

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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 construct 95 linear feet of new bulkhead an average of 18 inches seaward of an existing bulkhead, to dredge a 20 feet by 80 feet area to 3.5 feet below mean low water and to use the dredged material as backfill on property located at 28 Union Avenue, Center Moriches (Town of Brookhaven), Suffolk County, New York, adjacent to Senix Creek, which is a tributary of Moriches Bay by

Memorandum of Conference Call held on October 7, 2008, Issues Ruling, and Scheduling Order

DEC Application No. 1-4722-04178/00004

Daniel Pendzick,  
**Applicant.**

October 7, 2008

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Proceedings

Notice of Public Hearing dated September 4, 2008 concerning the captioned matter was published in the Department's *Environmental Notice Bulletin* on September 10, 2008 and in *The Suffolk County News* on September 11, 2008. The September 4, 2008 hearing notice set October 1, 2008 as the deadline for filing petitions for either full party status or amicus status (see 6 NYCRR 624.5[b]). In addition, the September 4, 2008 hearing notice scheduled a legislative hearing session and issues conference at the Lamb's Chapel, 25 Frowein Road, Center Moriches, New York at 10:00 a.m. on October 7, 2008. The September 4, 2008 hearing notice advised that the legislative hearing session and the issues conference would be canceled if no one filed a timely petition for party status.

Prior to the publication of the September 4, 2008 hearing notice, Applicant and Department staff agreed to stipulate to the hearing record, which would serve as the basis for the Commissioner's final determination, provided there were no intervening parties. No one filed a timely petition for party status. Consequently, in an e-mail message dated October 2, 2008 to Applicant and Department staff, I advised that because I did not receive any petitions for party status by October 1, 2008, the legislative hearing session and issues conference scheduled for October 7, 2008 were canceled. In addition, I advised the

parties that in lieu of convening an issues conference in Center Moriches, New York on October 7, 2008, I would schedule a telephone conference call with Applicant and Department staff at 10:00 a.m. on October 7, 2008.

As scheduled, the telephone conference call was held today. Daniel Pendzick represented himself during the telephone conference, and Assistant Regional Attorney Susan Schindler, Esq., participated on behalf of Department staff. Karen Graulich and Stephanie Larkin, who are members of Department staff, also participated in the telephone conference call. The parties to the proceeding are limited to Applicant and Department staff (see 6 NYCRR 624.5[a]).

### **October 7, 2008 Telephone Conference Call**

The purpose of today's telephone conference call was to discuss the following topics: (1) Department staff's proposed issue concerning cumulative impacts; (2) Applicant's proposed alternative project designs; and (3) site access. During the telephone conference, the parties presented their respective arguments about Staff's proposed issue concerning cumulative impacts. I reserved ruling on this proposed issue, and stated that I would issue a ruling in writing. This proposed issue is discussed fully below.

With respect to Applicant's proposed alternative designs, Mr. Pendzick had requested an opportunity to present an alternative design to the one originally proposed in his July 2006 tidal wetlands permit application. During today's telephone conference call, however, Mr. Pendzick withdrew that request. Therefore, the scope of this proceeding will be limited to the Mr. Pendzick's original proposal.

#### Site Access

Prior to today's telephone conference call, Ms. Schindler requested permission from Mr. Pendzick for Staff to inspect the site. Mr. Pendzick denied Staff access to his property. During the telephone conference, Staff renewed the request. Staff explained that an inspection was done in August 2006, and that since then, Staff has conducted hundreds of other inspections. Staff argued that a site visit would help Staff recall the site conditions, and prepare its direct case.

Mr. Pendzick argued that a site visit was not necessary because the permit application was filed two years ago, and that

the scope of this proceeding should be limited to his application. Mr. Pendzick contended that he did not contribute to any delay with respect to the review of his permit application or the commencement of this proceeding.

During the telephone conference, I referenced *Matter of Paul Palmieri*, Commissioner's Ruling dated February 1, 2002 and *Matter of Paul Palmieri*, Decision dated April 7, 2004. In these *Palmieri* cases, Mr. Palmieri denied access to Department staff during the review of his tidal wetlands permit application. In the *Palmieri* ruling, Department staff argued that Mr. Palmieri's application could not be properly evaluated without a site inspection. Staff argued further that Mr. Palmieri's application should be considered incomplete until Staff was provided access to the site.

After Mr. Palmieri failed to appear at the adjudicatory hearing that he requested, Staff moved for a finding that Applicant's failure to appear at the hearing constituted an abandonment of his hearing request, and requested that the Commissioner deny the permit due to an incomplete application. In the February 1, 2002 ruling, the Commissioner affirmed the ALJ's ruling and found that Applicant's tidal wetlands application was incomplete for the purposes of permit review under 6 NYCRR part 621 because Applicant denied Staff access to his property. As a result, the Commissioner concluded that Applicant prevented Staff from evaluating the on-site conditions and the proposed project. The Commissioner concluded further that the ability to gather information from a site visit is necessary to make the determination that the permit application is complete. The Commissioner concluded that Applicant's request for hearing was void until Applicant allowed Staff access to his property.

After Applicant appealed the Commissioner's February 1, 2002 ruling to Suffolk County Supreme Court (*see Matter of Palmieri v New York State Dept. of Env'tl. Conservation*, Sup Ct, Suffolk County, May 5, 2003, Baisley, J., Index No. 02-3925), an administrative hearing was held to provide Mr. Palmieri with the opportunity to develop a record about whether Department staff's demand for an on-site inspection was reasonably necessary to evaluate Mr. Palmieri's application for a tidal wetlands permit (*see id.* at 6). The court placed the burden upon Applicant to demonstrate that the Department's demand was not reasonably necessary to evaluate the application (*see id.*). In the April 7, 2004 Decision, the Commissioner affirmed Department staff's

denial of the permit application based on a lack of access to the site.

Relying on the Commissioners' February 1, 2002 and April 7, 2004 determinations regarding *Palmieri*, I ruled that Mr. Pendzick's permit application would be considered incomplete until he provided Staff access to his property. Mr. Pendzick consented to the inspection, and it has been scheduled for October 8, 2008 during low tide.

### **Issues for Adjudication**

#### 1. Stipulated Issues

Applicant and Department staff have agreed, in part, that the issues for adjudication will be whether Applicant's project for a new bulkhead, as described above, would comply with the standards for issuance of a permit outlined at 6 NYCRR 661.9(b)(1)(i, ii, iii and v), as well as the permit standards outlined at 6 NYCRR 608.8 and at 6 NYCRR 608.9 for a water quality certification. These stipulated issues were identified in the September 4, 2008 hearing notice.

#### 2. Cumulative Impacts (ECL 3-0301)

In addition to the stipulated issues identified above, Department staff proposed that a record should be developed concerning cumulative impacts as required by ECL 3-0301(1)(b). Staff argued that when making permit determinations, the Commissioner must consider the cumulative impacts of those determinations upon water, land, fish, wildlife and air resources. During the conference call, Ms. Schindler stated that Staff would offer testimony about the cumulative impacts associated with Applicant's proposal.

Mr. Pendzick objected to Staff's proposed issue, and argued that the scope of the hearing should be limited to the merits of the tidal wetlands permit application. Mr. Pendzick noted that the notice of permit denial dated November 3, 2006 did not address cumulative impacts. He noted further that the project is a minor project pursuant to the Uniform Procedures Act (ECL Article 71), and a Type II action pursuant to the State Environmental Quality Review Act (SEQRA [ECL Article 8]). Accordingly, Mr. Pendzick concluded that the environmental review required by SEQRA is complete.

I inquired whether Applicant provided an Environmental Assess Form (EAF), and the parties confirmed that the application materials included a short form EAF. I noted however, that the application materials provided to me included only page 1 of the short form EAF. I inquired whether page 2 was part of Staff's file, and if so, whether Staff completed it. Ms. Schindler stated that the application file maintained by Department staff includes only page 1 of the short form EAF. Mr. Pendzick could not recall whether he provided page 2 of the short form EAF as part of his application materials.

The Department's short form Environmental Assessment Form (EAF) is a useful tool for identifying potential adverse environmental impacts that must be addressed as part of the environmental review required by SEQRA and its implementing regulations at 6 NYCRR part 617. The short form EAF is two pages long and is divided into three parts. The first page is Part I, and is entitled "Project Information." Part I is completed by applicants or the project sponsors. Part II is on page two of the short form EAF. Part II provides for an "Impact Assessment" and is completed by the SEQRA lead agency, which in this case is Department staff. After Part II is completed, the lead agency completes Part III, which is a "Determination of Significance."

Part II, Item C6 of the short form EAF provides the lead agency with the opportunity to explain the long term, short term, cumulative, or other effects of the proposal. There is no dispute that Applicant's proposal is a Type II action, and that the application materials include a completed Part I of the short form EAF.

The hard look required by ECL article 8 allows the Commissioner to duly exercise his authority pursuant to ECL 3-0301(1)(b) to consider cumulative impacts within the context of making permit determinations. Therefore, I will allow Department staff the opportunity to present evidence about the potential cumulative impacts associated with Applicant's proposal. As part of the presentation, Department staff must include a completed short form EAF Parts II and III.

### 3. Appeals limited to Cumulative Impact Issue

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 related to the issue of cumulative impacts must be received at the office of Commissioner Alexander B. Grannis (attention: Louis A. Alexander, Assistant Commissioner for Hearings), New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010, by 4:45 p.m. on **October 22, 2008**. Moreover, responses to the initial appeals will be allowed and such responses must be received as above by 4:45 p.m. on **November 5, 2008**.

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 the opposing party's representative, 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.

The schedule for filing appeals will run independently from the schedule for filing additional materials for the hearing record as set forth below.

### **Exhibit List**

During the telephone conference call, I explained that I would prepare a draft Exhibit List that would identify the materials presently before me, which should be considered part of the stipulated hearing record. A draft Exhibit List is enclosed with this memorandum and ruling. The parties should review their respective files and advise me if the draft Exhibit List is incomplete.

I have reserved Exhibit 1C for a copy of the affidavit of publication from *The Suffolk County News*. Mr. Pendzick stated that he received the affidavit from the newspaper late last week,

and that he has mailed the affidavit to me. Upon receipt of it, the affidavit of publication will be identified in the hearing record as Exhibit 1C.

### **Public comments**

The September 4, 2008 hearing notice encouraged members of the public to file unsworn written comments about Applicant's proposal. Written comments are due by October 10, 2008. This date was selected to provide members of the public with additional time to file written comments in the event that the legislative hearing session was canceled. Copies of all public comments received to date are enclosed with this memorandum and ruling. I will advise the parties under separate cover after October 10, 2008 if I receive any additional written comments.

### **Scheduling Order**

The stipulated hearing record will include a direct case by Department staff in the form of an affidavit. Today, Ms. Schindler said that Staff would present one witness, and requested five to six weeks to prepare the affidavit after the site visit.

Applicant will have the opportunity to cross-examine Staff's witness. During the telephone conference, I explained that this process could take one of three forms. First, Applicant may choose to waive his right to cross-examine Staff's witness. Second, the hearing would be convened at a location in Region 1 for the purpose of cross-examining Staff's witness. Third, Applicant could submit questions in writing and Staff's witness could respond to them in the form of a second affidavit. Applicant would like to review Staff's initial affidavit before deciding how to proceed with cross-examination.

Given the limited scope of Applicant's proposal, Staff's request for five to six weeks to prepare an affidavit is excessive. In a letter dated October 26, 2006, Staff provided a rationale for permit denial (Exhibit 7 of attached draft Exhibit List). Moreover, Applicant has the burden of proof to show that his proposal would meet the previously identified permit issuance standards (see 6 NYCRR 624.9[b][1]). Though Staff has the right to present a direct case, one is not required. Therefore, I will provide Staff with four weeks time to prepare the affidavit from the date of the site visit, which is scheduled for October 8, 2008. Accordingly, Staff's affidavit and other supporting materials are due by **November 5, 2008**.

One copy of Staff's affidavit and other supporting materials must be sent to Mr. Pendzick at the same time and in the same manner as the materials are sent to me. Unlike any appeals and responses from the issues ruling that must be filed with the Commissioner concerning cumulative impacts, I will accept electronic filings of Staff's affidavit and other supporting materials via e-mail or fax. If Staff serves its materials electronically, Staff must send one hard copy by regular mail post-marked by November 5, 2008 to Mr. Pendzick and me.

By **November 13, 2008**, Mr. Pendzick shall advise Ms. Schindler and me about which process he will use for cross-examination. I would like to schedule a telephone conference call with the parties for 10:00 a.m. on **November 14, 2008**. Depending on which process Mr. Pendzick chooses, the purpose of the conference call will be to select a date either to convene the hearing in Region 1 to cross-examine Staff's witness, or to file written cross-examination questions.

#### **Settlement Discussions**

At the conclusion of today's telephone conference call, Ms. Schindler stated that Department staff is willing to discuss a settlement of this matter that would avoid a hearing. I request that Mr. Pendzick consider Staff's offer to settle this matter. Although significant costs have been avoided by the parties' agreement to develop a stipulated hearing record, additional resources would be conserved if the parties are able to settle this matter without a hearing.

/s/

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Dated: Albany, New York  
October 7, 2008



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