STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Articles 15, 17, 25 and 27 of the New York State Environmental Conservation Law (ECL) and Parts 360, 608, 661 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR),

- by -

MEZZACAPPA BROTHERS, INC., SAM MEZZACAPPA and FRANK MEZZACAPPA,

Respondents.

ORDER

DEC Case No. R2-20050607-202

This enforcement matter addresses alleged violations of New York State laws and regulations governing tidal wetlands, solid waste, and water resources arising from the activities that Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. ("Mezzacappa Bros.") (collectively, "respondents") conducted on property located at 200 Meredith Avenue, Staten Island (Richmond County), New York ("site" or "Meredith Avenue property").

Staff from the Region 2 office of the New York State Department of Environmental Conservation ("Department" or "DEC") commenced this administrative enforcement action with service, by certified mail, return receipt requested, of a notice of hearing and a complaint, both dated January 23, 2006, upon respondents.

The site contains tidal wetlands and tidal wetland adjacent area, in addition to some upland area. The complaint included seventeen causes of action, alleging that respondents violated various provisions of the New York State Environmental Conservation Law ("ECL"). These provisions included article 15, title 5 (Protection of Water), article 17 (Water Pollution Control), article 25 (Tidal Wetlands Act), and article 27, title 7 (Solid Waste Management and Resource Recovery Facilities). In addition, the complaint alleged that respondents violated applicable implementing regulations at title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") part 360 (Solid Waste Management Facilities), part 608 (Use and Protection of Waters), part 661 (Tidal

Wetlands - Land Use Regulations), and part 750 (State Pollutant Discharge Elimination System [SPDES] Permits).

The matter was referred to the Office of Hearings and Mediation Services, and Administrative Law Judge ("ALJ") Daniel P. O'Connell was assigned to the matter. The administrative hearing began on January 14, 2008, and continued on January 15, 2008, February 19 and 20, 2008, and March 3 and 4, 2008.

On May 22, 2009, respondents requested to reopen the hearing record in order to file an alternative remediation plan to the one requested by Department staff in the complaint. ALJ O'Connell granted this request and set a schedule for the parties to submit information concerning remediation. As the ALJ had already completed his hearing report, he advised that he would prepare a supplemental hearing report to address respondents' proposed alternative remediation plan.

Subsequently, respondents requested that the ALJ's hearing report and supplemental hearing report be circulated as recommended decisions. Department staff did not object to this request, and respondents' request was granted.

With a cover letter dated October 2, 2009, ALJ O'Connell's hearing report dated December 23, 2008 and supplemental hearing report dated October 2, 2009 ("Hearing Report/Recommended Decision" and "Supplemental Hearing Report/Recommended Decision," respectively) were circulated to the parties as recommended decisions. The cover letter set October 30, 2009 as the date for receipt of any comments from the parties concerning the ALJ's recommendations.

In a letter dated October 28, 2009, Department staff filed comments on the Hearing Report/Recommended Decision and the Supplemental Hearing Report/Recommended Decision ("DEC Comments"). Respondents filed comments on the reports in an undated letter received on October 30, 2009, and in an e-mail dated October 29, 2009 ("Respondents' Comments").

Upon review of the record, I adopt the Hearing Report/Recommended Decision and the Supplemental Hearing Report/Recommended Decision as my decision in this matter, subject to, and as modified by, my comments below.

I. Threshold Issues: Jurisdiction over the Corporate Respondent and the Scope of Department's Jurisdiction over the Site pursuant to the Tidal Wetlands Act

At the hearing, respondents raised two threshold issues. The first related to personal jurisdiction over the corporate respondent, Mezzacappa Bros. The second concerned the scope of the Department's jurisdiction over the site pursuant to ECL Article 25 (Tidal Wetlands Act).

A. Status of Corporate Respondent

According to respondent Sam Mezzacappa, the corporate respondent no longer exists and has been inactive since 1997. Respondent Sam Mezzacappa states further that he and his brother, Frank, rather than the corporation, jointly own the site, and that their ownership of the property predates service of the complaint. Given the inactive nature of the corporate respondent, respondents moved to dismiss the charges against Mezzacappa Bros.

According to Finding of Fact ("Finding") No. 1 (see Hearing Report/Recommended Decision, at 2), Mezzacappa Bros. was formed in 1961 as a New York State domestic corporation. Sam Mezzacappa is the Chairman or Chief Executive Officer of the corporation, and Frank Mezzacappa is a member of the corporation. In their comments on the Hearing Report/Recommended Decision, respondents contend that Finding No. 1 should state that Mezzacappa Bros. was formed in April 1963, rather than 1961.

At the hearing, Frank Mezzacappa testified that Mezzacappa Bros. was formed in 1961 (Transcript ["Tr"] at 703). However, records on file with the New York State Department of State, Division of Corporations, show that Mezzacappa Bros. made its initial filing on January 8, 1963 (Exhibit 88). Whether the corporate Respondent was formed in 1961 or 1963 is immaterial to its active status during the time of the alleged violations considered in this proceeding. Nevertheless, by this order, I am revising Finding No. 1 to reflect the date of the initial filing with the New York State Department of State, Division of Corporations.[1]

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[1] The first sentence of the revised Finding No. 1 will now read as follows: "Mezzacappa Brothers, Inc. (Mezzacappa Bros.) was formed in 1963 as a New

In any event, the records of the New York State Department of State show that Mezzacappa Bros. remains an active domestic business corporation (Exhibit 88). Accordingly, Mezzacappa Bros. may be found liable for the violations alleged in Department staff's complaint.

Respondents express concern that higher penalties may be imposed because a corporate entity is a respondent (see Respondents' Comments, at 1). In this proceeding, the penalties authorized by statute are not dependent on whether a respondent is a corporate entity or an individual.

B. Subject Matter Jurisdiction

1. Extent of the Adjacent Area

At the hearing, respondents contested the Department's jurisdiction pursuant to the Tidal Wetlands Act with respect to the activities on the site, and moved for a directed verdict to dismiss the charges alleged in the complaint (see Tr at 844-51).[2]

The site includes both tidal wetlands and the adjacent area to the tidal wetlands. "Adjacent area" is defined in the regulations to mean any land "immediately adjacent to a tidal wetland" (6 NYCRR 661.4[b][1]).

Referring to Exhibit 21, respondents asserted that the scope of the Department's jurisdiction over the site, pursuant to the Tidal Wetlands Act (ECL article 25), is limited to the 10-foot contour as set forth in 6 NYCRR 661.4(b)(1)(iii). Based on this assertion, respondents argued that the tidal wetland regulations do not apply to activities on the site because all activities occurred landward of the 10-foot contour and outside of the tidal wetland and adjacent area.

York State domestic corporation." The remainder of Finding No. 1 is unchanged.

[2] In the complaint, alleged violations not related to ECL article 25 are asserted in the third, sixth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth causes of action. Therefore, respondents' motion does not apply to ten of the seventeen charges alleged in the complaint. Respondents made no claims about the scope of the Department's jurisdiction with respect to the other alleged violations under ECL articles 15, 17, and 27, or their implementing regulations.

The State's tidal wetlands regulations provide three circumstances where the extent of the adjacent area may be limited (see 6 NYCRR 661.4[b]). First, in the City of New York where respondents' property is located, the adjacent area extends 150 feet from the "landward boundary" of a tidal wetland (see 6 NYCRR 661.4[b][1][i]).

Second, the landward boundary of the adjacent area may be limited by a "lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure" that is generally parallel to the wetland boundary, and which is a minimum of 100 feet in length (see 6 NYCRR 661.4[b][1][ii]). During the hearing, respondents did not contend that the landward boundary of the adjacent area is limited by an existing functional structure as provided for at 6 NYCRR 661.4(b)(1)(ii), and this limitation is not relevant here.

Third, as asserted by respondents, the landward boundary of the adjacent area may be limited by the elevation contour of 10 feet above mean sea level, except when that contour crosses the seaward face of a bluff, cliff, or hill, then to the topographic crest of that bluff, cliff, or hill. United States Geological Service (USGS) topographic maps having a scale of 1:24,000 are rebuttable presumptive evidence of the 10-foot contour (see 6 NYCRR 661.4[b][1][iii]).

Exhibit 81 (Arthur Kill USGS Quadrangle) is a copy of the relevant portion of the USGS Quadrangle where the site is located. Based on Exhibit 81, the elevation of the site was less than 10 feet above sea level when the tidal wetland maps were promulgated. No bluff, cliff, or hill existed that limited the extent of the elevation contour and reduced the extent of the adjacent area. Therefore, respondents' reliance on 6 NYCRR 661.4(b)(1)(iii) is misplaced. I concur with the ALJ that the adjacent area on the site extends 150 feet landward from the tidal wetland boundary, as established pursuant to 6 NYCRR 661.4(b)(1)(i).

2. Findings Nos. 3 and 8

Findings Nos. 3 through 8 in the Hearing Report/Recommended Decision establish that the upland portions of the site are limited to the area located near Meredith Avenue, and that the remainder of the property is either tidal wetlands or adjacent

area. Respondents dispute the language in Findings of Fact No. 3, although their disagreement with the language is not relevant or material to the ALJ's analysis and recommendations.

According to respondents, Mezzacappa Bros. did not purchase the site as stated in Finding No. 3 (see Hearing Report/ Recommended Decision, at 3). Rather, respondents state that Sam and Frank Mezzacappa purchased the property and own it. Respondents state further that Mezzacappa Bros. never owned the site.

Consistent with the claim that Sam and Frank Mezzacappa own the site, respondents contend that Sam and Frank Mezzacappa, rather than the corporate respondent, subdivided the site, and sold a portion of it to the Trust for Public Land (see Hearing Report/Recommended Decision, Finding No. 8, at 4). Respondents state that Mezzacappa Bros. used the site as part of its heavy construction operations. Respondents' arguments with respect to Findings Nos. 3 and 8 are supported by the hearing record (see Tr at 9, 1098).

Although not relevant to any determination of liability or penalty, I am, for purposes of correcting the record, revising Finding No. 3 to read as follows:

> "In August 1985, Frank and Sam Mezzacappa purchased property located at 200 Meredith Avenue on Staten Island (Richmond County Tax Block 2810, Lot 12) to use as a building material and contractors yard (Tr. at 703). Presently, Frank and Sam Mezzacappa jointly own the Meredith Avenue property."

Relatedly, in Finding No. 8, "Frank and Sam Mezzacappa" is substituted for "Mezzacappa Bros." Respondents stated in the hearing and their comments that when they subdivided the site, they sold the tidal wetland portion of it to the "Land for Public Trust" (Tr at 1098). The correct name of the organization is the Trust for Public Land, and Finding No. 8 is further revised by replacing "Land for Public Trust" with "Trust for Public Land."

During the hearing, the ALJ denied respondents' motion for a directed verdict to dismiss the complaint (see Hearing Report/Recommended Decision, at 19). Respondents renewed their

motion at the close of the hearing, and the ALJ recommended that the motion be denied (see id.). The record clearly demonstrates that substantial portions of the site are subject to the Department's jurisdiction, either as tidal wetlands or tidal wetland adjacent area. Respondents' arguments that the Tidal Wetlands Act is not applicable, or that some exemption to the Tidal Wetlands Act exists with respect to the site, are not supportable based on this record. Respondents' motion for a directed verdict to dismiss the complaint is denied in its entirety.

II. Parties' Comments on the Recommended Decisions

A. Findings of Fact

Department staff did not comment about the Findings presented in the Hearing Report/Recommended Decision. Respondents, in addition to their comments on Findings Nos. 1, 3, and 8, which I have previously addressed, also commented on Findings Nos. 13, 17, 22, and 23 in that report. These comments are addressed below.

1. Finding No. 13

With respect to Finding No. 13, which addresses the installation of water mains (see Hearing Report/Recommended Decision, at 5), respondents clarified that after the water supply pipes were laid in the trenches, sand was placed around the pipes, and the excavated material was used to backfill the remainder of the trench. At the hearing, Frank Mezzacappa testified that "we put sand in the ground around the pipes" (Tr at 763).

Although respondents' clarification is not material, I am revising Finding No. 13 by adding the phrase "sand was put around the pipes," immediately after the phrase "After the pipe was laid in place,."

2. Finding No. 17

Finding No. 17 addresses an application dated November 12, 2004 of Sam Mezzacappa for a tidal wetlands permit. Respondents, in their comments, do not appear to dispute the finding, but use the facts of the finding to criticize the

review of the application. Respondents emphasize that Department staff reviewed respondents' permit application for four months prior to sending a notice of incomplete application in March 2005. Respondents note further that Department staff sent a second notice of incomplete application dated May 9, 2005, which staff subsequently followed with a notice of suspension of permit processing dated May 12, 2005. Respondents' concerns with the application review process do not warrant revising Finding No. 17.

Accordingly, no change shall be made to Finding No. 17.

3. Finding No. 22

Respondents object to Finding No. 22 (see Hearing Report/Recommended Decision, at 7), which states in part that the May 9, 2005, notice of incomplete application expressly prohibited the placement of any fill, as well as the placement of any construction and demolition debris on the site. Respondents argue that staff offered no proof to show that any material was "placed or excavated after that date" (Respondents' Comments, at 1). Respondents contend further that only clean fill was placed on the site, and that the area disturbed was 15,160 square feet. According to respondents, this is only a small portion of a site that is about 305,000 square feet, or approximately 7 acres (see id.).

Respondents identify nothing in the hearing record to substantiate their objection to Finding No. 22, or to support their assertions concerning the nature of the fill and the size of the disturbed area. In contrast, Department staff offered photographic evidence from the site visits conducted on April 1, 2005, May 10, 2005, June 7, 2005, and June 19, 2007, which depict the conditions on the site. Staff's proffered evidence collected as a result of the site visits contradicts respondents' claims. Furthermore, even assuming that the fill was "clean," the placement of "clean fill" in a tidal wetland or adjacent area, absent Department authorization or an exemption, violates the Tidal Wetlands Act and its implementing regulations (see, e.g., ECL 25-0401[2]; see also Hearing Report/Recommended Decision, at 39).

No change shall be made to Finding No. 22.

4. Finding No. 23

Referring to Finding No. 23 (see Hearing Report/Recommended Decision, at 7), respondents state that the bases for the May 12, 2005 notice of suspension of permit processing were site visits by staff from the New York City Department of Sanitation on May 4, 2005, and by Department staff on May 10, 2005. According to respondents, they had moved “a few loads of our own material” on the site, and subsequently received the “summons” (Respondents’ Comments, at 1). Respondents indicate that if they had received a timely determination about their tidal wetlands permit application filed in November 2004, the captioned enforcement action would have been avoided. Respondents explain further that, if they had obtained that tidal wetlands permit, they would have applied to New York City for a permit to bring fill material to and from the site as they had been previously allowed to do.

Respondents’ argument does not constitute a defense. As the record demonstrates, respondents had no permit or other Department authorization prior to their undertaking the regulated activities in the tidal wetlands or adjacent area that are the subject of this proceeding.

No change shall be made to Finding No. 23.

B. Causes of Action

Department staff’s comments concerning the Hearing Report/Recommended Decision relate to the seventh and tenth causes of action, and the sixteenth and seventeenth causes of action. Respondents commented about each cause of action asserted in the complaint. These comments are discussed below.

1. Seventh and Tenth Causes of Action

In the seventh cause of action of the complaint, Department staff alleged that respondents violated ECL 25-0401 and 6 NYCRR 661.8 over several days by excavating material from the stockpiles located on the northeastern portion of site.

In the tenth cause of action, Staff alleged that respondents violated ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by “placing solid waste, which was contained in the

material excavated from the stock piles of fill, on the northwestern portion of the Site." In their answer, Respondents admitted that, on one day, they took "clean fill" from the stockpile and spread the material on the site.

The ALJ concluded that respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or about May 4, 2005, by excavating material from the stockpiles located in a tidal wetland adjacent area on the site and placing it on the northwestern portion of the site, which is also located within the adjacent area to the tidal wetland (see Hearing Report/Recommended Decision, at 35). The ALJ concluded further that respondents undertook these regulated activities without benefit of a permit from the Department. The ALJ rejected respondents' argument that a tidal wetlands permit that had been issued to Mezzacappa Bros. in May 1988 ("May 1988 permit")(see Exhibit 40) authorized respondents to "maintain" the roadway by filling in low levels and, as necessary, re-grading the area. Furthermore, the fact that fill may be "clean" is of no moment, as the Tidal Wetlands Act and its implementing regulations prohibit filling of any kind where the Department has not issued a permit or otherwise authorized the activity. Furthermore, the record supports the conclusion that the stockpiles on respondents' site included construction and demolition debris, a solid waste.

With respect to the tenth cause of action (see Hearing Report/Recommended Decision, at 38-39), the ALJ held that the apparent distinction between the allegations in the seventh and tenth causes of action was that the fill material in the latter cause of action was more precisely characterized as solid waste. Because solid waste could be considered "fill of any kind" pursuant to ECL 25-0401(2), the ALJ concluded that the violation asserted in the tenth cause of action was "not different from" the violation asserted in the seventh cause of action (see Hearing Report/Recommended Decision, at 39). Accordingly, the ALJ recommended that the charge alleged in the tenth cause of action be dismissed.

Department staff, in their comments on the Hearing Report/Recommended Decision, asserts that the charges alleged in the seventh and tenth causes of action of the complaint are distinct, and that the ALJ misapprehended the distinction.

Staff acknowledges that both causes of action allege that respondents violated ECL 25-0401 and 6 NYCRR 661.8 for undertaking regulated activities in the adjacent area of the tidal wetland without a permit from the Department (see ¶¶ 67 and 70 of the complaint). According to staff, however, the violation alleged in the seventh cause of action concerns the excavation of fill material from the stockpiles located on the northeastern portion of the site. The violation alleged in the tenth cause of action concerns the placement of fill from the stockpiles on the northwestern portion of the site.

Staff argues that, pursuant to ECL 25-0401(2), excavating and filling constitute separate and distinct regulated activities. In addition, staff contends that each of these regulated activities has the potential to adversely impact tidal wetlands and the benefits they provide. Staff underscores that respondents placed fill at two different locations at the site, which are a few hundred feet or more apart. Accordingly, staff requests that the violations alleged in the seventh and tenth causes of action be considered separate and distinct violations of ECL 25-0401 and 6 NYCRR 661.8.

Respondents contend that they did not violate the ECL and regulations identified in the seventh and tenth causes of action. Respondents state they were unaware that they could not fill in potholes or undertake other maintenance work to the roadway on the site. Referring to the chart at 6 NYCRR 661.5(b) (see Use No. 1), respondents argue that the activities they undertook in May 2005 were lawful (Respondents' Comments, at 3). Respondents argue further that they may undertake "ordinary maintenance" (see 6 NYCRR 661.5[b], Use No. 21), and so characterize the activities undertaken in May 2005 (see id.). Respondents conclude that no civil penalties should be imposed because they were simply maintaining the site, all fill on the site is clean and the fill that was used came from stockpiles located on the site.

Respondents' reliance on Use Nos. 1 and 21 from the chart at 6 NYCRR 661.5(b) is misplaced. The circumstances encompassed by those two uses do not apply to the site (see Use No. 1 ["(t)he continuance of lawfully existing uses"], and Use No. 21 ["(o)rdinary maintenance and repair . . . of existing functional structures, facilities or improved areas"]). The exemptions recognized by Uses Nos. 1 and 21 are limited to lawfully

existing uses and existing functional structures, facilities, or improved areas. As noted at 6 NYCRR 661.4(b)(1)(ii), a structure is lawfully existing if it existed prior to August 1977. However, none of the infrastructure on the site that respondents seek to maintain existed prior to August 1977. Rather, only after obtaining the May 1988 permit (Exhibit 40) could respondents develop the site. The terms and conditions of the May 1988 permit set forth the limits on the development of the site. Therefore, the development of the site authorized by the May 1988 permit is new and not exempted.

A review of the seventh and tenth causes of action, in the context of staff's comments, clarifies that the two causes of action are distinct and separate. The record of the hearing demonstrates that, without a permit, respondents removed material contaminated with construction and demolition debris from the stockpiles on the northeastern portion of the site and then placed it on the northwestern portion of the site. Both impacted areas are located in the adjacent area to the tidal wetland. Therefore, the seventh and tenth causes of action constitute separate violations and, on this record, respondents are liable for the violations charged.

2. Sixteenth and Seventeenth Causes of Action

In the sixteenth cause of action of the complaint, staff alleged two separate violations. First, staff alleged that respondents failed to obtain SPDES General Permit GP-02-01 to manage stormwater prior to undertaking construction activities on the site that disturbed more than one acre. In addition, staff asserted that respondents violated ECL 17-0807 and 6 NYCRR 750-1.3 by discharging pollutants to the tidal wetlands and to waters of the State. Respondents, however, contend that they disturbed less than one acre on the site, and that they did not discharge any pollutants to the tidal wetlands.

The ALJ found that respondents disturbed areas on the site which in total exceeded one acre (see Hearing Report/Recommended Decision, at 44-46). The ALJ further found that respondents had not filed a notice of intent or a stormwater pollution prevention plan with Department staff and had failed to obtain a SPDES general permit. Absent obtaining a SPDES general permit, respondents would have been required to obtain a site-specific SPDES permit, which they failed to do.

With respect to the second component of the sixteenth cause of action, the ALJ concluded that staff failed to meet its burden of proof regarding the discharge of pollutants into the tidal wetland and waters of the State, and recommended that the second portion of the sixteenth cause of action be dismissed (see Hearing Report/Recommended Decision, at 46).

Department staff states that the Hearing Report/Recommended Decision correctly concludes that respondents failed to obtain the required SPDES general permit (GP-02-01) before disturbing more than one acre at the site. Department staff objects, however, to the conclusion that it failed to demonstrate that respondents violated ECL 17-0807 (see DEC Comments, at 2-3).

According to Department staff, ECL 17-0807 and 6 NYCRR 750-1.3 prohibit non-permitted discharges to the State's waterways. To support its contention that respondents violated this statutory provision and implementing regulation, staff referred to the testimony of Department witness George Stadnik who testified that pollutants eroded into the surface waters of the State (see Tr at 166; see also Exhibit 33).[3]

Respondents argue that they controlled stormwater discharges because the slopes on the site are well vegetated, and they placed protective hay bales on the site. In addition, respondents argue that they were maintaining and repairing existing functional structures.

The record of this proceeding establishes that respondents disturbed more than one acre of the site without first obtaining any SPDES permit to manage storm water discharges. In their comments on the Hearing Report/Recommended Decision, respondents did not point to any record evidence that would support their contention that less than one acre of the site was disturbed. Consequently, respondents needed to obtain either a General Permit (GP-02-01), or a site-specific SPDES permit (see ECL 17-0803 and 6 NYCRR 750-1.4[b]), and did not do so.

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[3] Staff notes that the Hearing Report/Recommended Decision refers to the statutory section as ECL 17-0707, rather than ECL 17-0807 as stated in the complaint (see Hearing Report/Recommended Decision, at 64; Complaint, ¶ 76). This order notes that ECL 17-0807 is the correct reference.

Based on the record before me, the fill that respondents placed on the site was contaminated with solid waste (i.e., construction and demolition debris). Solid waste is defined as a pollutant (see 6 NYCRR 700.1[a][46]). The erosion in the area of the contaminated fill resulted in the discharge of pollutants into the tidal wetland and waters of the State, thereby violating ECL 17-0807 and 6 NYCRR 750-1.3. I hold that Department staff proved each of the violations contained in the sixteenth cause of action.

In the seventeenth cause of action, staff alleged that respondents violated ECL 17-0503(2) by placing waste material in waters of a marine district. The ALJ found that the reach of the Arthur Kill adjacent to the site is part of the State's marine district (see Hearing Report/Recommended Decision, at 46-47). Based on the photographic evidence that Department staff obtained during the various site visits, the ALJ also found that solid waste had eroded into the tidal wetlands. The ALJ concluded that respondents violated ECL 17-0503(2).

Respondents object to the charge in the seventeenth cause of action. Respondents reiterate that the slopes on the site are well vegetated, and that hay bales were installed to prevent erosion into the tidal wetlands. Respondents also argue that they were maintaining and repairing existing functional structures (see 6 NYCRR 661.5, Uses Nos. 1 and 21).

With respect to the charge in the seventeenth cause of action, the record evidence supports the ALJ's determination that respondents violated ECL 17-0503(2)(see, e.g., Hearing Report/Recommended Decision, at 47 [reviewing photographic evidence of erosion of fill into the marine district]). Furthermore, as noted previously, respondents' reliance on Uses Nos. 1 and 21 to exempt their onsite activities from regulation is in error.

3. Twelfth and Thirteenth Causes of Action

Department staff, as noted, set forth seventeen causes of action in its complaint. The ALJ, in his Hearing Report/Recommended Decision, evaluated based on precedent and a review of legal authority (see Matter of Richard K. Steck, Order of the Commissioner, March 29, 1993; Matter of David Wilder, Supplemental Order, September 27, 2005), whether certain causes

of action were multiplicitous and should be considered as single violations. Based upon my review and this record, I conclude that the twelfth and thirteenth causes of action (which reference 6 NYCRR 360-1.7[a] and 6 NYCRR 360-16.1[c], respectively) should be considered a single violation. Both regulatory provisions establish the same requirement, that is, before operating a solid waste management facility involving construction and demolition debris, a permit or other authorization must be obtained from the Department, and require the same elements of proof. Treating these two causes of action as one violation has, however, no effect on the civil penalty requested. As later discussed, the requested penalty is well within what is authorized by ECL article 71 for the violations found.

4. Respondents' Additional Comments

Respondents contest the other causes of action asserted in the complaint (see Respondents' Comments, at 2-4). I have reviewed respondents' comments in the context of the record before me. For the most part, respondents presented the same or similar comments during the adjudicatory hearing, and these were fully and correctly addressed by the ALJ in the Hearing Report/Recommended Decision. No further elaboration or discussion is necessary.[4] To the extent that respondents raise any new legal issues in their comments, these have been considered and rejected.

III. Relief

A. Civil Penalty

Department staff is requesting a civil penalty of $100,000. The ALJ recommended that staff's request be granted, and that the civil penalty be apportioned equally among the demonstrated violations. The ALJ also recommended that respondents should be ordered to pay at least $75,000 of the penalty, with the balance suspended pending respondents' implementation of an approved remediation plan.

[4] To the extent that respondents seek to present additional facts in their comments beyond the evidence in the hearing record, that is rejected (see, e.g., 6 NYCRR 624.8[a][6]["(b)riefs will be considered only as argument and must not refer to or contain any evidentiary material outside of the record").

Staff emphasizes in its comments that the requested civil penalty is relatively small compared to the number, duration, and nature of demonstrated violations (see DEC Comments, at 1). Staff, which is also requesting that respondents remediate the site, acknowledges that the costs associated with remediation would be substantial. In addition to taking into account remediation costs, staff also indicates that it considered respondents' financial and personal circumstances in calculating the penalty request (see DEC Comments, at 1). Staff states, however, that the Commissioner may want to consider assessing an even larger civil penalty in light of the number and types of violations at the site, but limit the payable amount to $75,000.

In lieu of the imposition of civil penalties, respondents have proposed an alternative remediation plan for the Meredith Avenue property and the Richmond Terrace property, which is the subject of a separate administrative enforcement action (Supplemental Hearing Report/Recommended Decision, at 2-3; Matter of Mezzacappa Brothers, Inc., Sam Mezzacappa and Frank Mezzacappa [2205-2217 Richmond Terrace, Staten Island, New York], DEC File No. R2-20070517-290). As discussed in the next section, respondents' alternative remediation plan is rejected.

This record demonstrates that respondents undertook numerous activities at the site without obtaining a Department permit or other authorization. Respondents' activities resulted in a multitude of violations of applicable statutes and regulations, and a civil penalty is warranted. Based on this record, I concur with the ALJ's recommendation of a $100,000 civil penalty.[5]

[5] Although the ALJ recommended apportioning the civil penalty among the causes of action, I conclude that such apportionment is not necessary. I note that, in light of the number and continuing nature of respondents' violations, the applicable penalty provisions of ECL article 71 would support a significantly higher penalty than what was requested, and is being imposed, in this proceeding (see, e.g., ECL 71-1107[1][for violations of ECL 15-0505, civil penalty of up to $5,000; see also ECL 71-1127(1)], 71-1929[1][for violations of titles 1 through 11 and 19 of article 17, civil penalty of up to $37,500 per day], 71-2503[1][a][for violations of ECL article 25, civil penalty of up to $10,000 for each violation, and each day's continuance is deemed a separate and distinct violation], and 71-2703[1][a][for violations of title 7 of article 27 or its regulations, civil penalty of up to $7,500 for each violation and up to $1,500 for each day the violation continues]).

However, in consideration of the costs that will be required to remediate the site, which is being directed by this order, and the comments of Department staff and the ALJ relating to suspending a portion of the penalty, I am hereby suspending $25,000 of the $100,000 penalty. The suspension is contingent on the following:

- respondents' development and implementation of a remediation plan for the site, as described in this order and approved by Department staff;

- respondents' completion of the remediation of the site to the satisfaction of Department staff; and

- respondents' compliance with all other terms and conditions of this order (including the payment of the penalty).

B. Remediation

The ALJ adopted staff's proposal for remediation of the site (see Hearing Report/Recommended Decision, at 55-56, 65). Respondents subsequently proposed an alternative remediation plan. The ALJ addressed the alternative remediation plan in his Supplemental Hearing Report/Recommended Decision.

Pursuant to respondents' proposal, areas of the Meredith Avenue property would be converted to tidal wetlands, or existing tidal wetlands areas would be improved. Respondents stated that they would convert or improve nearly 2,600 square feet of the property. They contend that this mitigation would be worth about $100,000, based in part on estimates that the per square foot value of the Meredith Avenue property is $39.00 (referencing a recent sale of comparable property in the vicinity). In light of their estimate of the value of the mitigation that they propose, respondents offered the alternative mitigation plan in lieu of a penalty. See Supplemental Hearing Report/Recommended Decision, at 2-3; respondents' letter received by the Office of Hearings and Mediation Services on June 19, 2009.

The ALJ recommended that the Commissioner not accept respondents' proposed alternative remediation plan (see Supplemental Hearing Report/Recommended Decision, at 8).

According to the ALJ, respondents did not provide sufficient detail about how areas on the Meredith Avenue property would be converted to and maintained as tidal wetland, or how existing wetland areas would be improved. Furthermore, respondents failed to demonstrate that they owned the property that was proposed be converted or improved. As described in the Hearing Report/Recommended Decision, respondents subdivided the Meredith Avenue property and sold the portion that included much of the tidal wetland areas to the Trust for Public Land (see Hearing Report/Recommended Decision, at 9).

In their comments, respondents generally state that they would like to implement the remediation that DEC Regional Solid Materials Engineer Kenneth B. Brezner proposed (see Respondents' Comments, at 4). I note that components of the remediation plan recommended by the ALJ incorporate Mr. Brezner's recommendations (see, e.g., Tr at 326-28). In addition, respondents propose spreading stockpiled materials over the upland portions of the Meredith Avenue property.

Department staff, in its comments on the recommended decisions, again objects to respondents' proposed alternative remediation plan (see DEC Comments, at 3; Supplemental Hearing Report/Recommended Decision, at 8). According to staff, one of the more significant deficiencies associated with respondents' proposed alternative remediation plan is that respondents may not own or have legal access to the areas they propose to use as mitigation (see DEC Comments, at 3-4).

Respondents' proposed remediation plan to convert upland areas of the Meredith Avenue property into tidal wetland areas could result in both the tidal wetland boundary moving landward from its current location and a reduction of the size of the upland portion of the Meredith Avenue property. Staff contends that, as a result, more of the site would be regulated as adjacent area pursuant to the Tidal Wetlands Act, thereby limiting its development potential. Under these circumstances, staff contends that the value of the Meredith Avenue property could be less than the $39.00 per square foot that respondents assumed when they proposed their remediation plan and upon which they based, in part, their argument that no penalty should be assessed.

As noted, respondents seek to use their proposed alternative remediation plan as mitigation in another proceeding (involving property on Richmond Terrace) where they are named respondents. In that proceeding, Department staff has alleged similar violations of the statutes and regulations that govern tidal wetlands and water resources. Department staff contends that the Meredith Avenue property is not "in close proximity" to the Richmond Terrace property, as the distance between the two properties is about five miles, and that the properties are not comparable. Accordingly, staff does not view the proposal as adequate to serve as mitigation for the two sites.

Finally, staff seeks to clarify a statement attributed to Mr. Brezner on page 5 of the Supplemental Hearing Report/Recommended Decision. Staff notes that it did not undertake any analysis to determine "whether any hazardous material is at this site" (DEC Comments, at 4). Staff's clarification is accepted.

I have reviewed respondents' letter describing the proposed alternative remediation plan, and I concur with the ALJ that respondents failed to present sufficient information to support that proposal. The use of property for mitigation that is owned by another individual or entity can be considered under the appropriate circumstances in an enforcement proceeding for a suspension of at least a portion of the penalty (see, e.g., Commissioner Policy 37, Environmental Benefit Projects Policy, January 29, 2010 ["CP-37"], § I). However, such proposals will be evaluated based on various criteria (see, e.g., id. § III C, D and F; see also Civil Penalty Policy, DEE-1, June 20, 1990, § V). The criteria in these Department policies include, among other things: whether the proposed project would provide a discernible benefit to the environment or the public health; the location of the mitigation property relative to the location of an impacted site; the existence of a direct programmatic nexus to the violations (including whether, on the mitigation property, comparable replacement for the resources that were damaged or lost on the impacted site can be achieved); and a sufficiently detailed description of the mitigation proposed.

Here, respondents' plan, although providing a general discussion of the proposed mitigation, lacks sufficient detail. For example, respondents do not provide information regarding the manner in which conversion of uplands to tidal wetlands

would occur, the specific areal extent of the mitigation (including an indication of the number of acres of tidal wetlands that are proposed to be created), and the procedures that respondents plan to implement to develop new wetland habitat. Respondents also fail to detail what activities will be conducted to change and reshape upland areas as tidal wetlands, what maintenance measures will be implemented to ensure that the areas remediated do not revert to uplands, or what water resources would be used to ensure survival of new tidal wetland habitat. Respondents indicate that they would accomplish the work by using their backhoe and heavy equipment but provide no further details and no indication whether any licensed professional engineer or wetland specialist would be used in the development and implementation of the proposed mitigation. The alternative remediation plan does not describe the onsite activities that respondents would undertake to improve existing wetland areas.[6]

Moreover, respondents do not demonstrate that they can access or use the portions of the property that they have designated for conversion to tidal wetlands, or that they have even initiated any specific discussions with the owners of the property that respondents identify for mitigation. Respondents also indicate that they would like to exchange additional upland property "along the shore line," but no specific information about any such exchange is offered.

Finally, the current market value of the site is uncertain, and respondents' calculations of the financial value of the proposed mitigation are speculative. Respondents' statement that the value of the remediation would be approximately $100,000 cannot be confirmed.

Where a respondent offers the possibility of off-site mitigation for a reduction of any civil penalty in an enforcement proceeding, a more definite, detailed and developed

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[6] Respondents, as part of the proposal, express an interest in spreading fill already on the existing site to areas of the existing site to establish a new grade. They provide no information as to how they will verify that the existing fill is not hazardous. Furthermore, respondents' plan does not identify where such spreading of fill would occur, and what actions would be undertaken to ensure that any additional filling does not adversely impact wetlands or the adjacent area.

mitigation proposal is necessary and required. Accordingly, for the aforementioned reasons and the reasons set forth by Department staff and the ALJ, I do not view respondents' proposal to be sufficient or appropriate for consideration in this enforcement proceeding, and, accordingly, it would not be a basis to warrant any penalty reduction.

The ALJ has recommended, based on the testimony, various remedial components for the site (see Hearing Report/Recommended Decision, at 55-56). These components include directing respondents to do the following:

- remove construction and demolition debris and other solid waste on the site to a duly authorized solid waste management facility and provide documentation from the facility where the solid waste was disposed;

- undertake a site investigation, which should include appropriate testing to determine the extent of hazardous waste on the site;

- undertake a feasibility study that considers potential commercial and industrial uses of the site;

- not sell any material from the site until the site investigation is completed and the extent of any contamination of the material proposed to be sold is known;

- remove fill from tidal wetlands and tidal wetland adjacent area on the site;

- stabilize the slope on the site; and

- implement a planting plan.

Remediation is authorized and warranted in the circumstances here. In reviewing the remediation plan, however, I am modifying staff's requested relief. I decline to require that respondents undertake a feasibility study of the potential uses of the site because I do not view this as an essential component for the remediation requested. Furthermore, with respect to the removal of fill, as Department staff and the ALJ have noted, removal of certain fill from the site may not be

feasible or environmentally appropriate. If Department staff determines, based on its review of the remediation plan that is submitted in accordance with this order, that the removal of fill from certain areas might cause substantial damage to tidal wetlands or the adjacent area, alternatives are to be considered, which may include leaving the fill in place. To the extent that fill from the site has eroded onto or been placed on tidal wetlands and adjacent area that adjoin the site, respondent shall include in the plan proposals to address or otherwise mitigate those impacts. The plan is to include a commencement date for each remedial task, and an estimated completion date for each task. Subject to the foregoing, the remedial relief requested by Department staff and recommended by the ALJ is adopted.

Finally, respondents are directed to retain the services of a licensed professional engineer in both the preparation and implementation of the remediation plan.

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

I. The motion of respondents Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. for a directed verdict to dismiss the charges in Department staff's complaint dated January 23, 2006 is denied.

II. Respondents Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. are adjudged to have violated the following statutes and regulations:

A. ECL 25-0401 and 6 NYCRR 661.8 (First Cause of Action), by installing concrete barriers on the site in the adjacent area to the tidal wetland, on or before November 12, 2004, without a permit or other authorization from the Department;

B. ECL 25-0401 and 6 NYCRR 661.8 (Second Cause of Action), by placing fill, including construction and demolition debris, on a vegetated slope on the northwestern portion of the site in the adjacent area of the tidal wetland, on or before November 12, 2004, without a permit or other authorization from the Department;

C. ECL 27-0707 and 6 NYCRR 360-1.5(a) (Third Cause of Action), by disposing of construction and demolition debris on a vegetated slope on the northwestern portion of the site on or before November 12, 2004, without a permit or other authorization from the Department;

D. ECL 25-0401 and 6 NYCRR 661.8 (Fourth Cause of Action), by removing vegetation on the site from the adjacent area of the tidal wetlands, on or before November 12, 2004, without a permit or other authorization from the Department;

E. ECL 25-0401 and 6 NYCRR 661.8 (Fifth Cause of Action), by placing construction and demolition debris on the site in the tidal wetland and its adjacent area, between November 12, 2004 and April 1, 2005, without a permit or other authorization from the Department;

F. ECL 27-0707 and 6 NYCRR 360-1.5(a)(Sixth Cause of Action), by disposing of additional construction and demolition debris on the site in the tidal wetland and the adjacent area during the period of November 2004 to April 1, 2005, without a permit or other authorization from the Department;

G. ECL 25-0401 and 6 NYCRR 661.8 (Seventh Cause of Action), by excavating material from the stockpiles on the northeastern portion of the site within the tidal wetland adjacent area, on or about May 4, 2005, without a permit or other authorization from the Department;

H. ECL 25-0401 and 6 NYCRR 661.8 (Eighth Cause of Action), by placing and grading material on the northwestern part of the site in the tidal wetland adjacent area, on or about May 4, 2005, without a permit or other authorization from the Department;

I. ECL 15-0505 and 6 NYCRR 608.5 (Ninth Cause of Action), by placing fill from the stockpile on the site below the mean high water mark of the Arthur Kill, on or about May 4, 2005, without a permit or other authorization from the Department;

J. ECL 25-0401 and 6 NYCRR 661.8 (Tenth Cause of Action), by taking fill from the stockpiles on the site and placing the

fill on the northwestern portion of the site on or about May 4, 2005, without a permit or other authorization from the Department;

K. 6 NYCRR 360-1.5(a) (Eleventh Cause of Action) by disposing of construction and demolition debris, which is a form of solid waste, on the site prior to June 7, 2005, without a permit or other authorization from the Department;

L. 6 NYCRR 360-1.7(a) (Twelfth Cause of Action), by operating a solid waste management facility on the site, as a result of the excavating, processing and relocating of solid waste on the site, without a permit or other authorization from the Department;[7]

M. 6 NYCRR 360-16.1(c) (Thirteenth Cause of Action), by processing construction and demolition debris stockpiled on the site, thereby operating a construction and demolition debris processing facility since 1997 without a permit or other authorization from the Department;

N. 6 NYCRR 360-1.14(b)(1) (Fourteenth Cause of Action), by allowing solid waste to erode and thereby enter into surface waters;

O. 6 NYCRR 360-16.4(f)(3) (Fifteenth Cause of Action), by storing construction and demolition debris in piles higher than twenty feet and in an area larger than 5,000 square feet, without Department authorization;

P. ECL 17-0807(4) and 6 NYCRR 750-1.3(d) (Sixteenth Cause of Action), by (1) failing to obtain the required SPDES general or SPDES individual permit to control stormwater runoff where more than one acre on the site was disturbed as a result of excavation, grading and disposal activities on the site, and (2) allowing pollutants to discharge into the tidal wetland and waters of the State without a permit or other authorization from the Department; and

Q. ECL 17-0503(2) (Seventeenth Cause of Action) by placing and allowing the placement of waste material in waters of a marine district.

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[7] As discussed previously on page 15 of this order, the twelfth and the thirteenth causes of action are considered to be a single violation.

III. Respondents Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. are jointly and severally assessed a civil penalty of one hundred thousand dollars ($100,000). Of that amount, seventy-five thousand dollars ($75,000) shall be due and payable within sixty (60) days from service of this order upon respondents. Payment shall be made in the form of a cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

NYS Department of Environmental Conservation
Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101
Attn: Udo Drescher, Esq., Assistant Regional Attorney.

The remaining portion of the penalty (twenty-five thousand dollars [$25,000]) shall be suspended, conditioned upon (a) respondents' development and implementation of a remediation plan for the site, approved by Department staff, (b) respondents' completion of the remediation of the site to the satisfaction of Department staff, and (c) respondents' compliance with all other terms and conditions of this order. Should respondent fail to meet these conditions, the suspended portion of the penalty 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 ($75,000) of the penalty.

IV. Within ninety (90) days from service of this order upon respondents, respondents shall submit a remediation plan, prepared by a licensed professional engineer, to Department staff for its review and approval. The plan shall include the following:

- a protocol for sampling and testing of on-site material to determine whether the material constitutes hazardous waste;

- a protocol for the removal of fill (including construction and demolition debris and other solid waste) from the tidal wetlands and tidal wetland adjacent area on

the site, provided that if the removal of the fill would cause further or irreparable damage to the tidal wetland adjacent area or the tidal wetland, removal may be limited, subject to the direction and approval of Department staff. Respondents shall dispose all solid waste (including construction and demolition debris) at solid waste management facilities that are authorized to accept such material. Respondents shall provide documentation to Department staff of the amount of solid waste that was disposed at facilities off-site, as well as the names and addresses of those facilities. The protocol shall also address removal of fill that respondents may have placed on adjoining parcels or water bodies or which has eroded from the site to those parcels or water bodies;

- a planting plan similar to the one depicted on Exhibit 51 to stabilize the slope on the site. Plantings shall be of location-appropriate native plant stock, which shall be monitored for at least three consecutive growing seasons to ensure their survival. Respondents are to provide annual reports to the Department, beginning on December 31, 2010 and by December 31 of the following three years, on the plantings and monitoring activities;

- a plan for the installation and maintenance of erosion controls until a full vegetative cover is established on the site; and

- a schedule for the commencement of each remedial task, and a schedule for the submission of site progress reports to the Department. Estimated completion dates for each remedial task shall also be provided in the plan.

Respondents shall commence implementing the plan within thirty (30) days of their receipt of Department staff’s written approval of the plan.

V. Respondents are enjoined from selling any material stockpiled on the site until the results of the testing of the material are provided to, and approved by, Department staff. Any sale of stockpiled material must comply with all applicable statutes and regulations.

VI. All communications from respondents to the Department concerning this order shall be made to

Udo Drescher, Esq.
NYS Department of Environmental Conservation
Region 2
One Hunter's Point Plaza
47-40 21st Street
Long Island City, New York 11101

VII. The provisions, terms, and conditions of this order shall bind respondents Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc., their agents, heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: ________________________________
Louis A. Alexander
Assistant Commissioner[8]

Dated: August 20, 2010
Albany, New York

[8] By memorandum dated June 29, 2010, Commissioner Alexander B. Grannis delegated decision making authority in this matter to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Articles 15, 17, 25 and 27
of the New York State Environmental Conservation Law (ECL) and
Parts 360, 608, 661 and 750 of Title 6 of the Official
Compilation of Codes, Rules and Regulations (6 NYCRR)

- by -

Mezzacappa Brothers, Inc.,
Sam Mezzacappa and Frank Mezzacappa,

Respondents.

DEC Case No. R2-20050607-202

Hearing Report/Recommended Decision

by

____
Daniel P. O'Connell
Administrative Law Judge

December 23, 2008

Proceedings

Staff from the Region 2 Office of the New York State Department of Environmental Conservation (Department staff) commenced this administrative enforcement action with service, by certified mail, return receipt requested, of a notice of hearing and a complaint, both dated January 23, 2006, upon Respondents Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. (Mezzacappa Bros.). In the January 23, 2006 complaint, Department staff asserts that Respondents own property at 200 Meredith Avenue, Staten Island (Richmond County), New York (Tax Block 2810, Lot 12), and that the property is adjacent to tidal wetlands that include the Arthur Kill and Neck (or Chelsea) Creek.

In seventeen causes of action, the January 23, 2006 complaint alleges that Respondents violated various provisions of Environmental Conservation Law (ECL) article 15, title 5 (Protection of Water); article 17 (Water Pollution Control); article 25 (Tidal Wetlands Act); and article 27, title 7 (Solid Waste Management and Resource Recovery Facilities). In addition, the January 23, 2006 complaint alleges that Respondents violated various provisions of applicable implementing regulations at title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 608 (Use and Protection of Waters), part 750 (State Pollutant Discharge Elimination System [SPDES] Permits), part 661 (Tidal Wetlands - Land Use Regulations), and part 360 (Solid Waste Management Facilities).

Based on the violations alleged in the January 23, 2006 complaint, Department staff requested an Order from the Commissioner that would assess a civil penalty, and direct Respondents to remediate the site, which would include, among other things, restoring the affected tidal wetlands. In its closing statement, Department staff requested a total civil penalty of $100,000 of which amount, no less than $75,000 should be payable immediately.

With a cover letter dated March 12, 2006, Sam Mezzacappa filed a "modified" copy of the January 23, 2006 complaint. In modifying the complaint, Mr. Mezzacappa struck certain statements alleged in the complaint, which he characterized as inaccurate, and wrote in corrections. Additionally, Mr. Mezzacappa denied

certain allegations. In this report, this document will be referred to as Respondents' March 12, 2006 answer.

Pursuant to 6 NYCRR 622.9, Department staff filed a statement of readiness, dated October 30, 2007 with the Office of Hearings and Mediation Services, and Administrative Law Judge (ALJ) Daniel P. O'Connell was assigned to the matter. In the statement of readiness, Staff requested that an adjudicatory hearing be scheduled.

Subsequently, the hearing began on January 14, 2008, and continued on January 15, 2008, February 19 and 20, 2008, and March 3 and 4, 2008. On March 4, 2008, the parties presented their respective closing statements on the record, and the hearing concluded.

During these proceedings, Department staff was represented by Udo Drescher, Assistant Regional Attorney. Department staff called the following witnesses: Mahmoud Assi, Environmental Engineer 2, Division of Solid and Hazardous Materials; Kenneth P. Brezner, P.E., Environmental Engineer 3, Regional Solid Materials Engineer; and George Stadnick, Biologist 1 Marine, Bureau of Marine Resources, Division of Fish, Wildlife and Marine Resources. In addition, Department staff called Environmental Police Officer Ron Fede from the New York City Department of Sanitation.

Sam Mezzacappa appeared *pro se* and on behalf of the other Respondents. The following witnesses testified on behalf of Respondents: Sam Mezzacappa, Frank Mezzacappa, and William Spiezia, L.S. from Rogers Surveying, PLLC.

The record of hearing closed on April 1, 2008 upon receipt of the transcript from the March 3 and 4, 2008 hearing sessions.

Findings of Fact

I. <u>Corporate Respondent</u>

1. Mezzacappa Brothers, Inc. (Mezzacappa Bros.) was formed in 1961 as a New York State domestic corporation. Sam Mezzacappa is the Chairman or Chief Executive Officer of the corporation. Frank Mezzacappa, who is Sam's brother, is also a member of the corporation. Mezzacappa Bros. is a heavy construction company. (Tr. at 702; Exhibit 88.)

2. At the commencement of this administrative enforcement action, Mezzacappa Bros. was an active domestic business corporation. (Exhibit 88.)

II. <u>200 Meredith Avenue</u>

3. In August 1985, Mezzacappa Bros. purchased property located at 200 Meredith Avenue on Staten Island (Richmond County, Tax Block 2810, Lot 12) to use as a building material and contractors yard (Tr. at 703). Prior to service of the January 23, 2006 complaint, ownership of the Meredith Avenue property was transferred from Mezzacappa Bros. to Frank and Sam Mezzacappa. Presently, Frank and Sam Mezzacappa jointly own the Meredith Avenue property. (Tr. at 9.)

4. The Meredith Avenue property consists of two contiguous portions. The first portion is about 218,000 square feet and fronts Meredith Avenue. This portion of the site includes some tidal wetlands, but is mostly adjacent area and upland. (Exhibit 21.) In the January 23, 2006 complaint (¶ 10.b), this portion of the site is referred to as the "northeastern portion."

5. The second portion of the site is long (700 feet) and narrow (70 to 90 feet), and extends west to the Arthur Kill. During the hearing, this portion of the site was referred to as the "string piece." This portion of the Meredith Avenue property is approximately 56,000 square feet, and is either tidal wetlands or adjacent area. (Tr. at 661; Exhibit 21.) In the January 23, 2006 complaint (¶ 10.c), this area of the Meredith Avenue property is referred to as the "northwestern portion."

6. Additional tidal wetlands are located to the west and south of the Meredith Avenue property (Exhibits 1, 2, and 21). The northwestern portion of the site borders the Arthur Kill, which is categorized as littoral zone (LZ). The Arthur Kill is also a navigable water of New York State. The tidal wetlands to the south of the site are categorized as intertidal marsh (IM), high marsh (HM), formerly connected tidal wetlands (*see* 6 NYCRR 661.4[hh][6]), and littoral zone. To the south, the littoral zone is identified as either Neck Creek (*see also* Exhibit 81) or Chelsea Creek (*cf* Exhibits 21 and 79), which extends along the eastern boundary of the site (Exhibit 21).

7. The Meredith Avenue property appears on the Arthur Kill United States Geological Survey (USGS) Quadrangle (Exhibit 81). The 10-foot elevation contour is depicted on the Arthur Kill Quadrangle. It is located east of the railroad tracks, which are located landward from the Meredith Avenue property. Based on Exhibit 81, the elevation of the Meredith Avenue property was less than 10 feet above sea level when the USGS Arthur Kill Quadrangle was prepared.

8. Subsequent to 1985 and prior to service of the January 23, 2006 complaint, a portion of the tidal wetland areas of Lot 12 were subdivided from the Meredith Avenue property, and Mezzacappa Bros. sold the tidal wetland property to the Land for Public Trust. The dates of the subdivision and sale are not part of the hearing record. The hearing record does not include a map or plan that expressly shows how the property was subdivided. (Tr. at 1098.)

III. <u>Tidal Wetlands Permit No. 20-86-0274</u>

9. In September 1985, Mezzacappa Bros. filed a tidal wetlands permit application with DEC Region 2 Staff for the Meredith Avenue property. With this permit application, Donald E. Peters, Architect, AIA, filed a series of site plans on behalf of Mezzacappa Bros. (Tr. at 709-711.) Exhibit 51 is one of the site plans prepared by Mr. Peters that Department staff received on December 22, 1987.

10. While reviewing the September 1985 tidal wetlands permit application, Department staff commenced an enforcement action against Mezzacappa Bros. The enforcement action was resolved with an Order on Consent (No. 2-RA-84003) dated June 10, 1987. (Tr. at 172; Exhibit 36.)

11. With a cover letter dated May 5, 1988, Staff issued Tidal Wetlands Permit No. 20-86-0274 to Mezzacappa Bros. (Exhibit 40). The permit authorized the placement of clean fill in the regulated tidal wetland adjacent area for use as a "building materials and equipment storage area." The effective dates for the permit were from May 5, 1988 to December 31, 1989. General Condition No. 19 and Special Condition No. 23 of the permit refer to approved plans prepared by Donald Peters, which Department staff received on February 4, 1988. (Tr. at 202-203, 206, 748, 1136; Exhibit 40.)

12. The May 1988 tidal wetlands permit (Exhibit 40) did not specify the amount of fill that could be placed on the site. The amount of fill that Mezzacappa Bros. brought to the Meredith Avenue property raised the elevation of the site by 2 to 4 feet. (Tr. at 759-760.)

13. From 1985 to 1997, the NYC Department of Environmental Protection (NYC DEP) awarded contracts to Mezzacappa Bros. to install water mains throughout the City of New York for the distribution of potable water. The work required Mezzacappa Bros. to excavate a trench for the pipe. After the pipe was laid in place, the trench was backfilled and the street that was subject to the NYC DEP contract was repaved. Generally, the backfill material was sand rather than the original, excavated material. (Tr. at 762-763, 976, 980-982.)

14. From 1985 to 1997, Mezzacappa Bros. would dump loads of material excavated from the work sites at the Meredith Avenue property with the intention of reloading the material into trucks and then transporting it to the Fresh Kills Landfill. NYC DOS authorized the temporary placement of excavated material at the Meredith Avenue property and other similar sites owned by Mezzacappa Bros. In addition to temporarily storing excavated material at the Meredith Avenue property, Mezzacappa Bros. would also store other building materials, such as the sand used for backfilling, as well as equipment such as dump trucks, excavators, and loaders. (Tr. at 766-767, 982-984.)

IV. Additional Enforcement Actions

15. Based on a November 9, 1990 site inspection, Department staff commenced the second enforcement action against Mezzacappa Bros. for allegedly failing to comply with special condition Nos. 21 and 22 in the May 1988 tidal wetlands permit. Special condition No. 21 required Mezzacappa Bros. to implement a planting plan, and special condition No. 22 prohibited the storage of equipment and materials within 30 feet from the tidal wetland boundary (Exhibit 40). This enforcement action was resolved with an Order on Consent (No. R2-3496-91-02), which was executed on April 22, 1991 (Exhibit 37). (Tr. at 173, 182, 717.)

16. After inspecting the Meredith Avenue property on January 2 and 21, 1992, and February 5, 1992, Environmental Conservation Officer (ECO) Thomas Flaitz issued Sam

Mezzacappa four notices of violation. During these inspections ECL Flaitz and Department staff from the Bureau of Marine Resources and the Division of Solid and Hazardous Materials observed, among other things, recognizable, processed construction and demolition (C&D) debris, as well as old, disabled equipment and vehicles in the adjacent area of the site. Respondents remediated the site. (Tr. at 187-188, 198, 1130; Exhibits 38 and 39.)

V. The Second Tidal Wetlands Permit Application (Application No. 2-6403-00060/00003)

17. Department staff received a second application for a tidal wetlands permit signed by Sam Mezzacappa and dated November 12, 2004. Mr. Mezzacappa included additional supporting materials with the second application. The activity proposed in the permit application is to grade the Meredith Avenue property in order to make better use of the site. (Exhibit 6.)

18. On March 11, 2005, Department staff issued a Notice of Incomplete Application (NOIA) concerning the second tidal wetlands permit application (No. 2-6403-00060/00003), and requested that Mezzacappa Bros. provide a project description and a plan, among other things (Tr. at 62-63; Exhibit 19). With respect to the plan, Staff requested information about the current location of the tidal wetland boundary, and recommended that the boundary be delineated by Staff and incorporated onto the plan by a surveyor. In addition, the March 11, 2005 NOIA requested that the plan include existing elevation contours, and the details of an erosion control plan. (Tr. at 61-62; Exhibit 19.)

19. Department staff visited the Meredith Avenue property on April 1, 2005 to meet a surveyor and to delineate the tidal wetland boundary (Tr. at 63-64). Subsequently, Mezzacappa Bros. filed a survey by Otis V. Volis, L.S. (Whol & O'Mara, LLP, Civil Engineers and Land Surveyors, Staten Island, New York [Exhibit 21]). The following details are depicted on the survey: (1) the metes and bounds of the property; (2) the delineated tidal wetland boundary and the adjacent area extending 150 feet landward from the tidal wetlands boundary; (3) a series of vertically placed poles, which approximates the location of the toe of the slope; (4) the top of the slope; and (5) the elevation contours of the four stockpiles on the site.

20. Four stockpiles are depicted on Exhibit 21. The height of the stockpiles are: (1) 25.4 feet; (2) 30.8 feet; (3) 50.3 feet; and (4) 66.1 feet.

21. The area of the base of the stockpile that is 25.4 feet high is approximately 3,900 square feet (70 ft. x 55 ft.). The area of the base of the stockpile that is 30.8 feet high is approximately 12,700 square feet (65 ft. x 195 ft.). The area of the base of the stockpile that is 50.3 feet high is approximately 37,400 square feet (115 ft. x 325 ft.). The area of the base of the stockpile that is 66.1 feet high is approximately 900,000 square feet (250 ft x 3,500). (Exhibit 21.)

22. On May 9, 2005, Department staff issued the second NOIA concerning the second tidal wetlands permit application (No. 2-6403-00060/00003), and requested that Mezzacappa Bros. provide a project description and a sediment/erosion control plan (Exhibit 29). In addition, the May 9, 2005 NOIA advised Mezzacappa Bros. that no other work at the site is authorized pending the review of the tidal wetlands permit application. The May 9, 2005 NOIA expressly prohibited the placement of any fill, as well as the placement of any C&D debris on the site. (Tr. at 92-93; Exhibit 29.)

23. On May 12, 2005, Department staff issued Mezzacappa Bros. a Notice of Suspension of Permit Processing (Exhibit 24) pursuant to 6 NYCRR 621.3(e). The suspension is based on Staff's May 10, 2005 site inspection (Tr. at 93-94). Thereafter, the captioned enforcement action commenced with service of the January 23, 2006 complaint.

VI. Site Visits

24. In 2005, Department staff visited the Meredith Avenue property on April 1, May 10 and June 7. Department staff returned to the site on June 19, 2007.

25. During these site visits, Staff took numerous photographs that are exhibits in the hearing record. The photographs corroborate Staff's observations concerning the conditions at the Meredith Avenue property.

26. Staff from the New York City Department of Sanitation (NYC DOS) visited the site on May 4, 2005. Exhibit 3 is a copy of a video tape taken by NYC DOS staff during the May 4,

2005 inspection of the Meredith Avenue property. (Tr. at 13-14.)

A. <u>April 1, 2005</u>

27. Staff from the Department's Bureau of Marine Resources went to the Meredith Avenue property on April 1, 2005, in part, to delineate the tidal wetland boundary. Prior to the site visit, Staff reviewed Exhibits 7 through 12, which are some of the photographs that Respondents provided with the second tidal wetlands permit application. They depict areas of the site that include the tidal wetlands, the adjacent area, and uplands. (Tr. at 64, 243-244.)

28. Exhibits 7 through 12 show that the slope on the site, authorized by the first tidal wetlands permit, was disturbed. Vegetation was matted down or completely removed. The unvegetated areas extended into the tidal wetland. In addition, there were track marks from trucks or heavy equipment in the areas of the disturbed vegetation. (Tr. at 28-41, 64-66.)

29. Jersey barriers are depicted in Exhibits 9 and 10. In the photographs, the Jersey barriers are located along the crest of the slope. In addition, Exhibits 9 and 10 show recognizable pieces of concrete, asphalt, wood and other debris such as pieces of plastic and metal scattered across the disturbed areas. Respondents placed the Jersey barriers and other large pieces of concrete along the crest of the slope between 1996 and 2001. (Tr. at 39, 42-45.)

30. After searching the Department's files, Staff did not find either a copy of any permit that Staff had issued to Mezzacappa Bros., or any consent order that authorized the placement of the Jersey barriers and large pieces of concrete on the Meredith Avenue property (Tr. at 61).

31. Exhibits 20A through 20F are a series of six Polaroid photographs. They depict the northwestern portion of the site, and show that the vegetation on the slope was disturbed and, in some areas, completely removed. Like Exhibits 8 through 12, Exhibits 20A through 20F also depict recognizable pieces of concrete, brick, asphalt, wood, and other debris such as pieces of plastic and metal scattered across the surface of the disturbed areas. (Tr. at 39-40, 45-47,65-71.)

32. Exhibit 20F depicts debris consisting of pieces of wood, concrete, brick and asphalt that was placed on the seaward side of the concrete slabs. The seaward side of the concrete slabs is part of the high marsh tidal wetlands. (Tr. at 73-74.)

B. May 4, 2005

33. The video tape (Exhibit 3) from the May 4, 2005 inspection by NYC DOS Staff shows a truck dumping approximately 15 cubic yards of material on the Meredith Avenue property near the Anthony Bruno property (Tr. at 140-141).

34. In May 2005, Frank Mezzacappa moved about 11 truck loads of material from a screened stockpile located on the Meredith Avenue property, and dumped the material on low areas on the northwestern portion of the site. Mr. Mezzacappa estimated that he added from 1 to 14 inches of fill to these low areas. (Tr. at 825-829, 993, 1030, 1035.)

C. May 10, 2005

35. On May 10, 2005, Staff returned to the Meredith Avenue property and took another set of Polaroid photographs identified as Exhibits 22A through 22E. Between Staff's April 1, 2005 and May 10, 2005 visits, Respondents had placed a substantial amount of fill at the end of the northwestern portion of the site, and graded it. The depth of the newly placed fill equaled or exceeded the height (*i.e.*, about two feet) of the concrete slabs located along the crest of the slope. The northwestern portion of the Meredith Avenue property is located entirely within the adjacent area of the tidal wetlands. (Tr. at 82-83, 85-86, 88-89, 661.)

36. In addition, Respondents placed some fill in the high marsh portion of the tidal wetlands. High marsh areas are flooded at high tide during the full and new phases of the moon. The high marsh areas of the tidal wetland on the Meredith Avenue property are associated with Neck Creek, which is a tributary to the Arthur Kill. (Tr. at 90, Exhibit 22D.)

37. Respondents also placed some of this fill in the Arthur Kill. The Arthur Kill is part of the littoral zone of the tidal wetlands on the Meredith Avenue property, and a navigable water of the State. (Tr. at 89-90; Exhibit 22E.)

D. June 7, 2005

38. Staff returned to the Meredith Avenue property on June 7, 2005, and took a series of photographs identified as Exhibits 25A through 25D (Tr. at 96). Between the May 10, 2005 and June 7, 2005 site visits, Respondents had placed 10 cubic yards of fill in the adjacent area of the northeastern portion of the site and regraded it (Tr. at 103-104). Vegetation was either disturbed or removed as a result of the placement of fill and the regrading process (Tr. at 103; Exhibit 25D). Exhibits 25A and 25C show that the newly placed fill eroded into the high marsh wetlands near Neck Creek (Tr. at 98-99, 101-104).

39. In addition to Exhibits 25A through 25D, Staff took other photographs that are identified as Exhibits 26 through 35. Exhibit 28 is a composite of a series of photographs, which depicts the northeastern portion of the Meredith Avenue property. The left side of Exhibit 28 depicts the entrance road to the site, which is located between the two stockpiles covered with vegetation. The right side of Exhibit 28 depicts the access road that extends toward the string piece. The right side of the stockpile, which is adjacent to the access road, is not vegetated. The absence of vegetation on this portion of the stockpile demonstrates that Respondents had disturbed the right side of the stockpile. As a result, the following became visible: concrete slabs, rubble and C&D debris such as brick, asphalt, timber, plastic, tiles, piping and rebar. (Tr. at 110-111; *also see* Exhibit 29.)

40. Exhibit 31 is a westerly view of the access road on the northwestern portion of the site. This portion of the site is located in the adjacent area of the tidal wetland. In the foreground on the left side of the photograph (Exhibit 31), there is a pile of debris consisting of pipes, plastic, a plastic carton, and cement debris. On the right side of the photograph are piles of tires and scrap metal. Some C&D debris material is strewn among the regraded material in the adjacent area of the tidal wetland. (Tr. at 162-163.)

41. Exhibit 33 shows that Respondents placed fill on the slope located within the buffer zone (*see* Exhibit 51 [slope planting barrier]) that subsequently eroded into the tidal wetland at the base of the slope. At this location on the site, the tidal wetland is also a navigable water of the State. (Tr. at 165-166, 618.)

42. The foreground of Exhibit 34 shows a disturbed area that is heavily strewn with C&D debris including concrete rubble, asphalt, and timber (Tr. at 167-168).

43. During the June 7, 2005 site visit, Staff observed that two distinct areas on the Meredith Avenue property had been disturbed by adding fill. One disturbed area was on the northeastern portion of the site, and the other was on the northwestern portion near the Arthur Kill. The total area disturbed exceeded one acre. Given the size of the area disturbed, Staff reviewed the Department's files to determine whether Respondents filed a Notice of Intent and Stormwater Pollution Prevention Plan for a general State Pollutant Discharge Elimination System (SPDES) stormwater permit for construction activities. Staff did not find the required submissions. In addition, Staff did not find a copy of the acknowledgment letter that Staff would have sent to Respondents with a permit identification number had Respondents submitted the required documentation. (Tr. at 116-118.)

44. Staff from the Department's Region 2 Office, Division of Solid and Hazardous Materials visited the Meredith Avenue property on June 7, 2005. Staff observed that solid waste materials were mixed into the soil laid down on the site as fill. In addition, Staff observed various piles of solid waste on the site, as depicted in the photographs identified above. Based on these observations (*see e.g.* Exhibit 45), Staff concluded further that solid waste was mixed in with the soil stockpiled on the site. (Tr. at 286-287, 294.)

E. June 19, 2007

45. Staff from the Division of Solid and Hazardous Materials returned to the Meredith Avenue property on June 19, 2007 (Tr. at 262-263, 294). The purpose of the site visit was to collect soil samples for a qualitative examination (Tr. at 294, 306). Exhibits 46A and 46B are DVDs from the June 19, 2007 site visit that document where and how Staff collected the soil samples.

46. On June 19, 2007, Department staff collected three samples from the northeastern portion of the Meredith Avenue property. Staff collected the first sample (#1) from the screened stockpile, which corresponds on Exhibit 21 to the stockpile with an elevation of 30.8 feet. The second sample (#2) was collected from the stockpile with an elevation of

50.3 feet (*see* Exhibit 21). Staff collected the third sample (#3) from the roadway on the southwestern side of the stockpile with an elevation of 50.3 feet; this portion of the roadway extends east toward Neck Creek (Exhibits 21 and 42).

47. After processing the samples, Department staff examined them with a microscope, which was set up with a camera (Tr. at 314-315).

48. Exhibit 47 is a set of two photographs taken by Staff. Exhibit 47A is a photograph of the 2 millimeter (mm) portion of either Sample #1 or #2, and Exhibit 47B is a photograph of the 6-mm portion of either Sample #1 or #2. Exhibits 47A and 47B depict pieces of asphalt based on the color and shape of the particles. To the naked eye, these particles would be considered “unrecognizable.” The 6-mm washed portion of Samples #1 and #2 included pieces of concrete and wood. (Tr. at 315-321.)

49. The content of Samples #1 and #2 is generally comparable, but the content of Sample #3 is very different quantitatively. Sample #3 consists almost exclusively of fines. Sample #3 was collected from the roadway where heavy equipment and machinery ran over the area, which had the effect of pulverizing the solid waste debris. (Tr. at 321-322.)

50. During the June 7, 2005 and June 19, 2007 visits, Department staff did not observe any areas on the site that contained “native, virgin soils” (Tr. at 387). Based on the qualitative examination of the soil samples, Staff concluded that the bulk of the material on the site consists of soil mixed with unrecognizable pieces of C&D debris. (Tr. at 324.)

Discussion

I. Status of the Corporate Respondent

Information on file with the New York State Department of State (DOS), Division of Corporations (Exhibit 88) establishes that Mezzacappa Brothers, Inc. (Mezzacappa Bros.) was formed in 1961 as a New York State domestic corporation. Sam Mezzacappa is the Chairman or Chief Executive Officer of the corporation. (Exhibit 88.) Frank Mezzacappa, who is Sam’s brother, is a

member of the corporation. Frank Mezzacappa described the corporation as a "heavy construction" company. (Tr. 703.)

Sam Mezzacappa contended that the corporate Respondent, Mezzacappa Bros., no longer exists and has been inactive since 1997. Mr. Mezzacappa stated further that prior to service of the January 23, 2006 complaint, ownership of the Meredith Avenue property was transferred from Mezzacappa Bros. to Sam and Frank Mezzacappa. Based on these circumstances, Sam Mezzacappa requested that the name of the corporate Respondent be removed from the caption, and that the charges against Mezzacappa Bros. be dismissed. (Tr. at 9-10.) During the hearing, Frank Mezzacappa testified that Mezzacappa Bros. "is not an active corporation," and that "the accountant is letting it expire" (Tr. at 996).

The records on file with the DOS Division of Corporations prove that Mezzacappa Bros. is an "active" domestic business corporation. Sam and Frank Mezzacappa did not offer any evidence to refute the information presently on file with the DOS Division of Corporations concerning the active status of Mezzacappa Bros. For example, Respondents did not offer a certificate of dissolution as provided for by either Corporation Law article 10 (Non-Judicial Dissolution) or Corporation Law article 11 (Judicial Dissolution).

Based on the hearing record, Sam and Frank Mezzacappa do not actively engage in construction activities, and the Meredith Avenue property may no longer be used as a building material and contractors yard. Nevertheless, the legal status of the corporation known as Mezzacappa Brothers Inc. remains active. Therefore, I recommend that the Commissioner deny Sam Mezzacappa's motion to remove the corporate Respondent from the caption and to dismiss the charges alleged against Mezzacappa Bros.

II. Background

Prior to 1977, Texaco operated a tank farm (*i.e.*, a petroleum storage facility) at the Meredith Avenue property, which included a pier that extended into the Arthur Kill at the end of the northwestern portion of the site. The storage tanks are depicted in Exhibit 1, which is a copy of a portion of Tidal Wetland Map No. 568-497. Exhibit 2 is a portion of Tidal Wetland Map No. 566-494 that depicts the Arthur Kill and the pier at the western end of the site.

In either 1977 or 1978, Texaco decommissioned the storage facility at the Meredith Avenue property. The decommissioning process required the removal of several buildings, the storage tanks, and the secondary containment structures. In addition to removing buildings and tanks, clean fill was brought to the site (Tr. at 760). As part of the decommissioning process, rows of hay bales were placed on the site to control erosion until the fill was stabilized with vegetation (Tr. at 1050). According to Frank Mezzacappa, Texaco did not require the removal of the pier, and its remnants remain on the site (Tr. at 900; Exhibit 71A).

A. Tidal Wetlands Permit Application

In August 1985, Mezzacappa Bros. purchased the Meredith Avenue property to use the site as a "building material and contractors yard" (Tr. at 703).[1] Mezzacappa Bros. obtained authorization from the New York City Department of Sanitation (NYC DOS) to bring excavated materials to the site, and to store construction materials at the site. The NYC DOS authorization designated an area on the Meredith Avenue property where the excavated and construction materials could be placed outside the scope of the DEC's tidal wetland jurisdiction. The area designated by NYC DOS is depicted on Exhibits 50A and 50B. (Tr. at 653, 704, 1019.) Department staff was aware of the authorization provided by NYC DOS (Tr. at 669), though the express terms and conditions of the authorization provided by NYC DOS are not part of the hearing record.

In September 1985, Mezzacappa Bros. filed a tidal wetlands permit application with DEC Region 2 Department staff for the Meredith Avenue property. With this permit application, Donald E. Peters, Architect, AIA, filed a series of site plans on behalf of Mezzacappa Bros. (Tr. at 709-711.) In the hearing record, these plans are identified as Exhibits 50A, 50B, 51 and 79.[2]

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[1] Mezzacappa Bros. owns real property located on Richmond Terrace (Tr. at 9-10). With respect to the issue of liability, the Richmond Terrace property is beyond the scope of this administrative enforcement action. However, the Richmond Terrace property is the subject of a separate administrative enforcement action commenced with service of a Motion for Order without Hearing dated October 28, 2008 (Case No. R2-20070517-290).

[2] With a cover letter dated September 9, 1986, Mr. Peters filed a site plan that is identified in the hearing record

Respondents offered Exhibits 50A and 50B.[3] Exhibit 51 is a site plan prepared by Mr. Peters and revised on May 6, 1987; May 28, 1987; Sept. 9, 1987 and Dec. 17, 1987. Department staff received Exhibit 51 on December 22, 1987.

Among other things, Exhibit 51 depicts the metes and bounds of the Meredith Avenue property, the tidal wetland boundary as delineated by Department staff, a sloped planting area, and a buffer zone. According to the plan, the buffer zone is 30 feet wide and extends landward from the tidal wetlands boundary. The sloped planting area is part of the designated buffer zone and extends 15 feet landward from the tidal wetlands boundary. The plan includes a cross section detail of the planting area. The planting area is divided into three zones, and the detail provides a list of plant species for each zone.

Subsequent to Staff's delineation of the tidal wetland boundary, Mezzacappa Bros. installed a series of vertical wood poles (eight inches in diameter) slightly landward of the tidal wetland boundary on the site (Tr. at 711-712), to form a pole line. The locations of these poles are depicted on the various plans identified above (*see e.g.* Exhibits 50A and 51). Some poles are visible in the various photographs offered at the hearing (*see e.g.* Exhibits 7, 11, 31, 56A, 56C, and 56D). The purpose of the pole line is to mark the bottom, or the toe, of the vegetated slope (Tr. at 711-712). Department staff did not require a pole line along the northwestern portion of the site (Tr. at 914), which extends to the Arthur Kill (*i.e.*, the string piece).

During the pendency of the review for the September 1985 tidal wetlands permit application, Department staff commenced an enforcement action against Mezzacappa Bros., which was resolved with an Order on Consent (No. 2-RA-84003) executed on June 10, 1987 (Tr. at 172; Exhibit 36).

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as Exhibit 79. Of the various site plans offered during the hearing, Exhibit 79 is the earliest prepared plan. Exhibit 79 has the following revision dates: 11 Sept. '85; 26 Mar. '86 and 12 June '86. Department staff received this site plan on September 10, 1986.

[3] Exhibits 50A and 50B are the same plan with the following revision dates: 11 Sept. '85; 26 Mar. '86 and 12 June '86. Exhibit 50B is a photocopy of Exhibit 50A.

With a cover letter dated May 5, 1988, Staff issued Tidal Wetlands Permit No. 20-86-0274 to Mezzacappa Bros., which is identified in the hearing record as Exhibit 40. The permit authorized the placement of clean fill in the regulated tidal wetland adjacent area for use as a "building materials and equipment storage area." The May 1988 tidal wetlands permit did not specify the amount of fill that could be placed on the site.

The Findings of Fact (Nos. 13 and 14) describe the activities that took place on the Meredith Avenue property from 1985 to 1997. During this period, the NYC Department of Environmental Protection (NYC DEP) awarded contracts to Mezzacappa Bros. to install water mains for the distribution of potable water. These contracts were for jobs on Staten Island and in the other boroughs. (Tr. at 762-763, 976, 980-982.)

B. Additional Enforcement Actions

During the hearing, Department staff offered evidence (Exhibits 36 through 39, inclusive), which demonstrates that the Meredith Avenue property was the subject of additional enforcement actions commenced subsequent to issuance of the May 5, 1988 tidal wetlands permit (Exhibit 40). Staff offered this evidence to show that since Respondents purchased the property in August 1985, they have violated various provisions of ECL article 25 and its implementing regulations (*see* 6 NYCRR part 661). Respondents did not contest the evidence that Staff offered to demonstrate the violations that occurred on the Meredith Avenue property prior to the commencement of the captioned administrative enforcement action.

C. The Second Tidal Wetlands Permit Application (Application No. 2-6403-00060/00003)

Department staff received a second application for a tidal wetlands permit signed by Sam Mezzacappa and dated November 12, 2004 (Exhibit 6). On March 11, 2005, Department staff issued a Notice of Incomplete Application (NOIA) concerning the second tidal wetlands permit application (No. 2-6403-00060/00003) (Exhibit 19), and requested that Mezzacappa Bros. provide a project description and a plan, among other things.

On May 11, 2008, Department staff issued the second NOIA (Exhibit 23) concerning tidal wetlands permit application No. 2-6403-00060/00003, and requested that Mezzacappa Bros. provide a project description and a sediment/erosion control plan. In addition, the May 11, 2005 NOIA advised Mezzacappa Bros. that no

other work at the site was authorized pending the review of the tidal wetlands permit application. The May 11, 2005 NOIA expressly prohibited the placement of any fill and any construction and demolition (C&D) debris on the site. (Tr. at 92.)

On May 12, 2005, Department staff issued Mezzacappa Bros. a Notice of Suspension of Permit Processing pursuant to 6 NYCRR 621.3(e) (Exhibit 24). Subsequently, the captioned administrative enforcement action commenced with service of the January 23, 2006 complaint.

III. Subject Matter Jurisdiction

During the March 3, 2008 hearing session,[4] Sam Mezzacappa, on behalf of Respondents, asserted an issue about the scope of the Department's jurisdiction over the Meredith Avenue property pursuant to ECL article 25, and moved for a directed verdict to dismiss the charges alleged in the January 23, 2006 complaint. Referring to the regulatory definition of the term "adjacent area" at 6 NYCRR 661.4(b)(1)(iii), Mr. Mezzacappa contended that the elevation of the Meredith Avenue property is greater than 10 feet above sea level as shown on Exhibit 21. Based on this contention, Mr. Mezzacappa argued that the width of the adjacent area on the site is limited by the location of the 10-foot contour, which is generally located about half way up the slope on the site. As a result, Mr. Mezzacappa concluded that the northeastern portion of the Meredith Avenue property is not part of the regulated adjacent area even though significant areas of the site are less than 150 feet from the tidal wetland boundary.

To further support Respondents' position, Mr. Mezzacappa referred to Use No. 1 at 6 NYCRR 661.5(b), and asserted that the site has been in continuous use from before the effective date of the Tidal Wetlands Act (ECL article 25). In addition, Mr. Mezzacappa referred to Use No. 21 at 6 NYCRR 661.5(b), and contended further that the activities, which are the subject of this administrative enforcement action, should be considered ordinary maintenance and repair. Therefore, by operation of regulation, Mr. Mezzacappa argued that he and his brother could undertake these activities (Use Nos. 1 and 21 at 6 NYCRR 661.5[b]) on the upland portion of the site without a tidal wetlands permit from the Department.

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[4] The discussion concerning Respondents' motion can be found in the hearing transcript at 844-851.

Department staff opposed Respondents' motion for a directed verdict to dismiss the charges alleged in the January 23, 2006 complaint. Staff noted that a directed verdict is not procedurally available because the ALJ is not the final decision maker. Staff also opposed the motion on the merits. According to Department staff, Mr. Mezzacappa misinterpreted the regulatory definition of the term "adjacent area" found at 6 NYCRR 661.4(b)(1)(iii). Staff argued that the limit of the tidal wetland adjacent area by the elevation contour of 10 feet above mean sea level does not apply here for the following reasons. First, if the contour crosses a bluff or cliff, then the adjacent area extends to the crest of the bluff. Second, United States Geological Service (USGS) topographic maps having a scale of 1:24,000 are rebuttable presumptive evidence of the 10-foot contour. Staff offered Exhibit 81, which is a portion of the Arthur Kill Quadrangle prepared by the USGS that shows the 10-foot contour located generally east of the railroad tracks which are east, or farther landward, of the Meredith Avenue property.

Contrary to Mr. Mezzacappa's contention, Staff argued that the site has not been in continuous use prior to the effective date of the Tidal Wetlands Act. Staff stated that Texaco used the site as a petroleum bulk storage facility before the effective date of the Tidal Wetlands Act, and subsequently decommissioned the site. In August 1985, Mezzacappa Bros. purchased the site to use as a building material and contractors yard. Because Texaco and Mezzacappa Bros. used the site for different purposes, Staff argued that the site has not been used in a continuous manner. Staff argued further that the contract between Mezzacappa Bros. and NYC DEP terminated, and since that time the site has not been actively used as a contractors yard, but as a storage facility. Finally, Department staff noted that on Exhibit 21, the northwestern portion of the site (or string piece), which extends to the Arthur Kill, does not have any contours drawn on it. According to Staff, many of the violations alleged in the January 23, 2006 complaint took place on the string piece which, as shown on Exhibit 21, is entirely located in the adjacent area and tidal wetlands (Tr. at 661).

In reply, Mr. Mezzacappa offered Exhibit 82, which is a letter dated February 28, 2008 to Mr. Mezzacappa from William Spiezia, L.S. Mr. Spiezia is from Roger Surveying PLLC (Staten Island, New York). In the February 28, 2008 letter, he states that,

> "[t]he Richmond High Water Datum (RHW) is 3.192 feet above the National Geodetic

> Vertical Datum of 1929 (NGVD 29) Mean Sea Level at Sandy Hook, New Jersey. An elevation of 10.00 feet above NGVD 29 Mean Sea Level will have a corresponding elevation of 6.81 feet above RHW datum."

Subsequently, Mr. Spiezia testified at the hearing. Mr. Spiezia has worked for Rogers Surveying, PLLC since 1985, and he has been a professional land surveyor in New York State since 1994 (Tr. at 1071). Referring to Exhibit 82, Mr. Spiezia explained that elevations on Staten Island are referenced to a plane above mean sea level at Sandy Hook, New Jersey. He explained further that a mean sea level elevation of 10 feet at Sandy Hook, based on the NGVD 29, is equivalent to elevation 6.81 feet based on Staten Island Borough datum. (Tr. at 1072.)

Mr. Spiezia reviewed Exhibit 21, and marked with a pencil the approximate location of the 6.81-foot contour at the site. According to Mr. Spiezia, his pencil mark on Exhibit 21 at the 6.81-foot elevation would be equivalent to the 10-foot contour at Sandy Hook. Mr. Spiezia noted that Mr. Otis, the professional land surveyor from Wohl & O'Mara, LLP who prepared Exhibit 21, used the Richmond High Water Datum. (Tr. at 1072-1073; Exhibit 21.)

During the hearing, I denied Respondents' motion without prejudice to renew. I explained that I was not the final decision maker and that a complete record about this issue needed to be developed (Tr. at 851.) In his closing statement, Mr. Mezzacappa renewed Respondents' motion (Tr. at 1163-1164).

Based on the rationale presented below, the Commissioner should deny Respondents' motion. Pursuant to regulation, the adjacent area of a tidal wetland may be limited by three circumstances. First, the adjacent area extends 300 feet from the landward boundary of a tidal wetland. In the City of New York, however, the distance is 150 feet. (*see* 6 NYCRR 661.4[b][1][i].) Because Staten Island (Richmond County) is a borough of New York City, the potential maximum width of the adjacent area on the Meredith Avenue property is 150 feet.

Second, the landward boundary of the adjacent area may be limited by a "lawfully and presently existing (*i.e.*, as of August 20, 1977), functional and substantial fabricated structure" that is generally parallel to the wetland boundary, and which is a minimum of 100 feet in length (*see* 6 NYCRR 661.4[b][1][ii]).

Respondents did not assert that this circumstance is relevant here.

Third, as asserted by Respondents, the landward boundary of the adjacent area may be limited by the 10-foot contour, except when such contour crosses the seaward face of a bluff, cliff or hill, then to the topographic crest of such bluff, cliff or hill. Staff correctly noted that USGS topographic maps having a scale of 1:24,000 are rebuttable presumptive evidence of the 10-foot contour. (*See* 6 NYCRR 661.4[b][1][iii]).

Upon a thorough review of the hearing record, I conclude that the applicable circumstance which limits the width of the adjacent area on the Meredith Avenue property is outlined at 6 NYCRR 661.4(b)(1)(i). Mr. Mezzacappa's reliance on 6 NYCRR 661.4(b)(1)(iii) is misplaced for the following reasons. First, none of the plans offered at the hearing (*see e.g.* Exhibits 50A, 50B, 51, and 79) that are associated with the first tidal wetland permit application provides any contour elevation lines. Exhibit 81, however, is a copy of that portion of the Arthur Kill USGS Quadrangle on which the site appears. Exhibit 81 depicts the Texaco storage tank facility and the 10-foot contour, which is located east of the railroad tracks. The railroad tracks are upland from the Arthur Kill and located farther east than the Meredith Avenue property. Based on Exhibit 81, the elevation of the Meredith Avenue property was less than 10 feet above sea level when the USGS Arthur Kill Quadrangle was prepared.

Mr. Mezzacappa, who has the burden of proof to sustain the motion on behalf of Respondents (*see* 6 NYCRR 622.11[b][3]), offered no evidence to refute Exhibit 81. As noted in the regulation (*see* 6 NYCRR 661.4[b][1][iii]), Exhibit 81 is rebuttable presumptive evidence of the 10-foot contour. Exhibit 82 and Mr. Spiezia's related testimony do nothing to reduce the significant weight that I assigned to Exhibit 81. Exhibit 82 and Mr. Spiezia's testimony do not speak to the question of whether the elevation contours on the Arthur Kill USGS Quadrangle are based on the NGVD 29 Mean Sea Level at Sandy Hook, the RHW datum,

or some other standard.[5] As noted above, the RHW datum is 3.193 feet higher than NGVD 29 mean sea level at Sandy Hook.

Second, from the hearing record, it is clear that Mezzacappa Bros. changed the elevation of the site after obtaining the first tidal wetlands permit from the Department (Exhibit 40). The first tidal wetlands permit (No. 20-86-0274) authorized the placement of an undisclosed amount of fill on the site including portions of the adjacent area, and then the grading of this fill. Although a copy of the approved plan originally appended to the first tidal wetlands permit is not part of the hearing record, the other plans in the record (*e.g.* Exhibits 50A, 50B, 51, and 79) demarcate a sloped area that extends about 15 feet horizontally from the delineated tidal boundary (*see* Exhibit 51). This sloped area is a direct result of the activities authorized by the first tidal wetlands permit.

Staff aptly observed that the scope of the Department's wetland jurisdiction cannot be changed by placing fill on a site after the effective date of the Tidal Wetlands Act and implementing regulations (Tr. at 1119-1120). In other words, Mezzacappa Bros. cannot rely on a prior tidal wetlands permit that authorized the construction of a 10-foot high slope on the site in order to subsequently limit the scope of the Department's wetlands jurisdiction in the future.

IV. Site Visits

The violations alleged in the January 23, 2008 complaint are based on the observations made by Department staff during a series of site visits. The following members of Department staff visited the Meredith Avenue property.

Mahmoud Assi is an Environmental Engineer 2 with the Department's Region 2 Office, Division of Solid and Hazardous Materials. Mr. Assi has worked in the Division of Solid and Hazardous Materials for 17 years. During this 17-year period, Mr. Assi has inspected solid waste management facilities for compliance with 6 NYCRR part 360, and has reviewed permit

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[5] Mr. Spiezia also testified about the NGVD 88 datum, which is based on a 1988 tidal study undertaken by the Nation Oceanic and Atmospheric Administration (NOAA) (Tr. at 1078). Based on this hearing record, the relationship, if any, between NGVD 88 datum and the contour elevation lines on Exhibit 81 is not known.

applications for solid waste management facilities. (Tr. at 261.)

Kenneth B. Brezner, P.E., is an Environmental Engineer 3 with the Department's Region 2 Office, Division of Solid and Hazardous Materials. He has a Bachelor's in Chemical Engineering from the Rensselaer Polytechnic Institute, and has worked for the Department for 20 years. During this period, Mr. Brezner worked in the Division of Solid and Hazardous Materials for 18½ years. Presently, Mr. Brezner is the Regional Solid Materials Engineer, and supervises ten Department staff members. Mr. Brezner conducts about 12 site inspections annually. (Tr. at 275-277.)

George Stadnick is a Biologist 1 Marine in the Department's Region 2 Office, Division of Fish, Wildlife and Marine Resources, Bureau of Marine Resources. Mr. Stadnick has worked in the Bureau of Marine Resources since June 1986, and is the Bureau's acting manager. Mr. Stadnick's duties include reviewing permit application related to ECL articles 15 and 25, and § 404 of the federal Clean Water Act related to Water Quality Certifications (*see* 6 NYCRR 608.9). In addition, Mr. Stadnick conducts permit compliance inspections and enforcement investigations. (Tr. 24-26.)

In addition to Department staff, Staff from the New York City Department of Sanitation (NYC DOS) visited the Meredith Avenue property on May 4, 2005. Exhibit 3 is a copy of a video tape taken by NYC DOS Staff (Tr. at 13-14). Ron Fede has been an Environmental Police Officer with the NYC DOS for 22 years. His duties include inspecting transfer stations and investigating illegal dumping. Officer Fede was present during the May 4, 2005 inspection with NYC DOS Environmental Police Officer Sweeney and Deputy Inspector Lombardo. Officer Sweeney took the video tape, according to Officer Fede. (Tr. at 120-121, 124.) The video tape shows a truck dumping approximately 15 cubic yards of material on the Meredith Avenue property near the Anthony Bruno property (Tr. at 141; Exhibit 3).

Mr. Stadnick visited the Meredith Avenue property on April 1, 2005 (Tr. at 64), May 10, 2005 (Tr. at 82-83), and June 7, 2005 (Tr. at 96). Messrs. Assi and Brezner went to the Meredith Avenue property with Mr. Stadnick on June 7, 2005 (Tr. at 262, 283-285). During these site visits, Mr. Stadnick took photographs of the site. Many of these photographs are Exhibits to the hearing record. The photographs corroborate Staff's observations of the site conditions.

V. The June 19, 2007 Site Visit

Messrs. Assi, Brezner and Stadnick visited the Meredith Avenue property on June 19, 2007 to collect soil samples for a qualitative examination (Tr. at 262-263, 294, 306). Exhibit 42 is an inspection report prepared by Mr. Assi (Tr. at 263), which includes a sketch of the site, and the locations of the following features: (1) the entrance to the site from Meredith Avenue; (2) several stockpiles; and (3) the wetland area. In addition, Exhibit 42 shows the approximate location of where Staff collected three soil samples on the site during the June 19, 2007 visit (Tr. at 264-265).

A. Sample Collection

Mr. Brezner explained how each sample was collected. First, a few inches of soil were dug away from the surface with a small shovel. Then, each sample was collected from the bottom of a shallow hole. Mr. Brezner explained further that this collection method provided a subsurface sample. Prior to collecting any samples, Mr. Brezner labeled three zip-lock plastic bags. (Tr. at 296-306.)

Each sample consists of about one cup of material, and was sealed in the pre-marked bags. During the hearing, Mr. Brezner testified that he retained possession and control of the three samples since the June 19, 2007 visit. (Tr. at 270-271, 296-306; Exhibits 21, 42, 46A and 46B.)

B. Processing and Qualitative Examination

During his testimony, Mr. Brezner outlined the instructions that he gave Mr. Assi, who processed the samples for examination (Tr. at 307-313). Mr. Assi, in turn, testified about how he followed Mr. Brezner's instructions for processing the samples (Tr. at 266-270). To begin, Mr. Assi divided each sample in half. Half the sample was retained in the original collection bag, and the second half was screened in the manner described below.

For each sample, the material was placed in a set of three stacked containers separated by two screens. The size of the screen between the first and second containers is about 1/4 inch or 6.3 millimeters (6 mm). The size of the screen between the second and third containers is described as No. 10, which is about 2 mm.

The set of containers were stacked together and a portion of the original sample was placed in the top container. With the lid in place, the stacked containers were then shaken to separate the sample into three parts. The three containers were then separated. In the first (or top) container were those particles that are larger than 1/4 inch (or 6 mm) in diameter. Half the sample with particles greater than 6 mm in diameter was removed from the top container and placed into a labeled bag (*e.g.*, Sample #1, 6-mm, dry). The other half was washed, dried and placed into a labeled bag (*e.g.*, Sample #1, 6-mm, washed).

In the second (or middle) container were those particles that are less than 6 mm, but greater than 2 mm in diameter. Half the middle sample was removed from the middle container and placed into a labeled bag (*e.g.*, Sample #1, 2-mm, dry). The other half was washed, dried and placed in a labeled bag (*e.g.* Sample #1, 2-mm, washed).

In the third (or bottom) container are the fines, which are less than 2 mm in diameter. The fines were placed in a labeled bag (e.g., Sample #1, Fines). Mr. Brezner explained that a portion of the 6-mm and 2-mm samples were washed in order to remove any fines that might stick to the comparatively larger particles. The fines were not washed, however, due to their small size. The screening and washing process was repeated in the same manner for each of the three samples collected from the site on June 19, 2007. (Tr. at 307-308.)

After processing the samples in the manner described above, Mr. Assi returned the materials to Mr. Brezner (Tr. at 270, 273-274). Mr. Brezner examined the processed samples with a microscope (Tr. at 314), which is set up with a camera (Tr. at 315). At the hearing, Mr. Brezner described his observations, which are summarized above in the Findings of Fact (Nos. 45-50).

V. Liability

A. Multiplicity of Allegations

In the January 23, 2006 complaint, Department staff asserts seventeen causes of action and alleges multiple violations of the ECL and implementing regulations. The alleged violations are associated with several program areas regulated by the Department. ECL article 15, title 5 (Protection of Water) regulates, among other things, the placement of fill in navigable waters of the State. The implementing regulations are 6 NYCRR part 608 (Use and Protection of Waters). ECL article 17 (Water

Pollution Control) regulates the discharge of pollutants to surface waters including the State's marine district. Article 25 (Tidal Wetlands) regulates activities in tidal wetlands. The regulations that govern activities in and adjacent to tidal wetlands are 6 NYCRR part 661 (Tidal Wetlands - Land Use Regulations). ECL article 27, title 7 (Solid Waste Management and Resource Recovery Facilities) regulates the disposal and storage of solid waste materials, which includes construction and demolition debris. The implementing regulations are 6 NYCRR part 360 (Solid Waste Management Facilities) and various subparts.

These various program areas result in concurrent regulatory authority over the natural resources at the Meredith Avenue property. For example, the Arthur Kill is a tidal wetland (ECL article 25) and a navigable water of the State (ECL article 15). In addition, pollutants discharged to the Arthur Kill are regulated pursuant to ECL article 17.

Given the number of alleged violations associated with several different program areas, there are issues concerning the number of violations that Department staff has proven, and the civil penalties that may be assessed for the demonstrated violations. The Commissioner has addressed these issues in prior administrative decisions by considering the similarity of the elements of proof for each alleged violation.

In *Matter of Richard K. Steck* (Order of the Commissioner, March 29,1993), the Commissioner considered two separate circumstances. First, the Commissioner considered whether it was appropriate to assess separate civil penalties for violating a statute and a regulation where the regulation reiterates a statutory prohibition. Under such circumstances, the Commissioner has held that it would be inappropriate to conclude that separate violations have occurred and thereby assess separate civil penalties because such an assessment would undermine the intent of the Legislature to establish the level of maximum civil penalties for a particular violation. More recently, the Commissioner reaffirmed this principle in determining the appropriate civil penalty in the *Matter of Frank Coppola, Sr.* (Order of the Commissioner, Nov. 12, 2003). This circumstance exists here with respect to all but the twelfth, thirteenth, fourteenth, fifteenth, and seventeenth causes of action.

The second circumstance considered in *Steck* (*supra.*)was whether it would be appropriate to conclude that separate violations have occurred and thereby assess separate civil

penalties for violating two similarly worded regulatory provisions. The Commissioner concluded in *Steck* (*supra.*) that separate civil penalties could be assessed if the elements of proof for each violation are different. The Commissioner has addressed this principle in detail in the *Matter of David Wilder*, Supplemental Order, Sept. 27, 2005 (*also see Matter of Q.P. Service Sta. Corp.*, Decision and Order, Oct. 20, 2004). The applicability of this principle will be discussed further below with respect to individual causes of action from the January 23, 2006 complaint.

Finally, in the *Matter of Linda Wilton and Costello Marine, Inc.* (Order, Feb. 1, 1991), the Commissioner determined that a single act that would require a permit under three independent bases constituted three distinct violations. The principle in *Wilton* applies here and is discussed below.

Each cause of action asserted in the January 23, 2005 complaint is addressed below.

B. <u>Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 by installing concrete barriers at the site on or before November 12, 2004</u>

In the January 23, 2006 complaint, Department staff asserts as the first cause of action that Respondents allegedly violated ECL 25-0401 and 6 NYCRR 661.8 by installing concrete barriers at the site on or before November 12, 2004. In the March 12, 2006 answer, Respondents admit that the barriers have been on the site since 1985.

After the Commissioner has inventoried and mapped the State's tidal wetlands, ECL 25-0401(1) requires any person to obtain a permit from the Department before undertaking any regulated activity in the tidal wetland and adjacent area. ECL 25-0401(2) identifies the regulated activities that require prior authorization from the Department. These regulated activities include, among other things, the excavation of material from the wetlands and its adjacent area, or the placement of fill in the wetlands and its adjacent area. Building any structures or roads are also regulated activities. The regulations at 6 NYCRR 661.8 reiterate the statutory requirement to obtain a permit before undertaking any regulated activities in the tidal wetland and adjacent area.

Staff's proof establishes this violation. As noted above, Department staff received a second tidal wetlands permit

application from Sam Mezzacappa dated November 12, 2004 (Exhibit 6). The application included 21 photographs, some of which Staff offered at the hearing and are identified as Exhibits 7 through 12, inclusive. Jersey barriers are depicted in Exhibits 9 and 10, and are located along the crest of the slope on the northeastern portion of the Meredith Avenue property.

Department staff also offered a series of aerial photographs of the Meredith Avenue property, which are identified in the hearing record as Exhibits 13 through 18. Jersey barriers are depicted in Exhibit 15, which was taken in 2001. The Jersey barriers are located along the crest of the slope on the northeastern portion of the property. The aerial photographs identified as Exhibits 17 and 18 were taken in 2004. The Jersey barriers depicted in Exhibit 15 are also present in Exhibit 17. In addition, Respondents admit, in the March 12, 2006 answer, that the barriers have been on the site since 1985.

Based on Exhibit 21, the tidal wetland boundary is located along the toe of the slope, and the regulated adjacent area extends 150 feet landward from the tidal wetland boundary. Therefore, the adjacent area extends beyond the crest of the slope where Respondents placed in the Jersey barriers. Prior to the hearing, Mr. Stadnick searched the Department's files and, except for the first tidal wetlands permit (Exhibit 40), did not find any permit that Staff had issued to Mezzacappa Bros., or an order on consent, which authorized the placement of Jersey barriers on the site (Tr. at 61).

Based on the foregoing, Respondents placed the Jersey barriers in the tidal wetland adjacent area on or before November 12, 2004 without first obtaining a permit from the Department in violation of ECL 25-0401(2) and 6 NYCRR 661.8. Based on the rationale provided in *Steck, supra*, this allegation should be considered a single violation because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

Furthermore, the Jersey barriers remain on the site based on Staff's observations made over the course of several site inspections in 2005 and 2007. Staff's unrefuted observations, and Respondents' admission establish the continuous nature of the violation.

C. Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 by placing C&D debris fill on a vegetated slope at the site on or before November 12, 2004

In the second cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or before November 12, 2004 by placing fill on a vegetated slope at the site, and that the fill was C&D debris. Although Respondents admit that they placed clean fill on the site, they deny that any of the fill was C&D debris. Respondents also assert that the fill was placed on an upland area of the site.

The previous section provides a summary of the statutory (*see* ECL 25-0401) and regulatory (*see* 6 NYCRR 661.8) requirements to obtain a permit from the Department prior to undertaking any regulated activities in the tidal wetland and adjacent area. With respect to these alleged violations, Staff also contends that the fill on this portion of the site is C&D debris.

The term, "construction and demolition (C&D) debris," is defined in the regulations (*see* 6 NYCRR 360-1.2[b][38]) as uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads, and uncontaminated solid waste resulting from land clearing. The definition provides further that such solid waste may include bricks, concrete and other masonry materials, soil, rock, wood, plastics, pipes and metal.

The regulatory definition of the term "solid waste" is expansive. Pursuant to 6 NYCRR 360-1.2(a), solid waste is discarded material, in general. Materials are discarded when they are abandoned by being either disposed of, or stored on, any land such that the materials or any of its constituents may enter the environment or be discharged to surface waters.

Department staff proved this allegation. As part of the second tidal wetlands permit application in November 2004, Respondents submitted Exhibits 8 through 12. In these photographs, recognizable pieces of concrete, brick, asphalt, wood, and other debris such as pieces of plastic and metal are scattered across the surface of the disturbed areas. I conclude that these materials as described by Staff are C&D debris, as that term is defined at 6 NYCRR 360-1.2(b)(38).

Exhibits 8 through 12 are pictures that were taken along the northwestern portion of the site referred to as the string piece,

which is located entirely within the adjacent area of the tidal wetland (Exhibit 21). Therefore, Respondents violated ECL 25-0401(2) and 6 NYCRR 661.8 on or about November 2004 by placing C&D debris in the adjacent area of the tidal wetland without a permit or any other authorization from the Department.

With respect to the issue of liability, the nature of the fill is immaterial. The relevant element of proof is whether Respondents placed fill in the adjacent area. This question can be answered in the affirmative and, therefore, establishes the violation. The fact that the fill was C&D debris may be considered an aggravating factor in determining the appropriate civil penalty for this violation because C&D debris is a form of solid waste that, due to its nature and its placement in the adjacent area, has despoiled the tidal wetland.

Based on the rationale outlined in *Steck, supra*, this allegation should be considered a single violation because the regulatory provision allegedly violated reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities. Furthermore, the violations alleged in the first and second causes of actions are separate and distinct violations based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. In other words, placing Jersey barriers in the adjacent area on the site is a regulated activity that is separate from the regulated activity associated with placing fill (regardless of whether that fill is C&D debris) in the adjacent area of the site.

D. <u>Alleged violation of ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing C&D debris on a vegetated slope on the site on or before November 12, 2004</u>

In the third cause of action, Staff alleges that Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing C&D debris on a vegetated slope on the site on or before November 12, 2004. Respondents deny this allegation.

ECL 27-0707(1) prohibits any person from constructing and operating any solid waste management facility without first obtaining a permit from the Department. The regulations at 6 NYCRR 360-1.7(a)(1) reiterate the statutory requirement to obtain a permit before constructing and operating a solid waste management facility. Section 360-1.5(a), which Staff cites in the third cause of action, prohibits the disposal of solid waste

except at either an exempt disposal facility or a duly authorized disposal facility.

A solid waste management facility is a facility where solid waste is transferred, processed, or reduced in volume, as well as a sanitary landfill, and a facility for the disposal of C&D debris (*see* ECL 27-0701[1]). The regulatory definition of the term "solid waste management facility," which is provided at 6 NYCRR 360-1.2(b)(158), generally mirrors the statutory definition, and identifies additional facilities such as waste tire storage facilities and C&D debris processing facilities as other types of solid waste management facilities.

The evidence offered by Department staff establishes a violation. As noted in the discussion concerning the second cause of action, the photographic evidence (*see* Exhibits 7-12) depicts recognizable pieces of concrete, brick, asphalt, wood, and other debris such as pieces of plastic and metal in the adjacent area of the tidal wetlands, which includes the slopes. This material is C&D debris, and its disposal is regulated pursuant to ECL article 27, title 7. Moreover, Staff has not issued any permit to anyone to operate any solid waste management facility at the Meredith Avenue property. Consequently, Respondents are not authorized to operate any solid waste management facility (*see* ECL 27-0707(1) and 6 NYCRR 360-1.7[a][1]), and the Meredith Avenue property is not an authorized solid waste management facility (*see* 6 NYCRR 360-1.5[a]).

Violations of ECL 27-0707 and 6 NYCRR 360-1.5(a) have the same elements of proof: (1) the lack of a permit from the Department, and (2) the presence of solid waste. Given the lack of any permit from the Department and the disposal of C&D debris at the Meredith Avenue property, I conclude that Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) on or before November 12, 2004. Because the elements of proof for violations of ECL 27-0707 and 6 NYCRR 360-1.5(a) are the same, the Commissioner should not assess separate civil penalties for each violation based on the determination in *Wilder, supra* (*also see Q.P. Service, supra*).

Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the third cause of action is different from the violation asserted in the second cause of action because the elements of proof for the violations alleged in the two, respective, causes of action are different. For violations of ECL article 27, title 7 (*i.e.*, the third cause of action), the elements of proof are the disposal of solid waste, and the

absence of a permit from the Department. For violations of ECL article 25 (*i.e.*, the second cause of action), however, the elements of proof are the existence of a regulated tidal wetland and the unauthorized placement of fill in the tidal wetland.

E. <u>Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 by removing vegetation from the adjacent area of the tidal wetlands on the site on or before November 12, 2004</u>

In the fourth cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or before November 12, 2004 by removing vegetation from the adjacent area of the tidal wetlands on the site. Respondents deny this alleged violation.

The discussion concerning the first cause of action provides a summary of the statutory (*see* ECL 25-0401) and regulatory (*see* 6 NYCRR 661.8) requirements to obtain a permit from the Department prior to undertaking any regulated activities in the tidal wetland and adjacent area. Pursuant to 6 NYCRR 661.4(ee), regulated activities include those activities that may substantially alter or impair the natural condition or function of any tidal wetland. During the hearing, Mr. Stadnick, opined that the unvegetated adjacent area on the site has adversely impacted the wetlands (Tr. at 1153) because soil and debris eroded into the tidal wetland and essentially filled it in (Tr. at 210). Based on Mr. Stadnick's opinion, I conclude that removing the vegetation from the adjacent areas on the site is a regulated activity that would require a permit from the Department. Respondents did not have a valid permit from the Department.

During his review of the photographs that Respondents submitted with the second tidal wetlands permit application (Exhibits 7 through 12), Mr. Stadnick observed that portions of the slope were disturbed and completely devoid of vegetation, and that the unvegetated areas extended into the tidal wetland. When Mr. Stadnick visited the site on April 1, 2005, he observed unvegetated areas on the site. Therefore, Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or before November 12, 2004 by removing vegetation from the adjacent area of the tidal wetlands on the Meredith Avenue property.

Based on the Commissioner's determinations in *Steck, supra* and *Coppola, supra*, this allegation should be considered a single violation because the regulatory provision allegedly violated reiterates the statutory requirement to obtain a permit from the

Department before undertaking any regulated activities. Furthermore, this violation is distinguishable from those asserted in the first, second and third causes of actions based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit.

F. Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 by disposing C&D debris in the tidal wetland and adjacent area on the site between November 12, 2004 and April 1, 2005

In the fifth cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 between November 12, 2004 and April 1, 2005 by disposing C&D debris in the tidal wetland and adjacent area on the site. Respondents deny this allegation.

ECL 25-0401 and 6 NYCRR 661.8 establish the requirement to obtain a permit from the Department prior to undertaking any regulated activities in the tidal wetland and adjacent area. Mr. Stadnick's testimony establishes that from November 12, 2004 to April 1, 2005, Respondents did not have a valid permit from the Department (Tr. at 61).

Department staff's proof offered at the hearing establishes the violation. During his April 1, 2005 site visit, Mr. Stadnick took a series of six Polaroid photographs, which are identified as Exhibit 20A through 20F in the hearing record. As evidenced by Exhibits 20A through 20F, C&D debris was placed in the adjacent area and the tidal wetland. I find that Respondents placed additional C&D debris on the Meredith Avenue property from November 2004 until Mr. Stadnick's April 1, 2005 site visit.

Staff established that Respondents placed about 20 cubic yards of C&D debris in the tidal wetland and adjacent area between November 2004 and April 2005. Therefore, Respondents violated ECL 25-0401(2) and 6 NYCRR 661.8 between November 2004 and April 2005 by placing C&D debris in the tidal wetland and its adjacent area without a permit or any other authorization from the Department.

With respect to the issue of liability concerning ECL article 25 and 6 NYCRR part 661, the nature of the fill is immaterial. The relevant element of the allegation in the fifth cause of action is whether the material that Staff observed, which is C&D debris, was fill that Respondents placed in the tidal wetland and adjacent area. This question can be answered in the affirmative and, therefore, establishes the violation.

The fact that the fill was C&D debris may be considered an aggravating factor in determining the appropriate civil penalty for this violation because C&D debris is a form of solid waste that, due to its nature and its placement in the adjacent area, has despoiled the tidal wetland.

This allegation should be considered a single violation because the regulatory provision allegedly violated reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities (*see Steck, supra* and *Coppola, supra*). Furthermore, the tidal wetlands violation asserted in this cause of action is separate and distinct from the violations asserted in the previously discussed causes of actions based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. Here, Respondents have placed more fill in the form of C&D debris on the site without a permit since November 2004.

G. <u>Alleged violation of ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing C&D debris on the site between November 12, 2004 and April 1, 2005</u>

In the sixth cause of action, Staff alleges that Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing C&D debris on the site between November 12, 2004 and April 1, 2005 without a permit from the Department. Respondents deny this alleged violation.

Exhibits 20A through 20F are photographs that Mr. Stadnick took on April 1, 2005. They show that Respondent brought additional C&D debris (in the form of recognizable pieces of concrete, brick, asphalt, wood, and other debris such as pieces of plastic and metal) to the site after November 2004. Staff estimates that Respondents placed about 20 cubic yards of C&D debris in the tidal wetland and adjacent area between November 2004 and April 2005. Therefore, without a permit from the Department and given the disposal of additional C&D debris at the Meredith Avenue property after November 2004, I conclude that Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) on April 1, 2005.

Because there are identical elements of proof associated with a violation of ECL 27-0707 and 6 NYCRR 360-1.5(a), the Commissioner should not assess separate civil penalties for each violation based on the determination in *Wilder, supra* (*also see Q.P. Service, supra*). However, based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the

sixth cause of action is different from the violation asserted in the third cause of action because the violations alleged in the January 23, 2006 complaint occurred at different times.

An alternative conclusion, would be that the factual information supporting the violation asserted in the sixth cause of action demonstrates the continuous nature of violation asserted in the third cause of action. In other words, Respondents continued to place additional C&D debris on the site after November 2004 without a permit from the Department.

H. Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 by excavating material from the stockpile of fill on the site over several days in May 2005

In the seventh cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 over several days by excavating material from the stockpile of fill on the site. Respondents admit moving clean fill on one day.

The factual basis for this alleged violation are the observations made during NYC DOS Staff's inspection on May 4, 2005, and Department staff's inspection on May 10, 2005. The video tape (Exhibit 3) shows a truck dumping approximately 15 cubic yards of material on the northwestern portion of the Meredith Avenue property referred to as the string piece. This portion of the site is near the Arthur Kill, and located entirely within the adjacent area of the tidal wetland (Tr. at 661; Exhibit 21).

Mr. Stadnick returned to the site on May 10, 2005, and took more photographs identified as Exhibits 22A through 22E. The views in Exhibits 22A and 22B are comparable to those depicted in Exhibits 20A and 20B. A comparison of Exhibits 22A and 22B with Exhibits 20A and 20B shows that Respondents placed a substantial amount of fill on the western end of the string piece between Staff's April 1, 2005 and May 10, 2005 visits. Mr. Stadnick confirmed this observation during his testimony, and noted that the depth of the newly placed fill equaled or exceeded the height (*i.e.*, about two feet) of the concrete slabs located along the crest of the slope (Tr. at 86).

Frank Mezzacappa testified that on or about May 4, 2005, he took material from the screened stockpile (Exhibit 21) to fill low areas on the string piece. According to Mr. Mezzacappa, he understood that the first tidal wetlands permit allowed him to

"fix potholes" and place material in low areas on this area of the Meredith Avenue property (Tr. at 825-827).

Based on the testimony of Staff from NYC DOS and the Department, the photographic evidence, as well as Frank Mezzacappa's admission, I conclude that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or about May 4, 2005 by excavating material from the stockpile on the site and placing it on the northwestern portion of the site, which is located entirely within the adjacent area, without a permit from the Department.

Respondents' argument that the May 1988 tidal wetlands permit (Exhibit 40) authorized maintenance activities is not persuasive because the terms and conditions of the permit do not expressly authorize any maintenance activities, except for the maintenance of the vegetative buffer (Tr. at 89). In addition, this violation occurred on or about May 4, 2005 – long after the expiration of the May 1988 tidal wetlands permit, which was December 31, 1989. Nothing was offered at the hearing to show that the terms of the permit were extended past the expiration date of the May 1988 tidal wetlands permit.

Given the rationale outlined in *Steck, supra* and *Coppola, supra*, this allegation should be considered a single violation because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities. Furthermore, the tidal wetlands violation asserted in this cause of action is separate and distinct from the violations asserted in the previous causes of actions based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. This violation occurred at a different time from those asserted in the first through sixth causes of action.

I. Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by excavating material from the stockpiles on the site, and subsequently placing and grading that material in the tidal wetlands and adjacent area

In the eighth cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by excavating material from the stockpiles on the site, and subsequently placing and grading that material in the tidal wetlands and adjacent area. Respondents deny placing any material in the tidal wetlands, but admit that on one day they moved material from the stockpiles. Respondents state further

that they removed items such as tires, trailers, scrap pipe, and other similar items from the site.

The bases for this alleged violation are the observations made by Department staff during the May 10, 2005 site visit, and Exhibits 22A through 22E. These photographs show that after Respondents placed additional fill on the western end of the northwestern portion of the site, they graded the material.

Frank Mezzacappa testified that in May 2005, he and his son moved about 11 truck loads of material from the screened stockpile and the larger stockpile, and placed the material on the northwestern portion of the Meredith Avenue property referred to as the string piece. In addition, Mr. Mezzacappa stated that he "knocked down" a few piles in this area of the site, but did not undertake a grading operation. Rather, Mr. Mezzacappa stated that he put the material on low areas to raise the elevation back to the height of the area when Respondents originally filled the area, consistent with the terms of the first tidal wetlands permit. (Tr. at 1036.) Using the material from the screened stockpiles, Mr. Mezzacappa said that he added from 1 to 14 inches of material to the low areas (Tr. at 1036).

Based on the foregoing, I conclude that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or about May 4, 2005 by grading the material excavated from the stockpile on the site after Respondents placed it on the portion of the site located entirely within the adjacent area without a permit from the Department.

The allegation that Respondents violated both ECL 25-0401 and 6 NYCRR 661.8 should be considered a single violation, based on the precedent outlined in *Steck, supra* and *Coppola, supra*, because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities. Furthermore, the tidal wetlands violation asserted in this cause of action is separate and distinct from the violations asserted in the previous causes of actions based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. With respect to this cause of action, grading is a distinct, regulated activity compared to filling.

J. Alleged violation of ECL 15-0505 and 6 NYCRR 608.5 by placing excavated material from the stockpile below the mean high water mark of the Arthur Kill and in the adjacent area of the tidal wetland

In the January 23, 2006 complaint, Department staff alleges as the ninth cause of action that Respondents violated ECL 15-0505 and 6 NYCRR 608.5 by placing excavated material from the stockpile on the site below the mean high water mark of the Arthur Kill and in the adjacent area of the tidal wetland. In the March 12, 2006 answer, Respondents deny this alleged violation.

ECL 15-0505(1) prohibits the placement of any fill below the mean high water mark of any of the State's navigable waters, as well as the State's tidal marshes and wetlands that may be contiguous or adjacent to navigable waters without a permit from the Department. The language of the regulatory prohibition at 6 NYCRR 608.5 (Excavation or placement of fill in navigable waters) mirrors the statutory prohibition.

The term, "navigable waters of the state" is defined at 6 NYCRR 608.1(l), and means:

> "all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation. It does not include waters that are surrounded by land held in single private ownership at every point in their total area."

Department staff proved this violation (*see* Findings Nos. 35 and 36). Mr. Stadnick testified that Exhibit 22E depicts the string piece near the Arthur Kill, and shows that Respondents had placed more fill at this location between his April 1, 2005 and May 10, 2005 site visits. In addition to being part of the tidal wetland, characterized as littoral zone, the Arthur Kill is also a navigable water of the State. (Tr. at 89-90; Exhibit 22E.) As noted above, Respondents did not have any permit from the Department since the expiration of their first tidal wetlands permit in December 1989 (Tr. at 61; Exhibit 40).

The parties do not dispute whether the Arthur Kill and Neck Creek are navigable waters of the State. Pursuant to the regulatory definition provided at 6 NYCRR 608.1(l), I conclude that the Arthur Kill is a navigable water of the State. Moreover, the tidal wetlands associated with the Meredith Avenue property are adjacent to and contiguous with the Arthur Kill (Exhibits 1 and 2). Consequently, the tidal wetlands are also navigable waters of the State, as provided by 6 NYCRR 608.1(l). High marsh areas are located below the mean high water mark. Therefore, Respondents violated ECL 15-0505 and 6 NYCRR 608.5 on or about May 4, 2005 when they filled a portion of the Meredith Avenue property located below the mean high water mark of the Arthur Kill without a permit from the Department.

The allegation that Respondents violated both ECL 15-0505 and 6 NYCRR 608.5 should be considered a single violation because the regulation reiterates the statutory requirement to obtain a permit from the Department before placing any fill in the State's navigable waters (*see Steck, supra* and *Coppola, supra*).

Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in this cause of action is distinct from the violations asserted in the previous causes of action because the elements of proof for each of these various violations are different. For violations of ECL article 15, the elements are proof of a navigable water and the absence of a permit for fill. For violations of ECL article 25, the elements of proof are the existence of a regulated tidal wetland and the unauthorized placement of fill in the tidal wetland. Although the Arthur Kill is a navigable water of the state, it and the areas adjacent to it are also regulated tidal wetlands. Navigable waters and tidal wetlands, however, are regulated by different statutory schemes. These different statutory schemes further support the conclusion that the Legislature intended to authorize separate penalties for violations of ECL article 15 and ECL article 25.

K. <u>Alleged violation of ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by placing and grading solid waste material from the stockpiles on the site</u>

In the tenth cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by taking solid waste material from the stockpiles and depositing it on the southwestern portion of the site. Respondents admit that, on one day, they took clean fill from the stockpile and spread the material on the site.

The apparent distinction between the allegation asserted in the tenth cause of action and that asserted in the seventh cause of action is, with respect to the latter, that the alleged fill material is solid waste. Pursuant to ECL 25-0401, regulated activities include placing "fill of any kind" in a tidal wetland. The nature of the fill, therefore, is not an element of the proof needed to establish an alleged violation.

I conclude that the violation asserted in the tenth cause of action is not different from the violation asserted in the seventh cause of action. Consequently, the Commissioner should dismiss the charge alleged in the tenth cause of action because it is the same as the charge alleged in the seventh cause of action.

L. <u>Alleged violation of ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing solid waste on the site without the proper authorization</u>

In the eleventh cause of action, Staff alleges that Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) by disposing solid waste on the site without the proper authorization. Respondents deny this allegation.

The basis for this alleged violation is the observations made by Department staff during the June 7, 2005 visit to the Meredith Avenue property (*see* Findings Nos. 38-44). In the absence of any permit or other authorization from the Department, the Meredith Avenue property is not an authorized solid waste management facility. Therefore, Respondents violated 6 NYCRR 360-1.5(a) when they deposited C&D debris material, a form of solid waste, on the site before Staff's June 7, 2005 visit.

Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the eleventh cause of action is different from the violation asserted in the third and sixth causes of action because the dates when the various violations occurred are different. An alternative conclusion would be that the factual information supporting the violation asserted in the eleventh cause of action demonstrates the continuous nature of violations asserted in the third and sixth causes of action.

M. Alleged violation of 6 NYCRR 360-1.7(a) by operating a solid waste management facility by excavating, processing and relocating solid waste on the site

In the January 23, 2006 complaint, Department staff asserts as the twelfth cause of action that Respondents allegedly violated ECL 6 NYCRR 360-1.7(a) by operating a solid waste management facility without a permit when they excavated, processed, and relocated solid waste on the site. Respondents deny the alleged violation.

In its closing statement, Staff argued that it demonstrated this violation because Respondents processed and, subsequently, disposed of solid waste at the site without a permit from the Department (Tr. at 1186). The regulations define the term "storage" and its relationship to the disposal of solid waste. Pursuant to 360-1.2(b)(164), "storage" means the containment of any solid waste in a manner that does not constitute disposal under section 360-1.2(a)(3); however, the accumulation of solid waste for a period in excess of 18 months is considered disposal.

Various stockpiles are depicted on Exhibit 21. Between 1985 and 1986, the Respondents began depositing excavated materials in stockpiles at the site that have elevations of 50.3 feet and 66.1 feet (Tr. at 1038; Exhibit 21). As noted above, the excavated material started to accumulate on the site when time did not permit its transport to the Fresh Kills Landfill during its normal operating hours, or when the landfill would not accept any excavated material during inclement weather. The screened stockpiles date from 1997 (Tr. at 831), and on Exhibit 21 have elevations of 25.4 feet and 30.8 feet, respectively. Mr. Brezner's subsequent qualitative examination of samples collected from the site on Staff's June 19, 2007 visit demonstrates that solid waste was mixed in with the soil stockpiled on the site. (Tr. at 315-322.)

With the accumulation of excavated materials, which included solid waste, on the site since the mid-1980s, I conclude that Respondents have stored and, by operation of the regulation, subsequently disposed of solid waste material in the form of C&D debris on the Meredith Avenue property without a permit from the Department in violation of 6 NYCRR 360-1.7(a).

N. Alleged violation of 6 NYCRR 360-16.1(c) by processing C&D debris prior to disposal on the site

In the thirteenth cause of action, Staff alleges that Respondents violated 6 NYCRR 360-16.1(c) by processing C&D debris prior to disposal on the site. In the March 12, 2006 answer, Respondents deny that they processed C&D debris on the site.

Subpart 360-16 is entitled "Construction and Demolition Debris Processing Facilities." A "construction and demolition debris processing facility" is a solid waste management facility where C&D debris is received and processed (*see* 6 NYCRR 360-1.2[b][39]). The regulations broadly define C&D debris as uncontaminated solid waste consisting of, among other things, bricks, concrete, rock and wood (*see* 6 NYCRR 360-1.2[b][38]). Subpart 360-16 outlines the relevant requirements that pertain to the construction and operation of C&D debris processing facilities. Operational requirements for C&D processing facilities permitted by the Department are outlined at 6 NYCRR 360-16.4.

Section 360-16.1(c) prohibits the construction or operation of any facility that receives, treats or processes C&D debris without a permit from the Department. Pursuant to 6 NYCRR 360-1.2(b)(120), a processing facility means a combination of structures, machinery or devices used to reduce or alter the volume or the chemical and physical characteristics of solid waste by separating, crushing or screening, among other things.

Frank Mezzacappa testified that from time to time since 1997, Mezzacappa Bros. screened materials from the large stockpiles on the Meredith Avenue property. He stated further that during the screening process, materials such as rock, concrete and asphalt were removed from the soil and discarded into a dumpster. Alternatively, when a dumpster was not available, discarded materials would be put aside and piled up. (Tr. at 744, 831, 984.)

With respect to what Frank Mezzacappa characterized as maintenance (*see* § V[H] and § V[I] regarding the seventh and eighth causes of action, respectively), Mr. Mezzacappa explained that, with the excavator, he removed large chucks of concrete and asphalt from the large stockpiles identified on Exhibit 21 with elevations of 50.3 feet and 66.1 feet. With this sorting process, he tried to limit the amount of concrete and asphalt to 5% or 6% of the total amount of fill. (Tr. at 989-990.)

The screening and sorting activities undertaken by Frank Mezzacappa at the site have resulted in the operation of a C&D debris processing facility. Because the Department has not issued a permit for these activities, Respondents have violated 6 NYCRR 360-16.1(c) since 1997, when they began to screen the C&D debris from the excavated materials stockpiled on the site.

O. Alleged violation of 6 NYCRR 360-1.14(b)(1) by allowing solid waste to enter surface and/or groundwater

In the fourteenth cause of action, Staff alleges that Respondents violated 6 NYCRR 360-1.14(b)(1) by allowing solid waste to enter surface and/or groundwater. Respondents deny there is any solid waste on the site.

The regulations at 6 NYCRR 360-1.14 outline the operational requirements for all solid waste management facilities. Section 360-1.14(b)(1) states in full that:

> "Solid waste must not be deposited in, and must be prevented from, entering surface waters or groundwaters."

Department staff visited the Meredith Avenue property in April, May and June 2005, and in June 2007. During each visit, Staff took photographs of the site. Many of the photographs offered as evidence during the course of the hearing show that fill, contaminated with C&D debris, was placed on or near the slope constructed by Respondents. Although Respondents were authorized to fill portions of the site and to construct a slope pursuant to the terms of the first tidal wetlands permit (Exhibit 40), the permit did not authorize Respondents to deposit C&D debris on the Meredith Avenue property. In addition, Staff observed and photographed fill on the slope or at the toe of the slope that had eroded into the tidal wetlands. Some of the relevant photographs include Exhibits 20F, 22A, 22B, 22D, 22E, 25A, 25C, and 33. Based on these photographs, which corroborate Staff's observations during the various site visits, fill, which is contaminated with C&D debris, entered the tidal waters in violation of 6 NYCRR 360-1.14.

Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in this cause of action is distinct from the violations asserted in the previous causes of action because the elements of proof for the various violations previously pleaded in the January 23, 2006 complaint. Violations of ECL article 25, and ECL article 15, title 5 require proofs of

activities in and adjacent to tidal wetlands and navigable waters of the State, respectively. Violations of the operational requirements at 6 NYCRR 360-1.14 require proof of solid waste deposited in surface waters. The authority provided by 6 NYCRR part 360 to regulate solid waste management facilities, is separate and distinct from the regulatory authority provided in ECL articles 15 (Protection of Water) and 25 (Tidal Wetlands) and, therefore, distinguishes the violation alleged in the fourteenth cause of action from the other allegations asserted in the January 23, 2006 complaint.

P. Alleged violation of 6 NYCRR 360-16.4(f)(3) by storing C&D debris in piles higher than 20 feet and in areas larger than 5,000 square feet on the site

In the fifteenth cause of action, Staff alleges that Respondents violated 6 NYCRR 360-16.4(f)(3) by storing C&D debris in piles higher than 20 feet and in areas larger than 5,000 square feet on the site. In the March 12, 2006 answer, Respondents deny there is any C&D debris on the site.

As noted above, 6 NYCRR subpart 360-16 regulates C&D debris processing facilities, which are solid waste management facilities where C&D debris is received and processed (*see* 6 NYCRR 360-1.2[b][39]). Operational requirements for C&D debris processing facilities are outlined at 6 NYCRR 360-16.4. Section 360-16.4(f) outlines storage requirements. Pursuant to 6 NYCRR 360-16.4(f)(3), processed or unprocessed C&D debris storage piles must not exceed 20 feet in height, and the area of the base of a storage pile must not exceed 5,000 square feet unless otherwise authorized by the Department. Department staff has not authorized Mezzacappa Bros. to operate any solid waste management facility at the Meredith Avenue property.

Mr. Brezner's qualitative examination of samples collected from the site during Staff's June 19, 2007 demonstrates that solid waste, in the form of unrecognizable C&D debris, is mixed with the soil stockpiled on the site (Tr. at 315-321). Four stockpiles are depicted on Exhibit 21, which is a survey of the site offered by Respondents as part of the second tidal wetlands permit application. The height of each stockpile is: (1) 25.4 feet; (2) 30.8 feet; (3) 50.3 feet; and (4) 66.1 feet. The height of each of the four stockpiles on the site exceeds the 20 feet height limit set forth in 6 NYCRR 360-16.4(f)(3).

From Exhibit 21, it is possible to estimate the area of each stockpile. The scale on the survey (Exhibit 21) is 1 inch equals

50 feet. The area of the base of the stockpile that is 25.4 feet high is approximately 3,900 square feet (70 ft. x 55 ft.). The area of the base of the stockpile that is 30.8 feet high is approximately 12,700 square feet (65 ft. x 195 ft.). The area of the base of the stockpile that is 50.3 feet high is approximately 37,400 square feet (115 ft. x 325 ft.). The area of the base of the stockpile that is 66.1 feet high is approximately 900,000 square feet (250 ft x 3,500). The area of the base of the first stockpile (25.4 feet high) is less than 5,000 square feet, which is less than the area limit in 6 NYCRR 360-16.4(f)(3). However, the areas of the bases of the remaining three stockpiles are greater than 5,000 square feet, which exceeds the limit in 6 NYCRR 360-16.4(f)(3).

The four stockpiles on the Meredith Avenue property do not comply with the storage requirement outlined at 6 NYCRR 360-16.4(f)(3). Therefore, Respondents have violated this regulatory requirement. Each non-compliant stockpile may be considered a separate violation based on the rationale outlined in *Wilton, supra* because each storage pile must comply with the requirements outlined in 6 NYCRR 360-16.4(f)(3).

Q. <u>Respondents failed to obtain General Permit GP-02-01 to manage stormwater prior to undertaking construction activities that disturbed more than one acre on the site; Respondents violated ECL 17-0707 and 6 NYCRR 750-1.3 by discharging pollutants to a tidal wetland and to waters of the State</u>

In the sixteenth cause of action, Department staff alleges that Respondents failed to obtain General Permit GP-02-01 to manage stormwater prior to undertaking construction activities on the site that disturbed more than one acre. Staff asserts further that Respondents violated ECL 17-0707 and 6 NYCRR 750-1.3 by discharging pollutants to a tidal wetland and to waters of the State. Respondents contend that they disturbed less than one acre of the site, and that they did not discharge any pollutants to the tidal wetlands.

The disturbance of one or more acres during a construction project requires a permit, pursuant to Section 402 of the federal Clean Water Act (CWA), to control stormwater discharges. Federal regulations related to stormwater discharges are found at Title 40 of the Code of Federal Regulations (CFR) part 122 (EPA Administered Permit Programs: National Pollutant Discharge Elimination System [NPDES]). To implement these federal requirements, the Department issued General Permit GP-02-01 for

stormwater discharges from construction activities on January 8, 2003.[6] Pursuant to 6 NYCRR 750-1.21, the Department may issue General Permit GP-02-01 as part of State's federally delegated State Pollutant Discharge Elimination System (SPDES) permit program.

General SPDES Permit GP-02-01 applies in very limited circumstances. For those operators who qualify for coverage under General SPDES Permit GP-02-01, they must file a Notice of Intent (NOI) and a stormwater pollution prevention plan (SWPPP) with the Department. The purpose of the SWPPP is to protect surface water resources by controlling runoff and the discharge of pollutants at construction sites during storm events. After reviewing the NOI and SWPPP, the Department will issue a letter that acknowledges receipt of the required information and documents, and which provides a permit identification number.

When Mr. Stadnick went to the site on June 7, 2005, he observed two areas of the Meredith Avenue property that had been disturbed with the addition of fill. One disturbed area was on the northeastern portion of the site, and the other was on the northwestern portion near the Arthur Kill. According to Mr. Stadnick, the sum of the disturbed areas exceeded one acre. Given the size of the total area disturbed, Mr. Stadnick reviewed the Department's files to determine whether Staff received a NOI and SWPPP from Respondents for the required General SPDES stormwater permit for construction activities, and did not find the required submissions. In addition, Mr. Stadnick did not find any acknowledgment letter from Staff to Respondents with a permit identification number. (Tr. at 116-118.)

Respondents' first tidal wetland permit (Exhibit 40) required the installation of erosion control measures and the maintenance of a vegetated buffer to prevent the fill authorized by Exhibit 40 from eroding into the tidal wetlands. Respondents' failure to comply with these conditions was the subject of prior enforcement actions as discussed above. In addition to the second tidal wetlands permit for which Respondents had applied, they needed to obtain either coverage pursuant to the General SPDES Permit GP-02-01, or a site-specific SPDES permit to protect the tidal wetlands before they began to redistribute more fill on the site. Respondents failed to obtain any SPDES permit in

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[6] General SPDES Permit GP-02-01 was superceded by General SPDES Permit GP-0-08-001 in April 2008.

violation of the requirements outlined in the federal Clean Water Act, and State regulations.

With respect to the second component of the sixteenth cause of action, ECL 17-0707 and its companion regulation at 6 NYCRR 750-1.3 list prohibited discharges. They include, among others, the discharge of any radiological, chemical or biological warfare agents or high-level radioactive waste; any discharge that would substantially impair anchorage and navigation; and any discharge not permitted by the ECL or implementing regulations.

ECL 17-0707 and 6 NYCRR 750-1.3 expressly preclude the Department from issuing a SPDES permit, or any other permit, that would authorize these prohibited discharges. Section 750-1.4 prohibits the discharge of any pollutant without a SPDES permit from the Department, however. In addition, 6 NYCRR 750-1.4(b) requires permits for the discharge of stormwater and refers to the federal regulations at 40 CFR 122.

During the hearing, Department staff did not present a legal theory about the applicability of ECL 17-0707 and 6 NYCRR 750-1.3 to the captioned enforcement action or the relationship between the list of prohibited discharges, and General SPDES Permit GP-02-01. It appears that the regulatory reference in the sixteenth cause of action should be to 6 NYCRR 750-1.4(b)[7] rather than to 6 NYCRR 750-1.3. Absent any further explanation from Staff, who has the burden of proof (*see* 6 NYCRR 622.11[b][1]), I conclude that Staff failed to demonstrate the assertion that Respondents violated ECL 17-0707 and 6 NYCRR 750-1.3. Accordingly, the Commissioner should dismiss this portion of the sixteenth cause of action.

R. <u>Alleged violation of ECL 17-0503(2) by placing waste material in waters of a marine district</u>

In the January 23, 2006 complaint, Staff asserts as the seventeenth, and final, cause of action that Respondents allegedly violated ECL 17-0503(2) by placing waste material in waters of a marine district. In the March 12, 2006 answer, Respondents deny that they placed any waste material in waters of a marine district.

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[7] Section 750-1.4(b) of 6 NYCRR requires permits for certain stormwater discharges.

Pursuant to ECL 17-0105(3), the State's marine district includes the waters of the Atlantic Ocean within three nautical miles from the coastline and all other tidal waters, except the Hudson River north of the southern end of Manhattan Island. Because the Arthur Kill is located south of the southern end of Manhattan Island, I conclude that the Arthur Kill and the associated tidal wetlands are part of the State's marine district. ECL 17-0503(2) states, in full, that:

> "Garbage, cinders, ashes, oils, sludge or refuse of any kind shall not be thrown, dumped or permitted to run into the waters of the marine district."

As noted in the discussion concerning the fourteenth cause of action, Department staff visited the Meredith Avenue property in April, May and June 2005, and in June 2007. During each visit, Staff took photographs of the site. Many of the photographs offered as evidence during the course of the hearing show that fill, contaminated with C&D debris, was placed on or near the slope constructed by Respondents pursuant to the terms of the first tidal wetlands permit. In addition, Staff observed and photographed fill either on the slope, or at the toe of the slope that had eroded into the tidal wetlands. Some of the relevant photographs include Exhibits 20F, 22A, 22B, 22D, 22E, 25A, 25C, and 33. Based on these photographs, which corroborate Staff's observations during the various site visits, fill, which had been contaminated with solid waste, entered the tidal waters included in the State's marine district. The erosion of this material into the State's marine district is a violation of ECL 17-0503(2) because the C&D debris, which contaminated the fill used by Respondents, would be considered "refuse of any kind."

Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in this cause of action is distinct from the violations asserted in the previous causes of action because the elements of proof for these various violations are different. ECL article 17 protects the State's marine district, which is defined in the statute. The elements required to prove a violation of ECL 17-0503 are separate and distinct from those required to prove violations of ECL articles 15 and 25. As a result, the violation asserted in the seventeenth cause of action is distinguishable from the other allegations asserted in the January 23, 2006 complaint.

VI. Relief

In the January 23, 2006 complaint, Department staff requests an Order from the Commissioner that would assess a civil penalty and direct Respondents to restore the site. Each of Staff's requests for relief is discussed below.

A. Civil Penalty

1. Staff's Request

Citing ECL 71-1107, 71-1929, 71-2503, and 71-2703, Department staff requests a civil penalty for each violation alleged in the January 23, 2006 complaint calculated on a daily basis. Staff further requests that Respondents be held jointly and severally liable for the civil penalty. Staff did not identify a specific civil penalty amount in the January 23, 2006 complaint.

In its closing statement, however, Staff provided additional information about its civil penalty request (Tr. at 1169-1196). Staff notes that the potential maximum civil penalty associated with each violation would be significant. For example, Staff argues that each truck-load of fill placed in the tidal wetlands and adjacent area constitutes a separate violation. According to Staff, there were 10 or 11 truck-loads of fill brought to the site on one day. As a result, the maximum civil penalty associated with the tidal wetlands violation would be in excess of $100,000.

Staff notes further there are violations of ECL article 17 and an additional violation from Respondents' failure to obtain a General SPDES Permit to manage stormwater. For these violations, Staff contends that the maximum civil penalty is $37,500 per violation. According to Staff, the civil penalties for solid waste violations are $7,500 per day, and that the civil penalty may be increased where, as here, the solid waste is C&D debris.

Staff requests a total civil penalty of $100,000. In addition, Staff argues that at least $75,000 of the total amount should be due immediately. Staff notes that the requested civil penalty takes into account the potential costs of remediation, which Staff anticipates will be very expensive.

Staff based its request on the following circumstances. First, the civil penalty must serve as a deterrent to the

regulated community. Staff is concerned that when permit applications are filed with the Department, applicants must wait until Staff decides whether to issue the permits before undertaking any regulated activities. Staff does not want the regulated community to take matters into its own hands, as was the case here.

Second, Staff notes that the site has been the subject of prior enforcement actions, and the consent orders related to the prior enforcement actions are part of this hearing record. Staff argues these enforcement actions demonstrate that Respondents are aware of the Department's jurisdiction over the tidal wetlands on the site. In addition, Staff contends that these prior enforcement actions demonstrate Respondents' high level of culpability with respect to the violations that are the subject of the captioned enforcement action.

Third, Respondents have significant real estate assets, according to Staff. The Meredith Avenue property is valuable, and Messrs. Sam and Frank Mezzacappa own homes. Finally, Staff contends that Respondents have been cooperative in attempting to settle this matter but, unfortunately, a settlement was not reached and a hearing was necessary.

2. Respondents' Position

As part of Respondents' case, Sam Mezzacappa testified about back taxes owed by Mezzacappa Bros., and Respondents' assets. Exhibit 78 is a set of documents offered by Respondents that consists of: (1) a Notice of Default dated February 7, 2006 from the US Treasury Department, Internal Revenue Service, Small Business/Self-Employed Division; (2) a letter dated February 22, 2007 from the IRS, Small Business/Self-Employed Division; (3) a Notification of Chapter 11 Plan Default dated April 19, 2007 from the IRS, Small Business/Self-Employed Division; and (4) a Quarterly Statement Account from the NYC Department of Finance for property taxes and interest owned on the Meredith Avenue property from June 16, 2007 through August 30, 2007 in the amount of $96,272.53.

The February 7, 2006 Notice of Default from the IRS states that Sam Mezzacappa has missed three payments for back taxes, and seeks payment of $16,089.51. The February 22, 2007 letter from the IRS states that Mezzacappa Bros. had planned to sell property, and the proceeds from the sale would be used to pay interest and back taxes. The February 22, 2007 letter from the IRS requests a report about the status of the sale of the

property. The April 19, 2007 Notification references the February 22, 2007 letter that requested a status report about the sale of the property. The April 19, 2007 Notification also states that the IRS has not received any payments since April 3, 2006.

Sam Mezzacappa testified that he and his brother are attempting to sell other property owned by Mezzacappa Bros. referred to as the Richmond Terrace property. Mr. Mezzacappa said that the proceeds from the sale of the Richmond Terrace property would be used to pay the overdue taxes referenced in Exhibit 78. According to Mr. Mezzacappa, it is difficult to find a buyer for the Richmond Terrace property because the Department is considering whether to commence an enforcement action. During the March 4, 2008 hearing session, Mr. Mezzacappa said that he would be contacting the IRS in April 2008. (Tr. at 1097-1097.)

According to Sam Mezzacappa, the Meredith Avenue and Richmond Terrace properties are not mortgaged. He estimates that the value of the Meredith Avenue property is between $6 to $10 million. Sam Mezzacappa's personal residence does not have a mortgage, but Frank Mezzacappa's personal residence is mortgaged. The mortgage on Frank Mezzacappa's personal residence was not offered for the record. Respondents sold a portion of the Meredith Avenue property to the Land for Public Trust. (Tr. at 1098-1099.)

Sam Mezzacappa, said that the sale of the Meredith Avenue property would be Respondents' "salvation" because Respondents owe more that one million dollars in interest and back taxes. Respondents want to sell the Richmond Terrace and Meredith Avenue properties, but according to Mr. Mezzacappa, Department staff has instructed Respondents not to sell the properties due to the pending administrative enforcement actions. Mr. Mezzacappa stated that if the Commissioner assesses any civil penalties in this case, Respondents would pay the civil penalties with the proceeds from the sale of the Meredith Avenue property. (Tr. at 1099.)

Sam Mezzacappa testified further that years ago, his father had purchased three undeveloped lots in Florida, but Mr. Mezzacappa does not know the value of the property. After Staff served the January 23, 2006 complaint and before the hearing commenced, Mr. Mezzacappa sold his residence at 8 Edgemere Drive in Matawan, New Jersey and purchased his current home at 7 Robin's Nest Drive in Millstone, New Jersey for $762,000. He estimates that the current market value of his home at 7 Robin's

Nest Drive is $650,000. Finally, Mr. Mezzacappa owns a 2004 Cadillac DeVille. He bought it used for $24,250, and its listed value is $16,000. (Tr. at 1102-1105, 1108.)

Frank Mezzacappa testified that debris accumulated on the site from two sources. First, the tides would bring debris to the site and it would accumulate at the toe of the slopes. Mr. Mezzacappa has collected and removed this material (Tr. at 748), including the remnants of a boat (Tr. at 813-815).

Second, referring to Exhibit 66, which is a set of photographs taken by Frank Mezzacappa on February 2, 2008, Mr. Mezzacappa stated that people have discarded, and continue to discard, material at the site by throwing it over the fence along Meredith Avenue. Often, the lock or chain that secures the site is cut, and Mr. Mezzacappa subsequently discovers discarded material dumped over the slope. (Tr. at 773-774, 946-951.) Mr. Mezzacappa said the unauthorized dumping has continued since the commencement of this enforcement action, and that material is dumped onto the slope (Tr. at 1012). Respondents remove this debris when it accummulates at their expense (Tr. at 1011).

To clean the slope or the toe of the slope, Frank Mezzacappa explained that he would use an excavator (Cat 245) by maneuvering it to the top of the slope and extending the front bucket over the slope to scoop up or rake the debris to the top of the slope. Mr. Mezzacappa never operated the excavator below the top of the slope. (Tr. at 784, 787-788.) Frank Mezzacappa took a series of photographs, which are identified in the hearing record as Exhibits 55-63, inclusive, and 65-76, inclusive, to show that the slopes on the site are vegetated. (Tr. at 802) Mr. Mezzacappa took the photographs in January and February 2008.

3. <u>Civil Penalty Recommendation</u>

For violations of ECL article 15, title 5 (Protection of Water), ECL 71-1107(1) authorizes the Commissioner to assess a civil penalty of not more than $5,000 per violation. Pursuant to ECL 71-1929(1), the Commissioner may assess a civil penalty of $37,500 per day for each violation of ECL article 17, titles 1-11 and 19 (Water Pollution Control). For violations of ECL article 25 (Tidal Wetlands), ECL 71-2503(1)(a) authorizes a civil penalty of $10,000 per violation. Each violation is considered separate and distinct, and each day that a violation continues is considered a separate and distinct violation.

Pursuant to ECL 71-2703(1)(a), the Commissioner may assess civil penalties of $7,500 for violations of ECL article 27, titles 3 and 7 (Solid Waste Management and Resource Recovery Facilities). Additional civil penalties of $1,500 may be assessed for each day that the violation continues. Alternative civil penalties may be assessed for the release of solid waste to the environment (*see* ECL 71-2703[1][b][i]), or when the amount of solid waste released exceeds ten cubic yards (*see* ECL 71-2703[1][b][ii]). For violations concerning the processing and disposal of C&D debris, ECL 71-2703(3) authorizes a civil penalty of $15,000 per violation, and each day that the violation continues is considered a separate violation.

Of the seventeen causes of action asserted in the January 23, 2006 complaint, Department staff has demonstrated sixteen violations of the ECL and regulations. Many of the these individual violations have continued for extended periods. As a result, the potential maximum civil penalty greatly exceeds Staff's request of $100,000. The prior violations at the site are a significant aggravating factor that justifies Staff's civil penalty request. Therefore, I recommend that the Commissioner assess a civil penalty of $100,000, and require payment of at least $75,000, as requested by Department staff. The balance ($25,000), would be suspended pending full compliance with the remediation requirements. The civil penalty should be assessed jointly and severally, and apportioned equally among the demonstrated violations.

B. <u>Remediation</u>

Staff seeks remediation of the site, and offered the opinion of two witnesses about the nature and scope of the remediation. As a wetland biologist, Mr. Stadnick recommends the following. First, he recommends that all the fill that Respondents placed on the site since April 1, 2005 should be removed from the site. Based on the terms and conditions of the first permit and the compliance schedules appended to the orders on consent, Mr. Stadnick testified that Respondents were supposed to maintain a vegetative buffer zone between the tidal wetland boundary and the top of the slope. However, Respondents never developed the vegetative buffer. Accordingly, Mr. Stadnick recommends that in addition to the fill, all debris (*e.g.* the Jersey barriers, etc.) should be removed, and the vegetative buffer should be established. (Tr. at 209.)

Second, after the vegetative buffer is developed, Mr. Stadnick recommends that Respondents be directed to stabilize the

access road with an approved type of fill, such as gravel, to prevent material from eroding into the tidal wetlands (Tr. at 210). Finally, Mr. Stadnick recommends removing all the material in the stockpiles rather than having it graded over the site. According to Mr. Stadnick, the stockpiled material includes a lot of C&D debris mixed into it. (Tr. at 213-214.)

To justify his recommendations concerning remediation, Mr. Stadnick said that the tidal wetlands adjacent to the site are valuable and "relatively pristine." Given the wetland value of the Neck Creek/Arthur Kill tidal wetland system, the Trust for Public Land and the NYC Department of Parks purchased portions of the site from Mezzacappa Bros. to assure the preservation of the wetlands. (Tr. at 212-213.)

As a solid waste engineer, Mr. Brezner recommends the following remediation. First, Respondents should undertake a site investigation. Mr. Brezner opined that the investigation would not be complicated or expensive because he does not suspect that the site is contaminated with any hazardous waste. The site investigation, however, should include testing to determine the different chemical components of the solid waste on the site. When Respondents have completed the investigation, Mr. Brezner recommends that they undertake a feasibility study. According to Mr. Brezner, the feasibility study is necessary to develop the remediation plan because a proper feasibility study should consider potential uses of the site. (Tr. at 326-327, 329.) Given the historical and current uses for the site as well as the current uses for the neighboring properties, future uses for the Meredith Avenue property would likely be commercial or industrial.

Based on his experiences, Mr. Brezner noted, in general, that it is very common to have a site where conditions are relatively consistent except for one particular area. Depending on the level and the nature of the limited contamination, Mr. Brezner said that Department staff may recommend removing all the contaminated material from that one area on the site and disposing of the material at an approved facility. With respect to the remainder of the material, Mr. Brezner stated that usually the site can be graded and capped. According to Mr. Brezner, the cap serves multiple purposes. The main purpose is to prevent the public from coming into contact with the contaminated material. The cover would be either permeable or impermeable. Permeable covers can be the relatively thinner of the two, but must comply with Department of Health regulations. Because the Meredith Avenue property is adjacent to a regulated tidal wetland, Mr.

Brezner said that the Division of Solid and Hazardous Materials would coordinate with the Division of Fish and Wildlife to review the details of any proposed remediation plan. (Tr. at 326-327.)

Mr. Brezner, noted that up to one quarter of New York City is built upon historic fill. Some filled areas date back to the 1800s, and other areas are as recent as the "Robert Moses era." At these areas, Mr. Brezner said the "dirt" is not clean. According to Mr. Brezner, all kinds of things were dumped at sites as fill, and these sites are now being excavated for new development. Some of the constituents of the historic fill material have been pulverized and are not recognizable; any putrescible components of the historic fill have decayed. (Tr. at 363-365.)

Because the alleged violations considered in this enforcement action took place after 1988, Mr. Brezner stated that the fill that Respondents placed on the site would not be considered "historic." Mr. Brezner observed, however, that requiring Respondents to remove all the fill from the site could be problematic because at some point, "historic" fill will eventually be found. According to Mr. Brezner, the effort and cost associated with subsequently removing all the historic fill after having removed all the other material would be astronomical. Therefore, Mr. Brezner suggests that all the material on the site should be considered "historic" fill, and recommends the development of a remediation plan that includes environmental protections commensurate with the anticipated use. (Tr. at 363-365.)

According to Frank Mezzacappa, Respondents did not bring any new material to the site after 1996. By 1996, the stockpiles had been established on the site. (Tr. at 875-876.) Referring to Exhibit 31, Mr. Mezzacappa agreed to remove the debris depicted in this Exhibit as recommended by Mr. Brezner. Exhibit 31 is a photograph taken by Mr. Stadnick during his June 7, 2005 site visit (Tr. at 160-161). The view in Exhibit 31 is to the west looking east down the roadway on the northwestern portion of the site (*i.e.*, the string piece) toward the Arthur Kill. Piles of C&D debris are located along each side of the roadway, and consist of pieces of scrape metal and wood, tires, plastic, and concrete (Tr. at 162-163). Mr. Mezzacappa said that all the debris depicted in Exhibit 31 was placed in dumpsters and removed from the site. Mr. Mezzacappa accepts Mr. Brezner's recommendation that the content of the stockpiles should be spread over the site (Tr. at 945).

Pursuant to ECL 71-2503(1)(c), the Commissioner has the power to direct Respondents to restore the affected tidal wetland and adjacent area to its condition prior to the violations. The Commissioner should order Respondents to remediate the site because fill and C&D debris have eroded into the tidal wetlands.

To the extent any recognizable C&D debris remains on the site such as depicted in Exhibit 31, the Commissioner should direct Respondents to remove the remaining solid waste to a duly authorized solid waste management facility and provide proof of where the solid waste was disposed.

Based on Mr. Brezner's recommendations, the Commissioner should direct Respondents to undertake a site investigation. The scope of the site investigation should include chemical testing to determine the extent of contaminated material on the Meredith Avenue property. Subsequently, Respondents should be directed to undertake a feasibility study that includes a consideration of potential commercial and industrial uses of the site.

With respect to the stockpiles, Respondents have argued that the material is clean fill, and have requested permission to sell the material. In the alternative, Respondents would like to spread the material on the site.

The Commissioner should enjoin Respondents from selling any material from the site until they undertake the site investigation, and provide the results to Department staff. Based on Mr. Brezner's site visits, his observations, and the qualitative examination of the samples collected at the site on June 19, 2007, the stockpiles are contaminated with unrecognizable C&D debris. This contamination is not remarkable given the historic filling practices in the metropolitan area as described by Mr. Brezner, and the nature of Respondents' business, which included extensive excavation projects throughout New York City. Therefore, the recommended site investigation will provide valuable information about the exact nature of the material in the stockpiles, as well as whether the stockpiled material can be used at another location. If the stockpiled material cannot be used at any other location, then Respondents must dispose of the stockpiled material at an approved solid waste management facility, and provide proof of proper disposal.

Given the decommissioning activities undertaken by Texaco prior to the sale of the site to Respondents, and the subsequent issuance of the first tidal wetlands permit to Respondents, which authorized them to place fill on the site, I agree with Mr.

Brezner's view that removing all fill, historic or otherwise, from the site may not be feasible. Although a copy of the plans originally approved by Staff with the first tidal wetlands permit could not be located, I recommend that Staff review the detail of the planting plan depicted on Exhibit 51 for consistency with the public policy outlined in the tidal wetland regulations to preserve and protect tidal wetlands, and to prevent their despoliation and destruction. To the extent that Staff determines that the planting plan on Exhibit 51 is acceptable, the Commissioner should direct Respondents, as part of the final remediation plan, to stabilize the slope authorized by the first tidal wetlands permit, implement the planting plan, and maintain the vegetation.

Conclusions

I. <u>Status of Corporate Respondent</u>

1. Mezzacappa Brothers, Inc. (Mezzacappa Bros.) was formed in 1961 as a New York State domestic corporation. The legal status of the corporation remains active, and as a result, Mezzacappa Bros. may be found liable for the violations alleged in the January 23, 2006 complaint.

II. <u>Subject Matter Jurisdiction</u>

2. Pursuant to regulation, the adjacent area of a tidal wetland may be limited by three circumstances. Pursuant to 6 NYCRR 661.4(b)(1)(i), the adjacent area extends 300 feet from the landward boundary of a tidal wetland. In the City of New York, however, the distance is 150 feet. Because Staten Island (Richmond County) is a borough of New York City, the maximum potential width of the adjacent area on the Meredith Avenue property is 150 feet.

3. The elevation of the Meredith Avenue property was less than 10 feet above sea level when the Commissioner promulgated the tidal wetland maps. Therefore, the circumstance which limits the width of the adjacent area on the Meredith Avenue property is 150 feet landward from the tidal wetland boundary as provided by 6 NYCRR 661.4(b)(1)(i).

4. For the reasons outlined in detail above, the circumstances that may limit the width of the adjacent area to less than 150 feet landward from the tidal wetland boundary outlined

at 6 NYCRR 661.4(b)(1)(ii) and 6 NYCRR 661.4(b)(1)(iii) do not apply to the Meredith Avenue property.

III. Causes of Action

A. First Cause of Action

5. Respondents placed Jersey barriers in the tidal wetland adjacent area on or before November 12, 2004 without first obtaining the required a permit from the Department in violation of ECL 25-0401(2) and 6 NYCRR 661.8. Furthermore, Jersey barriers remain on the site based on Staff's observations made over the course of several site inspections in 2005 and 2007, which establish the continuous nature of the violation.

6. Based on the rationale provided in *Steck, supra*, the allegation in the first cause of action that Respondents violated both ECL 25-0401(2) and 6 NYCRR 661.8 should be considered a single violation for the purposes of determining the appropriate civil penalty because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

B. Second Cause of Action

7. Pursuant to ECL 25-0401, regulated activities include placing "fill of any kind" in a tidal wetland and its adjacent area. Consequently, the C&D debris that Staff observed in the adjacent area of the Meredith Avenue property, although a regulated solid waste (see 6 NYCRR 360-1.2[a] and 6 NYCRR 360-1.2[b][28]), is also fill as that term is defined in the Tidal Wetlands Act. Therefore, Respondents violated ECL 25-0401(2) and 6 NYCRR 661.8 on or about November 2004 by placing C&D debris, which is a form of "fill of any kind," in the adjacent area of the tidal wetland without a permit or any other authorization from the Department.

8. Based on the rationale outlined *Steck, supra*, the allegation in the second cause of action that Respondents violated both ECL 25-0401 and 6 NYCRR 661.8 should be considered a single violation because the regulatory provision reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

9. Furthermore, the violations alleged in the first and second causes of actions are separate and distinct violations based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit.

C. Third Cause of Action

10. In the absence of any permit from the Department, Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) on or before November 12, 2004 when they disposed C&D debris at the Meredith Avenue property.

11. Violations of ECL 27-0707 and 6 NYCRR 360-1.5(a) have the same elements of proof: (1) the lack of a permit from the Department, and (2) the presence of solid waste. Therefore, the Commissioner should not assess separate civil penalties for violations of ECL 27-0707 and 6 NYCRR 360-1.5(a) based on the determination in *Wilder, supra* (*also see Q.P. Service, supra*).

12. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the third cause of action is different from the violation asserted in the second cause of action because the elements of proof for the violations alleged in the two causes of action are different.

D. Fourth Cause of Action

13. Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or before November 12, 2004 by removing vegetation from the adjacent area of the tidal wetlands on the Meredith Avenue property.

14. Given the Commissioner's determinations in *Steck, supra* and *Coppola, supra*, the allegation in the fourth cause of action that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 should be considered a single violation for the purposes of calculating the appropriate civil penalty because the regulatory provision reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

15. Furthermore, the violation alleged in the fourth cause of action is distinguishable from those asserted in the first, second and third causes of action based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit.

E. Fifth Cause of Action

16. Staff's observations and photographic evidence prove that Respondents placed about 20 cubic yards of C&D debris in the tidal wetland and adjacent area between November 2004 and April 2005. Therefore, Respondents violated ECL 25-0401(2) and 6 NYCRR 661.8 between November 2004 and April 2005 by placing C&D debris in the tidal wetland and its adjacent area without a permit or any other authorization from the Department.

17. The allegation in the fifth cause of action that Respondents violated ECL 25-0401(2) and 6 NYCRR 661.8 should be considered a single violation because the regulatory provision reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities (*see Steck, supra* and *Coppola, supra*).

18. In addition, the tidal wetlands violation asserted in the fifth cause of action is separate and distinct from the violations asserted in the previously discussed causes of action based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. Here, Respondents have placed more C&D debris on the site without a permit since November 2004.

F. Sixth Cause of Action

19. Without any permit from the Department and with the disposal of additional C&D debris at the Meredith Avenue property after November 2004, Respondents violated ECL 27-0707 and 6 NYCRR 360-1.5(a) on April 1, 2005. Given the identical elements of proof, the Commissioner should not assess separate civil penalties for each violation based on the determination in *Wilder, supra* (*also see Q.P. Service, supra*).

20. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the sixth cause of action is different from the violation asserted in the third cause of action because the violations occurred at different times.

G. Seventh Cause of Action

21. Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or about May 4, 2005 by excavating material from the stockpile on the site and placing it on the northwestern portion of

the site, which is located entirely within the adjacent area, without a permit from the Department.

22. Given the rationale outlined in *Steck, supra* and *Coppola, supra*, the allegation in the seventh cause of action that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 should be considered a single violation for the purpose of determining the proper civil penalty because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

23. The tidal wetlands violation asserted in the seventh cause of action is separate and distinct from the violations asserted in the previous causes of actions based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. The proof shows that this violation occurred after the violations asserted in the first through sixth causes of action occurred.

H. <u>Eighth Cause of Action</u>

24. Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on or about May 4, 2005 by dumping and grading material within the adjacent area without a permit from the Department.

25. Given the administrative precedent in *Steck, supra* and *Coppola, supra*, the allegation in the eighth cause of action that Respondents violated both ECL 25-0401 and 6 NYCRR 661.8 should be considered a single violation because the regulation reiterates the statutory requirement to obtain a permit from the Department before undertaking any regulated activities.

26. Moreover, the tidal wetlands violation asserted in the eighth cause of action is separate and distinct from the violations asserted in the previous causes of action based on the Commissioner's determination in *Wilton, supra*, where each regulated activity would require a permit. With respect to the eighth cause of action, grading is a distinct, regulated activity that is different from filling.

I. <u>Ninth Cause of Action</u>

27. ECL 15-0505(1) prohibits the placement of any fill below the mean high water mark of any of the State's navigable waters, which include the State's tidal marshes and wetlands that may be contiguous or adjacent to navigable waters without a

permit from the Department (*also see* 6 NYCRR 608.5 [Excavation or placement of fill in navigable waters]). Respondents violated ECL 15-0505 and 6 NYCRR 608.5 on or about May 4, 2005 when they filled below the mean high water mark of the Arthur Kill, which is a navigable water of the State (*see* 6 NYCRR 608.1[l]), without a permit from the Department.

28. The allegation in the ninth cause of action that Respondents violated both ECL 15-0505 and 6 NYCRR 608.5 should be considered a single violation because the regulation reiterates the statutory requirement to obtain a permit from the Department before placing any fill in the State's navigable waters (*see Steck, supra* and *Coppola, supra*).

29. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the ninth cause of action is distinct from the violations asserted in the previous causes of action because the elements of proof for each of these various violations are different.

J. Tenth Cause of Action

30. As the tenth cause of action, Staff alleges that Respondents violated ECL 25-0401 and 6 NYCRR 661.8 on multiple occasions by taking solid waste material from the stockpiles and placing it on the northwestern portion of the site in the adjacent area of the tidal wetlands. The apparent distinction between the allegation asserted in the tenth cause of action and that asserted in the seventh cause of action is that for purposes of the tenth cause of action the fill is solid waste. Pursuant to ECL 25-0401, regulated activities include placing "fill of any kind" in a tidal wetland. The nature of the fill is not an element of the proof needed to establish a violation.

31. The violation asserted in the tenth cause of action is not different from the violation asserted in the seventh cause of action. Rather, the charge alleged in the tenth cause of action is the same as that alleged in the seventh cause of action. Staff did not demonstrate a different violation of ECL 25-0401 and 6 NYCRR 661.8 from what has already been alleged.

K. Eleventh Cause of Action

32. In the absence of any permit or other authorization from the Department, the Meredith Avenue property is not an authorized solid waste management facility. Therefore, Respondents violated 6 NYCRR 360-1.5(a) when they deposited C&D debris material, a form of solid waste, on the site before Staff's June 7, 2005 visit.

33. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the eleventh cause of action is different from the violation asserted in the third and sixth causes of action because these violations occurred at different times.

L. Twelfth Cause of Action

34. Pursuant to 360-1.2(b)(164), "storage" means the containment of any solid waste in a manner that does not constitute disposal under § 360-1.2(a)(3); however, the accumulation of solid waste for a period in excess of 18 months is considered disposal. By accumulating excavated materials contaminated with C&D debris on the Meredith Avenue property, Respondents have stored and, by operation of the regulation, subsequently disposed of solid waste without a permit from the Department in violation of 6 NYCRR 360-1.7(a). This violation commenced between 1985 and 1986 when Respondents began depositing the contaminated, excavated materials in stockpiles at the Meredith Avenue property, and has continued.

M. Thirteenth Cause of Action

35. Section 360-16.1(c) prohibits the construction or operation of any facility used to receive, treat or process C&D debris without a permit from the Department. The screening and sorting activities undertaken by Respondents at the Meredith Avenue property have resulted in the operation of a C&D debris processing facility (*see* 6 NYCRR 360-1.2[b][120]). Because the Department has not issued a permit for these activities, Respondents have violated 6 NYCRR 360-16.1(c) since 1997.

N. Fourteenth Cause of Action

36. The regulations at 6 NYCRR 360-1.14 outline the operational requirements for all solid waste management facilities. Section 360-1.14(b)(1) prohibits solid waste from being deposited in either surface waters or groundwaters. Respondents' placement of fill on the Meredith Avenue property, which is contaminated with C&D debris, has entered the tidal waters in violation of 6 NYCRR 360-1.14.

37. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the fourteenth cause of action is distinct from the violations asserted in the previous causes of action.

O. Fifteenth Cause of Action

38. Operational requirements for C&D debris processing facilities are outlined at 6 NYCRR 360-16.4. Pursuant to 6 NYCRR 360-16.4(f)(3), processed or unprocessed C&D debris storage piles must not exceed 20 feet in height, and the area of the base of a storage pile must not exceed 5,000 square feet unless otherwise authorized by the Department. Four stockpiles are located on the Meredith Avenue property, and each does not comply with the storage requirement outlined at 6 NYCRR 360-16.4(f)(3). Therefore, Respondents have violated 6 NYCRR 360-16.4(f)(3).

39. Each of the four non-compliant stockpiles on the Meredith Avenue property may be considered a separate violation based on the rationale outlined in *Wilton, supra* because each storage pile must comply with the requirements outlined in 6 NYCRR 360-16.4(f)(3).

P. Sixteenth Cause of Action

40. Respondents did not file either the documents required for General SPDES Permit GP-02-01, or an application for a SPDES permit to control stormwater runoff at the Meredith Avenue property. Consequently, Respondents failed to obtain the required SPDES permit in violation of the federal Clean Water Act (*see* 40 CFR 122) and 6 NYCRR 750-1.21.

41. Department staff did not present a legal theory about the applicability of ECL 17-0707 and 6 NYCRR 750-1.3 to the captioned enforcement action. Therefore, Staff failed to

meet its burden of proof (*see* 6 NYCRR 622.11[b][1]) to demonstrate the allegation in the sixteenth cause of action that Respondents violated ECL 17-0707 and 6 NYCRR 750-1.3.

Q. Seventeenth Cause of Action

42. At the Meredith Avenue property, Respondents violated ECL 17-0503(2) when they allowed fill, contaminated with solid waste, to enter tidal waters included in the State's marine district.

43. Based on the Commissioner's determination in *Wilder, supra*, the violation asserted in the seventeenth cause of action is distinct from the violations asserted in the previous causes of action.

Recommendations

1. The Commissioner should find that Mezzacappa Brothers, Inc. is an active domestic business corporation, and conclude that it may be held jointly and severely liable with Sam and Frank Mezzacappa for the violations alleged in the January 23, 2006 complaint.

2. The Commissioner should conclude that the adjacent area on the Meredith Avenue property extends 150 feet from the boundary of the tidal wetlands as provided for by 6 NYCRR 661.4(b)(1)(i). The adjacent area on the Meredith Avenue property is not limited by the 10-foot contour as provided by 6 NYCRR 661.4(b)(1)(iii).

3. The Commissioner should deny, with prejudice, Respondents' motion for a directed verdict.

4. The Commissioner should conclude further that Respondents violated various provisions of the Environmental Conservation Law and implementing regulations as alleged in the January 23, 2006 complaint except for the violation alleged in the tenth cause of action. The Commissioner should conclude that the violation in the tenth cause of action duplicates the one asserted in the seventh cause of action.

5. For the sixteen demonstrated violations, the Commissioner should, jointly and severally, assess a civil penalty of $100,000, and require Respondents to pay at least $75,000.

The civil penalty should be apportioned equally among the sixteen demonstrated violations.

6. Consistent with the authority provided by ECL 71-2503(1)(c), the Commissioner should order Respondents to remediate the site based on the recommendations discussed above.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Articles 15, 17, 25 and 27
of the New York State Environmental Conservation Law (ECL) and
Parts 360, 608, 661 and 750 of Title 6 of the Official
Compilation of Codes, Rules and Regulations (6 NYCRR)

- by -

Mezzacappa Brothers, Inc.,
Sam Mezzacappa and Frank Mezzacappa,

Respondents.

DEC Case No. R2-20050607-202

Supplemental Hearing Report/Recommended Decision

by

____
Daniel P. O'Connell
Administrative Law Judge

October 2, 2009

Proceedings

This Supplemental Hearing Report addresses Sam Mezzacappa's request, made on behalf of Respondents, to present an alternative remediation plan to what Department staff requested in the January 23, 2006 complaint. In the January 23, 2006 complaint, Department staff asserted that Sam Mezzacappa, Frank Mezzacappa, and Mezzacappa Brothers, Inc. (Mezzacappa Bros.)[1] own property at 200 Meredith Avenue, Staten Island (Richmond County), New York (Tax Block 2810, Lot 12), and that the property is adjacent to tidal wetlands that include the Arthur Kill and Chelsea (or Neck) Creek.

In seventeen causes of action, the January 23, 2006 complaint alleged that Respondents violated various provisions of Environmental Conservation Law (ECL) article 15, title 5 (Protection of Water); article 17 (Water Pollution Control); article 25 (Tidal Wetlands Act); and article 27, title 7 (Solid Waste Management and Resource Recovery Facilities), as well as provisions of the corresponding, implementing regulations. Based on the violations alleged in the January 23, 2006 complaint, Department staff requested an Order from the Commissioner that would assess a civil penalty, and direct Respondents to remediate the site, which would include, among other things, restoring the affected tidal wetlands.

In a letter to the parties dated May 28, 2009, I explained that Sam Mezzacappa had telephoned me on May 22, 2009 concerning the captioned matter to make the following request on behalf of Respondents. Mr. Mezzacappa said that he wanted to send a letter to the Commissioner outlining an alternative remediation plan to the one proposed by Department staff during the hearing. As part of the alternative remediation proposal, Respondents seek permission from the Commissioner to regrade a portion of the Meredith Avenue property to create additional wetland areas on

[1] Collectively, Sam Mezzacappa, Frank Mezzacappa and Mezzacappa Bros. are referred to as Respondents. Sam and Frank Mezzacappa are brothers.

the site. Subsequently, after the Meredith Avenue property is sold, the newly created wetlands would remain as such. Respondents propose to trade the value of the newly created wetlands at $30-$39 per square foot for any assessed civil penalty.

I granted Respondents' request, re-opened the hearing record, and authorized them to file an alternative remediation plan by June 19, 2009. In addition, I provided Staff with the opportunity to respond, and set July 10, 2009 as the due date. On June 19, 2009, I received a letter from Sam Mezzacappa, on behalf of Respondents, with an attached plan of the Meredith Avenue site. Subsequently, Mr. Mezzacappa sent a three line addendum to his initial submission. On July 20, 2009, I advised the parties via e-mail that I had not received a response from Department staff. In an e-mail message dated July 20, 2009, Mr. Drescher stated that Staff did not file a response, and requested additional time to prepare one. Respondents, however, objected to any extension. In a letter dated July 24, 2009, I denied Staff's request for an extension. I advised the parties that the hearing record closed on July 10, 2009, and that I would prepare this Supplemental Report.

In an e-mail message dated August 13, 2009, the Assistant Commissioner for Hearings and Mediation Services granted Respondents' request for a recommended decision with respect to this matter, as well as for the other pending enforcement case concerning the Richmond Terrace property (DEC Case No. 2-20070517-290).

Respondents' Proposal

Referring to the hearing record in the matter concerning the Richmond Terrace property,[2] Sam Mezzacappa states that John DeFazio recently purchased property from Carp Construction, Inc. located in the vicinity of the Richmond Terrace property for $39.00 per square foot. According to Mr. Mezzacappa, the Meredith Avenue property is also in the vicinity of both the Richmond Terrace site and Mr. DeFazio's newly purchased property. Mr. Mezzacappa argues that the per square foot value of the Meredith Avenue property should be $39.00.

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[2] *See Matter of Mezzacappa Brothers, Inc., Sam Mezzacappa and Frank Mezzacappa*, (Richmond Terrace Property), DEC Case No. 2-20070517-290. May 11, 2009 Tr. at 51-52.

With respect to the proposed alternative remediation plan, Mr. Mezzacappa contends as follows. First, as outlined above, the value of the Meredith Avenue property is $39.00 per square foot. Second, the scope of the Department's jurisdiction over the Meredith Avenue property is not limited by the 10-foot contour (*see* 6 NYCRR 661.4[b][1][iii]). Mr. Mezzacappa's second contention is discussed at great length in the Hearing Report at pages 17-21. My conclusion, as discussed in the Hearing Report (at 20, 55-56), is that the 10-foot contour does not limit the scope of the Department's tidal wetlands jurisdiction over the Meredith Avenue property.

Respondents propose to convert about 2,564 square feet of upland property on the Meredith Avenue site to wetlands. Respondents would like to exchange the value of the property converted to tidal wetlands, which would approximate $100,000, for any civil penalty that the Commissioner may assess as part of this enforcement action.

Mr. Mezzacappa attached a survey of the Meredith Avenue property and highlighted two areas that Respondents propose to convert to tidal wetlands. Mr. Mezzacappa acknowledges that a permit from Department staff may be necessary to implement Respondents' proposed remediation plan, and contends that the Department would receive the benefit of additional tidal wetlands. In addition, Mr. Mezzacappa states that authorization from the New York City Department of Parks and Recreation may also be required.

In conclusion, Mr. Mezzacappa notes that the captioned enforcement matter has been pending for four years. According to Mr. Mezzacappa, the taxes Respondents have paid on the Meredith Avenue property over this period exceed $100,000. During the pendency of the administrative enforcement action, Mr. Mezzacappa states that he and his brother (Frank Mezzacappa) have not been able to derive any income from the Meredith Avenue property. According to Sam Mezzacappa, the inability to use the site productively has created a financial hardship. Mr. Mezzacappa hopes for a quick resolution to the captioned enforcement action.

In an e-mail message dated June 24, 2009, Mr. Mezzacappa stated that Respondents had obtained a permit from Department staff "years ago," which authorized material similar to what is now stockpiled on the site to be brought to the Meredith Avenue property as fill. I understand that Mr. Mezzacappa is referring to the May 5, 1988 tidal wetlands permit, identified in the hearing record as Exhibit 40.

Discussion

For their remediation plan, Respondents propose to convert $100,000 worth of property at the Meredith Avenue site to tidal wetlands in exchange for a comparable reduction in assessed civil penalties. For the reasons outlined above, Mr. Mezzacappa argues that the property at the Meredith Avenue site is worth $39.00 per square foot. Consequently, Respondents propose to convert about 2,564 square feet of property ($100,000/$39 per square foot = 2,564 square feet).

Mr. Mezzacappa attached a 17 inch by 11 inch copy of a survey of the Meredith Avenue property to Respondents' June 2009 submission. This survey will be identified in the hearing record as Exhibit 93. Because it has been reduced from the original, most of the details on Exhibit 93, such as the surveyor's name, are illegible. Also, the scale of both the original and the reduced version is unknown. However, it can be determined that the survey is dated February 21, 2008.

Exhibit 93 depicts Lots 12 and 47 of Tax Block 2810 on Staten Island (Richmond County). Anthony Bruno owns Lot 47 (Tr. at 140-141). Sam and Frank Mezzacappa presently own about 7.37 acres of Lot 12. Mezzacappa Bros. subdivided a portion of the tidal wetland areas of Lot 12 from the upland portions of the Meredith Avenue property. After subdividing Lot 12, Mezzacappa Bros. sold the tidal wetland portion to the Land for Public Trust. Details about the subdivision of Lot 12, such as an approved subdivision map and the sale of the property to the Land for Public Trust are not part of the hearing record. (Tr. at 1098) Prior to service of the January 23, 2006 complaint, Mezzacappa Bros. transferred ownership of the upland portion of Lot 12 to Sam and Frank Mezzacappa (Tr. at 9).

Several hearing exhibits depict the features on, and in the vicinity of, the Meredith Avenue property. For example, relevant portions of the tidal wetland maps are identified as Exhibits 1 and 2. Exhibit 1 is a portion of Tidal Wetland Map No. 568-497 that depicts the Arthur Kill, its shoreline, and the northwestern end of the site referred to as the "string piece" (Tr. at 661). Exhibit 2 is a portion of Tidal Wetland Map No. 566-494, and depicts the remainder of the Meredith Avenue property. Exhibit 17 is an aerial photograph of the site taken in 2004 (Tr. at 58). At the hearing, Staff explained that the blue line on Exhibit 17 approximates the property line for Lot 12 (Tr. at 49-51). Exhibit 21 is the Whol and O'Mara survey dated December 30, 2004,

which depicts the metes and bounds of Lot 12 prior to the subdivision, as well as Staff's delineation of the tidal wetlands boundary.

Grading

Respondents propose to create wetland areas on the Meredith Avenue property by regrading portions of the site highlighted in green and orange on Exhibit 93. Mr. Mezzacappa explains there is a backhoe on the Meredith Avenue property, and that he and his brother, Frank, know how to operate it. Respondents propose to spread the stockpiled materials (Exhibit 21) to establish a "new grade," and thereby create tidal wetlands. After Respondents redistribute the stockpiled materials, and regrade the areas designated on Exhibit 93, they would remove any remaining stockpiled materials from the Meredith Avenue property. Respondents anticipate that they will need a permit from the Department to redistribute the stockpiled materials.

The stockpiled materials on the Meredith Avenue property are contaminated with construction and demolition (C&D) debris. Some of the contamination is recognizable and some of it is not. (Tr. at 110-111, 315-322.) As a result of this contamination, Kenneth Brezner, P.E., the Regional Solid Materials Engineer for Region 2, recommended that Respondents conduct a site investigation to determine the nature and the extent of the contamination, and undertake a feasibility study to identify potential uses of the site. Mr. Brezner also recommended removing the stockpiled materials contaminated with hazardous substances, and grading the remainder of the stockpiled materials on the site in an effort to level it. After the site is graded, Mr. Brezner recommended that the site be capped. Mr. Brezner's recommendations concerning the remediation of the site did not include creating any new or enhancing existing tidal wetlands. (Tr. at 326-327, 329.)

Mr. Stadnick, however, recommended that Respondents be required to remove all the materials that they brought to the site. The basis for Mr. Stadnick's recommendation is that the majority of the Meredith Avenue site is within 150 feet of the tidal wetland boundary. Consequently, the site is part of the adjacent area and should not have any contaminated fill on it. (Tr. at 209, 212-214.)

In Respondents' proposed remediation plan, they do not explain how distributing the stockpiled materials over the site would lower the elevation of the Meredith Avenue property in a manner that would create additional tidal wetlands. Also,

Respondents did not explain how the areas disturbed by the regrading process would be stabilized in a manner that would maintain the newly created tidal wetlands.

In addition, to the general concerns associated with regrading the Meredith Avenue property in the manner proposed by Respondents, particular concerns exist with respect to the two areas identified on Exhibit 93 that Respondents propose to convert to tidal wetlands. On Exhibit 93, one area is highlighted in green, and the second area is highlighted in orange. Each area is discussed below.

The Green Area

The string piece of Respondents' property extends to the Arthur Kill, which is a regulated tidal wetland (Tr. at 661; Exhibit 21). On Exhibit 93, an area along the shoreline of the Arthur Kill is highlighted in green. Respondents propose to develop tidal wetlands in areas located north of the string piece, as well as south to the mouth of Chelsea Creek.

Exhibits 16 and 93 show that a portion of Lot 12, which is owned by Sam and Frank Mezzacappa extends north from the seaward end of the string piece. On this portion of the Meredith Avenue property, the tidal wetland boundary, according to the tidal wetlands map (Exhibit 2), generally follows the shoreline of the Arthur Kill. The portion of the Meredith Avenue property located north of the string piece, and which Respondents propose to convert to tidal wetlands is not depicted on any of the surveys previously offered during the hearing (*compare* Exhibit 93 with Exhibits 21, 50A, 50B, 51 and 79).

Given the lack of information in the hearing record, the size of this portion of the Meredith Avenue property is not known, and cannot be reasonably inferred from the hearing record. Consequently, it cannot be determined whether this portion of the Meredith Avenue site could be converted to tidal wetlands. Moreover, it is not known whether the conditions on this portion of the site are accurately reflected on the Tidal Wetlands map. For example, the actual tidal wetland boundary may be landward of the shoreline as currently depicted on the tidal wetlands map (Exhibit 2). Before the Commissioner determines whether this portion of Respondents' property could be converted to tidal wetlands, Department staff should delineate the tidal wetland boundary and evaluate conditions at this portion of the site.

The green highlighted area also includes property located south of the string piece along the shoreline of the Arthur Kill to the mouth of Chelsea Creek. This area is depicted on all surveys in the hearing record (Exhibits 21, 50A, 50B, 51 and 79). On the relevant tidal wetlands map (Exhibit 2), this area is identified as intermediate marsh and high marsh tidal wetlands. Given the current wetland conditions, Respondents do not explain, in their proposed remediation plan, why they selected this area. Moreover, all areas in the green highlighted area located south of the string piece on Exhibit 93 are part of the tidal wetland areas that Respondents subdivided from Lot 12, and sold to the Land for Public Trust. Accordingly, Respondents no longer have any control over the property, and should not have included it in their proposed remediation plan. Therefore, the Commissioner should not authorize Respondents to implement their proposed remediation plan in this portion of the green highlighted area.

The Orange Area

The orange highlighted area on Exhibit 93 closely approximates the tidal wetland boundary that Department staff delineated on April 1, 2005 (*compare* Exhibit 21). Based on Exhibit 93, the tidal wetland boundary appears to be the property line between the upland portion of Lot 12, which Sam and Frank Mezzacappa own, and the tidal wetland areas that Respondents sold to the Land for Public Trust. The wetland boundary on this portion of the Meredith Avenue site is not a straight line. Rather, it is irregular and reflects the natural conditions of the tidal wetlands when the boundary was delineated. As part of their remediation plan, Respondents propose to straighten out the property line by grading portions to create uplands, and grading other portions to create wetlands. On Exhibit 93, the note associated with the orange highlighted area states, in part, that Respondents propose to convert about "+ or minus 15,000 sq ft" of upland areas to tidal wetlands.

With respect to the orange area, it appears that Respondents are proposing to implement their remediation plan on property they no longer own and control. In addition, portions of Respondents' property identified in the orange highlighted area were the subject of the captioned enforcement action. As discussed in the Hearing Report (at 28-32, 33-34, 39, 42-43, 46-47), Department staff demonstrated that Respondents either deposited fill in the tidal wetlands, or allowed fill to erode from the adjacent area into the tidal wetlands without a permit from the Department (*see* January 23, 2006 complaint, Causes of Action Nos. 2, 3, 4, 6, 11, 14 and 17).

On this portion of the Meredith Avenue property, Respondents propose to convert 15,000 square feet of upland property to tidal wetlands (Exhibit 93). Based on a value of $39 per square foot, however, Respondents initially proposed to convert only 2,564 square feet. Consequently, based on the notation on Exhibit 93, Respondents would convert in excess of 12,000 square feet from what they initially proposed in their remediation plan. Respondents do not offer any explanation for the discrepancy.

For the reasons already addressed, it is not possible to use Exhibit 93 or other information in the hearing record to verify the size, in square feet, of the orange highlighted area. As a result, it is unknown whether and, if so, how much of the orange highlighted area could actually be used to implement Respondents' remediation plan assuming that Respondents owned the property, and that the area was not the subject of the captioned enforcement action. Therefore, the Commissioner should not authorize Respondents to implement their proposed remediation plan in the orange highlighted area.

Recommendations

Respondents' proposed remediation plan lacks sufficient detail to recommend its implementation. In addition, substantial portions of the property that Respondents propose to convert from upland areas to tidal wetlands are either existing tidal wetlands, or outside Respondents' control. The Commissioner should adopt the remediation recommended in the Hearing Report at 55-56, and 65.