STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC File No. R2-0303-98-02

-by-

MARY RISI and **ALAN RISI**,

Respondents.

WHEREAS:

1. Pursuant to the notice of hearing dated June 4, 1999 and amended complaint dated January 3, 2003, an administrative enforcement hearing was held before Helene G. Goldberger, Administrative Law Judge ("ALJ"), on February 3, 4, 5 and 13, 2004 at the Region 2 offices of the New York State Department of Environmental Conservation ("DEC" or "Department") located in Long Island City, New York. Department's Region 2 staff appeared by Udo M. Drescher, Assistant Regional Attorney, and respondents appeared by Periconi LLC, James P. Periconi, Esq. and John H. Paul, Esq., of counsel.

2. Respondents Mary Risi and Alan Risi reside at 154-43 Riverside Drive, Beechhurst, New York 11357 ("Risi site"). The Risi site is located on the East River, which is a navigable water of the State of New York, and abuts a State-regulated tidal wetland.

3. I hereby adopt ALJ Goldberger's hearing report, a copy of which is attached, subject to the comments in this order. Based on my review of the record, I conclude that:

a. The record establishes that respondents constructed a revetment and placed fill in a regulated tidal wetland, its adjacent area and the navigable waters of the State of New York in violation of a permit that was issued to respondent Mary Risi by Department staff on or about October 23, 1996 ("1996 permit"). The 1996 permit was issued pursuant to articles 15 and 25 of the Environmental Conservation Law ("ECL") and parts 608 and 661 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The construction and placement of fill have eliminated functions of the tidal wetland and its adjacent area at the Risi site. In addition, respondents constructed a deck, a wall, a utility line to serve the deck and other improvements without the required permit ("unpermitted structures");

b. The record further establishes that respondents violated various special conditions of the 1996 permit by failing to notify Department staff prior to the commencement of the work and by failing to establish erosion controls as part of the construction;

c. By conducting activities unauthorized by or otherwise in violation of the 1996 permit including but not limited to: (a) the placement of fill in the regulated tidal wetland, its adjacent area, and navigable waters, (b) constructing the revetment further seaward than what was permitted, (c) constructing unpermitted structures, and (d) allowing sediment runoff during construction, respondents violated ECL 15-0505 and 25-0401 and 6 NYCRR parts 608 and 661;

d. In light of respondents' violations and unauthorized activities, respondents are being directed to remove the unpermitted fill that was placed in the regulated tidal wetland, its adjacent area and navigable waters, to remove the unpermitted structures, to restore the beach at the Risi site to its pre-fill size, and to modify and relocate the existing revetment so as to be in compliance with the terms and conditions of the 1996 permit (collectively, "restoration activity") and are to be assessed a civil penalty; and

e. Because a tidal wetland enforcement matter is pending against the owners of an adjacent property ("Winkle property") involving similar alleged violations, I concur with the ALJ that it would be preferable to coordinate the restoration activity with any work that may be ordered or agreed upon at the Winkle property. However, I have also considered Department staff's recommendation that, if the Winkle property enforcement matter is not resolved in a timely fashion, restoration activity relating to the Risi site should not be further delayed. Therefore, if a consent order is not executed, a Commissioner's order after hearing is not issued, or no other resolution of the enforcement proceeding is reached with respect to the Winkle property within 180 days of the signing of this order, Department staff, at its sole discretion, may direct respondents to commence restoration activity relating to the Risi site. In that event, Department staff may require respondents, as necessary, to limit or delay certain aspects of the restoration activity at the Risi site until such time as the enforcement matter concerning the Winkle property is resolved.

4. The ALJ has reviewed the civil penalty proposed by Department staff in consideration of such factors as economic benefit, environmental harm, cooperation and deterrence. Given the recognized expense of the restoration activity and other circumstances relating to this case, the ALJ has recommended a reduction in the proposed civil penalty to $170,000, of which $50,000 would be payable within sixty (60) days of the date of this order and $120,000 would be suspended contingent upon respondents' completion of the restoration activity.

5. I have further considered the penalty calculation in light of the anticipated cost of the restoration activity at this residential property, the arguments raised by respondents in their post-hearing brief and reply brief in support of a reduction of any penalty, as well as other aspects of the record in this proceeding. Based on that consideration, I have determined to lower the civil penalty to $150,000, of which $30,000 is to be paid within sixty (60) days of the date of this order. The payment of the remaining $120,000 would be suspended contingent upon respondents' completion of the restoration activity.

6. To ensure that the restoration activity is satisfactorily implemented, respondents must prepare a restoration plan that describes the work to be undertaken pursuant to this order. Respondents must submit the restoration plan to Department staff for its review and approval prior to the commencement of the restoration activity.

7. The ALJ recommended that Department staff commence re-mapping of the boundary of the regulated tidal wetland at the Risi site. Based on my review of this record, I am not imposing any requirement in this order that the area be re-mapped, but I am referring the ALJ's recommendation to the Department's Region 2 natural resources staff for consideration. However, the record in this proceeding demonstrates that the restoration activity that respondents are being directed to undertake by this order is in no way contingent or dependent upon a re-mapping or alteration of the regulated tidal wetland boundary. See, e.g., Hearing Report, at 15.

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

I. Respondents are adjudged to have violated ECL 15-0505 and 25-0401 and 6 NYCRR parts 608 and 661.

II. Respondents are jointly and severally assessed a civil penalty in the amount of one hundred fifty thousand dollars ($150,000). The payment of one hundred twenty thousand dollars ($120,000) of this sum shall be suspended contingent upon respondents' removal of unpermitted fill that was placed in the regulated tidal wetland, its adjacent area and navigable waters and removal of unpermitted structures, restoration of the beach at the Risi site to its pre-fill size and modification and relocation of the existing revetment so as to be in compliance with the terms and conditions of the 1996 permit.

III. Payment of the civil penalty shall be by certified or cashier's check or money order payable to the order of "NYSDEC" and mailed (by certified mail, return receipt requested), sent by overnight delivery, or hand-delivered to: Udo M. Drescher, Assistant Regional Attorney, NYSDEC, Region 2, 47-40 21st Street, Long Island City, New York 11101. The unsuspended portion of the penalty ($30,000) shall be paid within sixty (60) days of the date of this order. The suspended portion of the penalty ($120,000) shall be paid within sixty (60) days of a written notice to respondents by Department staff that respondents have failed to comply with the provisions and terms of this order.

IV. Department staff shall notify respondents of the execution of an order on consent, the issuance of a Commissioner's order after hearing or other resolution of the enforcement proceeding with respect to the Winkle property. Within thirty (30) days of respondents' receipt of the notification or such later date as Department staff may determine to be appropriate, respondents shall submit to Department staff a restoration plan relating to the Risi site. However, if within 180 days of the date of this order, no order on consent is executed, no Commissioner's order after hearing is issued, or no other resolution of the enforcement proceeding is reached with respect to the Winkle property, Department staff, at its discretion, may so notify respondents and direct respondents to submit a restoration plan within thirty (30) days or such later date as Department staff may determine to be appropriate. In that event, Department staff may identify areas where respondents shall either limit or delay restoration activity until such time as the enforcement matter concerning the Winkle property is resolved.

V. Respondents shall submit a restoration plan that describes the work to be undertaken to Department staff for its review and approval prior to the commencement of the restoration activity. Department staff may direct that changes be made to the restoration plan. The restoration plan shall include, but not be limited to, a description of the manner in which respondents shall: remove the unpermitted fill that was placed in the regulated tidal wetland, its adjacent area, and navigable waters; remove the unpermitted structures; restore the beach at the Risi site to its pre-fill size; and modify and relocate the existing revetment so as to be in compliance with the terms and conditions of the 1996 permit. The restoration plan shall also include an implementation schedule for the restoration activity.

VI. Respondents may not commence any restoration activity until they are notified in writing by Department staff that the restoration plan has been approved, provided that Department staff, at its discretion, may make exceptions for certain restoration activities.

VII. Respondents shall notify Department staff: at least five (5) business days prior to the date when the restoration activity is to commence at the Risi site; on the date when the restoration activity is completed; and such other intermediate dates as specified by Department staff. Such notifications shall be made in the manner established by Department staff.

VIII. Respondents shall provide Department staff with access to the Risi site in order that Department staff may determine the sufficiency of the restoration plan that respondents have submitted to Department staff for review and approval, and the compliance of the ongoing and completed restoration activity with this order and the approved restoration plan.

IX. All communications between respondents and the Department concerning this order shall be made to Udo M. Drescher, Assistant Regional Attorney, NYSDEC, Region 2, 47-40 21st Street, Long Island City, New York 11101.

X. The terms and conditions of this order shall bind respondents, their heirs and assigns in any and all capacities.

New York State Department
of Environmental Conservation

_____/s/_____
By: Erin M. Crotty, Commissioner

Albany, New York
October 29, 2004

To: James J. Periconi, Esq.
John H. Paul, Esq.
Periconi, LLC
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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

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

MARY RISI and ALAN RISI
154-43 Riverside Drive
Beechhurst, New York 11357,

Respondents.

Case No. R2-0303-98-02

HEARING REPORT

by

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

June 3, 2004

Proceedings

Pursuant to Part 622 of Title 6 of the New York Compilation of Codes, Rules and Regulations (NYCRR), an administrative enforcement hearing was convened to consider allegations by the staff of the New York State Department of Environmental Conservation (DEC or Department) against respondents Mary Risi and Alan Risi, 154-43 Riverside Drive, Beechhurst, New York 11357. The staff alleged that the respondents failed to adhere to the conditions set forth in a 1996 permit issued to the Risis pursuant to Environmental Conservation Law (ECL) Articles 15 and 25 and Parts 608 and 661 to build a revetment - a type of retaining wall designed to reduce shoreline erosion. In addition, staff alleges that the respondents failed to provide Department staff with notice of intent to commence work and constructed a deck, two walls alongside said deck and utilities without a tidal wetlands permit pursuant to Articles 15 and 25 of the ECL and Parts 608 and 661 of 6 NYCRR. Staff also complains that respondents failed to maintain erosion control measures at the construction site, in violation of a permit condition.

Staff served the respondents with a notice of hearing and complaint dated June 4, 1999. Staff served an amended complaint on or about January 3, 2003. After a period of discovery and motion practice, on October 23, 2003, staff filed a statement of readiness with the Office of Hearings and Mediation Services. Subsequently, respondents retained new counsel, James J. Periconi, Esq., and during a conference call on December 5, 2003, the parties agreed to retain the dates of January 13-15, 2004 that were previously set for hearing. On December 22, 2003, in another conference call, the parties agreed to delay the hearing in order to accommodate an expert witness of the respondents.

By motion dated January 23, 2004, respondents moved to adjourn the hearing scheduled for February 3-5, 2004: (1) to apply for a new permit based upon their view that DEC staff failed to adhere to Uniform Procedures Act (UPA) requirements in processing the Risi permit and (2) to obtain a new determination of the Department's tidal wetlands jurisdiction. Staff opposed this adjournment. I denied this motion in a ruling dated January 26, 2004. On January 30, 2004, in response to respondents' motion for leave to file an expedited appeal of my ruling, Chief Administrative Law Judge James T. McClymonds conveyed Commissioner Crotty's decision to deny the motion.

The hearing took place in DEC's Region 2 offices in Long Island City on February 3-5 and 13, 2004.

The Department staff was represented by Udo Drescher, Assistant Regional Attorney, DEC Region 2. The respondents were represented by Periconi, LLC, James J. Periconi, Esq. and John H. Paul, of counsel.[1]

Department staff presented the following witnesses in support of its case: Jeffrey Rabkin, DEC environmental analyst; Stephen Zahn, DEC regional manager, Marine Resources Program; Susan Bauer-Maresca, DEC biologist, Marine Habitat Protection Bureau; Roman Gregory Rakoczy, DEC environmental engineer, Coastal Erosion Management; and William Daley, former DEC Director, Bureau of Flood Protection, Division of Water.

Respondents presented the following witnesses in support of their case: Henry Bokuniewicz, Professor of Oceanography, Marine Sciences Research Center, SUNY at Stony Brook; Michael Niebauer; Michael P. Bontje, President, B. Laing Associates; and respondent Alan Risi.

The Charges and Relief Sought

The Department staff alleged that the respondents constructed a revetment in a location and manner that violated the terms of the permit that was issued to Mary E. Risi in February 1996. In addition, staff alleges that the respondents built additional structures in the regulated tidal wetland zone and adjacent area without a permit. The amended complaint also contains allegations concerning the Risis' failure to provide sediment controls and to provide DEC staff with notice of the start of construction in accordance with the issued permit. Staff seeks the removal of the revetment and the additional structures and a payable civil penalty of $330,000. Staff bases this penalty on the loss of valuable tidal resources, the respondents' construction of additional structures after receipt of a notice of violation, and a lack of cooperation in resolving these allegations. Also, staff argues that the deterrent value of a large penalty is important in this case due to the respondents' actions.

Respondents' Position

The respondents allege that the 1996 permit is vague and staff failed to provide sufficient guidance during the permitting process and are thus responsible for any misunderstanding related to the construction of the revetment. In addition, the respondents maintain that because the 1974 tidal wetlands boundary reflected an area of land (hereinafter referred to as the eagle's head) north of the Risi property that was formerly part of their property, the Risis were entitled to fill in that area to reflect past conditions. The respondents also posit that the Department's tidal wetland jurisdiction falls short of the slope north of the Risi house based upon the 10 foot contour limitation set forth in 6 NYCRR § 661.4(b)(iii). The respondents maintain that due to the construction that has taken place along the shoreline that abuts their home and the strong

[1] I granted permission for Mr. Paul to participate in the hearing in response to Mr. Periconi's request based on Mr. Paul's pre-admission status. TR (transcript) 224.

erosive forces at work, they had little choice but to place the revetment as they did. The Risis respond to staff's pursuit of restoration work by stating that a new permit application process should ensue that is in conformity with Part 661. Respondents argue that due consideration must be given to the lack of tidal wetland values and their coastal erosion concerns. Respondents maintain that the penalty is not in keeping with precedent in other tidal wetland enforcement proceedings and given the lack of environmental damage is unwarranted. The Risis argue that to the extent that there have been violations resulting from the work performed, it was due to staff's unprofessional review of the permit application and the respondents are not responsible.

Respondents claim that staff's actions in this matter are due to political pressure and not based upon the environmental circumstances. In their answer, the Risis also state that any filling of adjacent areas and deposition of sediment in a tidal wetland occurred, if at all, as the result of the actions of other individuals.

Respondents also set forth a number of other legal claims in their answer such as laches, selective enforcement, and that respondents' actions were in response to an emergency.

Orientation

To facilitate the reader's understanding of this report, I have attached three exhibits – Exhibit 15 – a copy of the 1974 tidal wetlands map that shows the approximate location of the Risi property and the previously existing eagle's head; Exhibit 28 - an aerial photograph showing the Risi residence marked with an "X" prior to the construction at issue; Exhibit 29 – a copy of an aerial photograph also showing the Risi residence after the construction.[2] In all of these exhibits, north is towards the water. In Exhibits 28 and 29, the Winkle property is the next property to the east of the Risis' location. The Mattina property, also referenced in this report, is the property located east of the Winkle property. Exs. 24a, 24c. The condominiums which were referenced during the hearing are located to the west of a cove which is located west of the Risi property. Ex. 32g.

FINDINGS OF FACT

Permit Application Process

1. Mary E. Risi is an owner of property at 154-43 Riverside Drive, Beechhurst, New York. She purchased this property in December 1995. Exhibit (Ex.) 4. This property is located on the East River in the Borough of Queens between the Whitestone Bridge to the west and the Throg's Neck Bridge to the east. Exs. 4, 14.

[2] The parties did not concur on the exact location of the Risi property on the 1974 wetlands map. See, *e.g.*, Exhibit 48. By referring to Exhibit 15, I am attempting to orient the reader as to locations generally and I have not adopted the staff's identification of the exact location of the Risi property on this document.

2. On or about February 26, 1996, based upon information received from the Army Corps of Engineers with respect to DEC's jurisdiction, the respondents applied to the Department for a permit, pursuant to Articles 15 and 25, to "Construct a Clean StoneWall-Constructed of 1/4 to 1 Cubic Yard Stone. Backfilled with smaller stone and earth." Ex. 5a. The stated purpose of this project was to prevent further erosion of the ground behind the home. Ex. 5a. As part of this application, the Risis provided a wave break detail of what they intended to construct. Ex. 5g. At the time of the application, to the north of the house was a sloped wall consisting of an unorganized jumble of rock and rubble. Exs. 5c, 36. Based upon a lack of erosion protection, sections of ground on the Risi property were deteriorating and washing away. Ex. 5e; TR 929-930.

3. When this application was received in DEC's Region 2 office, the Division of Environmental Permits (DEP) staff forwarded it to the Bureau of Maine Habitat Protection for review by the technical group that reviews permit applications. TR 20; Ex. 6.

4. In response to the DEP staff's notification of availability for review, Stephen Zahn reviewed the application materials and determined that the applicant's approach would not serve to establish a stable slope. TR 96. During this review process, Mr. Zahn visited the site with DEC Marine Habitat Protection Bureau biologist Susan Bauer-Maresca. TR 101, 122-124. As part of his site visit, Mr. Zahn identified the then existing top of the slope which would be the starting point for any new structure. TR 102-103. Mr. Zahn confirmed that the top of the slope, as shown on the applicant's initial submission, was approximately 20 feet from the back of the house. Mr. Zahn also concluded from this visit that this area was the landward termination of the Department's adjacent area jurisdiction. TR 103-104, 115; Ex. 5g. During this site visit, Mr. Zahn determined the location of the apparent high water line on the beach which indicated the tidal wetland boundary. TR 104-105, 106.

5. The Department's official tidal wetlands map for this area - map 600-516 - was created in 1974. Ex. 14. This map shows that the type of tidal wetlands in existence in this area is littoral zone (LZ). Ex. 14. Littoral zone is a tidal wetland habitat that is permanently inundated by water. TR 112; 6 NYCRR § 661.4(hh)(4). In addition to the littoral zone, at the time of the application by the Risis, other habitat types existed at the Risi site - shoal or mud flat areas and adjacent area - the area between the mean high water line and the slope. TR 197; Exs. 24a, 24b, 24i, 40, 41; 6 NYCRR § 661.4(hh)(3).

6. The tidal wetland map shows that in 1974 at least part of the property now owned by the Risis contained a spit of land that jutted out northward into the East River. Exs. 15, 47, 60. This eagle's head no longer exists, making the tidal wetlands boundary more landward. See, e.g., Ex. 29; TR 112.

7. As a result of his review and site visit, Mr. Zahn critiqued the proposed application by stating that the "[p]roject would result in an unstable stone bank. Applicant needs to redesign as a conventional revetment. Plan should include: a. Capstone (½ - 1 ton); b. over Corestone (50 - 100 lbs.); c. over bedstone (5 -10 lbs); d. over filter fabric (anchored at toe which is buried 3 - 6 feet below grade at MHW [mean high water]); e. slope not to exceed 1:2 . . . Applicant should indicate removal of existing C & D [construction and demolition debris] that presently lines the slope." These comments also provided that the staff should send to the applicant the "attached sheet" which was a one page description and drawing of a revetment. Exs. 7a, 7b. This description came from an Army Corps of Engineers manual. TR 25. On the drawing Mr. Zahn noted where the filter fabric would go and also provided the slope of the revetment - 2:1. These instructions were in addition to the printed labels on the drawing that identified the overtopping apron, graded stone filter, armor layer, and toe protection. Ex. 7b. Above and below this drawing there is a description of the purpose of a revetment and the method of construction. In this version of the attachment there are a few words that appear highlighted and a few words that appear struck out. There is no indication of the amount of fill that would be needed to provide a stable foundation for the revetment. Staff admits that any voids that existed would have to be filled but that this would not amount to a significant amount of fill. TR 385.

8. A revetment protects shoreline from erosion of soil and also dissipates wave energy. TR 181. The design of the revetment is meant to hold the soil particles in place. To accomplish this goal, a filter fabric is the base layer - this is placed across the top of the soil itself to prevent soil particles from moving through the fabric. This material must be anchored by folding it back and wrapping it among the stone layers. TR 183. Then there are three layers of stone placed beginning with the smaller stone and graduating to the top layer of armor or capstone that will take the brunt of the wave energy. TR 185, 452. The mean high water should be below the overtopping apron. TR 186. See also, Ex. 36.

9. Mr. Zahn also spoke with Mr. Risi regarding staff's recommendations for the design of the revetment. Mr. Zahn explained how the information provided by staff would improve the stability and effectiveness of the revetment. TR 188. Mr. Zahn discussed with Mr. Risi the location of the tidal wetland boundary in 1996 - the apparent high water line. Because the applicant was not proposing to do much work in the adjacent area, Mr. Zahn did not emphasize the boundaries of the adjacent area. TR 331-332, 352, 361.

10. After he received the response from Mr. Zahn to the notice of availability for review, on July 17, 1996, Jeffrey Rabkin of DEP forwarded the information to Mr. Risi and also called him to discuss the application. TR 25; Exs. 7a and b, 31.

11. On or about July 23, 1996, Mr. Risi sent Mr. Rabkin a revised plan to construct the revetment. With this drawing is a cover letter dated July 23, 1996 that is signed by Mr. Risi and advises Mr. Rabkin that enclosed was "our plan to construct a stone wall at our residence." The letter is stamped "received" by the Region 2 office on July 24, 1996.

Ex. 8a. The drawing is based upon the one that Mr. Zahn had forwarded to the Division of Environmental Permits and contained measurements indicating that the top of the revetment would start 20 feet from the back (north side) of the house and that the revetment would go out an additional 30 feet to the north. Above these measurements is a notation that the entire distance from the back of the house to the toe of the revetment would be 50 feet. This plan also indicates the stone that would be used: bed - 5-10 lbs.; core - 50-100 lbs; cap - 1000-2000 lbs. Ex. 8b.

12. On or about October 23, 1996, staff issued to Mary Risi a permit pursuant to Articles 15 (Water Resources) and 25 (Tidal Wetlands) and 6 NYCRR 608 (Water Quality Certification) and 6 NYCRR 661 (Tidal Wetlands - Land Use Regulations) to "[r]econstruct approximately 80 linear feet of rip-rap revetment." Ex. 9. Among the requirements of the permit, special condition 18 required that the work comply "with the unattributed, undated drawing, 'Risi Residence: 154-43 Riverside Drive Beechhurst NY 11357,' stamped 'received by the Department on 24 July 1996. . ." Special condition 19 prohibited sediment, construction and demolition debris or any solid waste from entering the waterways. Condition 20 required that the revetment be composed of clean, natural stone and that all broken concrete, asphalt and comparable material on the site at the time be removed. Special condition 21 required that the permittee "[n]o less than five business days prior to the commencement of the subject work, . . .deliver a completed copy of the attached 'Notice of Intent to Commence Work' to Stephen M. Zahn . . ." Ex. 9.

13. Mr. Risi owns a company that employs 40 people - Georal International - that installs doors for commercial buildings with two locations in the United States. TR 992-994.

Project Construction

14. After receiving the permit, the applicants did not commence this project for approximately one year. TR 953-954. Prior to alerting the Department that he was commencing work pursuant to the permit, Mr. Risi arranged for approximately 40 truckloads of fill to be brought onto the site and stockpiled the rock to be used in the revetment construction. TR 196, 955. In approximately January or February of 1998, he started to install the wall. TR 959.

15. Staff did not receive any prior notification that the respondents had commenced work at the site. TR 362, 366. It was at a March 1998 meeting with the respondents that staff first viewed the letter the respondents claim they sent to the Department to notify them of the start of work and the intention to modify the existing plan. TR 366.

16. On February 24, 1998, in response to complaints from the local community board, Ms. Bauer-Maresca went to the Risi site and observed that the revetment was not built in conformity with the permit. TR 137, 143, 384; Exs. 20, 23. There had been a hard rainfall the day before the site visit and a significant amount of sediment had been

allowed to move off the site into the water. Ex. 19b; TR 135, 145, 147. The respondents had no erosion controls in place. TR 136.

17. From the corners of the Risi house to the top of the slope of the revetment, the distance was 80 feet instead of the 20 feet that the permit instructed. TR 137. The respondent placed 4800 square feet of fill in the East River, wetlands, and adjacent area. TR 286; Exs. 19a, d, 32d, e, f.

18. Based upon these observations, Ms. Bauer-Maresca sent Mary Risi a notice of violation dated February 24, 1998. Ex. 21, TR 141.

19. In addition to the placement of the revetment and the lack of sediment controls, the construction of the structure was also not in conformity with the permit requirements. TR 261. Small stones were on top of the structure where the largest sized capstone should have been placed. TR 261. The material appeared to be randomly dumped over the shoreline. TR 411-412, 505, 545-547, 617. The filter fabric, if placed, is buried but the method of construction - dumping rather than placement - could have resulted in piercing the fabric and defeating its purpose. While the revetment may do an adequate job in protecting the Risi property, its duration may be limited due to the nature of the construction.

20. In the summer of 1998, the respondents retained an architect, Anthony Cucich, to design additional improvements to their property – including a patio. Ex. 62.

21. The respondents installed a 30 foot cement patio, planted 40 feet of lawn, installed boards on top of the revetment supported by 4 foot by 8 foot wood sheets with a railing on top, built a wall on the western side of the property and installed a utility line on that wall. Exs. 30a, 30c; TR 1029 - 1033, 1049 - 1050. The Risis did not submit a permit application to the Department for any of this work. TR 281, 1028.

Revetment Efficacy

22. The erosion at the Risi location is caused by wind and currents, with the main source of wave energy coming from wind. TR 454-455. Fetch is the distance that wind-driven water can travel to reach a site. TR 161, 456. The distance that wind can travel without obstruction drives and creates waves. TR 457. The distance, velocity, and the length of time contribute to the force of those waves. TR 457. At the Risi site, the farthest point the wind can travel from the east without obstruction to create that wave energy is Hewlett Point - about 3 miles. TR 462; Ex. 16. Because of the shallow water near the Risi property, the fetch would be a shorter distance. Because of the short distance in the northwest direction (Old Ferry Point) and the shallow water, there is little opportunity to create a great deal of energy from that direction. TR 463-464; Ex. 16. Waves are relatively small in this area. TR 467-469. Erosion in this area is generally caused by storm-related events rather than currents. TR 473.

23. The Risis were seeking to protect their property from erosion. Ex. 5a, 5e, 5f. The permitted revetment, placed twenty feet from the home, would have fulfilled this intention had it been constructed properly. Ex. 36. By placing the revetment into deeper water than the Department had permitted, the wave height that will affect the revetment is increased because wave height is directly related to water depth. Ex. 36, TR 472.

24. Flood protection requires raising an area above the level of the flood from which protection is sought and must include the anticipated height of storm-driven waves. Ex. 36. The Flood Insurance Study for New York City indicates that the area of Queens where the Risi property exists is fronted by a V11 zone - elevation N.G.V.D. (National Geodetic Vertical Datum of 1919). Exs. 35, 36. In a 100-year storm event resulting in elevations of still water of 14 N.G.V.D., the lower floor of the Risi residence would be flooded. Ex. 36. The location of the revetment would not make a difference in such circumstances. Ex. 36. There is no absolute protection from coastal storms and their effects if property is located on the coast. TR 584.

25. The placement of the fill material at the Risi and Winkle properties has resulted in an abrupt transition in the shoreline at properties farther to the east along this shoreline. TR 523-524. This condition has the potential to focus wave energy in that area and erode current structures and shoreline. In addition, due to the placement of the fill, there is potential for erosion immediately to the west of the Risis - between the condominiums and the Risi property where there remains a small beach area. TR 525-526. To avoid this result, the unpermitted fill should be removed and the natural beach restored to the pre-fill size and composition. The Risi revetment should be removed and re-established with the slope set forth in the July 1996 drawing. Ex. 36.

Resource Impacts

26. Along the East River shoreline in the northern portion of Queens -- as exists in most of New York City -- there is a good deal of development. TR 154, 242, 598. At the time of the Risi application, in front of the old shoreline protection structure at the applicants' property there was a gently sloping beach. TR 114; Ex. 28. Remnants of this beach can be seen in properties to the east and west of the Risi property. Ex. 24a, 24h, 24i. The current status of the revetted shoreline at the Risi and adjacent properties shows the loss of this shoreline. Exs. 24d; 29.

27. In addition to the littoral zone tidal wetland habitat that is permanently inundated, prior to respondents' filling, there also existed shoal or mud flat areas that would provide wildlife habitat. TR 197. These different types of wetland provide habitat for different species of fish including juveniles as well as benthic organisms. TR 197-198, 233. Horseshoe crabs need sandy soils to reproduce and because development has eliminated a lot of this habitat in the metropolitan area, the remaining areas are important. TR 241-243. Horseshoe crab eggs are an important food source for wading birds. TR 241-243.

28. In May and August 2003, trawl studies of the area, including the waters near the Risi property, revealed a variety of fish species that use this area as habitat. TR 200-202; Exs. 25 and 26. According to 1993 impingement and entrainment studies performed for Consolidated Edison, there are approximately 20 species of fin fish and invertebrates in the area near the Astoria/Ravenswood power plant that is between 1 and 2 miles from the Risi property. TR 231-233.

29. The Risi property is within the normal foraging range of bird species that inhabit North and South Brother Islands, which are roosting and nesting areas 1 - 2 miles west of the Risi site. TR 204.

DISCUSSION

It is the conclusion of this ALJ, based upon the testimony and evidence produced by the DEC staff, as well as by evidence submitted by the respondents, that the Risis violated Articles 15 and 25 of the ECL and Parts 608 and 661 of 6 NYCRR by building their revetment in a different location than was allowed by the 1996 permit. The respondents do not deny that they built the revetment in a different location than the permit provided. Instead, the Risis claim that they modified the location based upon a number of factors discussed below. I also found credible the Department staff's testimony that they did not receive the applicant's notification of intent to commence work. While there is no way to determine whether or not the applicant actually sent the January 28, 1998 letter to staff, Mr. Risi admitted that he had begun to bring fill and stone onto the site prior to having sent the letter. Ex. 11. Staff also demonstrated that the respondents violated Article 25 of the ECL and Part 661 by building additional structures in the adjacent area of a tidal wetland without a permit. With respect to this allegation as well, the respondents did not contest that they did not submit a permit application for this additional work. And, as staff's evidence showed, the respondents failed to place erosion controls at their site during construction resulting in the entry of sediment into the East River.

I have rejected the defenses of the respondents for the reasons described below.

Unclean Hands - Compliance with Uniform Procedures Act

The respondents' first defense is that they are homeowners without any specific professional expertise in this subject. They state that at the time of the permit application, they were ignorant of the law's requirements and depended on DEC staff to ensure that the permit process was thorough and that their conduct was in compliance with the relevant mandates. Specifically, the respondents now claim that staff violated the Uniform Procedures Act (UPA) by not requiring the applicant to adhere to each and every element contained in 6 NYCRR § 621.4(k). This regulation requires:

> (1) A complete application must include:
> (i) plan and profile sketches of the proposed project;

(ii) a map at a scale of 1" = 2,000' or larger showing its location;

(iii) project plans at a scale of 1" = 100' with a contour interval of two feet and showing the mean high water line (if the project is in the water) and/or the tidal wetlands boundary as delineated at the site by DEC staff or an environmental consultant, or an accurate representation of the tidal wetland boundary as taken from the official tidal wetlands maps;

(iv) a description of the project including its proposed use;

(v) the names of adjacent landowners;

(vi) a statement of feasible alternatives; and

(vii) a statement of methods to mitigate or eliminate adverse impacts to tidal wetlands.

Staff acknowledged that the respondents' application did not include a number of the above mentioned requirements such as a plan view of the proposed project, scaled survey, or a statement of alternatives. Mr. Rabkin explained that for small projects of this size by private homeowners, the Department staff attempts to lessen the application burdens as long as there is sufficient information provided for staff to assess the impacts and make a determination. TR 56-59, 73-75. Mr. Rabkin explained that he spoke with Mr. Risi and determined that the applicant understood what the Department sought in this application and could follow the instructions. TR 75. Mr. Zahn visited the site, identified the apparent mean high water line and the Department's area of jurisdiction, and communicated his observations with Mr. Risi. TR 188, 331-332, 352, 361. This review provided enough additional information to allow staff to develop permit requirements and the revetment design so that the Risis would attain their shoreline protection goals and the tidal wetland resources would be minimally affected. TR 344-352.

Respondents are attempting to take the staff's decision not to dogmatically apply certain requirements for the homeowners' benefit and use this flexibility as their defense. I agree with staff that it is clear that Mr. Risi understood the requirements of the permit. They were simple. The location of the revetment is clearly marked on the drawing that Mr. Risi submitted in July 1996 to DEC staff. Ex. 8b. It is true that the drawing itself is not date-stamped as indicated in special permit condition 18. However, this condition references the drawing received by the Department on July 24, 1996. Since the cover letter submitted by Mr. Risi with the drawing indicates a date stamp of July 24, 1996, there can be no confusion about what drawing the staff had indicated in the permit.[3] This is particularly the case where it was Mr. Risi, in response to Mr. Zahn's critique, who had revised the initial drawing that accompanied the application. Exs. 5g, 7b.

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[3] Despite the inordinate amount of hearing time spent on discussions of whether it is Department policy to annex all approved drawings to permits, I did not find that Department staff always act in a particular manner. The practice appears to vary depending on the project and the region. TR 166, 324, 686; Exs. 52, 53, 54, 56, 57. This issue is irrelevant as there is no question that the Risis knew what drawing was referenced by the permit conditions.

Mr. Risi does not claim that he did not understand how to build the revetment. Even now he insists it was done properly despite the consensus of almost every witness, including Professor Bokuniewicz, that the stone appears to have been poured on the site rather than engineered. TR 617. Mr. Risi is an experienced businessman who appears well capable of following directions. TR 992-994.

I do not find it credible that in between the time of the permit application and the commencement of the work, Mr. Risi researched the tidal wetlands map and the original survey of his property to conclude that the permit entitled him to fill in the area of the former eagle's head previously located north of the current shoreline. Resp. Br. 7, TR 941, 951. Even if that was the case, given the application process, including the communications between staff and the respondents, it is beyond cavil that the Risis would not contact DEC prior to acting upon this new understanding of the permit's terms. This is apparent from the candid statement of Dr. Bokuniewicz when he reported a conversation he had with Mr. Risi regarding a letter Mr. Risi sent to the Department; "about modifying the structure and went ahead and modified it, but hadn't gotten a response from the DEC or something like that." [emphasis added.] TR 622.

Mr. Risi acknowledged that he did understand that the permit references to "reconstruct approximately 80 linear feet of rip-rap revetment" did not mean he could build the structure 80 feet from his house. TR 941. Rather, after getting the permit, he claims he researched the historical conditions of the property to better understand what "reconstruct" meant. TR 941-942. He claims that in looking at the tidal wetlands map of 1974 and some other documents, he concluded that the property was 80 to 100 feet less than it was in 1974. TR 942. It is upon this thin reed that the respondents rely to explain their illegal filling.

Even in the pictures that accompanied the respondents' application, there is evidence of a former structure that apparently had served as a shoreline protection device, albeit in a less than perfectly engineered fashion. Ex. 5c. This rip rap structure was referenced by several of the witnesses. TR 103, 387, 446. It is apparent that this was the structure that the permit references to reconstruct. If the respondents were unclear about the meaning of this language, the logical step was to contact DEC staff rather than go on some historical search that the Risis claim led them to act out of compliance with the clear mandate of the permit conditions.

The Risis claim that they sent staff a letter in January 1998 that included a revised drawing of the revetment. This drawing indicates that the structure would start 80 feet from the rear of the house rather than the twenty feet set forth in the approved drawing. Exs. 11, 12, 8b. Staff testified that nothing was received by the Department from the respondents indicating that work was to begin or that the Risis proposed to change the location of the revetment. TR 196, 384. I believe that staff did not receive this information; however, there is no way to tell whether or not the respondents did send it.[4] In any case, by virtue of its content, it is clear that the Risis

[4] The first time staff viewed this document was in a meeting with the respondents in March 1998.

understood that the structure they intended to build was not the formation that was approved in the 1996 permit. Ex. 9. Having not heard from Department staff regarding this critical change in their project, it was incumbent upon the respondents to contact DEC.

I conclude that while the Risi application certainly could have been more sophisticated, the applicants' lack of expertise was not the cause of the permit violations. Nor was the staff's decision not to require certain elements set forth in Part 621. The respondents claim that there was no discretion on staff's part not to require each and every item in § 621.4(k). I agree with staff's conclusion that Environmental Conservation Law § 70-0105(2) requires that a complete application is one that provides the information necessary for staff to make its findings and determination. The applicants provided this information with the staff's guidance and therefore, respondents' UPA argument fails as a defense.

Jurisdiction

Eagle's Head Location

In further support of the respondents' justification that they were merely filling in land that had previously been part of their property, their consultant constructed an elaborate historical theory. Mr. Bontje testified that he used the 1974 tidal wetlands map along with a survey of the property and a 1998 photograph to calculate the location of the eagle's head. TR 713-723. Based upon these calculations, Mr. Bontje concluded that there was more land in the East River that would have been part of the Risi property than is shown on the 1995 survey. TR 725. Specifically, Mr. Bontje testified that on the western side of the Risi property the land would extend 100 feet further to the north than the approximate high water line on the survey and on the eastern side of the Risi property the area of fill would extend approximately 85 feet north of this mark. TR 722. It is this conclusion that the respondents' consultant deems a sufficient foundation for the Risi's unpermitted filling. According to the Risis and their consultant, the respondents were merely trying to recover the land that natural or man-induced forces had taken away.

In response to further questioning on this theory on the last day of the hearing, Mr. Bontje provided some additional measurements that he deduced from a survey of the Risi property and an aerial photograph. Exs. 46, 47. He used these to create a third document - Exhibit 48 - the aerial photograph that contains Mr. Bontje's delineation of the Risi property lines. These lines indicate that the site formerly contained a substantial portion of the eagle's head. Ex. 48. Mr. Bontje compared the distances from the edge of the pavement where the property begins at Riverside Drive to the northern edge of the eagle's head and from the pavement edge to the northern edge of the Risi revetment. Again, this was meant to demonstrate that the respondents had only filled in an area that previously held fill. Initially, Mr. Bontje testified to a distance of 260 feet to the northern end of the eagle's head and 290 feet to the edge of the Risi revetment. TR 817-820. From these measurements, I would conclude that even if one were to accept the rationale - the respondents filled an additional 40 feet beyond the nonexistent spit.

Under additional questioning by respondents' attorney, the witness eventually came up with measurements that better coincided with the respondents' actions. TR 822. Mr. Bontje admitted that these distances were not precise: "[k]ind of hard to tell because of the driveway curves there." TR 822. Regardless of the accuracy of these measurements, I reject this evidence for the following reasons.

It is true that the tidal wetlands boundary in 1974 shows the boundary of the wetland going around the eagle's head that no longer exists. Ex. 14. However, in 1996 when the applicants applied for their permit, this spit had already disappeared. TR 112. Mr. Zahn identified the apparent mean high water line for the respondents as it existed at that time in accordance with 6 NYCRR § 621.4(k)(1)(iii). TR 104. It is this line, rather than some historical demarcation, that was the tidal wetland boundary. Because the Risis did not buy the property with this eagle's head or spit, they could not have had an expectation of its use when they negotiated for the purchase of their home. In addition, as staff pointed out in their closing brief, the structure and fill that the Risis placed in the waters off their land in no way replicates the shape and depth of the eagle's head. TR 302.

Historical Photograph - Shoreline Quality

The respondents' next defense is also based upon a historical theory developed with the consultant Bontje. The theory is that the shoreline at the Risi property is primarily composed of artificial fill and that the Department's jurisdiction ended at a location closer to the water's edge than what staff had identified during the permit process. Mr. Bontje relies on Ex. 38 - a photograph produced by a neighbor of the Risi's - Michael Niebauer. Mr. Niebauer grew up in Beechhurst and now owns a public relations company called "Spin Doctor." TR 658. Mr. Neibauer testified that the photograph was taken in the 1970's. TR 663. Mr. Niebauer identified a building in the photograph as the Catholic Youth Organization (CYO) home as well as the St. Andrew's school. TR 659. The witness also identified the CYO house on the tidal wetlands map - east of the Risi/Winkle/Mattina properties and south and west of the beach club which is a prominent structure that juts out into the East River. The witness started out testifying that the photograph was taken in 1970. In response to counsel's statement that the witness said ". . .late 1970s," Mr. Niebauer responded "during the 1970s". TR 662. While the witness never stated that the photograph was taken in the late 1970's, counsel referred repeatedly to the time period as the late 1970's.

When Mr. Niebauer was asked why he thought the photograph was taken during the 1970's, he responded because the condominium was built in "1980", "81". TR 662. But the photograph does not include the area where these buildings were constructed which was to the west of the Risi property. TR 662, 152. As these statements indicate, Mr. Niebauer's testimony with respect to this photograph was far from certain. As to identification of the time period, he testified that if it was earlier there would be boats from the yacht club in the water. TR 664. This is unlikely as the photo is taken in the winter and there is very little water visible. Under cross-examination, the witness stated that he believed the photograph was taken in the general

vicinity of what he believes to be the Risi property. TR 666. When the respondents' counsel tried to clarify this testimony further on re-direct, it only became more vague. TR 666-669.

This photograph was the foundation for Mr. Bontje's further theories regarding the shoreline's quality and DEC's tidal wetland jurisdiction. Based upon Mr. Niebauer's descriptions, Mr. Bontje determined that the picture was taken half-way onto the Risi property looking east to the cove on the east side of the eagle's neck projection and towards the Winkle property. TR 738. Comparing the photograph to the tidal wetlands map, I found it very difficult to agree with this conclusion even assuming that the building in the background is the CYO home that Mr. Niebauer identified. Exs. 14, 38. In my comparison of these two documents, it would appear that the photograph could have been taken in a number of locations along this shoreline including areas significantly east of the Risi property and possibly even to the west of the site.

Mr. Bontje used this photograph which shows a snow-covered shoreline to conclude that the shoreline is filled extensively with pieces of concrete and rubble. TR 739. Again, even assuming that the photograph was taken on or near the Risi land, given the snow cover, it is impossible to get a full view of what comprises this shoreline. More importantly, this record includes more recent photographs of the shoreline at or near the Risi property showing a pebble and sand beach that had been in existence prior to the Risis' placement of fill. Exs. 5c, 24h, 24i, 24n.

Using a tidal chart (Ex. 45) and performing some calculations to account for changes in sea level over the years, consultant Bontje concluded that there was an elevation of 7.6 feet for spring high water at the time of the photo. Ex. 38. In looking at the vegetation that appears in this photograph, Mr. Bontje found that DEC's jurisdiction would be at elevation 10 between the vegetation and the spring high water mark. TR 750. Mr. Bontje concludes that the photograph demonstrates that this filled shoreline from the Risi property at the top of that fill was likely out of DEC's jurisdiction at the time of this photograph.

I find these conclusions to be based on weak evidence and to be speculative at best. There is absolutely no reason to use "forensic" theories when there is current documentation of the conditions of the Risi property prior to the filling. Accordingly, I reject these defenses of the respondents.

Adjacent Area Boundaries - Cliff, Bluff, Hill

Section 661.4(b)(1) provides that:

> Adjacent area shall mean any land immediately adjacent to a tidal wetland . . .
>
> . . .

> Section 661.4(b)(1)(i) states: 300 feet landward of . . . a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet . . .; or
>
> (iii) to the elevation contour of 10 feet above mean sea level, except when such contour crosses the seaward face of a bluff or cliff, or crosses a hill on which the slope equals or exceeds the natural angle of repose of the soil, then to the topographic crest of such bluff, cliff, or hill.
>
> . . .

Staff maintains that the Department's adjacent area jurisdiction goes to the landward edge of the top of the slope that is exhibited in Ex. 5c. See, staff brief, pp. 8-10. Mr. Zahn testified at the hearing that the adjacent area jurisdiction extends to the top of the existing slope citing the United State Geological Survey map of this area to establish the ten foot contour line that the tidal wetland regulations reference. TR 115-120; Ex. 16.

Respondents argue that the slope in question is of manmade origins and therefore does not meet the criteria of 6 NYCRR § 661.4(b)(1)(iii) because bluff, cliff, and hill are all natural formations. See, respondents' brief, p. 10. Accordingly, the respondents claim that DEC's jurisdiction is limited to the ten foot contour line above mean sea level. The Risis argue that this line is 34 feet from the rear of their home on the western edge and 40 feet on the eastern edge. Accepting this jurisdictional boundary would render certain work performed by the respondents out of DEC's tidal wetland jurisdiction. However, this defense would not account for the placement of the revetment directly into the waters of the State - beginning 80 feet from the back of the Risi residence. TR 137.

Both parties have come up with a variety of definitions for bluff, cliff, and hill to bolster their contrary views of the nature of these structures. Respondents' brief, p. 22; staff's brief, p. 9. The regulations provide no definition and dictionary definitions do not shed light on the issue of natural vs. manmade. Cliff is defined as "a steep rock-face esp. at the edge of the sea." Bluff is defined as "having a vertical or steep broad front." Among a number of definitions that the dictionary provides for hill is "a naturally raised area of land, not as high as a mountain." See, *e.g.*, Oxford Enyclopedic English Dictionary (1991). These definitions all emphasize the common characteristic of steepness; as does the definition of bluff cited by the respondents that is contained in the coastal erosion regulations - 6 NYCRR § 505.2(d):

> Bluff means any bank or cliff with a precipitous or steeply sloped face adjoining a beach or a body of water. . . .The landward limit is 25 feet landward of the bluff's receding edge, or in those cases where there is no discernible line of active erosion to identify the the receding edge, 25 feet landward of the point of inflection on the top of the bluff.

The respondents point to this definition to support their position that the slope at the Risi residence is not a bluff, hill or cliff as it is manmade in nature. This definition does not specify the composition of the bluff and in terms of regulatory protection requires a setback even greater than what is set forth in the tidal wetlands regulations. Compare, 6 NYCRR § 661.4(b)(iii).

Given the lack of information in the definitions with respect to the nature of these formations, the purpose of the jurisdictional demarcation must be examined. The purpose of the adjacent area is to provide a buffer of protection to a wetland. See, *e.g.*, In re Application of Croton Watershed Clean Water Coalition, Inc., 2 Misc 3d 1010 (Sup. Ct. Westchester Co. 2004).[5] As explained by staff in its closing brief (pages 10-12), where the shoreline has a gentle slope, the 10 foot contour line is sufficient protection between the wetland and the non-regulated upland. But, where there is a steep slope which is less stable and thus more subject to erosion, it is important that the entire slope is protected in order to secure the wetland resource. Therefore, I find that the purpose of 6 NYCRR § 661.4(b)(iii) is to ensure that the resource is adequately shielded by including the entirety of a steep slope in the adjacent area boundary; whether it is manmade or not.

Elevations

Respondents raised a last argument related to the boundaries of the Department's jurisdiction based upon an examination of former elevation levels of the Risi property. Using a 1995 survey of this property upon which elevations were drawn in 1999, Mr. Bontje attempted to establish DEC's adjacent area jurisdiction. Exs. 46, 49; TR 837. The witness testified that though these elevations were taken after the fill was placed seaward of the approximate high water line shown in the 1995 survey, he extrapolated from photos taken in 1995 and 1999 to "reconstruct" DEC's jurisdictional line. TR 837. Mr. Bontje stated that photos of the retaining wall between the Risi and Winkle properties show a "weathering line" indicating that there was some sort of fill material that was deeper on the property than the photo suggests. TR 841; Ex. 50. He concluded from this photograph that the slope of the finished floor of the house to the top of the slope would be a "relatively flat area." TR 842; Exs. 49, 50. He found that there has been an 1.8 foot drop between the finished floor elevation and the top of the slope. Exs. 46, 49, 50; TR 845-846. As a last step, Mr. Bontje calculated between the high water line and the elevation of the property he calculated (at 14 feet) to find the approximate location of the ten foot adjacent area jurisdictional line. TR 847-848, 858.

I come to the same conclusions about this argument that I did for the preceding ones. First, Mr. Bontje's speculations here about the drop in fill are based upon a line on a wall on the Risi property. On cross-examination, Mr. Bontje admitted that this line could have been caused by other phenomena than fill. TR 910. More importantly, as stated previously in this report,

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[5] While this case concerns regulation of a freshwater wetland, there are many similarities in the regulatory protection schemes contained in Articles 24 and 25 of the ECL and the related regulations.

staff performed an inspection of this property at the time of the permit application and made determinations with respect to the extent of DEC's jurisdiction. I find that the observations of staff in 1996 are more reliable than evidence obtained by piecing together various documents combined with speculation about historical incidents for which there is no strong foundation. In addition, as Mr. Bontje admitted, there is no question that the Department's jurisdiction exists at the toe of the slope of the old revetment and northward. TR 798-791.

Staff's jurisdiction was not challenged by the applicant during the application process or at its conclusion. In effect, in this enforcement proceeding, the respondents are attempting to bring a collateral attack on the 1996 determination of the Department to issue the tidal wetlands permit to them. Pursuant to 6 NYCRR § 621.7(f), the Risis had 30 days to request a hearing to challenge the permit conditions. Once the Commissioner rendered a determination on that challenge, if still unsatisfied, the respondents would have had 30 days from that decision to bring an Article 78 proceeding in State Supreme Court. ECL § 25-0404.

Respondents' Other Defenses

In their answer, the respondents raised several defenses which they did not pursue at at the hearing or in their post-hearing arguments. Respondents claimed that the Department was barred from pursuing these violations because it did not object to the work performed by the respondents until it was completed. Ex. 2, Answer, ¶ 32. Laches is not a valid defense against the State. The State Administrative Procedures Act (SAPA) sets a reasonable time standard for all parties in an administrative hearing to be given the opportunity for a hearing. SAPA § 301. Whether or not this standard is met is governed by (1) the nature of the interests allegedly compromised by the delay; 2) the actual prejudice to the party; 3) the causal connection between the conduct of the parties and the delay; and 4) the underlying public policy advanced by government regulation. Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 178 (1985). The respondents did not provide any evidence of prejudice based on the Department staff's alleged delay in these proceedings. Moreover, soon after the Region 2 office was informed of the respondents' work, Ms. Bauer-Maresca went to the Risi property to investigate. Exs. 21 and 23. I am persuaded by staff that the Department did not receive the respondents' letter of January 28, 1998 to staff until mid-March of 1998. Ex. 11. In any case, Mr. Risi admitted that the respondents began receiving fill and rock at the site and preparing the area prior to notifying staff of the work. TR 1001.

Respondents also claim in their answer that their actions were in response to an emergency situation. Ex. 2, Answer ¶ 34. The Department staff acknowledged that the respondents' application to address the erosion issues at their property was legitimate. TR 102. In its review of this project, staff's goal was to balance the interests of the Risis to protect their property against the State's interest in environmental protection. TR 102, 191. However, even after the permit was issued, the respondent did not act for about a year. TR 953-954. Therefore, there is no support for the respondents' claim that they acted out of an emergency. Even in the event of an emergency, 6 NYCRR § 621.12 requires notification to the Department and the issuance of an emergency authorization.

Respondents allege in their answer that the Department acted out of political pressure. Ex. 2, Answer ¶ 23. The Department did receive a copy of a letter dated February 18, 1998 from Total Community Management Corp. to Community Board 7 regarding the work the Risi performed along the shoreline. Ex. 23. However, I fail to understand what is improper about this information being relayed to the staff and the staff responding by investigating the complaint and issuing a notice of violation based upon a biologist's observations. Ex. 21.

The respondents also complain in their answer of selective enforcement by Department staff. Ex. 2, Answer ¶ 27. The respondents provided no evidence at the hearing to support this claim. TR 1043-1045. The Department has prosecutorial discretion to pursue violations as it deems appropriate so long as it does not act with an "evil eye" against a class that has been selected for some reason other than effective regulation. Matter of 303 West 42nd Street v. Klein, 46 NY2d 686, 694-5 (1979). While Mr. Risi claimed that there were many fill violations along this shoreline that the Department had not addressed, as respondents know, staff has a pending proceeding against the Winkles, adjacent landowners to the Risis, for similar alleged violations of the ECL. Moreover, even when such discrimination occurs, this claim raises a constitutional issue that belongs in the appropriate judicial forum. Id.

Remedy and Penalty

In its amended complaint, staff requested that the Commissioner impose a penalty of a minimum of $120,000 based upon provisions contained in ECL §§ 71-1107, 71-2503 and 71-4003. With respect to remediation, staff requested, in part, that the Commissioner order the respondents to remove the illegally constructed revetment, fill, deck, walls and utilities from the site and the adjacent property and to restore those portions of the tidal wetland and adjacent area adversely affected by the Risi's unpermitted activities. Ex. 1.

In its closing brief, staff has requested a penalty of $330,000 that is based upon the following calculations of the maximum allowable penalties:

- Excavation in navigable waters - ECL § 15-0505 and 6 NYCRR § 608.5 $ 5,000
- Placement of fill in navigable waters and wetlands based upon an excess of 50 truck loads - ECL Articles 15 and 25 ($5000 for each violation of Article 15 x 50 truck loads and $10,000 for each violation of Article 25 x 50 truck loads) 750,000
- Erosion of sediment - violation of permit conditions - ECL § 71-2503(c) 10,000
- Violation of special condition 21 - submission of notice of intent 10,000
- Construction of deck, wall and utility line without permit 80,000

Staff concluded in its closing brief (page 20) that a penalty of $250,000 for non-compliance with the permit, placement of fill and the construction of the revetment would be appropriate with an additional $80,000 penalty assessed for the deck, wall and utility

construction.[6] Because the respondents had already been served with the notice of violation prior to the latter work, staff argues that a maximum penalty is appropriate.

The 1990 Civil Penalty Policy and Tidal Wetlands Enforcement Guidance Memorandum use similar factors in guiding the development of penalties in cases involving violations of Articles 15 and 25. Economic benefit, environmental harm, violator conduct and deterrence are relevant in this determination.

Economic Benefit

Respondents' construction was for the purposes of erosion control and enhancing property qualities. Respondents did not submit any evidence on the amount of funds they spent on this work. Given the amount of fill placed at the site, they expanded the usable space of their property. There is no evidence in the record on the value of these enhancements but there has been an economic benefit based upon these improvements.

Damage to Natural Resources

Staff produced evidence of the benefits of the environmental resource through the submission of photographs showing the nature of the beach that existed prior to the Risis' work. Exs. 24a-n. Staff testified that this resource would be suitable habitat for horseshoe crabs that in turn would provide valuable food for shore birds. TR 241-243. Ms. Bauer-Maresca observed shore birds in the vicinity of the Risi property. TR 155, 170-171. North and South Brother Islands are roosting areas for such species and staff provided that the Risi shoreline would be within range for these animals to forage for food.[7] TR 204. Mr. Zahn testified as well that in addition to the littoral zone habitat that is inundated, at the time of the application, this area contained shoal or mud flat areas in addition to some adjacent area. TR 197-198. Trawl studies as well as the Con Edison impingement/entrainment study at the Astoria/Ravenswood power generating facility produced by staff demonstrated that a variety of species of fish inhabit the waters in the vicinity of the Risi property. TR 200-203; Exs 25, 26, 58.

The respondents counter staff's assertions by stating that most of this shoreline is hardened by artificial fill thus minimizing its environmental benefit. TR 598, 601, 703, 761, 740, 826-828. Respondents submitted a December 2002 proposed remedial action plan (PRAP) for Fort Totten, a Coast Guard Station. Ex. 55. In this report, the Army Corps of Engineers

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[6] In its complaint, staff alleged that the respondents constructed two walls subsequent to receipt of the NOV and without a permit. Ex. 1, ¶ 16(b). Mr. Risi testified at the hearing that he only installed the wall to the west of his property and it was Mr. Winkle who installed the one to the east. TR 1030; Ex. 30c.

[7] The Department of State has designated these areas as significant coastal fish and wildlife habitat. Matter of American Marine Rail, 2000 WL 1299571*9 (August 25, 2000).

found that mercury is present in the sediment of Little Bay adjacent to Building 615 at this Coast Guard Station which is approximately one mile southeast of the Risi site. TR 882. The Army Corps of Engineers observed that while mercury was found above guidance values in the sediment at this location - it was not so found in the surface water or fish. PRAP, pp. 5, 7. Respondents relied upon this PRAP along with the speed of the current in this vicinity to demonstrate that the environmental quality at the Risi site is degraded. TR 883-885. The respondents did not produce any evidence with respect to the levels of contamination in the waters, sediments or fish at the Risi site.

Mr. Risi also testified that the habitat in this area had been degraded by the pesticide spraying related to West Nile virus. He stated that after the revetment was built but prior to the spraying there were a great many water birds such as ducks and swans near his home. TR 1047-1048. Without any objective scientific evidence or any records to document this alleged degradation of habitat attributable to the New York City Department of Environmental Protection's spraying, I do not find this testimony persuasive.

In their closing brief (p. 34), respondents cited a listing of the Upper East River adjacent to the Risi property as impaired by polychlorinated biphenyl (PCB) contaminated sediments. See, 6 NYCRR § 622.11(a)(5). The Risis argue that such contamination combined with the Fort Totten PRAP serve as evidence that this area is potentially contaminated and therefore the placement of 4800 square feet of fill does not warrant the penalties that staff has requested. Respondents' Br. pp. 34-35.

Mr. Zahn testified that through Clean Water Act initiatives, the enactment of New York's Tidal Wetlands Act as well as other laws and regulations, there has been dramatic improvement in the water quality of the East River, providing a healthier habitat for a variety of species. TR 216. Ms. Bauer-Maresca testified that the majority of the New York City shoreline is based upon fill; however that there are ". . . vast sections of functioning tidal wetlands that exist on this fill material." TR 154. This witness specifically identified northeastern Queens as a location that contains "very active and very vibrant tidal wetlands communities that exist on fill material." TR 154. She noted that given the lack of natural tidal wetland areas, the Department places value on wetlands that survive on fill. TR 154. Moreover, based upon extensive experience with fill removal, this witness described how fill removal in an intertidal area results in the return of species. TR 175. Based upon the studies submitted by staff, the testimony of Mr. Zahn and Ms. Bauer-Maresca regarding the shoreline both at the Risi property and in its vicinity, as well as the conclusions of the PRAP with respect to surface water quality and fish contamination, I disagree with the respondents' characterizations of the Risi shoreline as an entirely degraded environment.

Mitigating Circumstances

While the Risis determined that the placement of the structure that had been approved by DEC was not sufficient for protection, several coastal experts at DEC found the permit's provisions sufficient for protection. Exs. 33, 36. While I considered Professor Bokuniewicz's

testimony about the superior placement of the current revetment, his perspective appears to be solely one of shore protection without concern for tidal wetland resources.[8] It is the Department's job to balance both of these interests which staff did in this case.

The respondents also maintain that because the permit did not specify the amount of fill required for the placement of the revetment, their liberal use of fill was in compliance with the permit. Mr. Zahn agreed that some fill was necessary to supply a stable foundation for the revetment. However, the large amount of fill that the Risis employed exceeded this limited purpose.

In mitigation of their actions, the respondents claim that the location of the revetment was necessary to protect their shoreline and property. The respondents point to an incident of a boat crashing against their revetment as proof of the need to protect their property with the revetment as located. TR 1036. Staff countered that this incident demonstrated that the revetment represented a navigational hazard. TR 1052-1053.

Respondents' Cooperation

With respect to the respondents' conduct in this matter, staff emphasizes the Risis' construction that occurred after the notice of violation was served upon them. Ex. 20. The Risis' defense with respect to this allegation - stated for the first time in their closing brief - is that they were confident that the NOV was in error and that staff misunderstood their permit. Respondents' Br., pp. 9-10.

Staff also references the Risis' resistance to a site visit after these enforcement proceedings were commenced requiring the intervention of the administrative law judge. See, ALJ Ruling, October 29, 2002.

I agree with staff that based upon the Risis' decision to ignore the staff's directives -- in the permit conditions, in response to the NOV, and when staff sought access to the property for inspection purposes – they have not demonstrated cooperation.

Deterrence

With respect to deterrence, respondents argue that the penalty requested by staff is out of proportion to the facts of this matter and not in accord with Department precedent. In addition, the Risis point out that Mr. Zahn testified that it would take approximately $120,000 to re-locate

[8] Staff's deference to this witness's expertise has also been noted. TR 597. However, the professor's entry into this matter based upon a phone call from someone at NYC DEP who is a friend of the Risi's is unclear. TR 594-595, 621. Moreover, his lack of documentation and lack of memory on many details weakened his presentation. TR 621-622, 624, 630, 632.

the revetment and the expense of any work should be considered in any penalty calculation. TR 292; Respondents' Reply Br. p. 10.

Respondents also argue that they should be entitled to seek an after-the-fact permit based upon staff's establishment of the jurisdictional boundary. In support of this theory, respondents cite the DEC Commissioner's decisions: In the Matter of Tomaino, 2000 WL 214769 (1/25/00); In the Matter of Tubridy, 1998 WL 939494 (12/31/98); In the Matter of Frie, 1994 WL 734523 (12/12/94); In the Matter of Mills, 1992 WL 406388 (11/5/92) and In the Matter of Hansen, 2000 WL 214678 (1/3/00). The major distinction to be drawn between these cases and the case before me is that in all these other situations the respondents did not have a permit for the particular construction at issue. In the Risi matter, there already has been a permit application, review, and permit issued for the revetment construction. Therefore, the respondents already had an opportunity to present the circumstances entitling them to their erosion control. Staff was able to review the environmental circumstances and balance the need to protect the tidal wetlands against the homeowners' interest in shoreline protection. Despite this review, the respondents chose to ignore the permit's requirements and now seek a second opportunity to make their case. Such an appeal does not appear to be in line with past precedent.

I agree with staff that respondents have shown a poor history of compliance with the Environmental Conservation Law. I am wholly unpersuaded that the Risis' actions, particularly after the notice of violation was served, were driven by their presumption that DEC had erred. Rather, based upon the entire record including statements of the respondent Al Risi at the conclusion of the hearing regarding what others had done along this shoreline, I am convinced that the Risis decided to ignore the Department's instructions in order to maximize what they deemed most beneficial for themselves. TR 1044.

With respect to the quality of the resource, there is no question that this is an urban and well-developed shoreline that is not of a natural pristine quality. However, improvements in water treatment have caused corresponding improvements in the water column providing better habitat for fish and the species that feed upon them. TR 216; Exs. 25, 26, 58. Also, based upon the scarcity of tidal wetland habitat in this urban setting, the protection of these areas is paramount. TR 154. See, In the Matter of American Marine Rail, Issues Ruling, 2000 WL 12995*10, *15 (August 25, 2000) (although parkland in this vicinity was already surrounded by industrial uses, its scarcity in the community made it much valued).

In support of their position that the Department has established a precedent for allowing the filling of these kind of shorelines, the respondents cited to the Decision Conference Report in Matter of Thwaites S.S. Keansburg, Inc. (Buhrmaster/Drew 3/9/90). In Thwaites, the applicant applied to the Department for a permit to expand its existing marina in City Island, the Bronx. As part of this project, the applicant proposed the construction of a bulkhead and backfilling behind it. The applicant had begun work on this project without a permit. As part of settling the enforcement matter, the applicant agreed to complete the permit application process as well as restore the wetlands and adjacent area in the event the permit was denied. The purposes of the project were to expand the area for parking and winter boat storage. The areas north and south

of the site were heavily developed with marinas, boat storage facilities, and other commercial establishments that drew many visitors. An actual analysis of the spoil taken from beneath the applicant's piers revealed no organic material and only one species of pollution tolerant fish - the mummichog - was found in the nearby waters during a limited inspection. While acknowledging the destruction of 10,000 square feet of littoral zone, the administrative law judges determined that the benefit to the public outweighed the negative effect of the filling.

Thwaites is distinguishable from the matter before me. The City Island project was proposed for an area of much more intense development. In addition, the project – while of benefit to the applicant -- was also designed to enhance public access to the water. Finally, as the Thwaites report is 15 years old -- a time when the waters surrounding this facility were much further degraded -- the comparison is not useful. Moreover, in Thwaites there was evidence of the specific environmental condition of the site based upon the spoil analysis and the fish survey. In this matter, staff provided two studies showing that there is abundance of fish populations in the vicinity of the Risi property. In addition, the respondents did not persuasively demonstrate that the Risi site is contaminated. I cannot find that any determinations with respect to the nature of the affected resource in Thwaites are at all relevant to the circumstances in the waters and wetlands surrounding the Risi property.

In Matter of Ciampa Bell (Commissioner's Decision 8/21/81), also cited by the respondents, which concerned the permitting of a development on the East River to the west of the Risi property, the Commissioner determined that the filling of tidal wetlands would not be significant based upon the DEC staff's finding that this wetland was part of an "impoverished or stressed littoral zone." One of the other factors the Commissioner considered was the applicant's proposed improvement to the surface water run-off conditions on the site that would minimize the pollutants that were flowing into the East River from this area. This decision was made 23 years ago. The conditions of our waterways have changed for the better. TR 216. In addition, there is a greater understanding of the importance of these tidal wetland resources even in greatly developed areas. In his decision of February 1, 1980 concerning the Ciampa Bell development, Commissioner Flacke noted that there were concerns related to the potential for future adverse cumulative impacts and directed staff to address those concerns in reviewing future projects. It is that kind of review that Region 2 staff performed in the Risi permit application.

CONCLUSIONS

Section 17-1107 of the ECL provides for a penalty of up to ten thousand dollars for each violation of ECL § 15-0505. ECL § 71-2503 sets forth a penalty of ten thousand dollars for every violation of Article 25 and provides that each day of violation is a separate violation. Accordingly, as demonstrated by staff, the potential maximum penalty in this matter is very large. While I do find that the tidal wetlands and adjacent area have been adversely affected, the penalty recommended by staff is not in accord with that imposed in other tidal wetlands enforcement proceedings. While I am confident that the respondents were fully aware of their responsibilities pursuant to the permit they were issued by Department staff, they are private

homeowners. There was no testimony provided on the resources of the Risis other than the information concerning Mr. Risi's ownership of a business. However, given the large expense of the remediation required in this matter (approximately $120,000), I am reluctant to also recommend the large penalty staff has recommended. I am not using the number of truck loads of fill (a minimum of 40 according to Mr. Risi) to calculate the penalty.

Accordingly, I recommend: a) a payable penalty of $10,000 for illegal filling in the navigable waters of the State; b)a payable penalty of $30,000 for violations of the permit conditions including: the illegal placement of the revetment, for commencement of work without notification to the Department staff, and failure to place erosion controls as part of this construction and; c) a $10,000 payable penalty for the additional work performed in the adjacent area without a permit - such work involving the deck, wall, and utilities. In addition, I recommend a penalty of $120,000, payment of which would be suspended contingent upon the respondents' removal of the revetment and other unpermitted structures and restoration of the tidal wetland and adjacent area.

I agree with respondents that this work should be coordinated with any remediation that may be required on the adjacent Winkle property in order to minimize environmental damage and expense in the event that the Commissioner orders similar relief on that site.

In addition, based upon the change in the tidal wetlands boundary at this site, I recommend that staff commence a re-mapping procedure as soon as possible. In concert with the remediation measures necessary at the Risi property, staff should delineate the tidal wetlands and adjacent area boundaries to ensure that further work is in conformity with the goal of protecting these resources.