

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

In the Matter

-of-

the application for a tidal wetlands permit,  
use and protection of water permit, and water  
quality certification pursuant to the  
Environmental Conservation Law (ECL) articles  
15 and 25, and title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State of  
New York (6 NYCRR) parts 608 and 661,

- by -

PAUL PALMIERI,

Applicant.

PERMIT APPLICATION No. 1-4720-00666/00009

DECISION OF THE COMMISSIONER

April 7, 2004

DECISION OF THE COMMISSIONER

The attached hearing report, except for the section headed "Recommendation," of Administrative Law Judge ("ALJ") Molly T. McBride in the matter of the application of Paul Palmieri for a tidal wetlands permit, protection of waters permit, and water quality certification is hereby adopted as the decision in this matter subject to the following additional findings and conclusions.

This matter is before the Department of Environmental Conservation ("Department") pursuant to an order of Supreme Court, Suffolk County (see Matter of Palmieri v New York State Dept. of Env'tl. Conservation, Sup Ct, Suffolk County, May 5, 2003, Baisley, J., Index No. 02-3925). In that order, Supreme Court remanded the matter to the Department to afford applicant Paul Palmieri an adjudicatory hearing on the issue of whether Department staff's demand for an on-site inspection of applicant's property is reasonably necessary in order to evaluate applicant's application for a tidal wetlands permit (see id. at 6). The court placed the burden upon applicant to demonstrate that the Department's demand is not reasonably necessary in order to evaluate his application (see id.).

The hearing record demonstrates that applicant failed to meet his burden of proof that Department staff's request to inspect the project site from applicant's property is not

reasonably necessary. Accordingly, for the reasons stated in the hearing report and in this decision, I affirm Department staff's denial of the permit application.

#### Discussion

As an initial matter, it is important to note the narrow scope of the issue remanded for hearing by Supreme Court. Applicant devotes significant portions of his post-hearing brief to the ALJ to the argument that Department staff's demand for a pre-permit inspection on applicant's property to evaluate his wetlands permit application constitutes an unreasonable intrusion and unconstitutional search in violation of the Fourth Amendment of the United States Constitution, and an illegal trespass under New York law. In its order in the CPLR article 78 proceeding initiated by applicant, however, Supreme Court expressly rejected these arguments. The court held:

"[Applicant's] contention that NYSDEC's attempt to enforce a non-consensual site inspection of his property violates his constitutional rights is also without merit. Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit . . . . The cases cited by the petitioner . . . are inapposite in that an on-site inspection is a minimal intrusion and petitioner's project poses a diminished expectation of privacy and as well is a matter of significant governmental interest"

(id. at 4-5 [citations omitted]; see also Palmieri v Lynch, US

Dist Ct, ED NY, Aug. 29, 2003, Seybert, J., 00-CV-3225  
[dismissing similar claims under federal law that the  
Department's on-site inspection violated applicant's 4th  
Amendment rights]).

The court also expressly recognized that the Department has the authority to request during the permit review process additional information that is "reasonably necessary" to make any findings or determinations required by law in connection with the permit application, and that an applicant's failure to provide such information may be grounds for denial of an application (see id. at 5 [citing 6 NYCRR 621.1(d) and 621.15(b)]). Thus, applicant's arguments under federal and state law were rejected by Supreme Court, and are not presently before the Department on this remand.

Accordingly, the narrow issue presented for hearing is whether Department staff's demand for an on-site inspection complied with the regulatory requirement of 6 NYCRR 621.15(b), that is, whether the demand was "reasonably necessary" to make the required findings or determinations with regard to applicant's tidal wetlands permit application (see id. at 6). As noted above, Supreme Court expressly placed the burden of proof on applicant (see id. [citing 6 NYCRR 624.9(b)(1)]). The regulations applicable to permit hearing procedures establish that the party bearing the burden of proof must sustain that

burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]).

Review of the hearing record reveals that applicant failed to carry his burden of proof. A preponderance of the credible evidence presented at the hearing establishes that on-site inspections by Department staff are reasonably necessary to evaluate tidal wetland permit applications, and to determine whether statutory and regulatory standards for permit issuance can be met [see Environmental Conservation Law 25-0402 & 25-0403, and 6 NYCRR 661.9(b)].

On-site inspections are reasonably necessary to allow the Department to most efficiently and effectively carry out its statutory and regulatory obligations. The record demonstrates that, due to the high volume of permit applications filed with the Department's Region 1 office, the limited number of available inspectors must conduct numerous tidal wetland permit application inspections per day in an area covering both Nassau and Suffolk Counties.

Department staff's witness testified that on-site inspections are important in order to obtain the environmental information necessary for the evaluation of a tidal wetlands permit application with respect to the applicable statutory and regulatory criteria. As testified, such on-site inspections

provide significant information, including, for example, information on the upland topography, the extent and types of vegetated areas, the values of upland areas as buffers, existing structures, and drainage patterns.

Department staff's witness noted that on-site inspections afford a comprehensive view of the shoreline and upland areas. From the vantage point at the height of the bulkhead, it provides an opportunity to observe, among other things, water flow patterns and the condition of the areas seaward from the bulkhead.

Moreover, a preponderance of the credible evidence demonstrates that the Department had a reasonable need for the environmental information that would have been obtained by an on-site inspection in this particular case. Review of applicant's permit application materials submitted in 1991, 1993, and 1999, respectively, suggest that the underwater area under applicant's dock may be subject to significant sedimentation and accretion. Thus, applicant's own application materials revealed that a significant degree of sedimentation or accretion was underway in the shoals, mud flats, and littoral zone just seaward of applicant's property that required evaluation before a permit could be issued.

Staff's witness provided detailed reasons why access to the upland area of applicant's property was necessary, including

to confirm that accretion was occurring and, if so, to evaluate its source. He testified that an upland inspection on applicant's property would include, for example, determining the sources and nature of run off from the property, inspecting the condition of the landward side of the bulkhead, and inspecting the shoreline adjacent to the property from a vantage point that allowed a comprehensive view.

Staff's witness also indicated that the best vantage point for assessing water quality and the condition of the shoals and mud flats seaward of the bulkhead was from the bulkhead itself, and that walking out on applicant's dock would provide a more effective means of observing underwater vegetation growth in the vicinity of the dock.

Applicant did not challenge staff's assertion that an assessment of the upland area of the project site was a necessary part of the permit application review. Rather, applicant's contention at hearing was that staff could access the project site either by boat or along the shoreline, and could conduct the inspection from either of those two routes without crossing or stepping foot on applicant's property.

The weight of the record evidence demonstrates that both alternatives suggested by applicant would provide a much less effective means for conducting the appropriate inspection, both upland and in the water itself. In addition, the two

alternatives are impracticable, more costly, time-consuming, and wasteful of limited Departmental resources.<sup>1</sup> With respect to an inspection by boat, the record indicates that boats appropriate for use in the waters adjacent to applicant's project are not available to Department staff that review tidal wetlands permit application review.<sup>2</sup>

More importantly, the record indicates that inspection of the upland area, the shoreline, and the relevant underwater areas would be less effective and significantly hindered if it had to be conducted from a boat rather than from applicant's property. Staff's witness testified that inspection by boat, due to safety considerations, would best be conducted during high tide, a condition less favorable to effective inspection of underwater shoals and mud flats, and where projects involving a dock are concerned.

Applicant referred to staff using a boat in 1995 to visit off-shore around his dock following the Department's denial

---

<sup>1</sup>Use of a boat, practically and as a matter of Department policy, requires at least two staff members in order to both operate the boat and conduct the inspection. The record clearly establishes that inspections conducted during routine, high-volume review of tidal wetland permit applications are usually conducted by one inspector from land.

<sup>2</sup> Applicant introduced a list of boats (see Exh C) that are utilized by the Department, and argued that a Department-owned sixteen-foot Boston whaler was available to staff to use. Applicant did not establish by a preponderance of the evidence that the Boston whaler was available to staff to use.



of a prior permit application. This does not compel the conclusion that access to applicant's property is not reasonably necessary to evaluate applicant's 1999 permit application. To the contrary, the circumstances surrounding staff's use of a boat at that time demonstrates such use is atypical and out of the ordinary.<sup>3</sup>

As the record demonstrates, significant obstacles and costs are associated with applicant's second offered alternative of an inspection from the shoreline. Applicant failed to establish that access to the shoreline from a public location was generally known. Moreover, applicant failed to establish that use of the shoreline would be a safe means of gaining access to the project site. At most, applicant's witness established that the shoreline was rocky and sandy, but did not otherwise establish its condition. In contrast, Department staff's witness noted potential hazards associated with walking along similar shorelines, including the difficulty of walking over algae-covered rocks and the presence of sinkhole-like features under the water.

Applicant also failed to indicate the height of the

---

<sup>3</sup> Applicant contends that staff also visited his site in 1991 by boat. This contention was not corroborated and, thus, the contention was not established by the preponderance of the evidence. Moreover, the record is entirely silent concerning the circumstances surrounding the 1991 visit, assuming it occurred by boat.

bulkhead or otherwise establish that the bulkhead would not effectively block the view of the upland area and the area landward of the bulkhead to a viewer standing on the shoreline (or a viewer from a boat). To the contrary, staff's witness testified that bulkheads in the area are generally about six feet high.

Photographs entered into evidence by the applicant are the only record evidence of the actual height of the bulkhead in this case (see Exhs F, G, and H). Those photographs suggest that the bulkhead is taller than an adult male, and support the reasonable inference that the view of the upland area would be significantly blocked to an inspector of average height standing on the shoreline. In any event, applicant fails to establish, by a preponderance of the evidence, that such an inspector could effectively conduct the necessary inspection of the upland area from the shoreline or from a boat.

#### Conclusion

The hearing record demonstrates that applicant failed to carry his burden of establishing, by a preponderance of the evidence, that staff's demand to conduct an on-site inspection was not reasonably necessary to make the required findings or determinations with respect to applicant's permit application. The weight of the record evidence supports the conclusion that



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

In the Matter

-of-

the application for a tidal wetlands permit,  
use and protection of water permit, and water  
quality certificate pursuant to the  
Environmental Conservation Law (ECL) Articles  
15 and 25 and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State of  
New York (6 NYCRR) Parts 608 and 661 by

PAUL PALMIERI

PERMIT APPLICATION No. 1-4720-00666/00009

HEARING REPORT

-by-

\_\_\_\_\_/s/\_\_\_\_\_  
Molly T. McBride  
Administrative Law Judge

January 30, 2004

## **PROCEEDINGS**

In May 1999, an application for permits from the New York State Department of Environmental Conservation (Department) was made by Paul Palmieri (applicant), 123 East Shore Road, Babylon, New York, for a tidal wetlands permit, protection of waters permit and water quality certificate pursuant to ECL Article 25 and 6 NYCRR 661. The application was denied on July 7, 2000 and applicant requested an adjudicatory hearing. A hearing was scheduled for March 27, 2001 but was adjourned due to the unavailability of Staff's witness. The hearing was rescheduled for June 25, 2001. Applicant failed to appear for the hearing. Department Staff served a notice of motion for administrative judicial intervention on or about June 28, 2001 asking that the permit application be denied due to applicant's failure to appear at the hearing. Applicant opposed the motion. Department Staff had also moved for an order affirming its denial of the application due to applicant's refusal to allow Staff to conduct a site visit as part of the permit review process.

The motion was denied with regard to applicant's failure to appear for the hearing. By order of Commissioner Erin M. Crotty dated February 1, 2002, the application was deemed incomplete due to Department Staff's inability to enter the property for a site inspection and the hearing request was deemed void. Applicant commenced a proceeding in New York State Supreme Court pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR) challenging the Commissioner's order. Supreme Court, Suffolk County, by order of Justice Paul Baisley, Jr., dated May 5, 2003, remanded the matter to the Department for a hearing on the sole issue of whether an on-site inspection by Department Staff, as part of the permit application review, was reasonably necessary.

## **BACKGROUND**

This applicant has a history of filing permit applications with the Department for projects at this site. In 1991 applicant applied for a permit to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings. This application was also granted. In 1993, one year after the second permit was issued, applicant sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. Staff denied this application. A hearing was requested by applicant after the denial. The parties entered into settlement discussions. During these discussions, a site visit was done by Department Staff via boat. Ultimately, the parties resolved the matter and a Stipulation of Settlement was entered into on May 30, 1995 wherein applicant agreed to modify the application and reduce the extension of the boat dock from 110' to 40' and to reduce the boat lift request from two boat lifts to one boat lift. Based upon the changes made to the application as a result of the settlement, Staff withdrew its objections to the issuance of the permit and a permit was issued in June 1995.

In May 1999 applicant applied for a permit to construct an additional 50'

extension of the dock and to add an 80,000 lb. boat lift. This is basically what was requested by applicant in his 1993 application, when combined with what was permitted in June 1995.

The May 1999 application was denied by Staff by letter dated July 7, 2000. The Notice of Permit Denial states, in part: "You failed to allow Department Staff to inspect the property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied." It is undisputed that applicant has refused Staff access to his property to inspect it as part of the permitting process. Applicant contends that Staff can conduct whatever inspection is necessary without entering his property.

Pursuant to the Order of the Supreme Court, a hearing was conducted on October 8, 2003 at the Babylon Public Library, 211 Route 109, West Babylon, New York before Administrative Law Judge Molly T. McBride. The proceedings began with a legislative hearing at approximately 10:40 a.m. Applicant appeared with his counsel, Franklin Wilks, Esq. from the Coalition of Landlords, Homeowners and Merchants. The Department appeared by Craig L. Elgut, assistant regional attorney. No persons came forward to speak on the project. At the conclusion of the legislative hearing, an issues conference was convened. No other persons, agencies or organizations participated in the hearing process as parties or sought party status. At the conclusion of the issues conference, the adjudicatory hearing was immediately commenced on the sole issue of whether the Department's demand to conduct an inspection of the project site from applicant's property as part of the permit application review was reasonably necessary. The Supreme Court placed the burden of proof for this issue on applicant.

The following witnesses testified on behalf of applicant: Paul Palmieri and Aram Terchunian, First Coastal Corp., applicant's environmental consultant. Charles T. Hamilton, regional supervisor of the Department's Office of Natural Resources, Region One, Stony Brook, New York testified on behalf of the Department.

The parties submitted post-hearing briefs and the hearing record closed on December 31, 2003 upon receipt of the briefs.

## **POSITION OF THE PARTIES**

### Applicant

Applicant maintains that the Department can conduct its permit application review without accessing his property. He contends that the Department can conduct its site inspection from the water, by boat, or by walking along the shoreline after entering it from a public access point.

### Department

The Department contends that the application can not be reviewed to determine if the standards for a tidal wetlands permit have been met without Department personnel accessing applicant's property. Department Staff also argues that applicant's suggestion of using a boat is not practical because they can not rely on having boats available to do site inspections.

## **FINDINGS OF FACT**

1. In May 1999, Paul Palmieri, applicant, 123 East Shore Drive, Babylon, New York, applied for a tidal wetlands and protection of waters permit and water quality certificate to expand an existing 92' dock structure by 50 feet and add an 80,000 pound boat lift at his property noted above. The proposed project is located on the Great South Bay, in the Town of Babylon, County of Suffolk.

2. The existing dock structure was permitted by the Department in three phases. The first phase permitted was to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued in 1991. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings which was also granted. A third permit application, filed in 1993, one year after the second permit was issued, sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. This application was denied. After a request for a hearing was filed by applicant, the matter was resolved by an agreement between the parties which provided for the extension of the boat dock by 40' rather than 110' and the addition of one boat lift rather than two.

3. Applicant refused Department Staff access to his property in 1995 during the review of his 1993 permit application.

4. Department Staff attempted to access applicant's property during its review of the current permit application and applicant has refused Department Staff access to his property.

5. Department Staff notified applicant by letter dated April 7, 2000 that it would need to access the property to conduct a site inspection and complete the permit application review.

6. By letter dated July 7, 2000 the Department denied the latest permit application because it could not gain access to applicant's property to complete the permit application review.

7. Applicant filed a request for a hearing on the permit application denial. A hearing was scheduled but adjourned at the request of Staff as witnesses were unavailable. The hearing was rescheduled but applicant and his counsel failed to appear on the rescheduled date.

8. Department Staff moved for an order determining the hearing process abandoned based upon applicant's failure to appear for the hearing or, in the alternative, for an order affirming Staff's denial of the permit application based upon applicant's refusal to allow Department Staff on his property to conduct the site inspection.

9. Commissioner Erin M. Crotty, by order dated February 1, 2002, denied the motion to dismiss due to applicant's failure to appear. The order also deemed the application

incomplete based upon the Staff's inability to access applicant's property and, therefore, the hearing request was voided.

10. Applicant commenced a proceeding in New York State Supreme Court, Suffolk County pursuant to CPLR Article 78 challenging the Commissioner's order. Supreme Court, Suffolk County (Baisley, J.), by decision dated May 5, 2003 granted the petition to the extent of remanding the matter to the Department for a hearing to allow applicant an opportunity to demonstrate the Department's request for an on-site inspection was not reasonable and necessary to evaluate the application for a wetland permit, and otherwise denied the petition. The decision placed the burden of proof on applicant for the hearing. The hearing was held on October 8, 2003.

11. Applicant testified at the October 8, 2003 hearing that he will not agree to Department Staff entering his property as part of the permit review process. Applicant countered Department Staff's request with his suggestion that Department Staff inspect the project site by boat from the Great South Bay or enter the shoreline from a public access point and walk to applicant's project site. Applicant has not provided a specific route, specific entry point, nor provided details to Staff as to what they would find on any route that they may take to applicant's property if they did in fact enter the shoreline from a public access point and walk to his property.

12. Applicant was advised by Department Staff in writing that a boat was not available to them to conduct a site inspection. Applicant did not allow Staff onto his property after being told that a boat was not available.

13. Department Staff routinely conducts permit application reviews from an applicant's property. Charles Hamilton testified that in 36 years as an inspector he has never been denied access to an applicant's property. Department Staff testified as to numerous reasons why they need access to applicant's property as part of this permit application review.

14. Department Staff testified as to why the alternatives posed by applicant (walking shoreline or boat inspection) are not adequate for the permit application review in this case. Those methods would not allow Staff to obtain all necessary information to assess the application. By way of example, Staff testified that there has been an abnormal amount of accretion in the area around the boat dock (water depth changed from 5-6' to 2 ½' to less than 4' from 1991 to the date of this application) and Staff would need to evaluate the upland, as well as the dock location to assess possible causes/problems. Charles Hamilton identified approximately twelve items he would be inspecting from applicant's property with respect to the accretion problem alone. Also, from applicant's property Staff would have an elevated spot to view organisms and plants from the water that would not be readily visible from the shoreline or from a boat in the water. The inspector can view the shoals and mudflats below for other factors as well. Based upon those findings, a second site inspection may be warranted at which time Staff would come out with testing gear and take some samplings for testing.

15. The Department's Region One office, where this application is pending,



receives approximately 4,000 tidal wetland permit applications each calendar year. Each permit application requires review by Department Staff and four Staff members are responsible for all tidal wetlands applications inspections. The alternative methods proposed by applicant would be too time consuming to employ on a regular basis in the Department's application reviews.

16. Charles Hamilton testified that he conducted 27 site inspections on the day before this hearing. He testified that that number of site inspections is not unusual due to the volume of permit applications received in their office each year. His other inspectors typically conduct 10-15 inspections per day. If he and his Staff were required to use a boat or take a circuitous route to applicant's property to conduct site inspections, they would not be able to complete as many site inspections and application processing would be delayed.

17. Applicant permitted his environmental consultant and employees to conduct a site inspection from his property.

18. Supreme Court, Justice Baisley, held that "Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit." (*Baisley Memorandum Decision*, p. 4, citing *Thompson v. Dept. of Environmental Conservation*, 132 AD 2d 665).

### **CONCLUSIONS OF LAW**

1. Section 624.9(b)(1) of 6 NYCRR states: "The 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." Further, the Memorandum Decision of Justice Baisley remanding this matter for a hearing placed the burden of proof on applicant to show why the Department's demand for an on-site inspection of applicant's property is not reasonably necessary in order to evaluate the application.

2. This permit application is for a tidal wetlands permit, protection of waters permit and water quality certificate.

3. Section 661.1 of 6 NYCRR states, in part, "It is the public policy of the State to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the State." The Department is entrusted with implementing the state's tidal wetlands policy.

4. Section 661.9(b) of 6 NYCRR identifies the standards for a tidal wetlands permit to be issued. In summary, the applicable standards require a showing that the permitted activity will preserve and protect tidal wetlands, prevent the despoliation and destruction of wetlands, and not have an undue adverse impact on the present or potential value of the wetlands for marine food production, wildlife habitat and flood and hurricane and storm control.

5. Standards for issuance of a water quality certification are found at 6 NYCRR

608.9 and the protection of waters permit issuance standards are found at 6 NYCRR 608.8.

6. Department Staff identified numerous reasons why they need access to applicant's property to conduct the permit application review and why applicant's alternatives are not acceptable. Applicant has not met his burden of proof to show why access to this property is not reasonably necessary as part of the permit application review. Department Staff provided specific sworn testimony as to why that type of inspection would not be sufficient.

### **RECOMMENDATION**

I recommend that the Commissioner find that applicant has not met his burden of proof to show that Department Staff's request for access to his property as part of its permit application review is not reasonably necessary. Department Staff has indicated that they must deny the permit application because they were denied access to the property. Therefore, I recommend that the Commissioner affirm Staff's denial of the permit application unless Respondent provides Department Staff the necessary access to his property within 20 days of the Commissioner's decision. If applicant provides Department Staff with the necessary access, then I recommend that Staff conduct the site inspection and take the appropriate action on the application.