

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

In the Matter of the Alleged Violations  
of Articles 15 and 25 of the New York  
State Environmental Conservation Law and  
Parts 608 and 661 of Title 6 the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York,

**ORDER**

- by -

DEC File No.  
R2-20120807-484

**SALVATORE ACCARDI,**

Respondent.

---

**Introduction**

This matter involves the administrative enforcement of alleged violations of the protection of waters and tidal wetlands provisions of the New York State Environmental Conservation Law (ECL) and accompanying regulations (ECL articles 15 and 25 and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] parts 608 and 661). Staff of the New York State Department of Environmental Conservation (Department) alleged the following violations:

--unpermitted construction of structures in a regulated tidal wetland and adjacent area and in the navigable waters of the State (first and fifth causes of action);

--unpermitted paving of regulated tidal wetland adjacent area without permits (second and fourth causes of action);  
and

--installation of a set of floating docks in the navigable waters of the State and in a regulated tidal wetland (third cause of action),

at property owned by respondent Salvatore Accardi. The property is located at 99-34 164th Avenue, Queens, New York (Block 14250, lots 1461 and 1463).

The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick of the Department's Office of Hearings and Mediation Services. ALJ Garlick denied Department staff's motion for order without hearing (see Ruling dated March 2, 2015 [Ruling]), and a hearing was subsequently held on April 28, 2015. Respondent received the notice of hearing, but did not attend the hearing despite the ALJ's efforts to offer several alternative dates for the hearing in order to accommodate him (see e.g. letters from ALJ Garlick to respondent dated March 18, 2015 and April 13, 2015).

ALJ Garlick prepared the attached hearing report. I adopt ALJ Garlick's report in part as my decision in this matter, subject to the following comments.

### Liability

#### --First and Fifth Causes of Action

ALJ Garlick concluded that Department staff demonstrated that respondent violated ECL 15-0505 and 25-0401(1), and 6 NYCRR 608.5 (excavation or placement of fill in navigable waters), 661.8 (permit requirements applying to tidal wetland and adjacent areas), and 661.5(b)(49)(use guidelines regarding accessory structures), by constructing decks on the two lots that respondent owns at 164th Avenue in Queens (lots 1461 and 1463)(see Hearing Report, at 9-10; 13-15).

These violations were set forth in the first and fifth causes of action in Department staff's papers (see e.g. Affirmation of Jessica Steinberg Albin, Esq., in Support of Motion for Order Without a Hearing dated July 30, 2014 [Albin Aff.], ¶¶ 27, 28, 33 and 34; see also Exhibit D [Complaint] to Albin Aff., ¶¶ 19, 27). These violations were also addressed by Department staff in hearing testimony (see e.g. t. at 35 [deck on lot 1463 built partially in intertidal marsh]; 57 [deck in tidal wetlands and tidal wetland adjacent area]; 65-66 [deck supports and deck patio located in tidal wetland adjacent area and tidal wetlands], and 70 [deck in area of access stairway built on tidal wetlands]).

ALJ Garlick noted that respondent admitted to Department staff that he committed these violations (see Hearing Report, at 17; see also Hearing Transcript [t.] at 37-38).

I agree that staff established these violations.

--Second, Third and Fourth Causes of Action

ALJ Garlick held that Department staff did not establish the violations alleged in the second, third, and fourth causes of action, which relate to the paving of portions of the regulated tidal wetland adjacent area on lots 1461 and 1463 (second and fourth causes of action) and installing a dock in the navigable waters of the State without a permit and in a regulated tidal wetland without a permit (third cause of action).<sup>1</sup>

ALJ Garlick arrived at his conclusion on the grounds that (1) respondent did not admit these violations, and (2) a gap of some months existed between the date that respondent acquired each lot and the date of the aerial photographs depicting the dock and the paving, which gap in the ALJ's view allowed for the inference that a prior owner might have installed these improvements prior to respondent's purchase of the lots (see Hearing Report at 11-13).

I decline to accept the ALJ's analysis here.

First, with respect to lot 1463, respondent informed DEC Fish and Wildlife Technician Peter Malaty during a site visit on July 12, 2012, that when he purchased lot 1463, "[the lot] consisted of nothing but tall weeds and garbage" (Affidavit of Peter Malaty in Support of Motion for Order without a Hearing, July 28, 2014 [Malaty Affidavit], ¶ 6).<sup>2</sup> This admission supports staff's allegation that respondent paved portions of the lot

---

<sup>1</sup> Staff's papers refer to both a "set of floating docks" and "a dock." Based on a review of the record, at issue was one dock of approximately two hundred sixty feet (see t. at 20, 21 ["L shaped floating dock"], 30; see also Albin Aff., ¶ 6).

<sup>2</sup> Paragraph 6 of the Malaty Affidavit reads as follows:

On July 12, 2012, I [Malaty] inspected the Site. I observed that the eastern portion of Lot 1463 was paved with asphalt and/or other impervious material. This portion of Lot 1463, totaling 950 square feet, is regulated as a tidal wetland adjacent area. Additionally, a deck with an area of 715 square feet was built on the western portion of Lot 1463 in a regulated tidal wetland and tidal wetland adjacent area. While conducting the Site visit, Respondent informed me that when he purchased Lot 1463, it consisted of nothing but tall weeds and garbage, which he cleared. Respondent further stated that he built all of the decks on Site.

I note also that the deed for the August 21, 2008 sale of lot 1463 to respondent Accardi references the lot as being "principally unimproved and vacant" (see Exhibit B to Albin Aff., second page).

subsequent to his purchase of the property. That area was shown to be regulated tidal wetland adjacent area (see e.g. Malaty Affidavit, ¶ 6; t. at 25-26, 32 [landward portion of the property in the tidal wetland adjacent area]). Accordingly, Department staff has established the violations set forth in the fourth cause of action relating to paving.

I also conclude that Department staff established the violations set forth in the second cause of action relating to paving on lot 1461 and the third cause of action relating to the floating dock. The standard of proof in Department enforcement proceedings is a preponderance of the evidence. "This standard requires an inquiry into whether the existence of [a] fact . . . is more probabl[e] than its non-existence (Prince, Richardson on Evidence, Tenth Edition § 97)" (Matter of Steck, Order of the Commissioner, March 29, 1993, at 4). Under this standard, a finding of fact may be based upon the direct evidence and the reasonable inferences drawn from that evidence (see id.; see also Prince, Richardson on Evidence § 4-303 [Farrell 11th ed 1995]).

Respondent acquired lot 1461 on July 3, 2003. The first aerial photograph submitted into evidence was taken in April 2002 (see Hearing Exhibit B). Subsequent aerial photographs in evidence were taken on or about April 9, 2006, March 23, 2008, April 1, 2010, March 30, 2012, and April 1, 2014 (see Hearing Exhibit C [Attestation of Tim Ruhren, sworn to April 20, 2015]).

In the 2002 aerial photograph (see Hearing Exhibit B), the only structure on the lot that Mr. Accardi would purchase in the following year (2003) was a house (lot 1461) (see t. at 16). This photograph also depicts the adjacent lot (lot 1463), which Mr. Accardi would purchase in 2008, as vacant (see id.).

In the next aerial photograph (see Hearing Exhibit C), taken on or about April 9, 2006, several improvements appear on lot 1461: "a deck on the waterfront or the west side of the house, a ramp and a floating dock, an extension to the house, and a paved area just to the south of the house, as well as a paved area on the east side of the house" (t. at 18; see also t. at 17, 20). The next aerial photograph, taken on or about March 23, 2008 (approximately five months before Mr. Accardi would acquire the adjacent lot [1463]), shows essentially the same improvements to lot 1461 that are depicted on the April 2006 aerial photograph (t. at 19-20). Here, too, the photograph depicts the adjacent lot as vacant.

The next aerial photograph (see Hearing Exhibit C) was taken on or about April 1, 2010, approximately 18 months after respondent acquired the adjacent lot (lot 1463). As with the prior two photographs, this photograph depicts the floating dock with a ramp, a deck on the seaward west side of the house, an extension to the house, and the paved areas south and east of the house on lot 1461 (see t. at 21). The aerial photograph also shows, for the first time, improvements on the adjacent and formerly vacant lot (lot 1463) - that is, a deck and a paved area (see t. at 21-23).

Here, the direct evidence combined with reasonable inferences taken from this evidence, make it far more probable than not that respondent installed the paving on lot 1461, as well as the floating dock. While the record contains no admission from respondent for the violations relating to the second and third causes of action, as it does for the decks on both lots and the paving on lot 1463, it is more likely than not that respondent paved the area on lot 1461 and installed the floating dock as further improvements to the property.<sup>3</sup> Respondent has not denied that he committed these violations; to the contrary, he indicates that he has cleaned up the property and made improvements (see e.g. Hearing Report, at 7, 8.) I however find that it is unlikely that a prior owner would have made these improvements shortly before respondent acquired lot 1461.

Department staff demonstrated that permits were required for the activities that respondent undertook - construction of the decks, paving portions of the two lots, and installing the dock (see t. at 33). Department staff further testified that a search of Department records revealed that the Department had not issued any permits for the activities that respondent undertook at lots 1461 and 1463 (t. at 46-47).

In sum, I conclude that Department staff established the violations set forth in the second, third and fourth causes of action relating to paving and the floating dock. These included violations of ECL 25-0401(1), ECL 15-0505, 6 NYCRR 608.5, 6 NYCRR 661.8, 661.5(b)(30)(filling) and 661.5(b)(17)(installing floating dock totaling 200 square feet or more in area).

---

<sup>3</sup> Department staff estimated the square footage of the dock to be approximately 260 feet (see t. at 30).

## Civil Penalty

I also conclude that the proposed civil penalties sought by Department staff to address the violations are authorized and appropriate. Department staff set forth a proposed penalty for the violations as follows:

<b>Cause of Action</b>	<b>Violation</b>	<b>Number of Counts</b>	<b>Penalty Requested</b>
First	Deck	2	\$15,000
Second	Paving	1	\$ 8,000
Third	Floating Dock	2	\$ 2,000
Fourth	Paving	1	\$ 2,000
Fifth	Deck	2	\$ 3,000
<b>TOTAL</b>		<b>8</b>	<b>\$30,000<sup>4</sup></b>

ALJ Garlick determined that Department staff was entitled to the requested penalty in the amount of \$18,000 for the violations set forth in the first (\$15,000) and fifth (\$3,000) causes of action based on the duration, severity, and seriousness of the violations, as well as respondent's culpability and lack of cooperation (see Hearing Report, at 15-17).

I agree with the ALJ's analysis of the civil penalties for the first and fifth causes of action and determine that the civil penalties for these violations are authorized and appropriate (see id.; see also ECL 71-2503[1][a] and ECL 71-1107[1] [establishing civil penalties for violations of ECL article 25 and title 5 of ECL article 15, respectively]).

I further determine that Department staff is entitled to the requested civil penalties in the amount of \$8,000 for the second cause of action, \$2,000 for the third cause of action, and \$2,000 for the fourth cause of action. These penalties, too, are based on the duration, severity, and seriousness of the violations, as well as respondent's culpability and lack of cooperation and the aforementioned ECL civil penalty provisions.

The civil penalties for the five causes of action total thirty thousand dollars (\$30,000) which, as noted, are

---

<sup>4</sup> See Exhibit D (Complaint) to Albin Aff., at 6 [par II]).

authorized and appropriate. I hereby assess a civil penalty of thirty thousand dollars (\$30,000) upon respondent.

I also direct that respondent undertake restoration work relating to the unpermitted activities on the two lots. In consideration of the costs of the restoration work and the priority of the restoration of the property, I have decided to suspend one-third of the civil penalty (that is, ten thousand dollars [\$10,000]), contingent upon respondent's compliance with this order. The remaining, non-suspended portion of the penalty (that is, twenty thousand dollars [\$20,000]) shall be paid to the Department within sixty (60) days of the service of this order upon respondent.

### **Restoration Plan**

Department staff seeks the following restoration activity at the site:

- reduction of the amount of impervious surface in the tidal wetland adjacent area on lot 1461 to no more than twenty (20) percent coverage;
- reduction of the amount of impervious surface in the tidal wetland adjacent area on lot 1463 to no more than twenty (20) percent coverage;
- removal of the unpermitted decks and all other unpermitted overwater structures; and
- reduction of the size of the floating dock to less than two hundred (200) square feet.<sup>5</sup>

See Albin Aff., at page 8 [par 3]; see also Exhibit D [Complaint] to Albin Aff., at page 7 [par III]).

At the hearing, Department staff noted the value of tidal wetlands (see e.g. t. at 63-64) and the impacts on wetland values by respondent's unpermitted activities (see id. at 71-72; see also 33-36, 57-59 [addressing intertidal marsh, tidal wetlands and adjacent areas with respect to respondent's lots]). Department staff provided further details with respect to the restoration activities including but not limited to removal of unpermitted structures such as the deck supports, shoreline access stairway, and decks, and fill (see Hearing Transcript, at

---

<sup>5</sup> As noted, staff estimated that the floating dock had a square footage of approximately 260 feet (see, supra, fn 3).

73-74). Department staff noted that if respondent had applied for permits to build these structures, the permit applications would not have met the standards for issuance (see t. at 74). In addition, staff addressed restoration of the tidal wetlands and the tidal wetland adjacent area with appropriate plantings and vegetation (see id., at 75; see also Hearing Report, at 18-19).

ECL 71-2503(1)(c) authorizes the restoration of the affected tidal wetland or adjacent area. Based on this record, I hereby direct respondent to submit a restoration plan to Department staff, which shall include plans for the removal of the decks and overwater structures, removal of unpermitted fill, reduction of the size of the paved areas and the floating dock, and replanting of intertidal marsh and a variety of adjacent area vegetation species. The restoration plan, which shall be submitted within sixty (60) days of the service of this order upon respondent, shall include a timetable for commencement and completion of the restoration activities contained therein.

The restoration plan shall be in approvable form -- that is a plan that can be approved by Department staff with only minimal revision. Following notice to respondent of staff's approval of the restoration plan, respondent shall implement the plan under the supervision of Department staff and according to the agreed upon timetable contained in the plan. Upon good cause shown by respondent, Department staff may allow respondent additional time to complete one or more restoration activities provided for by the plan.

I encourage respondent to consult with Department staff prior to the submission of the plan regarding the restoration activities to be undertaken and their timetable.

Department staff also seeks an order requiring respondent to "cease and desist from any and all future violations of the ECL and rules or regulations promulgated pursuant thereto" (see Exh D [Complaint] to Albin Aff., at page 7 [par 4]). This request is unnecessary. Respondent is required to comply with the ECL and the applicable regulations, and further language to that effect is not needed (see Matter of Adonai Realty L.P., Order of the Commissioner, February 19, 2016, at 2).



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

- I. Based upon a preponderance of the record evidence, respondent Salvatore Accardi is adjudged to have violated:
  - A. ECL 15-0505 and 6 NYCRR 608.5, for constructing approximately eight hundred eighty (880) square feet of deck on Queens County Tax block 14250, lot 1461, in the navigable waters of the State without a permit;
  - B. ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49), for constructing approximately eight hundred eighty (880) square feet of deck on Queens County Tax block 14250, lot 1461, in a regulated tidal wetland and tidal wetland adjacent area without a permit;
  - C. ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(30), for paving approximately three hundred forty (340) square feet of Queens County Tax block lot 1461, in a regulated tidal wetland adjacent area without a permit;
  - D. ECL 15-0505 and 6 NYCRR 608.5, for installing a floating dock with a combined area of approximately two hundred sixty (260) square feet, in the navigable waters of the State without a permit;
  - E. ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(17), for installing a floating dock with a combined area of approximately two hundred sixty (260) square feet, in a regulated tidal wetland without a permit;
  - F. ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(30), for paving approximately nine hundred fifty (950) square feet of Queens County Tax block lot 1463, in a regulated tidal wetland adjacent area without a permit;
  - G. ECL 15-0505 and 6 NYCRR 608.5, for constructing a deck with an area of approximately seven hundred fifteen (715) square feet on Queens County Tax block lot 1463, in the navigable waters of the State without a permit; and

- H. ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49), for constructing a deck with an area of approximately seven hundred fifteen (715) square feet on Queens County Tax block lot 1463, in a regulated tidal wetland and tidal wetland adjacent area without a permit.
- II. Respondent Salvatore Accardi is assessed a civil penalty in the amount of thirty thousand dollars (\$30,000) for the violations set forth in paragraph "I" of this order, of which ten thousand dollars (\$10,000) shall be suspended, contingent upon respondent's compliance with the terms and conditions of this order.
- III. Within sixty (60) days of service of this order upon respondent Salvatore Accardi, respondent shall pay the non-suspended portion of the civil penalty referenced in paragraph "II" of this order (that is, twenty thousand dollars [\$20,000]) by certified check, cashier's check, or money order made payable to the "New York State Department of Environmental Conservation."

The non-suspended portion of the penalty (that is, twenty thousand dollars [\$20,000]) shall be sent to the following address:

Office of General Counsel  
NYSDEC Region 2  
47-40 21st Street  
Long Island City, New York 11101-5407  
Attention: Jessica Steinberg Albin, Esq.

Should respondent fail to comply with the terms and conditions of this order including, but not limited to, the submission of the non-suspended portion of the penalty and the submission and satisfactory implementation of the restoration plan, the suspended portion of the penalty (that is, ten thousand dollars [\$10,000]) shall become immediately due and payable and is to be submitted in the same form and to the same address as the non-suspended portion of the penalty.

- IV. No later than sixty (60) days after service of this order upon respondent Salvatore Accardi, respondent shall submit a restoration plan to Department staff in approvable form for staff's review and approval, which plan shall address the following:

- A. the removal of the unpermitted decks, deck supports, and other overwater structures;
  - B. the reduction of paved area on lot 1461 and on lot 1463 to no more than twenty (20) percent coverage;
  - C. the reduction of the size of the floating dock to less than two hundred (200) square feet;
  - D. the removal of unpermitted fill; and
  - E. the restoration of the area that has been impacted by respondent's unpermitted activities, including but not limited to the planting of appropriate vegetation.
- V. No later than thirty (30) days after respondent Salvatore Accardi receives notification from the Department of the approval of the restoration plan, respondent shall commence the implementation of the plan in accordance with the timetable contained therein.
- VI. No later than thirty (30) days after completion of the activities identified in the restoration plan in accordance with the timetable contained therein or such timetable as may have been modified by Department staff, respondent Salvatore Accardi shall provide photographic evidence to Department staff that demonstrates that the restoration activities in the approved restoration plan have been properly completed.
- VII. Respondent Salvatore Accardi shall submit the restoration plan and the photographic evidence required in paragraphs "IV" and "VI" of this order to the Department at the address set forth in paragraph "III" of this order.

VIII. The provisions, terms, and conditions of this order shall bind respondent Salvatore Accardi and his agents, successors, and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: Albany, New York  
May 15, 2017

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Articles 15 and 25 of the  
New York State Environmental Conservation Law and Parts 608 and  
661 of Title 6 of the Official Compilation of Codes, Rules and  
Regulations of the State of New York,

by

**SALVATORE ACCARDI,**

Respondent.

DEC # R2-20120807-484

Hearing Report

\_\_\_\_\_/s/\_\_\_\_\_

P. Nicholas Garlick  
Administrative Law Judge

## **SUMMARY**

This administrative enforcement proceeding addresses eight violations that staff of the Department of Environmental Conservation ("Department staff") allege were committed by Salvatore Accardi ("respondent") on property he owns located at 99-34 164th Avenue, Queens, New York, Queens County Tax Block 14250 lots 1461 and 1463 ("site"). The site includes a portion of and abuts Hawtree Basin, Jamaica Bay, which is a navigable waterway and a tidal wetland. The portion of the lot that is not in the tidal wetland is located in the tidal wetland adjacent area. The alleged violations involve the construction of decks, paving, and installation of floating docks at the site without the required permits. This report recommends that the Commissioner issue an order finding respondent Salvatore Accardi liable for four of the eight alleged violations of the Environmental Conservation Law and implementing regulations. In addition, the Commissioner's order should impose a payable civil penalty of eighteen thousand dollars (\$18,000) and require respondent to undertake certain remedial actions.

## **PROCEEDINGS**

On July 12, 2012, Department staff member Peter Malaty inspected the site (Malaty affidavit, July 28, 2014, ¶ 6). On August 1, 2012, Department staff issued a notice of violation which was personally served on the respondent on August 29, 2012 by Environmental Conservation Officer Christopher Lattimer (Malaty affidavit, Exhibit C).

Department staff initiated this administrative enforcement proceeding by serving respondent, via certified mail, with a notice of hearing and complaint dated September 12, 2013 (Malaty affidavit, Exhs. D & E).

By letter dated September 27, 2013, respondent contacted Department staff to request an extension of time to respond, due to the fact that he was incarcerated (Malaty affidavit, Exhibit F).

By letter dated October 8, 2013, Department staff granted respondent's request to be allowed to respond after he was

released and requested the answer be submitted to the Department within sixty days of his release (Malaty affidavit, Exhibit G)<sup>1</sup>.

By papers dated July 30, 2014, Department staff moved for an order without hearing. Department staff's papers included (1) a notice of motion; (2) the affirmation of Department staff counsel Jessica Steinberg Albin; (3) the affidavit of Department staff member Peter Malaty, with seven exhibits (described in the attached exhibit chart); and (4) an affidavit of service by certified mail (no mailing receipts attached).

On August 11, 2014, Department staff received a handwritten response from respondent and forwarded it to the Chief Administrative Law Judge with a cover letter dated August 14, 2014.

On September 9, 2014, this matter was assigned to me.

In a ruling dated March 2, 2015, I denied Department staff's motion for order without hearing.

By email dated March 6, 2015, Department staff counsel requested that a hearing be scheduled in this matter. After several unsuccessful attempts to reach respondent by telephone to schedule a conference call to discuss the timing of the hearing, I sent Mr. Accardi a cover letter and notice of hearing on March 18, 2015. The notice of hearing scheduled the hearing for June 9, 2015.

By email dated March 30, 2015, Department staff counsel requested that the hearing date be changed, because an important staff witness would be leaving the State to accept another job.

On March 30, 2015, I issued to the parties a notice of rescheduled hearing which moved the date of the hearing to April 28, 2015.

On April 10 2015, I received a submission from Mr. Accardi that included: (1) a handwritten cover letter in which Mr. Accardi stated he would be out of town on April 28, 2015 and would not be attending the hearing; (2) a copy of the notice of rescheduled hearing; and (3) seven pages of attachments

---

<sup>1</sup> In her affirmation, Department staff counsel Jessica Steinberg Albin states that respondent's answer was due on or before June 3, 2014 and that no answer was received by July 30, 2014.

(described in the attached exhibit list). Upon receipt of this submission, a copy was sent to Department staff counsel.

In a letter dated April 13, 2015, I offered Mr. Accardi seven alternative dates for the hearing.

On April 20, 2015, Mr. Accardi left me a voicemail, which I transcribed, shared with Department staff counsel, and placed in the record. In this voicemail, Mr. Accardi stated that he would not be able to attend the hearing and that I had all his paperwork.

As provided in the March 2015 notice of rescheduled hearing, on April 28, 2015, at 10:30 a.m. a hearing in this matter was convened in a conference room at the Department's Region 2 headquarters, 47-40 21<sup>st</sup> Street, Long Island City, New York. The hearing concluded at 2:20 p.m.

On May 11, 2015, Mr. Accardi called me at my office on my inside line and we spoke briefly. I immediately wrote a summary of our conversation and shared it with Department staff counsel. During this call, Mr. Accardi asked if the hearing had occurred, and I informed him that it had. He then tried to explain his position to me, but I had to interrupt him to explain the *ex parte* rule. At this point, I offered to get Department staff counsel on the phone and he declined. He asked if I had received his submissions, and I said I had and would include them in the record. He thanked me and then hung up.

The record in this matter closed with the receipt of the transcript on or about May 22, 2015.

### **APPEARANCES**

At the hearing, Department staff was represented by Jessica Steinberg Albin, Esq. and Udo Drescher, Esq. Department staff called three witnesses: Department staff members Peter Malaty, Tamara Greco, and George Stadnik.

The respondent did not appear at the hearing.

### **FINDINGS OF FACT**

1. An aerial photograph of the site, taken in April 2002 (Hearing Exhibit B), shows only a house on Queens County Tax block 14250, lot 1461. The vacant lot adjacent to the house



(lot 1463) has some vehicles and a few boats on it (transcript, t. 16).

2. Salvatore Accardi purchased 99-34 164<sup>th</sup> Avenue (Queens County Tax block 14250, lot 1461) on July 3, 2003 (Malaty affidavit, Exhibit A).

3. An aerial photograph of the site, taken on April 9, 2006 (Hearing Exhibit C at 3), shows changes to lot 1461, including a deck on the west side of the house, a ramp and floating, L-shaped docks, an extension to the house, a paved area on the south side of the house and a paved area on the east side of the house (t. 18). A portion of the deck on lot 1461 extends beyond the high water line. The ramp and floating docks are located in Hawtree Basin (t. 20).

4. An aerial photograph of the site, taken on March 23, 2008 (Hearing Exhibit C at 4), shows the site essentially unchanged from the aerial photograph taken on April 9, 2006 (t. 20).

5. Salvatore Accardi purchased the lot adjacent to his house (Queens County Tax block 14250, lot 1463) on August 21, 2008 (Malaty affidavit, Exhibit B).

6. An aerial photograph of the site, taken on April 1, 2010 (Hearing Exhibit C at 5), shows the earlier improvements on lot 1461. This photograph also shows new improvements to lot 1463, including paving and an extension of the existing deck, which was partially over water (t. 21-22).

7. In an application dated March 5, 2012 (Hearing Exhibit G), the respondent applied for a Department permit to construct docks, moorings and platforms on both lots (t. 43-45). The application materials included a survey of lot 1461, dated August 1, 2001 (Hearing Exhibit G at 8) which does not show either a deck or floating docks (t. 45-46).

8. An aerial photograph of the site, taken on March 30, 2012 (Hearing Exhibit C at 6), shows the site in the same condition as the aerial photograph taken on April 1, 2010 (t. 22-23).

9. On July 12, 2012, Department staff member Peter Malaty inspected the site (t. 16, 26) and took several photographs (Hearing Exhs. D, E & F). During this visit, Mr. Malaty observed that: (1) the area of both lot 1461 and lot 1463 above the high water mark (the tidal wetlands adjacent area) was entirely covered by impervious surfaces; (2) the decks had been

built partially over the water; and (3) a ramp and floating docks were in place (t. 27-32). Mr. Malaty estimated the size of the floating docks at 260 square feet (t. 30).

10. During this site visit Mr. Malaty spoke to Mr. Accardi. Mr. Malaty testified that respondent told him that respondent had built the decks at the site and did not have a permit to do so (t. 37-38).

11. On August 1, 2012, a notice of violation was prepared and on August 29, 2012 the notice of violation was personally served on respondent (Malaty affidavit, Exhibit C).

12. An aerial photograph of the site, taken on April 1, 2014 (Hearing Exhibit C at 7), shows the site in the same condition as the aerial photographs taken on April 1, 2010 and March 30, 2012, except that part of the ramp and the floating docks are not present (t. 24).

13. On April 16, 2015, Department staff member George Stadnik conducted a site visit (t. 57) and took several photographs (Hearing Exhs. H, I, J & K). During this visit, Mr. Stadnik observed that the decks at the site are located both in the tidal wetlands and in the adjacent area (t. 57, 66, Hearing Exhibit H). He also observed two roofed gazebo-type structures, a storage locker, a boat rack used for kayaks, a paved asphalt area, and patio furniture on top of the deck (t. 57). An access stairway extends from the deck into the tidal wetland. Beneath the deck support structures a significant amount of construction and demolition debris, basically concrete rubble, has been placed both above and below the high water line on lot 1461 (t. 60-61, Hearing Exhibit H) and lot 1463 (t. 70, Hearing Exhibit I). The floating docks and ramp were not in place during Mr. Stadnik's site visit (Hearing Exhibit H).

14. The site contains intertidal marsh (t. 33, 58), littoral zone (t. 35, 58), and shoal mudflats (t. 58). It also contains potential tidal wetland adjacent area vegetation (t. 34). The decks were partially built within a vegetated intertidal marsh (t. 35).

15. A portion of the site is situated within Hawtree Basin, which is a mapped tidal wetland, as shown on map #598-500. The entire site is located within either a tidal wetland or the tidal wetlands adjacent area (Hearing Exhibit A, t. 26).

16. Hawtree Basin is a fairly large canal used by many homeowners along the canal to get to Jamaica Bay (t. 36-37, 73).

17. No permit was issued by Department staff: (1) for property with a mailing address of 99-34 164<sup>th</sup> Avenue, Queens, New York; (2) for property identified as Queens County tax block 14250, lot 1461; (3) for property identified as Queens County tax block 14250, lot 1463; or (4) to respondent (t. 46-47).

## **DISCUSSION**

In its complaint, Department staff alleges eight separate violations in five causes of action. In addition to a finding of liability for these alleged violations, Department staff seeks an order of the Commissioner imposing a payable civil penalty of thirty thousand dollars (\$30,000) and requiring that the respondent undertake certain remedial actions at the site.

### ***Respondent's Submissions***

As discussed above, respondent made two written submissions in this matter. Rather than summarizing them, the complete text is reproduced below (errors in the text have not been corrected or noted). On August 11, 2014 the Department staff received a handwritten letter from Mr. Accardi attaching three documents, including a black and white photograph. The letter states:

8-7-14

Jessica Steinberg Albin:

I will never contract with you. To keep peace, I will accept for value your PENALTY, so send me your bill. Accept for value is not a guilty or not guilty plea. Its that I accept theirs a monetary debt to be paid, and I will discharge it, as soon as receiving your invoice. Appointing you as trustee, to take the funds from my trust account and put my account balance back to ORDER. If any tampering with the all capitol letter name, I will contact (3) agencies highlighted on 2<sup>nd</sup> document. On refusal of my constitutional right to discharge debt, because their is no real money of substance since 1933, HJR 192, House Joint Resolution 192.

I purchased my land the way it is.  
Just cleaned it up, remember all my  
neighbors protest letter, that I deserve a  
medal, not harassed.

[signature]  
By: autograph  
Living Beneficiary

P.S. House is still destroyed by Hurricane  
Sandy, buy it, \$800K. I'm on public  
assistance till I get on my feet taking care  
of an unhealthy 92 yr old DAD. After being  
released from Federal Prison in April.

The photograph attached to respondent's August 7, 2014 letter is  
an undated black and white photo of the house with a handwritten  
heading "Early 1900's Grandfathered."

On April 10, 2015, I received a submission from Mr. Accardi  
that included: (1) a handwritten cover letter; (2) a copy of the  
notice of rescheduled hearing; and (3) seven pages of  
attachments (described in the attached exhibit list). This  
letter reads:

4-7-15

Mr. Garlick

Will be out of town 4-28-15, will not  
be attending.

I assume to get an award for cleanin up  
a horrible, dangerous house, and making it a  
clean home.

Enclosed:

- (1) Letter from the Senator [Joseph P.  
Addabbo, Jr.]
- (2) Letters of my witnesses, neighbors,  
their children.
- (3) Pictures of every March's clean up.
- (4) Dock permit grand fathered in.<sup>2</sup>

---

<sup>2</sup> The "dock permit" is from the New York State Department of  
State (DOS) dated April 2, 2012 stating that DOS had received  
respondent's Federal Consistency Assessment Form and other  
documents relating to the replacement of a pole and a floating  
dock section. The letter also states that DOS determined that  
the proposed activity meets DOS's general consistency criteria.

I pay my taxes, its my land, mail my award, thank you.

By: signed  
Grantor

The photographs attached to this submission include the same photo supplied with the earlier submission stating that it was "prior 1970's." It shows a derelict deck and sunken boat with the caption "Dock Grandfathered in before we were all born." There is also an arrow pointing to lot 1463 and the caption "active paved yard storing junk cars, boats, etc. before we were born." Eight additional photos are included: one dated 3/15/11 which appears to show the wetland in front of the house and the ramp and floating dock with the caption "Beautiful Dock Kids to Kyack," and seven others dated 3/15/15 showing before and after raking. One of these photographs shows the water in front of the house and reads "no dock - Sandy has it can't afford to put it back."

Respondent's submission also includes another handwritten document stating that "Sal cleared a lot of old boats, rusty washing machines, flat tires, broken & bricks bottles, debris. Created a clean picnic area for all the children & the parents to enjoy. Kyacking, BBQs, general place for children & adults to go relax. Every weekend. Sal Accardi deserves a medal, not to be harassed. He repaired the ground & Deck that was grandfathered in from the beginning of the century. He cleaned up our mess eye saw, and raccoon & rat danger." The document then contains a list of witnesses, presumably families who live in the area.

As the attached exhibit chart indicates, I have included these submissions in the record, but they have little or no evidentiary value. Mr. Accardi's claim that the docks were grandfathered is not supported by any legal argument or citation to any law. The letter from the Department of State was not a permit to construct improvements on his property. His claim that he purchased his land the way it is, is not supported by any evidence he supplies. He may have cleaned up the two lots and created an area for his family and his neighbors to enjoy,

---

The letter explicitly states that this letter "does not obviate the need to obtain all other applicable licenses, permits, other forms of authorization or approval that may be required pursuant to existing State statutes."

but this is not relevant to whether or not he constructed decks, installed paving, or built floating docks at the site without a permit.

### ***Liability***

Common to all the violations alleged by Department staff is the fact that no permit was issued by Department staff for the decks, docks and paving at the site. At the hearing, Department staff witness Tamara Greco testified that: (1) no Department permit was ever issued for the property with a mailing address of 99-34 164th Avenue, Queens, New York (t. 46); (2) no Department permit was ever issued for property identified as Queens County tax block 14250, lot 1461 (t. 46); (3) no Department permit was ever issued for property identified as Queens County tax block 14250, lot 1463 (t. 46); and (4) no permit was ever issued under the name of Salvatore Accardi (t. 47).

#### First Cause of Action - Deck on Lot 1461

In this cause of action, Department staff alleges that respondent constructed approximately eight hundred eighty (880) square feet of deck on lot 1461, in a regulated tidal wetland and tidal wetland adjacent area without a permit, in violation of: (1) ECL 15-0505 and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

In his affidavit, Department staff member Malaty states that he reviewed aerial photographs of the site from 2002 and 2004 and discovered that between 2002 and 2004, a deck was built on lot 1461 with an approximate area of 880 square feet (Malaty affidavit, ¶ 5). At the hearing, Department staff introduced an aerial photograph taken in April 2002 (Hearing Exhibit B), which does not show a deck on lot 1461 (t. 16). Department staff also introduced an aerial photograph taken on April 9, 2006 (Hearing Exhibit C at 3) which shows the deck (t. 18). The respondent took title to lot 1461 in on July 3, 2003 (Malaty affidavit, Exhibit A). Mr. Malaty testified that during his site visit on July 12, 2012, he spoke to Mr. Accardi and that respondent stated that he built the decks at the site (t. 38).

First violation. ECL 15-0505 and 6 NYCRR 608.5 prohibit the excavation and placement of fill in the navigable waters of the State of in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the

navigable waters of the State and that are inundated at mean high water level or tide, without a permit from the Department.

At the hearing, Mr. Malaty drew a blue line on the April 9, 2006 aerial photograph delineating the approximate high water line at the site (t. 18). This line shows that a portion of the deck on lot 1461 extends beyond the high water line and into Hawtree Basin (Hearing Exhibit C at 3). Mr. Malaty also drew a line delineating the high water line on a photograph he took during his July 12, 2012 site visit which also shows a portion of the deck on lot 1461 extending beyond the high water line (t. 30, Hearing Exhibit E).

Department staff member Stadnik testified that he inspected the site on April 16, 2015 (t. 57) and took photographs. In one photograph (Hearing Exhibit H), he drew a green line delineating the approximate high water line on lot 1461 (t. 60). This photograph shows that a portion of the deck on lot 1461 is constructed beyond the high water line. It also shows construction and demolition debris placed below the high water line. Both Department staff witnesses Malaty and Stadnik testified that Hawtree Basin was navigable (t. 36-37, 73). As discussed above, no permit for this deck was ever issued by Department staff (t. 46-47).

Based on the evidence in the record, including the photographs of the deck on lot 1461, the testimony of Department staff witnesses, and the admission of respondent that he built the deck, the Commissioner should conclude that the respondent is liable for this alleged violation.

Second violation. ECL 25-0401(1) and 6 NYCRR 661.8 prohibit regulated activities in a tidal wetland or regulated tidal wetland adjacent area without a permit from the Department. Section 661.5(b)(49) of 6 NYCRR describes the construction in a tidal wetland of accessory structures or facilities associated with a single family dwelling as a presumptively incompatible use and in a tidal wetland adjacent area as a generally compatible use. Both types of construction require a Department-issued permit.

The discussion above regarding the first violation is also relevant to this alleged violation. Mr. Malaty also testified that the entire site is in the tidal wetland adjacent area, because it is all within 150 feet of the high water line (t. 25) and Mr. Stadnik stated that the boundary between the tidal wetland and the tidal wetland adjacent area is the high water

line (t. 63). Because the photographs in the record show the deck on lot 1461 both above and below the high water line, it is located in the tidal wetland and its adjacent area.

Based on the evidence in the record, including the photographs of the deck on lot 1461 in relation to the high water line on the property, the testimony of Department staff witnesses, and the admission of the respondent that he built the deck, the Commissioner should conclude that the respondent is liable for this alleged violation.

#### Second Cause of Action—Paving on Lot 1461

In this cause of action, Department staff alleges that respondent paved approximately three hundred forty (340) square feet of the southwest portion of lot 1461, in a regulated tidal wetland adjacent area without a permit, in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(30). ECL 25-0401(1) and 6 NYCRR 661.8 prohibit regulated activities in a tidal wetland or regulated tidal wetland adjacent area without a permit from the Department. Section 661.5(b)(30) describes filling in a tidal wetland adjacent area as a generally compatible use that requires a Department-issued permit.

In his affidavit, Department staff member Malaty states that an area of 340 square feet in the southeast portion of lot 1461 was paved with asphalt or other impervious material (Malaty affidavit, ¶5). At the hearing, Mr. Malaty testified about aerial photographs taken in April 2002 and on April 9, 2006 (Hearing Exhs. B & C at 3). He testified that the 2002 photo showed only a house on lot 1461 (t. 16) and that the 2006 photo showed a deck on the west side of the house, a ramp and floating docks, an extension to the house and paved areas to the south and east of the house (t. 18).

There are several problems with Department's staff's evidence regarding this alleged violation. The record clearly establishes that there now are paved areas on lot 1461 (e.g. top left hand corner of Hearing Exhibit F), that the area is within a tidal wetland adjacent area, and that no permit for this paving was ever issued (t. 46-47). However, the April 2002 aerial photograph is quite grainy and it is impossible to determine if the area on the southeast side of the lot was paved at that time. Even if it could be determined that the paving of this portion of lot 1461 did occur between April 2002 and April 9, 2006, as Department staff alleges, Mr. Accardi did not own lot 1461 for this entire time period. The 2002 photo was taken



in April 2002 and Mr. Accardi took title to lot 1461 in July 2003, so for over a year the property was owned by someone other than respondent and it is possible that such person or persons paved the area in question. The Commissioner should, therefore, conclude that Department staff has not proven that Mr. Accardi paved this area, as alleged in the complaint.

### Third cause of action - Installation of Floating Docks

In this cause of action, Department staff alleges that the respondent installed a set of floating docks with a combined area of approximately two-hundred sixty four (264) square feet in a regulated tidal wetland without a permit, in violation of: (1) ECL 15-0505 and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(17).

At the hearing, Department staff introduced an aerial photograph taken in April 2002 (Hearing Exhibit B), which does not show floating docks (t. 16) and an aerial photograph taken on April 9, 2006 (Hearing Exhibit C at 3) which shows the floating docks (t. 18). Both Department staff witnesses Malaty and Stadnik testified that Hawtree Basin was navigable (t. 36-37, 73).

The floating docks were observed by Mr. Malaty during his July 12, 2012 site visit and two photographs of the docks taken during this visit are in the record (Hearing Exhs. D & E). Mr. Stadnik did not testify that he saw the docks during his April 16, 2015 inspection (t. 57). In his April 7, 2015 submission, the respondent includes a photo showing where the docks had been with the caption "3-15-15, No Dock - [Hurricane] Sandy has it - can't afford to put it back" (p. 7).

The record clearly establishes that there were floating docks at the site, that they were placed in navigable waters, and that no permit for their installation was ever issued. Department staff has not shown, however, that the respondent was the person responsible for the installation of the floating docks. Mr. Accardi did not own lot 1461 for the entire time between the aerial photographs taken in April 2002 and April 9, 2006. As discussed above, Mr. Accardi took title to lot 1461 in July 2003, so for over a year, the property was owned by someone other than respondent and it is possible that such person or persons installed the floating docks. The Commissioner should conclude that Department staff has not proven that the respondent installed the floating docks as alleged in the complaint.

Fourth cause of action - Paving on Lot 1463

In this cause of action, Department staff alleges that respondent paved approximately nine hundred fifty (950) square feet of the eastern portion of lot 1463 in a regulated tidal wetland adjacent area without a permit, in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(30).

In his affidavit, Department staff member Malaty states that during his July 12, 2012 site visit he observed that the eastern portion, 950 square feet, of lot 1463 was paved with asphalt or other impervious material (Malaty affidavit, ¶6). At the hearing, Mr. Malaty testified that the aerial photograph taken March 30, 2010 (Hearing Exhibit C at 5) showed the paved area on lot 1463 (t. 21) which was formerly vacant (t. 22). In the other aerial photographs in the record and those taken in April 2002 (Hearing Exhibit B), on April 9, 2006 (Hearing Exhibit C, at 3), and on March 23, 2008 (Hearing Exhibit C, at 4) all show lot 1463 unpaved.

During his site visit, Mr. Malaty took a photo showing the paved area (Hearing Exhibit F). Mr. Stadnik also took a photo of this paved area on his April 16, 2015 site visit (Hearing Exhibit J). As stated above, the respondent took title to lot 1463 on August 21, 2008 (Malaty affidavit, Exhibit B).

The record clearly establishes that lot 1463 is paved and within the tidal wetland adjacent area. The record also shows that that no permit for this paving was ever issued (t. 46-47). In addition, the record demonstrates that this paving occurred between April 23, 2008 and April 1, 2010. However, because Mr. Accardi took title to lot 1463 on August 21, 2008, there was a period of several months when the property was owned by someone other than respondent and it is possible that that person or persons paved the area in question. Based on this, the Commissioner should conclude that Department staff has not proven that respondent paved lot 1463, as alleged in the complaint.

Fifth cause of action- Deck on lot 1463

In this cause of action, Department staff alleges that the respondent constructed a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of lot 1463 without a permit, in violation of: (1) ECL 15-0505

and 6 NYCRR 608.5; and (2) ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

At the hearing, Department staff introduced an aerial photograph taken on March 23, 2008 (Hearing Exhibit C at 4), which does not show a deck on lot 1463 (t. 20). Department staff also introduced an aerial photograph taken on April 1, 2010 (Hearing Exhibit C at 5) which shows a deck had been constructed on lot 1463 (t. 21). The respondent took title to lot 1463 on August 21, 2008 (Malaty affidavit, Exhibit B). At the hearing, Mr. Malaty testified that during his site visit on July 12, 2012, he observed the deck on lot 1463. He also testified that during this visit he spoke to the respondent and that Mr. Accardi stated that he built the decks at the site (t. 38).

At the hearing, Department staff member Stadnik testified that he inspected the site on April 16, 2015 (t. 57) and took photographs of lot 1463. These photographs show the deck constructed on lot 1463 as well as construction and demolition debris placed below it (Hearing Exhs. I & J). He testified that one photograph (Hearing Exhibit I) clearly showed (1) a portion of the deck structure that is inundated during normal high tide; and (2) the algal stain line on the timbers for the deck, support structures and concrete rubble debris (t. 69-70).

First violation. ECL 15-0505 and 6 NYCRR 608.5 prohibit the excavation and placement of fill in the navigable waters of the State, in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the State and that are inundated at mean high water level or tide, without a permit from the Department.

At the hearing, Mr. Malaty drew a blue line on the 2008 aerial photograph delineating the approximate high water line on lot 1463 (t. 20, Hearing Exhibit C at 4). When the aerial photos from 2008 (Hearing Exhibit C at 4) and 2010 (Hearing Exhibit C at 5) are compared, the line on the 2008 aerial photo shows that a portion of the deck on lot 1463 is constructed below the high water line at the site. In addition, both Department staff witnesses Malaty and Stadnik testified that Hawtree Basin was navigable (t. 36-37, 73). As discussed above, no permit for this deck was ever issued by Department staff.

Based on the evidence in the record, including the photographs of the deck on lot 1463, the testimony of Department staff witnesses, and the admission of respondent that he built

all the decks on the site, the Commissioner should conclude that the respondent is liable for this alleged violation.

Second violation. ECL 25-0401(1) and 6 NYCRR 661.8 prohibit regulated activities in a tidal wetland or regulated tidal wetland adjacent area without a permit from the Department. Section 661.5(b)(49) describes the construction of accessory structures or facilities associated with a single family dwelling in a tidal wetland as a presumptively incompatible use and in a tidal wetland adjacent area as a generally compatible use. Both types of construction require a Department-issued permit.

The discussion above is also relevant to this alleged violation. In addition, Mr. Malaty testified that the entire site is in the tidal wetland adjacent area, because it is all within 150 feet of the high water line (t. 25) and Mr. Stadnik stated that the boundary between the tidal wetland and the tidal wetland adjacent area is the high water line (t. 63). Mr. Stadnik also testified that one photograph (Hearing Exhibit J) showed that a portion of the deck was built in the tidal wetland (t. 70).

Based on the evidence in the record, including the photographs of the deck on lot 1463, the testimony of Department staff witnesses, and the admission of respondent that he built all the decks on the site, the Commissioner should conclude that the respondent is liable for this alleged violation.

### ***Civil Penalty***

In its complaint, Department staff requests the Commissioner include in his order a total payable civil penalty of thirty thousand dollars (\$30,000) for the alleged violations. This total is the sum of Department staff's requests for each cause of action set forth in the complaint. Specifically, Department staff seeks: (1) fifteen thousand dollars (\$15,000) for the first cause of action; (2) eight thousand dollars (\$8,000) for the second cause of action; (3) two thousand dollars (\$2,000) for the third cause of action; (4) two thousand dollars (\$2,000) for the fourth cause of action; and (5) three thousand dollars (\$3,000) for the fifth cause of action.

Relevant to this discussion are two Departmental policies, the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and the Department's Tidal Wetlands Enforcement Policy (DEE-7, issued February 8, 1990). The starting point for the

computation of the appropriate civil penalty amount in this case is a calculation of the statutory maximum. ECL 71-1107 provides for a maximum civil penalty of up to five thousand dollars (\$5,000) for each violation of ECL 15-0505. ECL 71-2503 provides for a maximum civil penalty of up to ten thousand dollars (\$10,000) per day for each violation of Article 25. Because of the length of time that the violations have continued in this case, the maximum civil penalty is well over one million dollars.

An analysis of the severity of the violation is also required by DEE-1. At the hearing, Mr. Malaty testified that the deck had been built beyond the high water line and partially in the tidal wetland (intertidal marsh) and destroyed the portion of the marsh where it was built (t. 36). Mr. Stadnik testified that respondent's actions had a negative impact on the wetland values of the affected area. Specifically, he stated that the unpermitted actions had negatively impacted marine food production, storm control, and wildlife habitat (t. 71).

Based on this evidence, it is possible to conclude that this violation was quite severe because of its destruction of a portion of the tidal wetland, tidal wetland adjacent area, and associated wetland values.

An analysis of the benefit component, or an estimate of the economic benefit enjoyed by the respondent as a result of delayed compliance is also required. The Civil Penalty Policy states that every effort should be made to calculate and recover the economic benefit of non-compliance (Civil Penalty Policy, p. 7). Department staff argues that the respondent avoided the cost of complying with the law but makes no argument that respondent enjoyed an economic benefit from his actions.

The next step is an analysis of the gravity component which reflects the seriousness of the violation. Two factors are identified as relevant to this analysis: (1) the potential harm and actual damage caused by the violation; and (2) the relative importance of the type of violation in the regulatory scheme (Civil Penalty Policy, p. 9). As discussed above, the respondent has actually destroyed a portion of the tidal wetland and impacted the adjacent area, so the gravity of these violations is great. While not addressed by Department staff, the relative importance of this type of violation, construction of structures without a required permit, is also great. The permit review process allows the Department to monitor and control activities in these environmentally sensitive areas.

Once the economic benefit and gravity components of a potential civil penalty are analyzed, the civil penalty amount should be adjusted using the following five factors: (1) the respondent's culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) any unique factors that exist. In this case, Department staff correctly argues that the record shows that respondent is fully culpable for the violations and has failed to cooperate in any way to correct the alleged violations. There is nothing in the record regarding respondent's history of non-compliance, ability to pay or unique factors.

In this case, respondent has admitted to constructing the decks without first obtaining a permit, so his culpability is clearly established. In addition, Mr. Malaty testified that respondent stated during the July 12, 2012 site visit that he would not remove the decks, whatever Department staff did (t. 37). There is nothing in the record to show that respondent has undertaken any actions to cooperate to correct the violations. Based on the record in this matter and the discussion above, Department staff has demonstrated that it is entitled to its requested penalty for the first and fifth cause of action, the two causes of action for which liability has been proven. The Commissioner should include in his order a requirement that the respondent pay a civil penalty of eighteen thousand dollars (\$18,000) for the violations proved.

#### ***Site Remediation***

In its complaint, Department staff requests the Commissioner order the respondent to perform the following remedial work at the site:

- (a) reduce the amount of impervious surface in the tidal wetland adjacent area on block 14250 lot 1461 to no more than twenty (20) percent coverage;
- (b) reduce the amount of impervious surface in the tidal wetland adjacent area on block 14250 lot 1463 to no more than twenty (20) percent coverage;
- (c) remove the unpermitted overwater structures; and
- (d) reduce the size of the floating docks to no more than two hundred (200) square feet.

ECL 71-2503 states that after an administrative hearing held pursuant to ECL 71-1709, the Commissioner shall have the power to direct the violator to restore the affected tidal

wetland or area immediately adjacent thereto to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the Commissioner. In her affirmation, Department staff counsel Albin also cites the Department's Tidal Wetlands Enforcement Policy (DEE-7) as providing authority for the Commissioner to require the respondent to restore the tidal wetlands and tidal wetlands adjacent area that were damaged as a result of the violations (¶ 37).

In this case, Department staff has failed to show that the respondent is liable for the causes of action relating to the paving of lot 1461, the installation of the floating docks, and the paving of lot 1463. Therefore, it is not appropriate for the Commissioner to require respondent to remedy these violations.

With respect to the first and fifth causes of action, the construction of decks on lots 1461 and 1463, Department staff has proven these violations and remediation is authorized and appropriate. In his testimony, Mr. Malaty stated that the Department's Marine Resources Program recommended removal of the unpermitted structures immediately and replanting of intertidal marsh and a variety of the adjacent area vegetation species (t. 38). Mr. Stadnik expanded on this in his testimony, stating that the deck supports, deck and access stairway should be removed because they would never have met permit issuance standards (t. 73-74). In addition, the fill beneath the deck should be removed (t. 74). The tidal wetlands (intertidal marsh) should be restored and vegetation should be replanted in both the tidal wetland and adjacent area (t. 74-75). Mr. Stadnik also testified that in enforcement cases, like this one, the violator is required to submit a restoration plan for Department staff review and approval, which, when implemented, would correct the violations (t. 52-53). Once approved, the violator must then begin restoration work under the supervision of Department staff, who upon completion of the work would conduct a final compliance inspection (t. 53-54).

In this case, based on the evidence in the record and discussion above, the Commissioner should direct respondent to submit a restoration plan to Department staff for approval and, after approval, the Commissioner should direct the respondent to implement the plan under the supervision of Department staff. Such plan should include, but not be limited, to the removal of the decks, including the deck support structures, the access staircase, and associated fill, and the restoration of the

affected area, including the replanting of appropriate vegetation.

### **CONCLUSIONS OF LAW**

1. Respondent Salvatore Accardi constructed approximately eight hundred eighty (880) square feet of deck on Queens County Tax block 14250, lot 1461 without a permit in violation of ECL 15-0505 and 6 NYCRR 608.5.

2. Respondent Salvatore Accardi constructed approximately eight hundred eighty (880) square feet of deck on Queens County Tax block 14250, lot 1461 without a permit in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

3. Respondent Salvatore Accardi constructed a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of Queens County Tax block 14250, lot 1463 without a permit in violation of ECL 15-0505 and 6 NYCRR 608.5.

4. Respondent Salvatore Accardi constructed a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of Queens County Tax block 14250, lot 1463 without a permit in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

5. ECL 71-1107 provides for a maximum civil penalty of up to five thousand dollars (\$5,000) for each violation of ECL §15-0505.

6. ECL 71-2503(a) provides for a maximum civil penalty of up to ten thousand dollars (\$10,000) per day for each violation of Article 25. ECL 71-2503(c) authorizes the Commissioner to direct a violator to restore the affected tidal wetland or area immediately adjacent thereto to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the Commissioner.

### **RECOMMENDATION**

Based on the evidence in the record and the discussion above, the Commissioner should issue an order that finds the respondent Salvatore Accardi liable for four violations: (1) constructing approximately eight hundred eighty (880) square feet of deck on Queens County Tax block 14250, lot 1461 without a permit in violation of ECL 15-0505 and 6 NYCRR 608.5; (2) constructing approximately eight hundred eighty (880) square



feet of deck on Queens County Tax block 14250, lot 1461 without a permit in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49); (3) constructing a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of Queens County Tax block 14250, lot 1463 without a permit in violation of ECL 15-0505 and 6 NYCRR 608.5; and (4) constructing a deck with an area of approximately seven hundred fifteen (715) square feet on the western portion of Queens County Tax block 14250, lot 1463 without a permit in violation of ECL 25-0401(1), 6 NYCRR 661.8, and 6 NYCRR 661.5(b)(49).

In addition, the Commissioner's order should impose a payable civil penalty of eighteen thousand dollars (\$18,000) and require respondent to submit a restoration plan to Department staff for approval, and the Commissioner should direct respondent to implement the approved plan under the supervision of Department staff. Such plan should include, but not be limited to, the removal of the decks, including the deck support structures, the access staircase, and associated fill, and the restoration of the affected area, including the replanting of appropriate vegetation.

**Matter of Salvatore Accardi  
DEC # R2-20120807-484  
EXHIBIT LIST**

**Exhibits attached to the affidavit of  
Peter Malaty dated July 28, 2014**

<b>#</b>	<b>Description</b>	<b>ID</b>	<b>Evidence</b>
A	Deed for lot 1461 dated July 3, 2003	Y	Y
B	Deed for lot 1463 dated August 21, 2008	Y	Y
C	Notice of violation dated August 1, 2012	Y	Y
D	Notice of hearing and complaint dated September 12, 2013	Y	Y
E	Affidavit of service dated September 17, 2013	Y	Y
F	Letter from respondent dated September 27, 2013	Y	Y
G	Letter from Department staff counsel Albin dated October 8, 2013	Y	Y

**Exhibits attached to Mr. Accardi's August 7, 2014 submission**

<b>#</b>	<b>Description</b>	<b>ID</b>	<b>Evidence</b>
A	Photo of site entitled "Early 1900's grandfathered"	Y	Y

**Exhibits attached to Mr. Accardi's April 7, 2015 submission**

<b>#</b>	<b>Description</b>	<b>ID</b>	<b>Evidence</b>
A	Copy of notice of rescheduled hearing dated March 30, 2015	Y	Y
B	Letter from NYS Department of State dated April 2, 2012	Y	Y
C	Letter from NYS Senator Joseph P. Addabbo, Jr. dated June 2, 2014	Y	Y
D	9 black and white photos of the site, some with handwritten captions	Y	Y
E	Petition of neighbors of the Site	Y	Y

**Exhibits introduced at the hearing on April 28, 2015**

<b>#</b>	<b>Description</b>	<b>ID</b>	<b>Evidence</b>
A	Tidal Wetlands Map 598-500	Y	Y
B	Cover affidavit dated April 24, 2015 and aerial photo of site dated April 2002	Y	Y
C	Cover affidavit and aerial photos of the site, dated: 1. April 9, 2006 2. March 23, 2008 3. April 1, 2010 4. March 30, 2012 5. April 1, 2014	Y	Y
D	Photo of site taken on July 12, 2012	Y	Y
E	Photo of site taken on July 12, 2012	Y	Y
F	Photo of site taken on July 12, 2012	Y	Y
G	DEC permit application signed by respondent on March 5, 2012	Y	Y
H	Photo of site taken on April 16, 2015	Y	Y
I	Photo of site taken on April 16, 2015	Y	Y
J	Photo of site taken on April 16, 2015	Y	Y
K	Photo of site taken on April 16, 2015	Y	Y