respondents placed fill, graded land, cleared vegetation, and constructed various structures (including two large connected patios) at the site without a permit. In addition, Department staff alleged violations relative to the construction of two brick walkways and a portion of the residence's driveway, and the installation of an oil storage tank at the rear of the residence. As a result of these unpermitted activities, staff alleged that respondents were in violation of both articles 24 (Freshwater Wetlands) and 25 (Tidal Wetlands) of the Environmental Conservation Law (ECL), and their respective implementing regulations.

Department staff, in its complaint, requested a penalty of $390,500, as well as restoration of the site. For each unlawful activity conducted on this residential property, Department staff requested a penalty under both the freshwater wetland and the tidal wetland regulatory programs.

In its closing brief, staff advised that, because it had withdrawn one of the alleged tidal wetland violations, it was reducing its penalty request to $380,500. Of the penalty amount, Department staff requested that $150,000 be suspended, pending completion of satisfactory site restoration.

The matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman who prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

The ALJ recommends that respondents jointly and severally be assessed a civil penalty of $287,000, with $150,000 suspended. As the record demonstrates, the impacts on the freshwater and tidal wetlands have caused significant impairment or loss of these environmental resources. Furthermore, respondents continued with their construction activities, including much of the unlawful filling and grading, even after being advised by Department staff that these activities were in violation of the law (see, e.g., Hearing Exhibits 7 [DEC tickets issued in 2003 for illegal activity] and 8 [DEC tickets issued in 2005 for illegal activity]; Hearing Transcript at 16, 19-24).

Respondents' liability for violations of the freshwater wetlands and tidal wetlands laws and regulations is clearly established on this record. While a substantial penalty is warranted in the circumstances here, I conclude that some downward adjustment of the recommended penalty is warranted to account for the fact that the same activities led to both the freshwater wetland and tidal wetland violations. Accordingly, based on this consideration and the record of this proceeding, I am assessing a civil penalty of $220,000.

Department staff is requesting that respondents implement a restoration plan for the site. Both the freshwater and tidal wetlands enforcement policies make clear that the Department's primary objective in enforcement is the restoration of wetlands adversely affected by unlawful acts (see Freshwater Wetlands Enforcement Policy, Commissioner Policy DEE-6, Feb. 4, 1992, § I [stating that "seeking restoration of wetland benefits and functions lost as the result of illegal activity" is the "primary goal" of the enforcement policy]; Tidal Wetlands Enforcement Policy, Commissioner Policy DEE-7, Feb. 8, 1990, § III [listing restoration as the first goal of enforcement]). The restoration plan, which includes among other things the removal of fill from wetland and adjacent areas, removal of certain structures, and undertaking specified plantings, is authorized and appropriate.

Because of the cost of the restoration work that respondents are being directed to undertake and in consideration of Department policy regarding wetland restoration, I am suspending $120,000 of the civil penalty, contingent upon respondents' implementation of the required restoration plan to Department staff's satisfaction and compliance with all other terms of the Commissioner's order. The unsuspended portion of the penalty ($100,000) shall be due and payable within sixty (60) days of the service of this order upon respondents.

To ensure the timely progress of the restoration, I am also directing that the restoration plan include a schedule of completion dates for the restoration tasks.

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

I. Respondents Arthur Francis and Maureen Michele Francis are adjudged to have violated the following provisions of the freshwater wetlands law and regulations:

a. ECL 24-0701 and 6 NYCRR 663.4(d)(20), by placing fill in freshwater wetland HP-3 and its adjacent area at the site without a permit;

b. ECL 24-0701 and 6 NYCRR 663.4(d)(23), by clearing vegetation in freshwater wetland HP-3 and its adjacent area at the site without a permit;

c. ECL 24-0701 and 6 NYCRR 663.4(d)(25), by grading land in freshwater wetland HP-3 and its adjacent area at the site without a permit; and

d. ECL 24-0701 and 6 NYCRR 663.4(d)(42), by constructing or placing: (1) a 66' by 30' deck/patio; (2) a 20' by 10' patio; (3) a driveway 15' closer to the wetland boundary than was authorized; (4) a 6' by 8' shed; (5) an 8' by 12' shed; (6) a kayak rack; and (7) two brick walkways in the adjacent area of freshwater wetland HP-3 at the site without a permit.

II. Respondents Arthur Francis and Maureen Michele Francis are adjudged to have violated the following provisions of the tidal wetlands law and regulations:

a. ECL 25-0401 and 6 NYCRR 661.5(b)(30), by placing fill in a tidal wetland adjacent area at the site without a permit;

b. ECL 25-0401 and 6 NYCRR 6 NYCRR 661.8, by clearing vegetation in a tidal wetland adjacent area at the site without a permit;

c. ECL 25-0401 and 6 NYCRR 6 NYCRR 661.8, by grading land in a tidal wetland adjacent area at the site without a permit; and

d. ECL 25-0401 and 6 NYCRR 661.5(b)(49), by constructing or placing: (1) a 66' by 30' deck/patio; (2) a 20' by 10' patio; (3) a driveway 15' closer to the wetland boundary than was authorized; (4) a 6' by 8' shed; (5) an 8' by 12' shed; (6) a kayak rack; and (7) two brick walkways in a tidal wetland adjacent area at the site without a permit.

III. Respondents Arthur Francis and Maureen Michele Francis are jointly and severally assessed a civil penalty in the amount of two hundred twenty thousand dollars ($220,000). One hundred twenty thousand dollars ($120,000) shall be suspended provided that respondents implement, to the satisfaction of Department staff, the restoration plan set forth in paragraph IV of this order and comply with all other terms of this order. The unsuspended portion of the penalty, that is, one hundred thousand dollars ($100,000), shall be due and payable within sixty (60) days after service of this order upon respondents. Payment shall be made in the form of a

cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Kari E. Wilkinson, Esq.
Assistant Regional Attorney, Region 1
New York State Department of Environmental Conservation
50 Circle Road
Stony Brook, New York 11790

If respondents fail to comply with any of the terms of this order, including but not limited to the timely payment of the non-suspended portion of the civil penalty, the submission of the restoration plan no later than sixty (60) days after service of this order upon them, or the satisfactory implementation of the restoration plan, the suspended portion of the penalty (that is, one hundred twenty thousand dollars [$120,000]) shall immediately become due and payable and shall be submitted to Department staff in the same form and to the same address as the non-suspended portion of the penalty.

IV. No later than sixty (60) days after service of this order upon respondents, respondents are directed to submit an approvable (i.e., approvable as written or with only minimal revision) restoration plan to Department staff for its review and approval. Respondents' plan shall, at a minimum, provide for:

a. removal of all fill located in the freshwater wetland or located in the natural buffer area established under special condition #9 of DEC permit number 1-4722-02893/00001, which extends 35 feet from the freshwater wetland boundary (DEC permit buffer area). The fill must be removed to a location approved by Department staff;

b. removal of all structures located in either the freshwater wetland or the DEC permit buffer area;

c. removal of any oil tank located at the rear of the dwelling;

d. installation of a fence on the landward boundary of the DEC permit buffer area;

e. planting, within the freshwater wetland at the site, 6' by 10' tall tupelo and white birch trees on 15' centers, and 4' to 6' tall bayberry or Baccharis halimifolia on 6' centers, with an 85% survival rate after five years; and

f. planting, within the DEC permit buffer area, 8' by 10' tall red maple, silver maple, and red oak trees on 15' centers, and 3' to 4' tall sweet pepper bush and highbush blueberry on 6' centers, with an 85% survival rate after five years.

The restoration plan shall also include an as-built scalable survey of the site by a licensed land surveyor and a schedule of dates for the completion of the aforementioned tasks. Department

staff and respondents may modify these restoration tasks if they mutually agree to the modifications. Following approval of the plan, Department staff shall notify respondents in writing.

V. Respondents shall notify Department staff, by certified mail or such other means as may be agreed to by Department staff, at least seven (7) days prior to the date of commencement of the work under the approved restoration plan. Within seven (7) days of the completion of all work required under the restoration plan, respondents shall submit a report, including photographs, to Department staff documenting that respondents have completed all the restoration work.

VI. No later than sixty (60) days after service of this order upon respondents, respondents shall submit documentation to Department staff demonstrating, to staff's satisfaction, that any oil tank located, or to be located, at or near the front of the dwelling meets the requirements of 6 NYCRR part 614.

VII. All communications from respondents to the Department concerning this order shall be made to Kari E. Wilkinson, Esq., Assistant Regional Attorney, at the address listed in paragraph III of this order.

VIII. The provisions, terms, and conditions of this order shall bind respondents Arthur Francis and Maureen Michele Francis, their heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: April 26, 2011
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Alleged Violations of the New York State Environmental Conservation Law, Articles 24 and 25, and Parts 663 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

ARTHUR AND MAUREEN MICHELE FRANCIS,

Respondents.

DEC File No. R1-20060130-20

HEARING REPORT

- by -

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

April 7, 2011

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, both dated November 5, 2008, by certified mail, on "Arthur and Michele[1] Francis." Department staff served an amended notice of hearing and complaint, both dated March 26, 2010, by certified mail, on "Arthur and Maureen Michele Francis."[2] The complaint alleges that respondents violated numerous provisions of the freshwater wetlands and tidal wetlands laws and regulations, as well as provisions of DEC permit number 1-4722-02893/00001 (permit). Respondent Arthur Francis served an answer (Arthur Francis answer), dated June 21, 2010, wherein he generally denies staff's allegations and asserts eleven affirmative defenses. Respondent Maureen Michele Francis served an answer (Maureen Michele Francis answer), dated December 11, 2010, wherein she states that she "agrees" with the large majority of staff's allegations and asserts that she has sought to cooperate with staff to resolve this matter.[3] Staff did not object to the timeliness of either answer.

On December 14, 2010, an administrative enforcement hearing was held at the DEC Region 1 Office in Stony Brook, New York, to consider Department staff's allegations. Pursuant to section 622.9(e) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), this office provided written notice of the hearing to both respondents by letter dated March 4, 2010. The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures (6 NYCRR part 622). Staff was represented by Kari Wilkinson, Assistant Regional Attorney, DEC Region 1, who called one witness: Robert F. Marsh, Natural Resources Supervisor, DEC Region 1. Respondent Arthur Francis was represented by Damon A. Hagan, Esq. Respondent Maureen Michele Francis appeared pro se. Neither respondent called a witness.[4]

This office received the hearing transcript on January 11, 2011. In accordance with arrangements made at the close of the hearing, each party filed a closing brief on January 26, 2011. By letter dated January 26, 2011, respondent Arthur Francis filed a motion (Arthur Francis motion) to strike the closing brief filed by respondent Maureen Michele Francis. No response to this motion was filed and no party requested authorization to file a reply to the closing briefs. Accordingly, the hearing record closed on February 7, 2011, the last day upon

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[1] In the hearing record, "Michele" is frequently spelled with two l's. The spelling used throughout this hearing report, irrespective of the spelling used in source materials, is that used by respondent Maureen Michele Francis (see e.g. Maureen Michele Francis answer at 1 and 2).

[2] The 2008 and 2010 complaints appear to be identical with the exception that the respondent who is originally identified as Michele Francis is now identified as Maureen Michele Francis. Throughout this hearing report, all references to the "complaint" are to the amended complaint dated March 26, 2010.

[3] Although respondents were husband and wife at the time of the hearing, they were estranged and mounted separate defenses.

[4] In her opening statement at hearing, respondent Maureen Michele Francis stated that she would not testify (see transcript at 11). Counsel for respondent Arthur Francis later stated that he had "some questions for Ms. Francis" and noted his objection to her refusal to testify on the record (id. at 92).

which timely responses to the motion to strike could be filed (see 6 NYCRR 622.6[b][2][i]; [c][3]).

As detailed below, on the basis of the record established in this proceeding, this hearing report recommends that the Commissioner issue an order (i) adjudging respondents to be in violation of the tidal and freshwater wetlands laws and regulations, as specified below; (ii) directing respondents to develop and implement a restoration plan; and (iii) assessing a civil penalty of $287,000 jointly and severally upon the respondents, with $150,000 suspended provided that respondents comply with all terms and conditions of the Commissioner's order.

FINDINGS OF FACT

1. At all times relevant to these proceedings, respondents Arthur and Maureen Michele Francis were fee owners of property (site) located at 68 South Howells Point Road, Bellport, New York (Suffolk County Tax Map Number 0202-13-1-6.5[5]) (complaint ¶ 5; Arthur Francis answer ¶ 5; Maureen Michele Francis answer at 1; see also exhibits 5 [attached site plan], 15 [description on aerial photographs]).

2. The site includes a portion of New York State regulated freshwater wetland HP-3 and corresponding regulated adjacent area (exhibits 2, 5 [attached site plan]; transcript at 17). Approximately one-third of the land area of the site is within the freshwater wetland and most of the remainder of the site is within the regulated adjacent area (id.). Freshwater wetland HP-3 is designated by the Department as a Class I wetland (transcript at 17). Class I wetlands "provide the most critical of the State's wetland benefits" and are the most protected (see 6 NYCRR 663.5[e]).

3. The site includes New York State regulated tidal wetlands and corresponding regulated adjacent area (exhibit 3, 5 [attached site plan]; transcript at 17). The tidal wetlands at the site are classified by the Department as littoral zone and the tidal wetland boundary corresponds to the shoreline of Howells Creek[6] (exhibit 3; transcript at 17).

4. The site is approximately 1.04 acres. Along the westerly boundary of the site, approximately 0.19 acre is underwater, submerged below Howells Creek (see exhibit 5 [attached site plan]).

5. Department staff issued a freshwater wetlands and tidal wetlands permit (DEC permit number 1-4722-02893/00001, effective May 26, 1998) to respondent Maureen Michele Francis. The permit authorized construction of a single family dwelling, septic system, and driveway at the site (exhibit 4).

[5] The permit identifies the location of the project/facility as "SCTM 0202-13-1-P/O 6.2" (see exhibit 4 at 2 [location of project/facility, page one of permit]).

[6] Howells Creek is the name of this water body shown on the official New York State tidal wetlands map (exhibit 3). In the record, the creek is variously referred to as a "canal" (exhibits 5 [attached site plan], 10 at 3), a "river" (transcript at 58, 59, 63), or simply a "tidal wetland" (transcript at 17 and passim).

6. In response to the written request of respondent Maureen Michele Francis, Department staff issued an amendment to the permit on March 18, 1999. Pursuant to the amendment, the site was to be developed in accordance with the site plan stamped as approved by Department staff on March 18, 1999 (exhibit 5).

7. In or about 2001, respondents constructed a single family dwelling and driveway at the site (exhibit15).

8. In or before 2003, respondents placed fill, clear cut vegetation, graded, and constructed or placed a 66' by 30' patio, a 6' by 8' shed, and an underground oil tank at the site (exhibits 9, 10, 11, 12, 15; transcript at 21-22).

9. In or before 2005, respondents placed additional fill, graded and constructed or placed a 20' by 10' patio, an 8' by 12' shed, a kayak rack, and two brick walkways at the site (exhibits 13, 14, 15; transcript 23-24, 37-38, 41-42, 44).

10. Department staff issued Administrative Conservation Appearance Tickets (ACATs) to respondent Arthur Francis on August 31, 2003 (exhibit 7), and to respondent Maureen Michele Francis on August 19, 2005 (exhibit 8).

11. Department staff's witness, Mr. Marsh, inspected the site on January 23, 2004 (transcript at 16-17; exhibits 10, 11), and on or about December 6, 2006 (transcript at 16-17; exhibit 14).

DISCUSSION

The statutory bases for Department staff's allegations are found in articles 24 and 25 of the Environmental Conservation Law (ECL).

Section 24-0701 of the ECL provides, in part:

> "1. . . . any person desiring to conduct on freshwater wetlands . . . any of the regulated activities set forth in subdivision two of this section must obtain a permit as provided in this title.
> "2. Activities subject to regulation shall include . . . any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads . . . any form of pollution, including but not limited to, installing a septic tank . . . and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom . . . These activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland."

The foregoing ECL provisions are implemented through 6 NYCRR part 663, the freshwater wetlands permit requirements.

With regard to tidal wetlands, ECL 25-0401 provides, in part:

> "1. . . . no person may conduct any of the activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so . . .
> "2. Activities subject to regulation hereunder include . . . any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads . . . and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area."

The foregoing ECL provisions are implemented through 6 NYCRR part 661, tidal wetlands – land use regulations.

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the complaint (see 6 NYCRR 622.11[b][1]) and must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).[7]

Summary of Respondents' Positions

Respondent Maureen Michele Francis states that she "agrees" with the majority of the allegations set forth in Department staff's complaint (Maureen Michele Francis answer at 1). She does, however, deny knowledge with regard to staff's allegation regarding installation of an oil tank behind the residence (id.). With regard to the alleged violations of permit conditions, she states that respondent Arthur Francis was the contractor who undertook the work at the site (id.). Additionally, this respondent asserts that she has cooperated with staff and had agreed to a mitigation plan to resolve the matter, but that respondent Arthur Francis has refused to agree to implement the plan (id. at 2).

[7] Respondent Arthur Francis argues that, pursuant to ECL 71-0101, the provisions of the Penal Law and Criminal Procedure Law control over "matters such as [this proceeding]" and, therefore, the "same levels of proof are required" (Arthur Francis closing brief at 3). This is an erroneous reading of the law. ECL 71-0101 does not extend the reach of the Penal Law or Criminal Procedure Law to non-criminal actions or proceedings (see Penal Law § 5.10[3] [stating that the Penal Law "does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this chapter"]; CPL 1.10[1] [limiting applicability of the Penal Law "exclusively to . . . criminal actions and proceedings [and] matters of criminal procedure . . ."]). Rather, ECL 71-0101 simply states that, with some limitations, the Penal Law and Criminal Procedure Law control where criminal proceedings are brought for violations of the ECL (see e.g. ECL 71-2503[2] [providing for criminal sanctions for violations of the tidal wetlands law, as opposed to ECL 71-2503(1) which provides for administrative sanctions]).

Respondent Arthur Francis denies the vast majority of the allegations contained in the complaint (see Arthur Francis answer ¶¶ 1-112). He admits, however, that he and Maureen Michele Francis are fee owners of the site (id. ¶ 5). He also asserts 11 affirmative defenses[8] (id. ¶¶ 113-123). Pursuant to 6 NYCRR 622.11(b)(2), "the respondent bears the burden of proof regarding all affirmative defenses." Respondent Arthur Francis failed to proffer any evidence in furtherance of his affirmative defenses.[9] To the extent that any of his affirmative defenses are implicated in the arguments he advanced at hearing or in his closing brief, they are discussed below.

Respondent Arthur Francis's Post-hearing Motions

Respondent Arthur Francis moves to strike the answer and the closing brief filed by respondent Maureen Michele Francis. His principal argument is that respondent Maureen Michele Francis should not be permitted to proffer testimony in her answer and closing brief after stating on the record that she would refuse to testify (see Arthur Francis closing brief at 2 [arguing that the answer filed by respondent Maureen Michele Francis provides her "the benefit of entering testimony . . . that would otherwise have been subject to cross examination in the hearing"]; Arthur Francis motion at 1 [arguing that the closing brief filed by Maureen Michele Francis is "testimonial in nature" and "allow[s] her the opportunity to testify without having to subject herself to cross examination"]). These motions are denied.

The answer and closing brief filed by respondent Maureen Michele Francis are not sworn statements and are not evidence (see 6 NYCRR 622.2[h]; see also 5-16 Bender's New York Evidence § 16.06[1][a] ["Technically, a formal judicial admission is not evidence, but rather, an obviation of the need for offering evidence"). Accordingly, where either the answer or closing brief raise factual matters not supported elsewhere in the record, such material may not form the basis for factual findings in this proceeding. Moreover, to the extent that respondent Maureen Michele Francis's answer admits to factual allegations set forth in the complaint, such admissions are personal to her and will not be imputed to respondent Arthur Francis (see Nixon v Beacon Transp. Corp., 239 AD 830, 831 [2d Dept 1933] [stating that "[a]s to his codefendant, defendant Wilson was a witness. His admissions, whether made in a pleading or on examination, were not binding on defendant Beacon Transportation Corporation]; Basile v Huntington Utilities Fuel Corp., 60 AD2d 616, 617 [2d Dept 1977] [noting that "an admission . . . may be used only against the party who made it or against his privies in interest"]).

Respondent Arthur Francis also requests that a negative inference be drawn against respondent Maureen Michele Francis because she indicated that she was unwilling to testify. This request is largely meaningless. Respondent Maureen Michele Francis, with some qualifications, admits the allegations set forth in the complaint. Accordingly, an adverse

[8] The affirmative defenses are numbered one through twelve; however, no sixth affirmative defense is asserted.

[9] Respondent Arthur Francis did not expressly refer to any of the affirmative defenses during the hearing or in his post-hearing filings. Further, the affirmative defenses do not appear to be tailored to this proceeding and are largely boilerplate. For example, the second, fifth and tenth affirmative defenses relate to "Plaintiff's" damages. The complaint, however, does not seek damages. Rather, the monetary relief sought by the Department is in the form of statutorily authorized penalties.

inference would not alter determinations concerning her liability. Her testimony would also be unlikely to alter determinations concerning respondent Arthur Francis's liability. This is because, for the vast majority of the causes of action, respondent Arthur Francis's liability is not contingent upon any act or omission of respondent Maureen Michele Francis. Rather, with respect to all but the permit violations, staff's causes of action against respondent Arthur Francis are premised upon his admitted ownership of the site.[10]

Causes of Action

At the outset of the hearing, Department staff moved to strike, in whole or in part, certain causes of action set forth in the complaint. Respondents did not object. Accordingly, the allegation contained in staff's thirteenth cause of action concerning placement of fill in a regulated tidal wetland has been struck, the allegation concerning placement of fill in a regulated tidal wetland adjacent area remains (transcript at 8; see complaint ¶ 57). The sixteenth cause of action has been struck in its entirety (transcript at 8-9; see complaint ¶¶ 65-67). The twenty-sixth cause of action has been struck in its entirety (transcript at 9; see complaint ¶¶ 95-97). The thirty-first cause of action has been struck in its entirety (transcript at 9-10; see complaint ¶¶ 110-112).

The remaining causes of action are discussed below.

Placement of Fill

-- First and Thirteenth Causes of Action[11]

The first cause of action alleges that, on or before and after August 19, 2005,[12] respondents placed fill (19 counts) in freshwater wetland HP-3 and its adjacent area at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(20). The thirteenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents placed fill (19 counts) in a regulated tidal wetland adjacent area at the site without a permit in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Pursuant to 6 NYCRR 663.4(d)(20), the placement of fill in a freshwater wetland is designated as a "P(X)" activity, meaning that it requires a permit and is "incompatible" with a wetland and its functions and benefits. The placement of fill in a freshwater wetland adjacent area is designated as a "P(N)" activity, meaning that it too requires a permit and is "usually incompatible" with the wetland and its functions and benefits (id.). With regard to tidal

[10] The alleged permit violations account for only $500 of the $380,500 penalty sought by Department staff (see staff closing brief at 15) and, as discussed below, staff failed to prove that either respondent violated a permit condition.

[11] Where the same factual allegations give rise to causes of action under both freshwater and tidal wetlands laws or regulations, those causes of action are discussed together.

[12] Each cause of action in the complaint uses the phrase "on or before and after August 19, 2005" to indicate the time period in which the various violations occurred. Staff did not explain its use of the phrase, but August 19, 2005, corresponds to the date that a series of ACATs were issued to respondent Maureen Michele Francis (see exhibit 8).

wetlands, 6 NYCRR 661.5(b)(30) designates the placement of fill in a tidal wetland adjacent area as a "GCp" use, meaning that it requires a permit and is considered a "generally compatible" use.

The fact that fill has been placed within the freshwater wetland, its adjacent area, and the tidal wetland adjacent area at the site is not in dispute. Department staff's expert, Mr. Marsh, testified that the extent of these jurisdictional areas at the site were determined after consultation with the official freshwater and tidal wetland maps (transcript at 17-18; see also exhibits 2, 3, 5 [attached site plan]). Mr. Marsh further testified that he visited the site in January 2004 and in December 2006 and personally observed that fill had been placed in these areas (transcript at 21-28). This witness also testified that the amount of fill increased between his visits to the site in 2004 and 2006 (transcript at 25; see also exhibits 11, 14). Neither respondent proffered evidence to controvert these factual assertions nor did they challenge Mr. Marsh's testimony.

Respondent Arthur Francis argues, however, that the Department failed to "present any tangible evidence that fill was brought to the subject property [from off-site]" (Arthur Francis closing brief at 4). This respondent further argues that fill at the site may consist of excavated materials from the construction of the residence and he notes that staff admitted that this was a possibility (id.). If the fill was from on-site, this respondent argues, it "would mean that [he] was being cited nineteen times for bringing dirt to a subject property that was already there to begin with" (id.).

There is no merit to the argument that no violation ensues where fill is removed from one portion of a site and placed within a regulated wetland or adjacent area at the same site. As Department staff's witness notes, "[w]hether the fill was brought in from [off-site] or generated on site, once in the wetland the impact is the same and it doesn't matter where the fill came from" (transcript at 59). Staff's position is entirely consistent with the provisions of the Environmental Conservation Law which expressly prohibit "any form" of filling in a freshwater or tidal wetland or their respective adjacent areas without a permit, irrespective of where the fill originated (see ECL 24-0701[2], 25-0401[2]). Accordingly, a permit is required to place fill material in a freshwater wetland, its adjacent area or tidal wetland adjacent area, regardless of whether the material is from on-site or off-site.

More problematic is Department staff's allegation concerning the number of counts charged for placing fill within the jurisdictional areas. Mr. Marsh testified that staff determined the number of counts on the basis of an estimate of the number of "large truck loads" it would take to transport the amount of fill that staff observed at the site (transcript at 25). Staff determined that the area filled was about 155' by 100', or approximately 15,500 square feet, and that the depth of fill ranged from several inches to as much as four or five feet (id. at 24). Mr. Marsh testified that staff "used [an] average depth of one foot which is a rather conservative estimate," to reach its estimate of 15,500 cubic feet of fill (id.). Mr. Marsh further testified that a large truck can transport about 30 cubic yards of fill per load and, therefore, the amount of fill at the site equates to approximately the amount contained in 19 large truckloads (id. at 25). [13]

[13] Mr. Marsh testified that the "[c]ubic yardage comes out to, I think, somewhere in the neighborhood of 548, I would have to use a calculator but 19 loads of fill at 30 cubic loads, that's a large truck load" (transcript at 25). The amount of fill contained in 15,500 cubic feet equals just over 574 cubic yards; 574 cubic yards divided by truckloads of 30 cubic yards each results in 19.1 truckloads. Although Mr.

Neither respondent contested staff's calculation of the amount of fill placed at the site, nor did they contest that it would take 19 large truckloads to transport that amount of fill.

Respondent Arthur Francis argues, however, that Department staff's 19 counts "are based on a math equation [and] not any actual evidence that truck loads of dirt showed up at the property" (Arthur Francis closing brief at 4). He further argues that the evidence shows that a large foundation was excavated at the site and that "the alleged trucked in fill could be from that foundation" (id.). Mr. Marsh agrees that it is possible that fill was excavated from on-site during construction of the foundation (transcript at 58-59, 89-90), but states that the use of 30 cubic yards to determine the appropriate number of counts of fill to be charged is provided for by regulation (id. at 86-87). Neither staff nor Mr. Marsh cited a regulation in support of this assertion, and I am not aware of any such regulation.

In Department staff's closing brief, staff argues that the use of 30 cubic yards to determine the number of counts of fill is derived, not from a regulatory provision, but rather from prior decisions of the Commissioner. Specifically, staff relies on the determinations of the Commissioner in Matter of Chester Indus. Park Assoc., L.P., Decision and Order of the Commissioner, October 24, 2000, and Matter of Bradley Corporate Park (Bradley II[14]), Decision and Order of the Commissioner, January 21, 2004 (staff closing brief at 10 n 14).

In Chester, the Commissioner upheld staff's use of 25 cubic yard truckloads to determine the number of counts of fill to be charged (id., adopting Hearing Report at 5-6). In that proceeding, as is the case here, staff calculated the total volume of fill placed at the subject site by multiplying the total surface area filled by the average depth of the fill. Staff then divided the total volume of fill by 25 cubic yards, which staff's expert testified was the approximate capacity of "a large tractor-trailer of the type which might typically be used to bring fill materials to such a site" (id.). The respondents in Chester did not controvert Department staff's calculation of the amount of fill or staff's assertion regarding the fill capacity of a large truck (id., Hearing Report at 8).

In Bradley II, the filling at issue was undertaken at a 26.2 acre corporate park (see Bradley I, adopting Hearing Report at 6), where a large off-road vehicle was used to move fill at the subject site (see Bradley II at 5-6). The estimated total amount of fill at the subject site was divided by 40 cubic yards, representing the approximate capacity of the specific off-road truck that was used on-site to haul fill (id., adopting Recommended Decision at 12). At hearing, there was conflicting testimony regarding the capacity of the off-road truck that was used. The Commissioner adopted the ALJ's recommendation to use the truck capacity that was advanced by respondents because, although the testimony of both staff's witness and respondents' witness were deemed credible, staff had the burden of proof (id.).

The facts and circumstances presented in Chester are analogous to those presented here. A similar methodology was used to determine both the amount of fill and the number of counts.

Marsh's recollection of the number of cubic yards of fill at the site was incorrect, the result of the calculation he describes is, as testified, 19 truckloads.

[14] Matter of Bradley Corporate Park was a bifurcated proceeding: Matter of Bradley Corporate Park (Bradley I), Order of the Commissioner, June 18, 2001, determined liability; Bradley II determined relief.

Both in Chester and in this proceeding, the testimony of staff's witness concerning the capacity of a large truck was uncontroverted. Here, however, staff testified that a large truck would transport 30 cubic yards, rather than the 25 cubic yard capacity that was used in Chester. This difference, however, inures to the benefit of the respondents in this proceeding, resulting in fewer counts of fill. Although the truckload capacity used in Bradley II was larger than that used by staff in this proceeding, the facts and circumstances presented in Bradley II are plainly distinguishable. In Bradley II a large off-road truck was used to transport fill within a 26.2 acre corporate park and, importantly, respondents introduced credible evidence on the factual dispute over truckload capacity.

I reject respondent Arthur Francis's argument that, because the fill may have been placed in the wetlands or adjacent area as part of one project, the filling activity should be considered as one violation. As Chester and Bradley II make clear, each instance of placing fill in a wetland or adjacent area is subject to a distinct penalty, regardless of whether the fill is placed as part of a single project (see also Matter of Nieckoski v New York State Dept. of Envtl. Conservation, 215 AD2d 761, 762 [2d Dept 1995] [upholding the Department's determination to assess separate penalties for each instance that fill was placed in a tidal wetland or adjacent area at a site]).[15]

Even assuming that the approximately 574 cubic yards of fill at the site were placed within the jurisdictional areas at the time the foundation of the dwelling was excavated,[16] it is inconceivable that such a large amount of fill could have been moved in "one instance" or "one event," as suggested by respondent Arthur Francis (see transcript at 89-90). A project is not an instance. Rather, each time fill is placed in a regulated wetland or adjacent area, a violation occurs. In its calculation, staff assumed that a large capacity truck was used to place fill in the jurisdictional areas at the site. This assumption produces a conservative number of violations because other plausible means of moving large amounts of fill, such as by a small capacity truck, backhoe, bulldozer, or other earth moving machine, would only increase the number of instances and, correspondingly, the number of counts.

Under the facts and circumstances presented here, I conclude that the method used by Department staff to determine the number of counts of fill is reasonable and supported by the

[15] Notably, the ECL makes no provision for the assessment of daily civil penalties for ongoing violations of the freshwater wetlands law (see ECL 71-2303[1]; cf. ECL 71-2503[1][a] [providing for daily civil penalties]). As was testified to at hearing, a freshwater wetland area that has been filled "is no longer functioning as a fresh water wetland" (transcript at 28). To conclude that a project involving the placement of fill in a freshwater wetland, and the concomitant loss of the wetland, may be penalized only as one violation, regardless of whether one or one thousand truckloads of fill were placed in the wetland, would greatly reduce the deterrent effect of the law.

[16] This assumption is not supported by the record evidence. Per the testimony of Mr. Marsh and other evidence in the record, it is clear that a large amount of fill was placed in the jurisdictional areas well after the dwelling was constructed (see exhibit 15[A] [aerial photograph taken in 2001 depicting the dwelling already in place and vegetation over much of the area that was subsequently filled]; transcript at 25 [Mr. Marsh's testimony that additional fill was brought to the site between his site visits in 2004 and 2006]; see also exhibits 11 [photographs taken on January 23, 2004, depicting fill in the jurisdictional areas], 13 [photographs taken on August 17, 2005, depicting extensive filling and grading in the jurisdictional areas]).

record. Accordingly, staff has met its burden of proof and respondents are liable for the violations set forth under the first and thirteenth causes of action.

Clearing Vegetation

-- Second and Fourteenth Causes of Action

The second cause of action alleges that, on or before and after August 19, 2005, respondents cleared vegetation in freshwater wetland HP-3 and its adjacent area at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(23). The fourteenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents cleared vegetation in a regulated tidal wetland adjacent area at the site without a permit in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Pursuant to 6 NYCRR 663.4(d)(23), the clearing of vegetation in a freshwater wetland is designated as a "P(X)" activity, meaning that it requires a permit and is "incompatible" with a wetland and its functions and benefits. The clearing of vegetation in a freshwater wetland adjacent area is designated as a "P(N)" activity, meaning that it too requires a permit and is "usually incompatible" with the wetland and its functions and benefits (id.).

With regard to tidal wetlands, staff does not cite to a specific provision of the law or regulation that prohibits vegetative clearing. Nevertheless, 6 NYCRR 661.8 provides that a permit is required to undertake any regulated activity in a tidal wetland or adjacent area. Pursuant to 6 NYCRR 661.4(ee)(1)(vi), regulated activities include any "activity within a tidal wetland or on an adjacent area which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland."

The fact that vegetation has been cleared within the freshwater wetland, its adjacent area, and the tidal wetland adjacent area at the site is not in dispute. Mr. Marsh testified that he personally observed that an "area which was 100 feet by 155 feet" (transcript at 21) had been cleared of vegetation in these jurisdictional areas (id. at 29; see also exhibit 10 at 3 [sketch map of the site depicting the area cleared]). Mr. Marsh also testified that his on-site observations were reflected in the series of aerial photographs of the site taken between 2001 and 2007 (see exhibit 15). He testified that the first of the aerial photographs, taken in 2001, shows "the natural vegetation is within approximately 30 feet of the rear . . . of the house;" the second photograph, taken in 2004, shows "most of the vegetation has been disturbed and cleared;" and the last photograph, taken in 2007, shows all but the walled off natural areas at the site were "entirely lawn" (transcript at 29-30). Neither respondent challenged these factual assertions on cross examination nor did they proffer evidence that would controvert Mr. Marsh's testimony.

As to whether clearing the vegetation at the site "directly or indirectly may substantially alter or impair the natural condition or function" of the tidal wetland, Mr. Marsh testified that clear cutting vegetation adversely affects the wetlands because plants "provide food to herbivores and detritivores [i.e., organisms that feed on and break down dead plant or animal matter]. They form the primary block of the food web. As stated earlier, plants also up take

nutrients, pollutants and that is a potential impact to fishing or shell fish" (transcript at 32[17]). Respondents proffered no evidence to controvert Mr. Marsh's testimony. Under the facts and circumstances presented here, I conclude that the clearing of a 155' by 100' area of natural vegetation within the tidal wetland adjacent area at the site is a regulated activity pursuant to the provisions of 6 NYCRR 661.4(ee)(1)(vi).

Respondent Arthur Francis argues that there is no evidence that shows he personally cleared the vegetation at the site (Arthur Francis closing brief at 4). This argument is without merit. Respondents did not have a permit to undertake the vegetative clearing complained of and they are the fee owners of the site. The benefits derived from the vegetative clearing, as well as the benefits derived from other activities at the site, inured to the fee owners. As such, and absent evidence to the contrary, a reasonable inference may be drawn that the vegetative clearing was done at the direction, or with the consent, of the fee owners. Under these circumstances, respondent Arthur Francis cannot claim to be an innocent landowner (cf. Matter of Ames, Order of the Commissioner, December 29, 1994, at 1[referring to a property owner as an "innocent landowner" where, without the property owner's knowledge or consent, a third party constructed a road and bus turnaround in a regulated freshwater wetland on the property without a permit]).

Respondent Arthur Francis also argues that he "was not on notice that [clearing trees and vegetation] were improper, since he was not a signatory on the permits . . ." (Arthur Francis closing brief at 4). This argument also fails. The provisions of the ECL governing activities undertaken within State regulated freshwater and title wetlands, and their adjacent areas, apply regardless of whether a permit is sought or issued. Moreover, the record demonstrates that by August 31, 2003, at the latest, respondent Arthur Francis had actual notice that the site contained State regulated wetlands and that activities at the site were subject to regulation (see exhibit 7 [Administrative Conservation Appearance Tickets (ACATs) issued by the Department to respondent Arthur Francis on August 31, 2003]). Respondent Arthur Francis was also an addressee on the Notice of Violation (NOV) sent by the Department to respondents on January 5, 2004 (see exhibit 12 at 1).[18] Much of the activity complained of by Department staff occurred after that time (see exhibits 11 [photographs taken on January 23, 2004, depicting construction equipment on site, a patio under construction, vegetative clearing and fill piles], 13 [photographs dated August 17, 2005, depicting extensive filling and grading], 14 [photographs dated December 6, 2006, depicting the completed patios, brick walkways and landscaped lawn]).

Mr. Marsh's testimony is uncontroverted and is supported by the record. I conclude that staff has met its burden of proof and respondents are liable for the violations set forth under the second and fourteenth causes of action.

[17] The first quoted sentence is taken from the transcript errata proposed by Department staff (see staff closing brief at 18). Neither respondent objected to staff's proposed errata.

[18] The NOV was sent via certified mail. The U.S. Postal Service domestic return receipt, also known as the "green card," is signed "Arthur [last name illegible]" (id. at 3).

Clear Cutting Trees

-- Third Cause of Action

The third cause of action alleges that, on or before and after August 19, 2005, respondents clear cut trees in freshwater wetland HP-3 and its adjacent area at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(22).

The evidence proffered by Department staff on this cause of action is limited. Mr. Marsh testified that the 2001 aerial photo "shows trees on the property in areas where there is no longer woody vegetation. So there [are] areas in here where there [were] trees present and which currently is now lawn" (transcript at 33; see also exhibit 15[A]).

Pursuant to 6 NYCRR 663.2(i), clear-cutting trees "means any cutting of trees over six inches in diameter at breast height over any 10-year cutting cycle where the average residual basal area of trees over six inches in diameter at breast height remaining after such cutting is less than 30 square feet per acre, measured within the area harvested." The 2001 aerial photograph is inconclusive with regard to how many trees, if any, at the site were over six inches in diameter. Photographs taken on-site by Department staff are also inconclusive. There are some trees shown in the earliest on-site photographs (see exhibit 9), taken in December 2003, but there are also trees shown in the latest on-site photographs (see exhibit 14), taken in December 2006. Whether particular trees were cut, and whether any were over six inches in diameter at breast height, is not established.

The evidence proffered by Department staff does not establish that respondents have clear cut trees at the site within the meaning of the regulations. On this record, I conclude that staff has failed to carry its burden on the third cause of action.

Grading

-- Fourth and Fifteenth Causes of Action

The fourth cause of action alleges that, on or before and after August 19, 2005, respondents graded land in freshwater wetland HP-3 and its adjacent area at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d). The fifteenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents graded land in a regulated tidal wetland adjacent area at the site without a permit in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Pursuant to 6 NYCRR 663.4(d)(25), the grading in a freshwater wetland is designated as a "P(X)" activity, meaning that it requires a permit and is "incompatible" with a wetland and its functions and benefits. Grading in a freshwater wetland adjacent area is designated as a "P(N)" activity, meaning that it too requires a permit and is "usually incompatible" with the wetland and its functions and benefits (id.). With regard to tidal wetlands, grading is a regulated activity subject to permitting requirements if it is determined to be an "activity within a tidal wetland or

on an adjacent area which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland" (6 NYCRR 661.4[ee][1][vi]).

Referring to the photographs of the site taken in December 2006, Mr. Marsh testified that "[y]ou can see by the retaining wall . . . areas one to three feet higher [than] previously; these areas were graded out, they are graded to smoother contour and then sodded or seeded with grass seed now lawn. The 2005 site inspection shows fresh tracks in the fill material as it was graded out" (transcript at 35; see also exhibits 13, 14). Mr. Marsh testified that the impacts of "grading are very similar to the impacts of the fill; changing of the natural contours or filling areas; once wetland areas now are up-land areas" (transcript at 35). He further testified that "grade changes can increase runoff to the tidal wetland when you change contours. Freshwater wetland serves to take much of the pollutants and nutrients that potentially reach the tidal wetlands . . ." (id. at 28). He testified that this increased runoff may cause "urification [sic, probably should read "eutrophication," meaning excessive nutrient loading] and pollution of the tidal wetland" (id. at 28-29).

Where fill is placed in a wetland, the area where the fill is placed no longer functions as a wetland. Similarly, where the fill is graded out to cover a larger area, the area covered ceases to function as a wetland. As established in the record, the fill at the site was spread over an area of approximately 155' by 100' to an average depth of one foot. Under the facts and circumstances presented here, I conclude that the grading undertaken at the site constitutes a regulated activity within the meaning of 6 NYCRR 661.4(ee)(1)(vi).

Mr. Marsh's testimony is uncontroverted and is supported by the record evidence. Department staff has met its burden of proof and respondents are liable for the violations set forth under the fourth and fifteenth causes of action.

Accessory Structures and Facilities

Pursuant to 6 NYCRR 663.4(d)(42), the construction of a residence or related structures or facilities in a freshwater wetland is designated as a "P(X)" activity, meaning that it requires a permit and is "incompatible" with a wetland and its functions and benefits. The construction of a residence or related structures or facilities in a freshwater wetland adjacent area is designated as a "P(N)" activity, meaning that it too requires a permit and is "usually incompatible" with the wetland and its functions and benefits (id.). With regard to tidal wetlands, 6 NYCRR 661.5(b)(49) designates the construction of accessory structures or facilities for a dwelling in a tidal wetland adjacent area as a "GCp" use, meaning that it requires a permit and is considered a "generally compatible" use.

-- Fifth, Sixth, Eighteenth, and Nineteenth Causes of Action

The fifth cause of action alleges that, on or before and after August 19, 2005, respondents constructed a 66' by 30' "deck/patio" in the adjacent area of freshwater wetland HP-3 at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42). The eighteenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date,

respondents constructed a 66' by 30' "deck/patio" in a regulated tidal wetland adjacent area at the site without a permit in violation of ECL 25-0401(1) and 6 NYCRR part 661.

The sixth cause of action alleges that, on or before and after August 19, 2005, respondents constructed a 20' by 10' patio in the adjacent area of freshwater wetland HP-3 at the site without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42). The nineteenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents constructed a 20' by 10' patio in a regulated tidal wetland adjacent area at the site without a permit in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Mr. Marsh testified that "during our site inspection [in 2004] we noted there was this new patio put to the rear of the house which did not have a permit" (transcript at 36). Mr. Marsh referred to photographs taken at the time of the site visit and noted that the patio was visible in several (id.; see exhibit 11). He further testified that, the 66' by 30' patio appeared to be completed at the time of the 2004 site visit and that construction had "just started" on a smaller connected patio (transcript at 88).

With regard to the smaller patio, Mr. Marsh testified that "a second patio [was] being constructed which was located 25 feet from the [freshwater] wetland boundary and within the area that was shown on the approved plans as a natural buffer, that was 20 by 10 [feet]" (transcript at 22). Mr. Marsh referred to the smaller patio as a "bump out" of the larger patio, and testified that it had been completed at the time of his 2006 site visit (id. at 37-38; exhibits 11-14). He further testified that, the smaller patio "most likely would not have been granted [a] permit if applied for because it is in an area to be designated natural buffer" (transcript at 38).

Although he does not contest staff's factual assertions, respondent Arthur Francis argues that the causes of action concerning the patios are duplicative. He notes that the complaint sets forth "the exact same language, contact, same day and before or after date on both causes of action; the only difference is the footage of the patio" (transcript at 57). Mr. Marsh, however, disputes this view and testified that the larger patio "was there before we were there [in 2004], [the smaller] one continued to get work done after violations were sent out and tickets were written" (id.). Mr. Marsh also testified that "[o]ne was simply a patio built without permits and one was a patio built without permit in a restricted buffer; the nature of the charges are significantly different" (id. at 56).

I conclude that Department staff has established that the two patios were constructed on separate occasions and are chargeable as separate violations on that basis. Mr. Marsh's testimony concerning the construction of the patios was uncontroverted and the patios were not authorized by the permit (see exhibit 5 [attached site plan]). Staff has met its burden of proof and respondents are liable for the violations set forth under the fifth, sixth, eighteenth, and nineteenth causes of action.

-- Seventh and Twentieth Causes of Action

The seventh cause of action alleges that, on or before and after August 19, 2005, respondents constructed a driveway in the adjacent area of freshwater wetland HP-3 at the site

15' closer to the wetland boundary than was authorized under the permit, in violation of ECL 24-0701 and 6 NYCRR 663.4. The twentieth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents constructed a driveway in a regulated tidal wetland adjacent area at the site 15' closer to the wetland boundary than was authorized under the permit, in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Mr. Marsh testified that "we reviewed the approved plans and took measurements at the site and found the driveway had been extended 15 feet further to the west then approved and into the area that was suppose[d] to be a buffer" (transcript at 39; see also exhibit 5 [attached site plan]). Mr. Marsh referred to the photographs taken during the 2004 site visit and noted that they depict the driveway extending closer into the freshwater and tidal wetlands than was authorized (id.; exhibit 11).

Respondent Arthur Francis questions Department staff's evidence in support of this cause of action. He argues that an aerial photograph of the site depicts a driveway extending significantly less toward the wetlands than described by staff (Arthur Francis closing brief at 4; transcript at 78-80; see also exhibit 15[C]). Mr. Marsh discounts this respondent's reliance on the aerial photograph and notes that it was taken from an angle that causes a "distortion" of the true length of the driveway (id.). Mr. Marsh testified that, looking at the aerial photograph, "you can see the front of the house not the rear. If taken directly over at a perfect 90 degree angle that would be [a] perfect image" (id. at 80). Moreover, Mr. Marsh testified that, on separate occasions, he and another staff member measured the driveway by tape measure and both determined it to be approximately 15' longer than authorized under the permit (id. at 78-79).

I conclude that Department staff has met its burden of proof and respondents are liable for the violations set forth under the seventh and twentieth causes of action.

-- Eighth, Ninth, Twenty-first, and Twenty-second Causes of Action

The eighth and ninth causes of action allege that, on or before and after August 19, 2005, respondents constructed a 6' by 8' shed and an 8' by 12' shed, respectively, in the adjacent area of freshwater wetland HP-3 at the site without a permit, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42). The twenty-first and twenty-second causes of action allege that, on or before and after August 19, 2005, and continuing to date, respondents constructed a 6' by 8' shed and an 8' by 12' shed, respectively, in a regulated tidal wetland adjacent area at the site without a permit, in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Mr. Marsh testified that two unauthorized sheds were constructed in the jurisdictional areas at the site (transcript at 40-41; see also exhibits 10 at 3 [sketch map depicting the 6' by 8' shed at the end of the driveway]; 11 at 1, 4 [depicting the 6' by 8' shed at the end of the driveway on photographs numbered 1 and 13]; 13 at 3, 4, 5, 7 [photographs depicting a shed with a cupola]; 14 at 1, 2 [photographs depicting three sheds: the 6' by 8' shed adjacent to a small bicycle shed on pages 1 and 2, and the shed with a cupola on page 2]). This testimony is uncontroverted.

Respondent Arthur Francis argues that these structures "were not cemented to the ground and were mobile in nature" (Arthur Francis closing brief at 4). He further argues that because Mr. Marsh "has not been back to the site since 2006 he has [no] idea as to the condition of the property or if these violations are in existence" (id.).

These arguments are without merit. The uncontroverted testimony of Mr. Marsh establishes that the sheds were located within the jurisdictional areas at the site during the time period set forth in the complaint. Whether the sheds are mobile structures or whether they were removed from the jurisdictional areas at some point after staff's site visit in 2006 is irrelevant to the determination of respondents' liability.

I conclude that Department staff has met its burden of proof and respondents are liable for the violations set forth under the eighth, ninth, twenty-first and twenty-second causes of action.

-- Tenth and Twenty-third Causes of Action

The tenth cause of action alleges that, on or before and after August 19, 2005, respondents constructed a kayak rack in the adjacent area of freshwater wetland HP-3 at the site without a permit, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42). The twenty-third cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents constructed a kayak rack in a regulated tidal wetland adjacent area at the site without a permit, in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Mr. Marsh testified that at the time of his 2006 site visit "the kayak rack was up close to the shed by the driveway. During the 2005 site inspection . . . staff noted the kayak rack was down near the dock by the tidal wetland" (transcript at 42). He further testified that both of these locations were within the jurisdictional areas at the site (id.). This testimony is uncontroverted.

Respondent Arthur Francis made arguments here similar to those he raised above with regard to the sheds (Arthur Francis closing brief at 4) and these arguments fail for the same reasons. Whether the kayak rack is mobile or whether it was removed from the jurisdictional areas at some point after staff's site visit in 2006 is irrelevant to the determination of respondents' liability.

I conclude that Department staff has met its burden of proof and respondents are liable for the violations set forth under the tenth and twenty-third causes of action.

-- Twelfth and Twenty-fourth Causes of Action

The twelfth cause of action alleges that, on or before and after August 19, 2005, respondents constructed 2 brick walkways in the adjacent area of freshwater wetland HP-3 at the site without a permit, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42). The twenty-fourth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents constructed 2 brick walkways in a regulated tidal wetland adjacent area at the site without a permit, in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Mr. Marsh testified that, to determine whether the brick walkways were unlawful, staff "checked the approved plans from 1999 and then took measurements in the field" (transcript at 44). He also testified that the walkways are depicted in the photographs taken during his 2006 site visit (id.; see also exhibit 14 at 2). This testimony is uncontroverted.

Respondent Arthur Francis argues that "without a walkway people would be inclined to walk over the foliage located at the site indiscriminately . . . As such the installation of a walkway probably prevents more environmental harm than not having one and its installation must be excused" (Arthur Francis closing brief at 5). While these arguments speak to the possibility that the walkways caused no harm, they do not undermine the allegations giving rise to respondents' liability.

I conclude that Department staff has met its burden of proof and respondents are liable for the violations set forth under the twelfth and twenty-fourth causes of action.

Storage of Substances

-- Eleventh and Seventeenth Causes of Action

The eleventh cause of action alleges that, on or before and after August 19, 2005, respondents installed an oil tank in the adjacent area of freshwater wetland HP-3 at the site in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(38). The seventeenth cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents constructed an oil tank in a regulated tidal wetland adjacent area at the site in violation of ECL 25-0401(1) and 6 NYCRR part 661.

Pursuant to 6 NYCRR 663.4(d)(38), introducing or storing any substance, including, among other things, any chemical or petrochemical, in a freshwater wetland or its adjacent area is designated as a "P(X)" activity, meaning that it requires a permit and is "incompatible" with a wetland and its functions and benefits. With regard to tidal wetlands, staff does not cite a specific provision of the regulations, however, 6 NYCRR 661.5(b)(55) is the most analogous provision to that cited by staff in the freshwater wetlands charge. Section 661.5(b)(55) designates the storage of any chemical, petrochemical or other toxic material in a tidal wetland adjacent area, where, as applicable here, such storage is for the use of the site owner, as an "NPN" use, meaning that it is a use not requiring a permit.

Mr. Marsh testified that an oil tank "had been installed on the rear of the house adjacent to the patio, also partially in the buffer and approximately 30 feet from the [freshwater] wetland boundary at its closest point" (transcript at 22). He further testified that he saw the top of the buried tank during his site visit in January 2004 and that photographs taken by staff in December 2003 "show the tank and the pipes coming out of the tank" (id. at 43; see also exhibits 9 at 13 [2003 photograph], 10 at 3 [sketch map depicting an oil tank adjacent to the rear wall of the dwelling and partially in the designated buffer area]).[19] Mr. Marsh testified that the "biggest

[19] On this record, the installation of the oil tank would appear to violate 6 NYCRR 663.4(d)(42) and 661.5(b)(49). Department staff did not, however, allege these violations in its complaint.

impact" of the oil tank is the increased risk of "oil in the area of the natural buffer and also the area having to be dug up and disturbed" if remediation is necessary (transcript at 44). He further testified that the closer an oil tank is to a wetland the more quickly a leak or spill may reach the wetland (id.). This testimony is uncontroverted.

Respondent Arthur Francis made arguments here similar to those that he raised above with regard to the sheds and kayak rack (Arthur Francis closing brief at 4), which are similarly rejected. However, he also raises the issue of whether the oil tank at the rear of the dwelling was ever put into service. Department staff did not proffer evidence to show what, if anything, was stored in the subject tank. Respondent Arthur Francis argues that the only photograph of the oil tank was taken in 2003 "during active construction" and that "[a]t some point things get moved during construction . . ." (id.). At hearing, this respondent asked, "If this house actually got natural gas heat, they wouldn't have the need for the oil tank, would they?" (transcript at 75). Mr. Marsh responded that this was possible.

The record is inconclusive with regard to whether fuel oil, or any other substance or chemical, was stored in the oil tank buried at the rear of the house. At the time that the subject oil tank was photographed in 2003, there was also a second tank being stored above ground at the site (see exhibit 9 at 4, 13). This second tank may have been placed in service at another location at the site.[20] On this record, it cannot be determined whether the subject tank was placed in service.

I conclude that Department staff has failed to meet its burden of proof to establish that a chemical, petrochemical, or other substance was stored in the subject oil tank. Because such storage is an element of the charge, respondents may not be held liable for the eleventh and seventeenth causes of action.

Permit Violations - Construction Conditions

Department staff alleges that respondents violated four special conditions (construction conditions) established under the permit concerning construction activities at the site. Pursuant to the terms of the permit, construction activities at the site were authorized only through the expiration date of the permit, May 31, 2003 (see exhibit 4 at 2 [page 1 of permit, noting the expiration date], 4 [page 3 of permit, general condition #15, providing that "[i]f upon the expiration . . . of this permit, the project hereby authorized has not been completed, the applicant shall . . . to such extent and in such time and manner as the Department of Environmental Conservation may require, remove all or any portion of the uncompleted structure or fill and restore the site to its former condition"]). There is nothing in the record that indicates the expiration date of the permit was extended or that any of the construction conditions continued

[20] In her answer, respondent Maureen Michele Francis states that she is "uncertain of the installation of the oil tank [at the rear of the dwelling] as I did not eye witness it. I am aware of an oil tank in the front of the residence which is where the oil supply company would come to drop fuel when I was residing at the subject property" (respondent Maureen Michele Francis answer at 1). As previously discussed, this statement may not be used as evidence against respondent Arthur Francis but, had staff alleged that oil was being stored in a tank at the front of the dwelling, this statement could have been used as an admission by respondent Maureen Michele Francis.

beyond the expiration date. Because the permit expired on May 31, 2003, Department staff must demonstrate that the alleged violations of the construction conditions occurred prior to that date.[21]

The four causes of action concerning the construction conditions are:

-- Twenty-fifth Cause of Action

The twenty-fifth cause of action alleges that, on or before and after August 19, 2005, respondents failed to comply with special condition #2 of the permit which requires all disturbed areas at the site where soil will be exposed or stockpiled for longer than one week to be contained by a continuous line of staked hay bales/silt curtains (or other DEC approved method), in violation of ECL 71-4003.

-- Twenty-seventh Cause of Action

The twenty-seventh cause of action alleges that, on or before and after August 19, 2005, and continuing to date, respondents failed to comply with special condition #9 of the permit which requires maintenance of a 35' buffer of undisturbed natural vegetation at the site around the freshwater wetland, in violation of ECL 71-4003.

-- Twenty-eighth Cause of Action

The twenty-eighth cause of action alleges that, on or before and after August 19, 2005, respondents failed to comply with special condition #13 of the permit which requires the storage of construction equipment and material at the site to be confined to within the project worksite and/or to upland areas more than 100' distant from the freshwater wetland boundary, in violation of ECL 71-4003.

-- Twenty-ninth Cause of Action

The twenty-ninth cause of action alleges that, on or before and after August 19, 2005, respondents failed to comply with special condition #15 of the permit, which, the complaint states, requires "that a snow fence shall be disposed of on an upland site and be suitably stabilized so that it cannot reenter any water body, wetland, or wetland adjacent area," in violation of ECL 71-4003.[22]

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[21] Of course, after the authorizations granted under the permit expired, subsequent activities undertaken at the site remained subject to the freshwater and tidal wetlands laws and regulations; consequently, where such activities violate the law, staff may pursue appropriate enforcement.

[22] The complaint misquotes the terms of special condition #15. This special condition does not require disposal of a snow fence in an upland site. Rather, it requires that a snow fence "be erected along the upland edge of the buffer zone in order to prevent the inadvertent intrusion of equipment into the protected area" and provides that "[t]he fence shall be maintained until project completion" (exhibit 4 at 5 [page 4 of permit]).

The evidence proffered by Department staff in support of these causes of action does not demonstrate that the alleged violations of the construction conditions occurred prior to the expiration date of the permit. As to each cause of action, Mr. Marsh testified that he observed non-compliance during his visits to the site (see transcript at 46-47 [non-compliance with special condition #2], 47-48 [non-compliance with special condition #9], 48-49 [non-compliance with special condition #13]; 49-50 [non-compliance with special condition #15]). Mr. Marsh, however, did not visit the site until January 2004, well after the May 31, 2003, expiration date of the permit. Accordingly, Mr. Marsh's observations do not provide a basis to hold respondents liable for the alleged violations of the construction conditions.

Moreover, the record is inconclusive with regard to when the authorized project was completed. As shown in the approved site plan (see exhibit 5), the major components of the authorized project are the dwelling, driveway, and septic system. An aerial photograph of the site taken in 2001 depicts the dwelling and driveway already in place (see exhibit 15[A]). Referring to aerial photographs of the site, Mr. Marsh testified that the area cleared of vegetation in and adjacent to the wetlands was covered "in natural vegetation in 2001; and at [the] time of the site visit in 2004 most of the area had been cleared . . ." (transcript at 29). It is evident that additional clearing, filling and grading, as well as the completion of the smaller patio, all occurred after Mr. Marsh's site visit in 2004 (see exhibits 11 [2004 photographs depicting construction equipment on site, a patio under construction, and fill piles], 13 [2005 photographs depicting extensive filling and grading as well as the completed patio and a brick walkway], 14 [2006 photographs depicting the completed patio, brick walkways and landscaped lawn]).

On this record, it is possible that the project authorized under the permit was complete, or nearly complete, at the time that the 2001 aerial photograph was taken. It is also possible that the activities that Department staff alleges violated the construction conditions established under the permit were undertaken not as part of the authorized project, but as part of a subsequent project at the site that was commenced after the permit had expired.

I conclude that Department staff failed to prove by a preponderance of the evidence that the alleged violations of the construction conditions occurred as part of the authorized project prior to the expiration date of the permit. Accordingly, respondents may not be held liable for the twenty-fifth, twenty-seventh, twenty-eighth, and twenty-ninth causes of action.

Deed Covenant

-- Thirtieth Cause of Action

The thirtieth cause of action alleges that, on or before and after August 19, 2005, respondents failed to comply with special condition #20 of the permit, "which requires that the permittee incorporate notice covenant language into the deed within 90 days of issuance of the permit," in violation of ECL 71-4003.

The deed covenant required under special condition #20 is intended to provide notice in the chain of title that "[r]egulated freshwater wetlands are located in the northern portion of the property," and that approval of the Department is required to undertake regulated activities at the

site (exhibit 4 at 6 [page 5 of permit]). Of course, with or without this covenant, Department approval is required to undertake regulated activities at the site.

Mr. Marsh testified that there is "no evidence that that [the] deed covenant had been filed because nothing has been mailed to the Department as per the requirement in the special condition" (transcript at 50). The permit was issued only to respondent Maureen Michele Francis and, as stated on the face of the permit, she agreed to abide by its terms and conditions (see exhibit 4 at 2 [page one of permit]). Although Mr. Marsh's testimony may be sufficient to establish that the permittee did not send a copy of the deed covenant to the Department, it does not establish that the covenant was not timely recorded, and the latter is the charge set forth in the complaint. Accordingly, staff failed to prove the specific violation charged.

I conclude that Department staff failed to prove by a preponderance of the evidence that the deed covenant was not recorded. Accordingly, respondents may not be held liable for the thirtieth cause of action.

Relief

By its complaint, Department staff requests that the Commissioner issue an order assessing a penalty of $390,500 and directing respondents to undertake restoration measures intended to, in large part, return the jurisdictional areas at the site to their pre-violation conditions. In its closing brief, staff noted that the sixteenth cause of action, concerning excavation within a tidal wetland adjacent area, was struck, and staff reduced its penalty request to $380,500. Staff further requested that $150,000 of the penalty be suspended pending completion of the requested restoration (staff closing brief at 15). For the reasons discussed below, I recommend that the Commissioner issue an order assessing a penalty of $287,000, with $150,000 suspended, and requiring respondents to implement a restoration plan at the site.

Penalty Provisions

Department staff's penalty request is well within the maximum statutory penalty available. For violations involving tidal wetlands, ECL 71-2503(1)(a)[23] provides, in part:

> "Any person who violates, disobeys or disregards any provision of article twenty-five shall be liable to the people of the state for a civil penalty of not to exceed ten thousand dollars for every such violation, to be assessed, after a hearing or opportunity to be heard, by the commissioner. Each violation shall be a separate and distinct violation and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation."

Because several of the tidal wetland causes of action relate to ongoing violations, the maximum statutory penalty available on this record would be in the tens of millions of dollars (see Matter of Valiotis, Order of the Commissioner, March 25, 2010, at 5-6 [holding that, until removed, unauthorized structures or fill placed in a tidal wetland or its adjacent area are ongoing

[23] In its closing brief, Department staff erroneously cites ECL 71-2323(1), which does not exist. The correct cite, as set forth in the complaint, is ECL 71-2503.

violations]).[24] Although staff notes that the ECL provides for the assessment of daily penalties for violations of the tidal wetlands law, staff requests only a one-time penalty for each violation. Accordingly, for the tidal wetlands violations, staff requests $290,000.

For violations involving freshwater wetlands, ECL 71-2303(1) provides:

> "Any person who violates, disobeys or disregards any provision of article twenty-four . . . or any rule or regulation . . . permit or order issued pursuant thereto, shall be liable to the people of the state for a civil penalty of not to exceed three[25] thousand dollars for every such violation, to be assessed, after a hearing or opportunity to be heard . . . [and] the commissioner . . . shall have power, following a hearing held in conformance with the procedures set forth in section 71-1709 of this article, 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 . . ."

Unlike the tidal wetlands penalty provision, the freshwater wetlands penalty provision does not provide for assessment of daily civil penalties for ongoing violations. Staff states that it calculated the freshwater wetland penalty by multiplying the statutory maximum, $3,000, by the 30 alleged violations of the freshwater wetlands law. Accordingly, for the freshwater wetlands violations, staff requests $90,000.

Lastly, staff requests a $500 penalty for the alleged violations of the permit. Staff cites ECL 71-4003 as the basis for this penalty amount. Section 71-4003 provides:

> "Except as otherwise specifically provided elsewhere in this chapter [the Environmental Conservation Law], a person who violates any provision of this chapter, or any rule, regulation or order promulgated pursuant thereto, or the terms or conditions of any permit issued thereunder, shall be liable to a civil penalty of not more than one thousand dollars, and an additional civil penalty of not more than one thousand dollars for each day during which each such violation continues. Any civil penalty provided for by this chapter may be assessed following a hearing or opportunity to be heard."

By its express terms, ECL 71-4003 only applies where no penalty is specifically provided for elsewhere in the ECL. Here, however, there are specific penalties applicable to violations of the permit. The permit was issued pursuant to the Department's authority under

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[24] The maximum statutory penalty for a single count of placing fill in the tidal wetland adjacent area, over the duration of the violation shown on this record, would be $22,540,000. The violation continued for a minimum of 2,254 days (although use of an earlier date is supportable on this record, the number of days was calculated using the date of Mr. Marsh's initial site inspection, January 23, 2004, through the date of the complaint, March 26, 2010) and is subject to a maximum penalty of $10,000 per day.

[25] Effective May 28, 2010, this penalty amount was increased to eleven thousand dollars. At all times relevant to the allegations in this proceeding, however, the maximum penalty amount was three thousand dollars (see L 1977, ch 654, as amended by L 2010, ch 99).

ECL articles 24 and 25, and the penalties for violations of the permit are set forth under ECL 71-2303 and 71-2503, respectively. Section 71-2303(1) expressly states that penalties may be assessed for the violation of any "permit or order" issued pursuant to article 24. Section 71-2503(1)(a) sets forth the penalty applicable to violations of article 25, and ECL 71-2503(1)(b) defines a violation of article 25 to include "failure on the part of a permittee to adhere to permit conditions" (see also Matter of Breezy Point Cooperative, Order of the Commissioner, May 13, 1993, at 1-2 [holding that "[o]nce the permitted activity is undertaken any violation of those conditions is a violation of the provisions of Article 25 and is subject to the civil penalties in ECL 71-2503"]). Accordingly, because there are express penalty provisions applicable to violations of the permit, ECL 71-4003 may not be relied upon.

By its complaint, Department staff sought a single penalty of $500 for all seven of the causes of action concerning alleged violations of permit conditions. That amount is less than what is provided for under the applicable provisions of the ECL, as described above.

Penalty Calculation

As detailed above, Department staff has met its burden of proof and has established that respondents are liable for multiple violations of the tidal and freshwater wetlands laws. Staff seeks a substantial penalty and justifies the amount sought on the basis of (i) respondents' enforcement history, (ii) the gravity of the violations, and (iii) respondents' continued construction activities after they had been advised that these activities were in violation of the law (staff closing brief at 17). Respondents' enforcement history is well established on the record (see e.g. exhibits 6, 7, 8, 12; transcript 16, 19-20). It is also clear that numerous violations occurred after respondents were advised that their activities were in violation of the law (see e.g. exhibits 9-15). Staff does not, however, differentiate between the violations in relation to their gravity.

As set forth in the Department's Civil Penalty Policy:

> "Developing and assigning dollar amounts to represent the gravity of a violation is a process which necessarily involves consideration of various factors and circumstances. The relative seriousness of violations has always been implicit in DEC's exercise of prosecutorial discretion. However, systematic exercise of that discretion requires an explicit analysis addressing these two 'gravity component factors': a.) Potential harm and actual damage caused by the violation; and b.) Relative importance of the type of violation in the regulatory scheme" (Civil Penalty Policy, Commissioner policy DEE-1, June 20, 1990, § IV.D.1).

Taking this policy into consideration, I recommend that Department staff's penalty request be reduced. The benefits and functions provided by the freshwater wetland and the freshwater and tidal wetland adjacent areas at the site were essentially eliminated by respondents' clear cutting of vegetation, filling and grading in these areas. Respondents undertook these activities over a large portion of the site, comprising an area of approximately 155' by 100.' Mr. Marsh testified to the importance of the natural vegetation in the wetland and the adjacent areas (see transcript at 32) and also testified that when fill is placed in a wetland "it ceases to be

wetland" (id. at 59). Moreover, the record shows that substantial clearing, grading, and filling occurred within the freshwater wetland itself,[26] which is also the area of the site that is closest to the tidal wetland.

In contrast, Department staff's complaint alleges that each of the unpermitted structures was located outside the freshwater wetland[27] and the record shows that most of these structures were constructed or placed close to the dwelling.[28] Additionally, staff acknowledges that some of these structures, including the larger patio, might have received authorization from the Department if a permit had been sought (transcript at 37). Notably, staff's restoration request seeks only to remove those structures, or portions thereof, that are located in the buffer area designated in the approved site plan under the permit.

In his closing brief, respondent Arthur Francis argues, without citation to law, regulation or precedent, that "[t]he DEC also has a burden of showing an environmental impact of the alleged culpable conduct. They have to show damages to the environment" (Arthur Francis closing brief at 5). This assertion has no basis in the law. As the language of ECL 24-0701 and 25-0401 makes clear, a person must obtain a permit to undertake certain actions in freshwater wetlands, tidal wetlands, and their respective adjacent areas. Under the various causes of action set forth in the complaint, it is staff's burden to demonstrate that the specified regulated activity occurred at the site and that the activity was either done without a permit or in violation of the permit. While environmental harm may be considered when determining the appropriate relief to impose (see Civil Penalty Policy § IV.D.1 [referencing "[p]otential harm and actual damage caused by the violation" as one of the "gravity component factors" used to calculate the appropriate penalty]), environmental harm need not be proven in order to hold respondents liable.

Respondent Arthur Francis also argues that there are neighboring properties that may be the source of any adverse environmental impacts that are occurring, including a "large eighteen hole golf course" that runs along the opposite shore of the tidal wetland (Arthur Francis closing brief at 5). Neither respondent called an expert witness to present evidence concerning environmental impacts and, as previously noted, Mr. Marsh's testimony on impacts was uncontroverted. Moreover, with regard to impacts from the golf course, Mr. Marsh testified that

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[26] Because these activities occurred within the freshwater wetland, they are deemed "P(X)" activities and are considered more significant violations (see Freshwater Wetlands Enforcement Policy, Commissioner Policy DEE-6, Feb. 4, 1992, § IV.2.3 [stating that the "relative seriousness of harm resulting from various activities described in 6 NYCRR Part 663 in order of gravity of harm, is as follows: 1. Unauthorized activities that are 'incompatible,' or P(X)"]).

[27] Because these activities occurred outside of the freshwater wetland, they are deemed "P(N)" activities (see Freshwater Wetlands Enforcement Policy § IV.2.3 [ranking P(N) activities as either second or fourth in order of gravity of harm]).

[28] The subject structures appear to be more than 75' from the tidal wetland (see exhibit 10 at 3) and, therefore, may satisfy the development restrictions set forth at 6 NYCRR 661.6(a). Although any structure built in violation of the tidal wetlands law warrants a "severe sanction," the Department considers structures that meet the development restrictions to be "more environmentally benign" (Tidal Wetlands Enforcement Policy, Commissioner Policy DEE-7, Feb. 8, 1990, § VI.1).

the golf course pre-dates the enactment of the Tidal Wetlands Act[29] (transcript at 60-64) and that, although there may be adverse impacts from the golf course, "that doesn't mean we should allow further impacts" (id. at 62; see also 6 NYCRR 661.5[b][1] [providing that "[t]he continuance of lawfully existing uses . . . and the continuance of all activities normally and directly associated with any such use" does not require a permit).

Respondent Maureen Michele Francis argues that she attempted to cooperate with Department staff to resolve this matter and to restore the wetlands, but that these efforts were frustrated by respondent Arthur Francis (see Maureen Michele Francis answer at 2; Maureen Michele Francis closing brief at 1). These arguments are not evidence, however, and there was only limited testimony on this point (see transcript at 85-86 [testimony by Mr. Marsh confirming that, in or about 2007, he met with a representative of "the respondent" and that he saw "a set of site plans that were submitted as part of a potential restoration"]). Moreover, staff has not sought to differentiate the respondents on the basis of their respective levels of cooperation with the Department (see Civil Penalty Policy § IV.E.2 [stating that the "cooperation of the violator in remedying the violation may be an appropriate factor to consider in adjusting the penalty in the discretion of staff"]). On this record, I decline to recommend a penalty adjustment on the basis of violator cooperation.

I conclude that the penalties requested by staff for the clear cutting, filling, and grading are warranted and appropriate. With regard to the structures, I recommend the Commissioner assess a $2,000 penalty for each structure, $1,000 under the freshwater wetlands law and $1,000 under the tidal wetlands law. Finally, with regard to the alleged violations of the permit, no violations were proven. The penalty recommendation for each violation is set forth in Appendix B.

Restoration

It is the policy of the Department to require restoration where unlawful activities have adversely affected the functions and benefits of regulated wetlands (see Tidal Wetlands Enforcement Policy, Commissioner Policy DEE-7, Feb. 8, 1990, §§ III, V.1; Freshwater Wetlands Enforcement Policy, Commissioner Policy DEE-6, Feb. 4, 1992, §§ I, IV.3). The Commissioner is empowered to direct a violator to restore the affected wetland and its adjacent area (see ECL 71-2503[1][c], 71-2303[1]; see also Matter of Bradley Corporate Park v Crotty, 39 AD3d 632, 636 [2d Dept 2007], lv denied, 9 NY3d 816 [2007] [holding that the Commissioner has the power to direct a violator to restore the adjacent area of a freshwater wetland back to the condition that it was in prior to the violations]).

By its complaint, Department staff requests an order of the Commissioner directing respondents to (i) remove all structures from the natural and undisturbed buffer area designated under the permit, (ii) remove all fill from the freshwater wetland and from the designated buffer area, (iii) erect a fence to delineate the boundary of the designated buffer area, (iv) remove the oil tank(s) from the rear of the house to a location approved by staff, and (v) submit an

[29]The golf course, and the properties located on either side of the subject site, were also developed prior to enactment of the Freshwater Wetlands Act (see L 1975, ch 614, § 1; exhibit 3; transcript at 17, 61 [noting that the map referred to in the testimony was derived from a photograph taken in 1974]).

approvable restoration plan to the Department within 30 days of the issuance of the Commissioner's Order. Staff requests that the restoration plan include a scalable survey of the site, drawn by a licensed surveyor, depicting the as built structures, the freshwater wetland and adjacent area boundaries, and the boundaries of the buffer area established under the permit.

With regard to restoring vegetation in the affected areas, Department staff requests that the restoration plan include the number of trees and shrubs that are to be planted and further requests that the plantings include:

- within the buffer area, 8' by 10' tall red maple, silver maple, and red oak trees on 15' centers, and 3' to 4' tall sweet pepper bush and highbush blueberry on 6' centers; and
- within the regulated freshwater wetland, 6' by 10' tall tupelo and white birch trees on 15' centers, and 4' to 6' tall bayberry or "Baccharis himifolia"[30] on 6' centers.

On this record, I conclude that the restoration requested by staff is both authorized and appropriate, subject to the following comments. The proposed restoration plan set forth in the complaint calls for all unlawful structures to be removed from the buffer area designated under the permit (see complaint, wherefore clause ¶ V). This provision should be modified to also require the removal of any unlawful structures that are located in the freshwater wetland. The list of structures to be removed should be modified to include the 6' by 8' shed (id.). There are inconsistent provisions set forth in the proposed restoration plan regarding the oil tank located at the rear of the dwelling (see id. ¶¶ V, IX). The latter provision, requiring the tank's removal regardless of whether it is located in the designated buffer, should be imposed. Lastly, I suggest that the respondents be given 60 days to submit an approvable restoration plan to the Department, rather than the 30 days proposed by staff (id. ¶ VII).

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has established respondents' liability for the violations alleged in the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth causes of action. I further conclude that staff failed to establish respondents' liability for the third, eleventh, seventeenth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth, and thirtieth causes of action. The sixteenth, twenty-sixth, and thirty-first causes of action were struck.

For the foregoing violations, I recommend that the Commissioner issue an order directing respondents to develop and implement the above described restoration plan, and assessing a civil penalty of $287,000 jointly and severally upon the respondents. I further recommend that $150,000 of the penalty be suspended provided that respondents implement the approved restoration plan and comply with all other terms of the Commissioner's order.

[30] Probably should read "Baccharis halimifolia."

APPENDIX A

EXHIBIT LIST
Matter of Arthur and Maureen Michele Francis
DEC File No. R1-20060130-20

Exhibit No.	Description
1	Resume of Robert F. Marsh, Natural Resources Supervisor, DEC
2	New York State Freshwater Wetlands Map, Howells Point Quadrangle
3	New York State Tidal Wetlands Map 672-512
4	Freshwater Wetlands and Tidal Wetlands Permit (permit number 1-4722-02893/00001, effective May 26, 1998)
5	Amendment to Permit, dated March 18, 1999, and Site Plan.
6	Order on Consent, signed by respondent Maureen Michele Francis on May 22, 1998
7	ACATs, dated August 31, 2003, issued to respondent Arthur Francis
8	ACATs, dated August 19, 2005, issued to respondent Maureen Michele Francis
9	Photographs of site taken by Department staff on or about December 19, 2003[31]
10	Enforcement Report, dated January 23, 2004
11	Photographs of site taken by Department staff on January 23, 2004
12	Notice of Violation, dated January 5, 2004, addressed to respondents
13	Photographs of site taken by Department staff on or about August 17, 2005
14	Photographs of site taken by Department staff on or about December 6, 2006
15	Aerial Photographs of site taken in 2001, 2004, and 2007

[31] By stipulation of the parties, descriptive comments appearing on these photographs are not in evidence.

APPENDIX B

PENALTY CHART
Matter of Arthur and Maureen Michele Francis
DEC File No. R1-20060130-20

Cause of Action*	M. Francis Liable (Y/N)	A. Francis Liable (Y/N)	Penalty Sought (complaint)	Penalty Recommended
First: placing fill in FW & FWAA (19 counts)	Y	Y	57,000	57,000
Second: clearing vegetation in FW & FWAA	Y	Y	3,000	3,000
Third: clear cutting trees in FW & FWAA	N	N	3,000	0
Fourth: grading in FW & FWAA	Y	Y	3,000	3,000
Fifth: construction of 66' x 30' patio in FWAA	Y	Y	3,000	1,000
Sixth: construction of 20' x 10' patio in FWAA	Y	Y	3,000	1,000
Seventh: driveway 15' closer to FW than authorized by permit	Y	Y	3,000	1,000
Eighth: construction of 6' x 8' shed in FWAA	Y	Y	3,000	1,000
Ninth: construction of 8' x 12' shed in FWAA	Y	Y	3,000	1,000
Tenth: construction of kayak rack in FWAA	Y	Y	3,000	1,000
Eleventh: oil storage tank in FWAA	N	N	3,000	0
Twelfth: construction of two brick walkways in FWAA	Y	Y	3,000	1,000
Thirteenth: placing fill in TWAA (19 counts)	Y	Y	190,000	190,000
Fourteenth: clearing vegetation in TWAA	Y	Y	10,000	10,000
Fifteenth: grading in TWAA	Y	Y	10,000	10,000
Sixteenth: excavation in TWAA	Struck	Struck	10,000	0
Seventeenth: oil storage tank in TWAA	N	N	10,000	0
Eighteenth: construction of 66' x 30' patio in TWAA	Y	Y	10,000	1,000

Cause of Action*	M. Francis Liable (Y/N)	A. Francis Liable (Y/N)	Penalty Sought (complaint)	Penalty Recommended
Nineteenth: construction of 20' x 10' patio in TWAA	Y	Y	10,000	1,000
Twentieth: driveway 15' closer to TW than authorized by permit	Y	Y	10,000	1,000
Twenty-first: construction of 6' x 8' shed in TWAA	Y	Y	10,000	1,000
Twenty-second: construction of 8' x 12' shed in TWAA	Y	Y	10,000	1,000
Twenty-third: construction of kayak rack in TWAA	Y	Y	10,000	1,000
Twenty-fourth: construction of two brick walkways in TWAA	Y	Y	10,000	1,000
Twenty-fifth: permit SC # 2 (silt protection/disturbed soils)	N	N		
Twenty-sixth: permit SC # 8 (ensure contractor complies with permit)	Struck	Struck		
Twenty-seventh: permit SC # 9 (35' undisturbed buffer along FW)	N	N		
Twenty-eighth: permit SC # 13 (construction material too close to FW)	N	N	500**	0
Twenty-ninth: permit SC # 15 (snow fence to be disposed in upland area)	N	N		
Thirtieth: permit SC # 20 (covenant added to deed w/in 90 days of permit)	N	N		
Thirty-first: permit supplementary SCs (permit must be available at site)	Struck	Struck		
Totals			**$390,500**	**$287,000**

*Abbreviation key: FW - Freshwater Wetland; FWAA - Freshwater Wetland Adjacent Area; TW - Tidal Wetland; TWAA - Tidal Wetland Adjacent Area; SC - Special Condition

**Department staff requested a single penalty of $500 for the seven causes of action concerning alleged violations of the permit.