

**NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

**ORDER**  
Case No.:  
R2-20120613-353

-by-

**PETER PLAGIANAKOS and MADELINE FELICE,**

Respondents.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondents Peter Plagianakos and Madeline Felice violated ECL 15-0503(1)(b) and 25-0401(1) and the implementing regulations at 6 NYCRR 608.4 and 661.8 when they undertook, caused or allowed several activities in regulated tidal wetlands and waters of the State without obtaining the requisite permits from the Department. The alleged violations involve a deck, pilings, floating docks, floats, an access ramp, an underdeck structure and a knee deck.

The site of the alleged violations is on property owned by respondent Madeline Felice, located at 2686 (Lot No. 104) and 2690 National Drive (Lot No. 106), Brooklyn, Kings County, New York, and the area immediately seaward of the two aforementioned lots (site). Respondent's property abuts and is immediately adjacent to East Mill Basin, a navigable water of the State of New York, and which is part of the Jamaica Bay estuary system.

Administrative Law Judge D. Scott Bassinson from the Office of Hearings and Mediation Services (OHMS) was originally assigned to this matter. Following ALJ Bassinson's departure to another state agency, the matter was reassigned to ALJ Maria E. Villa on June 26, 2020. ALJ Villa has prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

Background

In the late 1980's respondent Felice submitted an application for a boat dock and a deck at the site (*see* Hearing Report at 4 [Finding of Fact No. 8]; DEC Staff Exhibit [Exh] 28). In March 1989, a State Environmental Quality Review Act (SEQRA) negative declaration was issued for the construction of the deck and dock (*see* Hearing Report at 4 [Finding of Fact No. 9]), and a permit was issued in March 1993 to respondent (*see id.* at 4-5 [Finding of Fact No. 11]; *see also* DEC Exh 4 [Permit 2-6105-0016/00001-0]). DEC staff conducted a compliance check on September 2, 1994 and identified certain violations (*see* Hearing Report at 5 [Finding of Fact No. 12]). To address these violations, respondent Felice entered into a consent order

with the Department (*see id.*). Based on subsequent inspections conducted in June 2012, Department staff identified a number of compliance issues with respect to the construction and structures at the site (*see id.* at 5-6 [Finding of Fact Nos. 14, 16, 19, 20 and 22]).

Department staff served a complaint dated April 14, 2015 (Complaint) that listed nine causes of action by which staff alleged that respondents Peter W. Plagianakos and Madeline Felice had committed numerous violations on or before June 1, 2012, including:

- First cause of action: respondents constructed or caused the construction of a fixed wooden platform (deck) in, on or above the waters of East Mill Basin at the site without the requisite DEC permit in violation of ECL 15-0503 and 6 NYCRR 608.4;
- Second cause of action: respondents constructed or caused the construction of a fixed wooden platform (deck) at the site above a regulated tidal wetland and open water area without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8;
- Third cause of action: respondents drove or otherwise installed at least six (6) round piles as support for the wooden deck at the site in the regulated tidal wetland without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8;
- Fourth cause of action: respondents drove or otherwise installed at least eight (8) rectangular piles as support for the wooden deck at the site in the regulated tidal wetland without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8 on at least eight (8) occasions;
- Fifth cause of action: respondents placed or constructed, or caused the placement of eight (8) floating docks on the water at the site without the requisite DEC permit in violation of ECL 15-0503 and 6 NYCRR 608.4;
- Sixth cause of action: respondents installed at the site eight (8) floats totaling more than 200 square feet in area in the regulated tidal wetland without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8;
- Seventh cause of action: respondents drove six (6) piles to support new floats at the site in the regulated tidal wetland without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8;
- Eighth cause of action: respondents placed or constructed an access ramp, connecting the deck to the floating docks, above the water at the site without the requisite DEC permit in violation of ECL 15-0503 and 6 NYCRR 608.4; and
- Ninth cause of action: respondents placed or constructed an access ramp, connecting the deck to the floating docks, in the tidal wetlands area without the requisite DEC permit in violation of ECL 25-0401(1) and 6 NYCRR 661.8.

At the conclusion of the hearing, Department staff moved to conform the pleadings to the evidence at the hearing (*see* Hearing Transcript [VI] at 776). Staff sought to add two additional causes of action, one relating to an alleged unpermitted installation of a wooden structure (rack) underneath the deck (and which protrudes seaward of the upper deck) and the second relating to the installation of a knee deck that protrudes seaward. Staff provided further information in staff's closing brief (*see* Hearing Report at 28-29; Staff's Closing Brief with Motion to Amend Pleadings dated May 11, 2018 [Staff Closing Brief], at 5-6, 31).

Also in its closing brief Department staff withdrew the charges against respondent Plagianakos without prejudice (*see* Hearing Report at 3; Staff Closing Brief at 2). I am dismissing the charges against respondent Plagianakos and, therefore, the provisions of this order pertain only to respondent Madeline Felice.

### Standard of Review

Where a hearing is held in a Department administrative enforcement proceeding, Department staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint (*see* 6 NYCRR 622.11[ b][1]). The standard of proof in Department enforcement proceedings is a preponderance of the evidence (*see* 6 NYCRR 622.11[c]).

The ALJ in her hearing report has detailed and comprehensively addressed each of the causes of action, the civil penalty and injunctive relief requested by Department staff, and the affirmative defenses and arguments set forth by respondent Felice. I agree with her conclusions and recommendations except as otherwise noted below.

### Liability

#### -Legal Authority

Department staff's causes of action in this proceeding relate to alleged violations involving the use and protection of waters and tidal wetlands. Specifically, staff cites as to protection of waters:

- ECL 15-0503. Section 1(b) of ECL 15-0503 establishes a permitting requirement for docks, wharfs, platforms, breakwaters, moorings or other structures “in, on or above waters [as that term is defined by ECL 15-0107(4)];” and
- 6 NYCRR 608.4. Section 608.4(b) of 6 NYCRR states that “[e]xcept as provided in subdivision (c) of this section, no person . . . may: (1) construct, reconstruct, modify, repair or change the use of any dock, pier, wharf, platform, breakwater or other structure in [,] on or above the navigable waters of the State; or (2) install or modify any mooring area; without a permit issued pursuant to [Part 608].”

As to tidal wetland requirements, staff cites to:

- ECL 25-0401. This ECL section establishes a permitting requirement (ECL 25-0401[1]) for activities listed in ECL 25-0401(2) that are conducted in regulated tidal wetlands. ECL 25-0401(2) provides that the activities subject to regulation include “any form of dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, . . . or fill of any kind; the erection of any structures . . . , the driving of any pilings, or placing of any other obstructions, . . . and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area;” and
- 6 NYCRR 661.8. Section 661.8 provides that no person shall conduct a new regulated activity on or after August 20, 1977 on any tidal wetland or any adjacent area unless such person has first obtained a permit pursuant to Part 661,

-Causes of Action in Staff’s Complaint

With respect to the first cause of action which relates to staff’s allegation that respondent constructed a fixed wooden platform (deck) “in, on or above the waters of East Mill Basin” at the site (*see* Complaint at 7. ¶ 39), the ALJ evaluated whether the waters in question constituted navigable waters (*see* Hearing Report at 9-12). The ALJ evaluated the applicable statutory and regulatory authority, administrative precedent and staff’s exhibits showing the deck and bulkhead, and related testimony. She concluded that the deck at the site is above a navigable water of the State and therefore its construction without the requisite DEC permit violated ECL 15-0503(1)(b) and 6 NYCRR 608.4. Upon my review of the record, I concur.

As to the second cause of action, ALJ Villa has set forth the evidence in the record that clearly establishes that respondent’s construction or causing the construction of the deck without the required permit was in violation of the State’s Tidal Wetlands Act. Again, the ALJ has reviewed the applicable statutory and regulatory authority, administrative precedent, the record exhibits, and the testimony presented at the hearing in reaching that determination (*see* Hearing Report at 13-21). Respondent raised a number of arguments including but not limited to the extent of the tidal wetland, the location of the deck above the wetland, the relevance of a 1989 SEQRA negative declaration, applicability of a 1993 permit issued to respondent Felice that authorized the reconstruction of existing shoreline structures, and a grandfathering of the structure. The ALJ found respondent’s arguments to be lacking in merit and I agree.

The next two causes of action involve driving or otherwise installing piles to support the deck in the regulated tidal wetland without the required permit. The third cause of action involves six supporting (6) round piles and I concur with the ALJ’s determination that respondent’s activity was in violation of ECL 25-0401(1) and 6 NYCRR 661.8 (*see* Hearing Report at 21). The fourth cause of action involves the driving or otherwise installing at least eight (8) rectangular piles in the regulated tidal wetland at the site. As to this fourth cause of action, the ALJ concluded that Department staff had not established this violation by a

preponderance of the evidence. The ALJ indicated that, in the alternative, I could determine that, based upon the evidence, at least two of the rectangular structures are driven piles (*see* Hearing Report at 21-22). Upon my review of the record, I agree with the ALJ's conclusion that the violation has not been established by a preponderance of the evidence and I hereby dismiss this fourth cause of action.

The record establishes that respondent placed or constructed, or caused the placement or construction, of eight (8) floating docks, which included jet ski floats, on the water at the site without the required DEC permit and therefore violated ECL 15-0503(1)(b) and 6 NYCRR 608.4 (fifth cause of action). I note that respondent Felice raised various arguments that respondent was not liable for this violation. The ALJ, in reviewing these arguments, concluded that the record demonstrated that respondent failed to establish that she was entitled to any exemption from the permit requirement, and the argument that the floating docks constituted a mooring facility was not supported (*see* Hearing Report at 22-25). In addition, respondent's argument that the site involves two separate deeded lots has no legal bearing or relevance to staff's assertions (*see id.* at 23). I concur with the ALJ's determinations.

As for the sixth cause of action, the record establishes that respondent's unpermitted installation of eight (8) floats totaling more than 200 square feet at the site in the regulated tidal wetland was a violation of ECL 25-0401(1) and 6 NYCRR 661.8 (*see* Hearing Report at 25).

Department staff, in the seventh cause of action, stated that respondent drove six (6) piles to support new floats at the site in the regulated tidal wetland without a permit for this regulated activity. Department staff testified and submitted evidence in support of its allegation (*see* Hearing Report at 26). The ALJ noted that respondent offered similar arguments to the ones it offered in response to the second cause of action (*see id.*). Those arguments had been rejected as to the second cause of action. On this record, these similar arguments are rejected as to the eighth cause of action as well. Respondent's driving of the six (6) piles to support new floats without a permit for this regulated activity violated ECL 25-0401(1) and 6 NYCRR 661.8.

As to the eighth cause of action, Department staff alleged that respondent placed or constructed an access ramp connecting the deck to the floating docks above the water at the site, without the required DEC permit. The ALJ concluded that Department staff met its burden to show that respondent Felice violated ECL 15-0503(1)(b) and 608.4 (*see* Hearing Report at 26-27). I have considered respondent's arguments and have found those to be unavailing. I agree with the ALJ that the violation has been established for this cause of action.

The ninth cause of action alleged that respondent "placed or constructed an access ramp, connecting the deck to the floating docks, in the tidal wetlands area" (Complaint at 11, ¶ 85). As noted by the ALJ, respondent did not have a permit to conduct this regulated activity and thus violated ECL 25-0401(1) and 6 NYCRR 661.4(ee)(iii) (*see* Hearing Report at 27). I concur with the ALJ's conclusion and her rejection of respondent's arguments.

### -Two Additional Causes of Action

As previously noted, at the conclusion of the hearing, Department staff moved to conform the pleadings to the evidence at the hearing. Staff sought to add two additional causes, specifically:

- the unauthorized construction of a wooden structure underneath the new wooden deck, “which spans its entire width and protrudes seaward of the upper deck,” in violation of ECL 15-0503(1)(b) and 25-0401(1) and (2), and 6 NYCRR 608.4(b) and 661.8; and
- the unauthorized construction “of the additional knee deck that protrudes seaward of the new deck” also in violation of ECL 15-0503(1)(b) and 25-0401(1) and (2), and 6 NYCRR 608.4(b) and 661.8.

Staff Closing Brief, at 5-6.

Respondent argued that staff’s motion must be denied on several grounds. Respondent argued that the knee deck and the wooden structure underneath the wooden deck “were there prior to the complaint” (Reply Post Hearing Brief for Respondents dated May 25, 2018 [Respondents Post Hearing Reply Brief] at 3). Respondent also argued that, based on Department staff testimony, knee decks “are routinely allowed as a matter of safety” and that “bracing (stringers) had no environmental impact” (*id.* at 4).

The record shows that the knee deck and the wooden structure underneath the new wooden deck were observed by Department staff during a visit on August 13, 2015 (*see* Hearing Report at 6-7 [Finding of Fact No. 24]; *see also* Hearing Transcript at 83-84), which indicated that the structures were added at some time between staff’s 2012 site visits and the August 13, 2015 site visit. These two additional structures were added without any notification to the Department and without the requisite permits. On the record before me, I see no basis to deny Department staff’s motion. Based on this record, respondent, by the construction of these two structures without the requisite permit violated the protection of waters and tidal wetlands law and regulations – ECL 15-0503(1)(b) and 25-0401(1), and 6 NYCRR 608.4(b) and 661.8.

### --Affirmative Defenses

Respondents Plagianakos and Felice in their answer dated June 12, 2015 (First Amended Answer) set forth five affirmative defenses – laches, statute of limitations, res judicata, claim preclusion, and unclean hands (*see* First Amended Answer at ¶¶ 120-161). In an enforcement proceeding, respondent bears the burden of proof with respect to any affirmative defenses (*see* 6 NYCRR 622.11[b][2]).

ALJ Villa has evaluated each of these affirmative defenses and recommends that I dismiss all five (*see* Hearing Report at 29-31). I have considered these defenses including the arguments presented in support (*see e.g. id.*; *see also* Post Hearing Brief for Respondents dated

May 11, 2018 at 36-38). Based on the record, I concur with the ALJ's recommendations and the affirmative defenses are dismissed.

--Summary of Violations

In sum, respondent Felice violated ECL 15-0503(1)(b) and 6 NYCRR 608.4 when, without the requisite DEC permit, she:

- constructed or caused the construction of a fixed wooden platform (deck) at the site;
- placed or constructed or caused the placement or construction of eight (8) floating docks at the site; and
- placed or constructed an access ramp connecting the deck to the floating docks at the site.

These activities were conducted in, on, or above the waters of East Mill Basin, a navigable water of the State. Furthermore, these violations, which commenced on or before June 1, 2012, are ongoing.

In addition, respondent Felice violated ECL 25-0401(1) and 6 NYCRR 661.8 when, without the required DEC permit, she:

- constructed or caused the construction of a fixed wooden platform (deck) at the site;
- drove or otherwise installed six (6) round piles as support for the deck at the site;
- installed eight (8) floats totaling more than 200 square feet in area at the site;
- drove six (6) piles to support the new floats at the site; and
- placed or constructed an access ramp, connecting the deck to the floating docks at the site.

These activities were all conducted in a regulated tidal wetland. These violations commenced on or before June 1, 2012, and are ongoing.

In addition, based on this record, I am finding respondent liable for the placing or constructing a knee deck, connecting the decks to the floating dock at the site, and placing or constructing a wooden structure underneath the deck at the site, in violation of ECL 15-0503(1)(b) and 6 NYCRR 608.4 and ECL 25-0401(1) and 6 NYCRR 661.8. These violations commenced on or before August 13, 2015 and are continuing.

Penalty and Injunctive Relief

For violations of ECL article 15 (except for ECL 15-1713 which is not at issue here) and its implementing regulations, ECL 71-1127(1) authorizes a civil penalty of not more than \$2,500 per violation and an additional civil penalty of not more than \$500 for each day during which the violation continues. That statutory section further provides for injunctive relief. For violations of ECL article 25 and its implementing regulations, ECL 71-2503(1)(a) authorizes a civil penalty of not more than \$10,000 per violation, and an additional civil penalty of not more than \$10,000

for each day the violation continues. Pursuant to ECL 71-2503(1)(c), a commissioner may direct the violator to cease and desist from any violations and require restoration of the affected areas.

Department staff calculated that the statutory maximum penalty for the violations was over eight hundred million dollars. (Staff Closing Brief at 22). The ALJ has summarized staff's application of the Department's Civil Penalty Policy dated June 20, 1990 and staff's consideration of the benefit and gravity components and other adjustments (*see* Hearing Report at 31-33; *see also* Staff Closing Brief at 22-25). In particular, Department staff noted respondent Felice's failure to cooperate and her knowing disregard of the applicable statutes and regulations that governed her construction activities. I note also the continuing nature of these violations.

In its complaint, Department staff requested a payable civil penalty of "no less than two hundred thousand dollars (\$200,000)" (Complaint at 11, Wherefore Clause ¶ II). In its closing brief, Department staff requested an order assessing a total civil penalty of \$300,000, with \$100,000 suspended upon completion of the remediation requested by Department staff, for a total payable civil penalty of \$200,000 (*see* Hearing Report at 33).<sup>1</sup> In consideration of the record before me, including the arguments with respect to increasing the penalty, I am imposing the civil penalty of \$200,000 that was requested in staff's complaint. However, in consideration of the scope of remediation that is directed by this order (including the removal or modification of various structures) and the need to direct resources to the remedial work, I am apportioning the civil penalty as follows: a payable civil penalty of \$75,000 and a suspended civil penalty of \$125,000. In the event that respondent fails to comply with the terms and conditions of this order, including but not limited to undertaking and completing the remedial work and paying the non-suspended portion of the civil penalty, the suspended amount of \$125,000 will become immediately due and payable.

With respect to remediation of the site, Department staff, in its complaint, asked that I order respondent to:

- reduce the size of the deck on Lot No. 106 (2690 National Drive) so that it will not extend seaward beyond the edge of the bulkhead;
- reduce the size of the deck on Lot No. 104 (2686 National Drive) to the previously lawfully existing dimensions;<sup>2</sup>
- remove all piles that support those portions of the decks that must be removed; and
- remove all floating docks and related structures that are not lawfully existing.

Department staff further requested that respondent restore the site under staff's oversight, "and consistent with instructions provided by and to the satisfaction of DEC staff" (Complaint at 12, Wherefore Clause ¶ III).

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<sup>1</sup> With respect to the two additional causes of action, Department staff only requested civil penalties pursuant to Article 25 and its implementing regulations (*see* Hearing Report at 28; *see also* Staff Closing Brief at 31).

<sup>2</sup> The deck at the site spanned both lots (*see* Hearing Transcript at 73, 96, 195, 216-217, and 219; *see also* Staff Exh 15).



In its closing brief, Department staff, as to Lot No. 106 (2690 National Drive), requested that respondent Felice be ordered “to bring the area seaward of the bulkhead into compliance with DEC Permit 2-6105-00016/00001-0 by removing all piles and (fixed or floating) structures except for a fixed dock measuring 4’ x 14’, a ramp measuring 3’ x 24’, and two floats measuring 6’ x 32’ and 8’ x 30’, respectively” (Staff Closing Brief at 10; *see also* Hearing Report at 5 [Finding of Fact No. 16]).

Department staff asserted that the deck at the property at Lot No. 104 (2686 National Drive) does not meet the standards for permit issuance and is not permissible (*see id.* 11, 12-13). Accordingly, staff requested that the deck be removed. Staff also requested that the utilities associated with the unauthorized structures be removed (*see id.* Closing Brief at 13). In addition, staff requested that respondent be ordered “to provide [s]taff with proof of proper disposal in the form of tipping receipts from a facility authorized to accept the removed items” (*id.* at 14).

Department staff’s requests regarding the modifications to be made to the structures at Lot No. 106, the removal of utilities and the documentation of the proper disposal of material from the site, as set forth in staff’s closing brief, as well as the direction that the site be restored under Department staff’s oversight, are incorporated into this order.

I have considered Department staff’s discussion regarding the status of the deck at the property at Lot No. 104. I am directing that the deck be removed, except that I am providing respondent with the opportunity, within sixty (60) days of the service of this order upon her, to submit a proposed modification of the deck at Lot No. 104 (2686 National Drive) to Department staff. Such modification must demonstrate that it is fully consistent with all applicable legal requirements. Absent respondent making such a demonstration, the deck at the property at Lot No. 104 must be removed.

In light of the extent of remediation to be undertaken, I am directing respondent to submit, within sixty (60) days of the service of this order upon respondent, an approvable<sup>3</sup> plan to Department staff that sets forth the manner of, and timetable for, the removal and modification of the structures that have been the subject of this proceeding. As part of the plan, respondent is to include a description of the measures to be taken to protect the regulated tidal wetland and waters at the site during such removal and modification. I encourage respondent to discuss the removal and modification of the referenced structures with Department staff prior to submitting the plan.

**NOW, THEREFORE**, having considered this matter and being duly advised, it is **ORDERED** that:

- I. The charges against respondent Peter Plagianakos in Department staff’s complaint dated April 14, 2015 are dismissed without prejudice.
- II. The affirmative defenses raised by respondent Madeleine Felice in her answer dated June 12, 2015 are dismissed.

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<sup>3</sup> “Approvable” means a plan that can be approved by Department staff with only minimal revision.

III. The fourth cause of action in Department staff's complaint dated April 14, 2015 is dismissed.

IV. Based on the evidence, respondent Madeline Felice violated:

A. ECL 15-0503(1)(b) and 6 NYCRR 608.4 when on or before June 1, 2012, respondent Felice:

1. constructed or caused the construction of a fixed wooden platform (deck) at the site;
2. placed or constructed or caused the placement or construction of eight (8) floating docks at the site;
3. placed or constructed an access ramp connecting the deck to the floating docks at the site;

in, on, or above the waters of East Mill Basin, a navigable water of the State, without a permit from the Department; and

B. ECL 25-0401(1) and 6 NYCRR 661.8 when on or before June 1, 2012, respondent Felice:

1. constructed or caused the construction of a fixed wooden platform (deck);
2. drove or otherwise installed six (6) round piles as support for the deck;
3. installed eight (8) floats totaling more than 200 square feet in area;
4. drove six (6) piles to support the new floats;
5. placed or constructed an access ramp, connecting the deck to the floating docks;

in a regulated tidal wetland at the site without a permit from the Department; and

C. ECL 15-0503(1)(b) and 6 NYCRR 608.4 and ECL 25-0401(1) and 6 NYCRR 661.8 when on or before August 13, 2015, respondent Felice:

1. placed or constructed a knee deck, connecting the decks to the floating dock at the site; and
2. placed or constructed a wooden structure underneath the deck at the site;

above the waters of the State and in a regulated tidal wetland.

V. I hereby assess a civil penalty in the amount of two hundred thousand dollars (\$200,000) upon respondent Madeline Felice. Of that amount, one hundred twenty-five thousand dollars (\$125,000) is suspended provided that respondent Madeline Felice complies with all terms and conditions of this order, including

but not limited to the payment of the non-suspended portion of the civil penalty (seventy five thousand dollars [\$75,000]) and undertaking and completing the remedial work directed by this order.

Within ninety (90) days of service of this order upon respondent, respondent Felice shall pay the non-suspended portion of the civil penalty of seventy-five thousand dollars (\$75,000) by check, cashier's check or money order made payable to the New York State Department of Environmental Conservation and mailed or hand-delivered to the following address:

Udo Drescher, Esq.  
Assistant Regional Attorney  
New York State Department of Environmental Conservation  
Region 2  
One Hunter's Point Plaza  
47-40 21<sup>st</sup> Street  
Long Island City, New York 11101

In the event that respondent Madeline Felice fails to comply with any term or condition of this order, the suspended portion (that is, \$125,000) of the civil penalty shall become immediately due and payable and is to be submitted in the same manner and to the same address as the non-suspended portion of the civil penalty.

- VI. Within sixty (60) days of the service of this order upon respondent Madeline Felice, respondent shall submit an approvable plan to Department staff that sets forth the manner of, and timetable for, the remedial activities set forth in paragraph VII of this order. Such plan shall also include the date by which each remedial work shall be completed.
- VII. Within ninety (90) days of the service of this order upon respondent Madeline Felice, respondent is directed to commence the following remedial activities:
  - A. Modification of the deck at Lot No. 106 (2690 National Drive) to bring the area seaward of the bulkhead into compliance with DEC Permit 2-6105-00016/0001-0 by removing all piles and (fixed or floating) structures except for a fixed dock measuring 4' x 14', a ramp measuring 3' x 24', and two floats measuring 6' x 32' and 8' x 30', respectively;
  - B. Remove the deck on Lot No. 104 (2686 National Drive), provided however that respondent may, within sixty (60) days of the service of this order upon her, submit a proposed modification of the deck at Lot No. 104 (2686 National Drive) to Department staff that demonstrates that the modification is fully consistent with all applicable legal requirements. If such a showing is satisfactory to Department staff, respondent may

proceed to modify the deck accordingly. Otherwise the deck must be removed;

- C. Removal of all piles that support any portions of the deck that must be removed;
- D. Removal of any floating docks and related structures that are not lawfully existing; and
- E. Removal of any utilities associated with the unauthorized structures.

Respondent shall restore the site under the oversight of, and consistent with instructions provided by, DEC staff. Respondent shall provide staff with proof of proper disposal, sale or recycling of any items removed from the site in the form of tipping receipts or other supporting documentation.

- VIII. Any questions or other correspondence regarding this order shall be addressed to Udo Drescher, Esq., at the address referenced in paragraph V of this order.
- IX. The provisions, terms and conditions of this order shall bind respondent Madeline Felice and her agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: February 25, 2021  
Albany, New York

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
Albany, New York 12233-1550

In the Matter

- of -

Alleged Violations of Articles 15 and 25 of the Environmental Conservation Law  
of the State of New York, and Parts 608 and 661 of Title 6 of the Official Compilation of Codes,  
Rules, and Regulations of the State of New York

by

Peter W. Plagianakos and Madeline Felice,  
Respondents.

DEC File No: R2-20120613-353

Hearing Report

- by -

\_\_\_\_\_  
/s/  
Maria E. Villa  
Administrative Law Judge

August 20, 2020

## Proceedings

Staff of the New York State Department of Environmental Conservation (Department Staff) commenced the captioned enforcement proceeding by serving a notice of hearing and complaint, both dated April 14, 2015, upon respondents, Peter Plagianakos and Madeline Felice (collectively, “respondents”). The complaint alleged that respondents violated Sections 15-0503(1)(b) and 25-0401(1) of the New York State Environmental Conservation Law (“ECL”), and implementing regulations at Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (“6 NYCRR”) Sections 608.4 and 661.8. According to the complaint, respondents had “undertaken, caused or allowed” several regulated activities in tidal wetlands and waters of the State without obtaining the permits required to do so. Complaint, ¶¶ 26-27. The site of the alleged violations is on property owned by respondent Madeline Felice, located at 2686 and 2690 National Drive, Brooklyn, Kings County, New York (the “Site”).

The complaint sought an order of the Commissioner finding that respondents violated the cited statutes and regulations; imposing upon respondents, jointly and severally, a civil penalty of “no less than two hundred thousand dollars;” and directing respondents to perform several remedial activities. Complaint, Wherefore Clause ¶¶ I-III.

Respondents served a May 29, 2015 answer and a June 12, 2015 first amended answer (the “Answer”). In addition to denying that Department Staff was entitled to the requested relief, respondents asserted the following affirmative defenses: (1) laches; (2) statute of limitations; (3) *res judicata*; (4) claim preclusion; and (5) unclean hands. In addition, respondents asserted a “reservation of other defenses,” seeking to “reserve the right to plead additional defenses as appropriate” based upon respondents’ investigation and discovery. Answer, ¶ 162.

Pursuant to a notice of hearing dated November 10, 2016, the hearing began on December 20, 2016 and continued to the following day at the Department’s Region 2 office at 47-40 21<sup>st</sup> Street, Long Island City, New York. Administrative law judge (“ALJ”) D. Scott Bassinson presided.<sup>1</sup> The hearing resumed on March 8-9, 2017, and the following year on March 20, 2018, concluding on March 21, 2018.

Udo Drescher, Esq., Assistant Regional Attorney, represented Department Staff. Department Staff called Neil Stevens, a criminal investigator in the Department’s Region 7 Division of Law Enforcement; George Stadnik, a Marine Resource Specialist in the Department’s Region 2 office; Stephen A. Watts III, the Region 2 Regional Permit Administrator; and Susan Maresca, the Region 2 Habitat Restoration Program Manager.

Respondents were represented by Robert M. Lustberg, Esq. and Joan Ferretti, Esq., of the law firm of Lustberg & Ferretti, Long Lake, New York. Respondents called Robert Frein, of Frein Lazzara Ltd., Westbury, New York; Robert James Palermo, Principal – Jaime Lore Design, and President of Corporate Design of America, P.C.; and Thomas M. Grothues, Ph. D., an Associate Research Professor at Rutgers University, New Jersey.

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<sup>1</sup> ALJ Bassinson left the Department in 2018. On June 26, 2020, the matter was assigned to ALJ Maria E. Villa, who prepared this hearing report.

At the hearing, a number of exhibits were received into evidence, and those exhibits are listed in the exhibit chart attached to this report. The parties filed post hearing briefs and reply briefs. Respondents' reply brief was received on May 29, 2018, and at that point the record of the proceeding closed.

At the hearing on March 9, 2017, at the conclusion of Department Staff's direct case, respondents made several oral motions, including a motion to dismiss the charges against respondent Peter Plagianakos. Transcript (hereinafter "Tr.") at 623. In his January 8, 2018 ruling on respondents' oral motions, the ALJ reserved on respondents' motion to dismiss, and in its May 11, 2018 closing brief, Department Staff withdrew the charges against respondent Peter Plagianakos without prejudice. This hearing report recommends that the Commissioner dismiss the charges against respondent Peter Plagianakos, and therefore this report considers only the charges against the remaining respondent, Madeline Felice. To avoid confusion when citing to the pleadings, the evidence, and the parties' submissions, "respondents" are referred to in the plural, except at the conclusion of this report.

### **Findings of Fact**

1. Respondent Madeline Felice owns property located at 2686 (Lot No. 104), and 2690 National Drive (Lot No. 106), Brooklyn, Kings County, New York. The property abuts and is immediately adjacent to East Mill Basin. Staff Exhs. 1, 2, and 3; Answer, ¶ 4.
2. Madeline Felice and another individual purchased the property at 2690 National Drive (Lot 106) in 1985. Staff Exh. 1; Answer, ¶ 4. In 1997, Ms. Felice became the sole owner of the property. Staff Exh. 2; Answer, ¶ 4. In 2002, Ms. Felice acquired 2686 National Drive (Lot 104) the neighboring property. Staff Exh. 3; Answer, ¶ 4.
3. The deed conveying Lot 106 (2690 National Drive) describes the easterly boundary of the lot as "the United States Pierhead and Bulkhead line<sup>2</sup> on the Westerly side of East Mill Basin." Staff Exhs. 1 and 2; Complaint, ¶¶ 10 and 11; Answer, ¶¶ 10 and 11. According to the deed, the easterly boundary of Lot 106 is 43 feet long. *Id.*
4. The deed conveying Lot 104 (2686 National Drive) describes the easterly boundary of the lot as "the United States Pierhead and Bulkhead line on the westerly side of East Mill Basin." Staff Exh.3; Complaint, ¶¶ 14 and 15; Answer, ¶¶ 14 and 15. According to the deed, the easterly boundary of Lot 104 is 43 feet long. *Id.*
5. The two adjacent parcels are located on the west side of East Mill Basin. The northern parcel is 2690 National Drive, and the southern parcel is 2686 National Drive. Staff Exh. 28. East Mill Basin is a navigable water of New York State. Complaint, ¶ 17; Answer, ¶ 17. East Mill Basin is part of the Jamaica Bay estuary system, which is part of Gateway National Park. Tr. at 121-122, 566.

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<sup>2</sup> The United States Pierhead and Bulkhead line is a legal boundary beyond which artificial structures may not be built in navigable waters. See 33 United States Code Annotated, Section 404.

6. Jamaica Bay is a significant ecosystem, one of the most important parts of the Atlantic flyway. Tr. at 122 and 565. Birds use the area to rest and feed during migration, as do monarch butterflies. Tr. at 122. Jamaica Bay is unique, because it is a relatively large estuary system located next to one of the most densely populated areas in the United States. Tr. at 122. It is a significant area for birding recreation, research, and as habitat for horseshoe crabs and red knots. Tr. at 123. Jamaica Bay is also a resource for other wildlife such as muskrats, and numerous fish species that use it as a nursery area. Tr. at 565. The water is very shallow and thus is important for a number of fisheries. Tr. at 566.
7. Respondent Felice's property is depicted on the tidal wetlands inventory map, panel number 592-494, for Kings County. Staff Exhs. 10, 20 and 21; Tr. at 63. The seaward edge of the face of the bulkhead at the Site is the limit of the tidal wetland boundary. Tr. at 131, 254 and 270. The tidal wetlands at the Site are designated as within the littoral zone. Tr. at 260-262; 287 and 558. Tidal waters reach the bulkhead at the Site. Staff Exh. 16; Tr. at 352, 375, 427, 447, 452, and 470-472; Respondents' Exhs. 7N, 7T, 7V and 7 GGG. The water at the Site one hour after low tide is between 3' and 4' at the piles supporting the deck. Tr. at 102, 107-108 and 112; Staff Exhs. 16, 17 and 18.
8. On December 16, 1988, the Department's Region 2 office received a joint application from respondent Felice for a permit for a residential boat dock at 2690 National Drive. Staff Exh. 28. The proposal included a 12' x 43' deck from the bulkhead to the U.S. Pierhead and Bulkhead Line. Staff Exh. 31. In addition, an 8' x 43' floating dock would be installed, with two parallel floating docks attached and extending out into the waterway. Staff Exh. 28. The two floating docks would be 5' wide by 37' long. Staff Exh. 28. The application was assigned permit application No. 2-6105-00016/00001-0. Staff Exh. 33.
9. On March 10, 1989, a negative declaration was filed for "the construction of a 43' x 10' deck with a ramp and floating dock, East Mill Basin, Brooklyn." Respondents' Exh. 11. The following narrative appears in the "Reasons Supporting This Determination" section of the document: "Upon inspection of this site, it was found that the proposed deck with ramp and float would have little, if any, impact on the East Mill Basin environment. Most of the decks are 10' wide or more along East Mill Basin. These decks are approximately 15' above the mean high water line. Little if any shading from the deck will occur. The floating dock currently there will be replaced by one with less square footage, hence less shading in the littoral zone." Respondents' Exh. 11, at 2.
10. By letter dated March 16, 1989, Department Staff advised respondent's contractor, Robert Palermo, that the proposed deck and dock, which would be 61 feet long, was an unacceptable encroachment into East Mill Basin. Staff Exh. 29. A document with the notation "Withdrawn 4/10/92" was found in Region 2's file in connection with the permit application. Respondents' Exh. 10; Tr. at 527-528.
11. On March 11, 1993, the Department issued a permit (DEC Permit No. 2-6105-00016/00001-0) to respondent Madeline Felice. Staff Exh. 4. The permit authorized the



reconstruction of existing shoreline structures at 2690 National Drive to allow for a 4' x 14' fixed dock, and a 3' wide x 24' long ramp leading to a 6' x 32' float perpendicular to another 8' x 30' float (“[b]asically, a T float arrangement”). Staff Exhs. 4, 5, and 35; Tr. at 88. The permit also authorized seven (7) piles, six to support the 4' x 14' fixed pier, and one pile to support the floating structure. Tr. at 304; Staff Exh. 5. The project encompassed 488 square feet. Staff Exh. 5.

12. On or about September 2, 1994, DEC Bureau of Marine Protection staff member Stephen Zahn conducted a compliance check of the Site, and found that respondent Madeline Felice violated special condition number one of the permit. Staff Exh. 6. Construction at the Site did not follow the plans submitted, and the floats installed exceeded the permitted size by 124 square feet. *Id.* The matter was resolved by an order on consent dated November 10, 1994 (DEC File No. R2-0265-94-09) (the “Consent Order”), which stated that respondent Madeline Felice violated ECL Section 25-0401, and Part 661 of 6 NYCRR. *Id.* Pursuant to the terms of the Consent Order’s schedule of compliance, respondent Madeline Felice was to reduce the size of the floats by 124 square feet. *Id.* Respondent Felice also paid a civil penalty of five thousand dollars (\$5,000), with five hundred dollars (\$500) payable and forty-five hundred dollars (\$4,500) suspended. *Id.*
13. By letter dated September 17, 1993, the Department issued a letter of non-jurisdiction (*see* Section 661.18 of 6 NYCRR) with respect to the proposed construction of a pool with decking at 2690 National Drive. Staff Exh. 36; Tr. at 265-266.
14. In response to an anonymous complaint, NYS DEC Environmental Conservation Officer Neil Stevens visited the Site on June 1, 2012, and observed workers repairing the bulkhead, and installing new pilings and decking. Staff Exhs. 8, 9; 19, at 3; Tr. at 17 and 20. The decking was above water, with “some portion” of the deck above the bulkhead. Tr. at 25-26; 32.
15. George Stadnik, a Marine Resource Specialist in the Department’s Region 2 office, visited the Site on June 25, 2012. Tr. at 66; Staff Exhs. 9 and 11. At the time of the hearing in 2016, Mr. Stadnik had been a Marine Resource Specialist for over 28 ½ years, and had conducted over 6,000 inspections of properties in and near tidal wetlands. Tr. at 56-58.
16. During the visit on June 25, 2012, Mr. Stadnik took measurements of the structures at the Site. The entire length of the deck was approximately eighty-six feet (86’), “from property line to property line, involving both lots.” Staff Exh. 9; Tr. at 73. The portion of the deck on 2690 National Drive measured approximately forty-eight feet long by fifteen feet ten inches wide (48’ x 15’ 10”) from the landward edge to the seaward edge. Staff Exh. 9; Tr. at 72. Almost all of the deck was seaward of the bulkhead. Tr. at 131-132. The minimum standard for a setback from a tidal wetland boundary in the New York City area is 30 feet. Tr. at 130.

17. Mr. Stadnik observed four piles that were installed as part of the deck construction. Staff Exh. 11; Tr. at 73-74. Mr. Stadnik testified that the piles were “recent, because they hadn’t been weathered.” Tr. at 75.
18. Mr. Stadnik also observed six steel support piles for two floating docks. Staff Exhs. 9 and 11; Tr. at 74-79. The two docks measured approximately seventy feet by nine feet (70’ x 9’), and eighteen feet by nine feet (18’ x 9’). Staff Exh. 9. A ramp thirty feet long by three foot six inches wide (30’ x 3’ 6”) ran from the deck to the floating dock. Staff Exhs. 9 and 11; Tr. at 73. In addition, there were six jet ski floats, each measuring four and one half feet by twelve feet (4’ 6” x 12”) attached to the floating dock. Staff Exhs. 9 and 11; Tr. at 78.
19. The deck at the Site shades the water beneath the deck. Staff Exhs. 11 and 16; Tr. at 77, 103, 559, 579-580, and 603. Shading occurs as a result of the deck at the Site 50% of the time. Tr. at 458. Shading results in less marine productivity of the habitat because of decreased photosynthesis, and also reduces the ability of wading birds to forage for food. Tr. at 105-106. Shading can affect biological productivity, by reducing the algae and plant material that forms the basis of the food chain in the water. Tr. at 584.
20. Most New York shore marine plants need full sunlight in order to thrive. Tr. at 584. Shallow water marine plants, such as *Spartina alterniflora*, need full sunlight to thrive. Tr. at 583 and 617. *Spartina alterniflora* is typically found in an intertidal marsh. Tr. at 616. Eel grass needs up to ninety percent of its light as full sunlight. Tr. at 583-584.
21. If people are using a deck, there can be noise, as well as artificial light. Tr. at 559. Noise and artificial light can affect wildlife, and artificial light at night can have impacts with respect to fish attraction. Tr. at 559. When smaller fish are attracted to and aggregated around the light, they tend to become easier prey for predatory fish. Tr. at 569.
22. The primary negative impact of a floating dock results from the pilings, and the subsiltation that occurs because of tidal currents. Tr. at 136. Fine sediments hit the edge of the floating dock “and drop straight down instead of getting transported up into the basin or down into the open mouth of the bay.” Tr. at 136-137. There are temporary and permanent impacts that result from the placement of piles in the water. Tr. at 143. Temporary impacts include the release of sediment and suspension of the mud bottom as a result of driving a pile. Tr. at 143. This results in a loss of sunlight and temporary productivity, and fish and birds would avoid the area. Tr. at 144. Permanent impacts would result from the loss of habitat due to filling the mud bottom with the circumference of the pile. Tr. at 144. Pilings can also have a beneficial impact, offering a hard substrate allowing attachment of algae and mussels. Tr. at 583.
23. Cumulative impacts “looks at whether the addition of many smaller impacts makes a major impact.” Tr. at 595.
24. During a subsequent visit on August 13, 2015, Mr. Stadnik observed that a permanent railing had been installed along the seaward edge perimeter of the deck; a knee deck

extension<sup>3</sup> had been installed in the middle of the seaward edge of the deck; and “some type of rack” was installed underneath the deck. Tr. at 82-84; Staff Exhs. 12 and 14.<sup>4</sup>

The rack had some shading impacts, depending upon the angle of the sun; open space and appreciation impacts; and impacts to navigation by preventing small vessels from passing underneath the upper deck. Tr. at 299.

25. Mr. Stadnik returned to the Site on September 21, 2015. Tr. at 90; Staff Exhs. 14 and 15. At that time, he measured the knee deck, which was approximately three feet by 14 feet (3' x 14'). Tr. at 96; Staff Exh. 15. The bulkhead had been raised approximately two feet to accommodate the new deck construction. Tr. at 97. The “rack” extended approximately three feet seaward from the upper deck platform, for the entire length of the deck. Tr. at 96. Mr. Stadnik testified that the deck “measured a little bit differently.” Tr. at 96. Specifically, the south side was seventeen (17') wide, and on the north side it was fifteen feet ten inches (15' 10") wide. Tr. at 96 and 216; Staff Exh. 15. Mr. Stadnik observed approximately 18 deck piles attached to the bulkhead to stabilize the new deck on the landward side of the deck adjacent to the bulkhead. *Id.* Photographs taken during the site visit show at least 6 piles further seaward supporting the deck, and Mr. Stadnik observed approximately ten seaward piles during the site visit. Tr. at 96; Staff Exh. 12. The bulkhead had been modified and raised by approximately two feet to accommodate the higher deck. Tr. at 96; Staff Exhs. 11 and 15.
26. The main float measured nine feet by seventy feet (9' x 70'), with four steel piles. Tr. at 97; Staff Exh. 15. The ramp float measured nine feet by eighteen feet (9' x 18'), with two steel piles. *Id.* Six jet ski floats were attached, “a diameter of 28 feet long by 11-and-a-half feet.” Tr. at 97. Utilities were installed. Tr. at 98.
27. Mr. Stadnik returned to the Site at approximately 12:40 p.m. on June 1, 2016. Staff Exhs. 16, 17 and 18; Tr. at 98-99. Mr. Stadnik testified that he visited the Site in a canoe “to measure water depths to determine if tidal wetlands existed at the site, and to make sure the deck platform was built in water depths less than 6 feet deep at low tide, and that is the definition of littoral zone.” Tr. at 98-99. The measurements were taken approximately an hour after “dead low tide,” and the water depths at the time were four feet or less. Tr. at 102, 108, 112 and 261; Staff Exhs. 16, 17 and 18. The measurements were taken at four pilings supporting the deck. Tr. at 107-108. The pilings are approximately 10 feet seaward from the bulkhead at the Site. Tr. at 104, 194.
28. During that site visit, Mr. Stadnik was able to navigate within five feet of the bulkhead. Tr. at 446-447.

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<sup>3</sup> Mr. Stadnik testified that the “typical use” of a knee deck “is to attach ramps to fixed structures.” Tr. at 210-211.

<sup>4</sup> Although the Exhibit Chart (attached) indicates that Staff Exhibit 14 was received into evidence, this is not reflected in the transcript. Tr. at 233. Exhibit 14 consists of photographs taken by Mr. Stadnik during a site visit on September 21, 2015. Tr. at 90. In light of the discussion of the photographs during the hearing, for clarity of the record, Exhibit 14 is received into evidence.

29. Robert Frein, of Frein Lazzara Ltd., produces graphics for courtroom presentation. Tr. at 326. On December 8, 2016, he visited the Site and took a video of the shoreline, as well as a number of photographs, and on February 28, 2017 he returned to take additional photographs. Tr. at 327 and 349-350. Mr. Frein estimated the water depth at the pile supporting the floating dock to be around “two to three feet or more” that day, at low tide with the tide coming in. Tr. at 382-383, 418. He estimated that the pile was 20 to 25 feet from the bulkhead. Tr. at 384.

### Discussion

The first, fifth, and eighth causes of action in Department Staff’s complaint alleged protection of waters violations pursuant to ECL Section 15-0503(1)(b) and Section 608.4 of 6 NYCRR. The second, third, fourth, sixth, seventh and ninth causes of action alleged violations of ECL Section 25-0401(1) and Section 661.8 of 6 NYCRR (tidal wetlands). At the conclusion of the hearing on March 21, 2018, counsel for Department Staff moved to conform the pleadings to the evidence by adding two additional causes of action, and indicated that further discussion about the motion would be included as part of Department Staff’s closing brief. Tr. at 776 (Vol. VI<sup>5</sup>).

Respondents asserted that the structures at the Site are outside the Department’s jurisdiction, because those structures are not located in a tidal wetland or the navigable waters of the State. Respondents argued that the deck on 2690 National Drive is a permitted structure, and that the deck on 2686 National Drive is a “partially grandfathered” structure. Respondents’ Closing Brief, at 2. According to respondents, any modifications to the structures at the Site “enhanced the environmental qualities of 2686 and 2690 National Drive compared to what was permitted and grandfathered.” *Id.*, at 3. Respondents maintained that the portion that is not grandfathered is outside the Department’s jurisdiction, that Department Staff’s case was frivolous, and that Department Staff failed to prove the required elements of its case against respondents.

At the conclusion of Department Staff’s direct case on March 9, 2017, respondents moved to dismiss all of the causes of action, as well as to strike certain exhibits and the testimony of Department Staff’s witness, George Stadnik, as it related to those exhibits. The ALJ issued a ruling on January 8, 2018, reserving with respect to the motions to dismiss the causes of action, and denying the motion to strike the testimony and exhibits. *Matter of Plagianakos*, Ruling on Respondents’ Oral Motions, at 3 (Jan. 8, 2018). Because Department Staff met its burden to establish liability for all but one of the causes of action respondents moved to dismiss, the motions to dismiss are denied, except with respect to the fourth cause of action.

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<sup>5</sup> Both Volume V and Volume VI begin at page number 650. Consequently, this report notes both the page and volume number for citations to those portions of the transcript.

### Standard of Review

Where a hearing is held in a Department administrative enforcement proceeding, Department Staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint (*see* Section 622.11(b)(1) of 6 NYCRR). The standard of proof in Department enforcement proceedings is a preponderance of the evidence (*see* Section 622.11(b); *see also* *Matter of Steck*, Order of the Commissioner, at 4 (March 29, 1993)).

Respondents bear the burden of proof with respect to any affirmative defenses (*see* Section 622.11(b)(2)). Section 622.4(c) of 6 NYCRR states that “[w]henver the complaint alleges that respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.” Section 622.4(d) provides that “[a]ffirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the ALJ. The ALJ shall only allow such defense upon the filing of a satisfactory explanation as to why the defense was not pled in the answer and is likely to be meritorious.”

The record shows that a permit pursuant to Article 25 (tidal wetlands) and Part 608 of 6 NYCRR (Water Quality Certification) was issued in 1993 for certain structures at 2690 National Drive, but it is undisputed that respondents never obtained a permit pursuant to Article 25 for the activities that took place at 2686 National Drive, or a protection of waters permit pursuant to Article 15 for either property. Staff Exh. 4. In this proceeding, although respondents argued that a permit was not required for certain activities that took place at the Site, they did not plead this as an affirmative defense in their Answer, and would therefore be foreclosed from raising this defense. Nevertheless, this hearing report addresses all of the parties’ arguments with respect to the alleged violations, in order to provide a complete record for the Commissioner’s consideration.

### First Cause of Action

The first cause of action alleged that respondents constructed a fixed wooden platform (the deck) “in on, or above the waters of East Mill Basin at the Site,” without a permit, in violation of ECL Section 15-0503(1)(b) and Section 608.4 of 6 NYCRR. Complaint, ¶ 39. The statute prohibits “any dock, wharf, platform, breakwater, mooring, or other structure in, on or above waters . . . [from being] erected, placed, constructed, reconstructed or expanded” without a permit from the Department. Section 608.4(b)(1) of 6 NYCRR “applies to the construction, reconstruction or repair” of various types of structures “in on or above the navigable waters of the State lying above underwater lands not owned by the State.” It is undisputed that respondent Felice’s property extends offshore to the U.S. Pierhead and Bulkhead Line. According to the complaint, this violation began on or before June 1, 2012. Complaint, ¶ 48.

Section 15-0107(4) defines “waters” to include “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction.” Section 608.1(u)

of 6 NYCRR defines navigable waters of the State to include “all lakes, rivers, streams and other bodies of water in the State that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruption to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation.” Department Staff took the position that the entirety of East Mill Basin is a navigable water of the State. Tr. at 240.

A decision in a prior proceeding established that East Mill Basin is a navigable water of the State. In *Matter of Lucas*, the ALJ considered an application for a permit to construct a bulkhead and to backfill at property owned by the applicant on East Mill Basin, the same waterbody that is at issue here. The ALJ noted that the project would “involve construction in the navigable waters of the State and therefore would require a permit under 6 NYCRR Part 608 (Protection of Waters).” *Matter of Lucas*, Decision Conference Report, ¶ 3 (Sept. 9, 1981).

In their Answer, respondents admitted that East Mill Basin is a navigable water of the State.<sup>6</sup> Answer, ¶ 17. Despite this admission, as part of their motion to dismiss this cause of action, and in post-hearing briefing, respondents disputed Department Staff’s assertion that the structures at the Site are located in navigable waters. Specifically, respondents argued that the issue “is whether this [East Mill Basin] is actually navigable as it exists along the seawall where they are asserting jurisdiction. It is our contention that that is not navigable water.” Tr. at 240-241. According to respondents, “DEC adopted its own fact based definition [of navigability] which required proving navigability in fact at every specific location it seeks to regulate.” Respondents’ Post-Hearing Brief, at 30. Respondents contended that it was a “crucial question” whether East Mill Basin was navigable within ten feet of the bulkhead at the Site. Tr. at 158-159. Respondents took the position that “[t]he issue is whether there is navigable water, and navigable water in fact within 10 feet of that bulkhead, and that is the issue, and that is what I am trying to deal with.” Tr. at 164-165.

The wooden deck platform is connected to the bulkhead, and is above the water at the Site. At the hearing, investigator Stevens testified that when he inspected the Site on June 1, 2012, “[t]here was work being done by some laborers . . . . We discussed the work that was being done as new pilings, some work to the bulkhead, new decking.” Tr. at 20; Staff Exhibits 8 and 9. The witness observed that the decking was above water. Tr. at 25-26.

Tidal waters reach the bulkhead at the Site. Staff Exh. 16; Tr. at 375, 427 and 452; Respondents’ Exhs. 7N (showing water at the bulkhead at low tide), 7V and 7 GGG. George Stadnik, the Department’s witness, testified that he visited the Site in a canoe on June 1, 2016, and that it would be possible to navigate within five feet of the bulkhead at the Site absent the presence of “ramps, floats and decks.” Tr. at 446-447, 151 and 450-451.

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<sup>6</sup> Respondents were represented at the hearing by a different law firm than at the time respondents served their first amended answer. As part of a motion to admit a video into evidence at the hearing (Respondents’ Exh. 5), respondents sought leave to amend their answer. The ALJ denied the motion to amend. *See Matter of Plagianakos*, Ruling on Motion to Admit Video Into Evidence, at 4, fn. 4 (Feb. 27, 2017). In their closing briefs, respondents renewed their motion to amend to conform the pleadings to the evidence. The ALJ’s 2017 ruling on this motion will not be disturbed. There is no prejudice to respondents, in light of the extensive discussion of the issue of navigability in fact as it pertains to the Site during the hearing and in subsequent briefing.

Respondents' reliance on Mr. Stadnik's inability to paddle a canoe within five feet of the bulkhead at the Site overlooks the fact that he was prevented from reaching that bulkhead because of the structures in the water. Tr. at 151 ("[i]f you could make it safely underneath the deck, yes, you could do it, but the obstructions were ramps, floats and decks.") Respondents' argument that the area next to the bulkhead is not navigable water, due to the presence of these obstructions, is not supported by the language of the regulation, which defines navigability to include even those bodies of water where navigation is interrupted by "artificial structures . . . or other obstructions." See Section 608.1(u) of 6 NYCRR. The obstructions at the Site, by their nature, encroach upon navigable waters.

Similarly, Respondents' reliance upon the regulation for their contention that any water at the bulkhead was too shallow to be navigable, arguing that the term "shallows" refers only to streams, is not supported by any authority and contradicts the language of the regulation. As Department Staff points out, the definition of navigable waters in Section 608.1(u) of 6 NYCRR includes "all lakes, rivers, streams and *other bodies of water in the State . . . notwithstanding interruption to navigation by . . . shallows*" (emphasis supplied). Respondents argued further that because there was little or no water at the bulkhead at the time of a site visit in the winter of 2016-2017 at low tide, the area under the deck is not navigable water. According to respondents, "[a] water which lacks capacity to support navigation in fact twice a day is not navigable within 6 NYCRR 608.1(u)." Respondents' Post Hearing Brief, at 18. Respondents do not offer any legal authority to support this proposition, and it is evident from the record that tidal waters reach the bulkhead at times even at low tide, and to the maximum extent at high tide. Similarly, respondents' argument, without citation, that "[t]he whole notion of the US Pierhead and Bulkhead Line is that it represents the landward limit of navigability," is not persuasive. Respondents have made no showing that navigability is so narrowly defined for the purposes of protection of waters under the jurisdiction of the Department.

In fact, "navigability" has been construed more liberally in this context. In *Matter of Serth*, the Commissioner noted that "the Department's jurisdiction over the waters of the State under ECL article 15 is not limited only to waters used as public highways. ECL 15-0505 is a broad environmental protection statute concerned with uses of the State's waters for a variety of water quality and ecological purposes beyond public navigation, and includes waters such as tributaries and headwaters that impact the navigable waters of the State, whether those tributaries and headwaters themselves are navigable in the traditional sense or not." *Matter of Serth*, Commissioner's Decision, at 5-6 (Dec. 19, 2012) (citations omitted). The decision points out that the definition of "waters" is "sufficiently broad to include not only waters that are navigable in fact, but tributaries and other surface waters that are hydrologically connected to waters navigable in fact." *Id.*, at 6.

The decision in *Matter of Serth* goes on to state that "[t]he structure of ECL 15-0505 also reveals the broad scope of the statute's intended reach," requiring consideration of the impacts of proposed projects not only on navigation, but also on health, safety, and the State's natural resources." *Id.*, at 7. In light of this, the decision concludes that "given the broad health and safety, and environmental protection purposes of ECL article 15, and the lack of a specific definition of the term 'navigable' in article 15, a broad interpretation of the term 'navigable waters of the state' under ECL 15-0505 is necessary to accomplish the statute's purpose." *Id.*, at

7-8. This reasoning is applicable, and this broad interpretation is appropriate, in this proceeding. The Department's jurisdiction over the activities at the Site is not limited by the presence of obstructions, or variations in water level at the bulkhead due to tidal fluctuations. As a matter of law, the waters in question here fall within the Department's jurisdiction as "waters of the State" under ECL Article 15.

In addition to their arguments regarding navigability, respondents also asserted that when Mr. Stadnik visited the Site to take depth measurements on June 1, 2016, he trespassed on respondent Felice's private property without her consent or an administrative warrant. According to respondents, the depth measurements he took "are the fruits of his illegal search," and that consequently, Staff Exhibits 16 and 17, as well as his testimony relating to those exhibits, should be stricken. Respondents' Post Hearing Brief, at 24. Respondents did not cite to any authority in support of this argument.

Department Staff countered that the waters at the Site are "navigable at law," because tidal waters are considered by common law to be arms of the sea, and "solely by virtue of this tidal influence, are subject to the public right of navigation." Staff's Reply Brief, at 2 (*citing Morgan v. King*, 35 N.Y. 454, 458 (1866) (holding that the public have a right of passage or transportation on all tide waters); *Adirondack League v. Sierra Club*, 92 N.Y.2d 591 (1998) (boaters may make use of a common law easement on a private, non-tidal river, rendering it navigable in fact). Department Staff went on to note that Mr. Stadnik came to the Site by boat because respondents refused to comply with Department Staff's request to permit entry to take measurements, despite Department Staff having proposed five possible dates for a fifteen minute inspection. Respondents' motion to strike the testimony and exhibits associated with the June 1, 2016 site visit is denied.

The record establishes that the fixed wooden platform, or deck, at the Site is above East Mill Basin, a navigable water of the State, and therefore that the construction of the deck without a permit violated ECL Section 15-0503(1)(b) and Section 608.4(b)(1) of 6 NYCRR. Department Staff met its burden to demonstrate by a preponderance of the evidence that respondent Felice violated ECL Section 15-0503(1)(b) and Section 608.4 of 6 NYCRR, as alleged in the first cause of action.

As discussed below, Department Staff requested a total civil penalty of \$300,000, with \$200,000 suspended if respondent Felice undertook the required remediation. In its closing brief, Department Staff cited to Section 71-1127(1) of the ECL in calculating that the maximum penalty for the violation alleged in the first cause of action would be \$2,500, plus an additional penalty of \$500 for each day that the violation continued. Staff's Closing Brief, Attachment 2. Section 71-4003 provides for a general civil penalty of up to one thousand dollars for each violation of the ECL and an additional civil penalty of not more than one thousand dollars for each continuing day of violation. Department Staff used the time period from June 1, 2012,



when the violation was first observed, to May 10, 2018, a total of 2,168<sup>7</sup> days, and concluded that the maximum civil penalty for the violation alleged in the first cause of action would be \$1,086,500.

### Second Cause of Action

The second cause of action alleged that respondents “constructed or caused the construction of a fixed wooden platform at the Site above the regulated tidal wetland and open water area.” Complaint, ¶ 48. Department Staff alleged that this unpermitted activity, which took place on or before June 1, 2012, violated the Tidal Wetlands Act, ECL Section 25-0401(1) and Section 661.8 of 6 NYCRR. Id.

Section 25-0103(1) of the Tidal Wetlands Act defines tidal wetlands to include, among other areas, “those areas which border on or lie beneath tidal waters,” including “low lands subject to tidal action.” The regulations define tidal wetlands, or wetland, to mean “any lands delineated as tidal wetlands on an inventory map.” Section 661.4(hh) of 6 NYCRR. The regulation goes on to enumerate various classifications as delineated on the tidal wetlands map, including, among others, intertidal marsh and the littoral zone. Intertidal marsh is defined in Section 661.4(hh)(1) of 6 NYCRR as the vegetated tidal wetland zone, designated IM on an inventory map, lying generally between average high and low tidal elevation; the predominant vegetation in this zone is low marsh cordgrass, *Spartina alterniflora*. “Littoral zone” is defined as the tidal wetlands zone, “designated LZ on an inventory map, that includes all lands under tidal waters which are not included in any other category . . . provided, there shall be no littoral zone under waters deeper than six feet at mean low water.” Section 661.4(hh)(4) of 6 NYCRR. Accordingly, pursuant to this definition, the Department’s tidal wetlands jurisdiction includes all tidally influenced areas down to a water depth of six feet at mean low water, that is, during a normal low tide.

Section 25-0401(1) of the ECL provides that “no person may conduct any of the activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so.” Section 661.8 of 6 NYCRR states that “[n]o person shall conduct a new regulated activity on or after August 20, 1977 on any tidal wetland or any adjacent area unless such person has first obtained a permit” from the Department. The term “regulated activity” encompasses, among other activities, the following:

- (a) Any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate;
- (b) Any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish or fill of any kind;

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<sup>7</sup> Department Staff’s penalty calculation uses 2,168 days (from June 1, 2012 to May 10, 2018) of continuing violation in calculating the maximum penalty for violations of Article 15, and 2,169 days of continuing violation to calculate the maximum penalty for tidal wetlands violations. Staff’s Closing Brief, at 21, and Attachment 2. This discrepancy is not explained, but because Department Staff did not seek the maximum civil penalty, the difference is not significant.

- (c) The erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide;
- (d) Any form of pollution; and
- (e) Any other new activity within a tidal wetland or on an adjacent area which directly or indirectly substantially alter or impair the natural condition or function of any tidal wetland.

Section 661.4(ee)(1)(i)-(vi) of 6 NYCRR.

With respect to the alleged tidal wetland violations, respondents offered several arguments, including a challenge to Department Staff's determination that the Site was located in a wetland, specifically, a littoral zone; that the structures at the Site have little, if any impact on any wetland; that the deck at 2690 National Drive is a permitted structure, and that no permit was needed to reconfigure the docks at that location because the square footage was reduced; and that the deck on 2686 National Drive is a partially grandfathered structure, and the remaining portion is outside of the Department's jurisdiction.

During the hearing on December 20, 2016, Department Staff introduced into evidence a copy of the official tidal wetlands inventory map for Kings County, along with the testimony of a Department Staff employee who identified the location of respondent Felice's property on the map. Tr. at 59-61; Staff Exh. 10. Prior to the third day of hearings, on March 2, 2017, respondents moved, among other things, for dismissal of the second, third, fourth, sixth, seventh and ninth causes of action in the complaint. Those causes of action related to alleged violations of the Tidal Wetlands Act, ECL Section 25-0401(1), and its implementing regulation at Section 661.8 of 6 NYCRR. According to respondents, the Department lacked jurisdiction over any tidal wetlands at the Site because the tidal wetlands inventory maps for Kings County, which include respondent Felice's property, were not filed in the office of the Kings County Clerk as required by ECL Section 25-0201 and Section 661.4(o) and (hh) of 6 NYCRR. Department Staff opposed the motion, pointing out that within the City of New York, the tidal wetlands inventory maps for the counties of New York, Bronx, Queens and Kings were not filed with the county clerks, but with the City Register.

In a ruling dated April 3, 2017, the ALJ denied the motion to dismiss the six causes of action "to the extent that it is based upon the Commissioner having filed the official tidal wetland maps with the City Register rather than the Kings County clerk," and took official notice of map panel no. 592-494, the panel of the tidal wetlands inventory maps that included the Site. *Matter of Plagianakos*, Ruling on Respondents' Motions to Dismiss and to Strike, at 7 (Apr. 3, 2017). The ALJ also denied the motion to strike testimony and exhibits related to the tidal wetland violations.

By letter dated April 6, 2017, respondents moved for leave to file an expedited appeal, and the Commissioner granted that motion on June 3, 2017. Respondents filed a memorandum of law in support of the appeal dated June 6, 2017, and on July 6, 2017, Department Staff submitted its memorandum in opposition. On July 10, 2017, respondents sought leave to reply to Department Staff's memorandum, and the Commissioner granted the request and accepted the

July 10, 2017 reply as filed. The Commissioner also authorized a sur-reply by Department Staff, and that submission was filed on July 20, 2017.

On October 3, 2017, the Commissioner issued an interim decision and order affirming the ALJ's ruling and remanding the matter for further proceedings. *Matter of Plagianakos*, Interim Decision and Order of the Commissioner, at 8 (Oct. 3, 2017). The Commissioner held that “[b]y operation of the plain and express terms of the General Construction Law, the Department’s filing of tidal wetlands inventory maps in the Kings County office of the City Register which exercises the functions, powers and duties formerly exercised by the King County Register, is deemed to be in compliance with any provision of law requiring that the inventory maps be filed in the office of the Kings County Clerk.” *Id.*, at 5 (citations omitted).

Respondents then commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) in Supreme Court, Albany County. In a February 21, 2018 Decision and Order, the court held that the Commissioner’s determination was not final for purposes of judicial review, and dismissed respondents’ petition (*see Matter of Felice v. Seggos*, Index No. 907054-17 (Feb. 21, 2018)). The court noted that the Commissioner’s decision “determined only that the official tidal wetlands inventory map for Kings County was properly filed and that, therefore, the ALJ correctly denied petitioners’ motion to dismiss the complaint due to the alleged improper map filing.” *Id.*, at 3.

In its decision, the court observed that “[n]otably, the administrative hearing has yet to be completed and the Commissioner has remitted the matter to the ALJ for further proceedings, including the opportunity for petitioners to present evidence at the hearing in support of their position.” *Id.* Although the hearing continued on March 20, 2018, and concluded on the following day, respondents did not renew their arguments concerning this issue, and the parties did not address it in their closing briefs. The Commissioner’s holding that the inventory maps were filed in accordance with the law will not be disturbed.

In this proceeding, Department Staff had the burden to show that respondents undertook unpermitted activities in a regulated tidal wetland. Respondents did not dispute that they did not obtain a permit prior to undertaking the activities charged in the complaint; rather, respondents challenge the accuracy of the Department’s determination that the Site is located in a tidal wetland, specifically, the littoral zone of East Mill Basin. According to respondents, the violations charged in the complaint did not take place within a regulated tidal wetland, and that as a result, those activities were outside the Department’s jurisdiction, and did not require a permit.

In his February 27, 2017 Ruling on Motion to Admit Video Into Evidence, the ALJ disallowed the use of the video “to the extent if at all [respondents] seek to use the video or other evidence to establish that the Site is not located in tidal wetlands.” *Matter of Plagianakos*, Ruling, at 3. The ruling went on to state that “[t]he wetlands inventory map that includes respondents’ Site was established by order of the Commissioner pursuant to ECL § 25-0201(4), and that order is not subject to challenge in this enforcement proceeding.” *Id.*

Respondents maintained that Department Staff failed to establish the seaward boundary of the tidal wetland at the Site, and as a result, did not prove the extent of Department Staff's jurisdiction. On cross-examination, Mr. Stadnik, referred to the tidal wetlands map for East Mill Basin (Staff Exhibit 10), and testified that the Site was within the littoral zone:

Q. So basically it is the Department's position that the littoral zone is all of the water of Mill Basin that is not identified as a wetland by these other delineations and letters; is that correct?

A. They identified it as littoral zone because they could not determine water depths based on infrareds. That's why we do field inspections . . . based on our inspection, the water depth was significantly less than 6 feet, averaged anywhere from 3 feet to 4 feet, and this is an hour, hour-and-a-half after low tide so you might subtract six inches, so it was easily below 6 foot, the depth of low water, so that designates it as tidal wetland, and it designates the area as littoral zone.

Tr. at 260-262.

The tidal wetland map shows a line following the bulkhead at the Site as the boundary of the tidal wetland littoral zone. Staff Exh. 10. The line following the bulkhead on the western side of East Mill Basin is straight, depicting the "armored" character of the shoreline. Tr. at 666 (Vol. VI); Staff Exh. 10. The eastern side of East Mill Basin has a more natural, curved shoreline, which is reflected in the boundary line depicted on the tidal wetland map. Tr. at 668 (Vol. VI); Staff Exh. 10. Department Staff having established that the Site is within a mapped tidal wetland, the burden then shifted to respondents to show that it was not. Respondents failed to do so, and rather relied upon testimony about the width of a line on the tidal wetlands map as demonstrating the limits of the Department's jurisdiction at the Site.

Specifically, respondents argued that Mr. Stadnik's testimony established that the tidal wetland boundary extended approximately six feet from the seaward edge of the bulkhead, based upon cross-examination questioning regarding the scale of the line that followed the bulkhead on the tidal wetlands map. Tr. at 307-309; Staff Exh. 10. Respondents' citation to Mr. Stadnik's testimony as to the width of line as scaled from the map overlooks the fact that the tidal wetlands map is a representation of the approximate location of the tidal wetland boundary at the Site. As Mr. Stadnik testified, "[i]t is basically an interpretation basically that the bulkheads are all straight . . . That's why we perform field inspections; to actually determine the existing environmental conditions and existing locations of structures. That is why field inspections are a normal part" of permit review and enforcement investigations. Tr. at 147-148.

As the ALJ previously determined, respondents' attempt to challenge whether a tidal wetland extends to some point seaward of the bulkhead boundary is in effect an attempt to amend the tidal wetlands map, and is inappropriate in this proceeding. *See* Section 661.5 of 6 NYCRR (setting forth the procedure to amend an existing tidal wetland map). Moreover, testimony at the hearing by Department Staff's witness established that, more than an hour after low tide, the water at the pilings that support the deck averaged from three to four feet, and

therefore below the six foot water level at low tide that defines the littoral zone. Tr. at 102, 112; Staff Exhs. 16, 17 and 18. Those pilings are approximately ten feet seaward of the bulkhead. Tr. at 104 and 194. Respondents did not introduce any measurements or data to dispute the measurements taken by Department Staff, or any testimony or evidence with respect to the wetland characteristics of the Site, or the absence of such characteristics. Although on the second day of the proceedings, counsel for respondents indicated that respondents would offer the testimony of a wetland expert, respondents ultimately elected not to do so. Tr. at 277.

Respondents also contended that the second cause of action is meritless because the deck is not “in” a tidal wetland within the meaning of Section 661.4(ee)(1) of 6 NYCRR. According to respondents, the deck is not in a wetland, but rather above it, “way up in the air.” Respondents’ Reply Memorandum of Law in Support of Oral Motions Directed to DEC’s Case, at 11 (April 28, 2017) (included as Appendix A to Respondents’ Post Hearing Brief). Department Staff countered that ECL Article 25 and Part 661 of 6 NYCRR use the term wetlands “area,” and that “a suspended structure is still in the area where it is located.” Department Staff’s April 14, 2017 Reply to Respondents’ Oral Motions, at 10; *see* ECL Section 25-0401(2) (stating that activities subject to regulation include “any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.”)

Department Staff also cited to the order in *Matter of Mills*, in which the Commissioner held that “[b]y definition, an activity is regulated if there is a potential for it to impair or alter the natural condition of the tidal wetland substantially.” *Matter of Mills*, Order, at 1, Whereas Clause ¶ 3 (Nov. 5, 1992). The Commissioner concluded that “building a deck extension and a ramp over a tidal wetlands may substantially impair or alter the natural conditions of the tidal wetlands on the Site. These activities are, therefore, regulated pursuant to ECL § 25-0401(2).” *Id.* Respondents’ objected to this authority as “a 25 year old Commissioner decision,” but did not point to anything that might indicate that the passage of time has undermined the decision. Respondents’ Reply Memorandum of Law in Support of Oral Motions Directed to DEC’s Case, at 12 (April 28, 2017).

Moreover, respondents themselves relied upon a 1989 negative declaration (Respondents’ Exhibit 11) for the proposition that a deck proposed at 2690 National Drive in a permit application submitted by Ms. Felice in 1988 would have “little, if any, impact on the East Mill Basin Environment.” Respondents’ Exh. 11, at 2. This argument overlooks the fact that the deck proposed in the permit application, and referenced in the negative declaration, was 43’ long and 10’ wide, almost six feet smaller in width than the existing deck at the property, which measures approximately 43’ long and 15’ 10” wide. Respondents also misquote Ms. Maresca’s testimony on cross-examination in response to questions about the negative declaration. The complete testimony demonstrates that Ms. Maresca did not agree that there would be little, if any, impact, except to the extent that “[y]es, there is a minimal impact [overall within all of Mill Basin], but, again, in terms of cumulative, what we are trying to do is reduce all of these minimal impacts occurring over time, which is why I object to it.” Tr. at 606. In fact, she specifically

stated, in response to questioning whether she agreed with the assessment in the exhibit, that she disagreed that it would be completely without impact. Tr. at 605.<sup>8</sup>

As noted in *Matter of Mills, supra*, structures above a tidal wetland may substantially impair or alter the natural condition of tidal wetland. The testimony of Department Staff's witnesses supports the conclusion that shading from the structures at the Site would have an adverse effect on the wetland. Mr. Stadnik noted that "[w]e take into consideration the character of the immediate area when we review a permit application, when we recommend removal or modification of structures that were non-permitted, depending on offset mitigation. You have to offset the impact caused by the structure that is not permitted by doing something else so we always mitigate anything that causes shading, whether it is removal of an adjacent structure, a deck protrusion or a floating dock; it offsets the non-permitted action." Tr. at 489.

Department Staff noted that the policy expressed by the Tidal Wetland land use regulations "clearly disfavors the addition of unnecessary shading and other structures over and in the water, especially structures that are built to support a use that can just as well be undertaken in an upland area away from the wetland." Staff's Closing Brief, at 20. Department Staff cited to the permit issuance standards in Section 661.9, as well as the table in Section 661.5 of 6 NYCRR, noting that decks such as the one at issue here are considered to be "presumptively incompatible" features that should not be placed in a tidal wetland. Section 661.5(a)(3) and (b)(49); Tr. at 139-141. As Department Staff's witness Ms. Maresca testified, shading affects fish behavior. Tr. at 570-571. In addition, the witness discussed the adverse effects of noise and artificial lighting on fish behavior. Tr. at 559 and 569. Although respondents' witness, Dr. Grothues, took the position that the impact of the deck is "negligible," and that the shading from the deck is "not profound," a commentary co-authored by the witness did acknowledge that reduced shading in shallow water "likely increases the available habitat for fishes." Tr. at 683 and 714 (Vol. VI); Respondents' Exh. 39. Dr. Grothues also testified that structures such as a dock provide an "edge effect;" an accumulation of animals along changes between two different environments. Tr. at 685 (Vol. VI). According to Dr. Grothues, "fish will actually concentrate along that edge." *Id.*

According to respondents, the deck at 2690 National Drive was permitted in 1989, based upon the negative declaration and testimony by respondents' witness, Robert Palermo, that a negative declaration operated as a "stand aside." Tr. at 683 (Vol. V) ("A negative declaration is the same as a quasi-approval"). Nevertheless, respondents did not produce any permit from 1989, and Stephen Watts III, the Region 2 Regional Permit Administrator testified that a negative declaration does not automatically lead to the issuance of a permit. Tr. at 539. Notwithstanding their contention that Department Staff had an obligation to preserve and account for any records, it was respondents' burden to show that a permit was issued in 1989, and respondents did not cite to any authority to support the assertion that a negative declaration was the equivalent of a permit.

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<sup>8</sup> Although the exhibit chart (attached) indicates that Ms. Maresca's resume (Exhibit 37) was received into evidence, this is not reflected in the transcript. Tr. at 648. Nevertheless, Department Staff moved to qualify Ms. Maresca as an expert in marine resource protection and marine habitat restoration, and the ALJ granted that motion. Tr. at 547-549. As such, her testimony is accorded significant weight.

The only permit in evidence was issued in 1993 ((DEC Permit No. 2-6105-00016/00001-0) to respondent Madeline Felice. Staff Exh. 4. The permit authorized the reconstruction of existing shoreline structures at 2690 National Drive to allow for a 4' x 14' fixed dock, and a 3' x 24' ramp leading to a 6' x 32' float perpendicular to another 8' x 30' float (“[b]asically, a T float arrangement”). Staff Exhs. 4, 5, and 35; Tr. at 88. The permit also authorized seven (7) piles, six to support the 4' x 14' fixed pier, and one pile to support the floating structure. Tr. at 304; Staff Exh. 5. The project encompassed 488 square feet. Staff Exh. 5.

Correspondence from respondents' consultant on July 27, 1993 and September 1, 1993 shows these features and the dimensions on a site plan. Staff Exhs. 34 and 35. The July 27, 1993 correspondence included a site plan, with incorrect measurements for the two existing floats. Staff Exh. 35. The September 1, 1993 letter provided a corrected site plan. Staff Exh. 36. According to respondents, this discrepancy led to respondent Felice entering into the Consent Order, despite the fact that the floats were actually constructed to the dimensions authorized in the permit.

On or about September 2, 1994, DEC Bureau of Marine Protection staff member Stephen Zahn conducted a compliance check of the Site, and found that respondent Madeline Felice violated special condition number one of the permit. Staff Exh. 6. According to the Consent Order, construction at the Site did not follow the plans submitted, and the floats installed exceeded the permitted size by 124 square feet. *Id.* The schedule of compliance in the Consent Order resolving the violation required respondent Madeline Felice to reduce the size of the floats by 124 square feet. *Id.* Respondent Felice also paid a civil penalty of five thousand dollars (\$5,000), with five hundred dollars (\$500) payable and forty-five hundred dollars (\$4,500) suspended. *Id.* Respondents appear to be arguing that Department Staff is bound by the extent of the violations documented in September of 1994 and resolved in the Consent Order. As discussed below in connection with respondents' affirmative defenses, this assertion is without merit. It is also unclear why respondent Felice would sign an order on consent and pay a penalty “for a violation which apparently did not exist.” Respondents' Post Hearing Brief, at 14.

According to respondents, “the 1993 permit allowed 432 square feet of floating docks on 2690 National Drive.” Respondents' Post Hearing Brief, at 32. Respondents went on to assert that the existing floating docks total only 386 square feet at that parcel, and that re-configuration of the floating docks at the Site “involved rotating the dock until it was parallel with the deck, and extends less far out into the channel than what was grandfathered in 1974, and is essentially equivalent to what was permitted in 1993.” *Id.* It is unclear how respondents calculated the 386 square foot figure, and respondents' brief refers only to “Stadnik's notes.” *Id.* Assuming that respondents are referring to Staff Exhibit 9, Mr. Stadnik measured the two floating docks to be 9' x 18' and 9' x 70', for a total of 792 square feet. Assuming further that respondents divided 792 square feet in half, the total would be 396 square feet, not 386. It is undisputed that the deck presently in existence at 2890 National Drive is larger than the 4' x 14' fixed dock allowed in the 1993 permit; in fact it measures at least 43 feet x 15 feet 10 inches. Staff Exhibit 9.

Respondents' argument that any impacts are obviated by a reduction in square footage, or by reconfiguring the structures at the Site, overlooks the fact that the authorizations in a tidal wetland permit are not fungible. Otherwise, a permit applicant would be entitled to modify a

proposed project without Department oversight, so long as it remained within the general outline of what was authorized in a permit. Activities undertaken in a tidal wetland are subject to the Department's review and approval, and require a permit, because it is necessary for qualified personnel to evaluate the potential impacts of any proposed project. Here, respondents took it upon themselves to alter the deck, docks, and ramps at the Site, without first consulting with Department Staff to ensure that any impacts would be minimized or eliminated.

As Ms. Maresca testified, Department Staff considers the cumulative impact of a project in evaluating a permit application. According to the witness, "cumulative impacts looks at whether the addition of many smaller impacts makes a major impact." Tr. at 595. The witness testified that the deck at the property would have a minimal overall impact within all of Mill Basin, "but, again, in terms of cumulative, what we are trying to do is reduce all of these minimal impacts occurring over time, which is why I object to it." Tr. at 606. As noted above, respondents' witness, Dr. Grothues, testified that in his opinion the shading effect of the deck at the Site was negligible, the cumulative effect of the structures at the Site on the East Mill Basin ecosystem must be taken into account. Moreover, arguments as to the degree of environmental harm go to the amount of penalty to be assessed, not liability.

Respondents also asserted that the structure at 2686 National Drive is "a partially grandfathered structure." Respondents' Post Hearing Brief, at 2. Although respondents maintain that it is Department Staff's burden to show which of the structures at the Site are grandfathered, respondents' argument is in fact an affirmative defense, which should have been raised in their Answer, pursuant to Section 622.4(c). Nevertheless, this hearing report includes a discussion of this defense for the Commissioner's consideration.

With respect to respondents' grandfathering argument, Department Staff pointed out that when the tidal wetlands law was first enacted, the statute included a moratorium period for undertaking new, permitted projects in a tidal wetland. The moratorium period set forth in Section 25-0202(1) of the ECL began on September 1, 1973, and ended on August 20, 1977, the date on which the tidal wetland land use regulations became effective. Department Staff referred to *Matter of F.L.D. Construction Corp.*, in which the Commissioner held that ECL Article 25 does not provide for "grandfathering" of unconstructed projects. *Matter of F.L.D. Construction Corp.*, Commissioner's Decision, 1984 WL 19292 (Aug. 28, 1984). Noting that "[w]hile the Tidal Wetland regulations, 6 NYCRR § 661.12<sup>9</sup> (Existing land use and development) do allow pre-existing structures to remain, the regulations do not exempt projects that have not been constructed." *Id.*, at \* 2. The Commissioner concluded that "it is clear that the Tidal Wetlands Act when read as a whole, provides no support that the Legislature intended to grandfather projects which had received approvals but had not yet been constructed." *Id.* Department Staff contended that "[t]he Tidal Wetlands Act does not provide for the reconstruction or rearrangement, much less so any expansion, of structures that were not 'lawfully in existence on August 20, 1977' without a DEC permit." Staff's Reply Brief, at 2.

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<sup>9</sup> Former Section 661.12 of 6 NYCRR is now codified as Section 661.10 of 6 NYCRR. In pertinent part, it provides that "(a) No provision of the Part shall be deemed to prohibit or require the removal of any land use and development, including any structure, lawfully in existence on August 20, 1977."



The only information cited by respondents as to the structures that were present at the Site prior to 1977 is Respondents' Exhibit 13A. According to respondents, "[p]rior to 1974, 2686 National Drive contained three grandfathered floating docks in a U formation extending out into the channel of East Mill Basin." Respondents' Post Hearing Brief, at 32. Respondents' argument overlooks the fact that the structures that existed in 1974 have since been deconstructed, and new structures were installed in a different configuration. Notwithstanding any arguments regarding a reduction in square footage from what was grandfathered, the fact is that the floating docks in a U formation are no longer in existence. Respondents' assertion that the existing structures at the Site are grandfathered is unavailing.

Record evidence establishes that the structures seaward of the bulkhead are within the Department's jurisdiction pursuant to the Tidal Wetlands Act. Pursuant to Section 71-2503(1) of the ECL, the maximum penalty for violations of the Tidal Wetlands Act is \$10,000 per day of violation, and in the case of a continuing violation, each subsequent day is a separate and distinct violation. In addition, the Commissioner has the authority under Section 71-0503(1)(c) of the ECL to direct a violator to cease and desist from any violation, and may require restoration of the affected area. With respect to the second cause of action, Department Staff calculated a maximum civil penalty of \$21,690,000, based upon 2,169 days of violation.

#### Third Cause of Action

Department Staff's third cause of action alleged that on or before June 1, 2012, respondents violated ECL Section 25-0401(1) and Section 661.8 of 6 NYCRR by driving or otherwise installing at least six (6) round piles to support the deck at the site in a regulated tidal wetland, without a permit to do so. The complaint cited to Section 661.4(ee)(1)(iii), which states that the driving of any pilings is a regulated activity requiring a permit from the Department. The Site is mapped as tidal wetland littoral zone. The round piles are depicted in photographs of the Site, and the testimony supports Department Staff's contention that the pilings were driven at a location where the water level at mean low tide is less than six feet. Tr. at 73, 79-80, 96, 102 and 112; Staff Exhs. 11, 15, 16, 17 and 18.

As was the case in the second cause of action, respondents argued that these structures were not located in the tidal wetland. For the same reasons articulated above, this argument is rejected. Respondents have not offered any evidence to rebut Department Staff's proof, and liability for this violation is established by a preponderance of the evidence.

Pursuant to Section 71-2503(1) of the ECL, the maximum penalty for violations of the Tidal Wetlands Act is \$10,000 per day of violation, and in the case of a continuing violation, each subsequent day is a separate and distinct violation. With respect to the third cause of action, Department Staff calculated a maximum civil penalty of \$21,690,000, based upon 2,169 days of violation.

#### Fourth Cause of Action

The fourth cause of action alleged that, on or before June 1, 2012, respondents "drove or otherwise installed at least eight (8) rectangular piles as support of the wooden deck at the Site in

the regulated tidal wetland.” Complaint, ¶ 58. The complaint cited to ECL Section 25-0401(1) and Sections 661.8 and Section 661.4(ee)(1)(iii) of 6 NYCRR. The latter provision states that the driving of any pilings in a tidal wetland is a regulated activity requiring a permit from the Department.

Mr. Stadnik testified that during the September 21, 2015 site visit, he observed that “deck piles were installed approximately 6 by 4 inches, and I counted approximately 18 of them that were attached to the bulkhead to stabilize the new deck on the landward side of the deck adjacent to the bulkhead.” Tr. at 96. The rectangular structures are visible in the last photograph in Staff Exhibit 11, and Department Staff also referred to these structures in the photographs entered into evidence as Respondents’ Exhibits 7M, 7T, 7W, 7ZZ, 7CCC and 7YYY. Respondents’ witness, Dr. Grothues, testified that he observed the rectangular vertical structures, and considered them to be “framing that is part of the bulkhead. It braces the bulkhead.” Tr. at 720 (Vol. VI).

Respondents argued that there were no driven square or rectangular pilings on the Site, “merely rectangular supports affixed to the bulkhead, which are not driven piles, and which, being really severely old according to DEC’s own witness, are not actionable.” Respondents’ Post Hearing Brief, at 28.

Respondents’ contention is largely borne out by the photographs in the record. Staff’s Exhibit 11 shows the rectangular structures attached to the bulkhead, but because the photograph was not taken at low tide, the ground is not visible. The photographs taken at low tide in respondents’ exhibits, including those cited by Department Staff, appear to show two of the rectangular structures extending down to the soil below the deck, but it is not clear that the rectangular structure is in fact a driven pile, given its location and the presence of other, round pilings. Respondents’ Exhs. 7 K, L, M, R, S, T, W, KK, LL, ZZ and CCC. On this record, Department Staff has not established this violation by a preponderance of the evidence, and no penalty should be imposed. In the alternative, should the Commissioner determine that, based upon the evidence, at least two of the rectangular structures are driven piles, the penalty sought by Department Staff should be reduced accordingly.<sup>10</sup>

#### *Fifth Cause of Action*

The fifth cause of action stated that on or before June 1, 2012, respondents “placed or constructed, or caused the placement or construction of, eight floating docks on the water at the Site.” Complaint, ¶ 63. This cause of action asserted that respondents’ action was a violation of Section 15-0503(1)(b) of the ECL and Section 608.4 of 6 NYCRR. The floating docks, including the jet ski floats, were observed during the June 25, 2012 site visit (Staff Exhibits 9 and 11), as well as the site visit on September 21, 2015. Tr. at 97; Staff Ex. 15. Respondents do not dispute that these features are located in navigable waters. Staff Exhibit 15 shows the dimensions of the two floating docks that were secured with steel pilings. One float measured 9’ x 70’, and the other measured 9’ x 18’.

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<sup>10</sup> For this violation, Department Staff calculated a maximum penalty of \$10,000 times 18 piles (\$180,000), multiplied by 2,169 days, for a total maximum penalty of \$390,420,000. Staff’s Closing Brief, at Attachment 2.

Staff Exhibit 9, which includes Mr. Stadnik's measurements from the June 25, 2012 site visit, refers to "six jet ski floats 12' x 4'6"" on the third page of the exhibit, next to a hand drawn sketch. In addition, the notation from Mr. Stadnik's September 21, 2015 site visit (Staff Exhibit 15) refers to "Jet Ski float . . . six attached 28' x 11'5" (4' 7" each)." Mr. Stadnik testified that during that visit he measured "the jet ski float, six of them were attached, and they measured a diameter of 28 feet long by 11-and-a-half feet." Tr. at 97 (*see also* Tr. at 103 ("the bottom left corner [of the photograph in Staff Exhibit 16] is the most northern jet ski float, one of the six northern jet ski floats").

Respondents asserted that "since the Complaint specifically alleges that the floats were unlawfully secured with steel pilings, the foam jet ski float was not the subject of the Complaint." Respondents' Post Hearing Brief, Appendix A, at 23. There is no further elaboration, or citation to support this argument, and it is not supported by the language of the cause of action, which refers to eight floating docks, with no mention of pilings. Complaint, ¶ 63. Moreover, the broad language of the regulation at Section 608.4(b)(1) imposes a permit requirement for any dock "in on or above navigable waters." As noted, respondents did not argue that the floating docks at the Site are not located in navigable waters. Each of the floating docks is attached or secured, either directly or indirectly, by means of steel pilings.

Respondents also cited to Section 608.4(c)(6), and contended that "[i]t is also well settled that no permit is needed for the 'relocation, replacement and/or rearrangement of floating docks, ramps, walkways and anchoring devices within the established perimeter of a docking area.'" This provision appears under the section of the regulation entitled "Exceptions" to the permitting requirements. Therefore, it was respondents' burden to adduce evidence to show that respondents are entitled to assert this exception as an affirmative defense. *See* Section 622.11(b)(2) of 6 NYCRR. Respondents failed to carry this burden. Instead, they argued that "[n]o permit was needed to re-configure the floating docks, and this is especially true because the re-configuration resulted in less coverage that [sic] what was permitted in 1993 and grandfathered in 1974." Respondents' Post Hearing Brief, at 34.

According to respondents, "[t]he fallacy of the Complaint is that it defines the 'Site' as if it were a single parcel, when in fact it is two separate deeded residential lots, each with a house, one of which has a permit for floats and ramp, and the other which had lawful historic floats and ramp." Respondents' Post Hearing Brief, Appendix A, at 24. Nevertheless, respondents have not shown that the existence of two separate deeded lots has any legal bearing or relevance to the charges asserted by Department Staff. Nor have respondents made any showing that the facts established in the record would support a finding that the disputed structures are grandfathered, as discussed above.

Moreover, respondents themselves conflate the square footage of the floats on both properties to argue that any impacts have been lessened by reducing the square footage of the floats ("Based on Mr. Stadnik's diagram, the float is 9' x 70', or 630 square feet, but this is evenly divided between the two parcels." *Id.*, at 25). Respondents do not provide any support for this allocation, which may be a basis for a reduced penalty, but it is not a defense to liability.

Citing to Section 15-0503(3)(a) and (b) of the ECL, respondents also contended that “[t]his is an established docking facility used solely as a landing place on water providing dockage for the single boat; it is also a mooring facility providing mooring for fewer than 10 boats.” *Id.* As discussed below, the floating docks are not a “mooring facility,” within the meaning of the regulatory definition or Section 15-0503(3)(b). With respect to their argument that the floating docks amount to “an established docking facility . . . for a single boat,” respondents did not demonstrate that the docks are “established,” nor did they address the fact that there are also six jet ski floats attached to the dock. Moreover, respondents did not offer any proof of the statute’s requirement that the outer perimeter of the docking area be less than four thousand square feet, as set forth in the permitting exception in Section 15-0503(3)(a) of the ECL. Such bare assertions do not provide a legal basis to find that respondents’ actions and structures fall within the scope of Section 608.4(c)(6) of 6 NYCRR or Section 15-0503(3) of the ECL.

In their post-hearing brief, respondents maintained that jet ski floats are not subject to regulation by the Department. According to respondents, “[t]hey are foam and not permanently installed and not a structure.” Respondents’ Post-Hearing Brief, at 34. Respondents went on to assert, without citation, that “[i]n any event, if anything they would be a mooring facility, which provides mooring for fewer than 10 boats, and no permit would be needed.” *Id.* This argument fails as well, on the facts and the law.

Section 608.1(h) of 6 NYCRR defines a “docking facility” to mean “any marina, boat basin, marine terminal, and any other areas on navigable waters containing a single structure or a collection of related structures, such as docks, piers, platforms, bulkheads, breakwaters, and pilings, used for the reception, securing and protection of boats, ships, barges or other water craft.” Section 608.1(t) of 6 NYCRR provides that a “mooring” means “a float, buoy, chain, cable, rope, pile, spar, dolphin or any other device or combination of device that are anchored or fixed in navigable waters of the State to which a vessel can be made fast.”

The six jet ski floats are depicted in the photographs in Staff Exhibit 11. The floats are attached to the floating dock. Given the function, complexity, and location of the floats, respondents’ argument that the floats are a “mooring” is not persuasive. The floats are a collection of related structures that function as a means to receive, not merely secure, the jet skis, and the floats themselves are located to the landward side of the floating dock, which provides protection for these water craft, as do the foam platforms on which the jet skis are docked. Respondents’ assertion that the floats are not permanently installed is inconsistent with the record, which shows the floats and several shrink-wrapped jet skis were present in the winter months, during Mr. Frein’s site visits on December 8, 2016 and February 28, 2017. Tr. at 327, 350 and 385; Respondents’ Exhs. 7G, 7H and 8 (JPG No. DSC0037).

As discussed above, Department Staff has demonstrated that the activities undertaken at the Site took place in a navigable water of the State. Specifically, with respect to the fifth cause of action, Department Staff met its burden to show, by a preponderance of the evidence, that respondent Felice violated Section 15-0503(1)(b) of the ECL and Section 608.4(b)(1) of 6 NYCRR by placing two floating docks, as well as six floating docks for jet skis, in navigable waters at the Site. Respondents’ arguments to the contrary are not supported by the record or

citation to any legal authority, respondents did not establish that they had obtained a permit for the floating docks or for the jet ski floats, nor did they establish that they were entitled to any exception to the permitting requirement.

For protection of waters violations, pursuant to ECL Section 71-1127(1), violations of Section 15-0503(1)(b) of the ECL and Section 608.4(b)(1) of 6 NYCRR carry a maximum civil penalty of \$2,500 for each violation, with an additional penalty of \$500 for each day the violation continues. Department Staff's penalty calculation multiplied \$2,500 times 8 floating docks<sup>11</sup> (\$20,000), plus 8 times \$500 for each day of continuing violation (\$4,000), times 2168 days of violation, for a total maximum civil penalty of \$8,692,000. Staff's Closing Brief, Attachment 2. This calculation is in error; the correct total maximum penalty, using Department Staff's multipliers, would be \$52,032,000.

### Sixth Cause of Action

The complaint's sixth cause of action stated that on or before June 1, 2012, respondents installed eight floats, totaling more than 200 square feet, at the Site in the regulated tidal wetland. Department Staff alleged that this was done without a permit, in violation of ECL Section 25-0401(1) and Section 661.5(b)(17) of 6 NYCRR, which requires a permit in order to install a floating dock of 200 square feet or more in area in a regulated tidal wetland. The floats are the same as those referred to in the fifth cause of action, specifically, two floating docks and six jet ski floats. The main floating dock alone is approximately 630 square feet (9' x 70'). Staff Exh. 15; Tr. at 95-98.

Respondents maintained that there was no proof as to the size of the floats, and that in any event the ramp and floating docks were "well outside" the boundary of the tidal wetland, pointing out that the only water depth measurements were taken at the pilings beneath the deck, "irrelevant to any determinations pertaining to the floats which are well seaward of the US Pierhead and Bulkhead Line." Respondents' Post Hearing Brief, at 31. As discussed above in connection with the other tidal wetland causes of action, this argument is not persuasive. Moreover, respondents' witness, Mr. Frein, estimated that the water depth at one of the pilings for the floating dock was "2 to 3 feet or more," at a distance 20 to 25 feet from the bulkhead, at low tide. Tr. at 383-384 and 418; Respondents' Exh. 7HH.

Respondents reiterated their arguments regarding grandfathering and the lessened impacts resulting from the reconfiguration of the floating docks. According to respondents, the reconfiguration resulted in a reduction of 77 square feet from what was grandfathered. As discussed above, it was respondents' burden, not Department Staff's, to demonstrate what, if anything, was grandfathered at the Site, and respondents did not do so. Respondents' remaining arguments about alleged lesser impacts on the tidal wetlands at the Site do not relate to whether the record shows there is a violation, but rather would be considered in connection with the penalty to be assessed.

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<sup>11</sup> Department Staff's penalty calculation refers to "piles" rather than floats. Staff's Closing Brief, at Attachment 2.

For this cause of action, Department Staff calculated a maximum civil penalty of \$65,070,000 for the tidal wetland violations at the Site. According to Department Staff's penalty calculation, Department Staff considered the floating structures to consist of "3 distinct elements: The main float, the ramp float, and the jet ski floats." Staff's Closing Brief, Attachment 2. Department Staff calculated the penalty by multiplying \$10,000 by three, for a total of \$30,000, multiplied by 2169 days of continuing violation.

#### Seventh Cause of Action

The seventh cause of action stated that on or before June 1, 2012, respondents drove six (6) piles to support new floats at the Site in the regulated tidal wetland, without a permit from the Department, in violation of Section 25-0401(1) and Section 661.8 of 6 NYCRR. Section 661.4(ee)(1)(iii) provides that driving any piles, or placing any obstructions in a tidal wetland is a regulated activity, requiring a permit. Department Staff's witness testified that he observed the floats and the six piles during the site visits on June 12, 2012 and September 21, 2015. Tr. at 97; Staff Exh. 9, 11 and 15.

Respondents offered similar arguments as those advanced in connection with the second cause of action, and, as discussed above, those arguments are rejected. Specifically, respondents contended that there was no showing that the tidal wetland at the Site extended to the six piles supporting the floats. Contrary to respondents' position, Department Staff established that East Mill Basin at the Site is within the littoral zone, as shown on Staff Exhibit 10, the tidal wetlands map on which the Site appears. Respondents' witness, Robert Frein, provided the only testimony with respect to the water level at the piles for the floating dock, estimating that the water depth was "two to three feet or more" at low tide with the tide coming in. Tr. at 382-383, 418. This is less than the six foot depth limit of a tidal wetland littoral zone. Even assuming that a challenge to the tidal wetland map would be appropriate in this proceeding, respondents would then have the burden of coming forward with record evidence to support their position. They have not done so. On this record, the violation was established by a preponderance of the evidence.

Department Staff calculated the maximum penalty for this violation by multiplying the six piles by the \$10,000 per day statutory maximum (\$60,000) times 2,169 days of continuing violation, for a total maximum civil penalty of \$130,140,000.

#### Eighth Cause of Action

In the eighth cause of action, Department Staff alleged that on or before June 1, 2012, respondents placed or constructed an access ramp connecting the deck to the floating docks above the water at the Site, without a permit from the Department, in violation of ECL Section 15-0503(1)(b) and Section 608.4 of 6 NYCRR. It is undisputed that respondents did not have a permit for this activity. Respondents also did not dispute that this feature is above the navigable waters of East Mill Basin.

The access ramp connecting the deck to the floating docks appears in a photograph in Staff Exhibit 8, as well as photographs in Respondents' Exhibits 7G and 7H. The ramp measures

three feet six inches wide by thirty feet long (3' 6" x 30') (Staff Exh. 9) and is located on the 2690 National Drive parcel. Respondents argued that any impacts were lessened because the ramp was reduced from what was originally permitted, and also now serves both properties, rather than only 2686 National Drive. According to respondents, "it is narrower and of less square footage than what was permitted by DEC in 1993 for the Northern Property [2690 National Drive] alone." Respondents' Post Hearing Brief, at 19. This assertion is not borne out by the record. The 1993 permit authorized a ramp 3' wide x 24' long, but the ramp at the Site currently is wider by six inches and longer by six feet. Staff Exhs. 6 and 9.<sup>12</sup> Respondents' arguments as to any lessened impacts may be considered by the Commissioner in determining an appropriate penalty, but respondent Felice's liability for this violation is established.

Based upon this record, Department Staff met its burden to show that respondent Felice violated Section 15-0503(1)(b) of the ECL and Section 608.4(b)(1)<sup>13</sup> of 6 NYCRR by placing or constructing an access ramp connecting the deck to the floating docks above the water at the Site, without a permit from the Department. Pursuant to Section 71-1127 of the ECL, the maximum civil penalty for this violation is \$2,500, with an additional civil penalty of up to \$500 for each day of continuing violation. According to Department Staff, the violation continued for 2,168 days, for a total potential penalty of \$1,104,500. As noted in footnote 13, below, it appears that the correct total should be \$1,086,500.

#### Ninth Cause of Action

The ninth cause of action alleged that respondents "placed or constructed an access ramp, connecting the deck to the floating docks, in the tidal wetlands area." Complaint, ¶ 85. The complaint stated further that respondents did not have a permit for this activity, and that the violation occurred on or before June 1, 2012. According to the complaint, this violated Section 25-0401(1) of the ECL and Section 661.4(ee)(1)(iii) of 6 NYCRR, which provides that "the erection of any structures . . . whether or not changing the ebb and flow of the tide" is a regulated activity requiring a permit.

For the same reasons as set forth above in connection with the other tidal wetland causes of action, and in light of the facts established in connection with the eighth cause of action, respondents' arguments are unavailing.

Pursuant to Section 71-2503(1) of the ECL, the maximum penalty for violations of the Tidal Wetlands Act is \$10,000 per day of violation, and in the case of a continuing violation, each subsequent day is a separate and distinct violation. With respect to the ninth cause of action, the maximum civil penalty would therefore be \$21,690,000, based upon 2169 days of violation.

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<sup>12</sup> It appears that this measurement may be drawn from a different structure at the Site. Respondents appear to have been referring to the 3' x 14' measurement of the knee deck on Staff Exhibit 15, rather than the measurement of the actual 3'6" x 30' ramp, which appears on Staff Exhibit 9.

<sup>13</sup> Department Staff's penalty calculation in connection with this cause of action contains two typographical errors; the calculation refers to "§ 609.4" of 6 NYCRR, and also shows a total maximum penalty of \$1,104,500. Staff's Closing Brief, Attachment 2. It appears that the correct total should be \$1,086,500.

### Additional Causes of Action

As noted above, at the hearing and in its closing brief, Department Staff moved to amend the complaint to add two additional tidal wetland and protection of waters violations, both of which were first observed on August 13, 2015 (*see* Staff Exhibit 12); Tr. at 776 (Vol. VI). The first additional violation alleged was the unpermitted installation of a wooden structure (the “rack”) underneath the deck. Department Staff asserted that this installation violated Sections 15-0503(1)(b) and 25-0401(1) and (2), as well as Sections 608.4(b)(1) and 661.8 of 6 NYCRR. Staff’s Closing Brief, at 31.

Department Staff calculated the statutory maximum penalty to be \$9,990,000 for 999 days of violation at \$10,000 per day (August 35, 2015 to May 10, 2016). This penalty amount accounts only for the tidal wetland violations, and Department Staff did not explain why no penalty amount was calculated or sought for the alleged protection of waters violation.

The second additional violation alleged was the installation of a knee deck without a permit. Department Staff alleged that this installation violated Sections 15-0503(1)(b) and 25-0401(1) and (2), as well as Sections 608.4(b)(1) and 661.8 of 6 NYCRR, and calculated that the statutory maximum penalty was \$9,990,000 for 999 days of violation at \$10,000 per day. Again, although Department Staff charged a violation of Article 15 in connection with this cause of action, Department Staff only calculated and sought a penalty for the tidal wetland violations alleged.

Pursuant to Section 3025(b) of the New York Civil Practice Law and Rules (“CPLR”), leave to amend pleadings “shall be freely given, absent prejudice or surprise resulting from the delay.” A motion to amend should be granted unless the opposing party demonstrates substantial prejudice resulting directly from the delay. *See Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 275 A.D.2d 440, 441 (2<sup>nd</sup> Dept. 2000) (“[m]ere lateness is not a barrier to an amendment, and significant prejudice must be demonstrated to justify the denial for an application for an amendment”); *citing Edenwald Contr. Co., Inc. v. City of New York*, 60 N.Y.2d 957 (1983). The burden of establishing prejudice is on the party opposing the amendment, and “absent prejudice, courts are free to permit amendment even after trial.” *Kimso Apartments, LLC v. Ghandi*, 24 N.Y.3d 403, 411 (2014).

Respondents contended that the motion must be denied because the rack and the knee deck were in existence prior to the date of the complaint (April 14, 2015). Respondents renewed their request to move Respondents’ Exhibits 15A and 15B into evidence. Those exhibits were prepared in May 2015 as part of a permit application. That motion is denied. Pursuant to Section 621.3(e) of 6 NYCRR, by letter dated September 2, 2015, respondents were notified by Stephen Watts, the Regional Permit Administrator, that the application for a tidal wetlands permit was suspended pending resolution of the enforcement action. Respondents’ Exh. 16. Respondents concluded, without citation, that “[a]ny claim that could have been made in the Complaint, but was not made, is precluded.” With respect to the merits, respondents also mischaracterized Mr. Stadnik’s testimony that knee decks are routinely allowed, and that the “rack” had no environmental impact. Tr. at 210 and 213. This assertion is not borne out by the testimony.



Respondents' arguments regarding Department Staff's motion to amend are not persuasive. Respondents were on notice since 2012 of Department Staff's investigation of the violations at the Site. Despite this, they added additional structures without notifying Department Staff. As Department Staff pointed out, the additional structures are clearly visible on respondents' own exhibits, are within respondents' control, and were installed at some period between June 25, 2012 and August 13, 2015. Respondents were also aware that the Department's review of the permit application had been suspended during the pendency of this enforcement action. Under such circumstances, respondents cannot credibly assert that they would be unfairly prejudiced by Department Staff's motion to amend the complaint.

Department Staff's motion to amend the complaint to add these two causes of action is granted, and on this record, respondent Felice's liability for the violations charged in these additional causes of action was established by a preponderance of the evidence.

### Affirmative Defenses

Respondents' June 12, 2015 Answer included five affirmative defenses, including laches, statute of limitations, *res judicata*, claim preclusion, and unclean hands. In their post hearing brief, respondents asserted that based upon the record, "the Complaint is barred by each of these defenses." Respondents' Post Hearing Brief, at 36. All of the affirmative defenses in the Answer are related to the same set of facts, specifically, a compliance check of the Site on September 2, 1994 by Stephen Zahn in connection with the work authorized in the 1993 permit. According to respondents, at the time of the inspection, "the deck and a ramp and dock substantially similar to those which currently exist at the site were located at the site." Answer, ¶ 102. Respondents took the position that because the violations at issue in this proceeding were in existence at that time, Department Staff's delay in bringing this enforcement action prejudiced respondents.

Specifically, respondents maintained that Department Staff's unreasonable delay prejudiced respondents because "changes in DEC's applicable tidal wetlands and permitting regulations, policies and procedures impose restriction on Respondents that may not have applied to their original application," that documents and testimony had become unavailable due to the length of time between the observation of the violations and the commencement of an enforcement action; and that this delay "could result in substantially greater penalties than if the issues raised by the complaint had been resolved when DEC was first on notice of the deck and boating facilities at the site." Answer, ¶ 126.

In their post-hearing brief, respondents discussed the affirmative defenses of laches and unclean hands, noting that a representative of the Department was on the property in 1994 when the deck and floating docks were in place. According to respondents, "it would be extremely unfair and prejudicial, and a frank denial of due process, to permit an agency to delay 25 years before bringing an enforcement proceeding." Respondents' Post Hearing Brief, at 37. Respondents observed that "statutes of limitation are statutes of repose," and pointed out that Department Staff did not call several witnesses that, in respondents' view, were available and should have testified. *Id.*

Respondents' first affirmative defense, laches, is based upon the requirement in the State Administrative Procedure Act ("SAPA") Section 301(1), which provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for a hearing within a reasonable time." Laches is an equitable defense that is seldom available against an agency acting in a governmental capacity to enforce a public right or to safeguard a public interest. *Matter of Cortlandt Nursing Home v. Axelrod*, 66 N.Y.2d 169, 177, n. 2 (1985); *Matter of Grout*, Ruling of the Chief Administrative Law Judge, at 12 (Dec. 14, 2014).

To establish a *Cortlandt* defense, a party must show relevant delay, an injury to respondent's private interests, and significant and irreparable prejudice to respondent's defense of the proceeding resulting from that delay. *Matter of Cortlandt*, 66 N.Y.2d at 177-178, 180-181. The violations at issue in this proceeding were first observed in June of 2012. Notwithstanding respondents' arguments regarding the prior permit violation, and the structures in existence at that time, that violation was resolved by an order on consent, and related to different structures than those at issue here. The Commissioner should dismiss the first affirmative defense.

Respondents' second affirmative defense was the statute of limitations. The time periods established by the CPLR were not incorporated into Part 622 of 6 NYCRR, and therefore are not available in this administrative enforcement proceeding. *Matter of Stasack*, Ruling of the Chief Administrative Law Judge, at 9 (Dec. 30, 2010). Respondents have not identified any other applicable statute of limitations, and therefore the Commissioner should dismiss this defense.

Respondents' third and fourth affirmative defenses, *res judicata* and claim preclusion, are based upon respondents' assertion that Department Staff's claims related to alleged violations of tidal wetlands permitting requirements were resolved by the Consent Order respondent Felice entered into in 1994, and cannot now be resurrected in this proceeding. Respondents have not established that the violations resolved by the order on consent are the same as those addressed in this enforcement proceeding, nor have they cited any authority to support these affirmative defenses as applied to these proceedings. Department Staff is not asserting a claim arising out of prior violations, but rather has charged violations related to the existing conditions at the Site as a result of inspections beginning in June of 2012. The Commissioner should dismiss both affirmative defenses.

In their fifth affirmative defense, respondents contended that the doctrine of unclean hands was applicable to this proceeding, because Department Staff failed to research the permit history of the Site before issuing a notice of violation, and also failed to acknowledge that the Site consists of two separate properties, "each with its own permitting and grandfathering history." *Id.* In addition, as discussed above, respondents asserted that Mr. Stadnik trespassed on Ms. Felice's property when he visited the Site in 2016, and that Department Staff "failed to ascertain its own practices and procedures from the applicable time period, [and] failed to share the Negative Declaration with its own 'expert.'" *Id.*

Unclean hands is another equitable defense rarely available against a governmental agency. In order to establish this affirmative defense, a respondent must show that Department Staff "committed some unconscionable act that is directly related to the subject matter of the

proceeding and has injured respondent.” *Hytko v. Hennessey*, 62 A.D.3d 1081, 1085-1086 (3<sup>rd</sup> Dept. 2009). Affording respondents every possible inference, the actions respondents cite to support his affirmative defense are based upon their arguments, rejected as set forth above, that the structures at the Site were permitted or grandfathered. Moreover, respondents’ argument that the Site consists of two separate properties is undercut by their contention that the reduction or reconfiguration of structures on one property should act as an offset with respect to an expansion or reconfiguration on the neighboring property. The Commissioner should dismiss the fifth affirmative defense.

Because Department Staff ultimately withdrew the claims against respondent Peter Plagianakos in Department Staff’s closing brief, respondents sought dismissal of those claims with prejudice, reimbursement of costs and attorneys’ fees, “and an additional award [of \$250,000] to deter DEC staff from pursuing and prolonging frivolous claims.” Respondents’ Reply Post Hearing Brief, at 2-3. Respondents did not cite to any authority for an award of costs and attorneys’ fees, or any additional award, in an administrative enforcement proceeding, and Part 622 of 6 NYCRR contains no provisions for such awards. Respondents’ request should be denied.

### Penalty

For violations of ECL Article 15, its implementing regulations, as well as permits and orders issued pursuant thereto, Section 71-1127 of the ECL authorizes a civil penalty of not more than \$2,500 per violation and an additional civil penalty of not more than \$500 for each day that the violation continues, as well as injunctive relief. Violations of the tidal wetlands act (Article 25) are punishable by the imposition of a civil penalty of up to \$10,000, with each violation considered a separate and distinct violation. *See* Section 71-2503(1)(a) of the ECL. Pursuant to Section 71-2503(1)(c), the Commissioner may direct the violator to cease and desist from any violations, and require restoration of the affected areas. In addition, Section 71-4003 of the ECL provides for a general civil penalty of up to ten thousand dollars for each violation of the ECL, and an additional civil penalty of not more than one thousand dollars for each day of continuing violation.

As relief for the alleged violations, Department Staff’s complaint sought an order of the Commissioner that would find respondents in violation of the provisions of the ECL and 6 NYCRR cited in the complaint, and impose a civil penalty pursuant to ECL Sections 71-1107, 71-1127, and 71-2503 “of no less than two hundred thousand dollars (\$200,000).” Complaint, Wherefore Clause, ¶ II. In addition, Department Staff requested that the Commissioner order respondents to reduce the size of the deck on Lot 106 so that the deck would not extend seaward beyond the edge of the bulkhead; reduce the size of the deck on Lot 104 “to the previously lawfully existing dimensions;” remove all piles that support the portions of the deck to be removed; remove all floating docks “and related structures that are not lawfully existing;” and restore the Site “under the oversight and consistent with instructions provided by and to the satisfaction of DEC staff.” Complaint, Wherefore Clause, ¶ III(a) –(c).

In arriving at a civil penalty calculation, Department Staff referred to DEE-1, the Commissioner’s *Civil Penalty Policy* (issued June 20, 1990), as well as the Department’s Tidal

Wetlands Enforcement Guidance (DEE-7; Feb. 8, 1990). Department Staff calculated the total maximum civil penalty for all of the violations to be \$876,773,000. In calculating the penalty requested, the Civil Penalty Policy directs Department Staff to consider a benefit component and a gravity component, as well as adjustments to the maximum penalty calculation.

With respect to the benefit component, Department Staff asserted that “[t]he benefit Respondent Felice derived from the violations consists of having a larger recreational space behind her residence – now going into the sixth year.” Staff’s Closing Brief, at 22. Department Staff argued that enlarging the usable area of expensive waterfront property in the metropolitan area was a benefit.

The Civil Penalty Policy breaks down the gravity component into two subcategories: potential harm/actual damage, and the importance of the regulatory scheme. In terms of the potential harm and actual damage, Department Staff took the position that the record reflected “the impacts the structures at the Site have on the tidal wetlands, the waters of East Mill Basin, and the organisms that occupy and use those habitats.” Staff’s Closing Brief, at 22. The purposes of ECL Article 15 are to protect water bodies for fish and wildlife, and to provide recreational resources for members of the public. The Tidal Wetlands Act is intended to protect the State’s marine resources. Department Staff noted the adverse impacts to the marine environment by the hardening of the shoreline and the overwater structures, and maintained that “[t]he push to build along or over the water is as strong if not stronger today than it was when the Tidal Wetlands Act came into effect. Accordingly, the regulatory scheme Felice violated is of utmost importance – her violation is serious.” *Id.*, at 23.

In terms of penalty adjustments, Department Staff considered culpability, violator cooperation and a history of non-compliance, concluding that all of these factors weighed strongly against respondent Felice. Department Staff observed that more than 25 years ago, she unsuccessfully attempted to construct a similar overwater structure “but ran into resistance from both DEC and the Department of State, eventually abandoning the pursuit of the permit.” Staff’s Closing Brief, at 23. Department Staff noted that Ms. Felice was well aware of the Department’s jurisdiction when an enforcement proceeding was initiated against her for a violation of the Tidal Wetlands Act at the Site, and entered into a consent order (Staff Exh. 6) to resolve the matter. Department Staff argued that respondent Felice’s culpability is significant, in light of her knowing disregard of the statute and regulations, and provides further justification for the requested civil penalty.

In addition, Department Staff contended that once the violations were discovered, respondent Felice did not cooperate, but instead finished the construction at the Site after being issued a notice of violation, and added even more structures after the complaint was served upon her. Noting that the Civil Penalty Policy includes consideration of deterrence, Department Staff observed that respondent Felice knowingly broke the law despite a prior consent order, and committed additional violations after this action was commenced. Department Staff argued that deterrence of this conduct “points toward a stiff penalty,” and that this respondent “needs a strong monetary incentive to comply with the ECL.” Staff’s Closing Brief, at 24. Department Staff also argued that deterrence with respect to other potential violators was also a consideration, stating that “[o]ther members in this community may be tempted to try what

Felice has been doing.” *Id.* As to respondent Felice’s ability to pay, Department Staff asserted that “[s]he owns two sizable waterfront homes in an expensive neighborhood of Brooklyn with a pool and has obviously the funds for a big yacht and an armada of jet skis.” *Id.* (citations omitted).

In its closing brief, Department Staff requested a civil penalty of \$300,000, with \$100,000 suspended pending respondent Madeline Felice’s compliance with the Commissioner’s order, leaving a payable penalty of \$200,000. Department Staff justified this increase by arguing that the violations were ongoing, and pointed to respondent Felice’s lack of cooperation. In addition, Department Staff took the position that this respondent “has been on notice throughout this proceeding that the penalty Staff would seek at the conclusion of the hearing might or would likely be higher.” Staff’s Closing Brief, at 25.

Department Staff indicated a willingness to make adjustments to the time periods used in calculating the penalty amounts, to the extent respondents were able to document that some or all of the structures were removed prior to the filing of closing briefs on May 11, 2018. Staff’s Closing Brief, at 21, fn. 12.

With respect to injunctive relief in connection with the 2690 National Drive property, Department Staff requested that the Commissioner order respondent Felice “to bring the area seaward of the bulkhead into compliance with DEC Permit 2-6105-00016/00001-0 (Exh. 4) by removing all piles and (fixed or floating) structures except for a fixed dock measuring 4’ x 14’, a ramp measuring 3’ x 24’, and two floats measuring 6’ x 32’ and 8’ x 30’, respectively.” Staff’s Closing Brief, at 10. Department Staff asserted that the deck at the property on 2686 National Drive “does not meet the standards for permit issuance,” and therefore “it was and is not permissible.” *Id.*, at 13. Accordingly, Department Staff requested that the Commissioner order that the deck be removed, along with the utilities associated with the structures.

Respondents argued that the penalty sought was excessive, “outrageous and unjustifiable.” Respondents’ Reply Post Hearing Brief, at 15. According to respondents, Department Staff’s brief did not “contain a scintilla of evidence” as to how Department Staff arrived at the requested penalty. *Id.*, at 18. Respondents took the position that the penalty was not tied to any adverse environmental impact, “since there are none,” and contended further that “the items complained of actually improved the environment.” *Id.* Respondents asserted that “[t]here is not a shred of evidence in the record regarding Ms. Felice’s financial situation or ability to pay. There is no evidence in this record that she owns a “yacht” or boat. No inference of present day wealth or ability to pay can be made from buying a house in 1985 or 2002, nor from building a pool in 1993.” *Id.*, at 19.

With respect to relief, Department Staff’s requests are reasonable and demonstrated by the evidence presented during the hearing, particularly in light of the maximum civil penalty as calculated by Department Staff. With regard to respondent Felice’s ability to pay, the Civil Penalty Policy provides that “[t]he burden to demonstrate inability to pay rests with the respondent. If the violator fails to provide sufficient credible information, Department staff should disregard this factor.” *Civil Penalty Policy*, DEE-1, at ¶ IV(E)(4). Accordingly, the Commissioner should require the remediation recommended by Department Staff, and assess a

total civil penalty of three hundred thousand dollars (\$300,000) against respondent Madeline Felice, with one hundred thousand dollars (\$100,000) suspended upon completion of the remediation requested by Department Staff, for a total payable civil penalty of two hundred thousand dollars (\$200,000).

### **Conclusions**

1. Respondent Madeline Felice violated Section 15-0503(1)(b) and Section 608.4(b)(1) of 6 NYCRR when, without a permit from the Department, she (a) constructed or caused the construction at the Site of a fixed wooden platform (the deck) above the navigable waters of East Mill Basin; (b) placed or constructed, or caused the placement or construction of eight floating docks at the Site on the navigable waters of East Mill Basin; and (c) placed or constructed an access ramp connecting the deck to the floating docks at the Site above the navigable waters of East Mill Basin. These violations commenced on or before June 1, 2012, and are continuing.
2. Respondent Madeline Felice violated Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she constructed or caused the construction at the Site of a fixed wooden platform (the deck) in a regulated tidal wetland. This violation commenced on or before June 1, 2012, and is continuing.
3. Respondent Madeline Felice violated Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she installed six round piles as support for the wooden deck at the Site, in a regulated tidal wetland. This violation commenced on or before June 1, 2012, and is continuing.
4. Respondent Madeline Felice violated Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she installed eight floats totaling more than 200 square feet in area at the Site, in a regulated tidal wetland. This violation commenced on or before June 1, 2012, and is continuing.
5. Respondent Madeline Felice violated Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she drove six piles to support the new floats at the Site, in a regulated tidal wetland. This violation commenced on or before June 1, 2012, and is continuing.
6. Respondent Madeline Felice violated Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she placed or constructed an access ramp, connecting the deck to the floating docks at the Site, in a regulated tidal wetland. This violation commenced on or before June 1, 2012, and is continuing.
7. With respect to the two additional causes of action, respondent Madeline Felice violated:
  - Section 15-0503(1)(b) and Section 608.4(b)(1) of 6 NYCRR and Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she placed or constructed a knee deck, connecting the deck to the

floating docks at the Site, above the navigable waters of East Mill Basin and in a regulated tidal wetland; and

- Section 15-0503(1)(b) and Section 608.4(b)(1) of 6 NYCRR and Section 25-0401(1) and Section 661.8 of 6 NYCRR when, without a permit from the Department, she placed or constructed a wooden structure (the “rack”) underneath the deck, above the navigable waters of East Mill Basin and in a regulated tidal wetland.

These violations relating to the knee deck and the rack both commenced on or before August 13, 2015, and are continuing.

### **Recommendations**

For respondent Madeline Felice’s violations of ECL Article 15, Title 5, and Article 25, and the implementing regulations at Part 608 and Part 661 of 6 NYCRR, the Commissioner should assess a total civil penalty of three hundred thousand dollars (\$300,000), with one hundred thousand dollars (\$100,000) suspended upon completion of the injunctive relief requested by Department Staff, for a total payable civil penalty of two hundred thousand dollars (\$200,000). The Commissioner should dismiss the fourth cause of action, or in the alternative, impose a lesser penalty for the violation alleged; dismiss respondents’ affirmative defenses; and dismiss the charges against respondent Peter W. Plagianakos without prejudice.

Attached: Exhibit Chart

STATE OF NEW YORK  
DEPARTMENT OF ENVIROMENTAL CONSERVATION

MATTER OF PLAGIANAKOS AND FELICE

DEC File No. R2-20120613-353

**EXHIBIT LIST**

Updated July 31, 2018

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
DEC 1	Deed to Block 8614, Lot 106 from Jerome Gutterman to Mary S. Parasco and Madeline Felice, dated December 20, 1985	✓	✓	DEC	
DEC 2	Deed to Block 8614, Lot 106 from Mary S. Parasco to Madeline Felice, dated September 29, 1997	✓	✓	DEC	
DEC 3	Deed to Block 8614, Lot 104 from Daniel Turchin and Lillian Turchin to Madeline Felice, dated July 11, 2002	✓	✓	DEC	
DEC 4	Letter from John J. Ferguson, Regional Permit Administrator, DEC to Tanya Lachenmeyer with attached permit, dated March 11, 1993	✓	✓	DEC	
DEC 5	Letter from Tanya Lachenmeyer to Michelle Moore, DEC with attached plans, dated July 24, 1992	✓	✓	DEC	
DEC 6	Order on Consent, dated November 10, 1994	✓	✓	DEC	
DEC 7	Attestation to the correctness of copies with attached aerial photos	✓	✓	DEC	
DEC 8	Photographs, undated	✓	✓	DEC	



Exhibit No.	Description	ID	Rec'd	Offered By	Notes
DEC 9	Case Initiation Form	✓	✓	DEC	
DEC 10	Portion of Tidal Wetland Map 592-494	✓	✓	DEC	
DEC 11	Photographs, dated June 25, 2012	✓	✓	DEC	
DEC 12	Photograph, dated August 13, 2015	✓	✓	DEC	
DEC 13	Letter from Tanya Lachenmeyer to DEC with attached permit application, dated April 16, 1992	✓	✓	DEC	
DEC 14	Photographs, dated September 21, 2015	✓	✓	DEC	
DEC 15	Inspection Report, dated September 21, 2015	✓	✓	DEC	
DEC 16	Photograph, dated June 1, 2016	✓	✓	DEC	
DEC 17	Inspection Report, dated June 1, 2016 with drawing	✓	✓	DEC	
DEC 18	Tides for Mill Basin on June 1, 2016 (webpage dated May 27, 2016)	✓	✓	DEC	
DEC 19	Complaint Form / Call for Service # 12-009161	✓	✓	DEC	
DEC 20	Infrared Aerial Photograph (on which tidal wetlands map blueprint is based)	✓	✓	DEC	
DEC 21	Enlargement of Exhibit 20 Photograph	✓	✓	DEC	
DEC 22	Section 5 of Part 661 Tidal Wetlands Use Regulations	✓	✓	DEC	
DEC 23	NYC Buildings re. 2686 National Drive (webpage dated December 21, 2016)	✓	✓	DEC	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
DEC 24	NYC Buildings re. 2690 National Drive (webpage dated December 21, 2016)	✓	✓	DEC	
DEC 25	Legend, Official Tidal Wetlands Map	✓	✓	DEC	
DEC 26	6 CRR-NY 661.18 Regulation	✓		DEC	Not received (see hearing volume II, page 318)
DEC 27	Tides for Mill Basin on February 21, 2017 (webpage dated March 8, 2017)	✓	✓	DEC	
DEC 28	Joint Application for Permit, dated December 2, 1988	✓	✓	DEC	
DEC 29	Letter from John J. Ferguson, Associate Environmental Analyst, DEC to Robert Palermo, dated March 16, 1989	✓	✓	DEC	
DEC 30	Letter from David Buerle, Coastal Resources Specialist, DOS to Robert Palermo, dated March 29, 1989	✓	✓	DEC	
DEC 31	Letter from Robert Palermo to David Buerle, dated May 30, 1989	✓	✓	DEC	
DEC 32	Letter from David Buerle to Robert Palermo, dated June 28, 1989	✓	✓	DEC	
DEC 33	Letter from David Buerle to Robert Palermo, dated November 6, 1989	✓	✓	DEC	
DEC 34	Letter from Tanya Lachenmeyer to DEC with plans and photos attached, dated July 27, 1993	✓	✓	DEC	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
DEC 35	Letter from Tanya Lachenmeyer to DEC with plans attached, dated September 1, 1993	✓	✓	DEC	
DEC 36	Letter from John J. Ferguson, Regional Permit Administrator, DEC to Madeline Felice, dated September 17, 1993	✓	✓	DEC	
DEC 37	Susan Maresca Resume	✓	✓	DEC	
DEC 38	Overwater Structures: Marine Issues White Paper, dated June 2001	✓	✓	DEC	
DEC 39	Commentary of Strategies for Enhancing Marine (and Human) Habitat at Brooklyn Bridge Park	✓	✓	DEC	
DEC 40	Hand-drawn Diagram	✓	✓	DEC	
DEC 41	Google Earth Map / Aerial Photograph	✓	✓	DEC	
DEC 42	Estuarine Fish Communities along a Spatial Urbanization Gradient	✓	✓	DEC	
DEC 43	Effects of shoreline armouring and overwater structures on coastal and estuarine fish: opportunities for habitat improvement	✓	✓	DEC	
Resp.1	National Wetlands Inventory (webpage dated December 19, 2016)			Respondent	Not Admitted
Resp. 2	Kings County Clerk's Certification (concerning wetlands maps)	✓	✓	Respondent	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
Resp. 3	Letter dated March 6, 2017 with attachments			Respondent	Pre-marked (see hearing volume III, page 324)
Resp. 4A	Ruling on motion			Respondent	Pre-marked (see hearing volume III, page 324)
Resp. 4B	Letter dated February 28, 2017			Respondent	Pre-marked (see hearing volume III, page 324)
Resp. 5	Flash Drive (video of Mill Basin, taken by Robert Frein, on December 8, 2016)	✓	✓	Respondent	
Resp. 6A	Google Earth Map / Aerial Photograph of Mill Basin	✓	✓	Respondent	
Resp. 6B	Google Earth Map				Pre-marked (see hearing volume III, page 324)
Resp. 7A - 7EEE	Photographs, undated	✓	✓	Respondent	7TT not received because there is no 7TT
Resp. 7FFF - 7III	Photographs, undated	✓	✓	Respondent	
Resp. 8	57 Photographs, undated	✓	✓	Respondent	
Resp. 9	Google Earth Map / Aerial Photograph of Mill Basin from (revised version of photo in Resp. 6A)	✓	✓	Respondent	
Resp. 10	Portion of 1988 Permit File	✓	✓	Respondent	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
Resp. 11	SEQR 617.21, Appendix F, State Environmental Quality Review, Negative Declaration, Notice of Determination of Non-significance	✓	✓	Respondent	
Resp. 12	Photograph	✓	✓	Respondent	
Resp. 13A	Survey drawing, dated November 7, 2001	✓	✓	Respondent	
Resp. 13B	East Mill Basin survey			Respondent	Pre-marked (see hearing volume V, page 652)
Resp. 14	May 2015 Existing Conditions	✓	✓	Respondent	
Resp. 15A	Architect Rendering	✓		Respondent	Not Admitted
Resp. 15B	Architect Rendering	✓		Respondent	Not Admitted
Resp. 16	Notice of Suspension of Review, from Stephen A. Watts, Regional Permit Administrator, DEC to Madeline Felice dated September 2, 2016	✓	✓	Respondent	
Resp. 17	Google Earth Map / Aerial Photograph of Mill Basin, dated October 11, 2014	✓	✓	Respondent	
Resp. 18	Plant Copy / Survey (enlarged DEC 34)	✓	✓	Respondent	
Resp. 19	Plans from Application for Permit, dated December 2, 1988 (enlarged DEC 28, Page 3)	✓	✓	Respondent	
Resp. 20	Plans from Application for Permit, dated December 2, 1988 (enlarged DEC 28, Page A-6 of 6)	✓	✓	Respondent	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
Resp. 21	Robert James Palermo Resume	✓	✓	Respondent	
Resp. 22	Thomas M. Grothues Resume	✓	✓	Respondent	