

In the Matter of the Application of
PETER FENNER AND NANCY FENNER
for a Tidal Wetlands Permit pursuant to
Environmental Conservation Law ("ECL")
Article 25 and Part 661 of
Title 6 of the Official
Compilation of Codes, Rules
and Regulations of the
State of New York ("6 NYCRR"),
a Protection of Waters Permit Pursuant
to ECL Article 15 and 6 NYCRR Part 608,
and a Section 401 Water Quality Certification,
to Install a Private Recreational
Dock at 742 Dune Road, West Hampton
Dunes, Suffolk County, New York.

ISSUES RULING

DEC Project No. 1-4736-02179/0003

BACKGROUND

Peter Fenner and Nancy Fenner (the "Applicants") own property at 742 Dune Road, West Hampton Dunes, Suffolk County, New York (the "Site"). The Applicants propose to install a private recreational dock at the Site, consisting of a 4' x 150' elevated catwalk, with a 3' x 15' ramp leading down to a 6' x 25' float, with two tie off poles. Pass/repass stairs 4' wide would also be provided to facilitate public access across the dock. The float would be secured in place with two 8" x 18' piles. The dock, ramp and float would be constructed of wood. The proposed location of the dock structure is on the north side of Dune Road fronting Moriches Bay.

The project would be located in tidal wetlands, regulated by the New York State Department of Environmental Conservation (the "Department") pursuant to Article 25 of the Environmental Conservation Law ("ECL") and Part 661 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").¹ According to Department Staff, the construction of the catwalk would cause direct loss of 600 square feet of prime piping plover foraging habitat. The piping plover is a federal

¹ Additional approvals required are a Protection of Waters permit pursuant to ECL Article 15 and 6 NYCRR Part 608, as well as a Section 401 Water Quality Certification.

threatened, and State endangered bird species.² Department Staff denied the application by letter dated May 18, 2001, and in correspondence dated June 1, 2001, the Applicants requested a hearing on the denial. This ruling addresses a dispute between Department Staff and the Applicants as to the scope of the issues to be adjudicated. At the issues conference, the Applicants contended, over Department Staff's objection, that the issues identified in Department Staff's denial letter must be refined and narrowed to address only impacts to the piping plover's foraging habitat.

PROCEEDINGS

A Notice of Hearing dated August 24, 2005 (the "Notice") was published in the Department's *Environmental Notice Bulletin* on August 24, 2005, and in the September 8, 2005 edition of the *Southampton Press*. Administrative Law Judge ("ALJ") Maria E. Villa was assigned to the matter.³

As provided in the Notice, a legislative public hearing took place as scheduled on Tuesday, October 4, 2005 at the Westhampton Beach Fire Department. No members of the public appeared to comment on the application. Department Staff requested that the record of the legislative public hearing be held open to allow for receipt of comments from the United States Fish and Wildlife Service ("USF&W"), as well as the New York State Department of State ("DOS"). The Applicants objected to Department Staff's request. The ALJ noted that while the DOS received a copy of the Notice, the USF&W did not, and granted an extension of time to October 7, 2005 for both agencies to submit comments, as well as an opportunity for the Applicants to respond to those comments by October 14, 2005.

By e-mail dated October 4, 2005, Department Staff requested additional time to submit DOS's comments, to Friday, October 14, 2005, due to the attendance of the DOS contact person at a conference, as well as the Columbus Day holiday. Counsel for Department Staff indicated that she had not heard from USF&W, but asked that the deadline for receipt of comments be the same for both agencies.

² The piping plover (*charadrius melodus*) appears in the list of State endangered species at 6 NYCRR Section 182.6(a)(6)(v).

³ This matter was referred to the Department's Office of Hearings and Mediation Services in September of 2001, but the Applicants did not indicate that they were prepared to proceed to hearing until 2005.

In response, counsel for the Applicants requested a conference call, which took place on October 6, 2005. During the call, the Applicants reiterated their objections to the extension. Department Staff advised that the individual at DOS responsible for submission of the comments had not provided alternate contact information for the time that he would be attending the conference, and that his e-mail indicated only that he would be out of the office until October 11, 2005. Department Staff indicated that USF&W would be prepared to submit comments by October 7, 2005, the deadline set at the hearing.

In a memorandum dated October 6, 2005, the ALJ ruled that a further extension was not warranted, inasmuch as USF&W was prepared to meet the deadline, even though, unlike DOS, USF&W had not received a copy of the Notice. Department Staff submitted USF&W's comments on October 7, 2005. The comments consisted of three letters dated May 6, 1999, February 22, 2001, and July 13, 2001. Only the February 22, 2001 letter addresses the project that is the subject of this proceeding. The May 6, 1999 letter discusses an application by 682 Dune Road, LLC (the "Dune Application") and the July 13, 2001 letter discusses the application of John Kling (the "Kling Application").

By letter dated October 14, 2005, the Applicants objected to the submission, arguing that USF&W's comments should not be considered. As an initial matter, the Applicants objected to Department Staff's transmittal letter, noting that the extension was granted to allow USF&W, not Department Staff, to comment further on the application. This objection is without merit, as Department Staff's cover letter does no more than summarize the contents of the three USF&W letters, and provides an explanation as to some inconsistencies with respect to dates referred to in those letters.

The Applicants also maintained that the information in the letters was outdated, and contended that, pursuant to Section 624.4(b)(1) of 6 NYCRR, issues based on new information may only be considered upon a showing that such information was not reasonably available at the issues conference. Citing Section 624.4(a)(4), which provides that statements made at the legislative hearing are not evidence, but may be used as a basis to inquire further at the issues conference, the Applicants argued that Department Staff was attempting improperly to expand the issues to be adjudicated at the hearing.

In this regard, the Applicants also maintained that Section 624.4(c)(1)(ii) "limits the adjudicable issues to those cited by DEC as a basis to deny the permit," and went on to assert that

"[n]one of the issues in the USF&W letters were used by DEC as a basis to deny Mr. and Mrs. Fenner's permit." This argument is addressed further below, but it should be noted that the February 22, 2001 letter from USF&W specifically states that "[t]he proposed pier construction has the potential to exert direct adverse affects [sic] on the piping plover as a result of disruption of courtship, nesting, and feeding activities during the breeding season, and alteration of their habitat." (Emphasis in original). The letter goes on to discuss those impacts in some detail. Given that Department Staff's denial letter cites loss of habitat as a basis to deny the permit, the Applicants' arguments as to this submission are not persuasive. The Applicants went on to argue that "USF&W has expressed absolutely no interest" in this proceeding, but this statement is contradicted by the fact that USF&W has provided comments specifically addressing the Fenner application.

In contrast, the May 6, 1999 letter and the July 13, 2001 letter discuss other projects, and are not related to this proceeding. In particular, and as noted by the Applicants, the comments in the July 13, 2001 letter that discusses the Kling Application would have seem to have little bearing on this matter, because on March 8, 2001, the Department issued a permit for construction of the Kling dock. Nevertheless, USF&W's letter concerning the Fenners's application is pertinent to the issues to be addressed at the adjudicatory hearing, and therefore should be deemed to be a statement properly submitted with respect to that application.

After the legislative public hearing, the participants visited the site of the proposed project, then returned to the hearing location to begin the issues conference. The Applicants were represented by Lark J. Shlimbaum, Esq., of Shlimbaum and Shlimbaum, 265 Main Street, Islip, New York. Gail Rowan, Esq., Assistant Regional Attorney in the Department's Region 1 Office, appeared on behalf of Department Staff.

The Notice set a deadline of September 23, 2005 for receipt of petitions for full party or *amicus* status. No petitions were received by that date. Pursuant to Section 624.5(a), the Applicants and Department Staff are automatically full parties to this proceeding.

The parties agree that issues exist that relate to matters cited by Department Staff as a basis to deny the permit and are contested by the Applicants, and therefore, that those issues are adjudicable as provided in Section 624.4(c)(1)(ii). Nevertheless, at the issues conference, the parties disagreed as

to the scope of those issues, and the Applicants requested that the ALJ prepare a written issues ruling in that regard. Pursuant to Section 624.4(b)(2)(ii), one of the purposes of the issues conference is "to narrow or resolve disputed issues of fact without resort to taking testimony." Accordingly, the following discussion addresses the parties' arguments as to the scope of the issues to be considered at the hearing.

DISCUSSION AND RULING

At the issues conference, the Applicants contended that Department Staff should be precluded from raising any issues that were not specifically articulated in the denial letter, and that some of those issues should be refined and narrowed. Issues Conference Transcript (hereinafter "IC Tr.") at 8. In this regard, the Applicants contended that the only issue that should be considered at the hearing is the impact on the piping plover's habitat. Department Staff's denial letter states that the proposal would have an undue adverse impact on the present and potential values of the tidal wetland and wildlife habitat and thus would not comply with Section 661.9(b)(1)(i) and (c)(3) of 6 NYCRR. Department Staff's denial letter also asserted that the project is not compatible with the public health and welfare, and therefore failed to satisfy Section 661.9(b)(1)(ii) and (c)(1). Finally, Department Staff's denial letter stated that the project is not reasonable or necessary within the meaning of Section 661.9(b)(1)(iii). Issues Conference Exhibit (hereinafter "IC Exh.") 4.

The permit hearing procedures set forth in Section 624.9(b)(1) provide that "[t]he applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department." Thus, the permit hearing regulations obligate the Applicants to demonstrate that the project, as proposed, will meet all of the applicable requirements articulated in the tidal wetlands regulations at 6 NYCRR Part 661. This standard has been adhered to in prior proceedings. See Matter of Novack, Commissioner's Decision, at 1, 2001 WL 980474, * 1 (July 25, 2001) (applicant has the burden of showing compliance with all applicable standards). The tidal wetlands regulations include a similar provision stating that "[t]he applicant shall have the burden of establishing that the applicable standards of this section will be met." Section 661.9(a).

Section 661.9(b)(1) sets forth "Overall standards" which an applicant must satisfy in order to obtain a permit. That section mandates that an applicant demonstrate that the proposed

activity:

is compatible with the policy of the act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation, as more particularly set forth in the findings in section 661.2 of this Part, taking into account the social and economic benefits which may be derived from the proposed activity.

The findings in Section 661.2(k) indicate that "[a]ll of the tidal wetland zones⁴ and adjacent areas generally serve to an approximately equal degree the wildlife habitat, recreation, education and research, and open space and aesthetic appreciation values of tidal wetlands." The regulation goes on to note that "[v]ariations do occur in the values served from, for example, a particular intertidal marsh to another . . . Furthermore, one type of tidal wetland or an adjacent area may serve a particular wildlife habitat, recreation, education and research, or open space and aesthetic appreciation value." This section states further that "[g]enerally, tidal wetlands and adjacent areas are the habitat for a large number of wildlife species, provide large expanses for a variety of recreational purposes, offer conditions useful for many education and research purposes and satisfy a broad spectrum of aesthetic appreciation and open space needs."

Because the Applicants must show that the project, as proposed, will comply with all of the applicable standards articulated in the ECL and the regulations, any assertion that

⁴ The Department's regulations define "tidal wetlands" or "tidal wetland" to mean "any lands delineated as tidal wetlands on an inventory map," comprising six classifications including coastal fresh marsh (designated "FM" on an inventory map); intertidal marsh (designated "IM"); coastal shoals, bars and flats (designated "SM"); littoral zone (designated "LZ"); high marsh or salt meadows (designated "HM"); and formerly connected tidal wetlands (designated "FC"). Section 661.4(hh)(1)-(6). The "adjacent area" is defined, in pertinent part, as "any land immediately adjacent to a tidal wetland" extending 300 feet landward of the most landward boundary of the tidal wetland, or to the seaward edge of the closest presently existing fabricated structure, or to the elevation contour of ten feet above mean sea level. Section 661.4(b)(1)(i)-(iii).

the hearing must be limited solely to impacts on the piping plover's habitat must fail. The "values" of the tidal wetland or adjoining or nearby tidal wetlands include marine food production and wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, and absorption of silt and organic material, as well as opportunities for recreation, education, research, aesthetic appreciation and open space. In order to obtain a permit, the Applicants are required to show that their proposal will not have an undue adverse impact on any of these present or potential values. Department Staff's denial letter tracks the language of the regulation, and indicates that the proposal "will have an undue adverse impact on the *present and potential values* of the tidal wetland." IC Exh. 4 (emphasis supplied).

With respect to whether the proposal will have an undue adverse impact on the present or potential values of the tidal wetland, the Applicants argued that the inquiry at the adjudicatory hearing should be confined to only the "affected tidal wetlands." IC Tr. at 8. According to the Applicants, the piping plover habitat in question is the foraging habitat on the Applicants' property itself. IC Tr. at 16. The Applicants went on to point out that the application indicates that the project will not involve construction in the adjacent area. *Id.* As a result, the Applicants argued that "[t]he affected area of the tidal wetlands is the coastal shoals, bars and flats between high and low water where the dock is going to be." IC Tr. at 17.

Department Staff took issue with Applicants' position, maintaining that ECL Article 3 requires consideration of cumulative impacts. IC Tr. at 11. Department Staff went on to point out that the denial letter specifically states that "[a]nother standard for permit issuance is that the project 'will not have an undue adverse impact on the present or potential value of the affected tidal wetland area of [sic] adjoining or nearby tidal wetland areas for marine food production, wildlife habitat . . .'" IC Exh. 4, at 2 (citing Section 661.9(b)(1)(i)). *Id.* In addition, Department Staff noted that the project is situated both landward and seaward of high water, and argued that under the circumstances, it would be difficult to segregate the project in the manner advocated by the Applicants, which would take into consideration only the 600 square feet of foraging habitat identified in Department Staff's denial. IC Tr. at 12.

In response, the Applicants asserted that Department Staff was trying to "rewrite this denial letter." IC Tr. at 15. The Applicants stated that "by limiting this hearing to the affected

area, that does not preclude testimony concerning cumulative impacts. The issue is really what tidal wetland we are going to be testifying about, and, again, that should be the affected area." IC Tr. at 15.

Section 661.2 ("Findings") states that

[w]hile tidal wetlands and adjacent areas contain distinct zones, as set forth in these findings, these areas are essentially an integrated natural system. The resources in one area utilize and depend on the resources in other areas. The tidal wetland benefits produced in one area benefit nearby areas, and the negative impacts imposed on the natural values of one area are transferred to other nearby tidal wetland areas. Consequently, land use and development occurring in any particular tidal wetland or adjacent area may cause impacts on nearby areas and should be compatible with the values of the particular area on which it is located as well as with the values of nearby tidal wetlands.

Section 661.2(n). The permit issuance standards provide that the activity for which a permit is sought must be "compatible with the policy of the act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or *adjoining or nearby tidal wetland areas.*" Section 661.9(b)(1)(i) (emphasis supplied). Given this language, it is evident that the regulations contemplate a consideration of benefits and impacts that is not necessarily restricted to the immediate area of a proposed activity. Therefore, the issue for adjudication at the hearing in this case will be whether the proposal will have an undue adverse impact on the present and potential values of the tidal wetland.

As part of this issue, the Applicants also offered argument as to the foraging habitat of the piping plover in relation to the tidal wetlands areas at the Site. Referring to the portion of the denial letter stating that the construction of the catwalk would cause the direct loss of 600 square feet of prime piping plover foraging habitat, the Applicants argued that the only foraging habitat is the area situated between mean high and mean low water. IC Tr. at 9. According to Department Staff, the

project would be located within tidal wetland areas designated "SM" (Coastal Shoals, Bars and Flats) and "LZ" (Littoral Zones), as well as "AA" (Adjacent Area), and therefore would have impacts in all those areas. IC Tr. at 28-29. The Applicants disputed Department Staff's contention that the LZ and AA areas should be included in the area to be considered at the hearing, arguing that foraging habitat for the piping plover is found only in coastal shoals, bars and flats. IC Tr. at 29.

Department Staff took the position that the project is located both above mean high water and also seaward of that mark, making it necessary to examine the adjacent area, including the littoral zone and the shoals and mud flats. IC Tr. at 13. Moreover, Department Staff argued that the stairs are located in the adjacent area. IC Tr. at 34-35. According to Department Staff, piping plover forage in all wet habitats and open habitats, which would include the beach berm, the areas of ponding after storm tides, and wet areas after rain events, as well as the SM and LZ zones. IC Tr. at 13-14. The Applicants responded that "piping plover do not forage in the water, so the tidal zone should not be an issue." IC Tr. at 17.

As noted above, the hearing on this application must take into account impacts on the tidal wetlands at the Site. For the reasons articulated above, it is not proper at this point to seek to limit the examination of such impacts to those areas that serve as foraging habitat for the piping plover. This is particularly so because disputes between the Applicants and the Department Staff as to the extent of that foraging habitat cannot be resolved in an issues ruling, but must instead be the subject of adjudication.

The second bullet point in the denial letter indicates that the proposal is not compatible with the public health and welfare, and therefore does not comply with Section 661.9(b)(1)(ii) (for tidal wetlands) or Section 661.9(c)(1) (adjacent areas). At the issues conference, the Applicants asked that Department Staff clarify this issue. IC Tr. at 21. Department Staff declined to do so. IC Tr. at 22. Inasmuch as this issue is one of the bases for Department Staff's denial of the permit, it will be adjudicated. Pursuant to Section 624.7(b), "[w]ithin 10 days after service of the final designation of the issues any party has the right to serve a discovery demand upon any other party demanding that party provide . . . (2) a list of witnesses to be called, their addresses, and the scope and content of each witness's proposed testimony, and the qualifications and published works of each in general conformance with CPLR 3101(d)(1). . . ." Accordingly, the

Applicants will have the opportunity to conduct discovery as to the scope and nature of the testimony to be offered with respect to this issue, and the other issues for adjudication in this proceeding.

The Applicants noted that the third bullet point in the denial letter refers to Section 661.9(b)(1)(iii), and indicates that the "proposal is not reasonable or necessary." IC Exh. 4, at 2. At the issues conference, the Applicants contended that the issue for adjudication should take into account the entire text of the regulation, specifically, "whether the proposal is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent." Department Staff agreed. The applicable standard is therefore undisputed and the issue will be adjudicated as clarified at the issues conference.

The Applicants also requested clarification as to the use classifications under Section 661.5(b), arguing that only classification 14 is applicable. Classification 14 encompasses "[c]onstructing one open pile catwalk and/or dock not greater than four feet in width for any principal building." This activity is designated in the regulations as a "Generally Compatible Use - Permit Required" under the "Area and Use Categories." Department Staff contended at the issues conference that Classification 16 (installing a floating dock totaling less than 200 square feet in area) is also applicable, and the Applicants agreed. IC Tr. at 27. This use is designated as Generally Compatible, Permit Required in coastal fresh marsh, intertidal marsh or high marsh areas, and "NPN" (no permit required) in other areas.

Department Staff also maintained that Classification 57 ("[a]ny type of regulated activity not specifically listed in this chart") is applicable, because of the pile driving contemplated in the application. Classification 57 uses require a permit in all areas, with no presumption stated as to these activities' compatibility or incompatibility with tidal wetlands. The Applicants disputed the applicability of Classification 57 to the proposal, arguing that this activity is encompassed within Classification 14 (constructing an open pile catwalk or dock). Department Staff countered that the proposal would include two tie-off poles. IC Tr. at 27. At the issues conference, the Applicants clarified that the tie-off poles are seaward of the catwalk. IC Tr. at 38. Consequently, the project involves pile driving that would not be part of the catwalk construction itself, and therefore, the Applicants' arguments that

Classification 57 should not apply is not persuasive.

At the conclusion of the issues conference, Department Staff stated that ECL Article 11 (Protection of Wildlife) should also be considered at the hearing. IC Tr. at 39. The ALJ inquired whether there were any dispute that the piping plover is a protected species. IC Tr. at 40. The following colloquy ensued:

JUDGE: I think what you are trying to get at is that the piping plover, as an endangered species, is one of the bases for this permit denial. It's almost a threshold matter that that species purportedly has habitat that would be affected by this project; is that what you are trying to say?

DR. ROSENBLATT [Witness for Department Staff]: Right.

JUDGE: Ms. Shlimbaum, is there a dispute regarding that?

MS. SHLIMBAUM: Article 11 is not mentioned in the denial letter, and I don't think there is a dispute over the piping plover being a state endangered bird, so I don't see how that is an issue. I don't see what we are trying to adjudicate by that issue.

IC Tr. at 40-41. In light of the participants' acknowledgment of the piping plover's protected status and the discussion at the issues conference, this issue need not be adjudicated.

ISSUES FOR ADJUDICATION

1. Whether the proposal will have an undue adverse impact on the present or potential values of tidal wetlands. For the purposes of this hearing, the tidal wetlands include but are not limited to the footprint area of the proposed project.
2. Whether the proposal is compatible with the public health and welfare, pursuant to Section 661.9(b)(1)(ii) (for tidal wetlands) and Section 661.9(c)(1) (for adjacent areas).
3. Whether the proposal is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent.

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 (see 6 NYCRR 624.8(d)(2)). Expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling (see 6 NYCRR 624.6(e)(1)).

Allowing additional time to allow the parties a reasonable opportunity to review this ruling, and in light of the upcoming holidays, any appeals must be received before 4:00 p.m. on Friday, December 23, 2005. Replies to appeals are authorized, and must be received before 4:00 p.m. on Friday, January 20, 2006.

Send one copy of any appeal and reply to Commissioner Denise M. Sheehan, c/o Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010, and one copy of any appeal and reply to Department Staff the same time and in the same manner as transmittal is made to the Commissioner. The Commissioner will not accept submissions by electronic mail, or via telefacsimile. Send two copies of any appeal and reply to the ALJ, and one copy of any appeal and reply to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services, 625 Broadway, First Floor, Albany, New York 12233-1550.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.

A Service List and Exhibit Chart are attached.

/s/
Maria E. Villa
Administrative Law Judge

December 5, 2005
Albany, New York

TO: Service List