

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

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

ORDER

-by-

DEC Case No.
R1-20070830-252

EDIVANE FRANCO and UBIRAJARA FRANCO,

Respondents.

I. Procedural Background

This administrative enforcement proceeding concerns alleged violations of New York State's freshwater wetland law and regulations by respondents Edivane and Ubirajara Franco (respondents) at property they own at 970 East Main Street, Riverhead, New York (site). The site contains regulated Class 1 Wetland R-3 and wetland adjacent area.

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this proceeding by serving respondent Edivane Franco with a notice of pre-hearing conference, hearing and complaint dated October 3, 2007. On or about February 1, 2008, respondent Edivane Franco served an answer and counterclaims on the Department.

Subsequently, by motion dated March 14, 2008, Department staff moved to strike or clarify affirmative defenses and to dismiss counterclaims. By cross-motion dated April 21, 2008, respondent Edivane Franco moved to dismiss the complaint and opposed staff's motion. By notice of motion dated May 6, 2008, Department staff moved to amend or supplement its pleadings to add Ubirajara Franco as a respondent. Respondents opposed this motion on May 14, 2008. On June 18, 2008, Administrative Law Judge (ALJ) Kevin J. Casutto granted Department staff's motion for leave to amend or supplement its complaint, thus rendering the remaining motions moot. Respondents served an amended answer on July 29, 2008.

There was no further activity on the matter until on or about December 19, 2014 when Department staff served respondents with a motion for order without hearing. The motion added several counts to those counts alleged in the amended complaint. Respondents opposed Department staff's motion, and the matter was assigned to ALJ Michael S. Caruso on March 9, 2015.

In the December 19, 2014 motion for order without hearing, Department staff asserted six causes of action with multiple subparts, alleging that respondents:

- (1) Caused or allowed the placement of fill in a regulated freshwater wetland without a permit in violation of ECL article 24 and 6 NYCRR 663.4(d)(20) (First cause of action – three violations);
- (2) Caused or allowed the placement of fill in the adjacent area to a regulated freshwater wetland without a permit in violation of ECL article 24 and 6 NYCRR 663.4(d)(20) (Second cause of action – two violations);
- (3) Caused or allowed the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit in violation of ECL article 24 and 6 NYCRR 663.4(d)(23) (Third cause of action – two violations);
- (4) Caused or allowed the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit in violation of ECL article 24 and 6 NYCRR 663.4(d)(23) (Fourth cause of action – one violation);
- (5) Caused or allowed the construction of a white vinyl fence, dock and an inground swimming pool in violation of Article 24 Freshwater Wetlands Permit No. 1-4730-01202/00001 dated April 8, 2005, that had been issued for various activities on the site (2005 Permit) (Fifth cause of action – three violations); and
- (6) Caused or allowed the construction of a chain link fence and patio in an adjacent area of a regulated freshwater wetland without a permit in violation of ECL article 24 and 6 NYCRR 663.4(d)(42) (Sixth cause of action – two violations).

By ruling dated April 20, 2015, ALJ Caruso granted Department staff's motion in part, finding respondents liable:

- on the first, second, and third causes of action in their entirety; and
- on the third violation alleged in the fifth cause of action, concerning the construction of an inground pool in contravention of the 2005 Permit.

See Matter of Edivane Franco and Ubirajara Franco, Ruling of the ALJ, April 20, 2015, at 18 [April 2015 Ruling]. The ALJ denied staff's motion with respect to the fourth and sixth causes of action, and with respect to the first and second violations alleged in the fifth cause of action (see April 2015 Ruling at 18).

A hearing on the remaining issues was held on May 25, 2016 in the Department's Region 1 Office. At the beginning of the hearing, Department staff withdrew the first two violations alleged in the fifth cause of action (see Hearing Transcript at 9). The hearing therefore related to respondents' potential liability under (a) the fourth cause action, which alleged one violation based upon clear-cutting vegetation without a permit, in the adjacent area to a regulated freshwater wetland; and (b) the sixth cause of action, which alleged that respondents constructed a fence and patio in an adjacent area of a regulated freshwater wetland without a permit.

Following the hearing, ALJ Caruso prepared the attached hearing report, in which the ALJ (a) incorporated by reference his April 2015 Ruling; (b) made findings of fact and reached conclusions of law; and (c) recommends that I issue an order:

- Finding respondents liable on the first, second, third, fourth, and sixth causes of action in their entirety, and on the third violation alleged in the fifth cause of action;
- Imposing upon respondents a total civil penalty of twenty-two thousand five hundred dollars (\$22,500), comprised of a payable penalty of seven thousand dollars (\$7,500) and the remaining amount of fifteen thousand dollars (\$15,000) suspended contingent upon respondents' compliance with the terms of the order; and
- Directing respondents to perform several remedial activities, as discussed below.

(see Hearing Report at 10-11). I adopt the ALJ's April 2015 Ruling, and the findings of fact and conclusions of law in the attached hearing report, subject to my comments below.

II. Factual Background

As noted, the site, which respondents have owned since September 2001, contains a regulated Class 1 freshwater wetland and adjacent area (see Hearing Report at 3-4 [Findings of Fact Nos. 1, 2]).

Robert Marsh, Region 1 Natural Resources Supervisor, observed the site on several occasions (see Hearing Report at 4 [Findings of Fact Nos. 5, 6, 7]; see also Affidavit of Robert F. Marsh sworn to December 19, 2014 [Marsh Aff.], ¶ 8). During his site inspection on July 1, 2003 with respect to respondent's permit application, Mr. Marsh saw several violations, including clear-cutting vegetation other than trees in the wetland and adjacent area, and causing or allowing fill to be placed in the wetland and adjacent area (see Marsh Aff., ¶ 12). In 2004, respondent Edivane Franco entered into an order on consent to resolve the violations (see *id.*, ¶ 14; see also Affirmation of Kari E. Wilkinson, Esq. dated December 19, 2014 [Wilkinson Aff.], Exhibit D).

On May 30, 2003, respondent Ubirajara Franco submitted a permit application proposing to remove dead trees, garbage and construction debris, to construct a fence, driveway, garage and pool, and to clear-cut vegetation (see Marsh Aff., ¶ 11).¹ On April 8, 2005, the Department issued to respondent Ubirajara Franco freshwater wetlands permit No. 1-4730-01202/00001 (2015 Permit), authorizing the installation of fencing, a pool, driveway, garage, a 4' wide access path and 4' x 50' dock, in accordance with a Department-approved plan attached to the permit (see Hearing Report at 4 [Finding of Fact No. 3]). The plan document attached to the permit reflected the wetland boundaries, a 15-foot buffer, and the location of the proposed structures and improvements and identified the area at the site in which respondent was authorized to

¹ Although the permit was issued to Ubirajara Franco, information submitted with the application, as well as respondents' affidavits, indicate that the submission was made on behalf of Ubirajara Franco and Edivane Franco (see Affidavit of Mark Carrara sworn to December 4, 2014, Exhibit 2 [written statement]; Affidavit of Edivane Franco sworn to February 20, 2015, ¶ 10; and Affidavit of Ubirajara Franco sworn to February 20, 2015, ¶ 13).

remove “garbage, junk and dead trees.” (see Hearing Report at 4 [Finding of Fact No. 4]; see also Affidavit of Mark Carrara sworn to December 4, 2014 [Carrara Aff.], Exhibit 3).

III. Discussion

A permit is required for certain activities that occur upon a wetland, or “impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland” (ECL 24-0701[2]; see also ECL 24-0701[1] and 6 NYCRR 663.4[a]). Activities regulated and prohibited without a permit include depositing fill, clear-cutting vegetation other than trees, and erecting structures (see ECL 24-0701[2]; 6 NYCRR 663.4[d][20] [fill]; 6 NYCRR 663.4[d][23] [clear-cutting vegetation other than trees]; and 6 NYCRR 663.4[d][42] [constructing a residence or related structures or facilities]).

A. First and Second Causes of Action

The ALJ properly found, based upon the evidence submitted in support of staff’s motion for order without hearing, that respondents placed fill in the freshwater wetland and adjacent area, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(20) (see April 2015 Ruling at 8-9, 14, 18). In addition to citing Mr. Marsh’s sworn affidavit regarding his observation of fill at the site in 2006 and 2008, and his review of the May 2007 photographs and inspection report of DEC Enforcement Officer Thomas Gadomski, the ALJ noted that respondents admitted placing topsoil in the wetland (see April 2015 Ruling at 14).

B. Third and Fourth Causes of Action

In the April 2015 Ruling, the ALJ found that staff was entitled to judgment on its third cause of action alleging that respondents had caused or allowed clear-cutting of vegetation other than trees in the wetland (see April 2015 Ruling at 15, 18). With respect to the adjacent area, the April 2015 Ruling found that, although staff had made a prima facie showing that vegetation other than trees was clear-cut from the adjacent area without a permit, a question of fact remained regarding whether the clear-cutting would have been allowed by the permit (see Hearing Report at 6 [citing April 2015 Ruling at 9]; April 2015 Ruling at 15, 18).

Mr. Marsh testified at the hearing that there was natural vegetation in the wetlands and 15-foot buffer area in 2003, but that, before his site visit in April 2006, the vegetation had been removed, and the adjacent area had been clear-cut (see Hearing Report at 4-5 [Findings of Fact Nos. 8-12]). According to Mr. Marsh, although part of the wetlands area at the site had been allowed to revert to natural vegetation, other portions have remained cleared, and the 15-foot buffer area continued to be cleared (see Hearing Report at 5 [Findings of Fact Nos. 15, 16]).

The ALJ properly found, based upon the evidence submitted in support of staff’s motion for order without hearing, and the evidence provided at the hearing, that respondents clear-cut vegetation other than trees in the freshwater wetland and the adjacent area, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(23) (see April 2015 Ruling at 9, 15, 18; Hearing Report at 6-7, 9).

C. Fifth Cause of Action

The ALJ properly found, based upon the evidence submitted in support of staff's motion for order without hearing, that respondents violated the 2005 Permit by constructing a swimming pool that did not conform to the requirements of the 2005 Permit and its general condition number 10 (see April 2015 Ruling at 11, 16). At the hearing, staff withdrew the remaining two violations alleged in the fifth cause of action (see Hearing Report at 2 [withdrawal of counts relating to construction of white vinyl fencing and construction of dock]).

D. Sixth Cause of Action

In the April 2015 Ruling, the ALJ found that, staff made a prima facie showing that respondents had constructed additional fencing and a patio around the swimming pool in violation of the permit. Because staff did not respond to respondents' assertions that the fencing around the pool was required by the town and that the patio was structurally necessary to support the pool, the ALJ found a question of fact that required resolution at hearing (see April 2015 Ruling at 16).

At the hearing, Mr. Marsh testified that respondents had constructed, in the wetland adjacent area, a four to five foot wide patio apron around the pool, and a chain link fence around the pool within 100 feet of the wetland boundary (see Hearing Report at 5 [Findings of Fact 13, 14]). In addition, he testified that, even if the town required the fencing around the pool, and the patio was structurally necessary for the pool, a DEC permit would still be required (see Hearing Report at 6-7; see also Hearing Transcript at 57-59).

The ALJ properly found, based upon the evidence submitted in support of staff's motion for order without hearing, and the evidence provided at the hearing, that respondents constructed the patio and fence surrounding the pool without a permit, in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42) (see Hearing Report at 7, 9).

E. Civil Penalty

Department staff, after withdrawing two of the violations in the fifth cause of action, reduced by \$3,000 the amount of civil penalties it is seeking (see Hearing Report at 8; Hearing Transcript at 70-71). Department staff now seeks a total civil penalty of \$22,500, comprised of a payable amount of \$7,500 and \$15,000 suspended contingent upon respondents' compliance with the order. I agree with the ALJ that the civil penalty requested by Department staff is authorized and appropriate on this record (see Hearing Report at 8-9 [noting eleven violations proven]; see also Marsh Aff., ¶¶ 65-70).

F. Remedial Relief

In the papers submitted in support of its motion for order without hearing, and at the hearing, Department staff requests that respondents be directed to remediate the site, including the following:

- Submit an approvable restoration plan to the Department with 60 days of the Commissioner’s order, which plan shall include:
 - A minimum of twelve trees 6-8 feet in height;
 - A minimum of two dozen native species wetland shrubs 2-4 feet in height;
 - A minimum of one dozen native species upland shrubs for the adjacent buffer;
 - Seeding the wetland with a native wetland seed mix at a rate of 15 lbs/acre;
 - Seeding the adjacent area in the 15 foot buffer with native upland seed mix at a rate of 15 lbs/acre;
- Remove fill back to pre-existing grade within the wetland and the wetland’s upland buffer as shown on the plans attached to the 2005 Permit; and
- Prohibiting respondents from mowing or disturbing the wetland and 15 foot buffer area so as to allow the wetland and 15 foot buffer to revert to natural vegetation.

(see Wilkinson Aff. at 11, Wherefore Clause ¶ IV [referencing Marsh Aff.]; see also Marsh Aff., ¶¶ 71-77). Based upon my review of the record, the remedial relief requested by Department staff and recommended by the ALJ is authorized and appropriate.

For purposes of the restoration plan, “approvable” shall mean a plan that can be approved by the Department with only minimal revision. As part of any restoration plan, the plan must include a timetable for the remedial activities set forth in the plan, the requirement that respondents notify Department staff before undertaking any restoration activity at the site, and a date by which respondents shall complete the remedial activities. The restoration plan shall also provide for respondents’ submission of documentation, including but not limited to photographs, of the remedial activities at appropriate intervals, both before and after their completion. At the hearing, Department staff indicated that it may be possible to reduce the number of trees and shrubs required by the restoration plan depending upon the extent that the impacted area has reverted to its natural state (see Hearing Transcript at 67). Should respondents submit documentation to Department staff that would support modifying the planting requirements relating to trees and shrubs, Department staff in its discretion may modify the requirements of the restoration plan established by this order.

With respect to the removal of fill back to pre-existing grade, respondents shall complete the removal within sixty (60) days of the service of this order upon them, provided that Department staff may extend the time period upon good cause shown by respondents.

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

- I. Respondents Edivane Franco and Ubirajara Franco are adjudged to have violated:
 - A. ECL 24-0701 and 6 NYCRR 663.4 (d)(20), by causing or allowing the placement of fill in a regulated freshwater wetland without a permit;

- B. ECL 24-0701 and 6 NYCRR 663.4(d)(20), by causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit;
 - C. ECL 24-0701 and 6 NYCRR 663.4(d)(23), for causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit;
 - D. ECL 24-0701 and 6 NYCRR 663.4(d)(23), by causing or allowing the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit;
 - E. Article 24 Freshwater Wetlands Permit No. 1-4730-01202/00001 dated April 8, 2005, by causing or allowing the construction of an inground pool in nonconformance with the permit;
 - F. ECL 24-0701 and 6 NYCRR 663.4(d)(42) by causing or allowing the construction of a chain link fence in an adjacent area of a regulated freshwater wetland without a permit; and
 - G. ECL 24-0701 and 6 NYCRR 663.4(d)(42) by causing or allowing the construction of a patio in an adjacent area of a regulated freshwater wetland without a permit.
- II. Respondents Edivane Franco and Ubirajara Franco are hereby, jointly and severally, assessed a civil penalty of twenty-two thousand five hundred dollars (\$22,500) for the above referenced violations, with payment of fifteen thousand dollars (\$15,000) of the penalty suspended, conditioned upon respondents' compliance with the provisions of this order. Respondents Edivane Franco and Ubirajara Franco are hereby directed to submit the payable portion of the civil penalty in the amount of seven thousand five hundred dollars (\$7,500) within thirty (30) days of service of this order on respondents. Payment shall be made by cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

Office of General Counsel
NYSDEC Region 1
50 Circle Road
SUNY Stony Brook
Stony Brook, NY 11790
Attention: Kari E. Wilkinson, Esq.

If respondents fail to comply with any of the terms and conditions of this order, including but not limited to the timely payment of the non-suspended portion of the civil penalty, the suspended portion of the penalty (that is, fifteen thousand dollars [\$15,000]) shall immediately become due and payable, and shall be submitted to the Department in the same form and to the same address as the non-suspended portion of the penalty.

- III. Questions regarding this order should be directed to Attorney Kari E. Wilkinson at the above-referenced address.
- IV. Respondents Edivane Franco and Ubirajara Franco are hereby directed to remove all fill to pre-existing grades within the wetland and the wetland's upland buffer as shown on the approved plans attached to Article 24 Freshwater Wetlands Permit No. 1-4730-01202/00001, within sixty (60) days of service of this order on respondents provided that Department staff may extend the time period upon good cause shown by respondents.
- V. Respondents Edivane Franco and Ubirajara Franco are hereby directed to submit an approvable restoration plan to the Department within sixty (60) days of service of this order on respondents. The restoration plan shall include: a minimum of 12 trees that are 6 to 8 feet in height; a minimum of three dozen shrubs 2 to 4 feet in height comprised of native species (two dozen of the shrubs should be wetland shrubs and one dozen should be upland shrubs for the adjacent buffer); seeding of the wetland with a native wetland seed mix at a rate of 15 lbs/acre; and seeding of the 15-foot buffer with native upland seed mix at the rate of 15 lbs/acre.

As part of any restoration plan, the plan must include a timetable for the remedial activities set forth in the plan, the requirement that respondents notify Department staff before undertaking any restoration activity at the site, and a date by which respondents shall complete the remedial activities. The restoration plan shall also provide for respondents' submission of documentation, including but not limited to photographs, of the remedial activities at appropriate intervals, both before and after their completion. Should respondents submit adequate documentation to Department staff that would support modifying the planting requirements relating to trees and shrubs, Department staff in its discretion may modify those requirements.

- VI. Respondents Edivane Franco and Ubirajara Franco are directed to submit the approvable restoration plan to the following:

Robert Marsh
Regional Natural Resources Supervisor
NYSDEC Region 1
50 Circle Road
SUNY Stony Brook
Stony Brook, NY 11790

- VII. Respondents Edivane Franco and Ubirajara Franco are enjoined from mowing and disturbing the freshwater wetlands or 15-foot buffer area, and are hereby directed to allow the wetlands and 15-foot buffer area to revert to natural vegetation.

VIII. The provisions, terms and conditions of this order shall bind respondents Edivane Franco and Ubirajara Franco, and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: April 13, 2018
Albany, New York

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

HEARING REPORT

-by-

DEC Case No.
R1-20070830-252

EDIVANE FRANCO AND UBIRAJARA FRANCO,

Respondents.

Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Kari E. Wilkinson and Jennifer M. Ukeritis of counsel), for staff of the Department of Environmental Conservation
- R. Bertil Peterson, Esq., for respondents Edivane Franco and Ubirajara Franco

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondents Edivane Franco and Ubirajara Franco with placing fill into a regulated freshwater wetland (wetland) and regulated freshwater wetland adjacent area (adjacent area), clear-cutting vegetation other than trees in a wetland and adjacent area, and constructing structures or facilities in a wetland and adjacent area without a permit or in violation of DEC Freshwater Wetlands Permit No. 1-4730-01202/00001 issued April 8, 2005 (2005 Permit), on property owned by respondents in the Town of Riverhead, Suffolk County. Department staff filed a motion for an order without hearing addressed to the alleged violations and respondents opposed staff's motion.

By ruling dated April 20, 2015, which is incorporated herein by reference, I granted Department staff's motion in part on the issue of liability against respondents Edivane Franco and Ubirajara Franco on the following violations:

1. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in a regulated freshwater wetland without a permit (First cause of action – three violations);
2. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit (Second cause of action – two violations);

3. ECL 24-0701 and 6 NYCRR 663.4(d)(23) for causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit (Third cause of action – two violations);¹ and
4. The 2005 Permit for causing or allowing the construction of an inground pool in nonconformance with the permit (Fifth cause of action – count [c]).

Issues remaining to be decided after hearing were the alleged violations of ECL 24-0701 and 6 NYCRR 663.4(d)(23) for clear-cutting in the adjacent area (fourth cause of action);² alleged construction of white vinyl fencing in violation of Special Condition 14 of the 2005 Permit (fifth cause of action); alleged construction of the dock in violation of the 2005 Permit (fifth cause of action); and alleged construction of fencing and a patio surrounding the inground pool without a permit in violation of ECL 24-0701 and 6 NYCRR 663.4(d)(42) (sixth cause of action).

In addition, evidence and testimony on the penalties and remedial relief requested by Department staff were to be presented at hearing.³ (See Matter of Edivane Franco and Ubirajara Franco, Ruling of the ALJ, April 20, 2015 [Ruling] at 18.)

Because this matter concerns Department staff's enforcement of the ECL, regulations and permit conditions, the proceedings are governed by 6 NYCRR Part 622 - Uniform Enforcement Hearing Procedures (see 6 NYCRR 622.1[a][1]). To prevail on those allegations preserved for hearing, Department staff must prove its allegations by a preponderance of the evidence (6 NYCRR 622.11[b]).

I. Summary of the Parties' Positions

A. Department Staff

Prior to calling its witness, Department staff withdrew the counts alleging violations of the 2005 Permit regarding the construction of the white vinyl fencing and the construction of the dock (fifth cause of action, counts [a] and [b]) (see Transcript at 10).

In addition to the liability already found against respondents, Department staff alleges that respondents clear cut vegetation in the area adjacent to the freshwater wetlands, in violation of 6 NYCRR 663.4(d)(23); and allowed or caused the construction of a patio and chain link fence without the required permit in violation of 6 NYCRR 663.4(d)(42).

¹ The April 20, 2015 Ruling mistakenly referenced violation of 6 NYCRR 633.4(d)(23) in describing staff's third cause of action on page 6, but otherwise references the correct regulatory section throughout.

² The April 20, 2015 Ruling mistakenly referenced violation of 6 NYCRR 633.4(d)(23) in describing staff's fourth cause of action on page 6, but otherwise references the correct regulatory section throughout.

³ A discussion of the procedural history of this proceeding was provided in the the April 20, 2015 Ruling and will not be repeated here.

With the withdrawal of two counts of the fifth cause of action, Department staff seeks a civil penalty of \$22,500 with \$15,000 suspended so long as the restoration of the site by respondents is completed to staff's satisfaction (see Transcript at 68-69).

B. Respondents

Respondents argue that the wetland and adjacent area were used as a dumping place by the previous owners and others. Respondents assert there was a sunken boat, a refrigerator, stoves, ramps, tires and other debris in the wetland and adjacent area with vegetation growing through and surrounding the debris. Respondents claim they had to clear part of the wetland and adjacent areas to remove the debris and trees that had fallen down. Moreover, respondents claim that because the vegetation was so entangled with the debris, the very act of removing the debris resulted in vegetation being removed with it.

Respondents also assert that the patio surrounding the pool was needed for structural support of the pool and that the additional fencing around the pool was required by the town.

II. Hearing

The hearing was held on May 25, 2016 in the Department's Region 1 Office, 50 Circle Road, Stony Brook, New York. Assistant regional attorney Kari E. Wilkinson, Esq. appeared on behalf of Department staff and presented one witness: Robert Marsh, Natural Resources Supervisor for DEC Region 1.

R. Bertil Peterson, Esq. appeared on behalf of respondents and presented one witness: Ubirajara Franco.

Department staff offered four exhibits at the hearing. Each exhibit consisted of several photographs that were separately labeled. The attached exhibit chart describes each exhibit and whether it was received into evidence. Mr. Peterson marked one exhibit for identification but did not offer it into evidence. The matter concluded in one day.

The transcript of the hearing was received on June 7, 2016.

III. Findings of Fact

1. On September 28, 2001, the Chase Manhattan Bank, by deed, transferred all right, title and interest in the premises known as 970 East Main Street, Riverhead, New York [site] to Ubirajara Franco and Edivane Franco. The deed is recorded in the Suffolk County Clerk's office

in Liber D00012191 Page 112. (See Affirmation of Kari E. Wilkinson, In Support of Motion For Order Without Hearing, dated December 19, 2014, Exhibit A.)

2. The site contains a regulated freshwater wetland known as Wetland R-3 on Official Wetland Map 18 of 39, Riverhead Quadrangle, New York State Freshwater Wetland Map, Suffolk County, which is a class 1 freshwater wetland, and contains regulated freshwater wetland adjacent areas. (See Transcript at 18 [testimony of Robert Marsh]; Affidavit of Robert F. Marsh [Marsh Affidavit], In Support of Motion For Order Without Hearing, sworn to December 19, 2014, at ¶ 9 and Exhibit 2.)

3. On April 8, 2005, DEC issued Freshwater Wetlands Permit No. 1-4730-01202/00001 [2005 Permit] to Ubirajara Franco. The permit authorized respondents to “[i]ninstall fencing, pool and driveway, construct garage, and install 4’ wide access path and 4’ x 50’ dock. All work must be done in accordance with the attached plan prepared by William R. Simmons dated 2/10/93 last revised 12/20/04 and stamped NYSDEC approved on 04/08/05.” The permit also contained general and special conditions. (See Affidavit of Mark Carrara [Carrara Affidavit], In Support of Motion For Order Without Hearing, sworn to December 4, 2014, Exhibit 3.)

4. The plan attached to the permit shows the location of the wetland boundary, the area within the wetland to be cleaned (“removal of garbage, junk and dead trees”), a 15-foot buffer extending landward from the wetlands boundary, and the location of the proposed structures and improvements in the adjacent area (landward of the 15-foot buffer). Except for the permitted activity, the area within the wetland and 15-foot buffer were to “remain natural and undisturbed.” (See Carrara Affidavit, Exhibit 3.)

5. Robert Marsh is employed as the natural resources supervisor in DEC Region 1. Mr. Marsh manages several DEC Region 1 programs including habitat, marine habitat protection, forestry, wildlife, fisheries and real property. (See Transcript at 16 [testimony of Robert Marsh].)

6. Prior to being the natural resources supervisor, Mr. Marsh managed the Bureau of Habitat in Region 1 and was responsible for managing freshwater wetlands (ECL article 24), wild, scenic and recreational rivers (ECL article 15) and use and protection of waters (ECL article 15). (See Transcript at 16-17 [testimony of Robert Marsh].)

7. Mr. Marsh visited the site in 2003, 2006, 2008, 2014 and 2016. (See Transcript at 17-18 [testimony of Robert Marsh].)

8. Mr. Marsh first noted that respondents had clear-cut vegetation other than trees in the adjacent area in April 2006. (See Transcript at 19 [testimony of Robert Marsh].)

9. Mr. Marsh described the adjacent area that had been clear-cut as a 15 feet wide by 140 feet long area that is part of the 15 feet wide by 200+/- feet long buffer area illustrated on

the plan attached to the permit. (See Transcript at 19 and 54 [testimony of Robert Marsh]; Staff Exhibits 14 a-d.)

10. In 2003, there was natural vegetation (buttonbush and other native shrub species) in the wetlands and 15-foot buffer area. (See Transcript at 51 and 54 [testimony of Robert Marsh].)

11. When Mr. Marsh revisited the site in April 2006, the vegetation in the 15-foot buffer area had been removed. (See Transcript at 54 [testimony of Robert Marsh]).

12. Respondents clear-cut vegetation within the 15-foot buffer area. (See Transcript at 54-55 [testimony of Robert Marsh]; Staff Exhibits 6 A-B, 14 a-d.)

13. Respondents constructed a four to five feet wide patio apron around the pool. The patio is located within the adjacent area. (See Transcript at 57-58 [testimony of Robert Marsh].)

14. Respondents constructed a chain link fence around the pool. The fence is located within 100 feet of the wetland boundary. (See Transcript at 58-59 [testimony of Robert Marsh]; Carrara Affidavit, Exhibit 3.)

15. Part of the freshwater wetlands area at the site has been allowed to revert to natural vegetation, but other portions have been kept cleared. (See Transcript at 64-65 [testimony of Robert Marsh]; Staff Exhibits 15 D and F.)

16. The 15-foot buffer area continues to be cleared. (See Transcript at 66 [testimony of Robert Marsh]; Staff Exhibits 15 D and F.)

17. As authorized by the permit, respondents removed refrigerators, lawnmowers, a boat, catamaran, VCRs, stoves, rims and tires, carpets, construction debris, bricks, cement, roofing material and other debris as well as dead trees from the wetland and adjacent area. (See Transcript at 79-81 [testimony of Ubirajara Franco].)

18. Some of the vegetation that was removed by respondents was embedded in or growing through the debris, which resulted in vegetation being removed along with the debris. (See Transcript at 81-83 [testimony of Ubirajara Franco].)

19. Respondents owned a goat that was allowed to graze and forage in the wetland and 15-foot buffer area until 2008 or 2009. (See Transcript at 84 [testimony of Ubirajara Franco].)

IV. Discussion

A. Causing or allowing clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit in violation of 6 NYCRR 663.4(d)(23)

The April 20, 2015 Ruling found that staff had made a prima facie showing that vegetation other than trees was clear-cut from the adjacent area without a permit (see Ruling at 9). The Ruling, however, found that the depiction of the 15-foot buffer area (which is the first 15 feet of the 100-foot adjacent area bordering the wetland boundary) and Mr. Marsh's description that all clear-cutting in the adjacent area occurred within 30 feet of the freshwater wetland boundary raised a material issue of fact. In other words, if clearing were performed more than 15 feet landward from the freshwater wetland boundary it would still be within the 100-foot adjacent area but landward of the 15-foot buffer area and allowed by the permit.

At hearing, Mr. Marsh testified that vegetation other than trees were clear-cut from the adjacent area, including the 15-foot buffer area (see Findings of Fact Nos. 8-12). In 2003, Mr. Marsh witnessed wetland species of shrubs present in the 15-foot buffer area. When he visited the site in April 2006, the 15-foot buffer area had been clear-cut of vegetation. Mr. Marsh testified that during his May 24, 2016 view of the property, it looked like the 15-foot buffer continued to be cleared by respondents (see Finding of Fact No. 16).

Mr. Franco's testimony corroborates staff's proof that clear-cutting within the adjacent area and buffer area occurred. He testified that the family's goat ate much of the vegetation in the adjacent area and elsewhere. While he denied mowing the area, he caused or allowed a goat to forage in the freshwater wetland, adjacent area and buffer area (see Finding of Fact No. 19). After the goat was no longer foraging in the adjacent area, about 2008 or 2009, portions of the freshwater wetland area and the 15-foot buffer area have been kept cleared (see Findings of Fact Nos. 15 and 16).

I conclude that Department staff has proven by a preponderance of the evidence that respondents caused or allowed clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit in violation of 6 NYCRR 663.4(d)(23).

B. Constructing a chain link fence and patio in violation of 6 NYCRR 663.4(d)(42)

The Ruling found Department staff had made a prima facie showing that the chain link fence and patio were constructed in the adjacent area without a permit. The respondents, however, asserted that the fence was required by the town and the patio is structurally necessary to support the pool. I concluded that respondents raised a material issue of fact.

At hearing, Mr. Marsh testified that the fence and patio required a DEC permit even if the fence was required by local law and the patio was required for structural purposes (see Transcript at 57-59). I agree.

I conclude that Department staff has proven by a preponderance of the evidence that respondents caused or allowed the construction of the patio and chain link fence surrounding the inground pool without a permit in violation of 6 NYCRR 663.4(d)(42).

C. Summary

Accordingly, I find respondents liable for violation of the following:

1. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in a regulated freshwater wetland without a permit (First cause of action – three violations);⁴
2. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit (Second cause of action – two violations);⁵
3. ECL 24-0701 and 6 NYCRR 663.4(d)(23) for causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit (Third cause of action – two violations);⁶
4. ECL 24-0701 and 6 NYCRR 663.4(d)(23) for causing or allowing the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit (Fourth cause of action – one violation);⁷
5. The 2005 Permit for causing or allowing the construction of an inground pool in nonconformance with the permit (Fifth cause of action – count [c]);⁸ and
6. ECL 24-0701 and 6 NYCRR 663.4(d)(42) for causing or allowing the construction of the chain link fence and patio in an adjacent area of a regulated freshwater wetland with a permit (Sixth cause of action – counts [a] and [b]).⁹

⁴ See April 20, 2015 Ruling at 18.

⁵ Id.

⁶ Id.

⁷ Decided after hearing.

⁸ See April 20, 2015 Ruling at 18.

⁹ Decided after hearing.

D. Penalty and Relief Requested

After withdrawing counts (a) and (b) of staff's fifth cause of action, Department staff is seeking a civil penalty in the amount of \$22,500 with \$15,000 suspended leaving a payable penalty of \$7,500 (see Transcript at 68-69). In calculating the civil penalty, Department staff applied the penalty provisions of ECL 71-2303(1) that were in effect before May 28, 2010 because the dates of the later violations were unknown. Therefore, staff applied a penalty of \$3,000 per violation for purposes of calculating a maximum penalty. Staff has proven eleven violations; therefore, the maximum penalty would be \$33,000.

Department staff's motion papers and testimony demonstrate that the \$22,500 penalty falls within the statutory provisions of ECL 71-2303(1) and penalty guidance established in DEE-6 Freshwater Wetlands Enforcement Policy (February 4, 1992). Staff demonstrated the benefits provided by freshwater wetlands and adjacent areas and the importance and relevance of the regulatory scheme to protect the wetlands and the environmental impacts when the regulations are ignored. In addition to the economic benefit derived from noncompliance, Department staff demonstrated the gravity of harm for each type of violation (see Transcript at 67-69; Marsh Affidavit at ¶¶ 65-70).

For remedial measures, Department staff requested the following:

- submission of an approvable restoration plan to the Department within 60 days of the order;
- removal of fill to pre-existing grades within the wetland and the wetland's upland buffer as shown on the approved plans attached to the 2005 Permit;
- the pool and patio can remain as built;
- removal of sections of the white vinyl fence along the southern property line located in the flagged wetland;
- removal of the dock and associated fill;
- a restoration plan that includes: a minimum of 12 trees that are 6 to 8 feet in height; a minimum of three dozen shrubs 2 to 4 feet in height comprised of native species (two dozen of the shrubs should be wetland shrubs and one dozen should be upland shrubs for the adjacent buffer); seeding of the wetland with a native wetland seed mix at a rate of 15 lbs/acre; and seeding of the 15-foot buffer with native upland seed mix at the rate of 15 lbs/acre. The wetland and 15-foot buffer should not be mowed or disturbed and be allowed to revert to natural vegetation. (See Marsh Affidavit at ¶¶ 72-77.)

At hearing, Department staff withdrew the counts regarding the construction of the white vinyl fence and construction of the dock in nonconformance with the 2005 Permit. As a result, staff also withdrew staff's requests for removal of sections of the white vinyl fence and removal of the dock. Mr. Marsh also noted that some of the natural vegetation had returned to the wetland and buffer areas previously clear-cut. As a result, Department staff indicated it might be able to reduce the number of trees and shrubs to be planted, but those numbers would be subject to a site visit and evaluation of the presence of wetland and upland trees and shrubs (see Transcript at 67 and 69).

In mitigation of any penalty, respondents represented in their opening statement that respondents would submit a permit application for the patio and chain link fence as well as planting whatever trees or shrubs were required (see Transcript at 13). Respondents, however, have enjoyed an economic benefit from the more than ten years of noncompliance with the law, regulations and permit. The most glaring of which is the fact staff may be willing to reduce the number of plantings because native species have returned to portions of the wetlands and buffer area that were not kept clear by respondents. So by delaying the resolution of this matter that was commenced in October 2007 and refusing the Department access to the site since December 2007, respondents have benefitted economically by nature taking its course in areas that were not kept clear by respondents. Moreover, the ecological function of the wetlands and adjacent area has been impaired for those ten years.

I conclude that Department staff has demonstrated the requested civil penalty is consistent with the Department's enforcement policy as well as applicable provisions of the ECL. Staff indicated a willingness to reduce the number of plantings at hearing subject to the evaluation of the presence of native wetland species during a site visit. The number of plantings and other remedial efforts were further discussed during a site visit on May 26, 2016. The site visit and those discussions, however, are not part of this hearing record.

V. Conclusions of Law

1. By causing or allowing the placement of fill in a regulated freshwater wetland without a permit respondents violated ECL 24-0701 and 6 NYCRR 663.4(d)(20);
2. By causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit respondents violated ECL 24-0701 and 6 NYCRR 663.4(d)(20);
3. By causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit respondents violated ECL 24-0701 and 6 NYCRR 663.4(d)(23);
4. By causing or allowing the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit respondents violated ECL 24-0701 and 6 NYCRR 663.4(d)(23);
5. By causing or allowing the construction of an inground pool in nonconformance with the permit respondents violated the 2005 Permit; and
6. By causing or allowing the construction of the chain link fence and patio in an adjacent area of a regulated freshwater wetland without a permit respondents violated ECL 24-0701 and 6 NYCRR 663.4(d)(42).

VI. Recommendation

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

A. Granting Department staff's December 19, 2014 motion for order without hearing pursuant to 6 NYCRR 622.12, holding respondents Edivane Franco and Ubirajara Franco violated the following:

1. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in a regulated freshwater wetland without a permit (First cause of action – three violations);
2. ECL 24-0701 and 6 NYCRR 663.4(d)(20) for causing or allowing the placement of fill in the adjacent area to a regulated freshwater wetland without a permit (Second cause of action – two violations);
3. ECL 24-0701 and 6 NYCRR 663.4(d)(23) for causing or allowing the clear-cutting of vegetation other than trees in a regulated freshwater wetland without a permit (Third cause of action – two violations); and
4. The 2005 Permit for causing or allowing the construction of an inground pool in nonconformance with the permit (Fifth cause of action – count [c]).

B. Holding that, based upon the proof adduced at the adjudicatory hearing, respondents Edivane Franco and Ubirajara Franco violated the following:

1. ECL 24-0701 and 6 NYCRR 663.4(d)(23) for causing or allowing the clear-cutting of vegetation other than trees in an adjacent area to a regulated freshwater wetland without a permit (Fourth cause of action – one violation); and
2. ECL 24-0701 and 6 NYCRR 663.4(d)(42) for causing or allowing the construction of the chain link fence and patio in an adjacent area of a regulated freshwater wetland without a permit (Sixth cause of action – counts [a] and [b]).

C. Directing respondents Edivane Franco and Ubirajara Franco to pay a civil penalty of twenty-two thousand five hundred dollars (\$22,500) for the above referenced violations, with payment of fifteen thousand dollars (\$15,000) of the penalty suspended, conditioned upon respondent's compliance with the provisions of the Commissioner's order.

D. Directing respondents Edivane Franco and Ubirajara Franco to submit the payable portion of the civil penalty in the amount of seven thousand five hundred dollars (\$7,500) by certified check payable to NYSDEC within thirty (30) days of service of the Commissioner's order on respondents to the following:

Office of General Counsel
NYSDEC Region 1
50 Circle Road
SUNY Stony Brook
Stony Brook, NY 11790
Attention: Kari E. Wilkinson, Esq.

E. Directing respondents Edivane Franco and Ubirajara Franco to remove all fill to pre-existing grades within the wetland and the wetland's upland buffer as shown on the approved plans attached to the 2005 Permit.

F. Directing respondents Edivane Franco and Ubirajara Franco to submit an approvable restoration plan to the Department within sixty (60) days of service of the order on respondents, that includes: a minimum of 12 trees that are 6 to 8 feet in height; a minimum of three dozen shrubs 2 to 4 feet in height comprised of native species (two dozen of the shrubs should be wetland shrubs and one dozen should be upland shrubs for the adjacent buffer); seeding of the wetland with a native wetland seed mix at a rate of 15 lbs/acre; and seeding of the 15-foot buffer with native upland seed mix at the rate of 15 lbs/acre; unless otherwise agreed to by the Department.

G. Directing respondents Edivane Franco and Ubirajara Franco to submit the approvable restoration plan to the following:

Robert Marsh
Regional Natural Resources Supervisor
NYSDEC Region 1
50 Circle Road
SUNY Stony Brook
Stony Brook, NY 11790

H. Enjoining respondents Edivane Franco and Ubirajara Franco from mowing and disturbing the freshwater wetlands or 15-foot buffer area, and directing respondents to allow the wetlands and 15-foot buffer area to revert to natural vegetation.

J. Directing such other relief as the Commissioner may deem just, proper and appropriate.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: August 15, 2016
Albany, New York

EXHIBIT CHART – HEARING
Matter of Edivane Franco and Ubirajara Franco
 May 25, 2016
DEC Case No. R1-20070830-252

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6 A-B	Two Photographs from April 2006 Site Inspection labeled A-B, originally attached as part of Exhibit 6 to the Affidavit of Robert Marsh, sworn to December 19, 2014, in support of Department staff's motion for order without hearing (Marsh Affidavit).	✓	✓	Department Staff	
12 A-D	Four Photographs from March 2014 Site Inspection labeled A-D, originally attached as Exhibit 12 to the Marsh Affidavit.	✓	✓	Department Staff	
14 A-D	Four aerial photographs of the site labeled "a-d" depicting the site, wetland and 15-foot buffer area boundaries, dated 2004, 2004, 2010 and 2013 respectively.	✓	✓	Department Staff	
15 A-F	Six photographs of the site taken by Robert Marsh on May 24, 2016 labeled 15 A-F.	✓	✓ See Note	Department Staff	All marked for identification, only 15 D, E and F were offered and received into evidence.

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	Canel Landscaping Inc. "Contract Proposal" for remediation of the site, dated May 10, 2016.	✓	No	Respondents	The exhibit was marked for identification but not offered.