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

- by -

EFSTATHIOS VALIOTIS, STAMATIKI VALIOTIS, and MALBA ASSOCIATION,

Case No. R2-20060511-199

Respondents.

Respondents Efstathios and Stamatiki Valiotis ("Valiotis respondents") are the joint owners of a residential waterfront property at 89 Malba Drive, Queens County, New York, which abuts the East River (the "site"). The shoreline area is part of a State-regulated tidal wetland.

This administrative enforcement proceeding addresses violations of New York State's laws and regulations governing navigable waters, tidal wetlands, and tidal wetland adjacent areas as a result of the Valiotis respondents' construction of a seawall, concrete deck and staircase on or adjoining the shoreline of the site.

Staff of the New York State Department of Environmental Conservation ("Department") served a notice of hearing and complaint dated November 8, 2006, on the Valiotis respondents. Department staff's complaint listed eight causes of action, alleging that the Valiotis respondents conducted the following actions without a Department permit:

· "clearing vegetation within [a] regulated tidal wetland and/or tidal wetland adjacent area," in violation of section 25-0401 of the Environmental Conservation Law ("ECL") and section 661.8 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR");

· “constructing a seawall in the tidal wetland and the tidal wetland adjacent area,” in violation of ECL 25-0401 and 6 NYCRR 661.8;

· “constructing a seawall in the waters of the State,” in violation of ECL 15—0503(1)(b) and 6 NYCRR 608.4 and 608.5;

· “placing fill in the regulated tidal wetland and tidal wetland adjacent area in connection with the construction and backfilling of the seawall,” in violation of ECL 25-0401 and 6 NYCRR 661.8;

· “placing fill in the navigable waters of the State or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous to any of the navigable waters of the [S]tate,” in violation of ECL 15-0505 and 6 NYCRR 608.5;

· “constructing a concrete deck within the regulated tidal wetland and tidal wetland adjacent area,” in violation of ECL 25-0401 and 6 NYCRR 661.8;

· “constructing a concrete deck on or above the waters of the [S]tate,” in violation of ECL 15-0503 and 6 NYCRR 608.4; and

· “constructing a staircase in the tidal wetland or tidal wetland adjacent area,” in violation of ECL 25-0401 and 6 NYCRR 661.8.

On December 12, 2006, the Valiotis respondents served an answer. The matter was referred to the Office of Hearings and Mediation Services, and assigned to Administrative Law Judge (“ALJ”) Helene G. Goldberger. After an adjudicatory hearing, ALJ Goldberger prepared the attached hearing report, which I adopt as my decision in this matter subject to my comments below.

In enforcement proceedings, Department staff bear the burden of proof on all charges that they affirmatively assert in the instrument which initiated the proceeding (see 6 NYCRR 622.11[b][1]). A respondent bears the burden of proof regarding all affirmative defenses (see 6 NYCRR 622.11[b][2]). Where factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the

evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 622.11[c]).

With respect to the liability of the Valiotis respondents, the ALJ determined that Department staff met its burden of proof relating to the charges of (a) placing fill and constructing the seawall, concrete deck and staircase in the tidal wetlands and/or adjacent area without a permit, and (b) removing vegetation from the regulated wetland and adjacent area without a permit (see Hearing Report, at 12). Accordingly, the ALJ held that the Valiotis respondents violated ECL 25-0401 and 6 NYCRR 661.8 as charged by Department staff. The ALJ did not find that the Valiotis respondents (a) constructed a seawall in the waters of the State, (b) constructed a concrete deck on or above the waters of the State, or (c) placed fill in the navigable waters of the State or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous to navigable waters. Accordingly, the ALJ did not hold that the Valiotis respondents violated ECL 15-0503 ("Protection of water bodies; permit"), ECL 15-0505 ("Protection of navigable waters; excavation or fill; permit"), 6 NYCRR 608.4 ("Docks and moorings") or 6 NYCRR 608.5 ("Excavation or placement of fill in navigable waters").

I concur with the ALJ that the record demonstrates that the Valiotis respondents removed vegetation from the regulated tidal wetland and adjacent area without a Department permit (see, e.g., Hearing Transcript, at 96, 100, and 185; Hearing Exhibit [Exh] 7), and thereby violated ECL 25-0401 and 6 NYCRR 661.8.

The precise boundary between the tidal wetland and its adjacent area was the subject of extended testimony (see, e.g., Hearing Transcript, at 122-148). The ALJ found that the darkened stain that runs along the rocks underlying the newly built structures at about two feet high represents the landward edge of the tidal wetland boundary (see Hearing Report, at 5 [Finding of Fact 11]). It is clear that the placement of fill and construction of the seawall, concrete deck and staircase occurred within the tidal wetland adjacent area. Because the Valiotis respondents undertook the activities without the required Departmental permit, they are in violation of ECL 25-0401 and 6 NYCRR 661.8 (see, e.g., 6 NYCRR 661.4[ee][defining "regulated activity" for purposes of the tidal wetland regulations to include filling and erection of structures] and 6 NYCRR 661.8 [requiring Department permit for regulated activities]). Although the seawall, concrete deck and staircase are situated within the adjacent area, on this record, I am

unable to determine whether any portions of the structures that were constructed and are subject of this proceeding are situated within the tidal wetland itself.

During the construction, portions of the rock wall above the high water mark stain line were mortared with concrete (see, e.g., Hearing Transcript, at 69, 75). This mortar constitutes fill and would require a permit for any application to the rock wall. The evidence indicates that the mortar dripped onto the rocks within the boundaries of the tidal wetland (see, e.g., Hearing Exhs 19 and 21). Based on the record before me, I find that the mortar that dripped onto the rocks at the base of the rock wall represented unpermitted fill in the tidal wetland. In addition, the tidal area in this vicinity is known as Powell's Cove, a navigable waterway (see Hearing Report, at 4 [Finding of Fact 4]; Hearing Tr, at 21-23, 87). Accordingly, respondents are also in violation of ECL 15-0505 and 6 NYCRR 608.5, which prohibits the placing of fill in wetlands that are adjacent and contiguous to State navigable waters.

The construction of the seawall, the construction of the deck, the construction of the staircase, and the placement of fill each constitute a separate violation (see, e.g., Matter of Tomaino, Order of the Commissioner, January 25, 2000, at 2; Matter of Bruni, Order of the Commissioner, January 18, 1995, at 2).

Department staff alleged that the Valiotis respondents' construction of a concrete deck violated ECL 15-0503 which prohibits the construction of a platform or other structure "in, on or above waters" without a permit (see ECL 15-0503[1][b]). "Waters" is defined to include "bays, sounds, . . . rivers, . . . estuaries, marshes, inlets . . . and all other bodies of surface . . . water, . . . which are wholly or partially within or bordering the state or within its jurisdiction" (see ECL 15-0107[4]). Section 608.4 of 6 NYCRR also prohibits the construction of any platform or other structure in, on or above the navigable waters of the State (see 6 NYCRR 608.4[b][1]). I have reviewed the record and conclude that the overhang or protrusion of the concrete deck that the Valiotis respondents constructed extends over the tidal wetland area and related waters. Accordingly, this extension over the tidal wetland (even though its foundation may not rest in the wetland) constitutes a structure that is "above the waters" for purposes of ECL 15-0503(1)(b) and above the "navigable waters" for purposes of 6 NYCRR 608.4(b)(1) (see, e.g., Hearing Exhibit 31). Accordingly, the Valiotis respondents violated the referenced

statutory and regulatory sections. Furthermore, the deck creates a shadow effect that has an adverse impact on vegetation and aquatic life (see, e.g., Hearing Transcript, at 124).

The ALJ, in considering the penalty, did not accept Department staff's argument that the construction of the seawall, deck and staircase would constitute continuing violations, although she noted that the harm caused by these activities is ongoing (see Hearing Report, at 11). However, I hold that the existence of an unpermitted structure in a tidal wetland or its adjacent area is a continuing violation until such time that the structure is removed or otherwise modified to meet the applicable statutory and regulatory requirements.

The ALJ cites State of New York v Niagara Mohawk Power Corp., 263 F Supp 2d 650 (WD NY 2003), in support of the proposition that the violations in this matter are not continuing. However, the circumstances before me are distinguishable. The federal case involved the Clean Air Act's permitting scheme for the construction and operation of air pollution sources. Under that scheme, air pollution sources are required to obtain separate pre-construction and operating permits (see United States v Murphy Oil USA, Inc., 143 F Supp 2d 1054, 1081-1082 [WD Wis 2001]). In the federal case, the State charged that Niagara Mohawk Power Corporation violated the federal permitting scheme by modifying two major emitting facilities without securing the proper pre-construction permits (Niagara Mohawk Power, at 654). The court concluded that, under the federal Clean Air Act, operating a facility after it was modified, without first obtaining the necessary pre-construction permit, may constitute a violation of the relevant operating permit, but does not constitute a continuing violation of the relevant pre-construction permit (id. at 663). The court held that the requirement to obtain a pre-construction permit ended once the construction was completed (see id. at 661). The court further held that continuing violations, in the circumstances of that proceeding, were more appropriately enforced through operating permit requirements (see id. at 663).

In this case, we do not confront compliance with a pre-construction and operating permitting scheme similar to the federal Clean Air Act. The Valiotis respondents are charged with conducting unauthorized activities -- clearing, filling and construction -- in or above protected navigable waters, tidal wetlands and tidal wetland adjacent areas. Those unauthorized activities resulted in the illegal placement of fill and structures along the shoreline that remain and continue to

compromise the environment. Thus, the Valiotis respondents' violations are of an ongoing nature and continue until the illegal fill and structures are removed and the illegally removed vegetation restored.

Nor does the completion of construction terminate the illegality of the unauthorized activity (see, e.g., Matter of Segreto, Order of the Commissioner, February 1, 2008, at 2 [clearing of vegetation and the placement of fill in the adjacent area to a regulated tidal wetland on respondent's property without the required Department permit constituted a continuing violation of ECL 25-0401(1) and 6 NYCRR part 661]; Matter of Bruni, Order of the Commissioner, January 18, 1995, at 2 [penalty imposed for the time period in which an unauthorized retaining wall structure was in place]; see also Beneke v Town of Santa Clara, 45 AD3d 1164 [3d Dept 2007][presence of unauthorized structure constituted continuing violation of local law], lv denied, 10 NY3d 706 [2008]); Marcus v Village of Mamaroneck, 283 NY 325, 330 [1940] [altered use of premises made in violation of law continues to be illegal until such time as variance granted]). Moreover, even if a permit had been obtained but fill was placed or a structure erected that did not comply with the terms and conditions of the permit, the completion of construction would not serve to terminate the ongoing nature of any violation.

Department staff requested a civil penalty of $150,000. The ALJ, in consideration of the penalty, states that the restoration of the area should be the main goal of this enforcement proceeding (see Hearing Report, at 11). In light of the costs associated with the restoration, the ALJ recommends a reduction in the staff-requested penalty from $150,000 to $60,000. The ALJ also recommends that half of the $60,000 penalty, or $30,000, be suspended conditioned on the restoration of the area.[1]

Although I agree that a reduction in the penalty is appropriate, the circumstances of this matter warrant a lesser reduction than that proposed by the ALJ. The Valiotis respondents were aware of the need for a permit for the activities in which they engaged and, in fact, they had submitted a permit application for similar type of work in the

[1] Department staff also suggested that a portion of the civil penalty be suspended (see Department Staff's Closing Brief and Motion for Default Order dated December 9, 2009, at 1, 15 [proposing the suspension of $50,000 of the staff-requested penalty of $150,000]).

past. Even though the previously submitted application had not been approved, the Valiotis respondents unilaterally undertook unpermitted filling and construction activity (see, e.g., Hearing Exhibits 7, 8, 10, and 11; Hearing Transcript, at 81-83, 162-163). The resulting violations were inexcusable. Undertaking any action which requires a Department permit, without first obtaining the permit, is always a serious matter (see Civil Penalty Policy, Commissioner's Policy DEE-1, June 20, 1990, ¶ IV.D.2[b], at 8). Accordingly, although I am reducing the penalty in recognition of the costs of the restoration work that is required under this order, I am only reducing the penalty to $100,000.[2]

The ALJ recommends that the Valiotis respondents be ordered to submit a plan to restore the area to its condition prior to the unpermitted work ("restoration plan") and to implement that restoration plan after DEC approval within a reasonable time period (see id., at 12). I concur. It is the policy of the Department to require restoration of tidal wetland benefits and functions lost as a result of illegal activity (see Tidal Wetlands Enforcement Policy, § III "Goals", Commissioner Policy DEE-7 [Feb 8, 1990]).

I direct that respondents submit the restoration plan to Department staff for its review and approval within sixty (60) days of the service of this order. The restoration plan must be submitted in a form that is approvable by Department staff or subject to only minimal revision. The restoration plan, among other things, shall include a schedule providing for the

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[2] I am also taking into account that, on this record, I cannot conclude that the seawall was built in the waters of the State, as alleged in the complaint (see Complaint, Hearing Exh 2, at 5 [Third Cause of Action]).

Based on the record, the period of violation continued for at least 902 days from the first site inspection by Department staff on April 27, 2006 until the last site inspection on October 15, 2008 (see Department Staff Complaint dated November 8, 2006, ¶ 15 [Hearing Exh 2]; Hearing Tr, at 13 [April 27, 2006 site visit], 88 [June 27, 2007 site visit] & 103 [Oct. 15, 2008 site visit]; see also Department Staff's Closing Brief and Motion for Default Order dated December 9, 2009, at 9, 11). The civil penalty of $100,000 is well within the statutory maximum (see, e.g., ECL 71-2503 [imposing a civil penalty of up to $10,000 for every violation of ECL article 25, and in the case of a continuing violation, each day's continuance is deemed a separate and distinct violation]; ECL 71-1127 [imposing a civil penalty of up to $500 for a violation of any duty imposed by article 15 (except ECL 15-1713) and any regulation promulgated pursuant thereto, and up to $100 per day where such violations continue]). Pursuant to ECL 71-2503, the construction of the staircase alone would allow for a penalty in excess of nine million dollars.

completion of the restoration work within ninety (90) days following Department staff's approval of the plan.

The components of the restoration plan, as requested by Department staff (see, e.g., Department Staff's Closing Brief and Motion for Default Order dated December 9, 2009, at 9-10) are authorized and warranted. Department staff are hereby authorized to extend the ninety (90) day period for the completion of the work upon demonstration of good cause by respondents. I encourage the Valiotis respondents to review the components of the restoration plan with Department staff prior to submitting the plan.

In recognition of the cost of the restoration work that respondents Valiotis are being directed to undertake, I am suspending seventy thousand dollars ($70,000) of the civil penalty, conditioned upon respondents' undertaking and completion of the work, and compliance with the other terms and conditions of this order. The unsuspended portion of the penalty (thirty thousand dollars [$30,000]) is to be paid within sixty (60) days of the service of the order.

If the Valiotis respondents fail to submit a restoration plan that is approvable or is subject to only minimal revision within the timeframe established by this order, or if they submit the restoration plan but fail to complete the restoration work within the required time period, or if they otherwise fail to comply with the terms and conditions of this order (including but not limited to payment of the unsuspended portion of the penalty), the suspended portion of the penalty shall become immediately due and payable.

In addition, Department staff, in its closing brief, moved for a default judgment against respondent Malba Association (the "Association") for failure to appear at the hearing. Department staff requested, as a part of any order, that the Association be enjoined from interfering with the associated removal and restoration activities on its property arising from the restoration work that may be required of the Valiotis respondents.

The Association had been named in the complaint for the purpose of allowing access to its property for the undertaking of any restoration work. Nicholas Kaizer, Esq., attorney for the Association, stated that the Association consents to such entry for site restoration (see Letters dated March 10, 2009 and December 10, 2009 from Nicholas G. Kaizer, Esq., to ALJ Helene

Goldberger); see also Hearing Transcript, at 4). The consent that Mr. Kaizer has provided on behalf of the Association is sufficient for purposes of this matter. The ALJ determined that it was not necessary to grant Department staff's motion (see Hearing Report, at 11-12). In light of the consent of the Association prior to the commencement of the hearing to the relief that Department staff sought, the Association's nonappearance at the hearing did not constitute a default.

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

I. Respondents Efstathios and Stamatiki Valiotis are adjudged to have violated ECL 15-0503(1)(b), ECL 15-0505 and ECL 25-0401, and 6 NYCRR 608.4(b)(1), 608.5 and 661.8.

II. Respondents Efstathios and Stamatiki Valiotis are jointly and severally assessed a civil penalty in the amount of one hundred thousand dollars ($100,000), of which seventy thousand dollars ($70,000) is suspended. The unsuspended portion of the penalty (that is, thirty thousand dollars [$30,000]) is due and payable within sixty (60) days after service of this order upon respondents. Payment of the civil penalty shall be by cashier's check, certified check, or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to Udo M. Drescher, Esq., Assistant Regional Attorney, Division of Legal Affairs, Region 2, NYSDEC, 47-40 21st Street, Long Island City, NY 11101-5407.

In the event that respondents fail to comply with any of the terms and conditions of this order, including but not limited to the timely payment of the unsuspended portion of the civil penalty, the timely submission of a restoration plan, or the completion of the restoration work in accordance with the schedule set forth in the restoration plan as approved by Department staff, the suspended portion of the penalty (that is, seventy thousand dollars [$70,000]) shall immediately become due and payable and shall be submitted to Department staff in the form and manner as set forth above.

III. Respondents Efstathios and Stamatiki Valiotis shall submit a restoration plan to Department staff within sixty (60) days of the service of this order that will provide for restoration work, including:

-- the removal of the seawall and concrete deck. The staircase may remain if respondents provide a detailed plan acceptable to Department staff for a smaller landing area, which plan also receives any required approvals from the Malba Association;

-- the replanting of suitable vegetation in the wetland and adjacent area;

-- a schedule for monitoring the new plantings for a period of five years;

-- replacement of any plantings as needed to achieve a 90% survival rate consistent with the New York State Salt Marsh Restoration and Monitoring Guidelines; and

-- the completion of the restoration work within ninety (90) days of the approval of the plan by Department staff, provided however that Department staff may extend the ninety (90) day period for the completion of the work upon demonstration of good cause by respondents. The restoration plan that respondents submit must be in a form that is approvable by Department staff, or subject to only minimal revision.

IV. Based upon the consent of the Malba Association, as provided by its attorney, to the relief requested in Department staff's complaint, Malba Association is hereby directed to allow Efstathios and Stamatiki Valiotis entry on land owned by the Malba Association for purposes of any restoration work. Because the Malba Association consented to the relief sought by Department staff prior to the hearing, its non-appearance at the hearing did not constitute a default, and Department staff's motion for a default judgment is denied.

V. All communications from respondents to the Department concerning this order shall be directed to Udo M. Drescher, Esq., Assistant Regional Attorney, at the following address:

Division of Legal Affairs
Region 2, NYSDEC
47-40 21st Street
Long Island City, NY 11101-5407.

VI. The provisions, terms, and conditions of this order shall bind respondents Efstathios Valiotis, Stamatiki Valiotis and the Malba Association and their agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
March 25, 2010

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 Official Compilation of Codes,
Rules and Regulations of the State of New York, by:

EFSTATHIOS VALIOTIS, STAMATIKI VALIOTIS, and
MALBA ASSOCIATION,

Respondents.

DEC No. R2-20060511-199

HEARING REPORT

- by -

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

Proceedings

Pursuant to Part 622 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 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 Efstathios Valiotis and Stamatiki Valiotis of Malba, Queens, New York.[1] The staff alleged that the respondents failed to obtain a tidal wetlands permit and/or a protection of waters permit to remove wetland vegetation, construct a seawall and other structures, and place fill in navigable waters, tidal wetlands, and adjacent area in violation of Articles 15 and 25 of the Environmental Conservation Law (ECL) and Parts 608 and 661 of 6 NYCRR. The location of the activity subject to this enforcement proceeding is 89 Malba Drive, County of Queens, New York.

On or about November 8, 2006, staff served the respondents with a notice of hearing and complaint. On or about December 12, 2006, respondents served their answer that contained thirteen affirmative defenses. The Department staff moved for clarification of several of these affirmative defenses by motion dated December 13, 2006. On December 26, 2006, the Office of Hearings and Mediation Services (OHMS) received the respondents' reply to staff's motion dated December 22, 2006. On December 22, 2006, Chief Administrative Law Judge James T. McClymonds assigned this matter to me and I issued a ruling dated December 27, 2006 in which I granted staff's motion for clarification with respect to the seventh, eighth, ninth, and tenth affirmative defenses and directed the respondents to serve an amended answer by no later than January 27, 2007. The respondents served their amended answer dated January 25, 2007 on Department staff.

On June 24, 2009, the OHMS received staff's statement of readiness dated June 18, 2009. In a conference call on July 2, 2009 with the parties, we agreed to convene the hearing on October 8, 2009 in the DEC Region 2 offices in Long Island City. Due to the request of Mr. Peter Sullivan, the respondents' counsel, the matter was adjourned to October 21, 2009. The hearing took place in DEC's Region 2 offices located at 47-40 21st Street in Long Island City on that date.

The Department staff was represented by Udo Drescher, Assistant Regional Attorney. The respondents were represented by Peter Sullivan, Esq. of Sullivan Gardner PC.

Department staff presented one witness in support of its case: Andrew Walker, DEC Marine Biologist.

The respondents did not present any witnesses in support of their case. At the conclusion of the staff's case, Mr. Sullivan asked for the opportunity to present a surveyor or similar expert

[1] According to Department staff, respondent Malba Association was named in the complaint, not because of any violations, but as a necessary party in the event that restoration, if ordered, would involve Malba Association property that is adjacent to 89 Malba Drive. Attorney Nicholas G. Kaizer of Levitt & Kaizer represents the respondent Malba Association and informed this administrative law judge (ALJ) by letter and e-mail that Malba Association would grant entry onto its property for the purposes of remediation and since it consented to such relief, the firm would not be appearing on behalf of this respondent at the hearing.

in order to demonstrate that staff's measurements with respect to the relationship between the tidal wetland boundary and the structures at issue were faulty. I declined to grant the respondents this opportunity as the parties were given ample time to prepare their cases, have preliminary discussions, conduct discovery, and if necessary, to make additional motions. I found it foreseeable that the staff would use the tidal wetlands map to support its case and therefore the respondents were in no way ambushed. The additional cost of another day of hearing was unreasonable given these facts. Mr. Sullivan asked if affidavits could be submitted in lieu of testimony but staff argued persuasively that this was neither warranted nor appropriate given the burden it would place on the Department.

The hearing transcript was received by the OHMS on November 13, 2009. On November 19, 2009, by electronic mail, I sent the parties an errata sheet with my corrections to the transcript and invited them to submit their corrections by no later than December 4, 2009. On December 2, 2009, I received corrections from Mr. Drescher that I incorporated into the transcript. On that same day, by electronic mail, Mr. Sullivan objected to a correction offered by staff (transcript page 126, lines 16-17); however, upon further review, I deemed staff's version to be correct. On December 9, 2009, Mr. Sullivan submitted a post-trial affirmation and Mr. Drescher submitted a closing memorandum and notice of motion for default.[2]

With respect to the motion for default, Mr. Drescher explained that although Mr. Kaizer represented that Malta Association would grant access to its property for the purposes of allowing remediation efforts to go forward, he stated that this position could change. Therefore, based on the respondent Malta Association's failure to participate in the hearing, Mr. Drescher maintains that a default is appropriate unless the Association responds by agreeing to an order directing that access be permitted. By letter dated December 10, 2009, Nicholas G. Kaizer, Esq., counsel for Malba Association, wrote to me to clarify the Association's position in this matter. Mr. Kaizer reiterates the Association's consent for the entry of relief against it and asks that a default not be ordered.

I received replies from the parties on December 17 and 18, 2009. The record in this matter closed on December 18, 2009, the date the OHMS received the respondents' reply affirmation.

The Charges and Relief Sought

The Department staff alleged that:

1) by clearing vegetation within the regulated tidal wetland and/or tidal wetland adjacent area without a permit from DEC, respondents Efstathios Valiotis and Stamatiki Valiotis violated ECL § 25-0401 and 6 NYCRR § 661.8;

2) by constructing a seawall in the tidal wetland and the tidal wetland adjacent area without a permit from DEC, the respondents violated ECL § 25-0401 and 6 NYCRR § 661.8;

[2] At the close of the hearing, the parties agreed that closing briefs would be submitted in lieu of closing statements and these memoranda would be due on December 4, 2009. Due to Mr. Sullivan's request for an extension of time on the brief and Mr. Drescher's consent, the date for submission was moved to December 9, 2009.

3) by constructing a seawall in the waters of the State without a permit from DEC, the respondents violated ECL § 15-0503(1)(b) and NYCRR § 608.4 and 608.5;

4) by placing fill in the regulated tidal wetland and tidal wetland adjacent area in connection with the construction and backfilling of the seawall without a permit from the DEC, respondents violated ECL § 25-0401 and 6 NYCRR § 661.8;

5) by placing fill in the navigable waters of the State or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the State without a permit from DEC, respondents violated ECL § 15-0505 and 6 NYCRR § 608.5;

6) by constructing a concrete deck within the regulated tidal wetland and tidal wetland adjacent area without a permit from DEC, respondents violated ECL § 25-0401 and 6 NYCRR § 661.8;

7) by constructing a concrete deck on or above the waters of the State without a permit from DEC, respondents violated ECL § 15-0503 and 6 NYCRR § 608.4; and

8) by constructing a staircase in the tidal wetland or tidal wetland adjacent area without a permit from DEC, respondents violated ECL § 25-0401 and 6 NYCRR § 661.8.

Staff seeks an order finding the respondents acted in violation of the laws and regulations set forth in the complaint; requiring the respondents to remove all unauthorized fill from the site and restore the site; requiring respondent Malba Association to allow access to the Association's property if necessary to allow the restoration of the site to the satisfaction of the Department staff; imposing a penalty pursuant to ECL §§ 71-1127 and 71-2503 for each violation alleged in the complaint calculated on a daily basis where authorized by law; holding the respondents Valiotis jointly and severally liable for the penalties; and ordering the respondents to cease and desist from any and all future violations of the ECL and the implementing rules and regulations.

In support of the allegations, the staff listed 36 exhibits in the exhibit chart that was prepared by Mr. Drescher. At the hearing exhibits 1-33 and 36 were admitted into evidence. See, exhibit list annexed hereto.

Respondents' Position

The respondents did not present any testimony or documentary evidence to support their affirmative defenses. In the post-trial affirmation of their counsel and the reply affirmation, the respondents argue: 1) that the Department staff failed to prove that the respondents "permitted" or "allowed" any illegal conduct on their property; 2) the Department staff failed to establish the tidal wetlands boundary in question and therefore could not show that the respondents conducted any illegal activity therein; 3) the Department staff failed to prove, beyond a conclusory statement, that the waters in question constituted navigable waters; and 4) the Department staff failed to provide sufficient support for the penalty and relief requested.

FINDINGS OF FACT

1. Respondents Efstathios Valiotis and Stamatiki Valiotis are husband and wife and are, since July 2, 1998, the joint owners of a residential waterfront property with a mailing address of 89 Malba Drive, New York 11357.

2. 89 Malba Drive is also identified as Queens County Tax Block 4416 Lot 168.

3. Block 4416 Lot 168 abuts Queens County Tax Block 4416 Lot 18 that is owned by the Malba Association. The Malba Association's address is 138-10 11th Avenue, Malba, NY 11357 and is a domestic not-for-profit corporation. This property consists mainly of land under water but also approximately 3000 linear feet of shoreline, including the shore fronting lot 168.

4. The Valiotis property and the Malba Association property abut the East River and the tidal area in this vicinity is known as Powell's Cove, a navigable waterway. Hearing Exhibits (Ex.) 6, 7; Hearing Transcript pages (TR) 21-23. The Valiotis property at 89 Malba Drive is the fifth property to the north of the NYC Department of Environmental Protection's outfall. TR 23, 40; Ex. 5.

5. In August 2000, Sheldon L. Reich, P.E. submitted a joint application for permits on behalf of Efstathios Valiotis to build a 25` x 90` timber and concrete deck on piles and staircase at the 89 Malba Drive location. Ex. 7.

6. The Department staff issued a notice of incomplete application (NOIA) dated November 1, 2000 that stated, inter alia, that the applicant provided insufficient justification for the project that is "presumptively incompatible with the preservation, protection and enhancement of tidal wetlands . . ." Ex. 8. The NOIA also noted that the proposal did not meet the 30-foot setback requirements or limitation on impervious surface coverage in the regulations. Id.

7. By letter dated August 14, 2003, Mr. Reich submitted a revised set of plans to DEC in response to the NOIA in which the proposed structure was moved upland of the mean high water mark and the remains of the pre-existing concrete and stone seawall. Ex. 10. Mr. Reich also noted that the structure was to be composed of a material that would conform to the maximum impervious surface coverage requirements. Id.

8. By NOIA dated September 4, 2003, the Department staff stated that the project remained in tidal wetlands and adjacent area that is vegetated and serves as a buffer between the residential area and DEC-mapped shoal/mudflat and littoral zone habitat in Powell's Cove. Ex. 11. The NOIA provides that there was no justification for the placement of a seawall and backfilling in the tidal wetlands adjacent area and a formal variance request was needed because the proposed seawall and backfill did not meet the 30-foot setback requirement for structures unrelated to water-dependent uses. Id. Among other things,

the staff requested in the NOIA that the applicant include in its application the establishment of a vegetated buffer zone that would be continually maintained. Id.

9. The Department never approved or issued permits for the project described in paragraphs 5-8. TR 82, 162.

10. In the spring of 2006, while investigating a violation north of this site, Department staff observed a platform to the south. TR 11-12. Staff researched the Department's files and records including the GIS system to examine prior years' aerial photographs. TR 12. Subsequently, a resident contacted the staff to report the collapse of a wall with debris falling into the intertidal marsh at a location west of 89 Malba. TR 12. This prompted a visit back to the site on April 27, 2006 when staff discovered the construction of a seawall, concrete deck, and staircase at this location. TR 13-15; Exs. 12-27. The wall which is approximately 96 feet long and 20 feet wide was built on top of the pre-existing dilapidated seawall. Exs. 7, 12-16, 29.

11. Visible at this site is the landward edge of the tidal wetland boundary noted by the high water mark – a darkened stain that runs along the rocks underlying the newly built structures at about 2 feet high. TR 65, 133-134; Exs. 12-4. Intertidal marsh is the vegetated wetland zone, lying generally between average high and low tidal elevation. The predominant vegetation in this zone is low marsh cordgrass, Spartina alterniflora. 6 NYCRR § 661.4(hh)(2); TR 65, 96; Exs.7, 13, 31, 33.

12. The construction of these appurtenant structures – the filling as well as the seawall and staircase - have caused the loss of vegetation (both wetland and upland species) and habitat for various species such as the Canada geese, seagulls, egrets, and terns that have been seen at this location in addition to a variety of shellfish such as oysters, mussels and clams as well as snails. Exs. 23, 28; TR 113-114, 118, 120. Small fish that would normally populate such an area in order to utilize the vegetative cover for protection have lost that environment. TR 114-115. In addition, the reflection of wave energy against the seawall may cause erosion of sediment at its base, causing further loss of habitat in adjacent areas. TR 114.

13. Another effect of this construction is the dripping of cement mortar into the environment thereby potentially affecting the pH of the water. TR 121-122; Ex. 15. The construction of this platform has also created a shadow effect into the waterbody that will inhibit the growth of vegetation. TR 123-124. This also deters small fish from utilizing the area as these creatures perceive such shadows as predators. TR 125.

14. In order to restore this environment, it will be necessary to carefully remove the structures, concrete deck and I beams, and cement during low tide. TR 127. Silt curtains or a floating boom will have to be utilized in the gap created by removal of materials in the rock wall to prevent erosion of loose unconsolidated material. Id. There will also be a need for some fencing to protect the remaining spartina patches. TR 128. Once these structures are removed, it will be necessary to grade down to the preexisting area and replant. Id.

15. The Malba Association, through its representative Nicholas G. Kaizer, Esq., has consented to a Commissioner's order directing that access be granted to its property in the event such entry is necessary to accomplish any remediation associated with the alleged violations.

DISCUSSION

The site contains a dilapidated rock seawall. However, it is the conclusion of this ALJ, based upon the testimony and evidence produced by the DEC staff, that the respondents did act in violation of Article 25 of the ECL and Part 661 of 6 NYCRR by placing fill in a tidal wetland adjacent area without a permit, by removing wetland vegetation, and by constructing a seawall, deck and staircase.

Statutory and Regulatory Requirements

Pursuant to ECL § 25-0401, it is unlawful to perform any new regulated activity in a tidal wetland or adjacent area without a Department permit. Pursuant to ECL § 25-0402 and 6 NYCRR § 661.8, a tidal wetlands permit is required to conduct regulated activities in any tidal wetland or any adjacent area.

Except where a lease or other conveyance of land under waters by the Office of General Services has been made, ECL § 15-0503(1)(b) and 6 NYCRR § 608.4 prohibit the construction, placement or expansion of any dock, wharf, platform or other structure in or above waters of the State without a DEC permit.

Pursuant to ECL § 15-0505 and 6 NYCRR § 608.5, a protection of waters permit is required to excavate or place fill in any of the navigable waters of the state or place fill in any tidal wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a protection of waters permit issued by the Department. Navigable waters of the state include wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water or tide. ECL § 15-0505 and 6 NYCRR § 608.5.

Pursuant to ECL § 25-0102, "[i]t is declared to be the public policy of th[e] state [of New York] to preserve and protect tidal wetlands, and to prevent their despoliation and destruction." To effectuate this policy, an inventory was taken of all tidal wetlands within the State of New York. This inventory of tidal wetlands is set forth in the Official Maps. These maps identify and delineate all tidal wetland boundaries within the state. ECL §§ 25-0201. Staff has consistently asserted jurisdiction over the site in question. Map no. 598-516 depicts the site and identifies the area west of the respondents' home as part of regulated tidal wetlands in Powell's Cove. Ex. 5.

Section 6 NYCRR § 661.4(b)(1)(i) and (ii) define adjacent area as the "land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetland boundary is shown on an inventory map . . .: (i) 300 feet landward of said most landward boundary of a tidal wetland,

provided, however, that within the boundaries of the City of New York this distance shall be 150 feet . . .; or (ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure . . ."

Affirmative Defenses

The respondents did not defend against the allegations in their answer or at the hearing by stating that the pre-existing rock seawall established the seaward edge of the adjacent area based upon 6 NYCRR § 661.4(b)(1)(ii). Nor could they, because this stone seawall was not functional at the time of their activities. Exs. 7; 15. When a functional and substantial fabricated structure no longer meets the criteria in this section of the regulations, the structure no longer limits the landward boundary of the adjacent area. Matter of Louis Bruni, (Commissioner's Decision, January 18, 1995). Rather, it would appear that the pre-existing rear seawall that was described by Mr. Walker and seen in many of the photographs constitutes the boundary of the adjacent area. Ex. 7, photograph numbers 1-4; TR 101.

With respect to their affirmative defenses that are set forth in the amended answer, the respondents had the burden of proof regarding them but failed to provide any support for them at the hearing. 6 NYCRR § 622.11(b)(2). Therefore, the respondents failed to overcome the complaint on the bases of these contentions.

Ownership Liability

With respect to the respondents' arguments in their post-hearing submission that the staff failed to demonstrate that they "engaged" in "clearing", "placing", and "constructing," I find that the staff showed by a preponderance of the evidence that the structures at issue – the platform, wall, and staircase – were constructed by the respondents or at their bidding during the time they owned the property and in fact were constructed subsequent to the time that they had applied but failed to obtain a tidal wetlands permit from the Department. In the respondents' reply affirmation, Mr. Sullivan states that "the record is devoid of any reference to the ownership of the land upon which the illegality is alleged." This is not the case. In their answer, the respondents admit to ownership of 89 Malba. Ex. 3, ¶ 1. Mr. Walker identified the location of the violations both by reporting on his site visits as well as identifying the house on the tidal wetlands map and New York City's digital tax map information. TR 10-13, 18-22, Exs. 5, 6. Additionally, the respondents' defense that staff failed to prove that the respondents had anything to do with the construction appears to hang on a thin grammatical thread. Because the staff did not catch these respondents in the acts of clearing, placing, and constructing it is unknown whether Mr. and Mrs. Valiotis or their contractors or a combination of the two engaged directly in the illegal activities. However, as noted by staff, there is much precedent for holding landowners responsible for the acts of their agents in wetland enforcement matters. See, e.g., Matter of Risi (Commissioner's Order, October 29, 2004); Matter of Tomaino Santino (Commissioner's Order, January 25, 2000); DEE-7: Tidal Wetland Enforcement Policy (February 8, 1990) (http://www.dec.ny.gov/regulations/25248.html. And, it is wholly

implausible that another person would arrange to have these structures built on property that he or she could not access legally.[3]

In their answer, the respondents provided affirmative defenses that the allegations do not concern property owned or in control of the respondents (sixth affirmative defense), construction was done with the approval of DEC (seventh affirmative defense), work was undertaken to protect abutting property (eighth affirmative defense); the activities alleged by DEC were undertaken to repair an existing structure (twelfth and thirteenth affirmative defenses). However, the respondents did not provide any evidence to support these contentions and because they have the burden of proof on the affirmative defenses, they must fail. While the Department did not submit any evidence of the construction while it was ongoing and thus, did not catch the respondents or their contractors "in the act," the law does not require such proof. It is sufficient for the Department staff to demonstrate that the structures were built without a permit on the property owned by the respondents.

Wetland Boundary

At the hearing, there was dispute between the respondents' counsel and the Department staff with respect to precise measurements of the distances between the tidal wetland boundary and the built structures. TR 36-39, 44-46, 48-53, 84-87, 160-161, 165-188. The respondents did not present any expert witnesses to support any claims that the work performed was outside DEC's jurisdiction. However, the aerial map that is designated as the relevant portion of the tidal wetlands map (Ex. 5) is meant to establish the approximate boundary of the tidal wetlands and then the line must be further defined in the field. Mr. Walker credibly testified to his observations in the field and this testimony was generally supported by documentation from his notes, the photos from his field visits, as well as the photographs submitted by the applicant in its permit application. Exs. 7, 14-33.

As cited to by Department staff, the declaratory ruling in Thomas Thompson (25-02) makes clear that tidal wetlands are defined in ECL § 25-0103 as "areas which border on or lie beneath tidal waters, land which is subject to tides, and the presence of certain plant species." The identification of tidal wetlands is not restricted to that which appears on the maps, the intent of which is to provide notice to property owners. This declaratory ruling also acknowledges as did respondents' counsel (TR 37-39) that "[a] line drawn on a map can represent 50 feet or more on the ground, depending upon the scale . . ." While Mr. Walker was not so precise with his explanation of the use of the map in relationship to the wetland, he was clear in his identification of the subject property, the wetland's characteristics, and the attributes that were lost as a result of the respondents' activities.

There can be no doubt that the structures built by the respondents at 89 Malba Drive were placed in the tidal wetland adjacent area and that fill was placed in this area. What is more difficult to discern is whether or not the respondents placed fill in the waters of the state (other than by erosion of the pre-existing and new structures and by negligent building practices) and in

[3] To the extent that the respondents' activities have resulted in a trespass on the Malta Association property, they are still responsible for those violations. As the structures would only benefit the residents of 89 Malta Drive, there is no reason why the Malta Association or anyone else would have built them.

the wetland. The stain line that was repeatedly described by Mr. Walker and is shown in many of the evidentiary photographs does not appear to have changed from its location prior to the illegal activities. Exs. 7, photograph numbers 2, 4, 12-16. In fact, the stain line appears to have remained along the pre-existing dilapidated stone seawall that lies underneath the new stone seawall and concrete platform. Exs. 12-16; TR 69. The pictures in evidence depict the area at both high and low tides and one can see that at high tide the water goes right up to the structures. Ex. 28. But it is not possible to determine whether or not that water inundated the area beyond this old wall. It can be seen that the respondents removed upland vegetation that had grown up directly in front of the functional pre-existing wall (that lies to the east of the dilapidated wall and the new structures) and that this type of vegetation does not grow in inundated conditions. TR 154; Ex. 7, photographs 1-5.

At low tide, it is possible to see from the photographs that some of the wetland vegetation that existed in 2000 has been removed either directly or as a result of the work that undermined the root systems of these plants. Exs. 7, 16; TR 188-189.

The respondents failed to submit any testimony or evidence that would contradict these findings.

Penalty

In the complaint, the staff requested a penalty for each violation alleged in the complaint calculated on a daily basis but did not provide a specific sum. In addition, the staff requested that the Commissioner order the respondents to remove all unauthorized fill from the site and restore it and in the case of the respondent Malba Association to allow such restoration.

In its closing brief dated December 9, 2009, the staff provided a calculation of a maximum penalty based upon the relevant statutory provisions in Article 71 of the ECL which came to a sum of over twenty-eight million dollars. The staff had found that causes of action two through seven constituted continuing violations for 902 days based on the theory that the harm caused by the various structures was continuing. With respect to the removal of vegetation addressed in the first cause of action, the staff found two violations by virtue of removal of upland vegetation and removal of intertidal marsh. And, with respect to the construction of the staircase, the staff maintained that construction probably lasted only one day and did not cause significant harm. Staff then used the Civil Penalty Policy and the Tidal Wetland Enforcement Policy to address the various factors that would weigh in determining a viable penalty.

The staff concluded that the respondents did not derive a significant economic benefit from the violations and that the failure to obtain a permit was serious especially in a community where property values are high and land is at a premium. Staff found: 1) culpability was high due to the former unsuccessful efforts to obtain a permit; 2) respondents' cooperation was nil;

3) there was no history of non-compliance; and 4) there was no basis to conclude the respondents could not pay a penalty. Staff also concluded that the environmental threat from the violations was serious because the structures continued to have a negative effect on multiple species and on the tidal wetland. The staff found the respondents' actions to be knowing and

willful based on an awareness of the regulatory requirements. The staff determined that the deterrent effect of the penalty was important due to a number of other similar violations in the area. Based upon this analysis, staff asked for a penalty of $150,000.

The respondents argued in their closing brief, dated December 8, 2009, that the staff failed to provide any evidence or argument in support of a penalty request. Citing to the Civil Penalty Policy, the respondents maintained that the staff failed to request a specific penalty amount and an explanation of how it was derived. The respondents concluded this argument by stating that the staff failed to demonstrate liability and that to the extent liability could be found it was based solely on ownership of land and therefore any penalty must be nominal.

Staff did not introduce arguments with respect to penalties and relief at the hearing. The staff's complaint put the respondents on notice of their intentions to seek a penalty for each violation as authorized by law. And, as agreed to by the parties and noted by staff, closing briefs were chosen in lieu of closing oral statements by both counsel. Counsel for staff has not introduced any new facts in his request for penalties. Rather, he has applied his understanding of the statutory penalties and the Department's policies to the facts put forward at the hearing in testimony and exhibits. And, in his December 18th reply affirmation, Mr. Sullivan does not comment on staff's penalty analysis. Therefore, I reject the respondents' arguments that staff's penalty request is improper due to its timing.

ECL § 71-2503 provides for a maximum civil penalty of ten thousand dollars for each violation of Article 25 or 6 NYCRR Part 661 and restoration of the affected wetland. ECL § 71-1107 provides for a maximum civil penalty of five thousand dollars for each violation of Article 15 or 6 NYCRR § 608.5. In addition to the structures that have been built, at the hearing, the staff provided testimony to demonstrate ongoing effects such as: the alkaline content of the cement mortar drippings which cause a continuing undesirable impact on the waterway's pH levels; shadows created by the structures that would deter fish from utilizing the area; and the wave effects against the wall that would cause erosion and sedimentation. TR 121-122, 124, 128-129; Exs.15, 19, 30-31.

The Department's 1990 Civil Penalty Policy provides that several factors be considered in establishing a penalty. Among these are the gravity of the violation and the economic benefits of non-compliance. These factors are intended to effectuate a policy of punishment and deterrence. With respect to gravity, the criteria to consider are: a) potential harm and actual damage caused by the violations; and b) relative importance of the type of violations in the context of the Department's overall regulatory scheme. The harm caused by the violations has been described by the staff - primarily, loss of habitat. TR 120, 124. Certainly, the failure to apply for and obtain a permit in this case is also serious because it is likely that the staff would have denied a permit or placed protective conditions on any permit issued. The 1990 Civil Penalty Policy describes the failure to obtain a permit prior to undertaking a regulated activity as a serious matter. (Id., p. 8).

The respondents were aware of the permitting requirements – they had previously applied for a permit with respect to a similar project and had received from Department staff a series of notices of incomplete application but no permit. Exs. 7, 8, 10, 11, TR 162-163. Thus, their

violations show a particular disdain for the law. As for the economic benefits of the respondents' failure to apply for and obtain a permit, the staff did not submit any evidence on what the costs are of this process for applicants. However, by not retaining a professional to submit plans and an application on this project, funds were saved by the respondents.

The Tidal Wetlands Enforcement Guidance Memorandum issued by Commissioner Jorling in February 1990 indicates that Department action in response to violations should be guided by goals of restoring the resource, punishing those who commit Article 25 violations, deterring future violations, and assuring no economic gain is derived from failure to comply with the law.

The respondents' violation of ECL § 25-0401 and 6 NYCRR § 661.8 by clearing vegetation within a regulated wetland and adjacent area of a tidal wetland should result in a penalty of $20,000 as their actions caused the removal of both wetland and upland plant species.

The respondents' violation of ECL § 25-0401 and 6 NYCRR § 661.8 by placing fill in a tidal wetland and/or tidal wetland adjacent area; constructing a seawall in the tidal wetland and/or tidal wetland adjacent area; constructing a deck in the tidal wetland and/or tidal wetland adjacent area; and constructing a stairwell in the tidal wetland and/or tidal wetland adjacent area should result in a penalty of $40,000. I do not agree with staff that these activities constitute continuing violations although I appreciate that the harm caused by these activities is ongoing. However, the case law is clear that construction of this nature, once completed, is not considered to be an ongoing activity. See, State of New York v. Niagara Mohawk Power Corp., 263 F. Supp 2d 650, 660 (WDNY 2003).

Because I could not find definitively that the respondents violated ECL §§ 15-0503(1)(b) and 15-0505 and 6 NYCRR § 608.4 and 608.5 by placing fill and constructing structures in the navigable waters of the State or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state without a permit from DEC, I cannot recommend a penalty be exacted.

Although no proof was submitted by either party with respect to the cost of restoration of the site, it will undoubtedly be costly. In accordance with the goals of Article 25 and the tidal wetlands EGM, I find that restoration should be the main goal of this enforcement proceeding and order. Therefore, I recommend that a total penalty of $60,000 be assessed and that $30,000 of this sum be suspended pending the respondents' submission of a plan to Department staff to restore the area to its condition prior to the construction and their implementation of such plan. In its closing memorandum, the staff allowed for the possible retention of the staircase and a smaller landing. Staff's Closing Brief, p. 9. These considerations should be part of any detailed restoration plan should the respondents wish to pursue them.

Malba Association

As noted earlier in this report, the Malba Association was named in the complaint only for the purposes of ensuring that access to its property was obtained to carry out any remediation associated with this matter. Mr. Kaizer, the Malba Association's representative, has repeatedly stated that the Association has consented to such entry. The Association did not answer or

appear at the hearing because it had already consented to the relief that staff had requested in a letter dated March 10, 2009, an e-mail dated June 26, 2009, and a clarifying letter dated December 10, 2009. Therefore, I do not find it necessary or appropriate to grant staff's motion for a default.

CONCLUSION

The respondents are liable for violations of ECL § 25-0401 and 6 NYCRR § 661.8. Specifically, they failed to obtain a permit prior to placing fill and constructing a seawall, deck, and stairwell in the tidal wetlands and/or adjacent areas of Powell's Cove and for removing vegetation from the regulated wetland and adjacent area without a permit.

I recommend a penalty of $60,000 be assessed against the respondents with $30,000 suspended pending their restoration of the area. The respondents should also be ordered to submit to Department staff a plan to restore the area to its condition prior to the respondents' unpermitted work and to implement that plan after DEC approval within a reasonable time period.

Albany, New York
January 27, 2010