

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 15 and 25 of the Environmental Conservation Law (“ECL”) of the State of New York and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

-by-

PETER W. PLAGIANAKOS and MADELINE FELICE,

Respondents.

**RULING ON MOTION
TO ADMIT VIDEO
INTO EVIDENCE**

DEC Case No.
R2-20120613-353

Background

Staff of the New York State Department of Environmental Conservation (“Department”) commenced this administrative enforcement proceeding against respondents Peter W. Plagianakos and Madeline Felice (“respondents”) by service of a notice of hearing and complaint, both dated April 14, 2015. The complaint alleges that, in June 2012, Department staff observed that, at residential waterfront property in Brooklyn, New York (“Site” or “respondents’ properties”), respondents had “undertaken, caused, or allowed” several regulated activities without obtaining required permits, in violation of ECL § 15-0503(1)(b), ECL § 25-0401(1), and 6 NYCRR §§ 608.4 and 661.8. See Complaint dated April 14, 2015, at ¶¶ 26-27, 38-89.

Department staff seeks an order of the Commissioner finding that respondents violated the cited statutes and regulations, imposing on respondents, jointly and severally, a civil penalty of “no less than two hundred thousand dollars,” and directing respondents to perform several remedial activities. See id., Wherefore Clause ¶¶ I-III. Respondents served an answer dated May 29, 2015, and a first amended answer dated June 12, 2015. The adjudicatory hearing in this matter commenced on December 20, 2016, and continued through December 21, 2016. Additional hearing days are scheduled for March 8 and 9, 2017.

The two adjacent parcels at issue in this matter are located on the westerly side of East Mill Basin. Department staff has alleged, and respondents have admitted, that “East Mill Basin is a navigable waterway of the state used for water-based transport.” Complaint, ¶ 17; see Answer, ¶ 17 (“Admit”); see also Hearing Transcript (“Tr.”) at 155:4-7 (counsel for respondents: “I think they admitted that that basin was navigable water”).

Respondents have filed a motion seeking the admission into evidence of a video taken from a boat traveling on the water from south to north along the western shoreline of the East Mill Basin. According to respondents, the video “starts several properties to the south of

[respondent] Felice’s properties, heads north past her properties and several of her northerly neighbors, and then turns back for additional views of the subject property.” Trial Memorandum of Law in Support of Application for Admission of 6 Minute Video, dated January 11, 2017 (“Resp. Mem.”), at 4.

At the hearing on December 20, 2016, counsel for respondents stated that respondents seek to introduce the video to test the credibility of staff witness George Stadnik “[o]n whether that – within 10 feet of that seawall is navigable” at respondents’ properties. Tr. at 158:5-13; see also id. at 164:20-165:2 (“The issue is whether there is navigable water, and navigable water in fact within 10 feet of that bulkhead”); id. at 240:25-241:13 (“that is the issue in this case; is whether this is actually navigable as it exists along the seawall where they are asserting jurisdiction. It is our contention that that is not navigable water”).

Department staff opposes respondents’ motion, arguing first that the Site is located in waters both “navigable in law” and “navigable in fact.” See Letter-Brief of Department Staff dated January 19, 2017 (“Staff Resp.”), at 1-4. Department staff also argues that the video lacks proper foundation, and is not relevant to this proceeding or the cross-examination of staff witness George Stadnik, and that Mr. Stadnik should not be recalled. See id. at 4-6. Finally, staff states that it would not object to the introduction of a portion of the video subject to proper foundation. See id. at 6-7.

As discussed briefly below, subject to laying a proper foundation, I will allow respondents to utilize the video to continue its cross-examination of Mr. Stadnik, as limited below. In addition, respondents may seek the admission of the video into evidence with respect to the following issues only: (i) whether, with respect to the waters landward of the seaward edge of the deck and the underlying structure at respondents’ properties only, waters are, as a factual matter, navigable in fact or whether vessels with a capacity of one or more persons can be operated there notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions; and (ii) effects of respondents’ structures as they impact marine resources and the biological functionality of the wetlands in which respondents’ properties are located.

Discussion

In support of their motion, respondents essentially make three arguments: First, they argue that Department staff “opened the door” to the video images of properties north and south of the properties at issue here through testimony of Mr. Stadnik relating to various photographs depicting portions of respondents’ and neighboring properties. See Resp. Mem. at Point I, pp. 4-12. Second, they argue that the video is relevant to the issue of “shading” as it impacts marine resources and the biological functionality of the wetlands. See id. at 8-9. Third, respondents argue that the video is relevant to the issue of “the navigability of the water landward of the seaward edge of [respondent] Felice’s deck.” Id. at 10; see also id. at Point II, 12-14.

I agree with respondents’ argument that Department staff witness Stadnik “opened the door” to admission of the video through his testimony regarding Exhibit (“Ex.”) 14, comprised of several photographs depicting properties along the shoreline located north and south of the

Site which, according to Mr. Stadnik, were intended “just to show what the area looks like.” See generally Tr. at 90:5-93:18. Thus, the video may be used “to show what the area looks like.”

Second, the video may assist with respect to the extent of “shading” as it impacts wetlands functionality at respondents’ properties. In their discussion of the “shading,” respondents cite 6 NYCRR § 661.26 for the proposition that “areas that do not function biologically as wetlands will not be regulated as tidal wetlands.” Resp. Mem. at 8.¹ Although respondents’ papers do not elaborate on this citation, to the extent if at all they seek to use the video or other evidence in an attempt to establish that the Site is not located in tidal wetlands, such use and evidence will not be allowed. The wetlands inventory map that includes respondents’ Site was established by order of the Commissioner pursuant to ECL § 25-0201(4), and that order is not subject to challenge in this enforcement proceeding.² Thus, although the video, as it relates to “shading” and its effect on the functioning of the wetland, may be relevant to a possible civil penalty, it is not relevant to whether the Site is in a tidal wetland.

With respect to respondents’ third basis for seeking admission of the video, respondents argue that the proffered video is relevant to “the navigability of the water landward of the seaward edge of [respondent] Felice’s deck ... *the sole basis of the First Cause of Action.*” Resp. Mem. at 10 (emphasis added); see also *id.* at 10 n. 4 (stating that the first cause of action “is based on 6 NYCRR 608.4, which pertains only to actions in on or above ‘*navigable* waters of the state’”) (italics in original); *id.* at 12 (Point heading II stating that the first cause of action “is based on 6 NYCRR 608.4”).

Respondents’ characterization of the first cause of action is inaccurate and incomplete. Department staff’s first cause of action alleges that respondents constructed a deck at the Site without a permit, thereby violating both ECL § 15-0503(1)(b) and 6 NYCRR § 608.4. See Complaint ¶ 45. Except in circumstances not relevant here, ECL § 15-0503(1)(b) requires a permit for certain construction and expansion activities “in, on or above *waters.*” (italics added).³ This statutory provision makes no mention of navigability. Thus, navigability is not relevant to a determination of a violation of the statute.

In contrast, 6 NYCRR § 608.4 “applies to the construction, reconstruction or repair” of various types of structures “in on or above the *navigable* waters of the State lying above

¹ There has been no section 661.26 in the regulations for 27 years. Former section 661.26 was renumbered in 1990 and again in 1992; it is presumed that respondents are referring to language in what is currently 6 NYCRR § 661.14.

² I note that respondents cross-examined staff witness Stadnik using documents and aerial photographs printed from the U.S. Fish & Wildlife Service website. Although I allowed limited cross-examination of the witness with respect to these documents, the documents are not relevant to whether the Site in this proceeding is within the jurisdiction of the Department as reflected in the existing New York State wetlands inventory map established pursuant to statute and Commissioner order.

³ “Waters” is defined broadly in the statute to include “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction.” ECL § 15-0107(4).

underwater lands not owned by the State.” (italics added). Thus, the issue of navigability is relevant to the regulatory claim.

Department regulations define “navigable waters of the state” as:

all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation.

6 NYCRR § 608.1(u).

Respondents have already admitted that the East Mill Basin is navigable. See Complaint, ¶ 17; Answer, ¶ 17 (“Admit”); see also Tr. at 155:4-7.⁴ Respondents’ focus in this motion is on the first portion of the definition of “navigable waters of the state,” that is, whether the waters underneath respondents’ structures, landward of the seaward edge of those structures, are “navigable in fact.” Respondents have not, however, addressed the second definition of “navigable waters of the state” following the word “or” in section 608.1(u), that is: “upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions”

Respondents may utilize the video to cross-examine Mr. Stadnik regarding whether the Site is located in “navigable waters of the state” as that term is defined in the regulations; that is, whether, as a factual matter, it is “navigable in fact” or whether “vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions.” 6 NYCRR § 608.1(u).⁵

Conclusion

Subject to laying a proper foundation (including addressing the issues relating to foundation identified in staff’s responding papers at page 4, § II(1)), I will allow respondents to utilize the video to continue their cross-examination of Mr. Stadnik, for the limited purposes identified above.

⁴ Respondents, now represented by a different law firm than at the time they served their answer, have requested in papers relating to the video that they be allowed to amend the answer. The request is denied. I also deny Department staff’s request for an “interim ruling that finds East Mill Basin up to Respondents’ bulkhead is a navigable water of the state within the meaning of ECL article 15 title 5.” Staff Resp. at 7.

⁵ I note that the record already contains testimony and several photographs of the Site, including photographs taken underneath respondents’ structures in 1992 (see Ex. 13), 2012 (see Exs. 8 and 11), 2015 (see Exs. 12 and 14), and 2016 (see Ex. 16). In addition, the record contains aerial photographs of the Site and properties to the north and south of the Site. See Exs. 7, 10, 20, 21. Respondents submitted with its papers on the current application an additional photograph of respondents’ properties, deck and underlying structure, taken from the water. See Resp. Mem. Ex. B.

Respondents may seek the admission of the video into evidence with respect to the following issues only: (i) whether, with respect to the waters landward of the seaward edge of the deck and the underlying structure at respondents' properties only, waters are, as a factual matter, navigable in fact or whether vessels with a capacity of one or more persons can be operated there notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions; and (ii) effects of respondents' structures as they impact marine resources and the biological functionality of the wetlands in which respondents' properties are located.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: February 27, 2017
Albany, New York