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

In the Matter

- of -

the Application for Renewal/Modification of the Tidal Wetlands General Permit Pursuant to Article 25 of the New York State Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

VILLAGE OF WEST HAMPTON DUNES,

Permittee.

DEC No: 1-4736-01887/00006

DECISION OF THE COMMISSIONER

April 28, 2014

DECISION OF THE COMMISSIONER

This proceeding involves the proposed renewal and modification of a tidal wetlands general permit that was initially issued to the Village of West Hampton Dunes (Village) in 1999, Permit # 1-4736-01887/00006 (1999 General Permit).

Currently before me is an appeal by the Village from the April 1, 2011 Ruling on Issues and Party Status (Issues Ruling) issued by Administrative Law Judge (ALJ) Helene G. Goldberger. In her Issues Ruling, ALJ Goldberger held that: (i) the 1999 General Permit was by its terms limited to a ten year period, and was not, as argued by the Village, effective for a term between 30 years and perpetuity; (ii) the 1999 General Permit has expired and the proposed new permit (2010 General Permit) is not yet effective; (iii) the five-year term in the proposed 2010 General Permit is reasonable and does not require adjudication; (iv) two special conditions in the proposed 2010 General Permit will be adjudicated; (v) none of the other special conditions in the proposed 2010 General Permit present adjudicable issues, and the Village in any event failed to raise timely its challenges with respect to three of them; (vi) the parties agreed to work together to try to resolve the definition of the term "protected buffer areas" that had been in the 1999 General Permit and is in the proposed 2010 General Permit; and (vii) none of the procedural concerns that the Village raised impaired the ability of staff of the New York State Department of Environmental Conservation (Department) to modify the permit.

By papers dated April 29, 2011, the Village appealed from the Issues Ruling (see Notice of Motion for Leave to Appeal and for an Expedited Appeal, and Affirmation in Support of Motion for Leave to Appeal and for an Expedited Appeal, April 29, 2011 [Appeal]). Department staff, in its reply dated May 10, 2011, opposed the Village's appeal. The Village subsequently submitted a letter dated May 23, 2011 requesting leave to file a Reply Affirmation, which the Village attached to its letter. Department staff opposed the Village's request for leave. I grant the Village's request for leave to file the Reply Affirmation. This affirmation shall be included as part of the record of this proceeding.

I affirm the following holdings in the ALJ's Issues Ruling, based upon the analysis provided herein: (i) the 1999 General Permit was by its terms limited to a ten year period, and was not, as argued by the Village, effective for a term between 30 years and perpetuity; and (ii) the 1999 General Permit has expired and the proposed 2010 General Permit is not, and has never been, effective.

I do not reach the remainder of the holdings in the ALJ's Issues Ruling. Rather, based upon the discussion and analysis provided in this Decision, the Village's request for a permit is denied and this proceeding is hereby dismissed. The Village has repeatedly refused to comply with the Department's requests to provide information which is reasonably necessary to make findings or determinations with respect to the proposed 2010 General Permit. The Village's refusals violate the express terms and conditions of its 1999 General Permit, including General Condition No. 3 of that permit, as well as applicable provisions of the Environmental Conservation Law (ECL) and relevant regulations. Moreover, by failing to provide any information relating to any existing or planned construction projects in the Village, the Village has failed to demonstrate any need for a permit.

As discussed elsewhere in this Decision, nothing in this Decision precludes any individual or entity from seeking, in accordance with the standard permit application process, a tidal wetlands permit for any construction project for which such a permit may be required. As with any such application, a permit may be issued to an applicant who demonstrates that its project complies with the applicable tidal wetlands statute and regulations. This Decision, for the reasons discussed below, simply denies the *Village's* request that the Department reissue a unique General Permit to the Village, to be effective for an undefined period ranging from 30 years to perpetuity, and for a project or projects that the Village has repeatedly refused to identify.

I. BACKGROUND

Department staff originally issued the 1999 General Permit pursuant to a provision in a Stipulation of Settlement and Consent Judgment dated October 31, 1994 (Consent Judgment) in Rapf v Suffolk County of New York, No. 84 Civ. 1478 (EDNY). The Consent Judgment resolved litigation arising from damage to property allegedly resulting from a beach protection project that the U.S. Army Corps of Engineers, in cooperation with the Department and Suffolk County, had undertaken on a barrier island at West Hampton, Town of Southampton, Suffolk County, New York (see Issues Ruling, at 1).

The provision of the Consent Judgment relevant to the permits at issue here states as follows:

> (b) The obligations of Plaintiffs under Paragraphs 4, 5, 6 and 10[1] 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

(Consent Judgment [identified as Issues Conference (Issues Conf.) Exhibit (Ex.) 4], at 24 ¶ 12[b][i]). The quoted language above is the only language in the Consent Judgment that addresses a general permit to be provided by the Department to the Village.

The 1999 General Permit, delivered by the Department to the Village as required by the Consent Judgment, authorized, among other things, reconstruction, repair and construction of single family dwellings and accessory structures, and installation of

[1] These paragraphs of the Consent Judgment relate to a public access plan; boundary line agreement/dune protection and conservation easement and access grant; endangered species; and litigation releases, respectively (see Consent Judgment ¶¶ 4, 5, 6 and 10).

sanitary systems, within specified distances of the boundary of the neighboring tidal wetland. Under the terms of the 1999 General Permit, landowners seeking to perform such construction were required to submit a building application and plot plan/survey to the Village Building Department and fill out a Village Building application for permit at the Village. The Chief Building Inspector of the Village would review the application "to insure the project meets the General Permit requirements" (see Issues Conf. Ex. 3, at 4, Special Condition No. 1). The Village was required to forward copies of these materials to the Department (see id.). The 1999 General Permit included a number of special conditions that addressed, for example, endangered species, walkway construction, driveways and parking areas, construction activities, sanitary system location, discharge of runoff or effluent, and debris removal (see id., at 4-6).

Thus, the 1999 General Permit granted authority to the Village – rather than the Department – to review and approve reconstruction, repair and construction projects within the scope of the permit. The 1999 General Permit also stated, however, that "[a]ny project that exceeds the scope of this General Permit will require that a full permit application be submitted to the Region One, NYSDEC Division of Environmental Permits office for approval" (id., at 4, Special Condition No. 3).

The 1999 General Permit was expressly contingent upon compliance with statutory and regulatory provisions, as well as the general and specific conditions in the permit:

> By acceptance of this permit, the permittee agrees that the permit is contingent upon strict compliance with the ECL, all applicable regulations, the General Conditions specified (see page 2 & 3) and any Special Conditions included as part of this permit.

(id., at 1). General Condition No. 3 of the 1999 General Permit, entitled "Applications for Permit Renewals or Modifications," stated, in relevant part, as follows:

> The permittee must submit a separate written application to the Department for renewal, modification or transfer of this permit. *Such application must include any* forms or *supplemental information the Department requires*.

(id., at 2 [italics added]). The 1999 General Permit stated that it had a ten (10) year term and would expire on August 31, 2009 (see id., at 1).

After receiving the 1999 General Permit, the Village did not commence a court proceeding to challenge any provision of the 1999 General Permit or to seek a declaration that any provision of the 1999 General Permit violated the Consent Judgment.

On July 16, 2009, approximately six weeks before the 1999 General Permit was scheduled to expire, the Village requested that the Department reissue the 1999 General Permit (see Issues Conf. Ex. 7). A Notice of Receipt of Application reflects that the Department received the Village's application on July 20, 2009 (see Issues Conf. Ex. 11).

In its September 17, 2009 response to the Village's July 16, 2009 letter, the Department stated, among other things, as follows:

> Considering the unique and unprecedented basis for originally issuing the above referenced General Permit to the Village … in 1999, the Department has determined that it will require additional information from the Village to process the renewal request.
>
> * * *
>
> Recognizing that ten years have passed since the original permit was issued, it's reasonable to assume that the majority of storm-damaged or destroyed structures that were situated in the Damage Area have been either repaired, rebuilt or replaced with new homes. Additionally, the Department assumes that many of the undeveloped lots located in the Damage Area have been developed with new homes during the past ten years.
>
> In order for the Department to reasonably assess the extent to which there remain either structures or lots that have not yet been repaired, rebuilt, or built anew, the Department will require additional information from the Village to establish current conditions. As a next step, the Department recommends that the Village submit an inventory list of lots that remain to be repaired, rebuilt or replaced with new homes. The submitted inventory of lots should include the current owner's name(s), corresponding addresses and tax map numbers. Kindly submit this inventory data to the Department's Region One Permit Administrator at your earliest opportunity.
>
> Upon receipt and review of the requested information, the Department will be in a more informed position to determine whether to renew the General Permit as originally issued, or to tailor it to more accurately address the current redevelopment needs that remain within the Village.

(Issues Conf. Ex. 8, at 1-2). The Village did not provide the requested information in response to the Department's September 17, 2009 letter.[2]

The Department also specifically acknowledged that the General Permit was related to the Consent Judgment, stating "the Department fully recognizes and understands its role in providing an appropriate permitting mechanism to allow for the re-establishment of the Damage Area as a result of the historic storm events that gave rise to Judge Nickerson's Consent Judgment, and the issuance of the 1999 General Permit" (id., at 2).

[2] The Village states, inaccurately, that the Department's September 17, 2009 letter "requested a copy of each of the documents that the Village had already provided the DEC during the term of the 1999 General Permit" (Appeal, at 6-7, ¶ 17). The record reflects clearly, however, both that the Department requested specific information concerning lots that remained to be repaired, rebuilt or replaced, and that the Village never provided this information.

By letter dated December 23, 2009, Department staff advised the Village that the 1999 General Permit had expired effective August 31, 2009, and that the Department would treat the Village's application as a new application for a permit (see Issues Conf. Ex. 12). Staff also reminded the Village that the Village had never responded to the Department's request for information in its September 17, 2009 letter (id.).

By means of a five-day letter dated January 21, 2010, the Village served Department staff with a demand for a decision on the request for permit renewal, and demanded reissuance of the 1999 General Permit (see Issues Conf. Ex. 13). Once again, the Village did not provide to the Department the information the Department had requested. After the parties agreed to an extension of time within which the Department could respond to the Village's five-day letter, Department staff issued the proposed 2010 General Permit to the Village on February 5, 2010 (see Issues Conf. Ex. 2). The proposed 2010 General Permit provided for a permit term of five (5) years, with an expiration date of February 4, 2015 (id.).[3]

By letter dated March 1, 2010, the Village stated that it objected to the "content, terms and conditions" of the proposed 2010 General Permit, and requested a hearing on the permit pursuant to section 621.10 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) (see Issues Conf. Ex. 9). By letter dated October 22, 2010, the Department's Office of Hearings and Mediation Services (OHMS) sent to counsel for the Village a Notice of Legislative Public Hearing, Issues Conference and Adjudicatory Hearing (Notice), with direction to publish the Notice in accordance with the requirements of 6 NYCRR part 624 (see Issues Conf. Ex. 1a). The Department published the Notice on its public website on December 1, 2010 (see Issues Conf. Ex. 1b), and the Notice was also published in the Southhampton Press, Western Edition newspaper (see Issues Conf. Ex. 1c).

In December 2010, the Village and the Department each submitted a letter to ALJ Goldberger, stating their respective positions with respect to the proposed 2010 General Permit (see Issues Conf. Exs. 5 and 6). The legislative hearing and issues conference were held on January 5, 2011. No members of the general public made statements at the legislative hearing, and no person or entity sought party status in this proceeding (see Transcript of Legislative Hearing and Issues Conference [Tr.], at 7:20-8:17).

During the issues conference, the parties presented their positions with respect to the specific provisions of the proposed 2010 General Permit to which the Village objected (see

[3] Staff has not provided a clear rationale for having issued the proposed 2010 General Permit following the Village's refusal to provide the requested information relating to remaining lots subject to potential construction projects. Staff claims that it issued the proposed 2010 General Permit "[i]n the interests of time and our past understanding" (February 5, 2010 letter from V. Rail, Esq. to J. Prokop, Esq.); that, "[i]n the absence of the requested information, the Department used its discretion and reissued a general permit" (Staff Closing Memorandum, March 1, 2011, at 2); and that "Staff graciously reissued a general permit to the Village in 2010" (Staff's Reply to Village's Appeal of Issues Ruling, May 10, 2011). As discussed below, the Village's failure to provide the requested information warranted denial of the Village's request for a permit (see e.g. ECL 70-0117[2] [At any time during its review of a request to renew or reissue a permit, the Department may request information necessary for the Department to make any findings or determinations required by law, and may deny the request to renew or reissue if the applicant fails to provide such information]).

Issues Ruling, at 7-9). At the issues conference, the Village raised issues with respect to Special Conditions Nos. 3, 4, 9, 12, and 17 contained in the proposed 2010 General Permit (see e.g. Tr. at 76:23-77:5, 86:13-87:10, 90:19-91:11, 91:12-93:19, 93:25-99:11, respectively). The Village did not object to any of the General Conditions in the proposed 2010 General Permit.

At the issues conference, Department staff also stated that, because the Village had challenged the proposed 2010 General Permit, no permit is currently in effect (see Tr. at 138:8-14). The Village responded that, under State Administrative Procedure Act (SAPA) § 401, the 1999 General Permit would remain in effect "until the final adjudication" by the agency (see id. at 138:15-23). According to staff, however, SAPA § 401 does not apply here because the permit relates to construction activity within a tidal wetlands, which the Department has always considered to be temporary in nature. In such circumstances, the permit authorizes the particular construction activity and, once the construction is completed, the permit expires. According to staff, such permits are distinguishable from permits for solid waste management facilities or incinerators, which staff referred to as "operational permits." Staff's position is that the permit here at issue does not relate to an "activity of a continuing nature" to which SAPA § 401 applies, and therefore the 1999 General Permit expired per its terms on August 31, 2009 (see id. at 139:2-25).

In a letter to the parties dated January 7, 2011, ALJ Goldberger determined that the 1999 General Permit was subject to SAPA § 401(2), and would therefore "remain in effect pending the outcome of these proceedings." As discussed below, however, following briefing on the issue and the ALJ's further review of the statute, the ALJ reversed her determination, holding that SAPA § 401(2) does not apply here, and therefore that the 1999 General Permit had expired (see § III.A below at pp. 9-11).

In March 2011, the Village and Department staff each filed closing and reply memoranda. In its initial closing memorandum, staff argued again that the permit at issue here was not covered by SAPA § 401(2) because it did not relate to an "activity of a continuing nature" (Staff Closing Memorandum, March 1, 2011 [Staff Closing Mem], at 10-13). Staff also reiterated its position that it "has always construed tidal wetland permits not to be of a continuing nature, since they authorize construction, repair or maintenance activities, which are activities of a temporal nature" (id.). Moreover, staff argued that, because the activity here at issue is not of a "continuing nature," the permit application here was governed by 6 NYCRR 621.11(m), which identifies six criteria that must be satisfied before an expired permit may be reissued (id.).

Although the Village filed a reply memorandum responding to several points in staff's closing memorandum, its reply did not address the SAPA issue (see generally Village of West Hampton Dunes Reply Issues Conference Memorandum, March 16, 2011 [Village IC Reply]).

In its post-issues conference memoranda, the Village also argued that because the proposed 2010 General Permit contained conditions that were not in the 1999 General Permit, the proposed 2010 General Permit violated the Consent Judgment and the Village was entitled to an adjudicatory hearing with respect to the new conditions (see e.g. Village of West Hampton Dunes Issues Conference Memorandum, March 1, 2011 [Village IC Mem], at 2-3, 9, 14-15; see also Village IC Reply, at 2, 4-7). The Village specifically described its objections to Special

Conditions Nos. 1, 2, 3, 4, 9, 11, 12, 16, and 17 in the proposed 2010 General Permit (see Village IC Mem, at 19-25). The Village did not object to any of the General Conditions in the proposed 2010 General Permit.

II. THE ALJ'S ISSUES RULING AND THE VILLAGE'S APPEAL

ALJ Goldberger issued her Issues Ruling on April 1, 2011. The ALJ held as follows: (i) the 1999 General Permit was by its terms limited to a ten year period; (ii) the 1999 General Permit has expired and the proposed 2010 General Permit is not yet effective; (iii) the five-year term in the proposed 2010 General Permit is reasonable and does not require adjudication; (iv) an adjudicatory hearing will be held with respect to proposed 2010 General Permit Special Conditions No. 9 (relating to roof runoff and pool filter backwash) and No. 17 (relating to construction near endangered species habitat); (v) none of the other special conditions in the proposed 2010 General Permit present adjudicable issues, and the Village failed in any event to raise timely its challenges to Special Conditions Nos. 1, 2 and 16; (vi) the parties agreed to work together to try to resolve the definition of the term "protected buffer areas" that had been in the 1999 General Permit and is in the proposed 2010 General Permit; and (vii) none of the procedural issues that the Village raised impairs the ability of staff to issue the proposed 2010 General Permit.

In its appeal, the Village seeks the following: (i) the granting of an expedited appeal of the Issues Ruling; (ii) a ruling that the 1999 General Permit is still in effect and will remain in effect until the final determination of this proceeding; and (iii) a ruling or order setting aside the Issues Ruling, or determining that the term and all conditions of the proposed 2010 General Permit are issues to be adjudicated (see Appeal, at 2, ¶ 4).

The Village claims that the Issues Ruling: (i) reflects improper factual findings and conclusions of law; (ii) denied the Village due process "and its absolute right to an adjudication" of issues; (iii) was based on "an improper double standard of review and consideration;" (iv) "resulted in a grossly prejudicial and erroneous sua sponte reversal" by the ALJ of her January 7, 2011 determination that the 1999 General Permit would remain in effect until this proceeding is completed; and (v) requires a new legislative hearing and issues conference "upon proper notice to address the broad new class of aggrieved parties," which "class" is identified by the Village as "property owners in the village that either have not built or have under built since August 6, 1999, the date of the issuance of the 1999 General Permit" (see id., at 2-3, ¶ 5[E], [F]).[4]

[4] Although not entirely clear, it appears that the Village uses the term "Department" throughout its appeal to refer to ALJ Goldberger, and uses the term "DEC" to refer to the Department and/or Department staff (see e.g. Appeal at 2, ¶ 5[C] [alleging that the Issues Ruling "[w]as improperly based on the application of an improper double standard of review and consideration by the Department with respect to matters raised by the DEC" [emphasis added]; id. ¶ 5[E] [alleging a "sua sponte reversal by the Department of the position stated by the Department at the January 5, 2011 issues conference and in a January 7, 2011 letter by the Department"] [emphasis added]; id. ¶ 59 ["the Stipulation … is a binding agreement on all parties, which requires that the DEC maintain a General Permit in effect for not less than thirty years]; id. ["the Stipulation should have been enforced against the DEC by the Deopartment" (sic)]; see also id. ¶¶ 24, 28, 29, 55).

Department staff contends that the arguments in the Village's appeal are for the most part simply reiterations of prior contentions, are conclusory and unsupported, and that the Village's appeal should be rejected (see Staff's Reply to Village's Appeal of Issues Ruling, May 10, 2011 [Staff Appeal Reply], at 2, 5).[5]

Upon review of the ALJ's Issues Ruling, the record, and the parties' briefs on the appeal, I directed OHMS Hearings Counsel Scott Bassinson to send a letter on my behalf to the Village, with a copy to staff counsel for Region 1, requesting that the Village provide a list of existing or planned repair, rebuilding, replacement or other construction projects that may be subject to the proposed 2010 General Permit. Pursuant to the November 4, 2013 letter from OHMS Hearings Counsel, the Village's response was due on November 19, 2013, and staff's response, if any, was due on November 26, 2013.

Although the Village provided a written response dated November 19, 2013, it did not provide the requested information. Rather, the Village stated, among other things, that: (i) the request for information "is in direct violation of the [Consent Judgment];" (ii) the Consent Judgment requires that the 1999 General Permit be in effect "from thirty years to perpetuity;" (iii) *all* properties in the Village "are properties that will operate under the General Permit;" and (iv) "the General Permit is to be issued as intended and required for not less than the thirty year term of the Judgment *without a condition of providing information*" (Letter from Village Attorney Joseph W. Prokop, Esq., dated November 19, 2013 [11/19/2013 Village Letter], at 1-2 [italics added]).

Although the electronic record reflects that Region 1 counsel received Mr. Bassinson's November 4, 2013 letter, staff did not send a response to the November 4, 2013 letter, and did not provide a response to the Village's November 19, 2013 letter.

III. DISCUSSION

When an Issues Ruling is appealed, my review of legal and policy issues is de novo (see e.g. Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 10-11).[6] The Village summarizes its appeal by claiming that the Issues Ruling "has a draconian impact on a large community, [and] essentially reverses and vacates a Stipulation of Settlement and Federal Court Judgment without any basis" (Appeal, at 16, ¶ 44).

[5] Staff also questions the relevance of a copy of a page from an April 16, 1997 Environmental Notice Bulletin (ENB) relating to the Village's complete application for what ultimately became the 1999 General Permit. The ENB page, submitted by the Village for the first time on this appeal, describes the permit (which has the same number as the 1999 General Permit) as a request "to authorize the reconstruction of single family dwellings, septic systems and accessory structures on 150 parcels comprising approximately 1.6 miles of Atlantic Ocean beach recently restored by the federal/state/county Westhampton Dunes Beach/Dune restoration project" (Appeal Ex. B). I take official notice of this page from the Department's publication.

[6] The Village initially requests that an expedited appeal of the Issues Ruling be granted in this proceeding. Such a request is not necessary because the Part 624 regulations that govern this proceeding expressly provide that any ruling of an administrative law judge to include or exclude an issue for adjudication may be appealed to me on an expedited basis (see 6 NYCRR 624.8[d][2]). Accordingly, the request for leave to file an expedited appeal of the Issues Ruling is denied as unnecessary, and the appeal here is being considered pursuant to 6 NYCRR 624.8(d)(2).

The Village claims that the ALJ erred in determining that the 1999 General Permit has expired because the activities under the 1999 General Permit are not "activit[ies] of a continuing nature" under SAPA § 401(2) (see e.g. Appeal, at 2, ¶ 5(E); 12, ¶ 24; 14, ¶ 32; 20-23, ¶¶ 61-71; 24, ¶ 73). The Village also claims that the ALJ erred by determining that the Consent Judgment does not require the 1999 General Permit to be effective for a minimum of thirty years.[7]

In its November 19, 2013 letter, the Village repeats its position that the Consent Judgment requires that the 1999 General Permit be in effect for a period of between thirty years and perpetuity and, in addition, argues that the Department's request for information "is in direct violation of the [Consent Judgment]," and that "the General Permit is to be issued … *without a condition of providing information*" (11/19/2013 Village Letter, at 1-2 [italics added]).

As discussed below, the Village is incorrect with respect to these arguments.

A. SAPA § 401(2) Did Not Apply and the 1999 General Permit Has Expired

Pursuant to SAPA § 401(2), when a permittee has submitted a "timely and sufficient" application for renewal of a permit for an "activity of a continuing nature," "the existing permit does not expire until the department has made a final decision on the renewal application" (6 NYCRR 621.11[l]). The parties do not dispute that (i) the 1999 General Permit contains an expiration date of August 31, 2009 (see 1999 General Permit, at 1), or (ii) the Village requested more than thirty days prior to the expiration of the 1999 General Permit that the Department reissue the permit (see Issues Conf. Ex. 7).[8]

As set forth above, following the issues conference, ALJ Goldberger initially informed the parties, by letter dated January 7, 2011, that the 1999 General Permit was subject to SAPA § 401(2), and would therefore "remain in effect pending the outcome of these proceedings." In the Issues Ruling, however, based on her review of the regulations and the argument of Department staff in its closing memorandum relating to the applicability of SAPA § 401(2), the ALJ determined that the 1999 General Permit was not subject to SAPA § 401(2) and had therefore expired (see Issues Ruling, at 10-11).

The Village argues that this Issues Ruling determination has violated the Village's rights to due process (Appeal, at 2, ¶ 5[E]; id. at 14, ¶ 32; 16, ¶ 43; 20-23, ¶¶ 61-71; 24, ¶ 73; see also Reply Affirmation in Reply to the DEC Opposition to the Motion by the Village of West Hampton Dunes for an Expedited Appeal, May 23, 2011 [Village Reply], at 3, ¶ 11). The Village further argues that this aspect of the Issues Ruling has created a "broad new class of aggrieved parties" comprised of property owners in the Village "that either have not built or have under built" since the effective date of the 1999 General Permit (Appeal, at 3, ¶ 5[F]; id. at 15-16, ¶¶ 39-42; see also Village Reply, at 3, ¶ 9). The Village claims that the Department must

[7] See e.g. Appeal, at 3, ¶ 10[D] ["thirty years"]; 5, ¶ 13 ["thirty years"]; 7, ¶ 21[A] ["not less than thirty years"]; 18, ¶ 51 ["between thirty years and perpetuity"]; 19, ¶ 59 ["not less than thirty years"]; 20, ¶ 60; see also Village IC Mem, at 1, 6, 7, 14, 17, 18, 19, 22.

[8] Thus, had SAPA § 401(2) applied to this circumstance, the Village's request would have been "timely." Even had SAPA § 401(2) applied, however (and, as discussed herein, it did not), the Village's request was not "sufficient" because it did not include the information requested by the Department.

now conduct a new legislative hearing and issues conference to include this "broad new class" (Appeal, at 3, ¶ 5[F]; 16, ¶ 42).

Initially, I reject the Village's claim that the ALJ denied the Village's right to due process by deciding in the Issues Ruling that SAPA § 401(2) did not apply to the 1999 General Permit. The Village was on notice of, and had an opportunity to respond to, Department staff's argument that SAPA § 401(2) does not apply. Indeed, the entirety of Point III of Department staff's March 1, 2011 post-issues conference closing memorandum is dedicated to staff's argument, initially raised at the issues conference, that SAPA § 401(2) does not apply to the 1999 General Permit (see Staff Closing Mem, at 10-13). After receiving a copy of staff's closing memorandum, the Village served its Reply Issues Conference Memorandum dated March 16, 2011, in which it responded to several of the arguments advanced by staff in its closing memorandum, but failed to respond to staff's argument regarding the SAPA issue.

The Village therefore had an opportunity to respond to staff's closing memorandum Point III regarding the SAPA issue. Its failure to avail itself of that opportunity does not constitute a violation of due process (see e.g. Matter of Kaur v New York State Urban Dev. Corp., 15 NY3d 235, 260, cert denied, 562 US ---, 131 S Ct 822 [2010]).[9]

On the substantive SAPA issue, the Village argues that "the building and rebuilding of residential structures[] is a continuing action that has not changed, and is therefore a continuing action" under the regulations (Appeal, at 23, ¶¶ 69, 71; see also Village Reply, at 3, ¶ 10). According to the Village, then, the 1999 General Permit relates to an "activity of a continuing nature" and therefore, because the Village made a timely application for renewal, the 1999 General Permit will not expire until this permit proceeding is completed (see Appeal, at 23, ¶ 71). The regulations, past decisions and Department guidance, however, provide authority to the contrary.

The relevant regulation states that "[p]rojects or activities of a continuing nature are those involving an operational activity" (6 NYCRR 621.11[l]). SAPA § 401(2) has been applied to permit renewals involving activities such as operating a power plant (see e.g. Matter of Entergy Nuclear Indian Point 2, LLC, Interim Decision of the Assistant Commissioner, August 13, 2008, at 3), operating a hazardous waste management facility (see e.g. Frontier Chemical Waste Process, Inc., Order of Commissioner, April 7, 1994), operating a solid waste management facility (see e.g. Town of Sand Lake, Decision and Order of Commissioner, March 2, 1993), and operating a mine (see e.g. Metro Recycling & Crushing, Inc., Ruling of ALJ, August 7, 2003). These cases are fully consistent with Department staff's position in this proceeding.

The Village provides no authority to support its claim that construction activities fall within the scope of the regulatory phrase "activity of a continuing nature." Moreover, although

[9] In its Reply, the Village argues that other portions of the Issues Ruling have denied the Village due process (see e.g. Village Reply, at 5, ¶18 [ALJ determination that permit is a draft permit violated due process]; ¶ 19 [alleged denial by ALJ of ability to adjudicate term and special conditions of the permit violated due process]. As with its due process complaint relating to the SAPA § 401(2) issue, I hold that the Village has had a full and fair opportunity to address these issues, whether at the issues conference, in the post-issues conference initial and reply briefing, or on this appeal. I hold that the Village has suffered no denial of due process.

invited repeatedly to identify existing or planned building or rebuilding of residential or other structures, the Village has refused to do so. Thus, the Village has failed to demonstrate that there is *any* activity that would be covered by the 2010 General Permit, much less demonstrating that there is "activity of a continuing nature." Based on the foregoing discussion, I hold that the 1999 General Permit does not relate to an "activity of a continuing nature," and is therefore not subject to the provisions of SAPA § 401(2) or 6 NYCRR 621.11(l).

In addition, a memorandum of the Department's Chief Permit Administrator, cited by the ALJ and attached to the Issues Ruling, makes clear that activities "involving construction, repair or maintenance activities" are not within the scope of the permits relating to activities of a continuing nature, and "are not subject to the permit renewal provisions of the [Uniform Procedures Act] nor does SAPA continuance apply" (Memorandum of Chief Permit Administrator, Permit Renewal, Term Extension and Reissuance, March 12, 2010, at 2). The Village cites no authority contradicting this memorandum.

The regulations provide that where, as here, a permit relates to "[a]ctivities that are not of a continuing nature," the permit may be reissued where all six criteria found in 6 NYCRR 621.11(m) are satisfied.[10] I agree with the ALJ that the Village's circumstance does not satisfy all six of these regulatory criteria (see Issues Ruling, at 10-11). As the ALJ noted, 6 NYCRR 621.11(m)(6) is not satisfied because the time period from the effective date of the 1999 General Permit (August 6, 1999) to the expiration date of the proposed 2010 General Permit (February 4, 2015) exceeds 10 years (see id.).[11] Because the Village fails to satisfy all six regulatory criteria in 6 NYCRR 621.11(m), it must apply for a new permit (see 6 NYCRR 621.11[m]).[12]

[10] Those six criteria are as follows:

> (1) there is no change in the activities to be undertaken from those that were previously permitted;
> (2) there has been no material change in environmental conditions;
> (3) the request for reissuance of the permit is made within two years of the date the previous permit expired;
> (4) if applicable, all fees and sureties are paid;
> (5) there are no outstanding violations of the ECL or other environmental laws administered by the department at the facility or site that is the subject of the previous permit; and
> (6) the time period from the effective date of the initially issued permit to the expiration date of the reissued permit must not exceed 10 years.

[11] Because criterion (m)(6) is not satisfied, it is not necessary to base my holding on the other criteria. I do, however, agree with the ALJ that the present circumstance also fails to satisfy 6 NYCRR 621.11(m)(1) and (2) (id. at 11), and that these failures provide alternative bases for holding that section 621.11(m) is not satisfied. The Village did not attempt to demonstrate that there is no change in the activities to be undertaken or that there has been no material change in environmental conditions.

[12] Even satisfying the six criteria does not entitle an applicant to the reissuance of a permit; the regulation reflects that such decision is discretionary (see 6 NYCRR 621.11[m] ["expired permits may be reissued for a new permit term where the criteria in paragraphs (1) through (6) of this subdivision are met"] [emphasis added]).

Thus, by operation of regulation, the 1999 General Permit is not subject to renewal, and has therefore expired. Moreover, the proposed 2010 General Permit has never become effective (see Issues Ruling, at 10-11).[13]

Finally, I reject the Village's unsupported argument that the Department must hold a new legislative hearing and issues conference for a "broad new class of aggrieved parties" comprised of property owners in the Village "that either have not built or have under built" since the effective date of the 1999 General Permit (see Appeal, at 2-3, ¶ 5[E], [F]; 16, ¶ 42). The public notice relating to this proceeding was proper and complete (see Issues Conf. Exs. 1a, 1b, 1c). The public notice expressly stated that the 1999 permit was expired. At the legislative hearing and issues conference, which were open to the public, no member of the public spoke or sought party status (see Tr., at 4:23-8:14). Moreover, the Village has refused the Department's many requests seeking precisely this information – the identity of property owners whose properties remain to be repaired, rebuilt, or built anew – and there is thus no evidence in this record of a single such person, much less evidence of a "broad new class" of such persons.

I agree with and adopt the ALJ's statement in the Issues Ruling that, notwithstanding the Village's failure to demonstrate its entitlement to a new general permit, nothing precludes a property owner from applying to the Department for an individual permit to undertake work on such property pursuant to ECL article 25 or 6 NYCRR part 661 (see id., at 11).[14] Thus, this Decision in no way precludes a property owner in the Village of West Hampton Dunes from seeking a tidal wetlands permit relating to one or more construction projects for which such a permit may be required.[15]

B. The Consent Judgment Does Not Require that the General Permit Be Effective for 30 Years or in Perpetuity

As set forth above, the Village asserts that the Consent Judgment required the Department to issue a general permit effective for a period of not less than thirty years. Because the Department's regulations set a maximum period of ten years for tidal wetlands permits, the

[13] Given that the 1999 General Permit has expired, and the proposed 2010 General Permit has never become effective, I need not reach the parties' speculation as to the possible regulatory sources of authority that may have served as a basis for issuing the 1999 General Permit (see e.g. Staff Closing Memorandum, at 3-6 [arguing that 6 NYCRR 621.14(c) is "the most likely source of authority" to issue the 1999 General Permit]; Village IC Reply, at 3 [claiming that the 1999 General Permit was issued as a general permit "under 6 NYCRR 621.14(d) rather than an emergency permit under 6 NYCRR 621.14(c)," and submitting as part of its appeal an April 16, 1997 ENB Notice relating to the 1999 General Permit that refers to the Village's request for a general permit pursuant to 6 NYCRR part 661 and former 6 NYCRR 621.15(d) (subsequently amended and renumbered as section 621.14[d])]). The 1999 General Permit was issued pursuant to paragraph 12(b) of the Consent Judgment.

[14] The Issues Ruling erroneously refers to Part 663, which relates to freshwater wetlands permits, rather than Part 661 relating to tidal wetlands permits, applicable here (see id.).

[15] Furthermore, the Department has over the past several years implemented procedures to further facilitate expeditious consideration of tidal wetlands permit applications where appropriate (see, e.g., http://www.dec.ny.gov/permits/94281.html [tidal wetland bulkhead replacement general permit, GP-1-13-001]; http://www.dec.ny.gov/permits/89343.html [storm recovery permits including links to: GP-0-13-006, general permit for repair of damages resulting from Hurricane Sandy, including Suffolk County; GP-0-13-005, general permit for non-emergency cleanup and repair of damages resulting from June 28-July 3, 2013 storms]).

Village argues that the current renewal of the 1999 General Permit is essentially the second ten year "phase" of the thirty year period required by the Consent Judgment.

The Village argues that its position with respect to the requirements of the Consent Judgment is based on the lengthy negotiations resulting in the Consent Judgment, and the subsequent five year period of negotiations resulting in the 1999 General Permit. At the issues conference, the Village submitted a list of proposed witnesses who would testify regarding the intent of the parties relating to these documents (see Issues Ruling, at 9-10).

The Village acknowledges, however, that the Consent Judgment is a contract, and its meaning is therefore subject to the rules of contract interpretation (see Appeal ¶ 59 [Consent Judgment "is a binding agreement on all parties … enforceable under the principles of contract law"]; see generally Brad H. v City of New York, 17 NY 3d 180, 185 [2011]; 19th St. Assoc. v State of New York, 79 NY2d 434, 442 [1992]). As the New York Court of Appeals has held, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]). Where an agreement is clear and unambiguous, evidence outside of the language in the agreement is "generally inadmissible to add to or vary the writing" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]). Whether an agreement is ambiguous is a question of law, and evidence outside of the agreement cannot be used to create an ambiguity (id. at 162-163; see also Bailey v Fish & Neave, 8 NY3d 523, 528 [2007]). Moreover, ambiguity is not created simply because the agreement is silent on the issue in dispute (see e.g. Evans v Famous Music Corp., 1 NY3d 452, 458 [2004]; Nissho Iwai Europe PLC v Korea First Bank, 99 NY2d 115, 121-122 [2002]).

In this case, the Consent Judgment expressly states that it "constitutes the entire Stipulation of Settlement among the Parties with regard to the subject matter hereof and may not be modified or amended except in writing signed by all parties hereto" (Consent Judgment at 28-29, ¶ 22). The Consent Judgment requires the "Government Parties" (defined as Suffolk County, the United States and New York State, see id. at 2) to implement a "Project," which is defined as the "Interim Plan for Storm Damage Protection" (Interim Plan) as set forth in a May 1994 Technical Support Document attached to the Consent Judgment (see id. at 5-6, ¶1[a], and Appendix I). The Project includes a construction phase involving the filling in and modifying of "groins," which are structures designed to reduce or prevent erosion,[16] and an operations and maintenance (O&M) phase consisting of "periodic beach nourishment and project maintenance during the 30-year period following completion of Construction" (id. at 6, ¶ 1[b][ii] [emphasis added]). The periodic beach nourishment during the O&M phase was intended "to keep the actual beach profile at or near the Project's design beach profile" (id. at 5).

As reflected in the attachments to the Consent Judgment, the 30-year period referred to above relates to the beach nourishment and erosion protection elements of the Project (see e.g. Syllabus, Interim Plan, at first unnumbered page; see also Technical Support Document at 5-6, ¶ F[15]; 7 [Westhampton Beach Interim Storm Damage Protection Project, Preliminary New York State Plan], ¶ 2.1 [project design "based on a probability of providing 30 years of erosion

[16] See e.g. 6 NYCRR 505.2(p) (groin included as an example of an "erosion protection structure" under the Coastal Erosion Hazard Areas Act).

control"]; 10-11, ¶ 21 [referring to the Department's agreement to pay 30% of the costs "of periodic nourishment over 30 years"]; 13, ¶ 27 [referring to project design life of 30 years]; 27, ¶ 78 [interim shore protection project at Westhampton beach "is based on a 30 year project life and is designed to provide protection against a 44-year return period storm"]; 48, ¶ 145 [30-year project life]; 65 ¶ 216 [periodic nourishment to occur every three years "during the 30 year project life"]). All of the references in the Consent Judgment and its attached documents are consistent with the Department's regulation requiring that erosion protection structures and protective measures "must have a reasonable probability of controlling erosion on the immediate site for at least 30 years" (6 NYCRR 505.9[b]; see also Pub L 102-580 § 102[u], 106 US Stat 4808 [102d Cong, Oct. 31, 1992] [extending to 30 years the project for beach erosion control and hurricane protection at Westhampton Beach]).

The Consent Judgment does not define "Project" to include a general permit to be issued to the Village by the Department, or projects involving reconstruction, repair or construction of single family dwellings, accessory structures or sanitary systems. The only language in the Consent Judgment relating to a general permit to be issued by the Department is found at paragraph 12(b), quoted in full above at page 2 of this Decision. That paragraph requires the Department to deliver to the Village "a general permit, with appropriate conditions standard to such permits, allowing the building, rebuilding or repair of structures." This language is clear and unambiguous. The paragraph does not require that such general permit be effective for 30 years. The fact that the Consent Judgment does not specify a time frame for the general permit, however, does not render the Consent Judgment ambiguous (see e.g. Evans, 1 NY3d at 458; Nissho Iwai Europe PLC, 99 NY2d at 121-122).

The Village "ignores a vital first step in the analysis: before looking to evidence of what was in the parties' minds, [one] must give due weight to what was in their contract" (W.W.W. Associates, Inc., 77 NY2d at 162). The Consent Judgment is clear and unambiguous, and I agree with the ALJ that it would not be appropriate to hold a hearing regarding the Village's claim that the parties to the Consent Judgment intended that the general permit be effective for 30 years or in perpetuity (see Issues Ruling, at 14). Assuming without deciding that the parties could have included, as a term of the Consent Judgment, a 30-year period of effectiveness for the general permit, they did not do so. Extrinsic evidence such as the testimony proffered by the Village "as to what was really intended but unstated … is generally inadmissible to add to or vary the writing" (W.W.W. Associates, Inc., 77 NY2d at 162),[17] and I decline to allow such testimony here.

There is nothing ambiguous in the 1999 General Permit concerning the period for which the permit was effective. The 1999 General Permit, issued by the Department pursuant to the Consent Judgment, expressly states that it would be effective for ten years; it became effective on August 6, 1999 and expired on August 31, 2009. After the 1999 General Permit was issued,

[17] Given the clarity of the Consent Judgment, it is not necessary to make a determination with respect to the "purpose" of the Consent Judgment (see Issues Ruling at 12-13), or the circumstances in which there might be "little purpose to the continuation of the General Permit based upon the terms of 12(b)(i)" (id. at 14). Although I affirm the ALJ's holding that no fact-finding hearing is necessary on the issue of the 1999 General Permit's period of effectiveness, I do not adopt herein the ALJ's discussion of the "purpose" of the Consent Judgment.

the Village did not commence a court proceeding to challenge the ten year period of effectiveness in the 1999 General Permit; nor did the Village seek a declaration that such time period violated the Consent Judgment. Moreover, ten years is the maximum amount of time allowed under the regulations for tidal wetland permits (see 1999 General Permit, at 1; see also 6 NYCRR 661.13[a]).

C. The Consent Judgment Does Not Prohibit the Department From Requesting Information from the Village, and the Village's Refusal to Provide the Information Warrants Denial of its Request for a Permit

On July 16, 2009, the Village requested that the Department reissue the 1999 General Permit (see Issues Conf. Ex. 7). In its September 17, 2009 response to the Village's request, the Department noted the "unique and unprecedented basis for originally issuing" the 1999 General Permit ten years earlier, and stated that it had determined that it would "require additional information from the Village to process the renewal request" and "to reasonably assess the extent to which there remain either structures or lots that have not yet been repaired, rebuilt, or built anew" (Issues Conf. Ex. 8, at 1-2). The Village never provided the requested information.

At my direction, a letter was sent to the Village on November 4, 2013 requesting a list of existing or planned repair, rebuilding, replacement or other construction projects that may be subject to a General Permit such as the 1999 General Permit. In its November 19, 2013 response, the Village asserted that the Consent Judgment requires that a permit be issued "without a condition of providing information," and that the Department's November 4, 2013 letter requesting information "is in direct violation" of the Consent Judgment (see 11/19/2013 Village Letter, at 1-2).

The Village does not cite any provision of the Consent Judgment to support either assertion, and a careful review of the Consent Judgment reveals that there is no such provision. As discussed above, the Consent Judgment simply required that the Department deliver a general permit to the Village "with appropriate conditions standard to such permits" (Issues Conf. Ex. 4, at 24 ¶ 12[b][i]). The 1999 General Permit included General Condition No. 3, which provided that any application for a renewal of the permit "must include *any* … supplemental information the Department requires" (see Issues Conf. Ex. 3, at 2 [italics added]). This General Condition is standard to many types of permits issued by the Department, including general permits (see e.g. General Permit GP-0-05-001; Storm Recovery General Permit, GP-0-13-005), tidal wetlands permits, freshwater wetlands permits, air permits, and permits across multiple programs including solid waste, air, water quality certification, tidal wetlands and protection of waters.

It is clear that General Condition No. 3 in the 1999 General Permit was both an appropriate and standard condition to be included in the 1999 General Permit, and its inclusion was not unauthorized or unique. The Village never objected to its inclusion in the 1999 General Permit. Moreover, the proposed 2010 General Permit contained the identical General Condition No. 3, and the Village raised no objection – either before the ALJ or in its appeal papers – to the inclusion of that General Condition in the proposed permit. Both permits also expressly state that they are contingent upon compliance by the permittee with the ECL, regulations and the General and Special Conditions in the permit (see Issues Conf. Ex. 3 [1999 General Permit], at 1;

Issues Conf. Ex. 2 [proposed 2010 General Permit], at 1). The Village never challenged or objected to the inclusion of this language in either permit.

The ECL and Department regulations also expressly authorize the Department to request additional information, and state that a refusal to provide that information may be grounds for denying the request for a permit:

> At any time during the review of an application for a permit or a request by a permit holder for the renewal, reissuance, recertification or modification of an existing permit, the department may request additional information from the applicant or permit holder with regard to any matter contained in the application or request when such additional information is necessary for the department to make any findings or determinations required by law…. Failure by the applicant or permit holder to provide such information may be grounds for denial by the department of the application or request.

ECL 70-0117(2); see also 6 NYCRR 621.14(b) (virtually identical language); Issues Ruling, at 18-19 (Department not precluded from requesting additional information in accordance with 6 NYCRR 621.14[b] where, as here, permit application was deemed complete due to Department's failure to mail notice of its completeness determination [citing 6 NYCRR 621.6(h), 621.14(b), and Palmieri v New York State Dept. of Envtl. Conservation, 31 AD3d 645 (2d Dept 2006)]).

As the foregoing makes clear, the Department has been and remains fully authorized to request additional information from the Village regarding the extent to which there remain either structures or lots that have not yet been repaired, rebuilt or built anew, or existing or planned projects that may be subject to a General Permit such as the proposed 2010 General Permit. No provision of the Consent Judgment is to the contrary; indeed, the Consent Judgment expressly authorized the Department to include "appropriate" and "standard" permit conditions such as General Condition No. 3, and in no way absolves the Village of its obligation to comply with such permit condition or applicable statutory or regulatory provisions relating to providing to the Department information relevant to the permit request.

The Village's refusal to provide the information requested by the Department violated the terms and conditions of the 1999 General Permit, as well as the relevant statutory and regulatory provisions discussed herein. These refusals warrant denial of the request for a permit (see e.g. ECL 70-0117[2]; 6 NYCRR 621.14[b]). In addition, because the Village has failed to provide any information relating to one or more existing or planned construction, reconstruction or repair projects, it has failed in any event to make a threshold showing that it needs a permit at this time. I therefore deny the Village's request for a permit, and dismiss this proceeding. [18]

[18] It bears repeating that the Village's failure to make such showing does not preclude any property owner in the Village from submitting to the Department an individual application for a tidal wetlands permit.

I have considered the other arguments raised by the Village but, given that I am denying the request for a permit and dismissing the proceeding, they are moot.[19]

CONCLUSION

I affirm those portions of the ALJ's Issues Ruling that held that: (i) the 1999 General Permit was by its terms limited to a ten year period, and was not, as argued by the Village, effective for a term between 30 years and perpetuity; (ii) the 1999 General Permit has expired and the proposed 2010 General Permit is not effective. In addition, I deny the Village's request for a permit, and dismiss this proceeding, for the reasons stated in this Decision.

New York State Department of
Environmental Conservation

/s/
By: _____
Joseph J. Martens
Commissioner

Dated: April 28, 2014
Albany, New York

[19] Although not necessary to the holdings set forth in this Decision, I agree with the ALJ that the Village's objections to certain special conditions in the proposed 2010 General Permit, raised for the first time in its memorandum following the issues conference (see Village IC Mem, at 19-21, 24-25), were untimely (see Issues Ruling, at 15-16; see also 6 NYCRR 624.4[b]; Matter of Seneca Meadows, Inc., Interim Decision of Commissioner, Oct. 26, 2012, at 6 [it is untimely for a participant in an issues conference to raise an issue for the first time after the issues conference, absent permission from the ALJ]; Matter of Town of Brookhaven, Interim Decision of Commissioner, July 27, 1995, at 5).