STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 25 of the New York State Environmental Conservation Law ("ECL") and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

- by -

DEC File No.
R1-20070208-65

DAREN PFENNIG and
PFENNIG CONSTRUCTION CORP.,

Respondents.

This administrative enforcement proceeding concerns the clearing of vegetation, excavation of rocks and placement of fill in an area adjacent to a regulated tidal wetland at Lot 10 of Cove Beach Estates subdivision on the east side of Stoney Beach Road, East Marion, Town of Southhold, Suffolk County, New York (the "site"). The tidal wetland is delineated on Tidal Wetlands Map 722-556.

In a notice of hearing and complaint dated August 15, 2007, staff of the Department of Environmental Conservation ("Department") alleged that respondents Daren Pfennig and Pfennig Construction Corp. undertook clearing, excavation of rocks and placement of fill at the site without the requisite permit from the Department, in violation of ECL § 25-0401(1) and 6 NYCRR part 661.[1] Respondents are contractors who were hired to install roads and drainage in the Cove Beach Estates subdivision, where the site is located. Department staff, in its complaint, requested a $30,000 penalty, as well as restoration of the site. Subsequently, Department staff advised that it was seeking only the $30,000 penalty, but not site restoration.[2]

The matter was initially assigned to Administrative Law Judge ("ALJ") Richard A. Sherman and subsequently reassigned to ALJ Maria E. Villa. ALJ Villa prepared the attached hearing report, which I adopt as my decision in this matter subject to the following comments.

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[1] Department staff's complaint failed to identify the particular section of 6 NYCRR part 661 for which a violation was alleged. Although it would appear that Department staff intended to refer to 6 NYCRR 661.8, staff's papers did not do so. Department staff needs to clearly identify the particular regulatory (or statutory) section at issue (see 6 NYCRR 622.3[a][1][ii]).

[2] The owner of the property, Giacomo Chicco, entered into a January 8, 2007 order on consent with the Department ("2007 order"). As discussed in the hearing report (see Hearing Report, at 13-14), the 2007 order required the property owner to revegetate the site. The record before me does not indicate whether the required revegetation was ever undertaken or completed.

The ALJ concludes that Department staff failed to meet its burden of proof on the charges that staff asserted with respect to the excavation of rocks and the placement of fill. The ALJ, however, determines that respondents were involved in limited clearing associated with the staking and surveying of Lot 10. As the record demonstrates, respondents cleared some vegetation at the time that a set-back line was established in the adjacent area to the tidal wetland (see, e.g., Hearing Transcript at 159, 310, and 337-38). No permit had been issued for that activity at that time.

Clearing in an adjacent area to a tidal wetland is a regulated activity for which a permit is required (see ECL § 25-0401[1]; 6 NYCRR 661.8 and 661.4[ee][1][vi]). Because of the limited nature of the clearing, however, the ALJ recommends that only a minimal penalty of $1,000 be imposed (see Hearing Report, at 14). I concur with the ALJ that, based on the facts of this case, only a de minimis penalty is warranted, and I adopt the ALJ's recommendation of a $1,000 penalty.

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

I. Respondents Daren Pfennig and Pfennig Construction Corp. are adjudged to have violated ECL § 25-0401(1) by undertaking clearing in an adjacent area to a tidal wetland without a Department permit.

II. Respondents Daren Pfennig and Pfennig Construction Corp. are jointly and severally assessed a civil penalty in the amount of one thousand dollars ($1,000). The penalty shall be due and payable within thirty (30) days after service of this order upon respondents. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Craig Elgut, Esq.
Acting Regional Attorney
New York State Department of Environmental Conservation
Region 1
SUNY at Stony Brook
50 Circle Road
Stony Brook, New York 11790.[3]

III. All communications from respondent to the Department concerning this order shall be made to Craig Elgut, Esq., Acting Regional Attorney, at the address listed in paragraph II of this order.

[3] Gail Rowan, Esq., was the attorney of record for Department staff in this proceeding. Following receipt of the final briefs and close of the record, Ms. Rowan left the employ of the Department. Accordingly, any communications or submissions related to this matter are to be directed to Craig Elgut, Esq., in his capacity as the Acting Regional Attorney for DEC Region 1.

IV. The provisions, terms, and conditions of this order shall bind respondents Daren Pfennig, his heirs, successors and assigns and Pfennig Construction Corp., and its successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: May 27, 2010
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter

of the

Alleged Violations of Article 25
of the New York State Environmental Conservation Law ("ECL")
and Part 661 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York ("6 NYCRR")

-by-

DAREN PFENNIG

and

PFENNIG CONSTRUCTION CORP.,

Respondents.

Case No. R1-20070208-65

HEARING REPORT

_____/s/_____

Maria E. Villa
Administrative Law Judge

May 26, 2010

PROCEEDINGS

In a notice of hearing and complaint dated August 15, 2007, staff of the New York State Department of Environmental Conservation ("Department Staff") alleged that respondents, Daren Pfennig and Pfennig Construction Corp.[1] (collectively, "Respondents") were jointly and severally liable for violations of Article 25 of the New York State Environmental Conservation Law ("ECL") and Part 661 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Specifically, Department Staff alleged that, at some point prior to May of 2005, Respondents cleared vegetation, excavated large rocks, and placed fill in the area adjacent to a regulated tidal wetland at Lot 10 of Cove Beach Estates subdivision on the east side of Stoney Beach Road, East Marion, Town of Southold, Suffolk County, New York (the "Site"), all without a valid permit from the Department to undertake these activities. At the time the violations occurred, the property was owned by Giacomo Chicco, who subsequently entered into an order on consent and thereafter obtained a tidal wetlands permit from the Department. Respondents were contractors hired to install roads and drainage at the Cove Beach subdivision, where the subject property is located.

In its complaint, Department Staff sought a civil penalty of $30,000, and an order of the Commissioner directing Respondents to re-vegetate "the disturbed area located within buffers and open space areas as shown on the plans dated April 26, 2006 prepared by Joseph Ingegno" and maintain the required plantings for two years with a 100% survival rate. Complaint, at 3, ¶ III (Exhibit 2).

Respondents timely served a verified answer on September 5, 2007. On September 14, 2007, Department Staff filed a motion pursuant to Section 622.4(f) of 6 NYCRR to clarify Respondents' affirmative defenses. The matter was assigned to administrative law judge ("ALJ") Richard A. Sherman, whose October 10, 2007 ruling granted Department Staff's motion as to Respondents' second, third and fifth affirmative defenses, and denied the motion as to the remaining defenses. See Matter of Daren Pfennig and Pfennig Construction Corporation, ALJ Ruling, 2007 N.Y. Env. LEXIS 65 (October 10, 2007). Respondents served an amended verified answer on November 16, 2007.

Due to scheduling conflicts, the matter was re-assigned to ALJ Maria E. Villa, who conducted the hearing on July 22 and 23, 2008 at the Department's Region 1 office at 50 Circle Road, Stony Brook, New York. Gail Rowan, Esq., Assistant Regional Attorney, appeared on behalf of Department Staff. Department Staff called one witness, Matthew Richards, a Marine Biologist I in the Department's Region 1 office.

[1] Department Staff's complaint refers to the corporate respondent as "Pfennig Construction Corporation." A review of the records maintained by the New York State Department of State's Division of Corporations indicates that the correct name is "Pfennig Construction Corp."

Respondents were represented by Eric J. Bressler, Esq., of the law firm of Wickham, Bressler, Gordon & Geasa, P.C., 13015 Main Road, P.O. Box 1424, Mattituck, New York 11952. Respondent Daren Pfennig testified on Respondents' behalf.

The parties requested the opportunity to file post-hearing briefs. Initial briefs were filed on November 3, 2008. Respondents' November 14, 2008 post-hearing reply brief ("Respondents' Reply Brief") was filed on November 17, 2008, and by permission of the ALJ and with the agreement of the parties, Department Staff served its reply brief on December 5, 2008.

FINDINGS OF FACT

1. Respondent Daren Pfennig owns and operates Respondent Pfennig Construction Corp., a domestic business corporation located at 2905 Arbor Lane, Mattituck, New York.

2. The activities at issue in this proceeding took place at lot 10 of the Cove Beach Estates subdivision, a 104.4-acre waterfront subdivision in East Marion in the Town of Southold, Suffolk County, New York (the "Site"). Lot 10 is located on the east side of Stoney Beach Road.

3. The Site is located on Long Island Sound, and portions of the Site include tidal wetlands and tidal wetland adjacent area. The tidal wetlands in question appear on Tidal Wetlands Map 722-556.

4. At all times relevant to this proceeding, Giacomo Franco Chicco was the owner of the Site, which is designated on the Suffolk County Tax Map as No. 1000-22-3-18.20. By letter dated March 23, 2005, Suffolk County Environmental Consulting, Inc. submitted an application to the Department for a tidal wetlands permit on Mr. Chicco's behalf.

5. Respondents are contractors who were hired to install roads and drainage at the Cove Beach subdivision, where the subject property is located.

6. Department Staff inspected the Site on May 4, 2005. During the inspection, Department Staff observed clearing of vegetation and piles of wood chips.

7. On May 5, 2005, Department Staff issued a Notice of Violation to Giacomo Chicco.

8. Department Staff issued a Notice of Violation to Respondents Daren Pfennig and Pfennig Construction Corp. on September 29, 2005.

9. Department Staff inspected the Site again on September 30, 2005. During the inspection, Department Staff observed that some additional vegetative clearing had taken place.

10. On January 8, 2007, Giacomo Chicco entered into an order on consent with the Department. Pursuant to the order on consent, Mr. Chicco agreed to pay a $10,000 penalty ($5,000 payable and $5,000 suspended contingent upon restoration, including re-vegetation of certain cleared areas, and removal of any fill).

11. A tidal wetlands permit for the Site was issued to Mr. Chicco on February 20, 2007.

DISCUSSION

Applicable Statutory and Regulatory Provisions

Department Staff's complaint alleged that Respondents cleared vegetation at the Site, excavated, and placed fill, in violation of ECL Section 25-0401(1). Specifically, Department Staff alleged that:

> TWELFTH: Upon information and belief, the Respondents have violated ECL § 25-0401.1 and Part 661 of 6 NYCRR, by causing and/or permitting to be caused, the clearing of vegetation in the regulated adjacent area to a regulated tidal wetland, at the subject site, without the requisite DEC permit.
>
> THIRTEENTH: Upon information and belief, the Respondents have violated ECL § 25-0401.1 and Part 661 of 6 NYCRR, by causing and/or permitting to be caused, the excavation of large rocks in the regulated adjacent area to a regulated tidal wetland, at the subject site, without the requisite DEC permit.
>
> FOURTEENTH: Upon information and belief, the Respondents have violated ECL § 25-0401.1 and Part 661 of 6 NYCRR, by causing and/or permitting to be caused, the placement of fill in the regulated adjacent area to a regulated tidal wetland, at the subject site, without the requisite DEC permit.

Exhibit 2, at 3.[2] In its complaint, Department Staff requested a $30,000 penalty, as well as restoration of the Site. Id., at ¶¶ II and III. In its closing brief, Department Staff advised that it was seeking only the $30,000 monetary penalty. Department Staff's Reply Brief, at 2, 5.

[2] The causes of action in Department Staff's complaint were not denominated as such, nor did they appear under separate numbered headings. In a decision issued subsequent to the hearing in this matter, the Commissioner directed Department Staff to number the causes of action in future complaints. Matter of RGLL, Inc. and GRGH, Inc., Commissioner's Decision and Order, at 5, fn. 4, 2009 N.Y. Env. LEXIS 93, *9, fn. 4 (December 29, 2009).

Section 25-0401(1) provides that no person may conduct certain regulated activities in a tidal wetland or an area adjacent to a tidal wetland[3] without a valid permit issued by the Department. The statute goes on to state that

> [a]ctivities subject to regulation hereunder include any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.

Section 25-0401(2). The definition of "regulated activity" in Section 661.4(ee)(1) of 6 NYCRR contains similar provisions, but provides further that a regulated activity includes

> (iv) any form of pollution;
> (v) any portion of a subdivision of land located in any tidal wetland or adjacent area;
> (vi) any other new activity within a tidal wetland or on an adjacent area which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland.

Section 661.2(ee)(1)(iv)-(vi).

Impacts

Respondents argued that "[a]s a theshold [sic] matter, in order to constitute a violation, activities in an adjacent area must by statute (ECL 25-0401) be those which may substantially impair or alter the natural condition of the tidal wetland area. The regulations are in accord." Respondents' Post-Hearing Brief, at 7. Respondents took the position that because Department Staff did not offer any evidence as to the environmental impacts of the activities alleged, the record did not support a finding of liability for those activities.

Department Staff responded that "[p]roof of impacts is not required because the Department seeks a monetary penalty only." Department Staff's Reply Brief, at 5. Department Staff did not cite any authority for this proposition, nor has research revealed any

[3] The term "adjacent area" is defined in the regulations to mean "any land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetlands boundary is shown on an inventory map." Section 661.4(b)(1). The regulation goes on to provide, in pertinent part, that the limit is "300 feet landward of said most landward boundary of a tidal wetland." Section 661.4(b)(1)(i).

case law, statute or regulation to support Department Staff's assertion. Moreover, the environmental impact of a particular violation is one of the factors taken into consideration in penalty calculation, pursuant to the Department's Civil Penalty Policy. See Civil Penalty Policy, DEE-1, ¶ D(1)(a) (June 20, 1990) (gravity component analysis takes into account the potential harm and actual damage caused by the violation).

Nevertheless, Respondents' reading does not take into account the language which precedes the "catchall" provision in both the statute and the regulations. Both the statute and the regulation state that "*any* form of . . . excavation . . . either directly or indirectly, of soil . . . [or] . . . filling or depositing, either directly or indirectly, of any soil . . . or fill of any kind" constitutes a regulated activity. ECL Section 25-0401(1); 6 NYCRR Section 661.4(ee)(1)(i) and (ii) (emphasis supplied). "Filling" also appears in the list of use categories in Section 661.5(b) of 6 NYCRR, as a "generally compatible" use in an adjacent area, but for which a permit is required. These provisions do not support the conclusion that a regulated activity specifically enumerated in the statute or regulation (in this case, excavation or filling) must be shown to substantially alter or impair the natural condition or function of the tidal wetland in order for liability to be imposed. Rather, evidence of *de minimis* impact would be a mitigating factor for the Commissioner's consideration in arriving at an appropriate penalty.

Those activities not expressly identified in the statute or regulations are encompassed within Section 661.4(ee)(1)(vi) of 6 NYCRR, which addresses potential impacts and provides that a regulated activity is one which "*may* substantially alter or impair the natural condition or function of any tidal wetland." Section 661.4(ee)(1)(vi) (emphasis supplied). As Section 661.4(ee)(2) makes clear, the use categories in Section 661.5(b) are not an exclusive list. This low threshold for inclusion of regulated activities not specifically set forth in the regulation is consistent with the express policy of the statute and the implementing regulations. See ECL 25-0102; Section 661.1 of 6 NYCRR (declaring the State's public policy to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to reasonable economic and social development). As discussed below, the clearing that took place at the Site could potentially, either directly or indirectly, substantially alter or impair the natural condition or function of the tidal wetland. The degree of alteration or impairment would be taken into account in determining the gravity of any proven violation, for purposes of penalty calculation.

Pursuant to Section 622.11(b)(1) of 6 NYCRR, Department Staff bears the burden of proving the allegations in the complaint. Section 622.11(c) requires proof of those allegations by a preponderance of the evidence. As discussed below, in this case, Department Staff did not meet that burden, and the record is not sufficient to establish by a preponderance of the evidence that Respondents excavated or deposited fill in the adjacent area of a regulated tidal wetland. Department Staff also failed to establish Respondents' liability for the extensive clearing that was observed during the two Site visits. The record does contain evidence that Respondents cleared a small amount of vegetation at the Site in establishing a set-back line, and in his discretion, the Commissioner may elect to impose a minimal penalty for that violation.

Clearing

The tidal wetland area at issue is located to the southeast of the location where the house was proposed on Lot 10. Exhibits 14, 23.[4] In light of Section 661.4(b)(1)(i), which provides, in pertinent part, for a 300 foot adjacent area from the landward boundary of the tidal wetland, much of Lot 10 is encompassed within the adjacent area of the tidal wetland. Id. At the time the Site inspections took place in May and September of 2005, no tidal wetlands permit had been issued for any regulated activities at the Site. Transcript (hereinafter "Tr.") at 155-156. A tidal wetlands permit was not issued until approximately two years later, in February of 2007. Exhibit 22. Therefore, any clearing, excavation or filling in the adjacent area of the regulated tidal wetland was unpermitted and not in compliance with the requirements of the tidal wetlands statute or regulations.[5]

Department Staff's complaint alleged that Respondents "caus[ed] and/or permit[ed] to be caused" clearing of vegetation at the Site. As discussed above, the clearing alleged is a regulated activity, pursuant to subdivision 661.4(ee)(1)(vi), as a new activity within the adjacent area of a tidal wetland that directly or indirectly may substantially alter or impair the wetland's natural condition or function.

Mr. Richards, Department Staff's witness, testified that during a Site inspection on May 4, 2005, he observed that vegetation at the Site had been cleared from an area approximately one-half to one acre in size. Tr. at 25-27; Exhibit 14. Department Staff introduced a series of photographs depicting the clearing that took place. Exhibit 8. Department Staff introduced photographs to show that the area cleared was located in an adjacent area to the tidal wetlands. Exhibits 7, 8. Mr. Richards testified that during a subsequent inspection on September 30, 2005, Department Staff observed "a cleared area that we noted on the second site inspection that we did not note on the first." Tr. at 125; Exhibit 13. The witness stated that the area in which clearing without a permit would be a

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[4] The tidal wetland boundary at the Site is depicted on Exhibit 14, a survey prepared in February of 2005, as well as on Exhibit 23, the same survey updated and revised on April 26, 2006. Exhibit 23 also reflects a February 2, 2007 revision which added a 75' non-disturbance buffer. In the earlier survey, the tidal wetland boundary was generally located outside the property line. In the more recent survey (Exhibit 23) the flagged wetland boundary has shifted to the northwest, and as a result more of the tidal wetland itself, as well as the adjacent area, are now on Lot 10.

[5] On cross-examination, counsel for Respondents elicited testimony from Department Staff's witness that if Respondents did not perform the actual work at the Site, Respondents would not be liable for the violations alleged. Tr. at 250-252. Both the statute and the regulation state that "no person" may conduct regulated activities without a permit in a regulated tidal wetland or its adjacent area. ECL Section 25-0401(1); 6 NYCRR Section 661.8. Respondents' reliance upon this testimony is misplaced, and their reading of the statute and regulations is too narrow. If the requisite nexus between activities at a site and a respondent can be shown, liability is established. For example, a site owner may be held liable for tidal wetland violations, even if the owner did not perform the actual work. See Matter of Zatarain and New Suffolk Dock Bldg. Corp., Commissioner's Decision, at 1, 1992 N.Y. Env. LEXIS 42, * 2 (July 17, 1992) (property owner who argued that she did not control the Site or perform the work was found liable). Nevertheless, Respondents in this case are not the owners of the Site, and in order to establish Respondents' liability for the alleged violations, Department Staff must show that Respondents performed the work or directed its performance.

violation, and for which Department Staff sought an order requiring revegetation, amounted to approximately 6,500 square feet. Tr. at 200-201, 293.

At the hearing, counsel for Department Staff stated that it had not offered testimony concerning impacts. Tr. at 237-238, 295. Nevertheless, the record includes some limited testimony concerning impacts attributable to clearing. Matthew Richards, Department Staff's witness, testified that

> [c]learing of vegetation is an activity which can alter, can substantially alter or impair the natural condition or function of a wetland. When vegetation is cleared, it allows run-off and siltation to occur into nearby tidal wetlands. That run-off and siltation can directly fill in that wetland or it causes species changes. We will see more fresh water plants come in, migrate into the tidal wetlands with the input of the run-off and the fresh water. So, the clearing can change the natural condition of the nearby wetlands.

Tr. at 159.

Department Staff's witness acknowledged that he did not observe the actual clearing of the Site, and that he only saw Respondent Daren Pfennig at the Site during the September 30, 2005 inspection. Tr. at 80. On that occasion, the witness testified that Respondent was working on some of the hay bales and silt fence. Id.

Department Staff argued that the activities that resulted in the alleged violations observed at the Site were performed or directed by Respondents, and contended that "[w]ork orders in the Department's files show that Respondents received in excess of $15,000 for the unpermitted work they performed at the Site." Department Staff's Closing Brief, at 3. Three work orders were received in evidence, over Respondents' objection, and those work orders are discussed in greater detail below.

At the hearing, Respondent Daren Pfennig testified that the clearing that took place at the Site was performed by another entity, Beaver Excavating. Tr. at 325. Respondents contended that "[t]he unrefuted testimony shows that all worked [sic] complained of was performed by Beaver Clearing and that such work was directed by John Laffey, the architect on the job." Respondents' Reply Brief, at 2. Respondents also disputed Department Staff's assertions as to any payment Respondents received, stating that "Respondents' sole involvement was to receive payment from John Laffey and transmit payment to Beaver Clearing. There is no evidence that Respondents were paid anything for work performed." Id.

The work orders referenced by Department Staff consist of three documents, each on Pfennig Construction Corp. letterhead, and each directed to Gianfranco Chicco, referencing

"Lot 10 Cove Beach Estates." Exhibit 16. The first document, dated September 8, 2004, states:

> [p]er direction of John Laffey AIA, assist surveyors and clear as necessary to stake northerly and easterly building envelop [sic] lines. 1 day machine hire, assisting and directed by Young & Young surveying crew. $800.00. Install ramp from raised cul-de-sac into lot, remove trees, supply and truck fill to site, grade ramp. $1,350.00. Total $2,150.00.

The document also bears the handwritten notation "PAID # 3837."

The second document, also dated September 8, 2004, states as follows:

> [p]er direction of John Laffey AIA. Supply and installation of apx 900 lineal feet slit [sic] fence and hay bales for DEC setback line at pond area, building envelope line at north side (water front) and building envelope line at east side of property. Total $6,300.00. 50 % Deposit $3,150.00. 50 % Due Upon Completion $3,150.00.

This document includes a handwritten notation: "PAID 50% 3,150.00 CHECK # 3837." There is a line for a signature following the word "Approved." The signature line is blank.

The third document is dated October 4, 2004. A signature appears on the "Approval" line, but there is no other handwritten notation. The description states:

> [p]er direction of John Laffey AIA,
> Clear apx. 20-25' wide for driveway from cul-de-sac to main building envelope area
> Clear entire main building envelope area to hay bales and lot line on West side
> Chip all debris
> Remove stumps and grind on site
> All grindings and chips to remain on site
> Total $7,800.00

Department Staff did not question Respondent Daren Pfennig concerning the work orders, nor did Department Staff call Mr. Laffey, Mr. Chicco, or any other witness to testify as to those documents. The October 4, 2004 work order refers to clearing of the main building envelope, chipping of debris, and stump grinding, but there is no notation concerning payment.

The work orders are not sufficient to establish that the extensive clearing that took place in the adjacent area of the regulated tidal wetland was undertaken by Respondents. The other evidence as to Respondents' connection with the clearing, filling and excavation at the

Site is the testimony of Department Staff's witness, who acknowledged that he had no personal knowledge as to Respondents' involvement in those activities, and, as discussed below, the testimony of Respondent, Daren Pfennig, who stated that the clearing and chipping of vegetation was done by another entity.

Nevertheless, the first work order, dated September 8, 2004, does contain a "PAID" notation for work including, among other things, clearing "as necessary" to stake the northerly and easterly building envelope lines. Exhibit 16. Moreover, as discussed in greater detail below, Respondent Daren Pfennig testified that he did use a bobcat to follow the surveyors into the heavily vegetated lot to assist them in staking. Because a large portion of Lot 10 falls within the 300' adjacent area, this evidence is sufficient to establish that Respondents performed some clearing, although the extent of that clearing would have been minimal, given the equipment involved. Although the permit as ultimately issued to Mr. Chicco provides for only a 75' non-disturbance area, the clearing undertaken by Respondent took place before a permit was issued. Exhibit 22.

At the hearing, Respondent Daren Pfennig testified that in early 2004, he was hired to put in the roads and drainage in the Cove Beach subdivision, where the Site is located. Tr. at 303. The witness testified that personnel from the Department visited the subdivision from time to time to inspect the work. Tr. at 304. Mr. Pfennig went on to state that Mr. Laffey, the project architect, approached him "and asked me if I can come in and, because I had a bobcat on site all the time, if we can utilize the bobcat and go down the westerly line just so the surveyors could get in and they could possibly do some staking for the house." Tr. at 308. Mr. Pfennig agreed to do so. Tr. at 309. He testified that in order to stake the westerly line, he pushed brush away using the bobcat and some hand tools. Tr. at 337.

The witness testified that some time later, Mr. Laffey contacted him again to "follow the surveyors in with a bobcat to establish the DEC set-back line in the lot." Tr. at 309. Mr. Pfennig testified that he agreed with the surveyors and Mr. Laffey that "we were going to stay 10 foot back from the established DEC line." Tr. at 310. Mr. Pfennig proceeded to follow the surveyors around the lot with the bobcat. Id. The witness testified that he later placed the silt fence and hay bales at the Site. Tr. at 322.

Mr. Pfennig went on to testify that "afterwards, when I was called into the DEC office to go back and review the lot and double check the survey" he took a series of photographs. Tr. at 310-311. He stated that, contrary to Mr. Richards' testimony, he was not fixing silt fence or haybales at the time of the September 2005 inspection. Tr. at 311. Rather, he proceeded to take photographs entirely around the lot. Id. According to the witness, the photographs "show the clearing limit set 10 foot back from the silt fence and hay bales," and that "when we were working on this site, we had seen previous DEC stakes that were marked out for clearing limit, and these stakes [the original surveyor's stakes] are in front of those stakes." Tr. at 312-313. According to Mr. Pfennig, after the hay bales and silt fence were in place, a representative of the Department visited the site and "said it all looked good." Tr. at 323-324.

Mr. Pfennig testified that he was contacted by Mr. Laffey concerning clearing at the Site, as follows:

> [a]t one point, Mr. Laffey contacted me again and said "Could you clear – " well, he said to me actually, "Now that the DEC lines have been established, could you clear within the building envelope?" In conversations with Laffey, I said, "I don't have the equipment to clear." He says, "Well, can you get me anybody who can clear" because I have had clearing done down there – to clear Cove Beach, I had to bring in a specialized crew that can handle those size trees and clear that out. And I told Mr. Laffey I would ask them because we may have some stuff done on the top part of Cove Beach and I will see if I can coordinate it during that time at all. . . . The people agreed. It was Beaver Site Clearing agreed that yes, when we are down there, if we are grinding stumps or doing anything in the area, we can come down and clear that lot.

Tr. at 325-326. Mr. Pfennig testified that Mr. Laffey asked Beaver to leave the wood chips on site, and not to clear any large trees that could be saved. Tr. at 326. The witness stated further that "[a]ctually, Mr. Laffey and I had gone in the lot and he had pointed out the areas that he specifically wanted to save." Id. The witness stated that Beaver performed the clearing, and that it was approximately a year later that he became aware that there was a problem with the clearing that had been done. Tr. at 326-327.

On cross-examination, the witness testified that Beaver "is a site-clearing type of company," and that "[w]e don't do business with them that often." Tr. at 346. Mr. Pfennig testified that "Mr. Laffey paid me and I paid Beaver" and that he hired Beaver "under Mr. Laffey's direction." Tr. at 348. Mr. Pfennig stated that a representative of the Department visited the Site after the clearing took place and "said everything looked good." Tr. at 354.

Mr. Pfennig stated that he visited the Site a week to ten days before the hearing, and took a series of photographs. Tr. at 328. He stated that the lot was "very overgrown," and that there were still two piles of wood chips on the Site. Tr. at 329-330. The witness stated that he did not see any evidence of revegetation in accordance with the plans submitted by Mr. Chicco pursuant to the order on consent. Tr. at 333.

In their post-hearing submissions, Respondents emphasized that that there was no evidence in the record that Department Staff observed Respondents, or anyone, clearing vegetation or undertaking any of the activities enumerated in the complaint. Respondents argued further that there was no evidence that Respondents performed or directed any such activities, and went on to assert that "[t]he unrefuted testimony shows that all worked [sic] complained of was performed by Beaver Clearing and that such work was directed by John Laffey, the architect on the job." Respondents' Reply Brief, at 2. This assertion was set

forth in Respondents' fifth affirmative defense, specifically, that "work which may have been performed at the site was performed by Beaver Land Clearing." Exhibit 4 (Amended Verified Answer, at ¶¶ 22-23).

In response, Department Staff contended that Respondents failed to meet their burden of proof with respect to their fifth affirmative defense, arguing that "Respondents have the burden of proving that Beaver Site Clearing exists and that they, and not Respondents, engaged in the unpermitted regulated activities in the adjacent area to the regulated tidal wetlands on the property. Regrettably for Respondents, not a scintilla of evidence was presented to support this position." Department Staff's Reply Brief, at 1-2. Contrary to Department Staff's assertions, the sworn testimony of Respondent Daren Pfennig, which was credible and unrefuted by Department Staff, is probative as to this defense.

Moreover, Department Staff failed to establish by a preponderance of the evidence that Beaver Site Clearing was Respondents' subcontractor, or that Respondents directed Beaver Site Clearing's activities at Lot 10. See Matter of Martino, ALJ's Ruling on Liability, at 15, n. 10, 2009 N.Y. Env. LEXIS 1, *26, n. 10 (Jan. 6, 2009) (declining to find liability for respondent based upon witness's testimony that respondent provided his name and address, was present at the site, and "appeared to be the supervisor of several workers").

On this record, Respondents' liability for the extensive vegetative clearing observed during the two Site visits has not been established by a preponderance of the evidence. The evidence does support a finding that Respondents were involved in some minimal clearing associated with the staking and surveying of Lot 10, but the penalty associated with that clearing would be *de minimis*.

Alleged Violation: Excavation

In its complaint, Department Staff alleged that Respondents excavated large rocks in the area adjacent to the regulated tidal wetland. Exhibit 2, at 3. At the hearing, Department Staff's witness, Matthew Richards, testified that he observed disturbed soil around some rocks on the property. Tr. at 159-160. According to Mr. Richards, fresh dirt was exposed, and there were no stumps on the property, although exposed roots could be seen. Id. He testified that excavation would be required in order to remove the stumps. Id. On cross-examination, the witness acknowledged that he was not familiar with the complaint, and that he did not know if the allegations concerning excavation included removal of tree stumps. Tr. at 164. In fact, excavation of tree stumps was not charged in Department Staff's complaint, and therefore will not be considered in determining Respondents' liability, if any, for excavation at the Site.

On cross-examination, the witness acknowledged that he did not know whether rocks were removed, but that he observed soil disturbance around some rocks. Tr. at 165-167. With respect to the soil observed, the witness stated that at the time he performed the inspection in May of 2005, the disturbance appeared to be relatively recent. Tr. at 255. Respondents disputed the evidence with respect to this violation, pointing out that "[t]he

most that the DEC witness could testify to was 'disturbed' soil," and went on to argue that "[d]isturbed soil does not constitute excavation." Respondents' Reply Brief, at 5. In response, Department Staff took the position that any disturbance amounted to excavation.

As discussed above, any excavation within the adjacent area of a tidal wetland is a regulated activity. In this case, however, Department Staff did not establish, by a preponderance of the evidence, that Respondents excavated at the Site. Department Staff's witness testified that he had no personal knowledge as to Respondents' connection with the disturbed soil at the Site. Tr. at 168. The evidence is, therefore, insufficient to find Respondents in violation on this cause of action by a preponderance of the evidence.

Alleged Violation: Filling

Respondents argued that wood chips do not constitute "fill." This contention is not supported by the language of the statute and regulations. Although "fill" is not specifically defined, both the statute and the regulations state that "any form of dumping, filling, or depositing, either directly or indirectly of any soil, stones, sand, gravel, mud, rubbish, or fill *of any kind*" in a regulated tidal wetland or an adjacent area is a regulated activity. ECL Section 25-0401(1); 6 NYCRR Section 661.4(ee)(1)(ii). Although the use classifications in Section 661.5(b)(30) indicate that filling is a generally compatible use, that provision also indicates that a permit is required. Therefore, if Respondents placed fill at the Site without a permit, they would be liable for that violation.

Department Staff alleged that Respondents placed fill, specifically, wood chips, in the wetland adjacent area. Exhibit 1, at 3. Department Staff's witness testified that he observed wood chips at the Site, as well as the remains of shrubs and brushy material. Tr. at 169. With respect to the large piles of wood chips observed at the Site, the witness stated that he believed that the chips were generated by the clearing that had taken place. Tr. at 170. This testimony was confirmed by Respondent Daren Pfennig's testimony that Beaver Site Clearing chipped and shredded the byproducts of the clearing. Tr. at 326-327. Department Staff's witness stated that the piles of wood chips could be considered "rubbish . . . if it was placed in a large pile to be removed," but acknowledged that he did not know whether the chips were to be used or to be removed. Tr. at 171.

As was the case with the allegations concerning excavation, Department Staff's evidence was insufficient to establish Respondents' connection to the presence of wood chips at the Site. Moreover, Department Staff's witness declined to state that the wood chips would have a substantial impact on the wetland. Tr. at 206. On this record, Department Staff failed to establish Respondents' liability for this cause of action by a preponderance of the evidence.

RELIEF REQUESTED

Section 71-2503 of the ECL provides that

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

Department Staff sought a penalty of $30,000 ($10,000 for each violation alleged in the complaint). As discussed below, even assuming that Department Staff proved its case against Respondents, and could establish the violations alleged, the record in this case does not support the imposition of the penalty requested because of the lack of evidence as to impacts.

In its reply brief, Department Staff stated that excavation, clearing and filling are not specifically defined in the statute or the regulations, but went on to note that "each of these activities is characterized as a distinct tidal wetland violation by the Tidal Wetlands Enforcement Policy." Department Staff's Reply Brief, at 2; see DEE-7, *Tidal Wetlands Enforcement Policy* (February 8, 1990) (the "Wetlands Policy"). The Wetlands Policy states that "[a] single activity may involve numerous distinct tidal wetlands violations; for example, building a house might entail drainage, removal of vegetation, excavation, fill, construction of a septic system, or violation of the development restrictions in § 661.6." Wetlands Policy, at V(1) ("Sanctions"). Department Staff observed that the Wetlands Policy provides that penalty calculations should begin at the maximum penalty amount of $10,000 per violation, and noted further that Department Staff had elected not to seek the potential penalty of $10,000 per violation for each day the violation continued. Department Staff pointed out that the penalty requested was significantly below the statutory maximum authorized pursuant to Section 71-1929 of the ECL.

To further support its request for relief, Department Staff noted that the property owner entered into a January 8, 2007 order on consent with the Department. Exhibit 25. Pursuant to that order on consent, the property owner, Giacomo Chicco, agreed to pay a $10,000 civil penalty, with $5,000 of the penalty payable, and $5,000 suspended. Id. Pursuant to a compliance schedule, Mr. Chicco also agreed to remove all fill within the open space and/or buffer, regrade the Site, and replant with native species, all within 90 days of the date of the order. Id. The consent order also required that the property owner submit photographs of the completed work to the Department within five days of completion. Id.

Attached to the order on consent was a photocopy of a check for $5,000 and the Department's receipt for that amount. Id.

Department Staff's witness testified that he determined the penalty amount, and that the $30,000 penalty was based upon three violations, with $10,000 assessed for each. Tr. at 145-146. According to the witness, the $30,000 was "approximately what Mr. Chicco had paid for the work on his property, including the violations that were cited and the restoration of the property as well as the penalty that was imposed upon him." Tr. at 146.[6]

On cross-examination, Department Staff's witness, Mr. Richards, stated that he had not returned to the Site since the inspection in September of 2005, and that he did not know if the property owner had undertaken or completed the restoration of the Site as required pursuant to the order on consent. Tr. at 202-205. The witness stated that he did not know if the pile of wood chips he observed during the Site inspections, and which he testified was the fill referenced in Department Staff's complaint, had been removed from the Site. Tr. at 204-05; 290. Respondents provided a series of photographs showing the current condition of the Site, taken shortly before the hearing, depicting the growth of vegetation but also the presence of at least one pile of wood chips still at the Site. Exhibits 27A – 27DD; 28 A – G. These conditions support Respondents' contention that the property owner did not complete restoration required pursuant to the order on consent, and that the Site is naturally revegetated, not as a result of any efforts on the part of the property owner. On this record, the evidence offered by Department Staff was insufficient to establish by a preponderance of the evidence that any restoration was undertaken, or the costs of such restoration.

Assuming the Commissioner elects to find a violation for the clearing that took place in conjunction with the surveyors' activities at the Site, this hearing report recommends that only a minimal penalty be imposed, specifically, $1,000.

CONCLUSIONS AND RECOMMENDATION

The record is insufficient to establish Respondents' liability, except for some *de miminis* clearing associated with staking and surveying, and therefore only a minimal penalty of $1,000 should be imposed.

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[6] According to Department Staff, restoration costs were estimated at $10,000. To support this assertion, Department Staff attempted to introduce in evidence an e-mail response by Mr. Chicco, the property owner, to an inquiry by counsel for Department Staff sent on the Friday before the hearing commenced. Exhibit 17. In response to counsel's inquiry as to the costs of restoration at the Site, the e-mail stated: "I'll chk my records when I get back but i think it ws round $10,000." Id. Mr. Chicco was not called to testify, nor was there any other documentation introduced to substantiate the statements in the e-mail. Respondents objected to the receipt of the e-mail in evidence, and the ALJ sustained the objection. Tr. at 144-145.

Daren Pfenning and Pfennig Construction Corporation
Enforcement Hearing
EXHIBIT LIST
July 22-23, 2008

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
1	Notice of Hearing, Pre-Hearing Conference, and Complaint, dated August 15, 2007	✓	✓	N/A	
2	Verified Complaint, dated August 15, 2007	✓	✓	N/A	
3	Verified Answer, dated September 4, 2007	✓	✓		
4	Amended Verified Answer, dated November 16, 2007	✓	✓	N/A	
5	Resume: Matthew Richards	✓	✓	Department Staff	
6	March 23, 2005 letter from Matt D. Ivans, Suffolk Environmental Consulting, with attached Joint Application for Permit, project description, map, and photographs	✓	✓	Department Staff	
6A	Survey – Chicco Project	✓	✓	Department Staff	
7	Record of inspection (2 pages, including sketch)	✓	✓	Department Staff	
8	Photographs (six pages, two photos per page)	✓	✓	Department Staff	
9	Tidal wetlands map (722-556)	✓	✓	Department Staff	
10A	Aerial photo	✓		Department Staff	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
10B	Aerial photo	✓		Department Staff	
10C	Aerial photo	✓		Department Staff	
10D	Aerial photo	✓		Department Staff	
10E	Aerial photo	✓		Department Staff	
10F	Aerial photo	✓		Department Staff	
10G	Aerial photo	✓		Department Staff	
11	Notice of violation (May 5, 2005) – Chicco	✓	✓	Department Staff	
12	Notice of violation (September 29, 2005) – Pfennig	✓	✓	Department Staff	
13	Photos	✓	✓	Department Staff	
13A	Survey – photo key	✓	✓	Department Staff	
14	Survey – handwritten markings	✓	✓	Department Staff	
15	Aerial photograph – handwritten markings	✓		Department Staff	
16	Letter from Laffey – (three work orders received, two dated 9/8/04, and one dated 10/4/04)	✓	✓	Department Staff	Invoices received
17	July 20, 2008 e-mail from Chicco to Rowan	✓		Department Staff	
18	August 16, 2007 letter from Suffolk County re Pfennig license	✓		Department Staff	
19	Subdivision permit, including Chicco parcel	✓	✓	Respondent	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
20A-D	Final plat, Cove Beach (four sheets)	✓	✓	Respondent	
21A-E	Road and Drainage drawings (five sheets)	✓	✓	Respondent	
22	Permit issued for Chicco property	✓	✓	Respondent	
23	Survey – Lot 10 (Chicco parcel)	✓	✓	Respondent	
24	Revegetation Plan (Chicco parcel)	✓	✓	Respondent	
25	Chicco Order on Consent	✓	✓	Respondent	
26	Revegetation Plan (approved per Consent Order)	✓	✓	Respondent	
27A-DD	Photographs (30)	✓	✓	Respondent	
28A-G	Photographs (7)	✓	✓	Respondent	