

STATE OF NEW YORK
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”),

-by-

PETER W. PLAGIANAKOS and MADELINE FELICE,

Respondents.

**RULING ON RESPONDENTS’
MOTIONS TO DISMISS
AND TO STRIKE**

DEC Case No.
R2-20120613-353

I. Background

Staff of the New York State Department of Environmental Conservation (“Department”) commenced this administrative enforcement proceeding against respondents Peter W. Plagianakos and Madeline Felice (“respondents”) by service of a notice of hearing and complaint, both dated April 14, 2015. The complaint alleges that, in June 2012, Department staff observed that, at residential waterfront property in Brooklyn, New York (“Site” or “respondents’ properties”), respondents had “undertaken, caused, or allowed” several regulated activities without obtaining required permits, in violation of ECL § 15-0503(1)(b), ECL § 25-0401(1), and 6 NYCRR §§ 608.4 and 661.8. See generally Complaint ¶¶ 26-27, 38-89.

Department staff seeks an order of the Commissioner holding that respondents violated the cited statutes and regulations, imposing on respondents, jointly and severally, a civil penalty of “no less than two hundred thousand dollars,” and directing respondents to perform several remedial activities. See id., Wherefore Clause ¶¶ I-III. Respondents served an Answer dated May 29, 2015, and a first amended answer dated June 12, 2015. To date, four days of hearing have been held in this matter.

On March 2, 2017, respondents filed an application for an immediate stay of this proceeding, and for dismissal of the second, third, fourth, sixth, seventh and ninth causes of action. The application consists of a cover letter and the affirmation of Robert M. Lustberg, Esq., counsel for respondents, attaching three exhibits. By email ruling dated March 3, 2017, the undersigned denied respondents’ request for an immediate stay of the proceeding, and directed the parties to appear for the continuation of the adjudicatory hearing on March 8, 2017 as already scheduled.

By letter dated March 6, 2017, respondents filed an application with the Commissioner, seeking an immediate stay pursuant to 6 NYCRR § 622.10(d)(7), and leave to file an expedited

appeal pursuant to 6 NYCRR § 622.10(d)(2). The Commissioner did not issue an immediate stay prior to March 8, 2017, the day that the hearing was scheduled to continue. The hearing recommenced on March 8, 2017, and continued through March 9, 2017. At the close testimony and argument on March 9th, counsel for respondents moved to strike witness testimony relating to tidal wetlands and certain exhibits introduced at hearing. Counsel also acknowledged that respondents' request that the Commissioner stay the proceedings was moot. See Hearing Transcript ("Tr.") at 640:17-641:6.

At the beginning of the hearing day on March 8, 2017, Department staff handed up its opposition papers to respondents' motion. Staff's opposition is comprised of a cover letter, the affidavit of Sam Yee Chan, attaching two exhibits, and a memorandum of law. With leave, respondents filed, on March 13, 2017, a cover letter and a reply memorandum of law in further support of their motion to dismiss.

As discussed below, respondents seek dismissal of several causes of action based on an argument that the Department never satisfied a statutory prerequisite for enforcement of the statutes and regulations regarding activities in tidal wetlands; that is, respondents claim that the Commissioner never filed with the Kings County Clerk the wetlands inventory map that includes respondents' properties, although required to do so by ECL § 25-0201(4). Respondents also seek to strike witness testimony and certain exhibits related to tidal wetlands.

II. Discussion

Respondents seek dismissal of six causes of action in Department staff's complaint, summarized below:

- Second Cause of Action – on or before June 1, 2012, respondents constructed a fixed wooden platform above the regulated tidal wetland and open water area at the site without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.
- Third Cause of Action – on or before June 1, 2012, respondents drove or otherwise installed at least six round piles as support for the wooden deck in the regulated tidal wetland at the site without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.
- Fourth Cause of Action – on or before June 1, 2012, respondents drove or otherwise installed at least eight rectangular piles as support for the wooden deck in the regulated tidal wetland at the site without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.
- Sixth Cause of Action – on or before June 1, 2012, respondents installed eight floats totaling more than 200 square feet in area at the site in the regulated tidal wetland, without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.
- Seventh Cause of Action – on or before June 1, 2012, respondents drove six piles for support of new floats at the site in the regulated tidal wetland without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.
- Ninth Cause of Action – on or before June 1, 2012, respondents placed or constructed an access ramp, connecting the deck to the floating dock, in the tidal wetlands area without a permit, in violation of ECL § 25-0401(1) and 6 NYCRR § 661.8.

Section 25-0401(1) of the ECL provides in relevant part as follows:

After completion of the inventory prescribed in title 2 of this article with respect to any tidal wetland, 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.¹

Section 661.8 of the regulations provides as follows:

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 this Part.

In enacting the Tidal Wetlands Act in 1973, which created article 25 of the ECL, the legislature declared that it was the public policy of the State “to preserve and protect tidal wetlands, and to prevent their despoliation and destruction.” ECL § 25-0102. The legislation required that the Commissioner “as soon as practicable make an inventory of all tidal wetlands in the state of New York.” ECL § 25-0201(1). The legislation directed that such inventory “shall set forth the boundaries of such wetlands ... to provide clear and accurate maps of the tidal wetlands of the state for the purpose of effectuating the policies and provisions of this act. Said boundaries shall generally delineate all tidal wetlands in the state....” ECL § 25-0201(2).

The legislation required that, upon completion of a tentative tidal wetlands boundary map for a particular area, the Department was to hold public hearings and to provide notice of such hearing “to each owner of record of all lands designated as such wetland,” as well as to the chief administrative officer of each municipality of any such wetland. ECL § 25-0201(3). The purpose of such hearings was “to afford an opportunity for any person to propose additions or deletions from such map.” *Id.* Following such hearings, and

[a]fter considering the testimony given at such hearing and any other facts which may be deemed pertinent and after considering the rights of affected property owners and the policy and purposes of this act, the commissioner shall establish by order the final bounds of each such wetland. A copy of the order, together with a copy of the map depicting such final boundary lines, shall be filed in the office of the clerk of the county in which each such wetland is located.

ECL § 25-0201(4) (emphasis added).

The complaint alleges that, “[a]t the Site, East Mill Basin is mapped as part of the official tidal wetland inventory, panel number 592-494, and thus regulated as a tidal wetland,” and that

¹ Subdivision 2 of section 25-0401 identifies activities subject to regulation, including “the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, 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.”

“[t]he Site abuts and extends into East Mill Basin.” Complaint ¶¶ 18 and 16, respectively. At hearing, counsel for staff requested that I take judicial notice of map number 592-494. See Tr. at 59:12-15. Counsel provided an explanation regarding the nature of the map, that the Tidal Wetlands Act “mandated” that the Department create it, that the map was promulgated in 1977 and that it delineated wetland boundaries and various types of wetlands within the geographic area depicted on that panel. See id. at 59:12-60:8. Counsel for respondents asked several questions of counsel for staff regarding the map, and markings thereon, but did not object to my taking official notice of the map. See id. at 60:9-61:6.²

Following testimony by staff witness George Stadnik that the tidal wetlands map designated 592-494 “is filed in the Brooklyn clerk’s office,” Tr. at 262:21-25, respondents retained a title company to go to the Kings County clerk’s office to inspect the relevant tidal wetland maps. See Affirmation of Robert M. Lustberg, Esq. dated March 2, 2017 (“Lustberg Aff.”), at 4. According to respondents’ counsel, the title company was unable to inspect the maps “because there did not appear to be any such map on file.” Id. At respondents’ request, the title company then sent a “professional abstractor” to the clerk’s office, but the abstractor was also unable to locate a map. See id.

Respondents’ counsel thereafter personally traveled to the Kings County clerk’s office, presented (i) a letter stating that he was seeking to inspect and copy the “NYS Tidal Wetlands Inventory Map for Kings County on file in the office of the Kings County Clerk,” and (ii) a copy of 6 NYCRR § 661.4, which defines “Inventory map” as “a final tidal wetlands boundary map established by the commissioner . . . depicting the boundary lines of tidal wetlands and filed in the office of the county clerk in the county in which such wetlands are located.” Lustberg Aff., Exhibit (“Ex.”) A. After another search was conducted, the County Clerk for Kings County issued a document dated February 28, 2017, bearing the clerk’s seal, and including typed and handwritten text stating in relevant part:

I, Nancy T. Sunshine, Clerk of the County of Kings, do hereby certify that I have carefully examined the records of my office from the date of 1/1974; day of January 1974 1974 [sic], to date, to February 2017 for an [sic] search to tidal wetlands and fail to find the same on file therein.

Lustberg Aff. Ex. B; see also Lustberg Aff. at 4.³

In their initial papers, respondents argue that (i) ECL article 25 and implementing regulations required the Commissioner to file the final tidal wetlands map with the relevant county clerk; (ii) filing of the map with the county clerk is a prerequisite for enforcing ECL article 25, and an element of the Department’s claims against respondents; (iii) based upon the results of respondents’ counsel’s inquiry, the Commissioner failed to file the final tidal wetlands map with the Kings County Clerk; and (iv) therefore the Department “lacks jurisdiction over

² Of course, respondents’ counsel at that time was not aware that the official map was not located at the Kings County clerk’s office, so could not have raised that objection at that time.

³ At the beginning of the hearing day on March 8, 2017, respondents submitted the original clerk’s document for the record. See Tr. at 326:3-11.

tidal wetlands in Kings County as a matter of law” and is precluded from enforcing ECL article 25 against respondents. Lustberg Aff. at 6-9.

In response to respondents’ motion, Department staff submitted, with its memorandum of law, the affidavit of Sam Yee Chan, who serves as Habitat Manager in the Department’s Region 2 office and custodian of records maintained by the region’s Fish and Wildlife Division. See Affidavit of Sam Yee Chan sworn to March 7, 2017 (“Chan Aff.”), at ¶¶ 1 and 3. Mr. Chan conducted a search of Department records pertaining to the filing of tidal wetlands maps for Kings County, and has appended to his affidavit two documents that he found as part of that search: (i) a copy of a letter from Thomas Breden, an Engineering Technician, to Kathleen Morrison of the Department’s office of counsel, dated September 21, 1977; and (ii) a memorandum of the City of New York Office of the City Register dated September 16, 1977. See Chan Aff. Exs. 1 and 2, respectively.

Mr. Breden’s letter states:

On September 16, 1977, at 2:30 p.m., I filed two volumes of Tidal Wetlands maps with a total of 50 maps and a copy of the Commissioner’s order with the Kings County Office of the City Register. Enclosed please find a receipt for the above mentioned transaction.

Chan Aff. Ex. 1. The memorandum from the New York City Office of the City Register states: “[r]eceived from Dept. of Environmental Conservation two (2) volumes of Tidal Wetlands maps, this day, Sept. 16, 1977.” Chan Aff. Ex. 2. The letterhead of that document provides the addresses of the county offices for Bronx, Kings, New York and Queens Counties. See id. In addition, the memorandum contains the following statement: “Address Reply to County of _____.” On the copy of the memorandum submitted by Mr. Chan, the word “Kings” is typed in the blank. See id.

Department staff argues in its memorandum of law that the filing of the wetlands inventory maps with the Office of the City Register was “entirely consistent with legal requirements,” citing State constitutional and statutory provisions which state, in sum, that the City of New York may have a City Register to fulfill the function of a county clerk with respect to filings affecting real property. See Memorandum of Law in Reply to Respondents’ Motion to Stay Proceedings and Dismiss Six Causes of Action dated March 8, 2017 (“Staff Mem.”), at 2 (citing N.Y. Const. art. XIII, § 13; N.Y. Gen. Construction Law § 42; N.Y. Real Property Law § 372).

In addition, Department staff cites two Commissioner’s orders to support its argument that filing the final tidal wetlands maps with the Office of the City Register rather than with the county clerk was proper under relevant law, and did not divest the Department of jurisdiction to enforce ECL article 25. See Staff Mem. at 2-3. In Matter of Mills, Department staff alleged that respondent constructed, at his property located in Queens County, a deck extension and a catwalk in a tidal wetland without a permit from the Department, in violation of ECL article 25 and 6 NYCRR Part 661. See Matter of Mills, Hearing Report, at 1. In response, respondent asserted an argument identical to that asserted by respondents in the present case: “[T]he Department lacked subject matter jurisdiction because the Department incorrectly filed the tidal

wetland maps for Queens County with the County Register rather than with the County Clerk as required by ECL § 25-0201(4).” Id. at 5.

Following commencement of the administrative proceeding, but prior to the actual hearing, the Mills respondent (along with another person) filed a request for a declaratory judgment in State Supreme Court, Queens County, and sought a preliminary injunction preventing the administrative proceeding from continuing. See id. On May 26, 1992, the court denied the request for a preliminary injunction, and dismissed the action, holding that Mills had not demonstrated any of the necessary elements for an injunction, including (i) likelihood of success on the merits, (ii) irreparable injury and no adequate remedy at law, or (iii) that the balance of equities tipped in favor of Mills. See Mills v. New York State Dept. of Env'tl. Conserv., Sup. Ct., Queens County, May 26, 1992, Rutledge, J., Index No. 9197/92, at 1-2.⁴ The court later denied as moot the Department’s motion to dismiss the Supreme Court action, citing its May 26, 1992 dismissal of the action. See Mills v. New York State Dept. of Env'tl. Conserv., Sup. Ct., Queens County, July 10, 1992, Rutledge, J., Index No. 9197/92.⁵

Following dismissal of the Supreme Court action, the Mills administrative matter proceeded to hearing. In his hearing report, the administrative law judge (“ALJ”) discussed the facts surrounding the filing of tidal wetlands maps:

In 1977, when the Department attempted to file the tidal wetlands maps for Queens County with the County Clerk, the County Clerk indicated that it did not have the facilities to store large maps. The County Clerk suggested that the tidal wetlands maps should be filed with the Register’s Office since all other real property records are filed there. The City Register for Queens County acknowledged receipt of the tidal wetlands maps on September 15, 1977.

Matter of Mills, Hearing Report at 4-5. The ALJ thereafter determined that the dismissal of respondent’s Supreme Court action settled the issue whether the Department had jurisdiction to enforce the tidal wetlands claims against the respondent. See Matter of Mills, Hearing Report at 5 (stating that the Supreme Court decisions “settle this issue and uphold the Department’s jurisdiction in this matter”). The Commissioner affirmed that determination:

The issue of whether the Department properly filed the tidal wetland maps for Queens County in the County Register’s Office pursuant to ECL § 25-0201 was settled in the Decisions by Justice Rutledge dated May 26, 1992 and July 10, 1992.

Matter of Mills, Order of the Commissioner, November 5, 1992, at 1, ¶ 4.

The Commissioner reaffirmed this determination in Matter of Breezy Point Cooperative, Order of the Commissioner, May 13, 1993. In Breezy Point, the parties did not dispute the fact

⁴ A copy of Judge Rutledge’s May 26, 1992 decision is attached hereto as Appendix A.

⁵ A copy of Judge Rutledge’s July 10, 1992 decision is attached hereto as Appendix B.

that the Department filed with the City Register's office rather than the county clerk's office the map setting forth the boundaries of tidal wetlands in Queens County. See Matter of Breezy Point Cooperative, Hearing Report at 5. Respondent argued that the Department lacked jurisdiction to enforce tidal wetlands regulations because it failed to comply strictly with the statutory requirement that the maps be filed with the county clerk's office. See id.

The ALJ cited the Supreme Court's holding in Mills that it was likely that the Department would prevail on the merits of its enforcement, and stated that "such a finding would not have been possible if the Department did not have jurisdiction to enforce its regulations in Queens." Id. The ALJ held that "this issue appears to have already been resolved in DEC's favor as a matter of law." Id. The Commissioner agreed:

As set forth in the Hearing Report, the Department's jurisdiction over tidal wetlands in Queens County based on the maps that were filed in the New York City Register's Office has already been confirmed by a court of competent jurisdiction.

Breezy Point, Order of Commissioner, at 1, ¶ 3 (citing Mills v. New York State Dept. of Env'tl. Conserv., Sup. Ct., Queens County, Index No. 9197/92).

With the exception of the fact that the location of respondents' properties in this matter is in Kings County rather than Queens County, as was the case in the Mills and Breezy Point matters, this proceeding presents facts regarding the filing of tidal wetlands maps by the Commissioner that are identical to those presented in Mills and Breezy Point.

I conclude that the Mills and Breezy Point orders are applicable here, and agree with their interpretation of Supreme Court's determination that the Department would likely succeed on the merits of its tidal wetlands enforcement in those cases, notwithstanding filing the tidal wetlands maps with the City Register rather than the county clerk. The court could not have determined that the Department would likely succeed on the merits if the Department lacked jurisdiction to enforce the Tidal Wetlands Act.

I therefore deny respondents' motion to dismiss the tidal wetlands-related claims in the complaint to the extent it is based upon the Commissioner having filed the official tidal wetland maps with the City Register rather than the Kings County clerk. Moreover, having determined that the maps were filed consistent with relevant law, I also take official notice of map panel no. 592-494, the panel of the tidal wetlands inventory maps that is relevant to respondents' properties. This is consistent with prior cases involving use of panels from official tidal wetlands maps. See e.g. Matter of Hansen, Hearing Report at 4 (ALJ taking official notice of tidal wetlands map no. 656-534), aff'd by Order of Commissioner, January 3, 2000 (holding that the shoreline of respondent's property "is an inventoried tidal wetland"); Matter of D&D Bowne St. Realty Corp., ALJ Ruling, November 10, 2009, at 1-2 (taking official notice of tidal wetlands map panel no. 600-522).

Respondents raise for the first time on reply new arguments not included in their initial motion papers. For example, respondents now offer an evidence-based argument to dismiss the

tidal wetlands-related causes of action, claiming that, even if filing the map with City Register was permissible, Department staff “failed to put into evidence an attested copy of any map identified as being on file with the NYC Register.” See Respondents’ Reply Memorandum of Law in Support of Motion to Dismiss Second, Third, Fourth, Sixth, Seventh and Ninth Causes of Action (“Resp. Reply”), at 1; see also id. (arguing that staff has the burden “to put into evidence in *this* case, an official copy of a map identified as having been filed in the NYC Register”) (italics in original) and id. at 2 (as a result of failure to file the tidal wetlands maps in the County Clerk’s Office, “there is no cognizable evidence in this record of the existence of any regulated tidal wetland on Ms. Felice’s property”).

As set forth above, ECL § 25-0201(4) requires only that a copy of the map and the Commissioner’s order be filed with the County Clerk’s office. Staff is only obliged to produce at hearing a copy of the official map on file with the Department, which staff has done in this matter. See e.g. Tr. at 58:13-22; 59:12-62:18; see also Hearing Exhibits 10 and 25 (portions of official tidal wetlands maps). Staff provided a sufficient foundation and showing of relevance for receiving into evidence the portions of the official map used at hearing. For example, Mr. Stadnik testified that Exhibit 10 is a copy of a portion of the official tidal wetlands map relevant to respondents’ properties. See Tr. at 61:20-25.

Mr. Stadnik also testified that his training has included how to correctly perform tidal wetlands delineations, how to interpret tidal wetlands maps, how to use an engineering scale to measure distances and dimensions of structures on tidal wetlands maps, determine tidal wetlands boundaries, and how to interpret and use infrared photographs on which the tidal wetlands maps were based. See id. at 54:15-55:12; see also id. at 114:14-118:7, and Hearing Exhibits 20 and 21. Mr. Stadnik also testified that, during more than 28 years in his capacity as a marine resources specialist with the Department, he performed more than 6,000 inspections in and near tidal wetlands as part of investigations including those relating to enforcement, and used tidal wetlands maps as an integral part of these inspections. See generally Tr. at 56:12-58:22; see also id. at 58:13-22 (Mr. Stadnik uses official tidal wetlands maps as “part of standard operating procedure” and “[w]henever we review, perform a compliance inspection or enforcement action, we usually look at tidal wetlands maps”).

At the close of the fourth day of the hearing, respondents moved to strike hearing exhibits 4, 10, 15, 16, 17, and 20-26 contingent upon the outcome of respondents’ motion to dismiss the tidal wetlands claims as discussed herein. See Tr. at 622:9-15. In addition, respondents (i) moved to strike all of Mr. Stadnik’s testimony to the extent it relates to tidal wetlands, tidal wetland maps, enforcement of the Tidal Wetlands Act and its regulations, and impacts on tidal wetlands, and (ii) made a standing objection to the testimony of staff witness Susan Maresca to the extent it pertains to protection of tidal wetlands. See id. at 622:16-25.⁶

Having decided that the wetlands maps were filed properly, I also deny respondents’ motions to (i) strike hearing exhibits 4, 10, 15, 16, 17 and 20-26; (ii) strike all testimony of Mr. Stadnik to the extent it relates to tidal wetlands, tidal wetland maps, enforcement of the Tidal

⁶ Given that Ms. Maresca has finished her testimony, I will interpret respondents’ standing objection to portions of her testimony as a motion to strike such testimony.

Wetlands Act and its regulations, and impacts on tidal wetlands; and (iii) strike the testimony of Ms. Maresca to the extent it relates to protection of tidal wetlands.

I have considered respondents' other arguments and find them without merit. I note that respondents have requested an award of costs and fees incurred relating to their motion and defense of the causes of action discussed herein. See Resp. Reply at 9. The statutes and regulations governing Departmental administrative enforcement proceedings make no provision for award of costs or attorney fees.⁷

III. Conclusion

Respondents' motion to dismiss the second, third, fourth, sixth, seventh and ninth causes of action is DENIED.

Respondents' motion to strike the testimony of staff witnesses George Stadnik and Susan Maresca is DENIED.

Respondents' motion to strike hearing exhibits 4, 10, 15, 16, 17, and 20-26 is DENIED.

Respondents' request for the award of costs and fees is DENIED.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: April 3, 2017
Albany, New York

⁷ Respondents made several additional oral motions at the close of the fourth day of hearing. Department staff's written response to such motions is due April 14, 2017. Respondents requested, and were granted, leave to serve reply papers, which are due on or before April 28, 2017.