



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
COASTAL AND LAND USE
COMPLIANCE AND
ENFORCEMENT,

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO.: ECE 05467-11
AGENCY REF. NO.: PEA090002-0805-09-0002.1

Petitioner,

v.

GEORGE AND LORI COBLENTZ,

Respondents.

This Order addresses the appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the Department of Environmental Protection (Department) on September 3, 2009, against George and Lori Coblentz (Respondents), assessing \$65,000 in civil administrative penalties for violations of the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq., and its implementing rules, relating to the property at 1720 Harding Highway, Franklin Township, Gloucester County, Block 7202, Lots 22 & 23 (the Property). Specifically, the Department determined that Respondents violated N.J.A.C. 7:7A-2.2(a) and -2.6(a) when they failed to obtain a permit prior to conducting regulated activities in freshwater wetlands and a freshwater wetlands transition area located on the Property. On December 6, 2010, the Department granted Respondents'

request for a hearing to contest the AONOCAPA¹ and transferred the matter to the Office of Administrative Law (OAL), where it was assigned to Administrative Law Judge John Schuster III (ALJ). In the OAL, the Department filed a motion for summary decision, which Respondents did not oppose.² On February 10, 2016, the ALJ issued an Initial Decision finding Respondents liable for the violations alleged in the AONOCAPA and affirming the \$65,000 penalty. Neither the Department nor Respondents filed exceptions to the Initial Decision.

Based on my review of the record, I ADOPT the ALJ's findings and conclusions as to Respondents' liability and the penalty as set forth below.

FACTS AND PROCEDURAL BACKGROUND

Respondents owned the Property from October 25, 2005, until May 9, 2012. The Property is a rectangular lot of approximately thirty acres on Harding Highway in Franklin Township, Gloucester County. On January 13, 2009, Department Environmental Specialist Ginger Benckert (Benckert) performed a site inspection at the Property in response to a complaint that a large area of forested wetlands was being cleared. Because the ground was frozen on her initial visit, which made taking soil borings impossible, she returned to the property on January 22, 2009, to make observations, obtain soil borings, and delineate the extent of any disturbance to any freshwater wetlands and/or freshwater wetlands transition areas. Benckert determined that the Property contained freshwater wetlands and that the Respondents had destroyed approximately 104,000 square feet of freshwater wetlands and 28,500 square feet of freshwater wetlands transition area, totaling 3.04 acres of disturbance.

¹ The request was made by counsel by letter dated November 2, 2009.

² At the time of the motion, Respondents had discharged their attorney and were not represented by counsel.

On February 10, 2009, the Department issued a Notice of Violation (NOV) that was ultimately hand-delivered to Respondents on March 12, 2009. The NOV notified Respondents that they had cleared freshwater wetlands and a freshwater wetlands transition area without a permit. On March 18, 2009, the Department sent a Notice of Attachment of Violation to the Gloucester County Clerk's office with a copy to the Respondents, and thereafter, on March 23, 2009, the Clerk's office attached the NOV to the deed for the Property.

On September 3, 2009, the Department issued the AONOCAPA to Respondents assessing a penalty of \$65,000 for Respondents' failure to obtain a permit prior to conducting regulated activities on the Property, and ordering Respondents to submit a restoration plan for the Property. The Department explained its penalty assessment in the Penalty Rationale accompanying the AONOCAPA. In their November 12, 2009 request for a hearing, Respondents alleged that they had no notice that freshwater wetlands existed on the Property. Respondents also alleged that the root systems of the cut and trimmed trees remained intact and that the trees had, by then, begun to grow fresh branches and foliage. They thus denied the need for any restoration. Respondents denied that any fill and/or structures had been placed on the Property or that there was any disturbance of the grade or need to restore the grade.

Respondents did not restore the Property or pay the penalty. Lots 22 and 23 were sold in a sheriff's sale on May 9, 2012. Following an inspection by the Department on January 31, 2013, the Department, by letter dated May 1, 2013, advised the new owner of lot 22, Jenne Arzt, that lot 22 would not require restoration because the site had been left to re-vegetate naturally and was coming back on its own. The Department requested that Arzt submit a site plan showing the location of the existing structures and limits of disturbance on lot 22 as a baseline for future reference. On March 7, 2013, the Department received the site plan and, by letter dated May 1,

2013, advised Arzt that it had discharged the original NOV issued to Respondents on lot 22 and that a Notice of Discharge of Attachment of the NOV would be forwarded to the Gloucester County Clerk's Office. See Benckert Certification at Exhibit M.

On April 11, 2014, the Department advised the new owner of lot 23, Thomas Mecouch, that certain restoration work would be required on that lot. Thereafter, on May 13, 2014, the Department inspected lot 23 and concluded that the required restoration work had been completed. On June 9, 2014, the Department advised Mecouch that it had discharged the NOV originally issued to Respondents on lot 23 and that a Notice of Discharge of Attachment of the NOV would be forwarded to the Gloucester County Clerk's Office. See Benckert Certification at Exhibit N. On August 22, 2014, the Department issued a Letter of Interpretation (LOI) to Mecouch confirming the presence of freshwater wetlands on lot 23.

The Department filed a Motion for Summary Decision in the OAL on October 26, 2015. Service of process was perfected no later than December 1, 2015 by mailing copies of the motion papers to Respondents' last known address in New Jersey and to their forwarding address in Florida. Respondents did not oppose or otherwise answer the Department's motion. On January 13, 2016, the Department wrote to the ALJ to inform the OAL that Respondents had failed to respond to the Department's motion and were therefore in default and requesting the ALJ to rule on the Department's Motion for Summary Decision.

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). When a party

moves for summary decision, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue which can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply “sit on his or her hands,” but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard for a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Contini, supra, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). Applying this standard, the Department’s summary decision motion, unopposed by Respondents, was properly granted.

In enacting the FWPA, the Legislature determined that “it shall be the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance.” N.J.S.A. 13:9B-2. The FWPA prohibits “[r]egulated activities,” which includes “the destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees” in a freshwater wetlands. N.J.S.A. 13:9B-3. The FWPA similarly prohibits the “[d]estruction of plant life which would alter the existing pattern of vegetation” in a freshwater wetlands transition area. N.J.S.A. 13:9B-17. The Department’s rules implementing FWPA, at N.J.A.C. 7:7A-1.1 et seq., govern, among other things, the conduct of activity in freshwater wetlands. N.J.A.C. 7:7A-2.2 provides that:

- (a) The following activities are regulated under this chapter when performed in a freshwater wetland unless excluded under (c) below:

6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees.

Each of the activities described above requires a permit from the Department prior to engaging in the activity. N.J.S.A. 13:9B-9; N.J.A.C. 7:7A-2.1(a). N.J.A.C. 7:7A-2.6(a)5 prohibits the “[d]estruction of plant life which would alter the existing pattern of vegetation” in wetlands transition areas.

In his Initial Decision, the ALJ found that the Department had established that Respondents violated the FWPA by clearing freshwater wetlands area and freshwater wetlands transition area without first obtaining a permit to do so. Based on the evidence provided by the Department, the ALJ found that wetlands exist on the Property and that a portion of those wetlands and the surrounding transition area had been cleared of vegetation by the Respondents, which, unless a permit is obtained, is prohibited by N.J.A.C. 7:7A-2.2(a) (regulated activities in a freshwater wetland) and N.J.A.C. 7:7A-2.6(a) (regulated activities in a freshwater wetland transition area).

In support of its Motion for Summary Decision, the Department submitted certifications from Department staff, including Benckert’s Certification as to her findings at the Property. Benckert certified that during her January 13, 2009, inspection she found a large portion of the Property had been clear cut of vegetation. She observed what she thought were soils indicative of wetlands. Benckert returned to the Property on January 22, 2009, with Environmental Specialists Michael Palmquist and Peter Keledy to collect soil borings and other data to determine the presence of freshwater wetlands and to delineate the area of disturbance.

Benckert took seven soil borings from various points on the Property to determine the presence of wetlands. Of the seven soil borings taken, Benckert certified that soil borings four, five, and six, shown on the map attached to Benckert's Certification as Exhibit C, met the criteria for freshwater wetlands. For an area to be classified as wetlands, the 1989 Federal Manual for Delineating Wetlands (Federal Manual)³ requires the presence of (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology. Using the criteria set forth in the Federal Manual, Benckert certified that she classified the soil borings as hydric. She certified that she observed evidence of hydrophytic vegetation and observed wetland hydrology at all three soil boring locations.

Benckert also took photographs of the Property and took measurements to determine the approximate area of disturbance. Later, using the Department's geographic information system (GIS), Benckert compared her findings with a 2007 high-resolution color aerial photograph overlaid against the Property boundaries and the wetlands GIS layer, which corroborated her findings that the areas that had been cleared were previously forested in 2007 and contained freshwater wetlands.

The Respondents have not submitted any evidence of any material fact to the contrary, nor provided any evidence that they meet the exceptions in N.J.A.C. 7:7A-2.6(b)3 and 4⁴ or N.J.A.C. 7:7A-2.2(c)4.⁵ Thus, I concur with the ALJ's findings and conclusions as to the FWPA violations.

³ The relevant portions of the Federal Manual are included in Benckert's Certification at Exhibit D.

⁴ N.J.A.C. 7:7A-2.6(b)3 and 4 provide that "[p]runing of trees and shrubs" as well as "[s]elective cutting of trees" in transition areas do not require Department approval.

⁵ N.J.A.C. 7:7A-2.2(c)4 provides that "[h]and trimming of trees or other vegetation, provided the trimming does not alter the character of the freshwater wetland," is not a regulated activity.

PENALTY DETERMINATION

The Environmental Enforcement Enhancement Act of 2007 (EEEA), effective January 4, 2008, modified the FWPA at N.J.S.A. 13:9B-21d to allow the Department “to assess a civil administrative penalty of not more than \$25,000 for each violation of [the FWPA], or any rule or regulation adopted, or permit or order issued pursuant thereto.” The EEEA provides that each day during which a violation continues shall constitute an additional, separate and distinct offense. N.J.S.A. 13:9B-21d. It further provides that “[a]ny amount assessed . . . shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, duration, and conduct; provided, however, that prior to the adoption of the regulation, the commissioner may, on a case-by-case basis, assess civil administrative penalties up to a maximum of \$25,000 per day for each violation, utilizing the criteria set forth herein.” Id.

The Department uses the procedures set forth in N.J.A.C. 7:7A-16.8 to determine the amount of the penalty for regulated activities in a freshwater wetland or freshwater wetland transition area conducted without a permit. N.J.A.C. 7:7A-16.8(c) requires the Department to evaluate the conduct of the violator and the seriousness of the violation. Seriousness is based on the acreage of wetlands and wetlands transition area disturbed and the resource value of those areas. Id. The Department assigns a point value for each factor as well as for the acreage of disturbed area. See N.J.A.C. 7:7A-16.8(c)1, 2i and 2ii. The points are totaled and a base penalty is derived using Table D found in N.J.A.C. 7:7A-16.8(d). The base penalty is then multiplied by the number of days for which the violation continued. See N.J.A.C. 7:7A-16.8(f).

The Department determined that Respondents’ conduct was Moderate and assigned two points. N.J.A.C. 7:7A-16.8(c)1ii states that “[m]oderate conduct shall include any unintentional but foreseeable act or omission by the violator. . . .” Concerning resource value, the Department

determined that the disturbed wetlands were “intermediate resource value wetlands,” and assigned four points. N.J.A.C. 7:7A-16.8(c)2ii(2). Benckert determined that the disturbance area was 3.04 acres, which is assigned five points for disturbances greater than 2 acres and up to 4 acres. N.J.A.C. 7:7A-16.8(c)2i(3).

Adding the points for each of the criteria, the Department arrived at a base penalty of \$13,000 per day (2+4+5 points = 11 points). Using N.J.A.C. 7:7A-16.8(f), the Department determined that the violation continued for 175 days from March 12, 2009, when the NOV was issued to Respondents, to September 3, 2009, when the AONOCAPA was issued. Although the FWPA would have thus authorized a penalty of \$2,275,000 (175 days x \$13,000), the Department exercised discretion and assessed a penalty for one day of violation for each month of non-compliance from the date the NOV was issued. This resulted in a total penalty of \$65,000 (5 days x \$13,000). Because, as noted previously, the Department discharged the original NOV on lots 22 and 23, no further restoration by Respondents is required.

The ALJ found that the Department correctly applied N.J.A.C. 7:7A-16.8 in calculating the penalty of \$65,000 for Respondents’ failure to obtain a permit prior to conducting regulated activities on the Property. Based on the Department’s certifications and the record below, I concur with the ALJ’s findings and conclusions and ADOPT the Initial Decision affirming the penalty assessed by the Department.

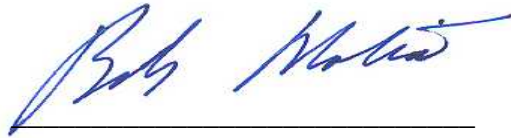
CONCLUSION

For the reasons set forth therein and above, I ADOPT the ALJ’s Initial Decision affirming the Department’s AONOCAPA and directing payment of the civil administrative penalty in the amount of \$65,000. Respondents are ORDERED to pay the civil administrative

penalty of \$65,000 as set forth in Paragraph 13 of the AONOCAPA within twenty (20) days from the date of this Final Decision. Based on the Discharge of the Notice of Violation as to both lots 22 and 23, no further restoration is required on the Property.

IT IS SO ORDERED.

DATE: May 5, 2016



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT, v.
GEORGE AND LORI COBLENTZ.

OAL DKT. NO. ECE 05467-11
AGENCY REF. NO. PEA090002-0805-09-0002.1

SERVICE LIST

Robert J. Kinney, DAG
Division of Law
R. J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, NJ 08625-0093
Email: Robert.Kinney@lps.state.nj.us

George D. and Lori Coblentz
9232 Flamm Place
Palm Bay, Florida 32909-1203

George D. and Lori Coblentz
P.O. Box 492
Newfield, New Jersey 08344-0492