

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

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

ORDER

DEC Case No.
R6-2287-99-02

- by -

H. GORDON GANTER,

Respondent.

Pursuant to section 622.12 of title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of New
York ("6 NYCRR"), staff of the New York State Department of
Environmental Conservation ("Department") commenced this
administrative proceeding against respondent H. Gordon Ganter
with service of a notice of motion for order without hearing in
lieu of a complaint by certified mail return receipt requested.

The motion alleged that Mr. Ganter owns property,
portions of which are regulated freshwater wetlands, adjacent to
the St. Lawrence River and located off Collins Landing Road in
the Town of Alexandria, Jefferson County. The motion
additionally stated that Department staff issued a combined
Freshwater Wetlands Permit and Water Quality Certification (No.
6-2222-00184/00003-0), effective February 12, 1993 to Mr. Ganter,
which authorized the construction of a roadway, 12 feet wide,
across two sections of regulated Freshwater Wetland F-13,
identified as crossings "A" and "B." The motion alleged further
that Mr. Ganter failed to comply with the terms of Special
Condition Nos. 2, 3, and 5 of the February 12, 1993 wetlands
permit. In response to staff's motion, Mr. Ganter timely filed
an answer.

The matter was assigned to Administrative Law Judge
("ALJ") Daniel P. O'Connell who issued a ruling dated August 8,
2006 on Department staff's motion for order without hearing. The
ruling concluded that Mr. Ganter violated the terms of Special
Condition No. 2 of the February 12, 1993 freshwater wetlands
permit when he installed four 12-inch diameter culverts rather
than two 36-inch diameter culverts. The ruling concluded
further, however, that a hearing was necessary to determine
whether Mr. Ganter violated the terms of the permit's Special

Condition Nos. 3 and 5. Because a hearing was necessary to determine whether Mr. Ganter complied with the terms of the February 12, 1993 wetlands permit, the ruling reserved on the relief requested by Department staff.

Subsequently, ALJ O'Connell convened an adjudicatory hearing on September 7, 2006 at the Department's Region 6 office in Watertown, New York. ALJ O'Connell prepared the attached hearing report, which I adopt as my decision in the matter, subject to the following comments. I also adopt the ALJ's ruling on liability contained in his August 8, 2006 ruling on staff's motion for order without hearing.

Based upon the record in this proceeding, Mr. Ganter did not fully comply with the terms of the February 12, 1993 freshwater wetlands permit issued to him by the Department. The evidence revealed that respondent installed four 12-inch diameter culverts instead of the two 36-inch culverts required by Special Condition No. 2 of his permit. Special Condition No. 3 of his permit required respondent to dredge adjoining property that he did not own, provided that he obtain permission from the adjoining landowner (his brother, Warren Ganter). The dredging was proposed by Department staff and accepted by respondent as mitigation for the project's impacts on the wetland and, therefore, was an appropriate condition of the permit. Respondent failed to seek a modification or amendment to these permit conditions when permission from his brother was not forthcoming in order to complete the project. Lastly, Department staff showed that respondent failed to remove material dredged pursuant to his permit to an upland location outside the wetland boundary as required by Special Condition No. 5 of the permit.

Pursuant to Environmental Conservation Law ("ECL") § 71-2303(1), any person who violates any provision of ECL article 24, its implementing regulations or a permit issued pursuant thereto, will be liable for a maximum civil penalty of \$3,000 for each violation. Based upon my review, the civil penalty of \$9,000 recommended by the ALJ is justified by the circumstances of this case.

In addition, ECL 71-2303(1) authorizes the Commissioner to direct the violator to restore the affected freshwater wetlands to its condition prior to the violation, among other things. The ALJ has recommended that respondent be given the choice of either (1) removing all the fill material from Freshwater Wetland F-13 and restoring the wetland to its preconstruction condition, (2) complying with the conditions of

the February 12, 1993 wetlands permit, or (3) seeking a modification of that permit.

Based upon my review of the record and applicable legal authority, I adopt the ALJ's recommendation insofar as it would provide respondent an option to either (1) remove all the fill material from Freshwater Wetland F-13 and restore the wetland to its preconstruction condition, or (2) comply with the conditions of the February 12, 1993 wetlands permit. I decline, however, to adopt the third option which would allow Mr. Ganter a further opportunity to seek modification of the 1993 permit. The record demonstrates that Mr. Ganter has not completed the authorized project consistent with the terms of the permit. When he failed to obtain permission to dredge portions of the channel, as required by Special Condition No. 3, Mr. Ganter was obliged to request a modification of his permit from Department staff. In the years since the permit was issued, he has not done so and, in light of the duration and seriousness of the permit violations, the third option is not adopted.

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

- I. Department staff's motion for order without hearing against respondent H. Gordon Ganter is granted with respect to the allegation that respondent violated Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit when he installed four 12-inch culverts at crossing "B" rather than two 36-inch culverts.
- II. Respondent violated Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit when he failed to undertake the mitigation dredging as required by that condition.
- III. Respondent violated Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit when he failed to remove dredged material to an upland location outside the wetlands boundary.
- IV. Respondent H. Gordon Ganter is hereby assessed a civil penalty in the amount of nine thousand dollars (\$9,000), which is due and payable no later than thirty (30) days after receipt of this order. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation," and delivered to the

Department at the following address: New York State Department of Environmental Conservation, Region 6, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601, ATTN: Ronald J. Novak, P.E., Regional Enforcement Coordinator.

- V. Following receipt of this order and within the time periods set forth below, respondent is hereby directed to remove all fill placed in Freshwater Wetland F-13 and restore the wetland to its preconstruction condition. In undertaking these activities, respondent is directed to:
- A. Remove all material to an upland site more than 100 feet from the boundary of Wetland F-13 and ensure such material does not re-enter Wetland F-13 or any wetland or waterbody of the State of New York;
 - B. Commence removal of the road comprising wetland crossing "B" as described in the permit within thirty (30) days after receiving this order;
 - C. Undertake no work in Wetland F-13 during the period April 1, 2007 to September 30, 2007;
 - D. Complete all removal by December 31, 2007 or, subject to the approval of Department staff, as soon thereafter as practicable;
 - E. Comply with all general conditions in the February 12, 1993 Freshwater Wetlands permit;
 - F. Notify staff at the Department's Region 6 Office within five (5) business days of completing the removal of the road and any portion thereof;
 - G. Take all necessary precautions to preclude the contamination of any wetland or waterbody; and
 - H. Should Department staff note any deficiency in the corrective actions undertaken by or on behalf of respondent, correct such deficiency within ten (10) days after notification in writing by Department staff subject to all other conditions and limitations provided herein.

VI. As an alternative to the provisions set forth in paragraph V above, within the time periods set forth in the sub-paragraphs below, and upon receipt of this order, respondent is hereby directed to:

- A. Comply with all the general and special conditions of the February 12, 1993 Freshwater Wetlands permit;
- B. Undertake no work in Wetland F-13 during the period April 1, 2007 to September 30, 2007;
- C. Complete all work by December 31, 2007 or, subject to the approval of Department staff, as soon thereafter as practicable;
- D. Notify staff at the Department's Region 6 office within five (5) business days of commencing the work required by the February 12, 1993 permit;
- E. Notify staff at the Department's Region 6 office within five (5) business days of completing the work required by the permit;
- F. Take all necessary precautions to preclude the contamination of any wetland or waterbody; and
- G. Should Department staff note any deficiency in the actions undertaken by or on behalf of respondent, correct such deficiency subject to all conditions and limitations provided herein within ten (10) days after receipt of notification in writing by Department staff.

VII. Respondent shall notify the Department's Region 6 office, in writing, within fifteen (15) days after receiving this order as to which alternative (paragraph V or VI) he has selected. Whether respondent selects the alternative described in paragraph V or paragraph VI, respondent shall provide a written work plan within thirty (30) days of having received this order, to be approved by the Department's Region 6 office, for accomplishing the work set forth in paragraph V or paragraph VI.

VIII. All communications from respondent to Department staff concerning this order, other than the payment of penalty (see paragraph IV), shall be made to the Regional Attorney, New York State Department of Environmental Conservation,

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Environmental Conservation Law (ECL)
Article 24 and Title 6 of the Official Compilation of Codes,
Rules and Regulations (6 NYCRR) Part 663 on property located in
the Town of Alexandria, Jefferson County

- by -

H. Gordon Ganter,

Respondent.

DEC File No.: R6-2287-99-02

HEARING REPORT

- by -

/s/

Daniel P. O'Connell

Proceedings

In lieu of a notice of hearing and complaint, Staff from the Region 6 Office of the New York State Department of Environmental Conservation (Department staff) commenced the captioned matter by duly serving a notice of motion for order without hearing dated February 28, 2006 and other supporting papers upon H. Gordon Ganter (see 6 NYCRR 622.12[a]). With the February 28, 2006 notice of motion, Department staff filed a motion for order without hearing and a memorandum in support of the motion by James T. King, Esq., Regional Attorney, also dated February 28, 2006.

According to the motion, Mr. Ganter owns property adjacent to the St. Lawrence River and located off Collins Landing Road in the Town of Alexandria, Jefferson County. The motion additionally stated that Department staff issued a combined Freshwater Wetlands Permit and Water Quality Certification (No. 6-2222-00184/00003-0), effective February 12, 1993 (Exhibit 2), to Mr. Ganter. The February 12, 1993 permit authorized Mr. Ganter to construct a roadway, 12 feet wide, across two sections of regulated Freshwater Wetlands F-13. In the permit, the wetlands crossings are identified "A" and "B." The approximate length of each authorized wetlands crossing is 40 feet.

In the February 28, 2006 motion for order without hearing, Department staff alleged that Mr. Ganter failed to comply with the terms of Special Condition Nos. 2, 3, and 5 of the February 12, 1993 freshwater wetlands permit (Exhibit 2, at 3 of 4). For the alleged noncompliance, Staff requested a total civil penalty of \$15,000. Also, Staff requested an order from the Commissioner that would direct Mr. Ganter to remove all the fill associated with the crossings and to restore Freshwater Wetland F-13 to pre-construction conditions.

With a cover letter dated February 28, 2006, Department staff provided the Chief Administrative Law Judge (ALJ) with a copy of its motion papers. Subsequently, with a cover letter dated April 26, 2006, Department staff provided the Chief ALJ with the affidavits of service. According to the affidavits of service, Department staff served the February 28, 2006 motion for order without hearing upon Mr. Ganter on April 6, 2006 by certified mail return receipt requested. In response to Staff's February 28, 2006 motion, Mr. Ganter timely filed an answer dated May 17, 2006 with nine exhibits identified as A through J

(excluding I). The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell.

On August 8, 2006, I issued a ruling on Department staff's February 28, 2006 motion for order without hearing. The ruling concluded that Mr. Ganter violated the terms of Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit when he installed four 12-inch diameter culverts rather than two 36-inch diameter culverts. The ruling concluded further, however, that a hearing was necessary to determine whether Mr. Ganter violated the terms of Special Condition Nos. 3 and 5. Because a hearing was necessary to determine whether Mr. Ganter complied with the terms of the February 12, 1993 wetlands permit, the ruling reserved on the relief requested by Department staff.

Subsequently, I convened an adjudicatory hearing on September 7, 2006 at 10:00 a.m. at the Department's Region 6 office in Watertown, New York. James T. King, Esq., Regional Attorney, represented Department staff. At the hearing, George Mead, Esq., former Regional Attorney; Mark A. Wiggins, Environmental Analyst I; and Alice Piaze Mae Richardson, Biologist I, testified on behalf of Department staff. H. Gordon Ganter appeared *pro se* and testified on his behalf. Mr. Ganter's wife, Phillis Ganter, also testified.

Immediately following the September 7, 2006 hearing, representatives for the parties and I visited the site of the alleged violations.

The Office of Hearings and Mediation Services received the stenographic transcript of the September 7, 2006 hearing on September 22, 2006, and the record of the hearing closed on that date.

Findings of Fact

The August 8, 2006 ruling on Staff's motion for order without hearing established the following findings of fact for this proceeding. They are presented here for convenience.

1. H. Gordon Ganter owns property off Collins Landing Road in the Town of Alexandria, Jefferson County near the St. Lawrence River. Portions of this property are regulated freshwater wetlands identified as F-13.
2. On February 12, 1993, Department staff issued Mr. Ganter a combined Freshwater Wetlands Permit and Water Quality Certification identified by permit No. 6-2222-00184/00003-0,

and effective from February 12, 1993 through December 31, 1995.

3. The permit identified in the preceding finding authorized Mr. Ganter to construct a roadway, 12 feet wide, across two sections, identified as crossings "A" and "B," of regulated Freshwater Wetland F-13. The approximate length of each authorized wetlands crossing was 40 feet.
4. For crossing "A," Special Condition No. 1 of the February 12, 1993 wetlands permit required the installation of three 12-inch diameter culverts. For crossing "B," Special Condition No. 2 of the February 12, 1993 wetlands permit required the installation of two 36-inch diameter culverts.
5. Alice P. M. Richardson is currently a Biologist I at the Department's Central Office. From November 1999 until March 2000, Ms. Richardson was a Fish and Wildlife Technician II at the Department's Region 6 Office. Ms. Richardson visited Mr. Ganter's property on November 19, 1999 and March 9, 2000.
6. During the November 19, 1999 site visit, Ms. Richardson observed that three 12-inch diameter culverts had been installed at wetlands crossing "A" in compliance with the permit. Ms. Richardson observed further that, at wetlands crossing "B," Mr. Ganter had installed four 12-inch diameter culverts rather than the two 36-inch diameter culverts required by the February 12, 1993 wetlands permit.

The following additional facts are based on the record developed at the September 7, 2006 hearing.

7. Freshwater Wetland F-13 is 37.8 acres, and classified as a Class I freshwater wetlands. Wetland F-13 covers portions of Mr. Ganter's property including the canal that Mr. Ganter's roadway crosses.
8. Special Condition No. 3 of the February 12, 1993 wetlands permit required Mr. Ganter to dredge an area from Swan Bay past wetlands crossing "B" toward Rood's Bay. When Ms. Richardson inspected the site on November 9, 1999, however, she observed that dredging had occurred only between Rood's Bay and crossing "B." The dredged area did not continue toward Swan Bay.
9. However, Mr. Ganter does not own the property from wetlands crossing "B" toward Swan Bay. That property is owned by Mr.

Ganter's brother, Warren Ganter. After the Department issued the permit, Warren Ganter did not give permission to his brother, Gordon Ganter, to dredge the wetlands from crossing "B" toward Swan Bay.

10. Based on a site visit in November 1999, Ms. Robinson observed that material dredged from the wetlands on the Rood's Bay side of the roadway was "sidecasted" to the side of the canal, which is within the wetland boundary.
11. Mr. Ganter did not comply with General Condition No. 8 of the February 12, 1993 wetlands permit, which required him to obtain any other permit or approval that may be required for his proposal. Additional approvals that Mr. Ganter was required to obtain were: (1) permission from his brother to dredge the canal from crossing "B" to Swan Bay; (2) a permit from the US Army Corps of Engineers; and (3) an approval from the New York State Department of State concerning compliance with coastal zone management policies.
12. Although the 12-inch diameter culverts installed by Mr. Ganter would likely accommodate changes in flow associated with shipping traffic along the St. Lawrence River and some storm events, the 36-inch diameter culverts and the dredging required by the February 12, 1993 permit were intended to enhance existing wetlands benefits related to fisheries habitat. The smaller culverts installed by Mr. Ganter in contravention of the requirements outlined in Special Condition No. 2 have adversely impacted the fisheries habitat previously provided by the wetlands.

Discussion

Liability

In the February 28, 2006 motion for order without hearing, Department staff alleged that Mr. Ganter did not comply with the terms of Special Condition Nos. 2, 3 and 5 of the February 12, 1993 freshwater wetlands permit. Each special condition is addressed below.

1. Culverts at Wetland Crossing "B"

Department staff's February 28, 2006 motion papers established as a matter of law, that Mr. Ganter violated the terms of Special Condition No. 2 of Freshwater Wetlands Permit No. 6-2222-00184/00003-0 effective February 12, 1993. Special Condition No. 2 required Mr. Ganter to install two 36-inch

diameter culverts at wetlands crossing "B." Rather, Mr. Ganter installed four 12-inch diameter culverts at wetlands crossing "B." Consequently, Mr. Ganter's liability with respect to Special Condition No. 2 was not an issue for adjudication at the September 7, 2006 hearing. The August 8, 2006 ruling on Staff's motion for order without hearing (at 4-5) provides a detailed discussion about this violation, and that discussion is incorporated by reference into this Hearing Report.

2. Excavation of the Main Channel

A drawing is attached to the February 12, 1993 freshwater wetlands permit, and section C of the drawing depicts the proposed roadway, wetlands crossings "A" and "B," as well as Rood's Bay and Swan Bay. On this drawing, Rood's Bay is to the right of wetlands crossing "B" and Swan Bay is to the left of the wetlands crossing.

Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit states that:

"[t]o mitigate the loss of wildlife habitat and to extend the longevity of the marsh, the main channel from Swan Bay past crossing "B" up to or beyond the existing foot bridge will be deepened by two feet x a width of ten feet with excavated material disposed of on an upland location. This work will take place concurrent with or prior to road construction."

Nevertheless, when Ms. Richardson inspected the site on November 9, 1999, she observed that dredging had occurred only between Rood's Bay and crossing "B." Based on Ms. Richardson's observations, the dredged area did not continue toward Swan Bay as required by Special Condition No. 3.

Ms. Richardson's observations during her November 9, 1999 site visit establish that Mr. Ganter did not comply with Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit. Mr. Ganter claimed in his May 17, 2006 answer, however, that he does not own all the property identified in the permit that should be dredged and, therefore, could not dredge the

portion he does not own (Exhibits 7 and 7A¹). As a result of Mr. Ganter's claim, I denied Department staff's motion for order without hearing with respect to this allegation, and held that a hearing was necessary to determine whether the Department had the authority to impose the mitigation required by Special Condition No. 3.

During his testimony at the hearing, Mr. Wiggins referred to both his letter dated February 8, 1993 to Mr. Ganter (Exhibit 6), in which Mr. Wiggins proposed several permit conditions including what subsequently became Special Condition No. 3, and to Mr. Ganter's response dated February 8, 1993 (Exhibit 7). In his letter dated February 8, 1993 (Exhibit 7), Mr. Ganter stated that the then proposed permit condition regarding dredging was "OK" with him. Mr. Ganter stated further, however, that he did:

"not own the NW side of the canal from point B crossing to about 150 feet towards Swan Bay - my brother, Warren, owns that. He is very likely to approve. Shall I contact him or plan to deepen just my side?"

Mr. Wiggins testified further that Department staff issued the permit on February 12, 1993, and that the permit required Mr. Ganter to dredge an area of the wetlands from Rood's Bay to Swan Bay. According to Mr. Wiggins, Mr. Ganter did not object to the permit condition, and Mr. Ganter did not subsequently request a hearing to modify Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit. (Tr. p 34.)

During cross-examination, Mr. Ganter acknowledged that Special Condition No. 3 required him to dredge the canal from Rood's Bay to Swan Bay (Tr. p 155), and that he did not request a hearing to modify the permit (Tr. p 157-158). Mr. Ganter stated, however, that after the Department issued the permit, his brother, Warren Ganter,² did not want his property dredged (Tr. p

¹ Exhibits 7 and 7A are copies of Mr. Ganter's letter to Department staff dated February 8, 1993. Compared to Exhibit 7A, the contrast on the copy of Exhibit 7 is lighter and, therefore, it is difficult to read. Because Exhibit 7A is a darker copy, it is easier to read (Tr. pp 42-45).

² In these proceedings, H. Gordon Ganter refers to his brother, the neighboring property owner, as "Warren" (Exhibit 7) and as "Jim" (Tr. p 116). For purposes of discussion in this report, Respondent will be identified as "Gordon Ganter" or "Mr. Ganter," and his brother, the

156), and that the Department did not check whether it had authority to impose the dredging required by Special Condition No. 3 (Tr. p 157).

Mr. Ganter also testified that his brother, Warren Ganter, uses the roadway authorized by the February 12, 1993 wetlands permit to access his property, which is adjacent to Mr. Ganter's property. Mr. Ganter offered this testimony with respect to issues related to remediation. Mr. Ganter objected to Staff's request for an order to restore the wetlands by directing the removal of the roadway, in part, because access to his and Warren Ganter's respective properties would be significantly limited. (Tr. p 116.) Issues related to remediation of the freshwater wetlands are discussed in detail below.

Mr. Ganter did not fully comply with the terms of Special Condition No. 3 of the February 12, 1993 wetlands permit when he failed to dredge that portion of the wetland from crossing "B" toward Swan Bay. As noted above, the dredging required by Special Condition No. 3 was to mitigate the loss of wildlife habitat associated with the fill that would be placed in the wetlands for crossings "A" and "B," and to extend the longevity of the wetlands (Exhibit 2).

To obtain the February 12, 1993 wetlands permit, Mr. Ganter had the burden to show that his proposal would meet the standards outlined in 6 NYCRR 663.5 (see 6 NYCRR 663.5[a]). Mr. Ganter's proposal to cross the wetlands included the placement of fill. This proposed regulated activity is characterized as presumptively incompatible (see 6 NYCRR 663.4[d][20]). Accordingly, Mr. Ganter was required to meet the three-part compatibility test outlined at 6 NYCRR 663.5(e)(1). Mitigation may be proposed to enhance existing wetland benefits in order to increase the likelihood that the proposed regulated activity would meet the permit issuance standards, and when applicable, the three-part compatibility test (see 6 NYCRR 663.5[g][1]). As required by regulation, Department staff incorporated the mitigation into the conditions of the permit issued to Mr. Ganter (see 6 NYCRR 663.5[g][2]).

As an affirmative defense, Mr. Ganter argues that he did not violate Special Condition No. 3 for two reasons. Mr. Ganter contends first that he does not own the property where part of the mitigation should have taken place. Second, Mr. Ganter

neighboring property owner, will be identified as "Warren Ganter."

contends further that he could not obtain the landowner's permission to undertake that portion of the mitigation. In asserting this defense, however, Mr. Ganter is inappropriately attempting to avoid the burden of showing that his proposal would meet the standards outlined in 6 NYCRR part 663. When Mr. Ganter failed to obtain Warren Ganter's permission to dredge the wetlands from crossing "B" to Swan Bay, as required by Special Condition No. 3, Mr. Ganter was obliged to request a modification of his permit from Department staff. This modification could have taken the form of either a reduction in the scope of the original proposal, or the development of an alternative mitigation plan.

In addition to the permit issuance standards at 6 NYCRR 663.5, General Condition No. 8 of the February 12, 1993 freshwater wetlands permit requires Mr. Ganter to obtain "any other permits, approvals, lands, easements and rights-of-way that may be required for this project" (Exhibit 2 at 2). In this instance, one of the other required approvals was permission from his brother, Warren Ganter, who is the neighboring property owner, to dredge a section of the canal from crossing "B" to Swan Bay as part of the required mitigation.

Based on the forgoing discussion, I reject Mr. Ganter's affirmative defense. Given the burden imposed upon an Applicant to show that his proposed activity will comply with the Freshwater Wetlands Act, its implementing regulations, I conclude that Mr. Ganter's failure to fully comply with the terms of Special Condition No. 3 is a violation of ECL article 24.

3. Disposal of Dredged Material

Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit states that:

"[a]ll dredged or excavated material shall be disposed of outside the wetland boundary and be suitably stabilized so that it cannot re-enter any water body or wetland area."

According to Ms. Robinson's January 13, 2006 affidavit, the material that Mr. Ganter dredged from the wetlands on the Rood's Bay side of crossing "B" was "distributed along the side of the canal and leveled out instead of being removed outside of the wetland boundary."

In his answer, Mr. Ganter states, however, that the excavated material was placed "on upland next to the canal and is

now in very stable condition." According to Mr. Ganter, the Department has no authority to direct where he must place the dredged material because the canal is not part of a naturally occurring freshwater wetlands. Rather, the canal is man-made, and was dug out around 1900, which predates the Freshwater Wetlands Act, which is also referred to as ECL Article 24.

In the August 8, 2006 ruling concerning Staff's motion, I concluded that Department staff failed to establish as a matter of law that Mr. Ganter placed the dredged material within the boundary of regulated Freshwater Wetland F-13. I concluded further that Staff did not offer any evidence to show where the freshwater wetlands boundary is located, and where Mr. Ganter allegedly placed the dredged material in relationship to the freshwater wetlands boundary.

Exhibit 22 is a copy of a portion of the Alexandria Bay United States Geological Survey (USGS) quadrangle on which is drawn the boundary for Freshwater Wetland F-13. F-13 is 37.8 acres and classified as a Class I freshwater wetlands. Wetland F-13 covers portions of Mr. Ganter's property including the canal that Mr. Ganter's roadway crosses. (Tr. pp 28-29.)

At the hearing, Ms. Robinson provided additional testimony, based on a site visit in November 1999, concerning the location of the freshwater wetlands boundary on Mr. Ganter's property, and where Mr. Ganter placed the dredged material in relationship to the freshwater wetlands boundary. Referring to Exhibits 26 and 27, Ms. Robinson testified that material dredged from the wetlands on the Rood's Bay side of the roadway was "sidecasted" to the side of the canal, which is within the wetland boundary (Tr. pp 70-72).

Mr. Ganter's challenge that the canal portion of Wetland F-13 is not subject to the Department's jurisdiction because the canal is man-made is beyond the scope of this administrative enforcement action. The procedures for identifying, classifying, and mapping freshwater wetlands, as well as amending freshwater wetlands maps are outlined in 6 NYCRR part 664. Activities undertaken on those areas of Mr. Ganter's property presently mapped as freshwater wetlands are regulated pursuant to ECL Article 24 until the Commissioner duly amends the freshwater wetland boundaries consistent with the procedures outlined in 6 NYCRR part 664 (Tr. pp 89-91).

Ms. Robinson's testimony at the September 7, 2006 hearing provides the evidence needed to show where the freshwater wetlands boundary is located on Mr. Ganter's property, and where

Mr. Ganter placed the dredged material in relationship to the freshwater wetlands boundary. Based on Ms. Robinson's testimony, I conclude, therefore, that Mr. Ganter violated Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit when he failed to place all dredged materials outside the freshwater wetlands boundary.

Relief

Department staff seeks a civil penalty, and an order from the Commissioner directing Mr. Ganter to restore Freshwater Wetland F-13 to its preconstruction condition. In the motion papers, Department staff included several conditions related to the remediation, which Staff would like incorporated into the order. I reserved ruling on issues concerning relief until after the adjudicatory hearing.

Pursuant to ECL 71-2303(1), any person who violates any provision of ECL Article 24, its implementing regulations or a permit issued pursuant thereto, will be liable for a maximum civil penalty of \$3,000 for each violation. In addition, ECL 71-2303(1) authorizes the Commissioner to direct the violator to restore the affected freshwater wetlands to its condition prior to the violation, among other things.

1. Civil Penalty

Department staff's penalty calculation is based on the estimated economic benefits that Mr. Ganter allegedly gained by not complying with the permit conditions, and a gravity component related to the actual or potential environmental harm associated with the violations. Staff's economic benefit analysis is outlined in Section III of Mr. King's February 28, 2006 supporting memorandum. Department staff argued that the total cost to purchase and install two 36-inch diameter culverts would be \$1,000. Staff estimated that the cost associated with dredging the canal would be \$2,000. As a result, Mr. Ganter realized a total economic benefit of \$3,000, according to Department staff. Staff did not present any evidence at hearing to support the estimated economic benefit. During the hearing, Mr. Ganter offered nothing to refute Staff's estimates.

With respect to the gravity component, Department staff identified four aggravating factors that would justify a significant civil penalty. They are: (1) Mr. Ganter installed culverts not authorized by the February 12, 1993 permit; (2) he failed to install the proper culverts; (3) Mr. Ganter failed to dredge the canal according to the permit; and (4) he improperly

disposed of dredged material. Staff argued that each factor warrants a civil penalty of \$3,000 for a total gravity component of \$12,000. Therefore, the total civil penalty requested by Department staff is \$15,000 (*i.e.*, \$3,000 [economic benefit] + \$12,000 [gravity component]). Staff requested that the Commissioner collect at least \$12,000 of the total requested civil penalty now, and suspend \$3,000 of the total amount pending Mr. Ganter's compliance with the remediation requirements.

To support its arguments concerning the aggravating factors identified above, Department staff offered an affidavit by George E. Mead sworn to January 9, 2006. According to his affidavit, Mr. Mead was the Regional Attorney at the Department's Region 6 Office from February 1999 to February 2001. In the affidavit, Mr. Mead relates his recollection of a telephone conversation held on May 25, 1999 with Mr. Ganter about the alleged violations. According to Mr. Mead, Mr. Ganter said, among other things, that he did not think that a wetlands permit was needed and that he would do whatever he wanted to do with respect to the wetlands crossings.

Mr. Mead testified at the hearing on September 7, 2006, and his testimony was substantially the same as the statements presented in his January 9, 2006 affidavit. During Mr. Mead's testimony, Department staff offered Exhibit 21, which is a copy of Mr. Mead's notes related to the captioned administrative enforcement action. These notes, among other things, document the May 25, 1999 telephone conversation between Messrs. Mead and Ganter. Mr. Mead's January 9, 2006 affidavit, his testimony and Exhibit 21 demonstrate that Mr. Ganter blatantly disregarded the regulatory process associated with the February 12, 1993 freshwater wetlands permit. The Commissioner should consider this blatant disregard to be a significant aggravating factor that justifies a substantial civil penalty.

An additional aggravating factor that further justifies a substantial civil penalty is Mr. Ganter's failure to comply with General Condition No. 8 of the February 12, 1993 wetlands permit (Exhibit 2 at 2 of 4). This condition directed Mr. Ganter to obtain any other permit or approval that may be required for his proposal. To demonstrate that Mr. Ganter did not comply with General Condition No. 8, Department staff offered Exhibit 34.

Exhibit 34 is a copy of a letter dated September 6, 2006 by Joseph E. Kassler from the US Army Corps of Engineers (Buffalo District Office). At the hearing, the parties stipulated that Mr. Kassler was a biologist with the Corps (Tr. pp 69-97). In his September 6, 2006 letter, Mr. Kassler stated that the US Army

Corps of Engineers had not issued any permit or approval to Mr. Ganter for the roadway authorized in the Department's February 12, 1993 freshwater wetlands permit. Mr. Kassler stated further in his September 6, 2006 letter that the matter was transferred to the US Attorney's Office for enforcement (Exhibit 34). At the hearing, Mr. Ganter admitted that he did not obtain the required permit from the US Army Corps of Engineers (Tr. p 159). In addition, Mr. Wiggins testified that Mr. Ganter was also required to obtain an approval from the New York State Department of State concerning coastal zone management and did not obtain that required approval (Tr. p 32, 37).

As noted above, Department staff asserted that Mr. Ganter realized a total economic benefit of \$3,000. In addition, Staff identified four aggravating factors, and argued that the maximum civil penalty of \$3,000 should be assessed for each factor, which would total \$12,000. Therefore, the total civil penalty that Staff requested is \$15,000.

I believe, however, that Department staff has miscalculated the total maximum potential civil penalty for the violations alleged in this enforcement action. In Staff's February 28, 2006 memorandum supporting the motion for order without hearing, Department staff asserted that Mr. Ganter violated the terms of three Special Conditions in the February 12, 1993 freshwater wetlands permit. Therefore, the total maximum potential civil penalty for the three alleged violations would be \$9,000 (\$3,000 per violation x 3 alleged violations).

Based on the foregoing discussion, Department staff demonstrated all of the three violations alleged in Staff's February 28, 2006 motion for order without hearing. Consequently, I recommend, pursuant to ECL 71-2303(1), that the Commissioner assess the maximum civil penalty of \$3,000 for each of the three demonstrated violations. In this case, an assessment of the maximum potential civil penalty for each violation is justified based on the significant aggravating factors discussed above. The total recommended civil penalty, therefore, is \$9,000.

2. Remediation

Mr. Ganter opposes Department staff's request for remediation. He argued that it would be "morally wrong" for the Commissioner to order the wetlands crossings to be removed, and that such a directive would be contrary to the Department's mission. Mr. Ganter added that people could be physically injured if the road had to be removed. Mr. Ganter referenced

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 US 304 (1987) for the proposition that a landowner has the right to a road to his property (Exhibit 35 at 4).

According to his May 17, 2006 answer and testimony at the hearing, Mr. Ganter studied engineering while he attended Clarkson University, and education, mathematics and science at St. Lawrence University, from which he graduated. Mr. Ganter stated that the two 36-inch diameter culverts required by the February 12, 1993 permit were oversized for the anticipated annual rainfall and seasonal changes to the water elevation of the St. Lawrence River. Mr. Ganter explained that a half inch of rain in the dead-end pond at wetlands crossing "B" would result in about 40 cubic feet of flow to the river. Mr. Ganter explained further that if the rain event lasted 40 minutes, the flow would be one cubic foot per minute. Mr. Ganter concluded that requiring two 36-inch diameter culverts demonstrates "a lack of research, knowledge, expertise and negligence" on the part of Department staff. At the hearing, Mr. Ganter presented additional testimony and evidence in an effort to substantiate his claims (see Exhibits 9, 18, 19, 20, 23 and 35; Tr. pp 130-135). Mr. Ganter argued for maintaining the status quo.

Department staff provided additional evidence to support its remediation request at the hearing. Mr. Wiggins testified that the terms of the February 12, 1993 wetlands permit required two 36-inch diameter culverts for crossing "B" in conjunction with the dredged canal as mitigation to improve the hydrological connection between the western and eastern portions of Freshwater Wetland F-13 (Tr. p 40). According to Mr. Wiggins, Steve LaPan from the Bureau of Fisheries recommended this mitigation from a natural resources perspective (Tr. p 48-49).

Ms. Richardson testified that the two 36-inch culverts and the dredged canal were required to mitigate the fill associated with the crossings by enhancing the existing qualities of the wetlands for fish habitat (Tr. p 65). According to Ms. Richardson, the smaller culverts installed by Mr. Ganter have adversely impacted the wetlands (Exhibit 3, ¶6). In addition, Ms. Richardson recommended that the material sidcasted into the wetland along that portion of the canal that Mr. Ganter dredged should be removed to an upland location. According to Ms. Richardson, the sidcasted material could erode back into the wetland, thereby reversing the limited mitigation that Mr. Ganter had undertaken. (Exhibit 3, ¶6; Tr. pp 93-94.)

Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit states that the required mitigation would offset the loss of wildlife habitat and extend the longevity of the wetlands. Mr. Ganter has acknowledged the delicate nature of the subject freshwater wetlands, and the importance of preserving them. In a letter dated August 17, 1998 to Department staff, Mr. Ganter stated that he has observed an overall loss of wetlands areas, and attributes the loss to surges caused by the movement of ships along the channel in the St. Lawrence River (Exhibit 23).

Remediation of the freshwater wetlands is necessary, and despite his protests to the contrary, Mr. Ganter has agreed to do it by accepting the conditions outlined in the February 12, 1993 freshwater wetlands permit. General Condition No. 15 states that:

"[i]f upon the expiration or revocation of this permit, the project hereby authorized has not been completed, the applicant shall, without expense to the State, and 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. No claim shall be made against the State of New York on account of any such removal or alteration."

When issued, the expiration date for the February 12, 1993 wetlands permit was December 31, 1995. The expiration date was extended until December 1998 (Exhibit 8, 10).

The record demonstrates that Mr. Ganter has yet to complete the authorized project in a manner consistent with the terms of the wetlands permit. Mr. Ganter has not installed two 36-inch diameter culverts at crossing "B," he has not completed all the dredging required by Special Condition No. 3 and, with respect to the dredging that Mr. Ganter did undertake, he has not properly removed that material to an upland area. As a result, the project has not been properly completed. Therefore, consistent with General Condition No. 15, the Commissioner could direct Mr. Ganter to remove all the fill material and culverts associated with crossing "B", as well as the dredged material adjacent to the canal extending from Rood's Bay to crossing "B" to an upland area.

As noted above, Mr. Ganter cited *First Lutheran* (482 US 304) for the proposition that he, as a landowner, is entitled to a road to access his property. In *First Lutheran*, the US Supreme

Court overturned a determination of the California Court of Appeals, which held that a landowner, the First English Evangelical Lutheran Church, who claimed that its property was "taken" by an interim land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of its property (see *First Lutheran* 482 US at 306-307).

Since 1957, the First English Evangelical Lutheran Church owned 21 acres of property in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. At this location, the church operated a camp called Lutherglen. After a forest fire in July 1977, the area upstream from Lutherglen was deforested, and the County of Los Angeles (the County) was concerned about the potential public health and safety impacts associated with flash flooding that could be exacerbated by the lack of any vegetative groundcover (see *First Lutheran* 482 US at 307).

On February 9 and 10, 1978, 11 inches of rain fell in the watershed, and the resulting flood destroyed Lutherglen. In January 1979, the County adopted Interim Ordinance No. 11,855, which prohibited the construction, expansion or reconstruction of buildings and structures located in the interim flood protection area of Mill Creek Canyon. The interim flood protection area included the property where Lutherglen had been located. In a claim filed in the Superior Court of California, the church asserted that Ordinance No. 11,855 prohibited the use of Lutherglen, and sought damages for the loss of use of Lutherglen (see *First Lutheran* 482 US at 307-308).

The issue before the Court was whether the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, requires compensation as a remedy for "temporary" regulatory takings when those takings are ultimately invalidated by the courts (see *First Lutheran* 482 US at 310). In deciding the issue, the Court noted that the Fifth Amendment does not prohibit the government from taking private property, but places a condition on the exercise of that power (see *First Lutheran* 482 US at 314). The Court noted further that the Fifth Amendment is designed not to limit governmental interference with property rights, but to secure compensation in the event of otherwise proper interference amounting to a taking (see *First Lutheran* 482 US at 315).

The Court concluded that a "temporary" taking which denies a landowner all use of its property is no different from a permanent taking for which the Constitution requires compensation

(see *First Lutheran* 482 US at 318), and no subsequent action by the government can relieve it of the duty to provide compensation for the period when the taking was in effect (see *First Lutheran* 482 US at 321). As a result, the Court determined that the California courts decided the compensation question inconsistently with the requirements of the Fifth Amendment (see *First Lutheran* 482 US at 311). Finally, the Court expressly stated that its holding in *First Lutheran* does "not deal with the quite different questions that would arise in the case of normal delay in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us" (*First Lutheran* 482 US at 321).

Mr. Ganter's reliance on *First Lutheran* (482 US 304) is misplaced. The captioned administrative enforcement action is distinguishable from *First Lutheran*. First, unlike County of Los Angeles Ordinance No. 11,855, ECL article 24 (the Freshwater Wetlands Act) is not a temporary ordinance that has been determined to be unconstitutional.

Second, Department staff never denied Mr. Ganter any use of his property. Rather, Staff issued Mr. Ganter a permit which allowed him to cross a regulated freshwater wetland to access his property. Prior to February 12, 1993, Department staff had issued Mr. Ganter other freshwater wetlands permits, and since February 1993, Mr. Ganter had filed other permit applications with Department staff (Exhibit 16). After accepting the February 12, 1993 wetlands permit, Mr. Ganter, however, did not comply with its conditions, and failed to obtain other necessary approvals. The captioned administrative enforcement action is an attempt by Department staff to enforce the conditions of the February 12, 1993 wetlands permit, not curtail Mr. Ganter's use of his property.

Third, the regulations applicable to processing permit applications provide permittees, such as Mr. Ganter, with the opportunity to modify permits issued by Department staff (see 6 NYCRR 621.13). Mr. Ganter did not avail himself of this opportunity. Staff's attempt to enforce the conditions of the February 12, 1993 permit are not a "taking" as incorrectly argued by Mr. Ganter.

During this proceeding, Mr. Ganter complained about how long it took Staff to review the application related to the February 12, 1993 wetlands permit, and accused Staff of being incompetent (see e.g. Exhibits 17, 23, 35 and 36). As noted above, the Court's determination in *First Lutheran* expressly excluded such concerns from consideration. In addition, the Court's

determination is silent about remediation, which is at issue in this administrative enforcement action.

As alternatives to an order directing Mr. Ganter to remove wetlands crossings "A" and "B," and to restore the wetlands to their preconstruction condition, the Commissioner may direct one of the following. First, the Commissioner may direct Mr. Ganter to comply with the conditions of the February 12, 1993 wetlands permit. Such a directive would require Mr. Ganter to complete the dredging required by Special Condition No. 3, among other things.³ To complete the required dredging, Mr. Ganter would have to obtain permission from his brother, Warren Ganter, because it is Warren Ganter who owns the property where the additional dredging would take place.

As a second alternative, the Commissioner could direct Mr. Ganter to seek a modification of the February 12, 1993 wetlands permit. Mr. Ganter may need to develop an alternative mitigation plan if he cannot obtain Warren Ganter's permission to complete the dredging required by Special Condition No. 3. If an alternative mitigation plan cannot be developed, then Mr. Ganter may need to modify the original wetlands crossing proposal to comply with the permit issuance standards outlined at 6 NYCRR 663.5.

Conclusions

1. With its February 28, 2006 motion for order without hearing, Department staff established as a matter of law that Mr. Ganter violated the terms of Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit when he installed four 12-inch diameter culverts rather than two 36-inch diameter culverts.
2. Based on the hearing record developed on September 7, 2006, Department staff proved that Mr. Ganter failed to fully implement the mitigation required by Special Condition No. 3. As a result, Mr. Ganter is liable for failing to comply with the terms of Special Condition No. 3 of the February 12, 1993 freshwater wetlands permit.
3. Mr. Ganter violated Special Condition No. 5 of the February 12, 1993 freshwater wetlands permit by sidecasting the

³ Mr. Ganter would also need to obtain the required approvals from the New York State Department of State and the US Army Corps of Engineers.

material dredged from the wetlands on the Rood's Bay side of crossing "B" along the canal, which is within the wetland boundary.

Recommendations

1. The Commissioner should grant, in part, Department staff's February 28, 2006 motion for order without hearing with respect to the allegation that Mr. Ganter failed to comply with Special Condition No. 2 of the February 12, 1993 freshwater wetlands permit.
2. The Commissioner should conclude that Mr. Ganter violated Special Condition Nos. 2, 3 and 5 of the February 12, 1993 freshwater wetlands permit.
3. For these three violations, the Commissioner should assess a total civil penalty of \$9,000.
4. The Commissioner should direct Mr. Ganter to remove from Freshwater Wetland F-13 to an upland location all the fill material and culverts associated with crossing "B", as well as the dredged material sidecasted along the canal extending from Rood's Bay to crossing "B."
5. In the alternative, the Commissioner should direct Mr. Ganter either to comply with the conditions of the February 12, 1993 wetlands permit, or to seek a modification of the February 12, 1993 wetlands permit.