

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

THOMAS THOMPSON

For a Declaratory Ruling

DECLARATORY
RULING
DEC 25-02

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On March 3, 1982, Thomas Thompson ("Petitioner") by his attorneys Esseks, Hefter, Cuddy & Angel, requested a Declaratory Ruling pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, to determine whether the Tidal Wetlands Act, Article 25 of the Environmental Conservation Law ("ECL") and its implementing regulations, 6 NYCRR Part 661, authorize the Commissioner of Environmental Conservation ("Commissioner") to alter a filed Tidal Wetlands Inventory Map to more precisely delineate a wetland after a party has filed a completed permit application pursuant to the Tidal Wetlands Act. Petitioner has not questioned the authority of the Commissioner to amend the map, but rather has challenged the relocation of the boundary line where its movement would increase the proportion of the property subject to the development restrictions contained in Article 25 and Part 661, to the detriment of one who has relied upon the original demarcation.

Since requests to the Department of Environmental Conservation ("Department" or "DEC") in tidal wetlands permit

proceedings recurringly arise regarding the precise location of a boundary line, and since the resolution of this issue affects the rights of the applicant as well as DEC's regulatory authority regarding this important natural resource, it is in the public interest to grant this petition. In view of the factual background presented in this petition, the Tidal Wetlands Act mandates the regulation of wetlands in the manner which takes into account the most recent and most accurate information regarding actual on-site conditions; accordingly, inventory maps must be amended as necessary to reflect these conditions under ECL §25-0201.6. Where, however, the degree of variation between the boundary line appearing on the map and that as identified by subsequent field work undertaken by DEC staff is more than de minimis and necessitates a map amendment hearing under 6 NYCRR §661.27, such hearing should proceed prior to consideration of a permit application.

Petitioner is the contract vendee of a certain parcel of land owned by Dr. Anton Notey. This parcel is located on Dune Road in the Village of Quogue, Town of Southampton, and is the subject of Tidal Wetlands Permit Application No. TWS64-0728, filed August 27, 1981. Petitioner seeks a permit to allow the construction of a one-family dwelling, swimming pool decks, septic system, and driveway on 1.0008 acres of land. A portion of this property is mapped as tidal wetland (Tidal Wetland Map #702-520).

A public hearing on the permit application commenced on January 7, 1982. At this hearing, the testimony of Petitioner's expert witness was in accord with information contained on the inventory map and testimony of the Department's expert witness as to the existence of high marsh wetlands on Petitioner's property [See Transcript, January 7, 1982, In the Matter of Application of Thomas Thompson by En-Consultants, Inc. ("Transcript"), pp.13-14 and 83-85]. Due to their unique characteristics, high marsh areas are considered to be one of the most important of the several wetland types. In particular, the critical functions performed by these wetlands include marine food production, absorption of silt and organic material, flood and storm protection, and cleansing of ecosystems. 6 NYCRR §661.2(g). The evidence uncontroverted in the record is a factual predicate to this Petition which establishes the value of the wetlands in question.

An issue of fact emerged in the public hearing as to the true location of the tidal wetlands boundary. The Department and the Petitioner both assert that the boundary shown on the inventory map is overly conservative in the sense that it is drawn further seaward than those subsequently derived from field work by DEC and Thompson. However, the new line proposed by DEC staff is significantly landward of that proposed by Petitioner. In essence, based on Petitioner's wetland boundary, the project as conceived meets the setback and other development restrictions

contained in 6 NYCRR 661.6; whereas the revised DEC boundary encroaches on Petitioner's "building envelope" (the area of the parcel on which principal and appurtenant structures will be located) by approximately one-third. Under the DEC mapping, variances from §661.6 and site plan modifications would be necessary to the issuance of an Article 25 permit. Petitioner argues that the proposed DEC boundary would preclude construction of a single-family dwelling on the property; DEC staff contend that although its new boundary would restrict the total buildable area, an approvable scheme for such a dwelling could be devised [Transcript at pp.109-10].

Petitioner now takes the position as a matter of law that DEC is bound by its filed inventory map, that submission of DEC staff's revised boundary line on the day of the hearing was tantamount to a request for remapping, and that it could not be bound by any relocation of the boundary effected subsequent to the submission of its permit application. In a letter to the hearing officer, Administrative Law Judge ("ALJ") Marshall Irving, dated January 26, 1982, Petitioner's counsel stated in pertinent part that:

...[W]e have received notice from you, dated January 13, 1982, indicating that the issue of the location of the tidal wetlands boundary on the property in question will be the subject of a "remapping" pursuant to §661.27 of your regulations. Please be advised that it is the applicant's position that his application, which was made in conformance with the filed tidal wetlands inventory maps, cannot be affected by a subsequent remapping. In other words, it is our client's position that he can justifiably and legally rely on the tidal wetlands inventory maps currently

filed in connection with his property and that any attempt to alter the boundary lines by a remapping subsequent to his application will have no affect on him.

At the public hearing, ALJ Irving reserved ruling on the question of whether the variation indicated by DEC staff would require a map change pursuant to 6 NYCRR 661.27. By letter dated January 13, 1982, ALJ Irving notified the parties that the boundary dispute would be resolved in this manner. After such a hearing had been scheduled and the required notices published, the ALJ, by letter dated February 9, 1982, informed Petitioner that the effect of a remapped boundary raised a jurisdictional issue which, as prescribed by 6 NYCRR 624.7(b)(8), could be addressed solely through a Declaratory Ruling by the Department's General Counsel. In accordance with the ALJ's determination, the Petition herein was submitted.

The legal issue presented is whether Article 25 and Part 661 authorize the Department to move a tidal wetlands boundary line after an application has been received for development of the affected property. For the reasons explained herein, the Department does have this power.

The Tidal Wetlands Act in §25-0102 of the Act articulates New York's policy to preserve and protect this scarce and finite resource, and to prevent its despoliation, giving due consideration to the reasonable social and economic development of the State. Tidal wetlands are defined in ECL §25-0103 in

terms of areas which border on or lie beneath tidal waters, land which is subject to tides, and the presence of certain plant species. Under the express statutory terms here controlling, the existence of regulated wetlands is determined on the basis of scientifically grounded characteristics and vegetation, not alone by their renderings on an inventory map.

The Wetlands mapping process is neither assumed nor intended to produce boundary lines pinpointing the exact location of the landward extent of indicator plant species. A line drawn on a map can represent 50 feet or more on the ground, depending upon the scale; this is an inherent and elementary limitation of all mapping and cannot be viewed as rendering DEC's inventory maps deficient in any way. It is a necessary element of the plain meaning of the Legislature's instruction to DEC to prepare maps. Section 25-0201(2) of the Act is entitled "Inventory of Tidal Wetlands" and states that

The inventory shall set forth the boundaries of such wetlands using such photographic and cartographic standards and techniques as the commissioner may deem reasonable and appropriate ... [slaid boundaries shall generally delineate all tidal wetlands ... (emphasis added.)

The statute further recognizes the need to periodically update existing maps in order to accommodate the various natural and man-induced factors influencing the location of boundaries. Section 25-0201(6) states that "[t]he statewide boundary shall be readjusted from time to time as may be necessary to reflect such

natural changes as have occurred through erosion, accretion, and otherwise and also to reflect such other changes as have occurred as a result of the granting of permits pursuant to section 25-0403 of this act." Thus, it is clear that the Legislature did not envision that the inventory maps would reflect precise and static boundaries, but rather that they would serve to generally portray the extent of regulated areas, subject to modification as necessary to make these boundaries as accurate as possible. Such maps afford complete notice that an area contains wetlands subject to state protection.

The Commissioner's regulations governing maintenance and amendment of inventory maps, 6 NYCRR 661.27, provide that inventory maps may be altered in the following instances:

- (1) after public hearing, any amendment to add a new tidal wetland to an inventory map, to significantly expand or detract from the boundaries of a tidal wetland shown on such map, to delete a wetland from such map or to alter the classification of a wetland shown on such a map as may be necessary to conform such maps to actual on-site conditions; (emphasis added) or
- (2) notwithstanding paragraph (1) of this subdivision, any amendment as may be necessary to reflect such natural changes as have occurred since the effective date of the inventory map, as originally established or as amended, through erosion, accretion or otherwise or to reflect such other changes as have occurred since such effective date as a result of granting permits under this Part;

These regulatory provisions establish that all final inventory maps are subject to change for the specified reasons. Nowhere in the statute or regulations, is there a restriction on

the map amendment process based upon the filing of a permit application. To so restrict the use of a map runs counter to the established scientific fact that wetlands do change by natural and anthropogenic causes, as the Legislature found in §25-0201(6). Furthermore, the Commissioner is constrained to judge permit applications in terms of compliance with the environmental protection accorded in the statute, not as constrained by the map. Section 25-0403(1) states that

... [i]n granting, denying or limiting any permit under this act, the commissioner shall consider the compatibility of the proposed activity with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, flood and hurricane and storm dangers, and the land-use regulations promulgated pursuant to section 25-0302 of this act.

The Commissioner's duty is bolstered by §25-0402(1): "[t]he applicant shall have the burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions of this act."

Thus, permit issuance is governed by a proposed project's compatibility with the statutorily recognized functions and benefits of wetlands, and by its conformance with the land-use restrictions of Part 661. To apply these tests there must be accurate and up-to-date facts. This need for current information also underlies the requirement in the State Environmental Quality Review Act (SEQRA), ECL Article 8, that applications for Type I and Unlisted Actions be accompanied by a complete environmental assessment, in order to determine the significance of the

proposed action. See 6 NYCRR §§617.6 and 617.7. Just as it would be unfair and illogical to bind an applicant to an obsolete inventory map which overstated the extent of a particular wetland, fairness, logic and the above-cited provisions of law, similarly dictate that DEC not be prevented from reconciling an outdated map with prevailing on-site conditions in the interest of correcting an underinclusive boundary.

In the instant Petition, the present map had alerted Petitioner to the need to make appropriate field inquiries regarding the metes and bounds of the wetlands. Contrary to Petitioner's insistence on being able to rely on the originally mapped line as a matter of law, in advance of the hearing the Petitioner commissioned an expert to make a field check of the site and stake the wetland boundary as perceived through direct observations. This was diligent and proper on the Petitioner's part. The Petitioner's proposed development was based on the resulting line, which was landward of the original line. Petitioner's disregard of the boundary shown on the inventory map recognizes that the actual extent of the regulated wetland portion of Petitioner's land is greater than was originally mapped.


That DEC jurisdiction over tidal wetlands is not limited to the area depicted on inventory maps is consistent with previous Decisions of the Commissioner in tidal wetlands permit proceedings, the most recent being In the Matter of F.L.D.

Construction Corp. (August 28, 1984). There, DEC staff sought a boundary relocation in mid-hearing, based on the conditions at variance with filed maps. In dismissing an argument similar to that raised by Petitioner herein, Commissioner Henry G. Williams ruled (at p.4) as follows:

...[t]he Applicant argues that the extent of the Department's jurisdiction over its Site should be limited to the legal fiction reflected in Tidal Wetlands Map 568-496 as filed, notwithstanding the clear and convincing proof in the record that since the map was drawn, the tidal wetlands have moved to the edge of the Pond adjacent to the Applicant's Site. Such a view of ECL Article 25 flies in the face of the legislative findings and regulatory scheme provided under ECL Article 25. The Applicant's view espouses form over substance, inconsistent with the purposes of the Tidal Wetlands Act and is therefore rejected.

Accordingly, I conclude that the Commissioner possesses the authority to alter an inventory map at any time pursuant to Article 25 and Part 661, and that an applicant is subject to any duly revised boundaries. Having determined this legal issue, the map amendment hearing originally scheduled for March 11, 1982 may proceed, to be followed by resumption of the underlying permit proceeding.

DATED: Albany, New York
December 11, 1984



Nicholas A. Robinson
Deputy Commissioner/General Counsel