

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

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

Mezzacappa Brothers, Inc.,
Sam Mezzacappa and Frank Mezzacappa
(Richmond Terrace Property)

Respondents

DEC Case No. 2-20070517-290

Hearing Report and Recommended Decision

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

September 16, 2009

Proceedings

With a cover letter dated October 28, 2008, Staff from the Department of Environmental Conservation Region 2 Office (Department staff) commenced this administrative enforcement action with service of a motion for order without hearing in lieu of complaint (see Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.12) and supporting papers upon Mezzacappa Brothers, Inc., Sam Mezzacappa, and Frank Mezzacappa (Respondents) by certified mail, return receipt requested. Udo M. Drescher, Esq., Assistant Regional Attorney, forwarded a copy of Staff's motion and supporting papers to the Office of Hearings and Mediation Services with a cover letter dated November 18, 2008. In a letter dated November 21, 2008, the parties were advised that the matter had been assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell.

Sam Mezzacappa responded to Staff's October 28, 2008 motion *pro se* and on behalf of his brother, Frank Mezzacappa, and Mezzacappa Brothers, Inc. (Mezzacappa Bros.). Sam Mezzacappa filed papers opposing Staff's motion for order without hearing. Respondents also cross-moved to dismiss the charges alleged in Staff's October 28, 2008 motion due to a lack of subject matter jurisdiction.

In the motion, Staff asserted that Respondents own property at 2205-2217 Richmond Terrace on Staten Island (Richmond County), New York. According to the motion, the Richmond Terrace property is adjacent to the Kill van Kull, a navigable water of the State, and a regulated tidal wetland. Staff contended that a functional bulkhead used to extend along the waterfront of the Richmond Terrace property, and that the bulkhead eventually deteriorated. Staff alleged that Respondents violated Environmental Conservation Law (ECL) § 15-0505(1) and 6 NYCRR 608.5 as well as ECL 25-0401 and 6 NYCRR 661.8 at various times since 2001 when Respondents undertook regulated activities at the Richmond Terrace property without a permit from the Department.

In a ruling dated April 9, 2009, I granted Staff's motion with respect to liability, and denied the motion with respect to relief. The ruling also denied Respondents' cross-motion to dismiss the charges alleged in Staff's October 28, 2008 motion. I concluded that the Department has jurisdiction over the Richmond Terrace property pursuant to ECL article 25 (Tidal Wetlands Act). Respondents did not raise any objection about the Department's authority to regulate the site and adjoining navigable waters pursuant to ECL article 15, title 5 (Protection of Water).

Subsequently, a hearing convened at 11:00 a.m. on May 11, 2009 at the Department's Region 2 Office, Long Island City (Queens County), New York. Udo Drescher, Assistant Regional Attorney, represented Department staff. George Stadnik, Marine Resources Specialist, Bureau of Marine Resources from Region 2, testified on behalf of Department staff. Sam Mezzacappa represented himself and the other Respondents. At the hearing, Respondents called the following witnesses: (1) John DeFazio, a contractor; (2) William Mowbray from M Square Builders; and (3) Frank Mezzacappa.

During the hearing, the parties offered additional exhibits. These have been added to the revised Exhibit List, which is attached to this Report as Appendix A.

The Office of Hearings and Mediation Services received the stenographic transcript from the May 11, 2009 hearing on May 22, 2009. At the hearing, the parties agreed to file closing statements simultaneously, and did not request leave to file reply briefs (Tr. at 211-213). In a letter dated May 28, 2009, I set July 8, 2009 as the due date for the closing statements.

The record of the hearing closed on July 9, 2009 upon receipt of closing statements. Department staff filed a closing statement dated July 3, 2009, which was timely received at the Office of Hearings and Mediation Services on July 7, 2009. With a cover letter dated July 6, 2009, Sam Mezzacappa filed the first part of Respondents' closing statement. The Office of Hearings and Mediation Services received this part of Respondents' closing statement on July 9, 2009. Mr. Mezzacappa sent the second part of Respondents' closing statement on behalf of Respondents as an e-mail message dated July 8, 2009. With Department staff's consent, Mr. Mezzacappa filed a short addendum e-mail message dated July 9, 2009.

Findings of Fact

The April 9, 2009 ruling identified findings of fact (Findings 1 through 17, inclusive) for the purposes of this administrative enforcement action. They are repeated here for the convenience of the reader. Additional findings (Findings 18 through 30, inclusive) are listed here based on the record developed during the May 11, 2009 hearing.

1. Mezzacappa Brothers, Incorporated was formed in 1961 as a New York State domestic corporation. Sam Mezzacappa is the Chairman or Chief Executive Officer of the corporation.
2. Based on information on file with the NYS Department of State, Division of Corporations, Mezzacappa Brothers, Inc. is an "active" domestic business corporation as of the date of the Department's October 28, 2008 motion.
3. The site of the alleged violations is located at 2205-2217 Richmond Terrace, Staten Island (Richmond County), New York 10302. The property is identified as Block 1070, Lot 54.
4. Mezzacappa Brothers, Inc. purchased the property located at 2205-2217 Richmond Terrace in June 1980. On May 10, 2005, Mezzacappa Brothers, Inc. subdivided Lot 54. The corporation retained ownership of Lot 54, which included the waterfront portion of the property. Chrisjohn Realty Holding, LLC, purchased the newly created Lot 55.
5. Subsequently, Mezzacappa Brothers, Inc. transferred ownership of Lot 54 to Sam and Frank Mezzacappa on November 14, 2006. On January 8, 2007, a correction deed was recorded with the Richmond County Clerk's Office to redress two errors in the November 14, 2006 deed. The errors in the November 14, 2006 deed related to the description of the metes and bounds of the Richmond Terrace property.
6. The northern boundary of the Richmond Terrace property is adjacent to the Kill van Kull. The Kill van Kull is a tidally influenced water body within New York State that has significant commercial traffic and recreation vessel usage.
7. Tidal Wetlands Map No. 572-498 depicts the Kill van Kull in the vicinity of the Richmond Terrace property. In the vicinity of the Richmond Terrace property, the Kill van Kull is a regulated tidal wetland.

8. From 1909 until the mid-1990s, a bulkhead extended along the northern boundary of the Richmond Terrace property adjacent to the Kill van Kull. The bulkhead was about 225 feet long.
9. Subsequent to August 1977, the Commissioner determined that the Kill van Kull off the northern shore of Staten Island was a regulated tidal wetland. At that time, the bulkhead along the Richmond Terrace property was a lawfully existing, functional and substantial fabricated structure that limited the landward boundary of the adjacent area on the site. The bulkhead continued to limit the landward boundary on the site until the mid-1990s.
10. Between 1996 and 2001, the bulkhead on the Richmond Terrace property began to deteriorate at the eastern end. Over time, the remaining portions of the bulkhead on the Richmond Terrace property deteriorated.
11. By 2004, the bulkhead had become significantly deteriorated, and ceased to be a functional and substantial fabricated structure. As a result, the bulkhead no longer limited the landward boundary of the adjacent area on the Richmond Terrace property, and the boundary of the adjacent area migrated landward.
12. On the northern end of the property near the Kill van Kull (landward of the former bulkhead), spot elevations plotted on the Wohl & O'Mara survey range from 1.2 feet to 9.4 feet. Examples of spot elevations on the survey within 150 feet from the shoreline are 6.1 feet, 7.4 feet, 7.5 feet and 8.3 feet. When converted from the Richmond High Water (RHW) Datum to the National Geodetic Vertical Datum of 1929 (NGVD 29) by adding 3.192 feet, some of the spot elevation values plotted on the Wohl & O'Mara survey exceed 10 feet. Since 2004, the landward boundary of the adjacent area on the Richmond Terrace property, therefore, has been limited to the 10-foot contour, which is at least 15 to 60 feet landward from the remnants of the previously functional bulkhead.
13. Between 2001 and 2004, material from the shoreline including soil, dirt, concrete rubble, and asphalt debris, has eroded into the Kill van Kull due to the deterioration of the bulkhead on the Richmond Terrace property.
14. George Stadnik is a Marine Resources Specialist from the Department's Region 2 Office. Mr. Stadnik visited the Richmond Terrace property on May 17, 2007, and determined

the apparent high water line on the Richmond Terrace property.

15. During his May 17, 2007 site visit, Mr. Stadnik observed, among other things, the continued erosion of the shoreline into the Kill van Kull, seaward of the mean high water level. In addition, Mr. Stadnik observed that concrete rubble, asphalt debris, and bricks had fallen into the Kill van Kull seaward of the mean high water level.
- 16.¹ Mr. Stadnik also observed, during his May 17, 2007 site visit, pieces of concrete rubble and soil piled in a manner to form a small berm along the northern boundary of the Richmond Terrace property. The berm is about 2 feet high and approximately 1 to 2 yards from the edge of the property. This portion of the Richmond Terrace property is within the adjacent area of the tidal wetland.
17. After searching the Department's files for permits concerning the Richmond Terrace property, Mr. Stadnik did not find any permit issued to any of the Respondents pursuant to ECL articles 15 and 25, and 6 NYCRR parts 608 and 661.
18. On May 17, 2007, pieces of concrete rubble and soil were piled along the northern boundary of the Richmond Terrace property. The piled material was about two feet high and approximately one to two yards from the shoreline of the property. This portion of the Richmond Terrace property is within the adjacent area of the tidal wetland. Respondents moved this pile landward subsequent to Mr. Stadnik's May 17, 2007 site visit.
19. The deterioration of the bulkhead on the Richmond Terrace property and the resulting erosion has created 2,225 to 3,250 square feet of shoals and mudflats. The area has become populated with tidal wetland flora and fauna such as seaweed, snails and fish. Staff has observed waterfowl in this reach of the Kill van Kull during visits to the site and the vicinity.
20. If the proposed location for a bulkhead is landward of the high tide line, its construction and the associated backfill

¹ As discussed below, Finding No. 16 has been amended. The amended finding is now identified as Finding No. 18.

are activities considered generally compatible with tidal wetland benefits.

21. Constructing the replacement bulkhead at the original location on the Richmond Terrace property would result in the loss of the newly established intertidal habitat. Therefore, off-site mitigation would be required at a ratio of 2:1, which would be about 4,500 square feet.
22. For the replacement bulkhead, Staff would prefer a timber crib structure that is filled with rocks. Depending on the tide cycle, organisms like fish and marine invertebrates could use the rocks and the spaces between them as foraging areas, for protection, or as habitat. A solid vertical wall of steel sheets (see Finding Nos. 25 and 26) would not provide these benefits.
23. Mr. DeFazio is a member of DeFazio Industries located at 38 Kinsey Place, Staten Island, and has been in the construction industry for 30 years. Mr. DeFazio is interested in purchasing the Richmond Terrace property, but only if the replacement bulkhead could be built at the original location. Mr. DeFazio would use the site to offload barges from the Kill van Kull. If the replacement bulkhead cannot be built at the original location, the Richmond Terrace property would not be large enough for Mr. DeFazio's anticipated business needs.
24. In a letter dated April 23, 2009, Sam Mezzacappa issued a request for bids to construct the replacement bulkhead at the Richmond Terrace property under two construction scenarios. The first would be to reconstruct the replacement bulkhead at the original location. The specifications for this scenario include removing the existing debris, and building a structure that would permit barges to tie up to the bulkhead while equipment (100 tons) on the landward side of the bulkhead offloads the material from the barges. The second construction scenario would be to construct the replacement bulkhead up to 20 feet landward from the original location. The specifications for the structure remain the same. For the second construction scenario, however, Mr. Mezzacappa requested estimates for the excavation and removal of rock.
25. William Mowbray from M Square Builders, Inc. provided a quote in response to Mr. Mezzacappa's April 23, 2009 request for bids. To construct the replacement bulkhead, Mr. Mowbray would use steel sheeting with tiebacks. With

respect to the first construction scenario, the estimated cost would be \$1,750 per linear foot for a total estimated cost of \$525,000. This estimate includes the removal of the debris associated with the deteriorated bulkhead. With respect to the second construction scenario, the estimated cost would be \$2,300 per linear foot for a total estimated cost of \$690,000. To excavate and remove rock, if necessary, the estimated cost would be an additional \$1,000 per cubic yard.

26. In addition to the quote received from M Square Builders, Inc., Mr. Mezzacappa also received quotes from Chesterfield Associates, Inc., Westhampton Beach, New York; Marine Bulkheading, Inc., Seaford, New York; and Soil Solutions, Inc., West Hampstead, New York. These contractors would use coated steel sheets tied back to precast concrete deadmen for the replacement bulkhead. With respect to the first construction scenario, the total costs estimated by these contractors range from \$570,000 to \$1,187,000. For the second construction scenario, the total costs estimated by these contractors range from \$660,000 to \$1,334,000. Estimates for the excavation and removal of rock range from \$600 to \$1,150 per cubic yard.
27. According to Frank Mezzacappa, reconstructing the replacement bulkhead landward from the original location would create an economic hardship for Respondents due, in part, to higher construction costs.
28. When they subdivided the Richmond Terrace property, Respondents were careful to retain ownership of at least 35,962 square feet for future development purposes (Exhibit 13, Lot 54) based on the presumption that a replacement bulkhead could be built at the original location. Potential future development uses include, among other things, operating a small concrete plant, docking barges and tugs, storing vehicles, and constructing a small building. These potential uses would be curtailed or prohibited if the location of the replacement bulkhead is moved landward.
29. Department staff would not have approved the subdivision of the Richmond Terrace property without first requiring Respondents to stabilize the shoreline due to the deteriorating bulkhead.
30. To subdivide the Richmond Terrace property, Respondents retained an architect and attorney to prepare the survey and other required documents. Prior to filing the documents

with the Richmond County Clerk's Office, these consultants did not advise Respondents that a permit from the Department was required. Subsequent to filing the subdivision documents for the Richmond Terrace property with the clerk's office, the architect retained by Respondents learned that a permit from the Department was necessary. The architect, however, did not apply for the tidal wetlands permit retrospectively because the subdivision had already been filed with the clerk's office.

Discussion

In the April 9, 2009 ruling (at 26-29), I determined that the parties raised factual disputes related to remediation of the Richmond Terrace property. Staff's proposed remediation plan (Exhibit 1) would include the following steps: (1) the removal of the remaining components of the deteriorated bulkhead and other debris from the site; and (2) the preparation and implementation of a plan to construct a replacement bulkhead landward from the original location. If Respondents are not able either to prepare the plan or to install the subsequently approved structure in an expeditious manner, Staff requested that the Commissioner direct Respondents to temporarily control any additional erosion at the site.

Respondents object to the proposed location for the replacement bulkhead because it would unfairly limit potential uses of the site in the future. According to Sam Mezzacappa, trucks would not have sufficient room to maneuver on the site. In addition, Mr. Mezzacappa argued that the proposed remediation conditions would substantially reduce the potential value of the Richmond Terrace property. Mr. Mezzacappa stated that Respondents would prefer to rebuild the bulkhead in its original location.

Staff correctly noted that the Commissioner may direct remediation "to restore the affected tidal wetland or area immediately adjacent thereto to its condition prior to the violation" (ECL 71-2503[1][c]). By disputing the appropriate location for the replacement bulkhead on the Richmond Terrace property, I concluded in the April 9, 2009 ruling that the parties had identified issues for adjudication about how to restore the tidal wetland to its condition prior to the violation.

I. Positions of the Parties

A. Department Staff

In his opening statement, Mr. Drescher stated that settlement discussions had focused on locating the replacement bulkhead where it would restore the Richmond Terrace property to some useable function. Staff argued, however, that the purpose of the hearing should be to determine how to restore the tidal wetlands to the condition that existed prior to the violations, as required by ECL 71-2503(1)(c). (Tr. at 7-8.)

Before the affected tidal wetlands can be restored, Staff contended that an issue exists concerning the condition of the tidal wetlands prior to the violations. Staff noted that several different violations occurred from 2001 to May 2007. Staff argued that the statutory requirement to "preserve wetlands and prevent their despoliation" (ECL 25-0102), and the Commissioner's Enforcement Policy entitled, *Tidal Wetlands Enforcement Policy*, dated February 8, 1990 (DEE-7), provide guidance about how tidal wetlands should be restored after illegal activities have occurred there. (Tr. at 9.)

Staff asserted that Respondents should not be rewarded for neglecting the bulkhead so that it deteriorated to such a condition that the wetlands were adversely impacted, and then allow them to restore their property to its original condition. Staff noted that material eroded from the Richmond Terrace property into the tidal wetlands for several years, and observed that, due to the action of the tides, it would be very difficult to locate, recover and remove all the material that eroded from the site. According to Staff, the eroded material was distributed throughout the Kill van Kull and the Arthur Kill wetlands ecosystem, and continues to adversely impact the tidal wetlands in the area. (Tr. at 9-10.)

Staff asserted that, as a matter of law, the Commissioner could not authorize Respondents to put the replacement bulkhead where the original had been located and, subsequently, backfill the area. Rather, because the original bulkhead deteriorated and erosion resulted, Staff argued that Respondents must locate the replacement bulkhead along the newly formed shoreline to minimize the amount of backfill. To support this argument, Staff cited ECL 25-0201(6), which allows the Commissioner to amend the maps to reflect any naturally occurring changes to the boundaries of tidal wetlands that may have resulted from erosion, among other things. (Tr. at 11-12.)

Staff contended that if Respondents want a bulkhead or some other shoreline stabilization feature on the site, the Commissioner should direct Respondents to submit an application for a tidal wetlands permit. Within the context of reviewing a permit application, Staff asserted that a proposal and alternatives could be properly evaluated. In the meantime, Staff requested that the Commissioner direct Respondents to cease and desist from any other activities that would contribute to additional violations, and to remove any fill material that Respondents had placed near the shoreline that could erode into the tidal wetlands. (Tr. at 12-13.)

In its closing statement dated July 3, 2009, Staff reiterated the arguments presented in its opening statement. To remediate the Richmond Terrace property, Staff requested that the Commissioner direct Respondents to remove all materials that have collapsed onto the shoreline, as well as the manmade materials located in the Kill van Kull that are visible at low tide. In addition, Staff also requested that the Commissioner direct Respondents to temporarily stabilize the shoreline of the Richmond Terrace property by grading it at a 2:1 slope and installing a geotextile fabric as erosion control. Staff noted that Respondents, or their successors, may subsequently file an application for a tidal wetlands permit to permanently install a shoreline stabilization feature that would be consistent with the permit issuance criteria outlined in the applicable statutes and regulations.

B. Respondents

In Respondents' opening statement, Sam Mezzacappa argued that the location of the replacement bulkhead proposed by Department staff would reduce the area of the Richmond Terrace property by 4,000 to 5,000 square feet. As a result, the cost of the replacement bulkhead would increase by at least \$300,000, according to Mr. Mezzacappa. Mr. Mezzacappa argued further that the resulting decrease in the size of the property would also reduce its value, which would make it more difficult to sell. Mr. Mezzacappa asserted that a reduction in the value of the Richmond Terrace property would be a financial hardship to Respondents. (Tr. at 48-49.)

With their July 6, 2009 closing statement, Respondents enclosed the following materials. The first enclosure is a handwritten, undated letter by Sam Mezzacappa addressed to Mr. Drescher. This letter references a March 2008 letter, and states that Mr. Mezzacappa has not received a response from Staff concerning the March 2008 letter. In the first enclosure, Mr.

Mezzacappa requests that the administrative enforcement action concerning the Richmond Terrace property move more expeditiously than the unrelated action commenced by Department staff against Respondents concerning their Meredith Avenue property (see DEC Case No. R2-20050607-202).

The second enclosure is a copy of a letter dated March 17, 2008 by Sam Mezzacappa addressed to Mr. Drescher, and concerns the Richmond Terrace property. In his March 17, 2008 letter, Mr. Mezzacappa requested a quick resolution of the administrative enforcement action concerning the Richmond Terrace property, and recommended a telephone conference call with the ALJ to discuss the matter. With this enclosure, Mr. Mezzacappa included a copy domestic return receipt, which demonstrates that "CB" from the Region 2 Department staff received Mr. Mezzacappa's March 17, 2008 letter on April 1, 2008.

The third enclosure is a copy of a typewritten, undated letter by Sam Mezzacappa addressed to Mr. Drescher concerning the Richmond Terrace property. In this letter, Mr. Mezzacappa stated that "this has been dragging on to [sic] long and we demand that this move along...." In this correspondence, Mr. Mezzacappa is referring to the captioned administrative enforcement action.

In the fourth enclosure, Mr. Mezzacappa explained that he included two drawings, which are intended to clarify Respondents' arguments concerning the 10-foot contour line and the scope of the Department's jurisdiction over the Richmond Terrace property. The first drawing is a color coded version of what was previously identified in the record of this matter as Exhibit 30. For purposes of identification, it will be identified as Exhibit 30-A on the revised Exhibit List (see Appendix A). The second drawing is a version of what was previously identified in the record of this matter as Exhibit 23. For purposes of identification, it will be identified as Exhibit 23-A (see Appendix A). These documents are discussed below.

In the July 8, 2009 e-mail, Mr. Mezzacappa presented arguments about the following topics. With reference to the April 9, 2009 ruling (at 8), Finding No. 16 identifies the presence of a berm near the shoreline. According to the May 11, 2009 hearing transcript, Mr. Mezzacappa argued, however, that this is a mischaracterization.

In the April 9, 2009 ruling (at 6), Finding Nos. 4 and 5 explain how the Richmond Terrace property was subdivided, and that ownership of a portion of the subdivided property was subsequently transferred from Mezzacappa Bros. to Sam and Frank

Mezzacappa. With reference to the May 11, 2009 hearing transcript, Mr. Mezzacappa explained that Respondents had retained the services of an architect to prepare documents to subdivide the property, and to file these documents with the Richmond County Clerk's Office. According to Mr. Mezzacappa, the architect was unaware of the need to obtain a tidal wetlands permit from the Department prior to filing documents with the clerk's office. Subsequent to filing the documents, Respondents' architect learned that a permit was required. The architect, however, did not seek to obtain a permit retrospectively because the documents had already be filed with the county clerk.

In the remainder of their July 8, 2009 closing statement, Respondents reiterated the following arguments. First, the value of the Richmond Terrace property would be substantially reduced if the replacement bulkhead must be located landward from the original. Second, the cost of constructing the replacement bulkhead landward from the original location would be substantially more than building the replacement bulkhead at the original location. According to Mr. Mezzacappa, these additional costs would be a financial hardship on Respondents.

Mr. Mezzacappa also offered to use the Meredith Avenue property for off-site mitigation if the Commissioner would permit the construction of the replacement bulkhead at the original location on the Richmond Terrace property. Finally, Mr. Mezzacappa renewed his request to have the Commissioner consider the administrative enforcement actions concerning the Meredith Avenue property and the Richmond Terrace property together, and to decide them as expeditiously as possible. According to Respondents, construction of the bulkhead or alternative shoreline stabilization feature could be undertaken faster, and the overall costs would be reduced. Mr. Mezzacappa also noted Mr. DeFazio's continued interest in purchasing the Richmond Terrace property.

II. Liability

Issues related to liability, including Respondents' affirmative defenses concerning subject matter jurisdiction, were fully addressed in the April 9, 2009 ruling. Nevertheless, Respondents inappropriately offered additional evidence concerning the 10-foot contour line with their closing statement. This information is beyond the scope of the adjudicatory hearing, which was limited to remediation issues. Also, Staff was not provided the opportunity to review this additional information because Respondents offered it with their closing statement. At

the conclusion of the hearing, the parties agreed to file only a closing statement and not replies (Tr. at 211-213).

A. 10-foot Contour

As noted above, Exhibit 30-A is a color-coded version of what is identified in the record of this matter as Exhibit 30. In the April 9, 2009 ruling (at 16), Exhibit 30 is an enlarged portion of the Elizabeth, New Jersey USGS Quadrangle. Respondents offered Exhibit 30 to show the location of the 10-foot contour that could limit the landward boundary of the adjacent area on the Richmond Terrace property (see 6 NYCRR 661.4[b][1][iii]). The purpose of Exhibit 30-A is the same as Exhibit 30.

I found, in the April 9, 2009 ruling (at 16), that it was not possible to determine where the Richmond Terrace property was located on Exhibit 30 because the site was not marked. On Exhibit 30-A, Mr. Mezzacappa had highlighted several features including the street identified as Richmond Terrace, the location of Respondents' property, and the 10-foot contour line.

Though I could not locate Respondents' property on Exhibit 30, I noted, in the April 9, 2009 ruling (at 16-17), that it was possible to locate the 10-foot contour. I noted further that on Exhibit 30, the 10-foot contour line is landward of the shoreline and all shoreline features, such as bulkheads and piers, as well as some buildings located near the shoreline. With respect to Exhibit 30-A, I am able to make the same observation, in general, and with respect to Respondents' property, in particular.

The second item, identified as Exhibit 23-A, is a version of what was previously identified in the record of this matter as Exhibit 23. Exhibit 23 (and 23-A) are enlargements of Exhibit 22 (see April 9, 2009 ruling at 12). Exhibit 22 is a topographic survey of Staten Island dated April 1909. The Richmond Terrace property and the 10-foot contour line are depicted on Exhibits 22, 23, and 23-A. On these exhibits, the 10-foot contour line is landward of Respondent's property. In other words, all of the Richmond Terrace property is at an elevation less than 10 feet above sea level based on Exhibits 22, 23 and 23-A. Rather than support Respondents' assertion that the landward boundary of the adjacent area on the Richmond Terrace property is less than 150 feet from the tidal wetland boundary, Exhibits 22, 23 and 23-A prove that the landward boundary of the adjacent area could extend up to 150 feet from the tidal wetland boundary.

In order for the 10-foot contour to limit the landward boundary of the adjacent area on the Richmond Terrace property to less than 150 feet from the tidal wetland boundary (see 6 NYCRR 661.4[b][1][iii]), the location of the 10-foot contour line on Exhibits 22, 23, 23-A, 30 and 30-A should be along, or very close to, the shoreline. Such is not the case with respect to any of these Exhibits.

Nevertheless, after considering Exhibit 26, which is the Wohl & O'Mara survey of the site (see Exhibit 13) and Exhibit 21, which is Mr. Spiezia's February 28, 2008 letter, I found in the April 9, 2009 ruling (at 7-8 [see Finding No. 12], and at 16-17), that the 10-foot contour on the Richmond Terrace property is between 15 to 60 feet landward from the remnants of the original bulkhead. I concluded (see April 9, 2009 ruling at 17 and 29 [see Conclusion No. 4]), pursuant to 6 NYCRR 661.4(b)(1)(iii) that the landward boundary of the adjacent area is limited to the 10-foot contour, which is between 15 to 60 feet landward from the location of the original bulkhead. Exhibits 23-A and 30-A do not change the facts or my conclusions as outlined in the April 9, 2009 ruling.

B. Fill in the Adjacent Area

In Respondents' closing statement, Sam Mezzacappa asserted that Finding No. 16 in the April 9, 2009 ruling (at 8) is inaccurate, and argued that Respondents did not construct a berm on the Richmond Terrace property near the shoreline. To support his argument, Mr. Mezzacappa referred to the May 11, 2009 hearing transcript at 151-153, and 160.

During the hearing, Frank Mezzacappa recalled Mr. Stadnik's May 17, 2007 site visit. Mr. Mezzacappa testified that Mr. Stadnik came to the site on May 17, 2007, and took several photographs, some of which are incorporated into what is identified as Exhibit 8. Photos 3a-c are on page 3 of 7 in Exhibit 8. According to Mr. Mezzacappa, Mr. Stadnik told Respondents to move the pile of material located near the edge of the eroding bank landward. Mr. Mezzacappa explained that subsequently he borrowed equipment to move the material landward as requested by Mr. Stadnik. (Tr. at 151-152.)

Frank Mezzacappa testified further that Respondents did not dump any material on the Richmond Terrace property near the edge of the water to stop erosion. Mr. Mezzacappa observed that the high tide washes soil away at the toe of the bank and creates an overhang. The overhanging material eventually falls into the tidal wetland, and that material is subsequently washed away.

The process repeats, and the shoreline continues to migrate landward. According to Mr. Mezzacappa, a berm or a pile of material placed near the edge of the water would only encourage the material to collapse sooner due to the additional weight associated with this material. (Tr. at 153.)

Frank Mezzacappa testified further that since Mr. Stadnik's visit on May 17, 2007, Respondents did not dump any material on the Richmond Terrace property. Mr. Mezzacappa is not aware that anyone else dumped any material at the site since May 17, 2008. (Tr. at 160.)

In his October 16, 2008 affidavit, Mr. Stadnik states his observations during the May 17, 2007 visit to the Richmond Terrace property and that he took photographs (Exhibit 8, Paragraphs 7, 8, 10 and 11). Mr. Stadnik does not use the term "berm" in his October 16, 2008 affidavit. Mr. Drescher, however, characterizes the material as a berm in his October 28, 2008 memorandum of law (Exhibit 2, Paragraphs 26 and 27). In their response to Staff's motion (Exhibit 19, Part 4), Respondents denied constructing a berm, but did not offer any proof either to support their denial, or to contradict Staff's characterization of the material deposited on the Richmond Terrace property. However, Respondents admitted "[t]here are a few loads dump [sic] there...."

As a result of the information obtained during the hearing, I amend Finding No. 16 to read as follows:

Mr. Stadnik also observed, during his May 17, 2007 site visit, pieces of concrete rubble and soil piled along the northern boundary of the Richmond Terrace property. The piled material is about 2 feet high and approximately 1 to 2 yards from the edge of the property. This portion of the Richmond Terrace property is within the adjacent area of the tidal wetland. Respondents moved this pile landward subsequent to Mr. Stadnik's May 17, 2007 site visit.

This amended finding is now identified as Finding No. 18. Respondents placed this material in the adjacent area of the tidal wetland without a permit from the Department. Therefore, on May 17, 2007 Frank and Sam Mezzacappa violated ELC 25-0401 and 6 NYCRR 661.8 when they placed fill along the northern boundary of the Richmond Terrace property in the adjacent area of the Kill van Kull, a tidal wetland, without a permit from the Department.

C. Subdivision of Property

On May 10, 2005, Mezzacappa Bros. violated ECL 25-0401 and 6 NYCRR 661.8 when it subdivided the Richmond Terrace property, which is land located within the adjacent area of a regulated tidal wetland, without a permit from the Department. In their closing statement, Respondents asserted that Finding Nos. 4 and 5 are inaccurate.

Upon review, I find that Finding Nos. 4 and 5 are accurate. In the April 9, 2009 ruling (at 23), I related the circumstances about how Respondents retained an attorney and architect who were unaware that 6 NYCRR 661.4(ee)(1)(v) identifies the subdivision of property in or adjacent to a tidal wetland as a regulated activity that requires a permit from the Department. During the course of these proceedings, Respondents have not offered any evidence to change these facts. Nevertheless, Respondents subdivided their property without the benefit of a permit from the Department and, therefore, violated ECL 25-0401 and 6 NYCRR 661.8 (see Conclusion No. 11). Below, I discuss that Respondents, given their reliance on their consultants, did not intend to violate ECL 25-0401 and 6 NYCRR 661.8 by subdividing the Richmond Terrace property, and that this circumstance should be considered a significant mitigating factor in determining the appropriate civil penalty for this particular violation.

D. Fill in the Kill van Kull

As discussed in the April 19, 2009 ruling, Respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 from 2001 to 2004 and on May 17, 2007 when they allowed fill to enter the Kill van Kull, a navigable water of the State, from the Richmond Terrace property without a permit from the Department. During the same periods, Respondents also violated ECL 25-0401 and 6 NYCRR 661.8 from 2001 to 2004 and on May 17, 2007 when they allowed fill to enter the Kill van Kull, a regulated tidal wetland, from the Richmond Terrace property without a permit from the Department.

III. Remediation

A. Department Staff

For the reasons discussed above, Staff amended its remediation request at the hearing. Rather than decide where to locate the replacement bulkhead as part of this enforcement action, Staff now prefers to have Respondents stabilize the shoreline and, subsequently, file a permit application for a permanent shoreline stabilization feature, such as a replacement

bulkhead. According to Staff, the consideration of a tidal wetlands permit application would provide the opportunity to evaluate alternatives, and to select the alternative that minimizes potential adverse environmental impacts to the tidal wetlands.

George Stadnik is a Marine Resources Specialist in the Department's Region 2 Office, Bureau of Marine Resources. Mr. Stadnik has over 23 years of experience. His duties include the review of protection of waters and tidal wetland permit applications. Mr. Stadnik also conducts enforcement investigations related to tidal wetlands. (Tr. at 15.)

During the hearing, Mr. Stadnik recommended that Respondents be directed to remove all the material from the tidal wetlands located immediately offshore from the Richmond Terrace property. This material includes concrete rubble, asphalt, gravel, wood cribbing, and other remnants of the now deteriorated bulkhead. Most of this material is visible at low tide. (Tr. at 16-18.)

After the bulkhead deteriorated and failed, Mr. Stadnik explained that tidal action scoured away material from the toe of the shoreline. An overhang developed, and the overhanging material subsequently fell into the tidal wetlands. According to Mr. Stadnik the process keeps repeating. As a result, the shoreline is moving landward as upland material erodes into the tidal wetland by this process. (Tr. at 18-19.) As noted above, Frank Mezzacappa offered the same explanation for the landward movement of the shoreline (Tr. at 153).

To stabilize the shoreline of the Richmond Terrace property, Mr. Stadnik recommended that the shoreline be regraded to a slope of 2:1 (two feet horizontal for every vertical foot), and covered with a geotextile fabric. (Tr. at 16-17.) To illustrate these recommendations, Mr. Stadnik referred to Exhibit 40. Exhibit 40 is a photograph taken by Mr. Stadnik from the northwest corner of the Richmond Terrace property looking east. The photograph depicts the shoreline stabilization feature on the property adjacent to Respondents' which is a city park. (Tr. at 192, 195; Exhibits 12 and 40.) Mr. Stadnik said that regrading the site could be considered either a temporary solution pending the review of a tidal wetlands permit application (Tr. at 18-19), or a permanent feature such as that undertaken in the adjacent park (Tr. at 195-196; Exhibit 40).

Mr. Stadnik stated that the deterioration of the bulkhead on the Richmond Terrace property and the resulting erosion has created 2,225 to 3,250 square feet of shoals and mudflats.

According to Mr. Stadnik, marine snails and seaweed could establish themselves in the recently created tidal wetlands at this location. Subsequently, bait fish, horse fish, blue fish and stripped bass use this area during high tide. (Tr. at 186-187, 202.) During his many visits to the site and the vicinity, Mr. Stadnik has observed waterfowl in this reach of the Kill van Kull (Tr. at 188, 200; Exhibit 39).

Mr. Stadnik made the following recommendations about the location of the replacement bulkhead, and the materials that should be used to construct it. With respect to its location, Mr. Stadnik noted that constructing a bulkhead and the associated backfilling are activities considered generally compatible with tidal wetland benefits if the bulkhead is located landward of the high tide line (see 6 NYCRR 661.5[b][Uses 29 and 30]) (Tr. at 19-20). Mr. Stadnik said that putting the replacement bulkhead in the original location would result in the loss of the intertidal habitat that has become established since 1996 (Tr. at 202). Therefore, Mr. Stadnik recommended that the replacement bulkhead, if ordered by the Commissioner, should be located 14 feet landward from the original bulkhead line (Tr. at 202; Exhibit 14).

Mr. Stadnik offered some testimony about a tidal wetlands permit application filed by Atlantic Salt, which wanted to stabilize the shoreline of its property after a long-existing bulkhead deteriorated. To obtain the requested permit for a replacement bulkhead at the original location, Atlantic Salt had to provide off-site mitigation at a ratio of 2:1, according to Mr. Stadnik. This means that for every unit (*i.e.*, square foot) of wetland at the Atlantic Salt site that was lost, Atlantic Salt had to provide two replacement units. (Tr. at 189.) For the mitigation associated with the Atlantic Salt permit application, Mr. Stadnik explained that Staff calculated the monetary value of the off-site mitigation and applied it to the cost of a public benefit project (Tr. at 197).

Mr. Stadnik said that the location of the replacement bulkhead on the Richmond Terrace property would determine the amount of off-site mitigation required. If, for example, Respondents want to build the replacement bulkhead in the original location, Staff would require Respondents to provide about 4,500 square feet of off-site wetlands to mitigate the loss of the on-site wetlands (Tr. at 191).

In addition, Mr. Stadnik opined that the materials used to construct the shoreline structure would impact the environment. For example, a timber crib structure that is filled with rocks

would provide significant environmental benefits. Depending on the tide cycle, organisms like fish, marine snails, worms, and crustaceans can use the rocks and the spaces between them as a foraging area, for protection, or as habitat. A solid vertical wall of steel sheets would not provide these benefits. (Tr. at 198.) For the replacement bulkhead, regardless of its location, Department staff would prefer timber cribbing over steel sheeting (Tr. at 209). Mr. Stadnik emphasized the importance of being able to evaluate alternatives as part of the review for a tidal wetlands permit application, particularly if off-site mitigation is required (Tr. at 199).

B. Respondents

Respondents offered the testimony of three witnesses. John DeFazio is a contractor who owns property in the vicinity of the Richmond Terrace site. Mr. DeFazio, among others, has expressed an interest in purchasing the site from Respondents. William (Sean) Mowbray is the owner of M Square Building. Mr. Mowbray responded to Sam Mezzacappa's request for bids (Exhibit 33) to replace the bulkhead on the Richmond Terrace property (Exhibit 34). Frank Mezzacappa also testified on behalf of Respondents.

Mr. DeFazio is a member of DeFazio Industries located at 38 Kinsey Place, Staten Island (Tr. at 57). He has been a contractor for 30 years (Tr. at 49). Mr. DeFazio said that he is interested in purchasing the Richmond Terrace property, but only if the replacement bulkhead could be built in the original location. Mr. DeFazio would use the site to offload barges from the Kill van Kull. (Tr. at 55, 62.) If the replacement bulkhead cannot be built in the original location, Mr. DeFazio stated that the Richmond Terrace property would not be large enough for his anticipated use. For example, he would not have sufficient space on the site to maneuver trucks, among other things. (Tr. at 56, 70.)

In a letter dated April 23, 2009, Sam Mezzacappa issued a request for bids to construct the replacement bulkhead at the Richmond Terrace property (Exhibit 33). Mr. Mezzacappa asked the potential contractors to consider two construction scenarios. The first would be to reconstruct the replacement bulkhead at the original location. The specifications include removing the existing debris, and building a structure that would permit barges to tie up to the bulkhead while equipment (100 tons) on the landward side of the bulkhead offloaded the material from the barges. The second construction scenario would be to construct the replacement bulkhead up to 20 feet landward from the original shoreline. The specifications for the structure remain the same.

However, Mr. Mezzacappa requested an estimate for excavating rock.

William Mowbray from M Square Builders, Inc. provided Mr. Mezzacappa with a quote dated May 9, 2009 (Exhibit 34). At the hearing, Mr. Mowbray explained that M Square Builders, Inc. is a family business, and that he has worked for the business for 25 years. M Square Builder, Inc. builds bulkheads in the New York/New Jersey area. (Tr. at 94-95). To construct the replacement bulkhead, Mr. Mowbray would use steel sheeting with tiebacks. With respect to the first construction scenario, the estimated cost would be \$1,750 per linear foot. This estimate includes the removal of the debris associated with the deteriorated bulkhead. (Tr. at 98-99, 102-103.) With respect to the second construction scenario, the estimated cost would be \$2,300 per linear foot. For excavating rock, if necessary, the estimated cost would be \$1,000 per cubic yard. Mr. Mowbray would subcontract the backfilling and the excavation of the rock, if encountered. (Tr. at 99, 102-103.)

Based on his experiences, Mr. Mowbray said that excavating rock would be necessary if the replacement bulkhead is constructed landward from the original location. As recently as two years ago, Mr. Mowbray observed the US Army Corps of Engineers excavating rock from the shipping channel in the Arthur Kill and Kill van Kull. (Tr. at 106-108.)

With respect to the first construction scenario, Mr. Mowbray estimated that the total cost for the replacement bulkhead would be \$525,000. The water-front length is about 225 feet. There is a return on the eastern end of the property that is 75 feet long. Therefore, the total length of the bulkhead would be 300 feet (*i.e.*, \$1,750 per linear foot x 300 feet is \$525,000). (Tr. at 101.) The estimated total cost for constructing the replacement bulkhead landward of the original shoreline would be \$690,000 (*i.e.*, \$2,300 per linear foot x 300 feet). This estimate does not include the excavation of rock. (Tr. at 102).

In addition to the quote received from M Square Builders, Inc., Mr. Mezzacappa also received quotes from Chesterfield Associates, Inc., Westhampton Beach, New York (Exhibit 36), Marine Bulkheading, Inc., Seaford, New York (Exhibit 37), and Soil Solutions, Inc., West Hampstead, New York (Exhibit 38). Chesterfield Associates, Inc. would use coated steel sheets tied back to precast concrete deadmen. For the first construction scenario, the estimated cost would be \$1,900 per linear foot. For the second construction scenario, the estimated cost would be \$2,200 per linear foot. These cost estimates include the

backfill. The quote provided by Chesterfield Associates, Inc. did not include an estimate for excavating rock because that portion of the construction project would be subcontracted.

Marine Bulkheading, Inc. would use coated steel sheeting tied to precast concrete deadmen. For the first construction scenario, the total estimated cost would be \$1,187,000, or about \$4,000 per linear foot. For the second construction scenario, the total estimated cost would be \$1,334,000, or about \$4,450 per linear foot. For excavating rock, if necessary, the cost would be \$1,150 per cubic yard.

Soil Solutions, Inc. would use steel sheeting for the replacement bulkhead. For the first construction scenario, the estimated cost would be \$2,100 per linear foot. For the second construction scenario, the estimated cost would be \$2,650 per linear foot. For excavating rock, if necessary, the cost would be \$600 per cubic yard.

Frank Mezzacappa testified that he and his brother, Sam, own the Richmond Terrace property, Block 1070, Lot 54 (Tr. at 121). Mr. Mezzacappa stated that ledge rock is located offshore from the Richmond Terrace property in the Kill van Kull. He explained that if the replacement bulkhead had to be built landward from its original location, rock would need to be excavated from the site. As a result, the presence of rock would make it difficult to bring in heavily loaded barges to the site. According to Mr. Mezzacappa, moving the replacement bulkhead landward would create an economic hardship for the reasons explained above. (Tr. at 125-128.)

When the Richmond Terrace property was subdivided, Sam and Frank Mezzacappa retained ownership of 35,962 square feet (Exhibit 13 [Lot 54]). According to Frank Mezzacappa, Respondents were careful to retain ownership of this amount of space, and presumed that in the future a replacement bulkhead could be built at the original location. (Tr. at 131.) Mr. Stadnik testified, however, that Department staff would not have approved the subdivision without requiring Respondents to stabilize the shoreline due to the deteriorating bulkhead (Tr. at 186). Mr. Mezzacappa testified that potential uses for Lot 54, at the presumed size of 35,962 square feet, would include operating a small concrete plant, docking barges and tugs, storing vehicles, and constructing a small building. Mr. Mezzacappa said that these potential uses would be curtailed, or prohibited if the location of the replacement bulkhead had to be moved landward. (Tr. at 131.)

Mr. Mezzacappa observed that most of the shoreline of the Arthur Kill is currently bulkheaded. According to Mr. Mezzacappa, replacing the bulkhead along the Richmond Terrace property would not adversely impact the tidal wetlands. (Tr. at 156.)

C. Discussion and Recommendations

The Commissioner has the authority, pursuant to ECL 71-2503(1)(c), to require Respondents to restore the affected tidal wetlands or area immediately adjacent thereto to their condition prior to the violation, insofar as it is possible within a reasonable time. Department staff's remediation proposal, as revised during the hearing, is reasonable given the current site conditions, and would be consistent with the applicable statute. Based on Mr. Stadnik's testimony, the condition of the tidal wetland in the vicinity of the Richmond Terrace property prior to the violations can be determined. I find that the tidal wetlands with the associated benefits, have moved landward due to the deterioration of the formerly functional bulkhead at the Richmond Terrace property.

In addition, Staff has correctly apprehended the intent of ECL 71-2503(1), which is to restore the affected tidal wetlands rather than to restore the Richmond Terrace property to some useable function. Consequently, Staff's legal argument that the replacement bulkhead should not be built in the location of the original bulkhead without some mitigation, is persuasive. Moreover, Staff's request to have the Commissioner direct Respondents to stabilize the shoreline by grading it to a slope of 2:1, and installing a geotextile fabric could be undertaken within a reasonable time, as required by the statute (see ECL 71-2503[1]).

Due to the expansion of the tidal wetlands at the Richmond Terrace property, Mr. Stadnik offered some expert opinion about the compatibility of building the replacement bulkhead at various locations on the site, the materials to use to construct the replacement bulkhead, potential alternative stabilization structures, and the potential need for mitigation. These topics, however, were not fully developed on the record, and any consideration of the permit issuance standards is beyond the scope of this enforcement action. Therefore, whether Respondents could build the replacement bulkhead in the location of the original bulkhead is an issue better addressed within the context of a tidal wetlands permit application.

Nonetheless, from Respondents' perspective, a full resolution of the violations considered in this enforcement action would be based on their ability to sell the site, which is directly linked to how useful the Richmond Terrace property would be after the tidal wetlands are restored. Based on the testimony offered by Mr. DeFazio and Frank Mezzacappa, a larger site would be more useful (Tr. at 53, 56, 70, 131, 143, 155). The evidence offered by Respondents shows that building the replacement bulkhead landward from the original location would reduce the interest in, and value of, the property (Tr. at 143, 158-159; Exhibit 35), and would be very costly (Tr. at 98-102; *cf* Exhibits 34, 36, 37, and 38).

The record does not include any cost estimates for temporarily stabilizing the shoreline by grading it at a 2:1 slope and installing a geotextile fabric. The costs associated with temporarily stabilizing the shoreline would be in addition to those associated with constructing the replacement bulkhead, regardless of where it should be located, and assuming that Respondents, or subsequent property owners, obtain a tidal wetlands permit. Therefore, the Commissioner may find it more equitable to order the construction of the replacement bulkhead now.

The following factors would favor this course of action. First, Respondents have been retired since 1997, and the corporate Respondent has been inactive since that time (Tr. at 122, 161). As a result, Sam and Frank Mezzacappa have been trying to liquidate their remaining assets, which includes selling the Richmond Terrace property. According to Respondents' closing statement, Staff has been slow to move the captioned administrative enforcement action forward. Respondents argued that this delay has inordinately prolonged the liquidation process. The time frame for constructing the replacement bulkhead is unknown if the remediation ordered by the Commissioner requires Respondents to stabilize the shoreline before Staff would consider a tidal wetlands permit application. In addition, requiring shoreline stabilization now does not resolve questions concerning the future uses of the site, based on the testimony of Mr. DeFazio and Frank Mezzacappa. As a result, unknown site constraints will continue to impact the sale of the Richmond Terrace property.

Second, prior to commencing the captioned administrative enforcement action, Department staff had commenced a separate administrative enforcement action against Respondents concerning a site located at 200 Meredith Avenue in Richmond County (DEC Case No. R2-20050607-202). A final determination in the matter

concerning the Meredith Avenue property is pending. As noted above, Respondents have requested that the Commissioner consider the two cases together, and issue either a joint decision concerning the two matters or separate decisions simultaneously.

If the Commissioner authorizes Respondents to construct the replacement bulkhead as part of the remediation, issues of where to locate the replacement bulkhead, and what materials to use for its construction must be addressed. These issues were discussed at length above.

If Respondents had obtained the required approval from the Department before subdividing the property, they may have avoided the predicament in which they now find themselves. According to Mr. Stadnik, Staff would not have approved the subdivision of the Richmond Terrace property without first requiring Respondents to stabilize the shoreline (Tr. at 186). As noted above, Respondents were mindful to subdivide the property in a manner that would preserve 35,962 square feet (Tr. at 165-166; Exhibit 13, Lot 54) based on the presumption that they, or any subsequent owner, could undertake an in-kind, in-place replacement of the existing, but deteriorating, bulkhead.

The April 6, 2009 ruling (at 23), however, identified a significant mitigating factor with respect to this violation. Although Frank Mezzacappa acknowledged that Respondents ultimately decided how the Richmond Terrace property would be subdivided (Tr. at 167), Respondents unfortunately had retained a consultant who was not familiar with the Department's regulations. Consequently, Respondents did not intentionally violate 6 NYCRR 661.8. In deciding whether to include construction of the replacement bulkhead as part of the remediation, the Commissioner may consider Respondents' lack of intent to violate 6 NYCRR 661.8, with respect to the subdivision of the Richmond Terrace property, as a mitigating factor.

In their closing statement, Respondents offered to implement off-site mitigation at the Meredith Avenue property in order to construct the replacement bulkhead in the original location at the Richmond Terrace property. The purpose of the off-site mitigation is to either create new tidal wetlands or enhance existing tidal wetlands. The Meredith Avenue site is adjacent to the Arthur Kill, which is also a regulated tidal wetland and a navigable water of the State. With respect to the Meredith Avenue site, however, Staff has alleged that Respondents encroached on the tidal wetlands, and have requested mitigation of the tidal wetlands and adjacent area at the Meredith Avenue property. Given the pending enforcement action concerning the

Meredith Avenue property that may require mitigation, I recommend that the Commissioner not consider the Meredith Avenue property as a potential off-site mitigation location.

Based on the foregoing, I recommend that the Commissioner require Respondents to remediate the Richmond Terrace property in the following manner. First, the Commissioner should direct Respondents to remove all debris associated with the deteriorated bulkhead including those components that are visible at low tide. Second, Respondent should be required to grade the shoreline at a 2:1 slope and install a geotextile fabric to stabilize the slope. Subsequently, either Respondents, or subsequent property owners, may file a permit application to reconstruct the bulkhead.

IV. Civil Penalties

In the October 28, 2008 motion for order without hearing, Department staff requested a total civil penalty of \$50,000. For violating provisions of ECL article 15, title 5 and 6 NYCRR part 608, Staff cited ECL 71-1107, which provides for a maximum civil penalty of \$5,000 for each violation. With respect to violating ECL article 25 and 6 NYCRR part 661, Staff referred to ECL 71-2503, which provides for a maximum civil penalty of \$10,000 per day for each violation.

The Commissioner may consider the following factors in assessing the appropriate civil penalty. The first factor concerns the number of violations. ECL 15-0505(1) prohibits the placement of fill in navigable waters of the State without a permit from the Department, and the implementing regulations at 6 NYCRR 608.5 mirror the statutory prohibition. Similarly, ECL 25-0401(1) requires persons to obtain a permit from the Department before undertaking regulated activities in or adjacent to tidal wetlands. The regulations at 6 NYCRR 661.8 mirror the statutory requirement at ECL 25-0401(1) to obtain a permit.

In *Matter of Richard K. Steck* (Order of the Commissioner, March 29, 1993), the Commissioner considered whether it would be appropriate to assess separate civil penalties for violating a statute and a regulation where the regulation reiterates a statutory prohibition. Under such circumstances, the Commissioner held that it would be inappropriate to conclude that separate violations have occurred. The Commissioner held further that it would be inappropriate to assess separate civil penalties because such an assessment would undermine the intent of the Legislature to establish the level of maximum civil penalties for a particular violation. More recently, the Commissioner reaffirmed these principles in determining the appropriate civil

penalty in the *Matter of Frank Coppola, Sr.* (Order of the Commissioner, Nov. 12, 2003). Therefore, with respect to the captioned matter, it would be inappropriate to conclude that a violation of ECL 15-0505(1) is separate and distinct from a violation of 6 NYCRR 608.5 when alleged in the same cause of action. Also, a violation of ECL 25-0401(1) would not be a separate and distinct violation of 6 NYCRR 661.8 when alleged in the same cause of action.

In the *Matter of Linda Wilton and Costello Marine, Inc.* (Order, Feb. 1, 1991), the Commissioner determined that a single act that would require a permit under three independent bases constituted three distinct violations. The principle in *Wilton* applies here with respect to alleged violations of ECL 15-0505(1) and ECL 25-0401(1). The factual elements for these violations are directly related to the deterioration of the bulkhead, and the resulting erosion of upland material into the Kill van Kull. The Kill van Kull is regulated as a navigable water of the State pursuant to ECL article 15, title 5, and as a tidal wetland pursuant to ECL article 25. These separate regulatory programs, though applicable in this case to the same natural resource, provide a basis for determining separate violations.

Finally, with respect to determining the number of violations, different Respondents were responsible at different times for the violations alleged in the October 28, 2008 motion. From 2001 to 2004, Mezzacappa Bros. owned the Richmond Terrace property, and the corporate respondent is responsible for the violations that occurred during that period. On May 17, 2007, Sam and Frank Mezzacappa owned the Richmond Terrace property, and they are responsible for the violations that occurred on that day.

The second factor for determining the appropriate civil penalty concerns Respondents' intent. Subdividing property in or adjacent to tidal wetlands is a regulated activity (see 6 NYCRR 661.4[ee][1][v]) that requires a permit. For the reasons discussed above, Respondents did not intend to violate ECL 25-0401 and 6 NYCRR 661.8 when they subdivided the Richmond Terrace property on May 10, 2005. Respondents had retained consultants who were not familiar with the requirement to obtain a permit. As a result, Respondents' consultants neither obtained the required permit on behalf of their clients, nor advised Respondents to obtain the permit. The Commissioner should consider Respondents' lack of intent with respect to this violation to be a significant mitigating factor in assessing the appropriate civil penalty.

The third factor relates to Respondents' obligation to maintain the bulkhead on the Richmond Terrace property in order to avoid the indirect placement of fill into the Kill van Kull. The applicable statutes and regulations appear to compel Respondents to maintain the bulkhead. For example, the definition of fill is broad (see ECL 15-0505[1] and 25-0401[2], as well as 6 NYCRR 608.1[g]), and includes the direct and indirect placement of fill in or near navigable waters of the State and tidal wetlands (see 6 NYCRR 608.1[h]; 608.5; 661.4[ee][1][ii]). In particular, the reconstruction or repair of docks and other similar structures in navigable waters of the State that are associated with tidal wetlands is a regulated activity (see ECL 15-0505[1] and 25-0401[6]). Therefore, in determining the appropriate civil penalty for the violations concerning the placement of fill in the Kill van Kull, the Commissioner may consider the degree to which Respondents should have maintained the pre-existing bulkhead at the Richmond Terrace property.

With respect to the third factor, it is also worth noting that about 2,225 to 3,250 square feet of shoals and mudflats have developed in the vicinity of the Richmond Terrace property as a direct result from the deterioration of the bulkhead. In addition, the newly developed wetlands are productive and are becoming more so. Ironically, if Respondents had maintained the original bulkhead, the tidal wetlands would not have extended to this portion of the site.

The fourth factor in determining the appropriate civil penalty is Respondents' ability to pay. Sam Mezzacappa argued that unless and until the Richmond Terrace property is sold, Respondents would not be able to pay any civil penalty. In Part III of his affidavit (Exhibits 19 and 31), Sam Mezzacappa explained that he and his brother, Frank, have attempted to mortgage the Richmond Terrace property. According to Sam Mezzacappa, he and his brother applied to Victory State Bank (Hylan Boulevard, Staten Island), but the bank denied the application because Sam and Frank Mezzacappa are retired, and Frank Mezzacappa is on disability.

Of the requested \$50,000, Department staff recommended that the Commissioner order Respondents to pay \$20,000 immediately, and suspend the balance (*i.e.*, \$30,000) pending compliance with remediation. With respect to the payable portion of the requested civil penalty, Staff would apportion \$5,000 for the ECL article 25 violation associated with subdividing the property, and \$15,000 for the violations associated with the fill (Exhibit 1, § II.B).

In the April 9, 2009 ruling (at 25-26), I noted that the total requested civil penalty is substantially less than the potential maximum authorized by the Environmental Conservation Law considering the continuous nature of the violations. In addition, I found that the requested civil penalty reflected Staff's priority to focus Respondents' limited resources on remediating the site.

The civil penalty requested by Department staff is authorized by ECL article 71. If the Commissioner decides to assess a civil penalty, the civil penalty should be assessed jointly and severally among all Respondents.

Conclusions

1. The Kill van Kull is a navigable water of the State of New York, pursuant to ECL article 15, title 5 and 6 NYCRR part 608, and a regulated tidal wetland pursuant to ECL article 25 and 6 NYCRR part 661.
2. From August 1977 to the mid-1990s, the bulkhead along the Richmond Terrace property was a 225-foot long, lawfully existing, functional and substantial fabricated structure that limited the landward boundary of the adjacent area on the site pursuant to 6 NYCRR 661.4(b)(1)(ii).
3. After 2001, the bulkhead on the Richmond Terrace property deteriorated and no longer limited the landward boundary of the adjacent area on the site pursuant to 6 NYCRR 661.4(b)(1)(ii) as a functional and substantial fabricated structure. Therefore, the landward boundary of the adjacent area on the Richmond Terrace property migrated landward.
4. Since 2001, the landward boundary of the adjacent area on the Richmond Terrace property has been limited to the 10-foot contour pursuant to 6 NYCRR 661.4(b)(1)(iii). Although the width of the adjacent area on the site is less than the maximum potential of 150 feet (6 NYCRR 661.4[b][1][i]), a portion of the Richmond Terrace property at least 15 to 60 feet landward from the remnants of the previously functional bulkhead is regulated adjacent area.
5. Because a portion of the Richmond Terrace property is regulated adjacent area, the Department retains jurisdiction over the site pursuant to ECL article 25 and its implementing regulations.

6. From 2001 to 2004, Mezzacappa Brothers, Inc. violated ECL 15-0505(1) and 6 NYCRR 608.5 when it allowed fill to enter the Kill van Kull, a navigable water of the State, from the Richmond Terrace property without a permit from the Department.
7. On May 17, 2007, Sam and Frank Mezzacappa violated ECL 15-0505(1) and 6 NYCRR 608.5 when they allowed fill to enter the Kill van Kull, a navigable water of the State, from the Richmond Terrace property without a permit from the Department.
8. From 2001 to 2004, Mezzacappa Brothers, Inc. violated ECL 25-0401 and 6 NYCRR 661.8 when it allowed fill to enter the Kill van Kull, a regulated tidal wetland, from the Richmond Terrace property without a permit from the Department.
9. On May 17, 2007, Sam and Frank Mezzacappa violated ECL 25-0401 and 6 NYCRR 661.8 when they allowed fill to enter the Kill van Kull, a regulated tidal wetland, from the Richmond Terrace property without a permit from the Department.
- 10.² On May 17, 2007, Sam and Frank Mezzacappa violated ECL 25-0401 and 6 NYCRR 661.8 when they placed fill along the northern boundary of the Richmond Terrace property in the adjacent area of the Kill van Kull, a regulated tidal wetland, without a permit from the Department.
11. On May 10, 2005, Mezzacappa Brothers, Inc. violated ECL 25-0401 and 6 NYCRR 661.8 when it subdivided the Richmond Terrace property, which is land located within the adjacent area of a regulated tidal wetland, without a permit from the Department.

Recommendations

1. The Commissioner should grant Department staff's October 28, 2008 motion for order without hearing with respect to liability.
2. The Commissioner should deny Respondents' cross-motion to dismiss.

² Conclusion No. 10 has been modified to reflect the amendment to Finding No. 16 (see Finding No. 18).

3. The Commissioner should order remediation of the Richmond Terrace property based on the discussion provided above.
4. The Commissioner should assess a civil penalty jointly and severally against Respondents.

Appendix A: Revised Exhibit List

Revised Exhibit List

Mezzacappa Brothers, Inc.,
Sam Mezzacappa and Frank Mezzacappa

DEC Case No. R2-20070517-290
(Richmond Terrace Property)

Department Staff

1. Notice of Motion and Motion for Order without Hearing dated October 28, 2008.
2. Memorandum of Law in support of Motion for Order without Hearing dated October 28, 2008.
3. Affirmation by Udo M. Drescher, Esq., Assistant Regional Attorney, dated October 28, 2008.
4. Deed, Richmond County, New York, Document date May 10, 2005 (Drescher Affirmation Exhibit A).
5. Deed, Richmond County, New York, Document date November 14, 2006 (Drescher Affirmation Exhibit B).
6. Deed, Richmond County, New York, Document date January 8, 2007 (Drescher Affirmation Exhibit C).
7. New York State Department of State, Division of Corporations regarding status of Mezzacappa Brothers, Inc. (October 28, 2008).
8. Affidavit of George Stadnik sworn to October 16, 2008.
9. 1996 Aerial Photograph of Richmond Terrace property (Exhibit 1.1 to Stadnik Affidavit).
10. 2001 Aerial Photograph of Richmond Terrace property (Exhibit 1.2 to Stadnik Affidavit).
11. 2004 Aerial Photograph of Richmond Terrace property (Exhibit 1.3 to Stadnik Affidavit).
12. 2006 Aerial Photograph of Richmond Terrace property (Exhibit 1.4 to Stadnik Affidavit).
13. Survey by Wohl & O'Mara, LLP, Civil Engineers and Land Surveyors (Staten Island, New York) (Exhibit 2 to Stadnik Affidavit).

14. Plan/Drawing of seaward portion of Richmond Terrace with "New Bulkhead Line" (Exhibit 3 to Stadnik Affidavit).

Respondents

15. Fax cover sheet dated November 22, 2008 from Sam Mezzacappa.
16. Letter-Answer dated November 22, 2008 from Sam Mezzacappa to Chief ALJ McClymonds.
17. Supplemental Letter-Answer dated December 19, 2008 from Sam Mezzacappa to ALJ O'Connell.
18. Cover sheet and correspondence to Commissioner Grannis dated February 12, 2009 from Frank Mezzacappa, and dated February 13, 2009 from Sam Mezzacappa.
19. Affidavit of Sam Mezzacappa sworn to February 13, 2009 (Parts I-IV, inclusive).
20. Affidavit of William Spiezia, LS, Rogers Surveying, PLLC, (Staten Island, New York) sworn to February 3, 2009 (Respondents 1-A).
21. Letter dated February 28, 2009 by Mr. Spiezia (Respondents 1-B).
22. Borough of Richmond, Topographical Survey (Sheet No. 8), New York, April 1909. From Rogers Surveying, PLLC [notarized] (Respondents 1-C).
23. An enlarged portion of Exhibit 22 [notarized] (Respondents 1-D).
- 23A. Copy of Exhibit 23 submitted with Respondents' closing statement. Exhibit depicts location of the Richmond Terrace property, Block 1070, Lot 54.
24. Plan entitled, *Pierhead and Bulkhead Lines for both sides of the Kill van Kull, Bayonne, New Jersey and Staten Island, New York*, prepared by the New York Harbor Line Board, July

Appendix A

Revised Exhibit List
Mezzacappa Brothers, Inc.
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1915. From Rogers Surveying, PLLC [notarized] (Respondents 1-E).
25. Map of Survey of Property in the 3rd Ward, Borough of Richmond, City of New York (February 1967). The survey bears the stamp of Carlton H. Ettlenger, LS (Respondents 1-F).
26. Survey by Wohl & O'Mara, LLP, Civil Engineers and Land Surveyors (Staten Island, New York) [see Exhibit 13 above] (Respondents 1-G).
27. Letter-Affidavit of Charles F. Vachis dated February 4, 2009 [notarized] (Respondents 2).
28. Letter-Affidavit of Elana Kapul, United National Realty sworn to February 10, 2009 [notarized] (Respondents 3).
29. Addendum to Sam Mezzacappa's affidavit (Part II).
30. Enlarged portion of Elizabeth, New Jersey USGS Quadrangle.
- 30A. Color coded version of Exhibit 30 submitted with Respondents' closing statement.
31. Addendum to Sam Mezzacappa's affidavit (Part III).
32. Letter dated February 6, 2009 from Michael Pantelis address to ALJ O'Connell [notarized] (Respondents 3-A).

Offered May 11, 2009

33. Bid for Bulkhead Construction (3 pages). See Exhibit 14 and Block 1070, Lot 54.
34. Quote dated May 9, 2009 from M Squared Builders.
35. Responses to a series of questions from Sam Mezzacappa by John Tesoriero, notarized May 7, 2009.
36. Quote dated May 7, 2009 from Chesterfield Associates Inc.

Appendix A

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37. Quote dated May 6, 2009 from Marine Bulkheading, Inc.
38. Quote dated May 7, 2009 from Soil Solutions, Inc.
39. Photograph dated April 10, 2009.
40. Photograph dated January 12, 2009.

Appendix A

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