STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a tidal wetlands permit pursuant to Environmental Conservation Law (ECL) article 25 and Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) part 661 to elevate the existing structure from the current foundation and to construct a two-story addition to property located at 122 Seafield Point Road in Westhampton Beach, Suffolk County, New York by	Issues Ruling DEC Application No. 1-4736-01981/00006
Joseph and Margaret Kelly, **Applicants**.	July 20, 2006

Proceedings

On September 4, 2003, Staff from the Region 1 Office of the Department of Environmental Conservation (Department staff) received an application for a tidal wetlands permit from Nicholas A. Vero on behalf of Joseph and Margaret Kelly. Mr. Vero is the Kellys' architectural consultant. The Kellys own property at 122 Seafield Point Road, Westhampton Beach (Suffolk County), New York, and have requested a permit from the Department to improve the two-story house on the property. During the course of Department staff's review, the Kellys supplemented the application materials. Department staff determined that the Kellys' proposal would be a Type II action pursuant to the State Environmental Quality Review Act ([SEQRA], ECL article 8, 6 NYCRR part 617). On May 2, 2005, Department staff issued a notice of permit denial. In a letter dated May 31, 2005, Mr. Vero requested a hearing on behalf of the Kellys.

On July 19, 2005, the Office of Hearings and Mediation Services received the hearing request, and the captioned matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. Efforts to resolve the case without a hearing were unsuccessful. Subsequently, a public hearing was scheduled for June 27, 2006 after conferring with the parties and their respective, potential witnesses.

A combined notice of complete application and public hearing dated May 16, 2006 was published in the Department's *Environmental Notice Bulletin* on May 24, 2006 and in the *Southampton Press - Western Edition* on May 25, 2006. As scheduled, ALJ O'Connell convened a legislative hearing on June 27, 2006 at the Westhampton Beach Fire Hall located at 92 Sunset

Avenue, Westhampton Beach, New York at 10:00 a.m. The purpose of the legislative hearing was to provide members of the public with the opportunity to comment about the Kellys' proposal. No one appeared at the legislative hearing. No written comments were filed with the Office of Hearings and Mediation Services.

Immediately following the legislative hearing session, ALJ O'Connell convened an issues conference to identify the issues for adjudication. Participation in the issues conference is limited to the applicant, Department staff, and those who have filed petitions for either full party status or amicus status (*see* 6 NYCRR 624.5). At the issues conference, James N. Hulme, Esq. (Kelly & Hulme, P.C., Westhampton Beach) appeared for the Kellys. Craig Elgut, Esq., Acting Regional Attorney, appeared on behalf of Department staff. The combined notice set June 21, 2006 as the return date for petitions, and none were received at the Office of Hearings and Mediation Services. Consequently, the parties to the upcoming adjudicatory hearing will be the Kellys and Department staff (*see* 6 NYCRR 624.5[a]).

After the issues conference, the parties and the ALJ went to the Kellys' home at 122 Seafield Point Road for a site visit. During the site visit, the Kellys and their consultants pointed out the natural features of the property and the location of the proposed improvements.

The record of the issues conference closed on July 7, 2006, upon receipt by ALJ O'Connell of the stenographic transcript of the June 27, 2006 public hearing and issues conference.

Project Description

The Kellys propose to elevate the existing two-story structure at 122 Seafield Point Road 1½ feet from the current foundation, and to construct a two-story addition. At the issues conference, the Kellys explained that Federal Emergency Management Administration (FEMA) standards concerning flood insurance require an increase in the elevation of the current structure. The footprint of the proposed addition would be about 714 square feet.

The existing structure is located, at its closest point, within approximately eight feet of the tidal wetlands boundary. The proposed addition would expand the dimensions of two of the four existing bedrooms, and add 1½ bathrooms to the house. If the proposal is approved, the house would have a total of 3½

baths. Other proposed features include a covered porch, which is about 20 feet by 8 feet, and a deck from the second story. Portions of the addition would be about six feet from the tidal wetlands boundary at its closest point.

The Kellys propose to abandon the current sanitary system, which is located near the southwest corner of the house, and to install a new sanitary system. The proposed sanitary system would include a retaining wall that would be located within 23 feet of the tidal wetlands boundary at its closest point. The Suffolk County Department of Health would need to approve the new sanitary system.

In addition, the current impervious asphalt driveway, located approximately five feet from the tidal wetlands boundary at its closest point, would be replaced with pervious crushed stone. Finally, the Kellys propose to install drywells on the site to collect rainwater runoff from the house. The number of drywells, their individual dimensions, and their exact locations on the property are not known. At the issues conference, the parties agreed that all of the proposed activities described above would be located on the adjacent area.

Rulings on Proposed Issues for Adjudication

1. The Bulkhead

The application materials include a survey of the Kellys' property dated May 5, 2003. The tidal wetlands are located along the northern, northeast, and eastern sides of the property. A bulkhead is depicted on the survey, and extends generally along the northern edge of the property near the tidal canal. On the survey, the bulkhead curves around the northeast portion of the property and abruptly ends. The east and southeast boundaries of the property are not bulkheaded. The southern side of the property is bounded by uplands not owned by the Kellys. A roadway is on the western side of the property. The Kellys' driveway extends toward the house from the roadway on the western side of the property.

At the hearing, the Kellys asserted that the bulkhead limits the scope of the Department's jurisdiction over the property based on the regulatory definition of the term "adjacent area" (*see* 6 NYCRR 661.4[b][1]). The adjacent area of regulated tidal wetlands is the land adjacent to the tidal wetland, which generally extends 300 feet landward from the wetland boundary

(*see* 6 NYCRR 661.4[b][1][i]). Section 661.4(b)(1)(ii) describes circumstances where the adjacent area may be less than 300 feet landward of the tidal wetland boundary. Under such circumstances, the adjacent area would extend landward from the wetland boundary to the seaward edge of the closest, lawfully and presently existing (*i.e.*, as of August 20, 1977) functional and substantially fabricated structure, such as a bulkhead, which lies generally parallel to the tidal wetland boundary and which is a minimum of 100 feet in length.

According to the Kellys, the bulkhead on the northern side of the property is a functional, man-made structure that has been present on the property since the effective date of the tidal wetland regulations. The Kellys argued that the bulkhead limits the width of the adjacent area on the northern side of the property to less than 300 feet.

Section 661.18 of 6 NYCRR entitled, "jurisdictional inquiries," allows people to request the regional permit administrator to make written determinations about whether certain regulatory requirements outlined in 6 NYCRR part 661 would apply to particular proposals. Department staff objected to the Kellys' attempt to challenge the scope of the Department's jurisdiction at the hearing, and contended that the Kellys' request, at this point in the proceeding, is untimely. Staff argued that the Kellys should have availed themselves of the procedures outlined in 6 NYCRR 661.18 when they filed the tidal wetlands permit application.

In the alternative, Department staff argued that the Kellys should submit information to support their claim about the bulkhead for staff's evaluation before the adjudicatory hearing commences. After reviewing this information, Staff would issue a determination about whether the bulkhead limits the width of the adjacent area along the northern side of the property.

The Kellys argued that the procedures outlined in 6 NYCRR 661.18 do not specify a time after which jurisdictional inquiries cannot be made. They argued further that issues concerning jurisdiction may be raised at any time. The Kellys contended that they can raise this issue now and that the ALJ has authority to consider issues related to the bulkhead within the context of this proceeding.

Ruling: The Kellys are correct that disputes concerning the scope of the Department's jurisdiction over the tidal wetlands on

their property cannot be waived, and that objections to the scope of the Department's jurisdiction may be taken at any stage of the action (*see Matter of Watervliet Housing Auth. v Brenda Bell*, 262 AD2d 810, 811; *Matter of Mark Fry v Village of Tarrytown et al.*, 89 NY2d 714, 718; *Robinson v Oceanic Steam Nav. Co.*, 112 NY 315, 324).

In particular, issues related to whether the width of an adjacent area is limited to something less than 300 feet by fabricated structures such as a rip-rap wall or a bulkhead have been the subject of administrative hearings to consider applications for tidal wetlands permits (*see e.g., FLD Construction Corp. v Williams*, 122 AD2d 189; *Matter of John and Eileen Dwyer*, Decision of the Commissioner, Feb. 4. 1988).

The following procedure will be used to resolve this issue. First, the Kellys shall file the proof to support their claim that the width of the adjacent area on their property is something less than 300 feet landward of the wetland boundary with Department staff. Then, after Department staff reviews this information and, if necessary, investigates the claim further, staff will issue a determination. Finally, if the Kellys dispute Staff's determination about the bulkhead's impact on the width of the adjacent area on their property, the disputed determination will be an issue for adjudication.

The foregoing procedure is more efficient over the one proposed by the Kellys. Department staff will be considering variance requests in advance of the adjudicatory hearing (*see* Section 3 below). Depending on the outcome of Staff's review of the proposed issues related to the bulkhead and the variance requests associated with the development restrictions outlined at 6 NYCRR 661.6, some issues may be resolved, or refined, which would shorten the adjudicatory phase of the administrative hearing.

Based on the survey filed with the application materials, it is worth noting here that the circumstances on the Kellys' property concerning the bulkhead appear to be similar to the circumstances depicted in explanatory figure 6, which is associated with the explanation presented at 6 NYCRR 661.4(b)(3).

2. Permit Issuance Standards

The standards for issuance for a tidal wetlands permit are outlined at 6 NYCRR 661.9. On May 2, 2005, Department staff

issued a notice of permit denial. The denial notice states that the Kellys' permit application did not meet the following regulatory standards:

a. 661.9(c)(3) - the proposal will have an undue adverse impact on the present and potential values of the tidal wetland;

b. 661.9(b)(1)(i) - the proposal is not compatible with the policy of the act to preserve and protect tidal wetlands and prevent their despoliation and destruction;

c. 661.9(b)(1)(ii) and/or 661.9(c)(1) - the proposal is not compatible with the public health and welfare;

d. 661.9(b)(1)(iii) - the proposal is not reasonable or necessary;

e. 661.9(b)(1)(iv), and either 661.9(c)(4) or 661.9(c)(2)[1] - the proposal does not comply with development restrictions; and

f. 661.9(b)(1)(v) - the proposal does not comply with the use guidelines in section 661.5.

The standards outlined at 6 NYCRR 661.9(b) apply to activities undertaken on tidal wetlands, and the standards outlined at 6 NYCRR 661.9(c) apply to activities undertaken on the adjacent area. At the issues conference, the parties agreed that all proposed activities would take place on the adjacent area. Therefore, the standards outlined at 6 NYCRR 661.9(b) are not applicable here.

According to the Kellys, they have complied with the standard at 6 NYCRR 661.9(c)(2) because Department staff did not expressly state that their proposal would fail to meet this standard in Staff's May 2, 2005 notice of permit denial. Department staff argued, however, that the appropriate regulatory reference in the May 2, 2005 permit denial notice is to 6 NYCRR

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[1] On page 2 of Department staff's notice of permit denial to the Kellys dated May 2, 2005, it appears that the "4" in 6 NYCRR 661.9(c)(4) was over written with a "2" to refer to 6 NYCRR 661.9(c)(2).

661.9(c)(2), rather than to 6 NYCRR 661.9(c)(4). Department staff observed that the wording in the May 2, 2005 denial notice paraphrases the language at 6 NYCRR 661.9(c)(2).

The Kellys stated that their copy of the May 2, 2005 denial notice refers only to 6 NYCRR 661.9(c)(4) and not to 6 NYCRR 661.9(c)(2). The Kellys argued further that because Department staff did not provide them with notice that their proposal would not comply with 6 NYCRR 661.9(c)(2), any issue related to compliance with 6 NYCRR 661.9(c)(2) would be beyond the scope of this proceeding.

Ruling: For permit applications duly filed with the Department, 6 NYCRR 621.9 requires Staff to mail to the applicant, or if applicable, its agent, a decision in the form of a permit, a permit with conditions, or a statement that the permit applied for has been denied with an explanation for the denial. With respect to the captioned matter, Department staff complied with this requirement by sending the May 2, 2005 notice of permit denial to the Kellys. As noted above, the May 2, 2005 denial notice identifies the permit issuance criteria with which the Kellys' proposal would not comply. These regulatory standards shall be the issues for adjudication. Specifically, the issues for adjudication are whether the Kellys' proposal would:

1. be compatible with the public health and welfare (*see* 6 NYCRR 661.9[c][1]);

2. comply with development restrictions contained in section 661.6 of 6 NYCRR part 661 (*see* 6 NYCRR 661.9[c][2]);

3. have an undue adverse impact on the present or potential values of the adjacent area and nearby tidal wetland (*see* 6 NYCRR 661.9[c][3]); and

4. comply with the use guidelines in section 661.5 (*see* 6 NYCRR 661.9[c][4]).

The Kellys' objection to considering compliance with 6 NYCRR 661.9(c)(2) is without merit. Although the actual reference to the regulations in the May 2, 2005 denial notice may not be precise, the wording paraphrases the language from 6 NYCRR 661.9 (c)(2) rather than 6 NYCRR 661.9(c)(4). Furthermore, all four

permit issuance standards and whether the Kellys' proposal would comply with them were discussed at the issues conference.

With respect to the second issue identified above, the development restrictions outlined at 6 NYCRR 661.6 that are relevant to this proceeding are:

1. the minimum 75 feet setback requirement from the tidal wetland boundary of all principal buildings and other structures that are in excess of 100 square feet (*see* 6 NYCRR 661.6[a][1]); and

2. the minimum 100 feet setback requirement from the tidal wetland boundary of any on-site sanitary system (*see* 6 NYCRR 661.6[a][2]).

A potentially relevant development restriction could be whether there would be a minimum 2 feet separation distance between the seasonal high ground water level and the bottom of the elements of the proposed sanitary system (*see* 6 NYCRR 661.6[a][3]). The application materials do not include any details about the proposed sanitary system. Therefore, it cannot be determined at this point in the proceeding whether the Kellys would be able to comply with this development restriction. If the Kellys cannot comply with this development restriction, then they will be required to request a variance from it.

In addition, there is insufficient information in the record, as developed to date, to determine whether the restriction at 6 NYCRR 661.6(a)(8) would apply here. It is unknown whether the nearby tidal waters are classified as SA or are within 1,000 feet of such waters (*see* 6 NYCRR 701.10 concerning the classification of Class SA saline surface waters). This information is within the expertise of Department staff. Therefore, within two weeks from receipt of this ruling, Department staff shall provide the Kellys and me with this information. If the water classification of the tidal waters near the Kellys' property is SA, or if tidal waters near the Kellys' property are within 1,000 feet of waters classified as SA, then the development restriction at 6 NYCRR 661.6(a)(8) will be relevant to this proceeding.

With respect to the development restriction at 6 NYCRR 661.6(a)(8), I note that the Kellys explained at the issues conference that they propose to install drywells on the site to collect rainwater diverted from the house. However, the number

of drywells, their exact locations on the property, and whether the design capacity would be sufficient to collect runoff from a five-year storm event are not known at this time.

During the issues conference, the parties discussed the use guidelines outlined at 6 NYCRR 661.5. Based on that discussion, and the parties' agreement that all activities proposed by the Kellys would take place exclusively on the adjacent area, the uses are considered "generally compatible" and would require a permit (*see* 6 NYCRR 661.5[a][2]). As noted in the regulations, the compatibility of a particular use depends on the particular location, design and probable impact of the proposed use. No use proposed by the Kellys that is identified in the table at 6 NYCRR 661.5(b) would be "presumptively incompatible" on the adjacent area. Furthermore, no use proposed to be undertaken on the adjacent area is considered an "incompatible" use that would be expressly prohibited by the regulations.

3. Variances

The Kellys argued that they are entitled to a tidal wetlands permit, and that they do not need to obtain any variances from the development restrictions outlined at 6 NYCRR 661.6 to obtain the requested permit. The Kellys do not seek any variances from 6 NYCRR 661.6 as part of their application for the tidal wetlands permit.

In the alternative, the Kellys argued that if any variances from 6 NYCRR 661.6 are required, they can offer evidence, during the adjudicatory hearing, to show that they are entitled to the variances needed to obtain the requested tidal wetlands permit.

According to Department staff, the Kellys' proposal would require variances from the development restrictions outlined at 6 NYCRR 661.6. Staff argued that the Kellys should be required to apply for the necessary variances before the hearing commences.

Ruling: The preceding section identifies the relevant, as well as two potentially relevant, development restrictions from 6 NYCRR 661.6. Based on the survey identified above, which the Kellys' consultant filed with the application materials, and given the size of the Kellys' property, the proposed deck and addition, the replacement driveway, and the sanitary system would not meet the setback requirements outlined at 6 NYCRR 661.6 (a)(1) and (2). I find that variances from these development restrictions may be necessary even if it is determined that the

bulkhead on the Kellys' property limits the width of the adjacent area to something less than 300 feet based on the configuration of the Kellys' property.

No determination can be made at this point in the proceeding, however, about whether the Kellys need a variance from the development restriction at 6 NYCRR 661.6(a)(3) concerning the 2 feet minimum separation distance between the seasonal high ground water level and the bottom of the elements of the proposed sanitary system. The hearing record does not provide any details about the proposed sanitary system and the ground water level. In addition, there is insufficient information in the record, as developed to date, to determine whether the restriction in 6 NYCRR 661.6(a)(8) would apply here. As directed above, Department staff will be providing additional information about the classification of the nearby tidal waters.

Although the Kellys could offer evidence at the hearing to show whether they would qualify for variances from the development restrictions outlined at 6 NYCRR 661.6, I find that it would be more efficient and ensure a complete hearing record if the Kellys request variances and provide Department staff with all information related to the variances in advance of the hearing. Depending on the information provided by the Kellys to support their variance requests, Department staff may decide to grant some or all of the requested variances, which would obviate the need for a hearing about the non-disputed variance or variances. If Department staff denies any or all of the requested variances, then those denials would become issues for adjudication.

Accordingly, before the adjudicatory hearing will commence, the Kellys shall file written requests with Department staff for the necessary variances. The variance requests shall include the information outlined in 6 NYCRR 661.11(a) concerning, among other things, the minimum relief from the relevant development restrictions, as well as the "practical difficulty" of complying with the various relevant development restrictions.

4. <u>The Sanitary System</u>

During the issues conference, the Kellys argued that their proposed sanitary system should be characterized as use #2 on the chart at 6 NYCRR 661.5(b). On the adjacent area of tidal wetlands, a permit is not required for:

> "[a]ctivities of the department of health or units of local government with respect to public health, when conducted in conformance with section 25-0401 of the [Tidal Wetlands] Act."[2]

Because the Kellys would need to obtain approval from the Suffolk County Department of Health for their proposed sanitary system, they argued that the installation of the proposed sanitary system would be an "activity" of the county health department that would not require a tidal wetlands permit from the Department.

Department staff argued, however, that the Kellys' proposed sanitary system should be characterized as use #45 on the chart at 6 NYCRR 661.5(b). On the adjacent area of tidal wetlands, the installation of a sewage disposal system and the discharge of pollutants that do not require a State Pollutant Discharge Elimination System (SPDES) permit pursuant to ECL article 17 is characterized as a generally compatible use that requires a permit.

Citing 6 NYCRR 661.7, Department staff argued further that because a tidal wetlands permit would be required for the other regulated activities proposed by the Kellys (*e.g.*, the proposed addition), the installation of the proposed sanitary system would also require a permit. Staff also characterized the installation of the proposed sanitary system as a set of uses, which would include excavating, installing a retaining wall and other components of the sanitary system, and backfilling the area. Staff reasoned that because each regulated use would require a permit, a permit would be required to install the proposed sanitary system.

Ruling: In addition to the requested tidal wetlands permit from the Department, the Kellys would need to obtain an approval from the Suffolk County Department of Health to install the proposed sanitary system. The Kellys, however, are not agents of the County Health Department, and the County Health Department is not installing the sanitary system for the Kellys. Moreover, the Kellys have offered nothing to show that the Suffolk County

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[2] ECL 25-0401(4) states in pertinent part, that "[a]ctivities, orders, and regulations of the department of health or of units of local government with respect to matters of public health shall be excluded from regulation hereunder, except as hereinafter provided."

Department of Health has ordered them to install a new sanitary system on their property. Therefore, the sanitary system proposed by the Kellys is more appropriately characterized as use #45 rather than as use #2 in the table at 6 NYCRR 661.5(b).

I am not persuaded by Staff's argument that the installation of the proposed sanitary system is a set of regulated uses, and that because each regulated use would require a permit, a permit would be required to install the proposed sanitary system. The regulations specifically identify the installation of a sanitary system as a use separate from the set of uses identified by Department staff. With respect to the proposed sanitary system, the appropriate consideration would be to consider the installation of the sanitary system as a single regulated use.

Appeals

During the course of a hearing, a ruling by the administrative law judge to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling as required by 6 NYCRR 624.6(e)(1). However, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Therefore, any appeals in this matter must be received at the office of Commissioner Denise M. Sheehan (attention: Louis A. Alexander, Assistant Commissioner for Hearings), New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233, no later than the close of business on August 24, 2006. Moreover, responses to the initial appeals will be allowed and such responses must be received as above no later than the close of business on September 14, 2006.

The appeals and any responses sent to the Commissioner's Office must include an original and one copy. In addition, one copy of all appeal and response papers must be sent to Chief ALJ James T. McClymonds at the Office of Hearings and Mediation Services, to opposing counsel, and to me at the same time and in the same manner as to the Commissioner. Service upon the Commissioner of any appeal or response thereto by facsimile transmission (FAX) or e-mail is not permitted and any such service will not be accepted.

Appeals and any responses thereto should address the ALJ's rulings directly, rather than merely restate a party's contentions and should include appropriate citations to the record and any exhibits introduced therein.

Further Proceedings

Department staff has been directed to provide the classification of the nearby tidal waters. This information relates to the applicability of the development restriction at 6 NYCRR 661.6(a)(8) to the Kellys' proposal for controlling stormwater runoff from their property.

Before the adjudicatory phase of the hearing will commence, the Kellys have been directed to: (1) file the proof to support their claim that the bulkhead along the north and northeast side of the property limits the width of the adjacent area on the property to less than 300 feet (*see* 6 NYCRR 661.4[b][1][ii]); and (2) file variance requests, pursuant to 6 NYCRR 661.11, from the applicable development restrictions outlined at 6 NYCRR 661.6, as identified above.

After the Kellys file their jurisdiction inquiry and variance requests with Department staff, Staff shall inform the Kellys within 15 calendar days whether any additional information is needed for Staff to complete its review. After the Kellys have provided all required information or state that no other information will be submitted, Department staff shall make determinations about the bulkhead and the variance requests within 30 calendar days. Information concerning the bulkhead and the variance requests not initially provided to Department staff will not be considered at the hearing. In setting these time frames, I am relying on the authority at 6 NYCRR 624.8(b)(1)(xv), which authorizes the ALJ to take any measures necessary to maintain order and the efficient conduct of the hearing. The adjudicatory phase of the hearing will commence after Department staff issues the determinations discussed in this issues ruling.

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

Dated: Albany, New York
July 20, 2006

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