

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

Ruling on Staff's Motion for Order Without Hearing and Respondents Cross-motion to Dismiss

DEC Case No.
2-20070517-290

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

Respondents.

April 9, 2009

Proceedings

With a cover letter dated October 28, 2008, Staff from the Department of Environmental Conservation Region 2 Office (Department staff) served a motion for order without hearing (see Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] § 622.12) with 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, Chief Administrative Law Judge James T. McClymonds acknowledged receipt of Staff's motion, and advised the parties that the matter had been assigned to me.

With Staff's motion for order without hearing dated October 28, 2008, Staff included the following supporting papers: (1) a notice of motion dated October 28, 2008; (2) a memorandum of law dated October 28, 2008; (3) an affirmation by Mr. Drescher dated October 28, 2008 with attached Exhibits A, B, C and D; and (4) an affidavit by George Stadnik sworn to October 16, 2008 with attached Exhibits. Exhibit A to Mr. Drescher's October 28, 2009 affirmation is a copy of a deed concerning the subdivision of real property located at 2205-2217 Richmond Terrace in Richmond County (Staten Island, New York). Exhibit B is a copy of a deed concerning the transfer of ownership of the Richmond Terrace property from Mezzacappa Brothers, Inc. to Sam and Frank Mezzacappa. Exhibit C is a copy of a correction deed concerning

the Richmond Terrace property. Exhibit D is a printout dated October 28, 2008 from the New York State Department of State (NYS DOS), Division of Corporations concerning the status of the corporate Respondent, Mezzacappa Brothers, Inc.

A series of photographs numbered 1 through 4, and Figure 1 are incorporated into the body of Mr. Stadnik's October 16, 2008 affidavit. In addition, the following exhibits are attached to Mr. Stadnik's affidavit. Exhibits 1.1, 1.2 and 1.3 are copies of aerial photographs. Exhibit 2 is a survey of the Richmond Terrace property prepared by Wohl & O'Mara, LLP, Civil Engineers and Land Surveyors (Staten Island, New York). The last revision on Exhibit 2 is dated January 11, 2007. Exhibit 3 to Mr. Stadnik's October 16, 2008 affidavit is a drawing or plan of the seaward portion of the Richmond Terrace property, which depicts a proposed replacement bulkhead line.

With respect to the captioned administrative enforcement action, Sam Mezzacappa appeared *pro se* and on behalf of his brother, Frank Mezzacappa, and Mezzacappa Brothers, Inc., the corporate Respondent. By fax and regular mail, Sam Mezzacappa filed the following: (1) a cover letter dated November 22, 2008 addressed to Chief ALJ McClymonds; (2) a letter dated November 22, 2008 answering Staff's motion; and (3) a letter dated December 19, 2008, which supplements the November 22, 2008 letter-answer.

After reviewing the papers identified above, I sent a letter dated January 5, 2009 to the parties. I explained that Department staff commenced the captioned administrative enforcement action by filing the October 28, 2008 motion for order without hearing (see 6 NYCRR 622.12), and noted that Staff's motion includes proof in the form of an affidavit and documentary exhibits. With the January 5, 2009 letter, I enclosed a copy of the Commissioner's Final Decision and Order dated June 16, 2003 in the *Matter of Richard Locaparra*. I explained further that 6 NYCRR 622.12 provides a respondent with the opportunity to file a response that includes supporting affidavits and other available documentary evidence, and that the Commissioner provides additional guidance in the *Locaparra* Decision about what the parties should file and how the ALJ should evaluate the parties' respective filings. In the January 5, 2009 letter, I recommended scheduling a telephone conference call with the parties to discuss the procedures associated with a motion for order without hearing.

As scheduled in a letter dated January 16, 2009, I convened a telephone conference call with the parties at 10:00 a.m. on January 27, 2009. Mr. Drescher participated on behalf of Department staff, and Sam Mezzacappa participated on behalf of Respondents. During the January 27, 2009 telephone conference call, I explained that Sam Mezzacappa's correspondence dated November 22, 2008 and December 19, 2008 did not comport with the requirements outlined at 6 NYCRR 622.12, and the Commissioner's guidance in the *Locaparra* Decision. Mr. Mezzacappa stated that, if provided the opportunity, he would like to supplement his response to Staff's motion with affidavits and other supporting documentation. In a letter dated January 27, 2009, I set February 17, 2009 as the due date for Respondents' supplemental information.

On February 19, 2009, I received, among other things, copies of correspondence from Frank Mezzacappa dated February 12, 2009 and from Sam Mezzacappa dated February 13, 2009. Both letters relate to a pending administrative enforcement action concerning property located at 200 Meredith Avenue in Richmond County (DEC Case No. R2-20050607-202). In this correspondence, Frank and Sam Mezzacappa request a final determination from the Commissioner with respect to the Meredith Avenue property.

With respect to Staff's October 28, 2008 motion, Sam Mezzacappa also provided a four part affidavit sworn to February 13, 2009. Mr. Mezzacappa attached Exhibits 1 through 1-G to his February 13, 2009 affidavit. With Exhibits 1 (a copy of Part II from Sam Mezzacappa's February 13, 2009 affidavit), 1-A and 1-B, Mr. Mezzacappa challenges the Department's jurisdiction over the Richmond Terrace property. Exhibits 1-C through 1-G are plans, drawing and surveys provided by Rogers Surveying, PLLC (Staten Island, New York). Exhibit 2 is a notarized letter dated February 4, 2009 from Charles F. Vachris. Exhibit 3 is a portion of a letter notarized on February 10, 2009 from Elana Kapul.

On February 20, 2009, I received additional materials from Sam Mezzacappa on behalf of Respondents. Addendum No. I relates to the issue of the Department's jurisdiction over the site. The second item is a replacement for page 3 of Mr. Mezzacappa's affidavit with attached Exhibit 3-A. Exhibit 3-A is a notarized letter dated February 6, 2009 from Michael Pantelis.

Attached to this ruling as Appendix A is a list of all the documents filed by the parties. The documents are consecutively numbered in the order in which the parties submitted them. In

this ruling, the documents are referenced by the assigned exhibit number (1 through 32, inclusive).

Summary Positions of the Parties

I. Department Staff

Staff asserts that Respondents violated Environmental Conservation Law (ECL) articles 15 and 25, and implementing regulations at 6 NYCRR parts 608 and 661. According to Staff, Respondents placed or allowed fill to enter the navigable waters of the State on multiple occasions without a permit from the Department. In addition, Respondents allegedly placed or allowed fill to enter a regulated tidal wetland on multiple occasions without a permit from the Department. Finally, Respondents allegedly subdivided a parcel of real property located within the adjacent area of a regulated tidal wetland without a permit from the Department. (Exhibit 1.)

According to Staff (Exhibit 2, ¶14), the alleged violation related to the placement of fill in navigable waters of the State occurred for the first time, between 1996 and 2004 and, for a second time, on May 17, 2007. With respect to the alleged tidal wetland violations (Exhibit 2, ¶ 32), Staff contends that they occurred at the following times: (1) May 10, 2005; (2) between 2001 and 2004, and (3) May 17, 2007.

Staff also seeks remediation as part of the motion for order without hearing. Staff requests an order from the Commissioner directing Respondents to remove all debris from the navigable waters and regulated tidal wetlands to an upland location. Staff also requests that Respondents should be directed to file a plan with Department staff for the installation of a shoreline stabilization structure such as a steel bulkhead or rock revetment. Finally, Staff requests that the Commissioner assess a total civil penalty of \$50,000 of which amount, \$20,000 should be payable immediately, with the remainder suspended pending compliance with the requested remediation. (Exhibit 1.)

II. Respondents

Respondents oppose Staff's motion and request a hearing. In his letter-answer dated November 22, 2008 (Exhibit 16), Sam Mezzacappa denies that he and the other Respondents placed or allowed fill to enter the water and the tidal wetland. Mr. Mezzacappa asserts that naturally occurring erosion is

responsible for any fill that entered the Kill van Kull. In the alternative, Mr. Mezzacappa contends that excessive blasting was done to clear the channel in the Kill van Kull, which undermined the retaining structures along the shoreline. According to Mr. Mezzacappa, there are many outstanding law suits related to the blasting. Finally, Mr. Mezzacappa argues that the Department does not have jurisdiction over the site.

Mr. Mezzacappa admits to subdividing the Richmond Terrace property (Exhibit 16), but argues that the Department lacks jurisdiction over the site because the adjacent area of the regulated tidal wetland is limited by the bulkhead on the property. In the alternative, Mr. Mezzacappa contends that the subdivided parcel is landward of the 150-foot wide adjacent area. Mr. Mezzacappa notes further that officials from the City of New York did not inquire whether Respondents had a permit from the Department when they applied for subdivision approval and filed the deed.

With respect to the relief requested by Department staff, Mr. Mezzacappa contends that all concrete debris has been removed from the site. Mr. Mezzacappa states that the property is for sale, and that he and the other Respondents were offered \$970,000 for the property in 2005. However, the sale did not go forward when the buyer became aware of this administrative enforcement action. According to Mr. Mezzacappa, the buyer was prepared to replace the bulkhead on the site. Mr. Mezzacappa asserts that he and the other Respondents cannot pay any civil penalty. With reference to Staff's replacement bulkhead line (Exhibit 14), Mr. Mezzacappa argues that the proposed location would substantially reduce the size of the property and, thereby, adversely impact the potential revenue that Respondents could obtain from the sale of it. (Exhibits 16 and 17.)

Respondents cross-move to dismiss the charges alleged in Department staff's October 28, 2008 motion for various reasons. In Part I of his affidavit (Exhibit 19), Mr. Mezzacappa argues that Staff failed to commence the captioned enforcement action in a timely manner. In Part II of his affidavit, Mr. Mezzacappa argues that the Department does not have jurisdiction over the site. He argues there has been a bulkhead on the site since 1887, which is higher than 10 feet. In the alternative, Mr. Mezzacappa contends that portions of the pre-existing bulkhead remain in place, and that Respondents should be allowed to undertake an in-kind, in-place replacement of the bulkhead.

In Part III of his affidavit (Exhibit 19), Mr. Mezzacappa asserts that the captioned administrative enforcement action would result in an undue hardship. According to Mr. Mezzacappa, when potential buyers of the Richmond Terrace property have contacted Department Staff, potential buyers are advised about the pending enforcement action, and decide not to purchase the property. In Part IV of his affidavit (Exhibit 19), Mr. Mezzacappa denies the allegations asserted in Staff's motion with respect to the placement of fill in navigable waters and the tidal wetland. With respect to the subdivision of the Richmond Terrace property, Mr. Mezzacappa states that both his architect and attorney advised that an approval from the Department was not necessary. Mr. Mezzacappa states further, however, that his architect later advised that a permit was necessary.

Findings of Fact

For the purposes of this administrative enforcement action, the following facts are determined as a matter of law.

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 DOS, 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. 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.

Discussion

I. Motion for Order without Hearing

Pursuant to 6 NYCRR 622.12, Department Staff has moved for an order without hearing against Respondents. That provision is governed by the same principles that govern summary judgment pursuant to Civil Practice Law and Rules (CPLR) § 3212. Section

622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.

The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (see *Richard Locaparra, d/b/a L&L Scrap Metals*, Final Decision and Order of the Commissioner, June 16, 2003).¹ The Commissioner's discussion includes numerous citations to case law, the Department's enforcement regulations, and CPLR 3212.

The party moving for summary judgment has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])" (*Friends of Animals v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely on conclusory statements and denials but must lay bare its proof (see *Hanson v Ontario Milk Producers Coop., Inc.*, 58 Misc 2d 138, 141-142 [Sup Ct. Oswego County 1968]). The failure of a responding party to deny a fact alleged in the moving papers constitutes an admission of the fact (see *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

Pursuant to the CPLR, where liability with respect to a particular cause of action is established as a matter of law, but triable issues of fact remain concerning the amount or extent of damages, summary judgment may be granted on the issue of liability only (see CPLR 3212[c]). The Department's regulations expressly recognize this possibility (see 6 NYCRR 622.12[f]). Similarly, both the CPLR and the regulations provide that where liability is determined with respect to one or more causes of

¹ More recently, the Commissioner provided additional guidance in the *Matter of Linden Latimer Holdings, LLC*, Order dated July 15, 2008.

action, but not all, summary judgment may be granted as to the causes of action established as a matter of law, leaving for a hearing the unresolved causes of action for which triable issues of fact remain (see CPLR 3212[e]; 6 NYCRR 622.12[d]). Where, as here, the motion is granted in part, and denied in part, the administrative law judge may, if practicable, issue a ruling that specifies the facts that have been established for all purposes in the hearing (see 6 NYCRR 622.12[e]).

II. Corporate Respondent - Mezzacappa Brothers Inc.

Mezzacappa Brothers, Inc. was formed in 1961 as a New York State domestic corporation. Sam Mezzacappa is the Chairman or Chief Executive Officer of the corporation. Exhibit 7 is a copy of the entity information for Mezzacappa Brothers, Inc. from the website maintained by the NYS DOS, Division of Corporations. According to these records, Mezzacappa Brothers, Inc. is an "active" domestic business corporation. Department staff printed out Exhibit 7 on October 28, 2008. Therefore, Mezzacappa Brothers Inc. may be held liable for any of the violations that Staff proves.

III. 2205-2217 Richmond Terrace

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. The northern property line abuts the Kill van Kull, which is a navigable water of New York State, and a regulated tidal wetland (Tidal Wetland Map No. 572-498). On the tidal wetlands map, the shoreline at the Richmond Terrace property is depicted as a straight line and follows a bulkhead that was functional prior to August 1977. The approximate length of the bulkhead was 255 feet. (Exhibits 8, 13.)

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 corporate Respondent retained ownership of Lot 54, which included the waterfront portion of the property. Chrisjohn Realty Holding, LLC, purchased the newly created Lot 55. (Exhibits 3, 4, 13, 26.)

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

deed dated November 14, 2006. The errors in the November 14, 2006 deed related to the description of the metes and bounds of the Richmond Terrace property. (Exhibits 4, 6.)

IV. Subject Matter Jurisdiction - Tidal Wetlands

In Part II of his affidavit (Exhibit 19), Sam Mezzacappa cross-moves to dismiss the charges alleged in Staff's motion because Mr. Mezzacappa contends that the Department has no jurisdiction over the Richmond Terrace property for the following reasons. First, Mr. Mezzacappa argues that a functional bulkhead has defined the seaward boundary of the Richmond Terrace property since 1887. Second, Mr. Mezzacappa argues, in the alternative, that when the bulkhead was functional, it was more than 10 feet high. In addition, the elevation of the property landward of the bulkhead is also greater than 10 feet. (Exhibits 20 through 27, inclusive.) Respondents do not object to the Department's jurisdiction over the Richmond Terrace property pursuant to ECL article 15, title 5 (Protection of Water).

Pursuant to regulation, the adjacent area of a tidal wetland may be limited by three circumstances. First, the adjacent area extends 300 feet from the landward boundary of a tidal wetland. In the City of New York, however, the distance is 150 feet (See 6 NYCRR 661.4[b][1][i]). Because Staten Island (Richmond County) is a borough of the City of New York, the potential maximum width of the adjacent area on the Richmond Terrace property is 150 feet.

Second, the landward boundary of the adjacent area may be limited by a "lawfully and presently existing (*i.e.*, as of August 20, 1977), functional and substantial fabricated structure" that is generally parallel to the wetland boundary, and which is a minimum of 100 feet in length (see 6 NYCRR 661.4[b][1][ii]).

Third, the landward boundary of the adjacent area may be limited by the elevation contour of 10 feet above mean sea level, except when such contour crosses the seaward face of a bluff, cliff or hill, then to the topographic crest of such bluff, cliff or hill. USGS topographic maps having a scale of 1:24,000 are rebuttable presumptive evidence of the 10-foot contour. (See 6 NYCRR 661.4[b][1][iii]).

A. Functional and Substantial Fabricated Structure

With respect to the second factor that may limit the landward boundary of the adjacent area (see 6 NYCRR

661.4[b][1][ii]), Mr. Mezzacappa refers to Exhibits 20, 21 and 27. Exhibit 20 is a letter from William Spiezia, dated February 3, 2008 (sic), but notarized on February 3, 2009. Mr. Spiezia is a land surveyor from Rogers Surveying, PLLC, (Staten Island, New York). Exhibit 21 is a second letter from Mr. Spiezia dated February 28, 2008.²

In Exhibit 20, Mr. Spiezia refers to a topographic survey of Staten Island dated April 1909 (Exhibit 22; Exhibit 23 is an enlargement of a portion of Exhibit 22, which depicts the Richmond Terrace property [see Exhibit 29]). According to Mr. Spiezia, the City of New York undertook the survey of Staten Island between 1908 and 1910. With respect to the Richmond Terrace property, Mr. Spiezia states that the line work on Exhibit 22 is straight and "non-irregular," which is evidence of the presence of a bulkhead.

In Exhibit 20, Mr. Spiezia also refers to Exhibit 24, which is a 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 1915. With respect to Exhibit 24, Mr. Spiezia observes that the waterfront boundary of the Richmond Terrace property is also depicted as a straight line which, as noted above, is further evidence of the presence of a bulkhead at the site. The purpose of Exhibits 22, 23 and 24 is to demonstrate that a bulkhead was in place at the Richmond Terrace site at the time of these surveys.

Exhibit 27 is a notarized letter dated February 4, 2009 from Charles F. Vachris. In his February 4, 2009 letter, Mr. Vachris states that from 1967 to 1979, he was a corporate officer of Vacar Construction Corporation. Mr. Vachris states further that in 1967, Vacar Construction Corporation purchased the Richmond Terrace property, and used it as a maintenance and storage yard, among other things. According to Mr. Vachris, his company went bankrupt in 1979, and the property was sold. Mr. Vachris states that during the period (1967-1979) that his company owned the

² Mr. Spiezia's February 28, 2008 letter is Exhibit 82 in the administrative enforcement hearing held to consider Respondents' alleged violations on property located at 200 Meredith Avenue, Staten Island, New York (DEC Case No. R2-20050607-202). The enforcement action concerning the Meredith Avenue property is pending before the Commissioner.

Richmond Terrace property, the bulkhead "was intact, and fully functional."

Staff acknowledges, in its memorandum of law (Exhibit 2), that the shoreline of the Richmond Terrace property depicted on the Tidal Wetlands Map (Exhibit 8, Fig. 1) is a straight line due to the presence of a bulkhead, and that the bulkhead was functional in 1974, when the aerial photograph was taken and the tidal wetland boundary was established. Based on the Wohl & O'Mara survey³ (Exhibits 13 and 26), the bulkhead at the Richmond Terrace property is about 225 feet long.

Mr. Stadnik points out, however, that over time, the bulkhead on the site has substantially deteriorated (Exhibit 8), and refers to a set of aerial photographs (Exhibits 9-12) attached to his October 16, 2008 affidavit. Exhibit 9 is a portion of an aerial photograph that depicts the site in 1996. Based on Exhibit 9, the bulkhead on the Richmond Terrace property was intact and functional in 1996. Exhibit 10 is a portion of an aerial photograph that depicts the site in 2001. In 2001, however, deterioration of the eastern end of the bulkhead is visible as depicted in Exhibit 10.

By 2004, the bulkhead had become significantly deteriorated. Exhibit 11 is a portion of an aerial photograph that depicts the site in 2004. In Exhibit 11, the straight shoreline that had been present since the early 1900s (Exhibits 22, 23 and 24), is no longer present. Erosion along several different portions of the shoreline of the Richmond Terrace property is visible in Exhibit 11. The conditions of the seaward portion of the site in 2006 are not substantially different from the conditions in 2004. Exhibit 12 is a portion of an aerial photograph that depicts the site in 2006. Erosion of the shoreline of the Richmond Terrace property is visible in Exhibit 12.

When the Commissioner determined that the Kill van Kull off the northern shore of Staten Island was a regulated tidal wetland, the bulkhead along the Richmond Terrace property was

³ In support of the October 28, 2008 motion for order without hearing, Department staff offered Exhibit 13. With their response, Respondents offered Exhibit 26. Exhibits 13 and 26 are identical. They are copies of a survey of the Richmond Terrace property prepared by Wohl & O'Mara, LLP, Civil Engineers and Land Surveyors (Staten Island, New York).

225 feet long, as well as a lawfully existing, functional and substantial fabricated structure. Consequently, as provided for by 6 NYCRR 661.4(b)(1)(ii), I conclude that the landward boundary of the adjacent area at the Richmond Terrace property was limited by the bulkhead. In addition, I conclude further that the bulkhead continued to limit the landward boundary until the mid-1990s.

Although Mr. Mezzacappa provides a detailed explanation for estimating the height of bulkhead, the height of the structure is irrelevant to determining whether the structure limits the landward boundary of the adjacent area pursuant to 6 NYCRR 661.4(b)(1)(ii). The regulations, for example, expressly identify a roadway as a potential lawfully existing, functional and substantial fabricated structure. The height of a roadway would be minimal compared to that of a bulkhead. Rather, the essential elements of a functional and substantial fabricated structure that could limit the landward boundary of the adjacent area are: (1) it existed prior to August 20, 1977; (2) the length of the structure is 100 feet or more; and (3) the fabricated structure is functional and substantial. Prior to 2001, the bulkhead on the Richmond Terrace property met these criteria, as noted above.

However, between 1996 (Exhibit 9) and 2001 (Exhibit 10), the bulkhead on the Richmond Terrace property began to deteriorate. By 2004 (Exhibit 11), the bulkhead had significantly deteriorated and ceased to be a functional and substantial fabricated structure. As a result, after 2001, I conclude that the bulkhead no longer limited the landward boundary of the adjacent area at the Richmond Terrace property pursuant to 6 NYCRR 661.4(b)(1)(ii).

B. 10-foot Contour

With respect to the third factor that may limit the landward boundary of the adjacent area (see 6 NYCRR 661.4[b][1][iii]), Mr. Mezzacappa contends that the elevation of the pre-existing bulkhead on the Richmond Terrace property is greater than 10 feet above sea level and, thereby, limits the adjacent area on the site. To support this alternative argument, Mr. Mezzacappa refers to Exhibit 26, which is the Wohl & O'Mara survey (see Exhibit 13). Mr. Mezzacappa notes, in Part II of his affidavit (Exhibits 19 and 29), that the Wohl & O'Mara survey does not show the elevation of any of the remaining portions of the bulkhead, but it does provide spot elevations of the property in the

vicinity of the shoreline, landward of the bulkhead. For example, some spot elevations are plotted as 6.5 and 6.6 feet.

According to Mr. Mezzacappa (Exhibits 19 and 26), the top of any bulkhead is always higher, by one to 1½ feet, than the elevation of the backfilled area for safety reasons. Mr. Mezzacappa contends that the bulkhead essentially serves as a barrier to prevent people and things from inadvertently falling into the water. Mr. Mezzacappa recalls walking along the top of the bulkhead at the Richmond Terrace property, and having to step up to do so.

In his February 28, 2008 letter (Exhibit 21), Mr. Spiezia states that,

"[t]he Richmond High Water Datum (RHW) is 3.192 feet above the National Geodetic Vertical Datum of 1929 (NGVD 29) Mean Sea Level at Sandy Hook, New Jersey. An elevation of 10.00 feet above NGVD 29 Mean Sea Level will have a corresponding elevation of 6.81 feet above RHW datum."

According to Mr. Spiezia, the elevations on Staten Island are referenced to a plane above mean sea level at Sandy Hook, New Jersey. Therefore, a mean sea level elevation of 10 feet at Sandy Hook, based on the NGVD 29, would be equivalent to elevation 6.81 feet based on the Richmond High Water Datum. The Wohl & O'Mara survey (Exhibit 26) relied on the RHW datum.

With reference to the evidence discussed above, Mr. Mezzacappa states that the elevation of the bulkhead can be estimated, and outlined the methodology in Respondents' papers. As a result, Mr. Mezzacappa concludes that the approximate elevation of the bulkhead on the Richmond Terrace property would exceed the 10-foot contour elevation identified at 6 NYCRR 661.4(b)(1)(iii). (Exhibits 19 and 29.)

In determining whether the adjacent area on the Richmond Terrace property is less than 150 feet wide pursuant to the circumstances outlined in 6 NYCRR 661.4(b)(1)(iii), the height of any fabricated structure, such as the bulkhead, is not relevant. The nature and effect of a fabricated structure are considered in 6 NYCRR 661.4(b)(1)(ii). Rather, this issue is limited to whether the elevation of the Richmond Terrace property, landward of the former bulkhead and within 150 feet of the tidal wetland boundary, is greater than 10 feet above sea level. Therefore, the reliability of Mr. Mezzacappa's methodology for estimating

the height of the bulkhead on the Richmond Terrace property in the absence of an actual measurement need not be considered further.

To support his argument that the elevation of the Richmond Terrace property landward of the bulkhead is greater than 10 feet above sea level, Mr. Mezzacappa refers to the spot elevations plotted on the Wohl & O'Mara survey (Exhibits 13 and 26). On the northern end of the property near the Kill van Kull, spot elevations above sea level range from 1.2 feet to 9.4 feet. Examples of spot elevations on the survey within 150 feet from shoreline are 6.1 feet, 7.4 feet, 7.5 feet and 8.3 feet. Within 150 feet from the shoreline, none of the spot elevations plotted on the survey are 10 feet or greater. Based on Mr. Spiezia's February 28, 2008 letter (Exhibit 21), Mr. Mezzacappa asserts, however, that 3.192 feet should be added to each of the spot elevation values plotted on the Wohl & O'Mara survey to convert the RHW datum to NGVD 29. After the spot elevation values plotted on the Wohl & O'Mara survey are converted from RHW datum to NGVD 29 values, Mr. Mezzacappa notes that the values exceed 10 feet and, thereby, contends that the elevation of the Richmond Terrace property is greater than the 10-foot contour.

It is significant to note that the Wohl & O'Mara survey (Exhibits 13 and 26) does not include any elevation contours. In addition, the spot elevations noted on the survey are randomly plotted. They are generally concentrated along the northern end of the property, near the Kill van Kull.

As part of his response, Mr. Mezzacappa includes Exhibit 30, which is an enlarged portion of the Elizabeth, New Jersey USGS Quadrangle. Respondents, however, did not offer a copy of the original quadrangle. The purpose of Exhibit 30 is to show the location of the 10-foot contour that could limit the landward boundary of the adjacent area (see 6 NYCRR 661.4[b][1][iii]). Although the scale of the original quadrangle is 1:24,000, the scale on Exhibit 30 is unknown because the scale changed when the proffered portion of the quadrangle was enlarged from the original. Therefore, accurate measurements cannot be obtained from Exhibit 30.

In addition, upon careful review, it is not possible to determine where the Richmond Terrace property is located on Exhibit 30 because the site is not marked or otherwise identified. However, from the enlargement it is possible to locate the 10-foot contour easily. 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. In order for the 10-foot contour to limit the landward boundary of the adjacent area to less than 150 feet from the tidal wetland boundary, the location of the 10-foot contour line on Exhibit 30 should be along, or very close to, the shoreline. That is not the case with respect to the enlarged portion of the Elizabeth, New Jersey Quadrangle that Mr. Mezzacappa includes with his response.

Nevertheless, in considering all the evidence proffered with Mr. Mezzacappa's response in the best light, I conclude, based on Mr. Spiezia's comments concerning the difference between RHW datum and NGVD 29, that the landward boundary of the adjacent area on the Richmond Terrace property may be limited to the 10-foot contour as provided by 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 seaward of the 10-foot contour and, therefore, regulated adjacent area. Based on this conclusion, the Department has jurisdiction over a portion of the Richmond Terrace property pursuant to ECL article 25.

As previously noted, Respondents did not raise an objection about the scope of the Department's jurisdiction pursuant to ECL article 15, title 5. Based on the discussion above, the Department has jurisdiction over the site pursuant to ECL article 25 because a portion of the Richmond Terrace property is regulated adjacent area. Consequently, I deny Respondents' cross-motion to dismiss the charges alleged in Staff's October 28, 2008 motion for order without hearing due to a lack of subject matter jurisdiction. Each alleged violation is addressed below.

V. Alleged Violations of ECL articles 15 and 25, and 6 NYCRR parts 608 and 661

Staff's October 28, 2008 memorandum of law (Exhibit 2) outlines the violations that allegedly occurred at the Richmond Terrace property. They are associated with two program areas regulated by the Department. First, ECL article 15, title 5 (Protection of Water) regulates, among other things, the placement of fill in navigable waters of the State. The implementing regulations are 6 NYCRR part 608 (Use and Protection of Waters). Second, ECL article 25 (Tidal Wetlands) regulates activities in and adjacent to tidal wetlands. The regulations

that govern activities in and adjacent to tidal wetlands are 6 NYCRR part 661 (Tidal Wetlands - Land Use Regulations). As a result, the Department has concurrent regulatory authority over the natural resources on, and adjacent to, the Richmond Terrace property.

In his October 16, 2008 affidavit (Exhibit 8), George Stadnik states that he has been a Marine Resources Specialist in the Bureau of Marine Resources since 1986. Among other things, Mr. Stadnik's duties include reviewing permit applications filed pursuant to ECL articles 15 and 25, and conducting site inspections to determine compliance with the requirements outlined in ECL articles 15 and 25, and their, respective, implementing regulations.

Mr. Stadnik visited the Richmond Terrace property on May 17, 2007 as part of a pre-application conference requested by a prospective buyer of Lot 54. The northern boundary of the Richmond Terrace property is adjacent to the Kill van Kull. According to Mr. Stadnik, the Kill van Kull is a tidally influenced water body within the State that has significant commercial traffic and recreation vessel usage. (Exhibit 8.)

Navigable waters of the State include all lakes, rivers and other bodies of water in the State upon which vessels with a capacity of one or more persons can be operated (see 6 NYCRR 608.1[1]). Based on Mr. Stadnik's description, the Kill van Kull is a navigable water of the State.

Staff requests (Exhibit 2, ¶19) that I take official notice (see 6 NYCRR 622.11[a][5]) of the Department's Tidal Wetlands Map No. 572-498. In their response to Staff's motion, Respondents did not object to this request. Therefore, I grant it, and take official notice, pursuant to 6 NYCRR 622.11(a)(5), of Tidal Wetlands Map No. 572-498. Tidal Wetlands Map No. 572-498 establishes that the Kill van Kull in the vicinity of the Richmond Terrace property is a regulated tidal wetland.

While at the site on May 17, 2007, Mr. Stadnik determined the apparent high water line on the Richmond Terrace property. He observed a line of natural and other floating debris that had accumulated at the high tide location, which is called the "wrack line." At the wrack line there is typically a line of green algae that grows on rubble, timber, rocks and other stationary shoreline features. Mr. Stadnik observed the wrack line at the site, which corresponds to the mean high water level. (Exhibit 8.)

During his May 17, 2007 visit to the Richmond Terrace property, Mr. Stadnik observed, among other things, the erosion of the shoreline into the Kill van Kull, seaward of the mean high water level. The erosion resulted from the deterioration of the bulkhead along the northern property line. 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. Mr. Stadnik took a series of photographs. They are incorporated into the text of his October 16, 2008 affidavit, and are identified in that document as Photos 1, 2 and 3. These photographs depict the conditions at the site when Mr. Stadnik was there on May 17, 2007. (Exhibit 8.)

In his October 16, 2008 affidavit (Exhibit 8), Mr. Stadnik refers to a set of aerial photographs which, for purposes of this motion, are identified as Exhibits 9-11 on Appendix A. Exhibit 9 is a portion of an aerial photograph that depicts the Richmond Terrace property in 1996. Based on Exhibit 9, the bulkhead on the Richmond Terrace property was intact in 1996. Exhibit 10 is a portion of an aerial photograph that depicts the site in 2001, and shows that the eastern end of the bulkhead has deteriorated. Exhibit 11 is a portion of an aerial photograph that depicts the site in 2004. By that time, the bulkhead on the Richmond Terrace property had become significantly deteriorated. In Exhibit 11, several areas of erosion are visible along the shoreline.

In addition to his observations concerning erosion, Mr. Stadnik also observed pieces of concrete rubble and soil piled on the Richmond Terrace property in a manner to form a small berm along the northern boundary of the site. 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. Due to the proximity of the berm to the shoreline, Mr. Stadnik opined that the material would erode into the tidal wetland. The material, and its location on the site are depicted in Photo 4 of Mr. Stadnik's affidavit. (Exhibit 8.)

After returning to the Region 2 Office from his May 17, 2007 site visit, Mr. Stadnik searched the Department's permit files. With respect to the Richmond Terrace property, Mr. Stadnik did not find any permit issued to any of the Respondents pursuant to ECL articles 15 and 25 as well as 6 NYCRR parts 608 and 661. (Exhibit 8.)

As noted above, Mezzacappa Brothers, Inc. purchased the Richmond Terrace property in June 1980, and retained ownership of

Lot 54 until November 2006. Subsequently, Mezzacappa Brothers, Inc. transferred ownership of the Richmond Terrace property (*i.e.*, Lot 54) to Sam and Frank Mezzacappa on November 14, 2006. (Exhibits 4 and 5.)

A. Navigable Waters

ECL 15-0505(1) prohibits any person from excavating or placing fill below the mean high water level in any of the navigable waters of the State, or in tidal marshes and wetlands that are adjacent to and contiguous with any of the State's navigable waters without a permit from the Department. Pursuant to 6 NYCRR 608.5, neither the direct nor indirect placement of fill in the State's navigable waters is authorized without a permit from the Department.⁴ Fill may include, among other things, earth, clay, silt, sand, gravel, stone, concrete (whole or fragmentary), metal or other similar material (see ECL 15-0505[1]). A person means any individual or corporation other than the State and a "public corporation" (see ECL 15-0107[1]; 6 NYCRR 608.1[n]).

Staff asserts that Respondents violated ECL 15-0505(1) and 6 NYCRR 608.5 when they placed fill or allowed fill to enter the Kill van Kull from the Richmond Terrace property without a permit from the Department. According to Staff, the alleged violation resulted from Respondents' failure to maintain the bulkhead, and took place on two separate occasions, first, between 1996 and 2004, and again on May 17, 2007. The proof provided with Staff's October 28 2008 motion demonstrates these allegations.

From 1980 until November 2006, Mezzacappa Brothers Inc. owned the Richmond Terrace property. By 2004, the bulkhead located along the northern property line had completely deteriorated, and upland material eroded into the Kill van Kull seaward of the mean high water level. The Kill van Kull is a navigable water of the State. Mezzacappa Brothers Inc. did not have a permit from the Department to allow the eroded material to enter the Kill van Kull. Therefore, 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 from the Richmond Terrace property without a permit from the Department.

⁴ The term, *indirect placement of fill*, means material introduced into the waterbody by natural erosive forces thereby creating a fill below the mean high water elevation (see 6 NYCRR 608.1[h]).

At the time of Mr. Stadnik's May 17, 2007 site visit, Sam and Frank Mezzacappa owned the Richmond Terrace property. Prior to that date, the bulkhead located along the northern property line had completely deteriorated. While at the site, Mr. Stadnik observed that soil had eroded into the Kill van Kull. In addition, he observed concrete rubble and debris below the mean high water level. Sam and Frank Mezzacappa did not have a permit from the Department to allow the eroded material to enter the Kill van Kull, which is a navigable water of the State. Therefore, 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 from the Richmond Terrace property without a permit from the Department.

B. Tidal Wetlands

ECL 25-0401(1) and 6 NYCRR 661.8 prohibit any person from undertaking any regulated activity in or adjacent to any regulated tidal wetland without first obtaining a permit from the Department. Regulated activities are identified in ECL 25-0401(2) and include, among other things, any form of dumping, filling, or depositing, either directly or indirectly, any soil, sand, gravel, rubbish or fill of any kind (*also see* 6 NYCRR 661.4[ee][1][ii] and 661.5[b][30]). Other regulated activities also include the construction of a berm in the adjacent area of a tidal wetland (*see* 6 NYCRR 661.5[b][32]), and the subdivision of land (*see* 6 NYCRR 661.4[ee][1][v]). In pertinent part, a person means any individual or corporation (*see* ECL 25-0103[4]).

In the October 28, 2008 motion (Exhibit 2, ¶32), Staff asserts four separate violations related to ECL article 25. With respect to the first two violations, Staff alleges that Respondents violated ECL 25-0401(1) and 6 NYCRR 661.8 when they placed fill or allowed fill to enter the Kill van Kull from the Richmond Terrace property without a permit from the Department. According to Staff, this alleged violation took place on two separate occasions, first, between 1996 and 2004, and again on May 17, 2007. As the third violation, Staff asserts that Respondents violated ECL 25-0401(1) and 6 NYCRR 661.8 when they placed fill on the site to construct a berm in the adjacent area of the site on May 17, 2007 without a permit. For the fourth violation, Staff asserts that Respondents violated ECL 25-0401(1) and 6 NYCRR 661.8 when they subdivided the Richmond Terrace property on May 10, 2005 without a permit (*see* 6 NYCRR 661.4[ee][1][v]).

1. Alleged Violations Concerning Fill

From 1980 until November 2006, Mezzacappa Brothers Inc. owned the Richmond Terrace property. After 2001, the bulkhead located along the northern property line deteriorated because Respondents failed to maintain it. As a result, upland material eroded into the Kill van Kull, which is a regulated tidal wetland. Mezzacappa Brothers Inc. did not have a permit from the Department to allow the eroded material to enter the Kill van Kull. Therefore, 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 from the Richmond Terrace property without a permit from the Department.

At the time of Mr. Stadnik's May 17, 2007 site visit, Sam and Frank Mezzacappa owned the Richmond Terrace property. While at the site, Mr. Stadnik observed that soil had eroded into the Kill van Kull, which is a regulated tidal wetland. In addition to soil, Mr. Stadnik also observed that concrete rubble and debris had entered the Kill van Kull. Sam and Frank Mezzacappa did not have a permit from the Department to allow the eroded material to enter the Kill van Kull. Therefore, 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 from the Richmond Terrace property without a permit from the Department.

Other regulated activities also include the placement of fill and the construction of a berm in the adjacent area of a tidal wetland (see 6 NYCRR 661.4[ee][1][ii], 661.5[b][30], and 661.5[b][32]). After 2001, the bulkhead on the Richmond Terrace property deteriorated and became non-functional. As a result, the landward boundary of the adjacent area migrated landward at least 15 to 60 feet from the location of the former bulkhead (see 6 NYCRR 661.4[b][1][iii]).

On May 17, 2007, Mr. Stadnik observed concrete rubble and fill in the adjacent area of the tidal wetland. On that date, Sam and Frank Mezzacappa were the owners of the Richmond Terrace property, and did not have a permit from the Department that authorized the placement of this material in the adjacent area. Therefore, on May 17, 2007, Sam and Frank Mezzacappa violated ECL 25-0401 and 6 NYCRR 661.8 when they placed fill to form a berm along the northern boundary of the Richmond Terrace property in the adjacent area of the Kill van Kull without a permit from the Department.

2. Subdivision of the Richmond Terrace Property

Pursuant to 6 NYCRR 661.4(ee)(1)(v), any portion of a subdivision of land located in any tidal wetland or adjacent area is a regulated activity that requires a permit from the Department. In 1980, Mezzacappa Brothers, Inc. purchased the property located at 2205-2217 Richmond Terrace, which is identified as Block 1070, Lot 54. On May 10, 2005, Mezzacappa Brothers, Inc. subdivided Lot 54. The corporate Respondent retained ownership of Lot 54, which includes the waterfront portion of the property, and Chrisjohn Realty Holding, LLC, purchased the newly created Lot 55. (Exhibits 3, 4, 13, 26.)

Although the width of the adjacent area on the Richmond Terrace property does not extend the full 150 feet landward from the tidal wetlands boundary (see 6 NYCRR 661.4[b][1][i]), a portion of the Richmond Terrace property is regulated as adjacent area. Therefore, subsequent to 2004, a permit from the Department was required to subdivide the property. On May 10, 2005, Mezzacappa Brothers, Inc. violated ECL 25-0401 and 6 NYCRR 661.8 when it subdivided land located, in part, within the adjacent area of a regulated tidal wetland without a permit from the Department.

It should be noted that in Part IV of his affidavit (Exhibit 19), Mr. Mezzacappa states that when the corporation subdivided the Richmond Terrace property, the architect and attorney advised that a permit from the Department was not needed. Mr. Mezzacappa states further that the City of New York approved the subdivision in the absence of a permit from the Department. Nevertheless, Mr. Mezzacappa notes that at a later date his architect learned that a permit from the Department for the subdivision was needed. It is not known whether Respondents took any further action based on the architect's revised opinion.

VI. Additional Arguments

Two of Respondents' remaining arguments need to be addressed. First, as noted above, Respondents argue in their November 22, 2008 letter-answer (Exhibit 16) that excessive blasting was done to clear the channel in the Kill van Kull that undermined many retaining structures along the shoreline including the bulkhead at the Richmond Terrace property. However, Respondents offered no other information about this contention in their supplemental responding papers. Within the context of a motion for order without hearing, Respondents may not rely on conclusory statements, but must lay bare their proof

(see *Hanson, supra.*) Respondents had the opportunity to provide proof to support this contention and failed to do so. Consequently, I can give no further consideration to this contention within the context of this administrative enforcement action.

Second, in Part I of his affidavit (Exhibit 19), Sam Mezzacappa argues that Staff failed to commence the captioned enforcement action in a timely manner, and requests that the matter be dismissed. Mr. Mezzacappa contends that Staff has been aware of the alleged violations at the Richmond Terrace property since Mr. Stadnik's May 17, 2007 site visit. Mr. Mezzacappa acknowledges there had been some settlement negotiations that were not successful. Mr. Mezzacappa states that he sent a letter certified mail, return receipt requested, to Staff in which he requested a hearing. Mr. Mezzacappa attached the signed domestic return receipt to Part I of his affidavit (Exhibit 19), which demonstrates that Staff ("CB") received the letter on June 17, 2008. Mr. Mezzacappa did not provide a copy of his June 2008 letter with Respondents' supplemental responding papers.

I deny Respondents' request to dismiss this matter. State Administrative Procedure Act (SAPA) § 301(1) requires that adjudicatory hearings must commence within a reasonable time. Mr. Mezzacappa's affidavit demonstrates that the parties were engaged in negotiations subsequent to Staff's May 2007 site visit for an undisclosed period. Since Staff filed the October 28, 2008 motion for order without hearing, Respondents requested, and I granted, leave for them to supplement their response to Staff's motion. I am not persuaded by Respondents' arguments. I find that the captioned enforcement action commenced in a timely manner with service of the notice of motion and motion for order without hearing. By this ruling, I have determined that a hearing is necessary to determine the appropriate remediation, and the hearing to consider that issue will commence shortly.

VII. Relief

Staff's notice of motion (Exhibit 1) sets forth the relief that it seeks, which includes a civil penalty and remediation of the Richmond Terrace property.

A. Civil Penalty

For violating ECL article 15, title 5, and 6 NYCRR part 608, Staff refers to 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 refers to ECL 71-2503, which provides for a maximum civil penalty of \$10,000 per day for each violation. (Exhibit 2.) Staff requests a total civil penalty of \$50,000. Of that amount, Department staff requests 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 seeks \$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).

As noted above, Staff alleges five separate fill violations: (1) ECL 15-0505(1) and 6 NYCRR 608.5 from 2001 to 2005; (2) ECL 15-0505(1) and 6 NYCRR 608.5 on May 17, 2007; (3) ECL 25-0401(1) and 6 NYCRR 661.8 from 2001 to 2005; (4) ECL 25-0401(1) and 6 NYCRR 661.8 on May 17, 2007; and (5) ECL 25-0401(1) and 6 NYCRR 661.8 on May 17, 2007 concerning the placement of fill in the adjacent area of the tidal wetland. Accordingly, the \$15,000 civil penalty requested by Staff for these violations could be apportioned evenly, which would be \$3,000 per fill violation.

Respondents object to the requested civil penalty, and argue that they are not able to pay any civil penalty, unless and until they can sell the Richmond Terrace property. In Part III of his affidavit (Exhibits 19 and 31), Sam Mezzacappa explains 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.

Mr. Mezzacappa states that he has received offers from Caesar Perfeddo for the Richmond Terrace property. Mr. Perfeddo initially offered \$870,000. However, after Mr. Perfeddo contacted Staff about the site, and learned that Staff wanted the site remediated in the manner described in the October 28, 2008 motion, Mr. Perfeddo reduced his offer to \$450,000. (Exhibits 19 and 31.)

For the demonstrated violations, the Commissioner may assess civil penalties pursuant to the authority outlined at ECL 71-1107 and 71-2503. The total requested civil penalty is substantially less than the total potential maximum authorized by the Environmental Conservation Law considering the continuous nature of the violations. The requested civil penalty also reflects

Staff's priority of focusing on site remediation. Given the circumstances of this matter, I find that Staff's civil penalty request is reasonable.

The legal theory of Staff's motion for order without hearing is based on Respondents' continuing obligation to maintain the bulkhead on the Richmond Terrace property in order to avoid the indirect placement of fill by the process of erosion into the Kill van Kull - a navigable water of the State and a regulated tidal wetland. The applicable statutes and regulations appear to support this theory. For example, the definition of fill is broad (see ECL 15-0505[1]; 25-0401[2], and 6 NYCRR 608.1[g]), and includes the direct and indirect placement of fill in or near these regulated bodies of water (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]). Nevertheless, in determining the appropriate civil penalty for the demonstrated violations, the Commissioner may consider the degree to which Respondents were required to maintain the pre-existing bulkhead on their property, given the passive or indirect nature of how the fill from the Richmond Terrace property entered the Kill van Kull.

B. Remediation

Staff refers to ECL 71-1107 and 71-2503 to support its request for remediation. Staff's proposed remediation plan involves several steps (Exhibit 1). First, Respondents should remove the concrete piles and other remaining components of the deteriorated bulkhead, as well as remove all concrete rubble and fill that Respondents brought to the site. Second, Respondents should prepare and submit a detailed plan for Department staff's review of a stabilization structure such as a bulkhead or rock revetment. Staff has proposed a location on the Richmond Terrace property for the structure (Exhibit 14). Third, Respondents should install the structure after Staff approves it.

If Respondents are not able either to prepare the plan or to install the approved structure in an expeditious manner, Staff requests (Exhibit 1) that Respondents take measures to temporarily control any additional erosion at the site. These measures would include removing all concrete rubble (*i.e.*, the first step identified in the preceding paragraph), re-grading the slope of the eroding bank at 2:1 (2 feet horizontal for every

vertical foot), and staking a geo-textile filter fabric on all disturbed areas.

Respondents object to the proposed location for the replacement bulkhead. In Part III of his affidavit (Exhibits 19 and 31), Mr. Mezzacappa states that the proposed location for the replacement bulkhead would unfairly limit the potential use of the site. According to Mr. Mezzacappa, trucks would not have sufficient room to maneuver on the site. Mr. Mezzacappa argues that this proposed remediation condition would substantially reduce the potential value of the Richmond Terrace property. Mr. Mezzacappa states that he would prefer to rebuild the bulkhead in its original location. To support his position, Mr. Mezzacappa offers Exhibits 28 and 32.

Exhibit 28 is a notarized letter dated February 10, 2009 from Elana Kapul. Ms. Kapul has worked for United National Realty on Staten Island for 10 years, and has specialized in selling and leasing commercial and industrial properties. According to Ms. Kapul, the Richmond Terrace property would be used for industrial purposes and, as a result, the future owner would need to be able to maneuver truck trailers and other large equipment on the site. Ms. Kapul estimates that the proposed location for the replacement bulkhead would be 20 feet landward from the original location, and opines that a bulkhead in the proposed location would reduce the size of the parcel substantially. Ms. Kapul observes that it has been extremely difficult to sell this property due to the pending administrative enforcement action. Ms. Kapul hopes that the matter can be resolved expeditiously, and that the final location for the replacement bulkhead would not be in the location proposed by Department staff.

Exhibit 32 is a notarized letter from Michael Pantelis dated February 6, 2009. Mr. Pantelis explains that he is interested in purchasing the Richmond Terrace property. He explains further that the proposed location for the replacement bulkhead is undesirable from his perspective for the following reasons. First, there would not be sufficient space near the waterfront to maneuver trucks and to load and unload them. Second, the size of the property would be substantially reduced. To Mr. Pantelis, the value of the property would be less than \$700,000, and he states that he would not be interested in purchasing the property at this price.

Mr. Stadnik states in his affidavit (Exhibit 8) that the actual location of the high water line on the Richmond Terrace

property is landward of the line depicted on the Wohl & O'Mara survey (Exhibits 13 and 26) based on his May 17, 2007 site visit. Without any shoreline stabilization, Mr. Stadnik opines that soil will continue to erode into the Kill van Kull, and that other debris will enter the regulated waterway. According to Mr. Stadnik, the high water line at the site will continue to move landward until the Richmond Terrace property is remediated. Mr. Stadnik states that the erosion that has occurred to date has adversely impacted the water resource, and that additional erosion would continue to adversely impact the Kill van Kull. Mr. Stadnik states further that the proposed location for the replacement bulkhead (Exhibit 14) would be consistent with the Department's permitting practice to construct such structures landward of the apparent high water line. Finally, Mr. Stadnik explains that installing a bulkhead at the proposed location would avoid a net increase in fill in this portion of the Kill van Kull compared to the current circumstances.

Pursuant to ECL 71-2503(1)(c), the Commissioner may direct remediation "to restore the affected tidal wetland or area immediately adjacent thereto to its condition prior to the violation." By disputing the appropriate location for the replacement bulkhead on the Richmond Terrace property, the parties' papers have identified an issue for adjudication about how to restore the tidal wetland to its condition prior to the violation.

Respondents do not object to reconstructing the bulkhead. They would prefer to build the replacement bulkhead where the original one was located. However, Staff has proposed a location landward of the mean high water level given the deteriorated condition of the original bulkhead and the amount of erosion that has resulted. Nevertheless, Respondents have presented evidence, in response to Staff's motion, to show that Staff's proposed remediation plan would extensively curtail the potential use of the Richmond Terrace property, and substantially reduce its value.

Therefore, a hearing is necessary to determine whether the location for the replacement bulkhead proposed by Department staff would restore the tidal wetland to its condition prior to the violations. During the hearing, Department staff will have the opportunity to provide the basis for the proposed remedial plan, including but not limited to, an explanation for why the replacement bulkhead should be located landward of the mean high water line. Respondents will have the opportunity to cross-examine any evidence offered by Staff, and may offer evidence to

rebut Staff's recommendations concerning the location for the replacement bulkhead.

Respondents will have the opportunity at the hearing to provide evidence related to the potential costs associated with locating the replacement bulkhead where Staff proposes. These costs may include, but are not limited to, the construction costs of the replacement bulkhead as well as the costs associated with locating the replacement bulkhead at the proposed location. Department staff will have the opportunity to cross-examine any evidence offered by Respondents, and may offer evidence to rebut Respondents' evidence.

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 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. On May 17, 2007, Sam and Frank Mezzacappa violated ECL 25-0401 and 6 NYCRR 661.8 when they placed fill to form a berm 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.

Rulings

For the reasons outlined above, Staff's October 28, 2008 motion for order without hearing is granted with respect to Respondents' liability. Furthermore, Staff's motion is granted with respect to the requested civil penalty. However, I deny Staff's motion with respect to the remediation of the Richmond Terrace property because there is a triable issue of fact about how to restore the wetland to its condition prior to the violation. This issue relates to the location of the replacement bulkhead.

I deny Respondents' cross-motion to dismiss the charges alleged in Staff's October 28, 2008 motion. The basis for Respondents' cross-motion was that the Department lacks subject matter jurisdiction over the Richmond Terrace property pursuant to ECL article 25. As outlined in detail above, the Department has jurisdiction over the site pursuant to ECL article 25. A portion of the Richmond Terrace property is within the adjacent area of a regulated tidal wetland. Respondents raised no objection concerning the Department's authority to regulate the Richmond Terrace property and adjoining navigable waters pursuant to ECL article 15.

Further Proceedings

An adjudicatory hearing is necessary. I would like to schedule a telephone conference call with the parties during the week of April 27, 2009 to set the schedule for the adjudicatory hearing. The parties shall advise me of their availability for the telephone conference call by noon on April 21, 2009. I would like to schedule the hearing during the week of May 11 or 18, 2009. Given the very narrow scope of the proceeding, I anticipate that the hearing can be completed in one day at the Department's Region 2 Office.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge
Office of Hearings
and Mediation Services
NYS Department of
Environmental Conservation
First Floor, 625 Broadway
Albany, New York 12233-1550
Telephone: 518-402-9003
FAX: 518-402-9037

Appendix A: Exhibit List

Dated: Albany, New York
April 9, 2009

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).

Appendix A

Exhibit List
Mezzacappa Brothers, Inc.
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(Richmond Terrace Property)

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).

Appendix A

Exhibit List
Mezzacappa Brothers, Inc.
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(Richmond Terrace Property)

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 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.
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).

Appendix A

Exhibit List
Mezzacappa Brothers, Inc.
DEC Case No. R2-20070517-290
(Richmond Terrace Property)