STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17, 23 and 24 of the Environmental Conservation Law, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and General Permit for Stormwater Discharges from Construction Activity No. GP-02-01 and Permit Number NYR 10L379,

ORDER

-by-

DEC CASE NO.
R5-20100629-991

LEE CUSTOM HOMES II, INC.,

Respondent.

This administrative enforcement proceeding concerns allegations that respondent Lee Custom Homes II, Inc. (respondent) has committed violations of the New York Environmental Conservation Law (ECL) and its implementing regulations, title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), while developing residential properties known as the Breezy Meadow Farm Subdivision located on Soper Street, Town of Schuyler Falls, Clinton County (site). During inspections of the site in April and May of 2010, staff of the New York State Department of Environmental Conservation (Department or DEC) identified what it alleges are violations relating to improper construction stormwater management, unpermitted activities in a freshwater wetland and its adjacent area, and unpermitted mining activities.

Background

The record reflects that respondent has undertaken a residential development project known as the "Breezy Meadow Farm Subdivision" (see Complaint ¶ 8; Default Summary Report at 4 [Finding of Fact No. 1]). The project has eight planned "phases," numbered Phases I-VIII (see Complaint ¶ 9). In July and August 2006, respondent submitted to the Department, with respect to Phase VII of the development project only, a Notice of Intent (NOI) form for coverage under State Pollutant Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity No. GP-02-01 (GP-02-01) (see Complaint ¶¶ 11, 13, and Complaint Exhibit [Exh.] 3). By letter dated August 8, 2006, the Department issued to respondent an acknowledgment of a complete NOI and coverage under GP-02-01, and identified the site under permit identification number NYR 10L379 (see Complaint ¶¶ 12-14, and Complaint Exhs. 3 and 4). Respondent has not obtained coverage under any Department-issued general permit for any other phase of construction or development at the site (see Complaint ¶ 16).

Department conducted inspections of the site in April and May of 2010 in which it identified a series of alleged violations. During a site inspection on April 13, 2010, Department staff observed that respondent had commenced construction at the site, including clearing trees and excavating and stockpiling soil, and that the construction activities, including disturbing more than one acre of soil, were conducted outside the boundaries of Phase VII. These activities were beyond the approval afforded respondent by GP-02-01 (see Complaint ¶¶ 17-19, and Complaint Exh. 5 [DEC Notice of Violation dated July 2, 2010]).

During a site inspection on April 20, 2010, Department staff observed that respondent had disturbed approximately 2,100 linear feet of adjacent area along the boundaries of the portion of freshwater wetland MV-32 that is on the site, including grading soil up to the boundary of wetland MV-32, stockpiling additional soil throughout the adjacent area, and piling, burning or burying other material including stumps and woody debris, construction and demolition material and assorted solid waste, in the adjacent area (see Complaint ¶¶ 20-26, and Complaint Exh. 5). In addition, staff observed that respondent had excavated in wetland MV-32 and its adjacent area to create two new ponds, and had stockpiled excavated material next to the ponds, partially in the wetland and deposited in the adjacent area (see Complaint ¶ 27, and Complaint Exh. 5). Respondent did not, however, have a permit to conduct regulated activities within wetland MV-32 or its adjacent area (see Complaint ¶ 28, and Complaint Exh. 5, citing a violation of ECL 24-0701[1]]).

During the April 13, 2010 inspection and a subsequent site inspection conducted on May 19, 2010, staff determined that respondent had excavated soil and other material, and removed approximately 1,290 cubic yards of material, from the site within a twelve month period, without a mining permit or a determination by the Department that such activities were exempt from the Mined Land Reclamation Law (see Complaint ¶¶ 30-36, and Complaint Exh. 5 [citing a violation of ECL 23-2711(1)] and Complaint Exh. 6 [Letter dated April 15, 2010 from Joseph Barbeito, DEC Mined Land Reclamation Specialist 2, to Lee Custom Homes II]).

On May 7, 2013, staff personally served respondent with a notice of hearing and complaint dated May 1, 2013. Department staff also mailed a copy of the notice of hearing and complaint to respondent. Respondent failed to answer, although such answer was due on or before May 27, 2013. By papers dated June 4, 2013, staff moved for a default judgment and order. This motion for a default judgment and order was served on respondent on June 5, 2013.

Staff's complaint alleges three causes of action related to respondent's actions at the site. Specifically, staff alleges that respondent:

- failed to obtain coverage under GP-02-01 for construction activities it conducted outside the boundaries of a portion of the development, in violation of GP-02-01 and 6 NYCRR Part 750-1.4(b);

- filled, graded, dredged, and introduced or stored solid waste and other pollutants in freshwater wetland MV-32 and excavated wetland MV-32 and its adjacent area to create two ponds, in violation of ECL 24-0701(1) and 6 NYCRR 663.4(a); and

- removed approximately 1,290 cubic yards of material from the site without a mining permit, in violation of ECL 23-2711(1) and 6 NYCRR 421.1(a).

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below. As set forth in the ALJ's report, respondent Lee Custom Homes II, Inc. failed to answer the complaint in this matter, and the ALJ recommends that I grant Department staff's motion for a default judgment.

Discussion

A respondent upon whom a notice of hearing and complaint has been served must serve an answer within 20 days of receiving the notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). Upon a respondent's failure to answer a complaint, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1] - [3]).

In this matter, staff has satisfied these requirements. Staff has submitted proof of service of the notice of hearing and complaint on respondent, proof of respondent's failure to file an answer or otherwise respond to the complaint, and a proposed order.

In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). Staff has provided proof of the facts sufficient to support the claims asserted in this matter (see Complaint Exhs. 1-7). By defaulting, respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow therefrom (see Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). I therefore concur with and adopt the ALJ's recommendation that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15.

In its complaint, Department staff charged respondent with violating GP-02-01 which, in fact, had expired prior to the time when staff identified the violations at the site (see Complaint Exhs. 5 and 6 [Department letters detailing violations identified during staff's April 13, 2010, April 20, 2010, and May 19, 2010 visits]). SPDES General Permit for Stormwater Discharges from Construction Activity Permit No. GP-0-08-001, which became effective May 1, 2008, had replaced GP-02-01 and itself was replaced by SPDES General Permit for Stormwater Discharges from Construction Activity Permit No. GP-0-

10-001, which became effective on January 29, 2010 and, thus, was in effect at the time of the violations in this matter.

In its notice of violation, however, Department staff identified the stormwater-related violations in the context of GP-0-10-001 which was the permit applicable to the violations established on this record and which permit I take official notice (see 6 NYCRR 622.11[a][5]). Respondent was aware that Department staff was charging them with violating the Department's general permit for stormwater discharges from construction activity. Thus, I conclude that respondent will not be prejudiced if the complaint's mistaken reference to GP-02-01 is ignored and respondent is found to have violated the general permit in effect at the time of the violations (see Matter of Greenfield v Town of Babylon Dept. of Assessment, 76 AD3d 1071, 1073 [2d Dept 2010] [citing CPLR 2001 and 3026]). Accordingly, respondent is found to have violated GP-0-10-001.[1]

Civil Penalty

Applying the Department's Civil Penalty Policy, DEE-1 (June 20, 1990) to the violations, staff has calculated the maximum penalty for these violations as $39,817,000. In this matter, staff has requested that I impose on respondent a civil penalty of twenty-five thousand dollars ($25,000). This Staff-requested amount was determined by calculating from a base penalty for each of the causes of action, resulting in a total base penalty of $13,000, and making an upward adjustment because this matter proceeded to adjudication (see Complaint ¶¶ 66-70).

Based on this record, I hold that the requested payable civil penalty of twenty-five thousand dollars ($25,000) for the violations alleged in the complaint is authorized and appropriate. Respondent is directed to pay this penalty within thirty (30) days of the service of this order upon it.

Remedial Relief

As set forth in the motion for default judgment and order, staff also requests that my order:

(1) direct that, unless and until authorized by the Department, respondent shall not conduct any new construction activities anywhere at the site that will require or result in soil disturbance until authorized to do so by the Department;

(2) require respondent to submit to the Department, within ten (10) days of service of the Commissioner's order on respondent, all notices of intent (NOI), NOI acceptance letters and Stormwater Pollution Prevention Plans (SWPPPs) for the rest of the phases of development at the site;

[1] GP-0-10-001 was subsequently replaced by GP-0-15-002 which became effective on January 29, 2015 and which applies to the remedial relief imposed by this order.

(3) require respondent to prepare and submit to the Department's Division of Water in Ray Brook, New York within thirty (30) days of service of the order on respondent, an approvable SWPPP for the construction activities at the site;

(4) require respondent to submit to the Department's Division of Water in Albany, within thirty (30) days of service of the order on respondent, a complete and acceptable NOI form for the construction activities at the site, in order to obtain authorization for stormwater discharges at the site;

(5) require respondent to submit to the Department's Division of Fish, Wildlife and Marine Resources in Ray Brook, New York, within forty-five (45) days of service of the order on respondent, a report and plan prepared by a qualified consultant which addresses the following details for restoration of freshwater wetland MV-32 and its adjacent area:

a. the removal of all stockpiled soil and other material from the adjacent area of the freshwater wetland on the site;
b. the grading of the adjacent area so that storm water flows away from the freshwater wetland;
c. seeding with a native grass seed and mulching of disturbed soils located in the adjacent area of the freshwater wetland and
d. the natural regeneration of all disturbed wetland areas.[2]

(6) require respondent to submit to the Office of General Counsel in Ray Brook, New York, within forty-five (45) days of service of the order on respondent, a schedule for the submission of any and all required permits for any planned development within adjacent areas of freshwater wetland MV-32 at the site;

(7) direct respondent to immediately cease all mining activities including, but not limited to, the removal of excavated material from the site;

(8) require respondent to submit to the Department's Mineral Resources program in Ray Brook, New York, prior to conducting any further mining activities at the site including, but not limited to, excavating and removing material from the site, an application for (a) an ECL Article 23 mining permit, or (b) an exemption from the Mined Land Reclamation Law; and

(9) direct that, unless and until the Department provides authorization for respondent to conduct mining activity, by issuing a permit or a letter confirming that respondent's activities are exempt from regulation under ECL Article 23, respondent shall not conduct any further mining activity at the site.

[2] Although the "natural generation" language was included in the complaint, it was not set forth in the body of staff's motion for default judgment. It was however included on page 13 of Exhibit 3 to staff's motion (Paragraph IX[4]).

Based on the record, the requested relief is authorized and appropriate. With respect to the restoration of freshwater wetland MV-32 and its adjacent area, the report and plan that respondent is to submit must contain a timetable for commencement and completion of remedial activities in the wetland and its adjacent area and be in a form approvable by Department staff.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer the complaint in this matter, respondent Lee Custom Homes II, Inc. waived its right to be heard at a hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.

II. Based upon the allegations of the complaint and the documents submitted in support of the motion, respondent Lee Custom Homes II, Inc. is adjudged to have violated:

A. 6 NYCRR 750-1.4(b) and the State Pollutant Discharge Elimination System General Permit for Construction Stormwater GP-0-10-001 when it failed to obtain coverage under the general permit for construction activities it conducted outside the boundaries of Breezy Meadow Farm Subdivision Phase VII;

B. ECL 24-0701(1) and 6 NYCRR 663.4(a) when it filled, graded, dredged, and excavated in freshwater wetland MV-32 and its adjacent area and introduced or stored solid wastes and other pollutants in MV-32, and excavated wetland MV-32 and its adjacent area to create two ponds, without a permit; and

C. ECL 23-2711(1) and 6 NYCRR 421.1(a) when it removed approximately 1,290 cubic yards of soil from the Breezy Meadow Farm Subdivision located on Soper Street, Town of Schuyler Falls, Clinton County (site) without a permit.

III. Respondent Lee Custom Homes II, Inc. is assessed a civil penalty in the amount of twenty-five thousand dollars ($25,000), which is due and payable within thirty (30) days of service of a copy of this order upon respondent. 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 shall be submitted by certified mail, overnight delivery or by hand delivery to the Department at the following address:

New York State Department of Environmental Conservation
Region 5 Office
P.O. Box 296
Ray Brook, New York 12977
Attention: Scott Abrahamson, Esq., Assistant Regional Attorney

IV. Unless and until authorized by the Department, respondent Lee Custom Homes II, Inc. shall not conduct any new construction activities anywhere at the site that will require or result in soil disturbance.

V. Within ten (10) days of service of this order on respondent Lee Custom Homes II, Inc., respondent shall submit to the Department all Notices of Intent ("NOIs"), NOI acceptance letters and Stormwater Pollution Prevention Plans ("SWPPPs") for the remaining phases of development at the site.

VI. Within thirty (30) days of service of this order on respondent Lee Custom Homes II, Inc., respondent shall prepare and submit to the Department's Division of Water in Ray Brook, New York, a SWPPP for the construction activities at the site, in accordance with the current SPDES General Permit for Stormwater Discharges from Construction Activity No. GP-0-15-002.

VII. Within thirty (30) days of service of this order on respondent Lee Custom Homes II, Inc., respondent shall submit to the Department's Division of Water in Albany a complete and acceptable NOI form for the construction activities at the site, to obtain authorization under GP-0-15-002 for stormwater discharges at the site.

VIII. Within forty-five (45) days of service of this order on respondent Lee Custom Homes II, Inc., respondent shall submit to the Department's Division of Fish, Wildlife and Marine Resources in Ray Brook, New York, a report and plan that is prepared by a qualified consultant and approvable by Department staff, which addresses the following details for the restoration of freshwater wetland MV-32 and its adjacent area:

A. the removal of all stockpiled soil and other material from the adjacent area of the freshwater wetland on the site;
B. the grading of the adjacent area so that storm water flows from the freshwater wetland;
C. the seeding with a native grass seed and mulching of disturbed soils located in the adjacent area of the freshwater wetland;
D. the natural regeneration of all disturbed wetland areas; and
E. a timetable for the commencement and completion of remedial activities relating to the freshwater wetland and its adjacent area.

IX. Within forty-five (45) days of service of this order on respondent Lee Custom Homes II, Inc., respondent shall submit to the Office of General Counsel in

Ray Brook, New York, a schedule for the submission of any and all required permits for any planned development within adjacent areas of the freshwater wetland at the site.

X. Respondent Lee Custom Homes II, Inc. shall immediately cease all mining activity at the site including, but not limited to, the removal of excavated material from the site.

XI. Respondent Lee Custom Homes II, Inc. shall, prior to conducting any further mining activities at the site, including, but not limited to, excavating and removing material from the site, either apply for a mining permit pursuant to ECL article 23 or apply for an exemption from the Mined Land Reclamation Law. Respondent shall not conduct any further mining activity at the site unless and until the Department provides authorization for respondent to conduct mining activity, by issuing a permit or by issuing a letter confirming that the activities of respondent Lee Custom Homes II, Inc. are exempt from regulation under ECL article 23. All applications made pursuant to this paragraph shall be submitted to the Department's Mineral Resources Program in Ray Brook, New York.

XII. Any questions or other correspondence regarding this order shall be addressed to Scott Abrahamson, Esq. at the address referenced in paragraph III of this order.

XIII. The provisions, terms and conditions of this order shall bind respondent Lee Custom Homes II, Inc., its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: February 26, 2018
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Alleged Violations of Articles 17, 23 and 24 of the New York State Environmental Conservation Law, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and General Permit No. GP-02-01 and Permit Number NYR 10L379,

DEFAULT SUMMARY REPORT

DEC CASE NO. R5-20100629-991

-by-

LEE CUSTOM HOMES II, INC.,

Respondent.
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This summary report addresses a motion for default judgment, pursuant to 6 NYCRR 622.15, by staff of the New York State Department of Environmental Conservation ("Department staff") against Lee Custom Homes II, Inc. ("respondent"). Respondent is the owner or operator of a property development known as the Breezy Meadow Farm Subdivision located on Soper Street, Town of Schuyler Falls, Clinton County ("site"). During inspections of the site in April and May 2010, Department staff discovered violations relating to: unpermitted construction activities; unpermitted activities in a freshwater wetland and its adjacent area; and unpermitted mining activities.

Department staff served a notice of hearing and complaint upon respondent by personal service on Lori P. Allen on May 7, 2013 (see affidavit of Daniel Malone sworn to on May 9, 2013). Ms. Allen is chief executive officer of respondent (see motion for default dated June 5, 2013, Exh. 1 at 5). Department staff also served respondent by delivering two duplicate copies of the notice of hearing and complaint and service of process cover sheet to an employee of the New York State Department of State on May 7, 2013 (see affidavit of Drew P. Wellette sworn to on May 7, 2013, and motion for default dated June 5, 2013, Exh. 1 at 4).

Respondent failed to answer, though such answer was due on or before May 27, 2013 (see affidavit of Scott Abrahamson sworn to June 3, 2013, ¶ 6). By papers dated June 4, 2013, Department staff moved for a default judgment and order. This default motion was mailed to respondent on June 5, 2013 (see affidavit of Betty E. Vann sworn to June 5, 2013). Department staff's motion papers included a notice of motion and a motion for default judgment and order. Attached to the motion were: (1) proof of service of the notice of hearing and complaint as well as a copy of the notice of hearing and complaint, with attachments; (2) the affidavit of Department staff counsel Scott Abrahamson, Esq.; (3) a proposed order; and (4) an affidavit of mailing for the default motion by Department staff member Betty E. Vann.

Department staff's complaint alleged three causes of action related to development activities at the site. The complaint also seeks an order of the Commissioner: (1) finding respondent liable for the causes of action alleged in the complaint; (2) imposing a payable civil penalty of twenty-five thousand dollars ($25,000) payable within thirty (30) days of service of the order upon respondent; and (3) requiring respondent to undertake certain remedial actions at the site.

Default Provisions

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order." In this case, Department staff met the requirements of 6 NYCRR 622.15 by: (1) providing proof of personal service of the notice of hearing and complaint upon respondent (see Motion for Default Judgment and Order dated June 4, 2013, Exh. 1); (2) a statement by Department staff counsel Scott Abrahamson stating the respondent has failed to answer (see Abrahamson affidavit dated June 3, 2013, ¶ 6); and (3) a proposed order (see Motion for Default Judgment and Order dated June 4, 2013, Exh. 3).

In Matter of Alvin Hunt d/b/a Our Cleaners (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an administrative law judge (ALJ) in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported. In this case the complaint sets forth three causes of action for which relief can be granted. In addition, the complaint sets forth a justification for the civil penalty (see Complaint dated May 1, 2013, ¶¶ 66-70). The remedial measures sought by Department staff in this case are warranted and sufficiently supported by the evidence in the record of the violations. As the Commissioner stated in Hunt, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified in the attached exhibit list.

In Matter of Dudley (Decision and Order of the Commissioner, July 24, 2009), then Commissioner Grannis announced that for default motions brought after the date of the decision that, in addition to the requirements set forth above, Department staff would have to serve motions for a default judgement on respondents. In this case, Department

staff has provided proof that the motion for default was mailed to respondent on June 5, 2013 (see Motion for Default Judgment and Order dated June 4, 2013, Exh. 4).

In Matter of Queen City Recycle Center, Inc. (Decision and Order of the Commissioner, December 12, 2013), the Commissioner directed that Department staff must, "consistent with the requirements applicable to default judgment motions under the CPLR … submit proof of the facts constituting the claim charged (see CPLR 3215[f]; see also Woodson v. Mendon Leasing Corp., 100 NY2d 62, 70-71 [2003])" (see Matter of Queen City Recycle Center, Inc. at 3). In Woodson, the Court of Appeals held that a verified complaint, attorney affirmation, defendants' answers and an affidavit from one of the defendants, taken together were sufficient as a matter of law to enable the court to determine that a viable cause of action existed and grant the default (see Woodson at 71). While this motion was served prior to this requirement being imposed, the instant motion is accompanied by proof of the facts constituting the claim charged, specifically a July 2, 2010 Notice of Violation (see Complaint dated May 1, 2013, Exh. 5).

Applicable Regulatory Provisions

In its first cause of action, Department staff alleges that respondent violated 6 NYCRR 750-1.4(b) and the State Pollutant Discharge Elimination System ("SPDES") General Permit for Construction Stormwater GP-02-01 (the "general permit")[1] when it failed to obtain coverage under the general permit for construction activities it conducted outside the boundaries of Breezy Meadow Farm Subdivision Phase VII at the site. A permit issued in accordance with federal law (40 Code of Federal Regulations 122.26) is required for discharges of stormwater (6 NYCRR 750-1.4[b]). New York's environmental regulations authorize DEC Staff to issue a general SPDES permit for construction activities to meet this federal requirement (6 NYCRR 750-1.21[b][2]). DEC staff has issued permit No. GP-0-10-001 entitled "SPDES General Permit for Stormwater Discharges from Construction Activities." This permit requires an owner or operator of a construction activity that results in soil disturbance of one or more acres to obtain coverage under the permit by filing a Notice of Intent prior to the commencement of construction activity. ECL 71-1929(1) provides a maximum daily civil penalty of $37,500 for these violations. Department staff also refers to DEC's Technical and Operational Guidance Series (T.O.G.S.) 1.4.2 (issued September 30, 1988).

In its second cause of action, Department staff alleges that respondent violated ECL 24-0701(1) and 6 NYCRR 663.4(a) when it filled, graded, dredged, and excavated in freshwater wetland MV-32 and its adjacent area and introduced or stored solid wastes and other pollutants in MV-32 and its adjacent area without a permit. ECL 24-0701(1) and 6 NYCRR 663.4(a) require that a permit be issued by Department staff prior to

[1] General Permit GP-02-01, which covered stormwater discharges from construction activities, has been superseded by General Permit GP-0-10-001. However, since these permits contain similar provisions, with respect to the violations alleged in this case, this error in Department staff's papers is treated as harmless.

undertaking certain activities in a freshwater wetland. ECL 71-2303 provides a maximum civil penalty of $3,000 for each violation.

In its third cause of action, Department staff alleges that respondent violated ECL 23-2711(1) and 6 NYCRR 421.1(a) when it removed approximately 1,290 cubic yards of soil from the site without a permit. ECL 23-2711(1) requires the issuance of a mining permit before commencing mining operations and 6 NYCRR 421.1(a) requires the submission of a mining plan and reclamation plan. ECL 71-1307 authorizes a maximum civil penalty of $5,000 for each violation and an additional daily maximum penalty of $1,000 for each day the violation continues.

Findings of Fact and Conclusions of Law

1. Respondent Lee Custom Homes II., Inc. is the owner or operator of a property development known as the Breezy Meadow Farm Subdivision located on Soper Street, Town of Schuyler Falls, Clinton County (see Complaint dated May 1, 2013, ¶¶ 4-5, Exh. 3 [Notice of Intent] at 1).

2. Respondent violated 6 NYCRR 750-1.4(b) and the State Pollutant Discharge Elimination System General Permit for Construction Stormwater when it failed to obtain coverage under the general permit for construction activities it conducted outside the boundaries of Breezy Meadow Farm Subdivision Phase VII at the site (see Complaint dated May 1, 2013, ¶¶ 59-60, Exh. 5 [Notice of Violation dated July 2, 2010] at 1).

3. Respondent violated ECL 24-0701(1) and 6 NYCRR 663.4(a) when it filled, graded, dredged, and excavated in freshwater wetland MV-32 and its adjacent area and introduced or stored solid wastes and other pollutants in MV-32 and its adjacent area without a permit (see Complaint dated May 1, 2013, ¶¶ 62-63, Exh. 5 at 1-2).

4. Respondent violated ECL 23-2711(1) and 6 NYCRR 421.1(a) when it removed approximately 1,290 cubic yards of soil from the site without a permit (see Complaint dated May 1, 2013, ¶ 65, Exh. 5 at 2).

5. On May 7, 2013, respondent was served with a notice of hearing and complaint in this matter (see Motion for Default Judgment and Order dated June 4, 2013, Exh. 1).

6. Respondent failed to answer the complaint (see Abrahamson affidavit dated June 3, 2013, ¶ 6).

7. Respondent was mailed a copy of Department Staff's motion for default judgment and order on June 5, 2013 order (see Motion for Default Judgment and Order dated June 4, 2013, Exh. 3).

Discussion

Department staff's papers provide the following information regarding the site and the violations. The Master Plan for the Breezy Meadow Farm Subdivision depicts approximately fifty building lots planned at the site and describes eight phases of development that began in 1997 (Complaint, Exh. 2). Respondent submitted a Notice of Intent (NOI) for coverage under the general permit for Phase VII of the project in July 2006 and revised it the following month. Department staff acknowledged coverage under the general permit by letter dated August 8, 2006 which provided the permit identification number for the site as NYR 10L379 (Complaint, Exh. 3). The NOI for Phase VII only covered disturbances of approximately 26 acres and was limited to four single family lots. Respondent has not obtained coverage under the general permit for any other phase of its construction project.

In April 2010 Department staff conducted two inspections of the site. On April 13, 2010 Department staff observed that respondent had undertaken construction activities beyond the boundaries of the Phase VII lots and that respondent had removed approximately 1,290 cubic yards of material from the site. The results of this inspection were stated in an April 15, 2010 letter (Complaint, Exh. 6). On April 20, 2010, Department staff again inspected the site and observed that respondent had disturbed approximately 2,100 linear feet of adjacent area along the boundaries of freshwater wetland MV-32 and stockpiled additional soil throughout the adjacent area. Department staff also observed that respondent had piled, burned, or buried other material, including stumps and woody debris, construction and demolition material and assorted solid waste in the adjacent area. Respondent had also excavated in MV-32 and its adjacent area to create two new ponds and stockpiled excavated material next to the ponds, partially in MV-32 and its adjacent area. Department staff conducted a third inspection on May 19, 2010 and issued a notice of violation by letter dated July 2, 2010 (Complaint, Exh. 5).

Department staff made several attempts to settle this matter. Attached to the July 2, 2010 NOV was a proposed consent order, which was revised and presented to respondent's attorney by letter dated May 26, 2011. The consent order was not executed and the violations were not resolved. By letters dated February 21, 2013 and April 11, 2013, Department staff wrote to respondent requesting a meeting to resolve the violations (Complaint, Exh. 7). No response was received from respondent (Abrahamson affidavit, ¶ 7) and Department staff initiated this enforcement proceeding.

The record shows that respondent was served with the complaint on May 7, 2013 and did not answer the complaint though such answer was due on or before May 27, 2013. Respondent was also mailed a copy of Department Staff's motion for a default judgment and order on June 5, 2013 (Vann affidavit, ¶ 2). The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

The record of this proceeding demonstrates that respondent Lee Custom Homes II, Inc. violated: (1) 6 NYCRR 750-1.4(b) and the SPDES General Permit for Construction Stormwater when it failed to obtain coverage under the general permit for

construction activities it conducted outside the boundaries of Breezy Meadow Farm Subdivision Phase VII at the site; (2) ECL 24-0701(1) and 6 NYCRR 663.4(a) when it filled, graded, dredged, and excavated in freshwater wetland MV-32 and its adjacent area and introduced or stored solid wastes and other pollutants in MV-32 and its adjacent area without a permit; and (3) ECL 23-2711(1) and 6 NYCRR 421.1(a) when it removed approximately 1,290 cubic yards of soil from the site without a permit.

In its papers, Department staff asserts that the requested total civil payable penalty of $25,000 (twenty-five thousand dollars) is reasonable and appropriate. Department staff calculates that the total maximum penalty for the violations alleged in the complaint is almost forty million dollars.

For the first cause of action, Department staff states that ECL 71-1929(1) provides for a maximum of $37,500 per day of violation, and calculates this violation began on July 2, 2010 and ended on May 1, 2013 for a total of 1,034 days, for a maximum penalty for this cause of action of $38,775,000. Department staff further notes that under the Department's Technical and Operational Guidance Series (T.O.G.S.) 1.4.2 (issued September 30, 1988), the lowest per day penalty recommended is $250, which when multiplied by the length of the violation results in a suggested penalty of $258,500. Department staff recommends a total penalty of $5,000 for this cause of action.

For the second cause of action, Department staff states that ECL 71-2303 provides for a maximum of $3,000 per violation. Department staff alleges a single violation of Article 24 of the ECL. Department staff recommends a total penalty of $3,000 for this cause of action.

For the third cause of action, Department staff states that ECL 71-1307 provides a maximum civil penalty of $5,000 for each violation and an additional penalty of $1,000 for each day the violation continues. Department staff calculates that this violation has continued for 1,034 days and that the maximum civil penalty is $1,039,000. Department staff recommends a total penalty of $5,000 for this violation.

As discussed above, Department staff calculated this base civil penalty of $13,000 comprised of: (1) $5,000 for the first cause of action; (2) $3,000 for the second cause of action; and (3) $5,000 for the third cause of action. Citing the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) ¶ 4, Department staff requests a higher amount, $25,000, because this matter is litigated, and higher civil penalties are warranted in litigated cases.

In determining the appropriate requested penalty in this case, Department staff considered the severity of the violations observed and respondent's failure to apply for a mining permit after the violations were discovered. Based on this record, the $25,000 payable civil penalty for the violations alleged in the complaint is authorized and appropriate.

Department staff also requests language in the Commissioner's order: (1) prohibiting respondent from conducting any new construction activities anywhere on the site that will require or result in a soil disturbance until authorized to do so by Department staff; (2) requiring respondent to submit all Notices of Intent (NOIs), NOI acceptance letters, and SWPPPs for Phases I through VI and VIII at the site within ten (10) days of service of the order upon respondent; (3) requiring respondent to prepare approvable SWPPPs for construction activities at the site in accordance with the requirements of the general permit and submit such SWPPPs to Department staff within thirty (30) days of service of the order upon the respondent; (4) requiring respondent to submit a complete and acceptable NOI form for the construction activities at the site to Department staff and obtain authorization under the general permit for stormwater discharges at the site within thirty (30) days of service of the order upon respondent; (5) requiring respondent to submit an approvable report and plan to Department staff for the restoration of freshwater wetland MV-32 and its adjacent area as well as permit applications for any and all required freshwater wetlands permits for future development within forty-five (45) days of service of the order upon respondent; (6) requiring respondent to immediately cease mining activities at the site; (7) requiring respondent to apply for a mining permit and any other necessary approvals from Department staff prior to conducting any future mining activity at the site; and (8) forbidding respondent from any mining activity at the site until such approvals from Department staff are obtained. Based on this record, these requests are authorized and appropriate to remedy the violations.

Recommendation

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

1. granting Department staff's motion for default, finding respondent Lee Custom Homes II, Inc. in default pursuant to the provisions of 6 NYCRR 622.15;

2. finding respondent Lee Custom Homes II, Inc. liable for violating: (1) 6 NYCRR 750-1.4(b) and the State Pollutant Discharge Elimination System General Permit for Construction Stormwater, by failing to obtain coverage under the general permit for construction activities it conducted outside the boundaries of Breezy Meadow Farm Subdivision Phase VII at the site; (2) ECL 24-0701(1) and 6 NYCRR 663.4(a) by filling, grading, dredging, and excavating in freshwater wetland MV-32 and its adjacent area and introducing or storing solid wastes and other pollutants in MV-32 and its adjacent area without a permit; and (3) ECL 23-2711(1) and 6 NYCRR 421.1(a) by removing approximately 1,290 cubic yards of soil from the site without a permit;

3. directing respondent to pay a total civil penalty in the amount of $25,000 (twenty-five thousand dollars) no later than thirty (30) days after service of the Commissioner's order; and

4. directing respondent to: (1) not conduct any new construction activities anywhere on the site that will require or result in a soil disturbance until authorized to do so by Department staff; (2) submit all Notices of Intent (NOIs), NOI acceptance letters, and Stormwater Pollution Prevention Plans (SWPPPs) for Phases I through VI and VIII at the site within ten (10) days of service of the order upon respondent; (3) prepare approvable SWPPPs for construction activities at the site in accordance with the requirements of the general permit and submit such SWPPPs to Department staff within thirty (30) days of service of the order upon respondent; (4) submit a complete and acceptable NOI form for the construction activities at the site to Department staff and obtain authorization under the general permit for stormwater discharges at the site within thirty (30) days of service of the order upon respondent; (5) submit an approvable report and plan to Department staff for the restoration of freshwater wetland MV-32 and its adjacent area as well as permit applications for any and all required freshwater wetlands permits for future development within forty-five (45) days of service of the order upon respondent; (6) immediately cease mining activities at the site; (7) apply for a mining permit and any other necessary approvals from Department staff prior to conducting any future mining activity at the site; and (8) refrain from any mining activity at the site until such approvals from Department Staff are obtained.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

Dated: Albany, New York

EXHIBIT LIST

Attached to Department Staff's notice of hearing and complaint

Exh. 1 portion of map depicting the site
Exh. 2 drawing dated 3/20/07 of master plan for Breezy Meadow Farm Subdivision
Exh. 3 Notice of intent application for Phase VII of the Breezy Meadow Farm Subdivision
Exh. 4 DEC's SPDES General Permit for Stormwater Discharges from Construction Activities (permit #GP-02-01)
Exh. 5 Copy of 7/2/10 letter to Mark Allen
Exh. 6 Copy of 4/15/10 letter to respondent Lee Custom Homes II
Exh. 7 Copy of 2/21/13 letter to Mark Allen and copy of 4/11/13 letter to Mark Allen with mailing receipt

Attached to Department Staff's motion for default judgment and order

Exh. 1 Affidavit of personal service on Lori Allen
Affidavit of personal service on NYS Department of State and related information
Department Staff's notice of hearing and complaint w/attachments
Exh. 2 Affidavit of Department Staff counsel Abrahamson
Attachment 1: copy of 2/21/13 letter to Mark Allen
Attachment 2: copy of 4/11/13 letter to Mark Allen w/ mailing receipt
Exh. 3 Draft Commissioner's Order
Exh. 4 Affidavit of Betty Vann on mailing of motion for default judgment