STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Proposed Renewal/Modification of the Tidal Wetlands General Permit of the Village of West Hampton Dunes

Ruling on Issues and Party Status

DEC Application No. 1-4736-01887/00006

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Background

These proceedings involve the New York State Department of Environmental Conservation (DEC or Department) staff's proposed renewal/modification of the Tidal Wetlands General Permit (permit) that was issued to the Village of West Hampton Dunes (Village) in 1999. The permit was originally issued pursuant to a stipulation of settlement and consent judgment dated October 31, 1994 (stipulation) that resolved the litigation in *Rapf v. Suffolk County of New York, et al*, 84 Civ. 1478 (EHN). In this litigation, the plaintiffs alleged damage to their property resulting from a beach protection project that the U.S. Army Corps of Engineers in cooperation with DEC and Suffolk County had engaged in east of the southern shore of the barrier island at West Hampton, Town of Southampton, Suffolk County, New York, where the plaintiffs' property was located. [1] In the 1970's, the beach protection project involved the construction of a series of groins which stopped short of the subject area. The plaintiffs claimed in their lawsuit that the failure to extend the groins to the vicinity of the barrier island was responsible for the destruction of their homes in several storms. The settlement of the lawsuit involved an interim project to modify some of the groins, build a new groin and a dune, and fill in the groins. The Department was named as a third party defendant in the *Rapf* litigation and was a party to the stipulation. Pursuant to that stipulation, the Department issued the Village the General Permit in compliance with tidal wetland laws and regulations.

The permit was to expire on August 31, 2009 and on July 16, 2009, the Village requested reissuance of the 1999 permit. By letter dated December 23, 2009, the Department's Division of Environmental Permits in Region 1 advised the Village that the permit had expired effective August 31, 2009. Via a five-day letter dated January 21, 2010, the Village served DEC staff with a demand for a decision on its permit renewal and demanded re-issuance of the permit. On February 5, 2010, the Department staff issued a new General Permit. However, because Department staff had revised several conditions and terms of the 1999 permit on that permit, by letter dated March 1, 2010, the Village requested a hearing on that permit pursuant to § 621.10 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR).

[1] The Village of West Hampton Dunes was incorporated in 1993 and covers the entire damage area that was the subject of the *Rapf* litigation and this proceeding.

Legislative Hearing

After a period in which the parties attempted to resolve the dispute unsuccessfully (issues conference hearing transcript [TR] 7), the matter was assigned to me for a legislative hearing, issues conference, and hearing. The notice of hearing was published in the *Environmental Notice Bulletin* and *Southampton Press* on December 1 and 9, 2010, respectively. Pursuant to the hearing notice, the legislative hearing was convened at 10:00 a.m. on January 5, 2011 at 906 Dune Road in the Village.[2] No petitions for party status were filed with the Office of Hearings and Mediation Services (OHMS) and no members of the public other than the individuals who appeared on behalf of the Village attended the legislative session. TR 7-8. Accordingly, we moved quickly into the issues conference phase of the proceedings.

Issues Conference

The Village was represented at the issues conference by Joseph W. Prokop, PLLC, Attorney at Law, 267 Carleton Avenue, suite 301, Central Islip, New York 11722. The Department staff was represented by Vernon Rail, Esq., Assistant Regional Attorney, DEC Region 1, SUNY at Stony Brook, 50 Circle Road, Stony Brook, NY 11790-3409.

By letter dated December 23, 2010, I advised the parties that I had concluded that I would not rule summarily on the issues and that instead, I would release an issues ruling after the issues conference record was complete.

We began the issues conference with an identification of documents that would be relevant to our discussions. TR 17-35. A copy of the list of these documents is attached to this ruling. We spent a brief time discussing the various freedom of information law (FOIL) and discovery requests that the parties had exchanged communications on in the time period prior to these proceedings. TR 36-46. The Village stated that the DEC staff had defaulted on its discovery responsibilities that were defined in the December 13, 2010 conference call (and confirmed in a December 14, 2010 letter). TR 41. Mr. Rail denied such omission, stating that the staff had revealed that it intends to have only one witness – Regional Permit Administrator Roger Evans – and that the only documents that it is relying upon are the 1994 stipulation and the 1999 permit. TR 43-44. In a later discussion during the issues conference, Mr. Rail stated that it was possible that if there was a hearing, the staff might also call Michelle Gibbons, a regional staff person with the DEC Endangered Species Unit. TR 57-58. I encouraged the parties to attempt to resolve these matters on their own. TR 40.

On January 23, 2011, I sent a letter to the parties enclosing my corrections to the legislative hearing and issues conference transcript and asking for their corrections by no later than February 22, 2011. The staff and the Village sent their revisions by letters dated February 22, 2011. With the exception of one suggested correction by the Village, I incorporated the

[2] The hearing notice had set 914 Dune Road as the location but the Village attorney notified me and Department counsel on January 3, 2011 that this location was not available due to storm damage. Accordingly, the proceedings were moved next door and I instructed the Village to post a sign to alert any members of the public seeking to attend of the change in location.

parties' corrections into the *errata* sheet and made the corrections to the issues conference transcript.

At the conclusion of the issues conference, we had a discussion regarding the scheduling of the submission of closing memoranda. TR 152-153. The parties agreed to submit these by February 28, 2011 with replies, if necessary by March 15, 2011. *Id.* Mr. Prokop requested and was granted a short extension of time to file the Village's brief and accordingly, both parties filed their closing memoranda on March 1, 2011. By electronic mail, on March 15, 2011, Mr. Prokop asked for a one day extension to file his reply brief. As Mr. Rail had already filed staff's reply memorandum before I could consult with both parties, I directed Mr. Rail to speak with Mr. Prokop about his request. Mr. Rail agreed to the one day request on the condition that Mr. Prokop did not review the staff's reply brief. Accordingly, the Village's reply brief was filed on March 16, 2011 and the issues conference record was closed upon receipt of this brief.

Department's Position

After the preliminary matters were addressed at the issues conference, we moved into a discussion of the positions of the parties, starting with the Department staff's position. I summarized what I understood to be the staff's position (see letter of Vernon Rail dated December 21, 2010, Issues Conference Exhibit [IC Ex.] 5). I related that the staff had determined that it was not appropriate to renew the permit due to the length of time that had expired since the events that had precipitated the issuance of the permit and its belief that most of the property affected by the beach nourishment project and/or storms had been built up. Then, the staff decided to issue a new permit with a shorter duration while maintaining its position that it did not have to reissue the prior permit. The staff finds that neither the stipulation nor the 1999 permit addresses the prospect of reissuance and that if there is ambiguity it should be decided by "a court of law" and not by the OHMS or the Commissioner. The staff proposes that alternatively, if the matter is addressed in the administrative context, there is no ambiguity because the parties could have addressed the term of the permit in the consent decree and did not. Therefore, staff concludes that there are no issues for adjudication.[3] TR 46-48.

Mr. Rail confirmed that this was an accurate summary of staff's position. He added that the 1999 stipulation represents the complete expectations and intentions of the parties. TR 48. Mr. Rail argued that the operative paragraph in the stipulation obligating DEC to permit issuance was a condition precedent to activating duties of the Village. However, he argued that nothing in that language obligated DEC to issue another general permit after the 1999 permit expired. TR 49, 55. Later in the conference, Mr. Rail emphasized that the stipulation was achieved after lengthy negotiations and constituted the entire agreement of the parties as set forth in ¶ 22 in the stipulation. He noted that the agreement was approved by a federal district court judge (the late Judge Nickerson) and was deemed fair, reasonable, and adequate to the plaintiffs by the judge. TR 62-64. Assistant Regional Attorney Rail argued that the Village was attempting to add terms

[3] Mr. Rail cited to 6 NYCRR § 624.4(c)(iii) in support of his contention that the Village had not raised any adjudicable issues. However, I noted that this regulation refers to intervening parties in a permit proceeding and that the staff and an applicant or permittee were automatically parties with adjudicable issues (not necessarily requiring a hearing) when they had a dispute on a substantial permit term or condition. See, 6 NYCRR § 624.4(c)(i). TR 137-138.

to the agreement that are not contained within it. He specified that the Village's interpretation would usurp the authority of the Legislature under ECL § 25-0302(1) which disallows localities from taking on the permit issuing function. TR 65. Mr. Rail also cited ECL § 25-0403(3), which provides that the Department may impose conditions as necessary to carry out the public policy set forth in the Tidal Wetlands Act. *Id.*

Mr. Rail stated that the 30 year period that the Village has referenced in its position paper addresses solely the operations and maintenance of the beach restoration project and is not part of the conditions precedent; he described it as a totally separate part of the document. TR 50.

In staff's closing brief, counsel reiterates and expands upon the positions stated at the issues conference. Staff provides that it had initially sought additional information from the Village prior to its determination on the permit but in the absence of the information decided to issue the general permit with appropriate conditions and a five year term. Staff Brief (Br.), p. 2. The staff classifies the general permit issued to the Village as an emergency permit pursuant to 6 NYCRR § 621.14(c). Staff Br., p. 5. Citing *Radlich v. Council of City of Lackawanna*, 93 AD2d 559 (4th Dep't 1983), aff'd, 61 NY2d 652 (1983), the staff emphasizes that exceptions to the regulations should be narrowly construed and not conflict with the statutory purposes of the law, specifically the Tidal Wetlands Act and the Endangered Species Act – Articles 11 and 25 of the ECL. Staff Br., p. 4. The staff also argues in its closing memorandum that State Administrative Procedure Act (SAPA) § 401(2) which provides for a continuance of a license or permit past an expiration date while the permitting agency is reviewing an application to renew does not apply. Staff Br., pp. 10-13.

In its reply brief (Reply Br.), staff cites to 6 NYCRR § 621.6(h), ECL § 70-0117(2), and General Condition # 3 in the 1998 permit in support of its position that it was entitled to request additional information from the Village. Reply Br., p. 2. In its reply, staff further expands on its position that the Village's stance promoted an improper usurpation of State authority. Particularly, Mr. Rail contends that the Village is seeking an entitlement to construction privileges beyond the terms of the stipulation and the requirements of Part 661. Reply Br., pp. 2-6. Based upon a declaratory ruling issued in 1988 and the case law cited therein, Mr. Rail maintains that the Village's powers are derived solely from the State and it has no vested rights against the State. *Town of Amherst* (DEC 24-12).

Village Position

At the issues conference, in addition to the Village attorney, Mr. Prokop, Aram Terchunian, the Village's Commissioner of Wildlife, and Mayor Vegliante participated in providing the Village's position on the permit.

Mr. Prokop stated that the permit issued to the Village should have a life of between 30 years and perpetuity as these are the two time periods expressed in the stipulation and the 1999 General Permit. TR 59. Mr. Prokop explained that the Village and other plaintiffs to the litigation had obligations that were their consideration for their "side" of the stipulation. TR 60. He pointed to paragraphs 4, 5, 6 and 10 of the stipulation as the portions of the agreement that embody those obligations. *Id.* Specifically, he identified these as the public access plan; the

boundary line agreement, the conservation easement, and the access grant – the rights to enter to gain public access and accommodate federal, state and county governments' actions to restore and maintain the barrier island; endangered species provisions that placed certain requirements on property owners and Village; and releases that relinquished claims against DEC and New York State. TR 60-63. Mr. Prokop emphasized that because all of these obligations were in perpetuity so should be the term of the tidal wetlands general permit.

Mayor Vegliante made a statement indicating that he had lived through the entire 35 year process and believed that a sincere and coordinated effort was made to right a wrong precipitated by government action. TR 116. He stated that the beach nourishment project had almost destroyed a community and that despite that, in the stipulation, the Village and its members had given up a lot of property. TR 117-118. He understood the agreement would last 30 years and that Herb Hoffman, the building inspector, had been told by Charles T. Hamilton, the former Natural Resources Supervisor of DEC's Region 1 office, not to worry about the expiration date in the permit. TR 119. He said that the project was a great example of coastal protection and any erosion of the agreement would take the lifeblood of the community. TR 121. The Mayor ended the Village's presentation by stressing that the Village had been brought back from the brink of disaster to top rated restored beaches – from the worst circumstances to a blueprint for restoration. TR 146.

Aram Terchunian stated that the State of New York was entrusted to use any appropriate administrative procedures to carry out the terms of the federal order. TR 141. He stated that sufficient and timely notice was given to reissue the new permit and the Department eventually decided to reissue. TR 142. He urged that if the Department desired changes it should have utilized negotiations as it had in the past. TR 143. He explained that it took 5 years to issue the general permit from the execution of the stipulation, and to undo that process without any discussion was not sustainable. TR 143. Mr. Terchunian remarked that every action by the Village was done strictly in compliance with Part 661 and that the State can raise a red flag at any time regarding any problems with development activities. TR 144.

The Village's closing brief essentially reiterated the principal argument it made at the issues conference – that by accepting the Village residents' commitments – many of which would be longstanding – the Department was obligated to provide the General Permit for at least a 30 year term. The Village states that the Department has not presented any material changes that would provide a basis to change the terms of the permit. Village Br., p. 1. The Village stresses in its brief that the cause of the damage to the Village property was the beach project that had been conducted by the various governmental entities; although this conclusion was specifically not agreed to in the stipulation. Village Br., pp. 1, 4; Ex. 7, p.4. Citing to *Quality Ceramic Tile and Marble*, 259 AD2d 607 (2d Dep't 1999) and other cases that interpret various kinds of stipulations, the Village argues that stipulations of settlement are honored by the courts and are not lightly set aside. See also, Village Reply Br., p. 5.

In its reply brief, the Village strongly disagrees with staff's characterization of the general permit as an emergency permit pursuant to 6 NYCRR § 621.14(c). The Village counsel maintains (without citation or documentation) that the 1999 permit was subjected to a full State Environmental Quality Review Act (SEQRA) analysis and therefore was based on 6 NYCRR

§ 621.14(d). Village Reply Br., p 3. The Village stresses more that the permit was issued based on the court-ordered stipulation. *Id.*

Procedural/Part 621 Arguments

At the issues conference, Mr. Prokop addressed some of the Village's procedural arguments by pointing to various sections of Part 621 of 6 NYCRR that implement the Uniform Procedures Act (Article 70 of the ECL) - §§ 621.2(aa) (defines renewal); 621.2(ad) (defines sufficient application for renewal); and 621.4 (provides a term of up to 10 years for tidal wetland permits). TR 122. He stressed that up to June 2009, after nearly 10 years of working together with DEC staff pursuant to the General Permit, the permit terms abruptly changed. TR 124. He explained that after the renewal was requested, DEC initially responded with two permit revisions reflecting only personnel changes. *Id.* Mr. Prokop claimed that no other changes were discussed or brought to the attention of the Village. TR 125. He noted that DEC issued a receipt for the renewal application but in September denied the request and asked for information that Mr. Prokop claimed was already in the possession of the Department. TR 125-126. After the Village served its 5-day letter demand, DEC issued the permit. TR 126. However, Mr. Prokop maintained that it was the Department's responsibility to issue a permit consistent with the terms of the prior permit and the stipulation. And, he reiterated the obligations the Village and private property owners had fulfilled in exchange for the General Permit (public access, conservation easement, re-establishment of coastal hazard line, and installation of public walkovers and right of ways). TR 127. He argued that because the obligations of the U.S. Government, Suffolk County, and DEC were to maintain the barrier beach and walkovers for 30 years, so too, it was DEC's obligation to maintain the permit for that same period. TR 127-130.

Mr. Prokop stated that the Department staff's request for additional information (IC Ex. 8 – September 17, 2009 letter from Mr. Rail to Mr. Terchunian in response to permit renewal request) was improper as the Village had already provided this information and also because DEC had missed the time period to ask for additional information pursuant to 6 NYCRR § 621.6(c). TR 131. The Department had 15 days to make a request or deem the application complete and no other determination was available according to Mr. Prokop. *Id.* The Village attorney further argued that DEC was precluded from modifying the permit as it never provided notification of the changes in conditions pursuant to 6 NYCRR § 621.13(c). TR 132. He stressed that negotiators of the settlement had intended for the General Permit to continue in 10 year segments and that renewals were never contemplated as a basis to impose new and unnecessary restrictions. TR 132-133.

The Village argued that the staff originally determined not to re-issue the permit, but that after the Village served its five-day letter on DEC, the Department staff issued the permit, albeit with some different conditions. The Village believes that this action undermines the Department staff's position that it had no obligation to reissue the permit.

Permit Conditions

For the first time in its closing brief, in addition to the permit conditions that the Village objected to at the issues conference, it raised objections to a number of additional conditions. Specifically, the Village has raised objections to Special Conditions #s 1, 2, and 16.[4]

As part of the issues conference, we reviewed the specific changes to the permit to which the Village objected.

1. Duration – The staff changed the length of the permit from 10 to 5 years and the Village objects to this change. The Village contends that the permit has a minimum life of 30 years and may potentially continue in perpetuity. Mr. Prokop argued that the Village as well as a number of the private plaintiffs in *Rapf* made considerable concessions and that they received the permit in return. The Village does not believe that the permit is tied to the restoration of the area. Rather, the Village believes that as many of the concessions that the plaintiffs made were long-lasting (e.g., public access to beach, conservation easements), the permit should also be long-lasting. When I inquired as to why the permit had an expiration date, the Village representatives stated that at the time the permit was issued, the staff had advised that the regulations did not permit the issuance of a permit with a longer interval and that upon expiration, the permit would be renewed. The Village wants a permit with a term of at least 10 years subject to renewal. Village Br., pp. 17-19.

2. Special Condition #1 - For the first time in its closing brief, the Village objects to additional language in special condition # 1, stating that such language is "unauthorized and restrictive." Village Br., pp. 19-20. The language at issue is: "[t]he project plans must depict a tidal wetland boundary delineated by a person with knowledge of tidal wetland boundary delineation methodologies. The tidal wetlands boundary depicted on the plan must be labeled with the person's name that delineated the line and the date of its delineation. Further, the Department retains the right to field inspect the project site(s) upon receipt of the application, for purposes of verifying the tidal wetlands boundary." Essentially, the Village reiterates its main argument that this term was not in the original permit, will disrupt the intention of the parties to the stipulation, and therefore must be deleted. Village Br., p. 20.

3. Special Condition # 2 – As noted above, in its closing memorandum the Village raised for the first time objections to the language in special condition # 2. In the new terms, the Department staff is requiring that in addition to a copy of the General Permit, a copy of the habitat map referred to in special condition # 17 be provided to approved building permit applicants. The Village argues that the phrase: "including the least tern and piping plover habitat map referenced in special condition # 17" is

[4] In the Village's position paper dated December 30, 2010 (IC Ex. 6, p. 3), the Village makes a blanket objection to any permit condition that was not the same as in the original permit. However, at the issues conference we reviewed the challenged conditions one by one. TR 75-102.

"additional unnecessary and restrictive language." The Village maintains that the Department has improperly expanded the identification of the piping plover habitat to be the entire Village and that this language must be stricken from the permit. Village Br., pp. 20-21.

4. Special Condition # 3 – This condition provides in its last sentence that the permit "does not authorize the subdivision of land, nor the subsequent modification, expansion or reconstruction of structures that have been reconstructed or replaced under authority of this permit." The Village objects to this provision, contending that it does not reflect the agreements reached by the stipulation and was not in the original permit. TR 77-78; Village Br., pp. 212-23. Mr. Rail responded that the position of the staff is that there is no obligation of the Department to issue a permit and that it does not have authority to delegate authority to the Village to essentially regulate activity in the wetlands. Citing to paragraph 12(b)(i) in the stipulation, Mr. Prokop argued that the stipulation did not limit construction to structures that existed prior to the storm damage and thus, this language should be stricken. TR 76. He cited to the 50 years of history between the parties including the litigation and negotiation that led to the stipulation. He stated that the current Department staff, being new to the stipulation, missed this history of mutual dealing consisting of long term obligations and benefits. TR 82-85.

5. Special Conditions # 4 and # 5 – These conditions address debris and potential run-off from construction sites. Staff noted that there are no changes from the original permit. The Village stated that it objects to the language "protected buffer areas" and contends that it does not know the meaning of this language despite the fact that it is in the 1999 permit. TR 87; Village Br., p. 23. Mr. Rail pointed out that there was no variance from the prior permit and that "protected buffer areas" are defined as natural areas that are not actively maintained. TR 87-88.

   I inquired as to whether the parties thought this language could be acceptably defined and there seemed to be consensus that it could be. TR 90, 92.

6. With respect to # 9, which addresses roof runoff and pool filter backwash, the Village wants the original condition restored because the entire area is surrounded by sand and therefore, it contends the condition is unnecessary. TR 90-91; Village Br., pp. 23-24.

7. Conditions # 11 and # 12 are identical to conditions # 9 and # 10 in the original permit; however, the Village seeks a definition of "protected buffer areas." TR 91-92; Village Br., p. 24.

8. Condition # 16 – The language of this condition was not objected to by the Village at the issues conference. However, in its closing brief, the Village objects to the addition of language in this condition that the "project must meet the development restrictions of Section 661.6 of the Tidal Wetland Land Use Regulations." Village Br., p. 24.

9. Special Condition # 17 – This condition pertains to protection of endangered species habitat; specifically, piping plovers and least terns. The Village points to the condition in the original permit which provided that the Department staff would create a yearly map to designate the areas of suitable plover breeding and endangered species habitat based on the prior two years' data. Using those maps as a baseline, the permit placed restrictions upon regulated activities, including monitoring requirements. The Village states that the current condition designates a restricted area that is essentially the entire Village without the basis of the historical data. The condition prohibits construction or exterior improvements from April 1 through August 31 of each year but does provide for an approval process on a case by case basis that includes project review and site inspection. TR 94-99; Village Br., p. 25.

   Aram Terchunian, the Village's Commissioner of Wildlife, contended that the new permit terms redefine and extend the jurisdiction of the Department beyond the original permit. He explained that the prior permit placed extensive obligations on Department staff to provide a map to the Village to define the nesting areas and that development restrictions were placed upon these areas according to their identification as either zone 1 or zone 2. TR 94-95. Mr. Terchunian noted that from his practical experience there were no endangered species on the bay side, which is the primary area of DEC jurisdiction. TR 95. He stated that the animals nested mainly on the ocean side, which is outside of DEC's jurisdiction. *Id.* However, he referred to the stipulation and original permit for the framework that governed the protection of the endangered and threatened species and claimed that the staff was introducing a new term in referencing habitat**.** TR 95-96. In addition, Mr. Terchunian provided that in the past the typical distance of no activity was 150' from the nesting area but now DEC is seeking 500'. TR 96-97. He argued that this is inconsistent with what has been the practice everywhere else in New York State. TR 96. He concluded that if the Department staff provides a map, the Village will abide by it. TR 96.

The Village maintains that at no time were any actions taken adverse to Article 25 and that it has always provided the Department with copies of all the building permits that were issued so that the agency could maintain oversight. TR 144.

This part of the discussion at the issues conference concluded with the Village stating its desire to change the description of authorized activity so the terms "build and rebuild" are included. The Village acknowledges that this language was not included in the original permit. TR 99-101.

Proposed Witnesses

The next phase of discussion at the issues conference was focused around the list of

hearing witnesses proposed by the Village. The proposed witnesses were described by Mr. Prokop as having been involved in aspects of the negotiations over the stipulation and permit and would be called to testify to the intent of the parties in those documents:

1. William Daly – employee of DEC, Coastal Erosion, Division of Water
2. Roman Rachoczy – (former) DEC employee, Coastal Erosion
3. Gordon Johnson, (former) Assistant Attorney General
4. John O'Connell – attorney for Village and private parties in litigation
5. Mayor Gary Vegliante
6. Aram Terchunian – employee of Village
7. Robert Strecker – private property owner and Village official
8. Herb Hoffman – Village building inspector
9. John Pavacic – (former) DEC permit administrator – issued 1999 permit
10. George Stafford – employee of Coastal Program – Department of State
11. Roger Evans – DEC permit administrator
12. Hon. Joan Azrak – referee/magistrate who assisted with negotiation of stipulation
13. Lawrence Pasciutti – (former) DEC employee – Marine Habitat Protection Bureau
14. Charles T. Hamilton – (former) Region 1 Natural Resources Supervisor

TR 105-113.

Mr. Rail argued that the Village was inferring an ambiguity in the stipulation and that this is a question to be determined by a court of law. TR 113. He maintained that New York law interpreted contracts such as the stipulation by objective evidence rather than the memories of witnesses from 20 years ago and longer. TR 113-114. Mr. Rail complained that the Village was clearly unprepared to go forward (that day) given the number of witnesses they proposed to call and their positions/locations. TR 114.

In the event there was a hearing, staff proposed one witness, Roger Evans, Regional Permit Administrator, and possibly Michelle Gibbons, who works in the regional Endangered Species Unit.

SAPA

Near the conclusion of the issues conference, Mr. Rail maintained that there was no authority for the Village to act pursuant to the 2010 permit as the Village had challenged its terms and the prior permit had expired. Mr. Rail contended that SAPA § 401(2) did not apply because the General Permit was not an operational permit that regulated an ongoing enterprise such as an industrial discharge. He said there was no prior history regarding issuance of general permits in the tidal wetlands area. TR 138-140. In the staff's closing brief, this position is reiterated at pages 10-13.

By letter dated January 7, 2011, I advised the parties that I did not find any basis in the law to distinguish this matter from other permits subject to renewal. Therefore, I ruled that SAPA § 401(2) was controlling and until this permit proceeding was decided, the 1999 permit remained in effect. However, in reviewing the regulations to develop this issues ruling, I noted

that 6 NYCRR § 621.11(m) distinguishes "[a]ctivities that are not of a continuing nature . . ." from those subject to SAPA § 401(2). And as argued by staff in its closing memorandum, SAPA § 401(2) specifically applies to "any activity of a continuing nature." Staff Br., p. 10.

Section 621.11(m) provides six criteria, which if met allow for the reissuance of such expired permits. In these circumstances, three of these conditions are not met. Section 621.11(m)(6) provides that the time period between the issuance of the original permit and the reissued permit's expiration date must not exceed 10 years. In this case, this period is exceeded by 6 years. IC Ex. 3. In addition, § 621.11(m)(1) and (2) provide that there has not been a change in the permitted activities or in the environmental conditions. Because over ten years has passed in which time the Damage Area has been built up and the permit relates to unique individual construction projects that have yet to be put before the Village and DEC, one cannot characterize the projects or environmental conditions as unchanged.

Thus, by operation of regulation, the 1999 permit has expired and the 2010 permit is not effective until the Commissioner determines that the new permit staff issued is effective or another permit is issued. See also, *Permit Renewal, Term Extension and Reissuance* (Memorandum Issued by Bill Adriance, Chief Permit Administrator, March 12, 2010) (permits that authorize construction activities are not subject to permit renewal provisions of UPA or SAPA), attached hereto. And, there is nothing in the applicable regulations that prevents the Department staff from modifying the permit, even if reissued. See, *Response to Comment, Part 624 Public Comment Responsive Document, Evidence, Burden of Proof and Standard of Proof,* p. 15 (attached hereto). Of course, during this interim period, individual property owners are free to apply for specific permits pursuant to Article 25 of the ECL and Part 663 of 6 NYCRR.

DISCUSSION

Interpretation of Consent Judgment/Stipulation/Permit

As set forth above, the parties are at odds with respect to the interpretation of the stipulation and the original permit. The staff points to the lack of any language in the stipulation or the permit that indicates the permit would continue for 30 years or longer. The Village argues that given the concessions made by the plaintiffs to settle the matter, it was clear that the parties meant for the permit to last along with the other terms of the stipulation. The Village requests a hearing to clear up any ambiguity (that the staff does not find) and provides that the witnesses called will clarify the intent.

The courts have deemed consent decrees to be tantamount to contracts that should be "given effect according to [their] plain and unambiguous terms." *Matter of Eastern Transfer of New York Inc. v. Cahill, et al.*, 268 AD2d 131 (3d Dep't 2000) citing *Flacke v. Salem Hills Sewage Disposal Corp.*, 91 AD2d 739 (3d Dep't). When a contract is unambiguous, its terms must be given effect. *WWW Associates, Inc. v. Giancontieri*, 77 NY2d 157, 162 (1990); *Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569 (2002). These same cases support the holding that where the terms of an agreement are unambiguous, the courts will not admit parol evidence for interpretation. Further, an ambiguity is not created by the absence of language from a document. *Nissho Iwai Europe PLC v. Korea First Bank*, 99 NY2d 115, 121 (2002).

However, if the language of an agreement is found to be ambiguous and there is available and relevant extrinsic evidence of the parties' true intent, the meaning of the terms becomes an issue of fact and appropriate subject for a hearing. *Heymann v. Commerce and Industry Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

Citing *Singh v. North Shore University Hospital*, 76 AD3d 1004 (2d Dep't 2010) in the Village's reply memorandum, counsel reiterates his argument that the courts do not condone setting aside stipulations which are treated as contracts. Village Reply Br., p. 5. There is no disagreement with this position. Staff asks not that the stipulation be put aside but rather that no decision is made regarding the General Permit that introduces terms that are not in the stipulation.

As the parties note, it took many years for the parties to the lawsuit and the permit to arrive at terms that were satisfactory. This fact combined with the terms of the documents themselves leaves little basis to reach outside their four corners to settle the current disputes.

Paragraph 12(b)(i) in the stipulation that addresses the issuance of the permit reads as follows:

> (b) The obligations of Plaintiffs under Paragraphs 4, 5, 6 and 10 shall be conditioned on the occurrence of the following:
>
> (i) delivery by DEC to the Village of a general permit, with appropriate conditions standard to such permits, allowing the building, rebuilding or repair of structures in the Damage Area substantially within the same footprint as, and with no greater ground area coverage than, existed prior to the damage or loss; and, in the case of a lot on which there never had been a structure, allowing the building of a structure in compliance with the Tidal Wetlands Act and other applicable laws and regulations; . . . .

The obligations referenced in this paragraph are those related to the public access plan set forth in Appendix II to the stipulation: the boundary line agreement, dune protection and conservation easement. These measures allowed, *inter alia*, for the construction of accessways, including dune walkovers, that would permit public access to the shore and also protect the sensitive portions of the shore – the dunes and area south of the dunes. These mechanisms also provided the means for the responsible agencies to gain access to the beachfront in order to carry out the storm damage protection project. Obviously, without this cooperation by the plaintiffs, the very work that they sought could not proceed and be sustained.

The terms of the stipulation left to the Department discretion within its jurisdiction pursuant to the Tidal Wetlands Act. It calls for the issuance of a general permit with "appropriate conditions standard to such permits" but does not spell out what those are in recognition of the Department's expertise and authority on tidal wetlands matters and the existing law and regulations that govern the protection of tidal wetlands. In addition, this paragraph identifies the area and structures that are to be subject to the General Permit as those that are in the Damage Area which was subject to the destruction that spurred the litigation.

With respect to property within the Damage Area that had no previous construction, the stipulation calls for permit terms consistent with the Tidal Wetlands Act and other laws and regulations.

The Village representatives argued that the plaintiffs gave up much in property rights to avail themselves of the settlement and thus it was only logical they would be given a right to continue to develop without the burdens of individual tidal wetland applications. But this is not stated anywhere in the two relevant documents. Rather, the whole tenor of the settlement and the permit is one which seeks to repair the storm damage and provide a repair that will last.[5] While the Village states emphatically in its closing brief (see, *e.g.*, Village Br., p. 1) that the government authorities that carried out the beach improvement project were responsible for the damage to the Village property, the stipulation specifically notes that there is no finding or agreement on this point. IC Ex. 7, p. 4. I find that the purpose of the stipulation was to repair storm damage that would both make private landowners whole and stabilize the shore for the public and the wildlife that dwell and recreate there and in its vicinity.

As noted by staff in its closing memorandum, 6 NYCRR § 621.14(c) allows for the issuance of "general permits to allow work to eliminate damage caused by natural disasters or extraordinary weather not unique to a particular locality, including repair or replacement in location and in kind of facilities which existed prior to the damage. Processing of such permits need not follow the full procedural requirements of this Part." In its reply brief, the Village argues that this regulation did not apply to the General Permit but rather it was 6 NYCRR § 621.14(d) that governed. Village Reply Br., p. 3. The Village contends that the "DEC and the Village treated the general permit as one for a major project and the issuance of the general permit received full SEQRA review for that reason, which among other circumstances distinguishes the permit from an emergency permit for that reason." *Id.* In either case, the Department could not agree to the stipulated terms that departed from the traditional permit requirements without a statutory or regulatory basis. These two special provisions in § 621.14 provide that legal justification.

In the appendices to the stipulation, it is repeatedly noted that in addition to the State's mandates pursuant to the New York State Coastal Zone Management Program Policies, the U.S. Government will not take any steps to maintain or repair private shoreline without provision of public access. See, *e.g.*, Appendix I, *Interim Plan For Storm Damage Protection Technical Support Document, Beach Erosion Control and Hurricane Protection Project, Westhampton Beach Interim Storm Damage Protection Project,* pp. 9,13; Appendix C, Real Estate Plan/Appendix, *Westhampton Beach Interim Beach Protection Project*, p. C2; Appendix D, *Public Access Plan*, pp. D-1-D-3. The public accessways that were designated in the agreement do not prevent the plaintiff landowners from accessing the shore or constructing their own accessways. *Id.*, D-4-5. The conservation easement leaves the dunes (that are created as a result

[5] During the issues conference, Mayor Vegliante asked hypothetically, "if tomorrow it [the beach] starts to deteriorate, and homes again start falling into the ocean, am I to understand that we won't have a General Permit and that now we fall victim back to a government agency that in the past helped contribute to our demise . . ." TR 120. In fact, the stipulation states that in the event that during operation and maintenance, a storm or other natural event damages the barrier island to the extent that continuation of the project is infeasible, the government is relieved of its obligations. IC Ex. 7, Stipulation, 1(d). So, based upon this language, there would be grounds to reassess the permit's status.

of this project) in private ownership but protects them from development in order to conserve their integrity and protect endangered/threatened species that may inhabit them. D-5. The very work the plaintiffs sought to repair their community required that there be permanent protection of the dune and landward buffer area to sustain the project. Appendix, C-2.

Rather than finding the real property concessions that the plaintiffs made tied to the duration of the permit, the documents before me lead to the conclusion that these concessions were inextricably tied to the restoration project which the plaintiffs sought. The General Permit was another restorative aspect in assisting the homeowners and landowners that were harmed by the loss of property to more readily become whole. However, once the landowners achieved these goals, there seems little purpose to the continuation of the General Permit based upon the terms of 12(b)(i).

In addition, the very permit at issue contained an expiration date of August 31, 2009. This is not ambiguous. And while the Village representatives state that various DEC staff members advised them "not to worry – it would be renewed," there is no indication in the permit's terms or in the stipulation that would so dictate. TR 70, 119.[6] At this juncture, this appears to be a moot issue because the staff has agreed to issue a permit with a five-year term. IC Ex. 2. It is this permit that will be the subject of these proceedings. If in the future, the Department elects not to continue the General Permit, the citizens of the Village will still be able to apply for individual permits.

I see nothing in the relevant documentation that would call for a 30 year permit or one in perpetuity. It seems obvious that while the parties took pains to set out the time periods for certain aspects of the various terms, they opted not to do so regarding the General Permit. Accordingly, it is certainly not appropriate for me to insert such language where it does not exist. Based upon the information before me, I find that there is no need for a fact-finding hearing to determine whether the parties to the stipulation intended for the General Permit issued in 1999 to continue for 30 years and potentially in perpetuity. There is no ambiguity in the documents. Rather, the Department complied with the stipulation's terms to issue the General Permit and when it expired, it responded to the Village's request for an extension. The appropriate purpose of these proceedings is not to try and fill in interstices where there are none but rather to determine whether the conditions the staff has included in the 2010 permit renewal/modification are appropriate pursuant to Articles 11 and 25 of the ECL and Parts 182 and 661 of 6 NYCRR.

Moreover, I agree with staff that variances from the dictates of statutes must be narrowly drawn and not be adverse to the Legislature's intent. Staff Br., pp. 4-6. As staff notes at page 3 of its closing memorandum, in *Matter of Gazza v. NYSDEC*, 89 NY2d 603 (1997) the Court of Appeals underscored "the State's regulatory interest in protecting and regulating tidal wetlands is evidenced by the very existence of the DEC by legislation and regulations pertaining to wetlands; and by the permit application process in general." So too have the courts noted the State's interest in protecting endangered species. *State v. White Oak Co., LLC*, 13 AD3d 435 (2004). This body of law makes clear this agency cannot provide the Village with a General

[6] To the extent that any staff members represented to the Village representatives that the permit would be renewed every 10 years, the State is not bound by mistakes that would usurp its statutory authority. See, *e.g.*, Wedinger v. Goldberger, 71 NY2d 428 (1988).

Permit to continue to for another 20 years or more without adequate protections of these resources.[7]

Permit Conditions

Permit Term - The Department staff has set a term of five years in the permit it has issued to the Village and the Village seeks a permit with the maximum length of time permissible in 6 NYCRR § 621.4(3) – ten years. Apart from the Village's argument that there should not be a limit (or if any, a 30 year one) to the term of the permit, there does not seem any basis to interfere with the staff's selection of a five-year term. The tension here lies between the Village's desire for expedited approval of development projects and the staff's desire to ensure that projects meet the applicable tidal wetland standards and that there is adequate protection for endangered and threatened species. I do not find any basis for a hearing on the term of the permit and I defer to staff's determination of limiting the permit to five years which seems very reasonable in light of the length of time that has passed since the permit was originally issued.

Description of Authorized Activity – This language is on the first page of the permit and describes the nature of the activities that are covered by this permit. Although the language in the renewal permit is identical to that in the original permit (except for a minor difference in the name of the subject beach), the Village desires a change to include the words "build and rebuild" consistent with its interpretation of the stipulation. TR 101. I do not find that a hearing is necessary to address this matter. The language provided in the original permit was satisfactory to the Village for the last 10 years and I believe reflected the intent of the stipulation – to address the harm created by the storm damage.

Special Condition # 1 – This condition was not challenged by the Village prior to its closing memorandum. Based upon the Village's failure to raise this issue as well as its objections to Special Conditions # 2 and # 16 at the issues conference, these objections are untimely. The purpose of the issues conference is to narrow or resolve issues of fact; to hear argument on whether disputed issues of fact are appropriate for hearing; to determine whether there are legal disputes that can be resolved without fact finding; and to decide any pending motions. 6 NYCRR §§ 624.4(b)(2)(i-v). At the issues conference, the parties present their arguments and any relevant documentation and respond to each other's positions. In addition, the issues conference provides the ALJ with an opportunity to query the participants to clarify any disputes and hone the issues. Therefore, it is inappropriate to raise new matters in closing briefs where there are not these opportunities.

However, in looking at the language that the Village disputes, I find that the language is an appropriate term of the permit. It requires that project plans delineate the tidal wetland boundary, identify the individual who performed the delineation, and allow staff to field inspect to verify the boundary. These terms are in keeping with 6 NYCRR § 661.12(a)(1) and essential to protection of the resource. I do not see how the term is an obstruction to the intention of the

[7] In its reply brief, the staff provides an analysis involving this Department's Declaratory Ruling in *Town of Amherst* (24-12) that addressed the applicability of vested rights and grandfathering with respect to a municipality's plan to develop a wetland. Given the factual differences and the fact that no party has raised claims of vested rights or grandfathering, I see no need to address this ruling's applicability here.

parties to the stipulation as it is an "appropriate condition standard to such permits." IC Ex. 7, Stipulation, ¶ 12(b)(i). Therefore, I do not find any basis to either reject this term or to require a hearing on it.

Special Condition # 2 – The Village did not object to this specific term until it submitted its closing memorandum and for the same reasons I note above, I find that it is too late to raise this objection at this stage. As noted below, I have found that special condition #17 which provides for the habitat map is appropriately the subject of a hearing to determine whether the Department staff's revisions are unnecessary. However, regardless of the outcome of that adjudication, it is appropriate for the applicants for a building permit to be provided with a copy of the habitat map as it is drawn so they are in the best position to meet their obligations pursuant to the permit. This map along with the General Permit provides essential information for any individual engaged in regulatory activities that are subject to Articles 11 and 25.

Though the Village representatives stressed that much of the least tern and piping plover habitat is out of DEC's jurisdiction, it appears that this interpretation disregards the agency's obligations pursuant to the Harris Law, ECL § 11-0535. The courts of this State have taken seriously the protections of this law when it comes to the potential for habitat modification resulting in a taking. See, *State v. Sour Mountain Realty, Inc.,* 183 Misc. 2d 313 (NY Sup. Ct. 1999), *aff'd,* 276 AD2d 8 (2d Dep't 2000); *State v. White Oak Co.,* 13 AD3d 435 (2004), *lv to appeal dismissed,* 5 NY3d 783 (2005). For a discussion of the concerns of the U.S. Department of Interior regarding the interim project, see, Appendix, pp. 20 and A-9-10.

I agree with staff that the stipulation does not and cannot serve as a basis to disregard New York's laws. See, *Town of North Hempstead v. New York State Department of Environmental Conservation,* 111 Misc.2d 954 (Sup. Ct. Nassau County) (J. Balletta annulled a consent judgment that permitted operation of a commercial hazardous waste facility without a permit despite DEC's issuance of consent order). In *Matter of Bayswater Civic Association v. NYSDEC,* 159 AD2d 566 (2d Dep't 1990), the Appellate Division permitted the continued operation of a municipal landfill pursuant to a consent order differentiating the public versus private nature of the landfills in the two cases and the continued nature of the operation in *Town of North Hempstead* without any date certain for closure. The Village's quest is more akin to the facts in *North Hempstead* as it entails the ability to grant private building permits for a minimum of another twenty years without the requirement of individual Article 25 applications, potentially undermining the serious protections of the Tidal Wetlands and Harris Acts.[8]

Accordingly, while Special Condition # 17 may change in its precise definition of the subject habitat, whatever the outcome, the map should be provided to any building permit applicant and there is no need for a hearing on this issue.

[8] The Village argued at the issues conference and in its closing memorandum that the Department has been provided with all the building permit applications and has always been in a position to provide oversight and objections to any proposal. See, *e.g.,* Village Reply Br., p. 4. Based upon the staff's determination to continue the General Permit, there is no reason to believe that this relationship will be altered in the near term. The changes in the permit terms merely ensure closer adherence to the applicable regulations.

Special Condition # 3 - The Village objects to the last sentence that defines those activities to which the General Permit does not apply. The sentence in contest states that the permit "does not authorize the subdivision of land, nor the subsequent modification, expansion or reconstruction of structures that have been reconstructed or replaced under authority of this permit." I find no basis to hold a hearing on this issue. I find that this sentence merely emphasizes what the original permit and stipulation already provided. That is, the permit was designed to redress the harm that properties were subjected to that gave rise to the litigation. For structures that have already been reconstructed there is no basis to allow modification, expansion or reconstruction under the General Permit. In the same vein, the subdivision of property is also not in accord with the purposes of the stipulation and the General Permit.

Special Conditions # 4, # 5, # 11 and # 12 – These conditions address debris and potential run-off from construction sites and the construction of driveways, parking areas, and roads. There are no changes from the original permit; however, the Village maintains that it did not agree with the "protected buffer areas" language, finding it vague. At the issues conference, the parties agreed to attempt to come to an agreement regarding the definition of "protected buffer areas." This definition should be incorporated into the permit. Based upon the agreement to work together on the definition, I see no reason to hold a hearing on the matter. TR 90, 92-93. In the event that the parties cannot come to an agreement on this language, the definition offered by Mr. Rail - "a natural area that is not actively maintained" – shall be incorporated into the permit. TR 88.

Special Condition # 9 – This condition addresses roof runoff and pool filter backwash. The revised condition provides that roof runoff shall be directed into dry wells a minimum of 75 linear feet landward of the tidal wetland boundary and dry wells for pool filter backwash shall be similarly located. The original permit stated in special condition # 9, "[t]here shall be no discharge of runoff or other effluent on, in or down the bluff face or onto the beach. Special condition # 10 (there is no special condition number 10 in the new permit) provided that "[t]here shall be no draining of swimming pool water directly or indirectly into tidal wetlands or protected buffer areas." The Village wants the original condition restored contending that it is unnecessary because the entire area is surrounded by sand. TR 90-91. As this is a substantial term/condition of the permit which the parties dispute, it shall be the subject of a hearing. 6 NYCRR § 624.4(c)(i).[9]

Special Condition # 17 – This provision addresses the endangered/threatened species protection issues. The Village objects to the changes in the permit claiming that the new terms are excessive. Specifically, the Village prefers that the Department staff continue the use of a map to indicate the areas that must be avoided due to the location of these animals. The Village also objects to the buffer distance in the permit which has been changed from 150 feet to 500 feet. Last, the Village objects to the construction ban that runs from April 1 through August 31

[9] As the issues conference, Assistant Regional Attorney Rail contended that because the staff had no obligation to reissue the General Permit, any conditions in the permit were not subject to any "regulatory criteria." TR 55. In staff's closing memorandum, the same arguments are made. Staff Br., pp. 7, 13. I disagree. Contrary to staff's statement on p. 13, Articles 11, 25, 70 and Parts 182, 621, 624, and 661 and any applicable agency policies contain the standards to guide review of the permit. Once the staff determined to modify and/or to reissue the permit, it became subject to review by the Village and the public and was always subject to the relevant criteria in the applicable law and regulations.

with respect to what appears the entire Village. TR 94-99. As this is a substantial condition of the permit which the Village objects to, it shall be the subject of a hearing. 6 NYCRR § 624.4(c)(i).

Based upon my findings indicated above, I find that special conditions 9 and 17 shall be the subject of an adjudicatory hearing that will be scheduled after consultation with the parties.

I encourage the parties to negotiate these conditions or to ask for assistance from a mediator from my office to facilitate a resolution.

However, if a settlement is not possible, § 624.9(b)(3) of 6 NYCRR will guide the hearing in terms of burden of proof. "The permittee has the burden of proof to demonstrate that the permitted activity is in compliance with all applicable laws and regulations administered by the department. A demonstration by the permittee that there is no change in permitted activity, environmental conditions or applicable law and regulations constitute a prima facie case for the permittee." Once the Village has made its case, the staff will have the burden of production regarding the modifications with respect to the two conditions that I have identified as subject to hearing. See also, *Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC*, Interim Decision of the Assistant Commissioner (August 13, 2008), p. 51. As set forth in *Entergy*, the Department staff will be required to produce evidence to establish the factual or legal basis of the two noted conditions to which the Village objects. Finally, the Village will have the right to put on a rebuttal case to show why these conditions, as articulated by the Department staff, are not reasonable and necessary. Because the hearing issues are limited to these two conditions, the parties shall exchange their lists of witnesses two weeks prior to the hearing date.[10]

Procedural Issues

In addition to the substantive matters discussed above regarding the interpretation of the Stipulation and the General Permit, the Village raised a number of arguments regarding the staff's handling of the Village's July 16, 2009 request for renewal pursuant to the Uniform Procedures Act and implementing regulations.

By letter dated September 17, 2009, Mr. Rail wrote to Mr. Terchunian requesting, among other things, that the Village provide "an inventory list of lots that remain to be repaired, rebuilt or replaced with new homes" including owner information. IC Ex. 8. Citing 6 NYCRR § 621.6(c)(2), the Village objected to the staff's request for additional information after 15 days had lapsed from the time that the Village asked for renewal of its permit and maintained that this information was already in the Department's files. This regulation requires that the Department make a determination on the completeness of a non-delegated permit application within 15 days of receipt. Section 621.6(h) provides that when the Department fails to notify an applicant of its completeness determination within the time limit specified, the application will be deemed

[10] The parties exchanged witness lists prior to the issues conference. However, because at that time there was an expectation that the hearing might be focused on the appropriate interpretation of the stipulation and permit, the witness lists reflected that understanding (except staff did mention the possible presentation of Michelle Gibbons, an endangered species staff person). TR 58.

complete. However, this regulation also provides that this does not preclude the Department from requesting additional information pursuant to 6 NYCRR § 621.14(b). Section 621.14(b) provides that "[a]t any time during the review of an application for a . . . renewal, the department may request in writing any additional information which is reasonably necessary to make any findings or determinations required by law." See, *Palmieri v. NYSDEC*, 31 AD3d 645 (2d Dep't 2006). In addition, as noted by staff in its closing memorandum, the original permit provided in General Condition 3 (Application for Permit Renewals or Modifications) that the "application must include any forms or supplemental information the Department requires." IC Ex. 3, p. 2. See also, Staff Reply Br., pp. 3-4.

Certainly, the Village should not have to provide information that the staff already maintains. However, the status of the property within the Damage Area is a relevant matter in terms of the need for the General Permit. Therefore, I find that the staff's request for additional information after the completeness determination was due was proper.

The next argument made by the Village pursuant to the Uniform Procedures regulations is pursuant to 6 NYCRR § 621.13(c) regarding the Department's intent to modify a permit. This section mandates that the Department send ". . . notice of intent to modify, suspend or revoke a permit to the permittee by certified mail return receipt requested or personal service. The notice must state the alleged facts or conduct which appear to warrant the intended action and must state the effective date, contingent upon administrative appeals, of the modification, suspension or revocation." Section 621.11(f)(3) of 6 NYCRR provides that when the Department proposes modifications to a permit in conjunction with a permit renewal, the Department must notify the applicant of the proposed changes either through a draft permit or by notification pursuant to 621.13(c).

A February 28, 2000 memorandum from Bill Adriance to the Regional Permit Administrators and Sub-office Deputies at DEC (attached hereto) states that at permit renewal it is appropriate for staff to determine if "circumstances warrant a change in the provisions of the permit." However, Mr. Adriance notes that "it is not acceptable to include such changes without first: [o]btaining consent of the permittee through permit renewal negotiation; or [f]ollowing Uniform Procedures requirements for Department-initiated modifications." Here, the Department issued a permit to the Village to which it objected apparently without first contacting the Village representatives to negotiate its terms or following the procedures set forth in the preceding paragraph. While it would have been preferable for staff to follow either of these procedures, I do not find any authority that dictates that a failure to do so would result in a loss of jurisdiction. Through this ruling and at a future hearing, the Department will address the Village's objections to this permit which I have deemed a draft permit. Accordingly, the Village has not lost any due process rights.

As set forth in the above discussion, I do not find any basis pursuant to ECL Article 70 and Part 621 of 6 NYCRR to find the staff's permit issuance inappropriate.

Conclusion

The following issues are adjudicable:

- Special Condition # 9 regarding roof runoff and pool backwash and
- Special Condition # 17 regarding protective measures for endangered and threatened species.

The remaining conditions that the Village finds objectionable are not adjudicable. The Village's position regarding the duration of the General Permit and the staff's ability to modify it is incorrect.

In deciding on the matter of "protected buffer areas," I rely on the agreement of the Village and the staff representatives to attempt to resolve the definition and incorporate it into the permit. In the event this is not possible, the terminology proposed by Mr. Rail shall be incorporated into the permit.

As discussed above, none of the procedural concerns raised by the Village impair the staff's ability to modify the permit.

Party Status

The staff and the permittee are automatic parties to this proceeding. 6 NYCRR 624.5(a). Because no other individuals or organizations applied for party status, the staff and the Village are the only two parties in this proceeding.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis pursuant to 6 NYCRR § 624.6(e). Expedited appeals must be filed to the Commissioner in writing within five days of the disputed ruling. 6 NYCRR § 624.6(e)(1). Because this ruling is being mailed by regular first class mail and also due to the complexity of the issues, those wishing to appeal have until April 26, 2011 to serve their appeal. Any replies are due by no later than May 3, 2011. Appeals and replies must be sent to Commissioner Joe Martens (Attn: Louis A. Alexander, Assistant Commissioner, NYSDEC, Office of Hearings and Mediation Services, 625 Broadway, Albany, New York 12233-1010). Copies of appeals and replies must be sent to me and to the Department Chief Administrative Law Judge James T. McClymonds (also at my address). No submissions by telecopier will be accepted. Appeals should address the ALJ's ruling directly, rather than merely restate the party's contention. To the extent practicable, appeals should also include citations to transcript pages and exhibit numbers.

The parties should be available for a conference call on April 13, 2011 at 2:00 p.m. to discuss scheduling of the adjudicatory hearing in this matter.[11] My office will organize the call. Should you wish to be contacted at a number different than the one you have provided previously to me, please let me know as soon as possible.

Albany, New York
April 1, 2011

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

[11] Section 624.8(d)(7) of 6 NYCRR provides that there is no automatic stay of the hearing pending appeals. Because I have found that the Village's General Permit is not in effect pending the outcome of this matter, I have determined that it is inappropriate to delay the hearing. However, as this involves the Village's permit, if it does not wish to proceed prior to a determination of the appeals, I will honor that request upon receipt.