

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

-----X
STATE OF NEW YORK and the ADIRONDACK PARK
AGENCY,

Plaintiffs,

-against-

LEWIS FAMILY FARM, INC.,

Defendant.

AFFIRMATION OF
ASSISTANT ATTORNEY
GENERAL ROBERT
ROSENTHAL

Index No. 626-00

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ROBERT ROSENTHAL, an attorney duly admitted to the practice of law in the State of
New York, hereby affirms under penalty of perjury:

1. I am an Assistant Attorney General in the office of Eliot Spitzer, Attorney General
of the State of New York, attorney for plaintiffs. I submit this affirmation to explain the
agreement entered into by the parties, which we respectfully request the Court to so order.

2. Plaintiffs commenced this action to enforce violations of the New York State
Freshwater Wetlands Law, Environmental Conservation Law ("ECL") Article 24, and the
regulations promulgated thereunder, committed by defendant upon and adjacent to State-owned
protected Forest Preserve in the Adirondack Park.

3. As set forth in the Verified Complaint in this action, defendant or his agents
entered on the State-owned portion of the Webb Royce Swamp ("the Swamp"), without
obtaining permits from the Adirondack Protection Agency ("APA"), and excavated a 250-foot
long ditch in a freshwater wetland area to drain surface and ground water from an extensive
drainage system constructed by defendant on an approximately 100-acre farm field (hereinafter

referred to as "the Farm Field") which is adjacent to the State land, and which is owned and operated by defendant. Defendant also placed fill illegally in an eight acre wetland area on the Farm Field without an APA permit.

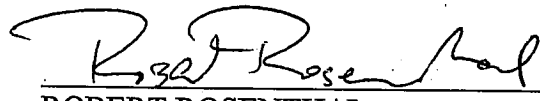
4. Following good faith, arms-length negotiations, plaintiffs and defendant have agreed to resolve plaintiffs' claims and settle this matter in accordance with the terms set forth in the proposed Consent Order ("the Order") annexed hereto as Exhibit A.

5. Under the terms of the proposed Order, LFF will be required to (i) restore both the area where the ditch was excavated in the Swamp and the historical flow into the Swamp area in accordance with the requirements and schedule set forth in the Engineering Plan, attached to the Consent Order; (ii) pay stipulated penalties for failure to comply with the requirements specified; and (iii) allow authorized representatives of the APA access to the Farm Field without prior notice. LFF has already contributed \$50,000 to the Town of Keene for the purpose of assisting in the funding of the "Rivermede Streambank Protection Project," as an Environmental Benefit Project. The parties also seek to have the Court retain jurisdiction in the event that the proposed Judgment is violated.

6. Counsel for plaintiffs and defendant have executed the proposed Judgment. Defendant's counsel, John Privitera, of the firm McNamee, Lochner, Titus & Williams, P.C., has agreed to entry of the Order without his appearance.

WHEREFORE, plaintiffs respectfully request that this Court enter the proposed Consent Order.

Dated: New York, New York
December 11, 2000



ROBERT ROSENTHAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

-----X
STATE OF NEW YORK and the ADIRONDACK PARK
AGENCY,

Plaintiffs,

CONSENT ORDER

-against-

Index No.

LEWIS FAMILY FARM, INC.,

Defendant.
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WHEREAS:

A. The Lewis Family Farm, Inc. ("LFF") owns and operates an approximately 100-acre farm field ("farm field"), within a larger parcel of land also owned by LFF, located off of Clark Road, in the Town of Essex, Essex County, New York. The farm field is located adjacent to the environmentally sensitive Webb Royce Swamp (the "Swamp"), a 300-acre wetland ecosystem of which one-third was acquired by the State of New York in the 1990's. The Swamp, located within the Adirondack Park, is classified as Wild Forest under the State Land Master Plan and includes freshwater wetlands.

B. The farm field includes approximately eight acres of freshwater wetlands in its southeast corner immediately adjacent to the state-owned portion of the Swamp. The LFF-owned 8-acre wetland is part of the Swamp ecosystem.

C. The Adirondack Park Agency ("the APA") is responsible, pursuant to Environmental Conservation Law ("ECL") Article 71, title 23, for enforcing the New York State Freshwater Wetlands Act ("the Act"), ECL Article 24, within the Adirondack Park.

D. The Swamp is protected under the Act, which prohibits all draining, dredging, excavating, filling, and depositing in, on or adjacent to freshwater wetlands, and any other activity that substantially impairs the functions served by or the benefits derived from wetlands if not permitted by the APA. See ECL §§ 24-0105, 24-0701, 24-0705, and 24-0801. Pursuant to its delegated authority under 9 New York Code, Rules and Regulations ("NYCRR") Part 578, the APA has rated the Swamp as a category "1" wetland, the highest value on a scale of 1 to 4. Under this rating, the APA cannot approve a proposed activity within the wetland without a finding that the activity would be compatible with the preservation of the entire wetland and would not result in degradation or loss of any part of the wetland or its associated values. See 9 NYCRR § 578.10(a).

E. The State-owned portion of the Swamp is also protected under Article XIV, § 1, of the New York State Constitution, which provides that "[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands."

F. From in or about October 1998 until February 1999, LFF installed an extensive drainage system both on the farm field and within the Webb Royce Swamp for the purpose of draining the farm field of both surface and subsurface water for crop production.

G. Plaintiffs allege that the drainage project included extensive work on the farm field, including (i) the removal of trees and vegetation, (ii) extensive regrading, (iii) filling of the 8-acre wetland area discussed above, (iv) excavation of two long-abandoned ditches and side-casting of the dredged materials onto adjacent wetlands, (v) installation of a culvert to collect and channelize

surface water from the two ditches, and (vi) installation of subsurface tile drains and a manhole for the purpose of collecting water from the drains.

H. Plaintiffs further allege that both the surface and subsurface water flows from the drainage system located on the farm field were channelized into and through the Swamp via a 250-foot long ditch, between 10 and 12 feet wide, and having a depth of between 18 inches and two feet, excavated into the Swamp by LFF's employees and contractors; the dredged materials were deposited over the adjacent wetlands vegetation in the Swamp; and, in order to excavate the ditch, LFF's employees and contractors clear-cut timber, understory, and other vegetation in the Swamp.

I. LFF neither sought nor received permission from the APA or from the New York State Department of Environmental Conservation ("DEC") for conducting any of the work within the farm field or the State-owned Forest Preserve lands of the Swamp.

J. Plaintiffs allege that through the activities conducted by LFF's employees and contractors within the Swamp, LFF has violated both Article XIV, § 1, of the New York State Constitution and the Act. Plaintiffs also allege that said activities and their lasting impact on the Swamp constitute a continuing trespass and have damaged the natural resources of the State.

K. LFF alleges that it is not legally responsible for the alleged violations, that it had a right to conduct the alleged work under the agricultural exemption of the Federal Clean Water Act, 33 U.S.C. §§ 1344(f)(1)(A) and (C), and the Act, ECL § 24-0701(4), and that the Swamp was not harmed.

L. Prior to agreeing to the terms of this Consent Order ("Order"), LFF contributed \$50,000 to the Town of Keene for the purpose of assisting in the funding of the "Rivermede Streambank Protection Project," as an Environmental Benefit Project.

NOW, without admission, in the interests of resolving this matter and upon the consent of the undersigned counsel for Plaintiffs and of LFF, it is hereby STIPULATED and AGREED by the parties as follows:

1. **Restoration of Swamp Area:** LFF shall restore both the area where the ditch was excavated in the Swamp and the historical flow into the Swamp area in accordance with the requirements and schedule set forth in the Engineering Plan, attached hereto as Exhibit A and made a part hereof.

2. **Stipulated Penalties:** In the event that LFF defaults by failing to timely comply with the requirements of paragraph 1, above, the APA shall provide LFF with written notice of such default served by overnight courier to the address set forth on the signatory page of this Order. LFF shall thereafter have three (3) days from the receipt of the written notice to cure the default. If LFF fails to cure the default, the APA shall be entitled to payment by LFF of a stipulated penalty or penalties to be calculated in accordance with the following schedule:

<u>Period of Non-compliance</u>	<u>Penalty per Day</u>
1st day through 30th day	\$500
Each day beyond the 30th day	\$1,000.

3. **Inspections:** LFF shall allow authorized representatives of the APA access to the farm field without prior notice at such times as may be necessary in order for the APA to inspect and determine the status of LFF's compliance with this Judgment.

4. **Force Majeure**: LFF shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or relief, if LFF cannot comply with any requirements contained herein because of an Act of God, war, riot, or other catastrophe as to which negligence or willful misconduct on the part of LFF were not a proximate cause, provided, however, that LFF shall immediately notify the APA in writing upon obtaining knowledge of any such condition and request an extension or modification of the provisions hereof.

5. **Indemnity**: LFF shall indemnify and hold harmless New York State, the APA, DEC, and any of their employees or contractors for all claims, actions, damages and costs resulting from the APA's, DEC's, or LFF's acts in fulfillment or attempted fulfillment of the provisions of this Judgment, unless said acts were caused by the intentional or reckless acts of New York State, the APA, DEC, or any of their employees or contractors.

6. **Reservation of Rights**: Nothing in this Judgment precludes the APA from enforcing, at its election, in law or equity, the terms, provisions, and conditions of this Judgment against LFF in the event that LFF shall fail to fulfill any of the obligations contained herein. The existence of this Judgment shall not be a ground for requiring initiation, continuance, or transfer of any enforcement proceeding or action to any forum not of the State's choosing.

7. **Entire Settlement**: This Judgment shall constitute the entire agreement of the parties with respect to settlement of those violations specifically referenced in the Complaint and is in full satisfaction of all civil or administrative claims that were or could have been raised in the Complaint against LFF, its principals, shareholders, officers, employees, agents, and contractors with respect to the facts alleged therein. Other than the Complaint that is hereby resolved and

except as is necessary in the discretion of the State of New York to enforce the terms of this Order, the State of New York and each of its agencies shall forbear from bringing any action, proceeding or suit against LFF and its principals, shareholders, officers, employees, agents, contractors and representatives for any penalties, relief, remediation or restoration based upon the activities alleged in the Complaint. Nothing herein shall constitute a release of LFF's liability for conditions on and adjacent to the farm field unknown to the State on the date hereof.

8. **Binding Effect**: This Judgment shall be binding on LFF, and its officers, directors, partners, affiliates, employees, successors and assigns.

9. **Continuing Jurisdiction**: The Court shall have continuing jurisdiction over this matter to enforce the terms and conditions of this Judgment.

SO ORDERED:

J.S.C.

DATED: _____

CONSENTED AND AGREED TO BY:

ELIOT SPITZER

Attorney General of the State
of New York

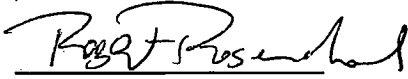
Attorney for Plaintiffs

New York State Department of Law
The Capitol

Albany, New York 12224

(518) 402-2260

By:



Robert Rosenthal

Assistant Attorney General

Dated:

12/07/00

MCNAMEE, LOCHNER, TITUS &
WILLIAMS, P.C.

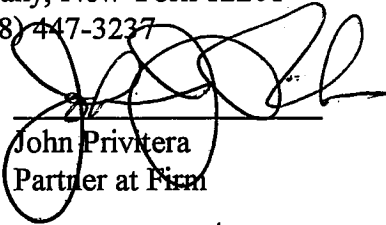
Attorneys for Defendant

75 State Street, P.O. Box 459

Albany, New York 12201

(518) 447-3237

By:



John Privitera
Partner at Firm

Dated:

12/11/00

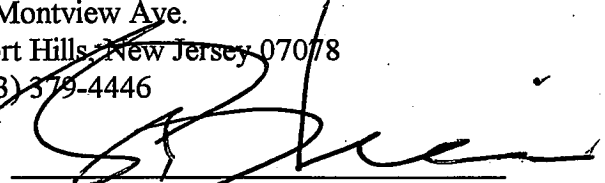
LEWIS FAMILY FARM, INC.

66 Montview Ave.

Short Hills, New Jersey 07078

(973) 379-4446

By:



Salim Lewis

President

Dated:

12/8/00

Exhibit A

- A. Supervision: Prior to the commencement of restoration work on State land, LFF shall provide notice to the APA (Ray Curran) and DEC (Ken Kogut, Region 5) of the specific dates that the restoration activities are to be undertaken; no work shall be undertaken on State land until an employee or authorized agent of the APA or DEC is on site.
- B. Restoration Work in the Swamp: Restoration of the Swamp shall be undertaken as escribed herein:
- (i) All restoration activities shall be conducted only in dry conditions and when the soils within the Swamp are able to withstand the application of the equipment to be used to carry out the activities. LFF shall employ all practicable measures to ensure that the restoration activities are undertaken and completed without further damage to the Swamp.
 - (ii) The area upon which the restoration activities are to be conducted shall be delineated with caution tape.
 - (iii) All machinery and material utilized in conducting the restoration activities shall be pressure-washed prior to bringing them into the Swamp in order to avoid the introduction of seeds of invasive species.
 - (iv) Filter fabric and rock to hold the fabric in place shall be installed at the northern opening of the ditch. Filter fabric shall also be properly installed across the ditch at 50-foot intervals.
 - (v) A tracked excavator, or like equipment, shall be used to redeposit soils into the ditch. Swamp mats, approximately 5' x 14' in size, shall be installed across the ditch to support the excavator. The mats shall be installed with the long side across the ditch.
 - (vi) The restoration activities shall be conducted in approximately 15- to 20-foot segments along the length of the ditch, starting at the southern end of the ditch. The tracked excavator shall be used to remove soil from the sidecast stockpiles adjacent to the ditch and place such soil carefully into the ditch around the filter fabric. The soils are to be compacted as they are deposited in the ditch. If the excavator cannot properly compact the deposited soils, the soils shall be wetted and then compacted with a tamper. The ditch shall be filled with at least 90 percent of the sidecast stockpile material to create a parabolic shape that does not exceed 12 inches in depth below adjacent grade of the "natural" soil surface nor shall the depression be wider than 12 inches as shown on the map entitled, "Conceptual Drainage Plan" (hereinafter referred to as the "Map"), attached hereto. The restoration process shall be repeated for each section until the entire ditch is filled with soil.

- (vii) Woody debris, including root masses, branches, and stems of trees and shrubs, are to be removed from the sidecast soils prior to their deposit into the ditch. Root masses are to be deposited on top of the soils in the refilled ditch. The remainder of the woody debris is to be scattered in the areas where the sidecast stockpiles were located prior to their removal. LFF shall employ all practicable measures to ensure that the excavator does not dig into and below the surface of the "natural" soil underlying the stockpiled soils.
- (viii) No more than 10 percent of the sidecast stockpile soils and no more than 16 cubic yards shall be removed from the Swamp and deposited on the southern portion of the farm field. This removed material may be used to recontour the farm field ditch in the vicinity of State land as shown on the Map.
- (ix) No longer than one week after the stockpiled soils have been deposited in the ditch, the areas upon which the ditch was filled and the sidecast stockpiles were located prior to their removal shall be seeded with "Northeast Wetland Hummock Seed Mix," manufactured by Southern Tier Consulting, Inc. (or equivalent) at the rate of one pound per 13,460 square feet.

C. Modification of the Drainage System on the Farm Field: The drainage system currently installed on the estimated 100 acres constituting the farm field shall be modified and maintained in the future so that direct and indirect runoff into the Swamp land is filtered, dispersed and diffused, and so that the hydrology of the Swamp over the 30 years preceding January of 1999 is maintained to the greatest extent practicable. The existing drainage system shall be modified or replaced to be consistent with the conceptual design depicted in the Map.

- (i) The manhole in the southeast corner of the farm field shall be removed.
- (ii) A detention pond shall be constructed on the southeastern section of the farm field, at least 75 feet north of the field's southern boundary and upgrade of the Swamp. As shown on the Map, this pond is anticipated to be saucer-shaped, three feet deep on the northern side near the tile drain outlets, sloping to meet the grade at its southern side. Rock or crushed stone shall be laid along the southern bank of the detention area to protect that edge from flows of water out of the detention area while allowing for a broad, diffuse outlet of such flows. The entire detention area shall be stabilized with jute netting and revegetated with an appropriate seed mixture.
- (iii) The two tile drains underlying the farm field that flow in a southerly direction shall be reconstructed so that they enter the north side of the one-acre detention depression (commonly referred to as "daylighting" the drains). A 12-inch rip-rapped outlet shall be installed on the easternmost drain and an 18-inch rip-rapped

outlet shall be installed on the westernmost drain. Several microtopographic depressions and ridges shall be constructed downslope of the outfalls of these tile drain outlets and upslope of the detention area as shown on the Map. These microtopographic features shall function to diffuse and dissipate flow of water from the outlets and into the detention area.

- (iv) The two open drainage ditches on the farm field, one flowing from north to south and the other from west to east, shall be gradually turned and recontoured, as shown on the Map, so they direct flow into the detention area. Up to 16 cubic yards (no more than 10 percent) of the soils material in the spoils piles on State land may be used to recontour the ditches. Downslope of the detention area the ditches shall be recontoured to mesh with the adjacent grade on State land. The existing grades on the adjacent State land shall not be disturbed.

D. Restoration and Future Activities in the Wetlands Area: LFF shall comply with the following requirements with regard to the approximately 8 acre-wetland area designated as wetlands on the Map:

- (i) The area designated as wetland on the Map shall be allowed to revegetate naturally to function as a buffer area to the adjacent Swamp.
- (ii) No excavation, ditching, filling, or removal of vegetation or soil material shall occur without prior written approval of the APA in the form of a wetlands permit.
- (iii) Mowing of the vegetation shall be permitted so long as the constructed topography and facilities are not materially altered by such operations.

E. Compliance Schedule: All work described in paragraphs B and C of this section shall commenced by June 1, 2001, and be completed as follows:

- (i) Restoration of the ditch within the Swamp shall commence concurrently with modification or replacement of the drainage system and shall be completed within thirty days, or on a schedule consistent with necessary approval/permit from the United States Army Corps of Engineers ("Corps").
- (ii) The modification or replacement of the existing surface/subsurface drainage system on the farm field shall be completed within thirty days, or on a schedule consistent with necessary approval/permit from the United States Army Corps of Engineers.
- (iii) The thirty day period for completion of activities may be extended by reason of inclement weather or other unforeseen circumstances upon authorization of the APA.

- (iv) LFF shall obtain the necessary approval/permit from the Corps prior to commencing the restoration activities.

MAP ANNEXED TO THE ORIGINAL