No. _____

In The
Supreme Court of the United States

CALL-A-HEAD PORTABLE TOILETS, INC., CALL-A-HEAD CORP., AND CHARLES W. HOWARD,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND BASIL SEGGOS, COMMISSIONER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New York Appellate Division, Second Judicial Department

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard were convicted in a quasi-criminal administrative proceeding of three charges issued by the New York State Department of Environmental Conservation based solely upon a "criminal court information and summons (ticket)" (App. 141)[1] issued by an Environmental Conservation Officer who was not called as a witness, did not testify, and was not cross-examined at the Hearing, and whose last known address was purposely withheld by the prosecutor to prevent Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard from calling the Environmental Conservation Officer as a witness at the Hearing. It was the New York State Attorney General's position before the New York State Court of Appeals that the Sixth Amendment does not apply in civil cases, including administrative proceedings like the one at issue in this case. This case thus poses the important question:

> Do the accused in State administrative proceedings have a Sixth Amendment right to confront and cross-examine witnesses whose written testimony serves as evidence against the accused?

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[1] "App ___" refers to pages in the Appendix filed with this Writ of Certiorari.

PARTIES TO THE PROCEEDING

Petitioners are Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard, who are the Petitioners-Appellants in these proceedings.

Respondents are the New York State Department of Environmental Conservation and Basil Seggos, Commissioner, who are the Respondents-Respondents in these proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of the Supreme Court, Rule 29.6, Appellants Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp. certify they are closely held and not publicly traded corporations formed under the laws of the State of New York and that there are no parent or subsidiary corporations related to it and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

In the Matter of the Alleged Violations of the New York State Environmental Conservation Law, Articles 17 and 25, and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by Call-A-Head Portable Toilets, Inc., et al., State of New York Department of Environmental Conservation, DEC File Nos. R2-20030505-238, R2-20030505-129, March 4, 2019.

RELATED CASES – Continued

In the Matter of Call-A-Head Portable Toilets, Inc., et al. v. New York State Department of Environmental Conservation, et al., New York State Supreme Court, County of Queens, 707956/2019, August 12, 2019.

In the Matter of Call-A-Head Portable Toilets, Inc., et al. v. New York State Department of Environmental Conservation, et al., New York State Supreme Court, Appellate Division: Second Judicial Department, 2019-10579, February 15, 2023.

In the Matter of Call-A-Head Portable Toilets, Inc., et al. v. New York State Department of Environmental Conservation, et al., New York State Court of Appeals, SSD 18, April 20, 2023.

In the Matter of Call-A-Head Portable Toilets, Inc., et al. v. New York State Department of Environmental Conservation, et al., New York State Court of Appeals, 2023-402, November 21, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard petition for a writ of certiorari to review the judgment of the New York State Supreme Court Appellate Division: Second Department in this case.

OPINIONS BELOW

The decision by the New York State Court of Appeals denying the Motion for leave to appeal can be found at 2023 NY Slip Op 76969 and is reproduced at App. 1. The dismissal of the case by the New York State Court of Appeals upon the ground that no substantial constitutional question is directly involved can be found at 2023 NY Slip Op 65335 and is reproduced at App. 2. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department can be found at 213 A.D.3d 842 and is reproduced at App. 3-11. The decision from the New York State Supreme Court, Queens County transferring the case to the Supreme Court of the State of New York, Appellate Division, Second Department is unreported and is reproduced at App. 12-15. The decision of the Commissioner of the New York State Department of Conservation is unreported and can be found at 2019 N.Y. ENV LEXIS 14 and is reproduced at App. 16-185.

JURISDICTION

The jurisdiction of this Court is invoked under 45 U.S.C. § 1257(a). The New York State Court of Appeals denied the Motion for leave to appeal on November 21, 2023. App. 1. An application to extend the time to file a petition for a writ of certiorari from February 19, 2024 to April 4, 2024 was granted by Justice Sotomayor on February 6, 2024. Therefore, the writ of certiorari is timely under Rules 13.5 and 29.2 of this Court.

CONSTITUTIONAL PROVISION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Factual Background

Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard (collectively referred to as "CAH Parties") operate a portable toilet company

(App. 64) at the real property located at 302-304 Cross Bay Boulevard, Broad Channel, Queens County, New York ("Subject Property"), which is located in a purported regulated tidal wetland and adjacent area.

On July 2, 2004 the New York State Department of Environmental Conservation ("DEC") commenced administrative proceedings against the CAH Parties. The DEC amended its Complaint on May 8, 2012 alleging nineteen charges that can be broken into three categories: (1) operating a commercial use facility within a regulated tidal wetland area and tidal wetland adjacent area without a permit; (2) installing structures on its property without a permit; and (3) draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, directly into the waters of Jamaica Bay.

Nearly twelve years after commencing the administrative proceeding, the matter proceeded to a hearing before the Hon. Richard A. Sherman ("Hearing Officer"). The Hearing was held on June 13, 14, 15, 2016, November 15, 16, 17, 2016 and January 10, 2017. App. 53.

Despite seven days of hearing and the unfettered opportunity to introduce all evidence of the allegations asserted against the CAH Parties, the only evidence introduced by the DEC to support its allegations that the CAH Parties drained untreated residual content of portable toilets, including sewage, chemicals, and wash-down fluids, directly into the waters of Jamaica Bay was "a criminal court information and summons

(ticket)" (App. 141) ("Criminal Summons") issued by ECO A.M. Mat ("ECO Mat"). App. 141.

The Criminal Summons was a sworn statement by a person who alleged he witnessed the CAH Parties draining untreated residual content of portable toilets, including sewage, chemicals, and wash-down fluids, directly into the waters of Jamaica Bay. App. 141.

Despite the fact that the Criminal Summons was the sole piece of evidence supporting three charges alleged against the CAH Parties, the DEC never called ECO Mat as a witness at the Hearing. As a result, the CAH Parties could not and did not confront and cross-examine ECO Mat regarding the contents of his Criminal Summons.

ECO Mat was available to the DEC. First, the Hearing did not commence until four years after the filing of the Amended Complaint. In those four years, the DEC knew that ECO Mat was a necessary and material witness for three of its charges alleged against the CAH Parties. Yet, the DEC did not take the necessary precautions to have him available for the Hearing.

Second, the DEC represented to the CAH Parties and the Hearing Officer that ECO Mat refused to return the telephone call of the DEC prosecutor in advance of the Hearing. ECO Mat was a recently retired employee of the DEC who could have been called as a witness or could have been subpoenaed by the DEC. However, the DEC did not do so. App. 149.

Not relying upon the DEC to call him as a witness, the CAH Parties requested from the Hearing Officer an Order directing the DEC prosecutor to produce ECO Mat's last known address. The Hearing Officer directed the DEC to produce ECO Mat's last known address, but the DEC never produced it. App. 149.

The DEC's failure to provide ECO Mat's last known address interfered with and impeded the CAH Parties from calling ECO Mat as a witness at the Hearing and thus prevented the CAH Parties from confronting him and cross-examining him. Thus, ECO Mat's Criminal Summons went unchallenged by the CAH Parties through cross-examination, which this Court called "the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

In his Order finding the CAH Parties guilty of the three charges for which the Criminal Summons was the sole piece of evidence, Commissioner Basil Seggos ("Commissioner") relied solely on the Criminal Summons to find the CAH Parties guilty of three charges against them. App. 32, App. 34. The Commissioner held that since the Hearing Officer determined that ECO Mat's "statements in the tickets and the accompanying case initiation form to be sufficiently reliable and probative to form the basis for respondents' liability," the DEC had established the violations by the CAH Parties. App. 32.

The finding of "sufficiently reliable and probative to form the basis for respondent's liability" (App. 32)

without permitting or enabling the CAH Parties to confront and cross-examine ECO Mat violated the CAH Parties' Sixth Amendment Confrontation Clause rights.

B. Procedural History

The Commissioner issued his decision on March 4, 2019. App. 16.

On May 6, 2019, the CAH Parties filed a N.Y. CPLR article 78 proceeding in the New York State Supreme Court, County of Queens challenging the Commissioner's decision arguing the decision was arbitrary, capricious, and contrary to law. N.Y. CPLR § 7803.3; N.Y. CPLR § 7803.4. One of the bases for the CAH Parties' challenges to the Commissioner's decision was a violation of the CAH Parties' Sixth Amendment right to confront their accuser (ECO Mat) challenging the use of ECO Mat's Criminal Summons as a basis to find the CAH Parties guilty of three of the charges.

On August 12, 2019 the New York State Supreme Court, County of Queens transferred the case to the Supreme Court of the State of New York Appellate Division, Second Judicial Department pursuant to N.Y. CPLR § 7804(g). App. 12-15.

On February 15, 2023, the Supreme Court of the State of New York Appellate Division, Second Judicial Department denied the CAH Parties' Petition holding, with respect to the issue of the CAH Parties' Confrontation Clause argument only, that "[w]e further note

that hearsay evidence was properly admitted at the administrative hearing." App. 8.

The CAH Parties filed with the New York State Court of Appeals an appeal as of right based upon substantial constitutional grounds namely a violation of the CAH Parties' Sixth Amendment right to confront and cross-examine ECO Mat. The New York State Court of Appeals *sua sponte* dismissed the appeal upon the ground that no substantial constitutional question is directly involved. App. 2.

The CAH Parties then filed a Motion for leave to appeal with the New York State Court of Appeals on the grounds that the CAH Parties' Sixth Amendment right to confront and cross-examine ECO Mat was violated. On November 21, 2023, the motion was denied by the New York State Court of Appeals. App. 1.

REASON FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT REVIEW TO CLEARLY ESTABLISH THE CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES IN STATE ADMINISTRATIVE PROCEEDINGS

In the United States today there are two tiers of the judicial system, one is the constitutional system of Courts and a second system is that of administrative proceedings with each administrative agency having its own rules, regulations, and procedures. More and

more citizens of the United States are facing charges, claims, and proceedings in this second-tier, administrative judicial system. However, State administrative agencies, like the DEC in this proceeding, often do not give citizens the opportunity to confront witnesses in administrative proceedings and shortcut the due process guaranteed by the United States Constitution. Too many accused do not have the financial wherewithal to challenge the lack of due process provided to them in the administrative proceedings, which allows the proceedings' processes to be unchallenged in the Courts.

While this Court for more than a century has not explicitly held that the right to confront and cross-examine witnesses in administrative proceedings is fundamental to due process, this Court has alluded to the right in many cases.

In this case, the CAH Parties were not afforded the opportunity to confront ECO Mat and therefore, the CAH Parties did not receive the minimum level of due process guaranteed to them under the United States Constitution. This case is a proper vehicle for this Court to make explicit what has been implicitly implied in the Court's prior decisions.

However, despite this Court's precedents that alluded to the constitutional right to confront witnesses in administrative proceedings, the New York State Attorney General argued, before the New York State Court of Appeals, that the Sixth Amendment does not apply in civil cases, including civil administrative proceedings like this one.

This Court's precedent, although not explicit, suggests that, contrary to the New York State Attorney General's position before the New York State Court of Appeals, the Sixth Amendment right to confront witnesses and cross-examine witnesses is a constitutional right enjoyed by the accused in State administrative proceedings.

For example, in *Ohio Bell Tel. Co. v. Pub. Util. Com.*, 301 U.S. 292, 300 (1937), this Court held that the failure of the Commission to provide the data and documents it relied upon to order refunding in the millions of dollars resulted in "not the fair hearing essential to due process. It is condemnation without trial."

In *Carter v. Kubler*, 320 U.S. 243, 247 (1943) this Court held "[t]he basic elements of such a hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence."

In *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949), this Court held "one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive."

In *GREENE v. McELROY*, 360 U.S. 474, 496-497 (1959), this Court opined:

> Certain principles have remained relatively immutable in our jurisprudence. One of these

is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *e. g., Mattox* v. *United States*, 156 U.S. 237, 242-244; *Kirby* v. *United States*, 174 U.S. 47; *Motes* v. *United States*, 178 U.S. 458, 474; *In re Oliver*, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. *E. g., Southern R. Co*. v. *Virginia*, 290 U.S. 190; *Ohio Bell Telephone Co*. v. *Public Utilities Commission*, 301 U.S. 292; *Morgan* v. *United States*, 304 U.S. 1, 19; *Carter* v. *Kubler*, 320 U.S. 243; *Reilly* v. *Pinkus*, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation.

Joint Anti-Fascist Committee v. *McGrath*, 341 U.S. 168-169 (concurring opinion).

During the Hearing in this administrative proceeding, the CAH Parties were not provided the opportunity to confront and cross-examine ECO Mat, the sole witness against the CAH Parties to three charges asserted against the CAH Parties by the DEC. It was ECO Mat's written statements that were used by the Commissioner to find the CAH Parties guilty of those three charges. App. 32, 34.

In his Order finding the CAH Parties guilty of the three charges, the Commissioner, relying solely on the Criminal Summons, held ECO Mat's "statements in the tickets and the accompanying case initiation form to be sufficiently reliable and probative to form the basis for respondents' liability." App. 32.

In *Crawford v. Washington*, 541 U.S. 36, 61 (2004), in the criminal context, this Court held the Confrontation "Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

In this administrative proceeding, the CAH Parties did not have an opportunity to test the Criminal Summons and ECO Mat's reliability to the crucible of cross-examination.

Yet, the Commissioner, in finding the CAH Parties guilty of three of the charges, made the determination that ECO Mat's "statements in the tickets and the accompanying case initiation form [were] sufficiently reliable and probative to form the basis for respondents' liability." App. 32.

The Commissioner's determination of reliability of ECO Mat's statements without the CAH Parties having had the opportunity to confront and cross-examine ECO Mat in the Hearing, coupled with the DEC's failure to provide the CAH Parties with ECO Mat's last known address, which would have permitted the CAH Parties to call or subpoena ECO Mat as a witness to confront and cross-examine him (App. 147-150), was a violation of the CAH Parties' Sixth Amendment right to confront witnesses.

This case presents the opportunity for this Court to explicitly hold that the accused in State administrative proceedings have a Sixth Amendment right to confront and cross-examine witnesses whose testimony could serve as a basis for a finding against the accused and that cross-examination is a fundamental component of due process enjoyed by the accused in State administrative proceedings.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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State of New York
Court of Appeals

Decided and Entered on the twenty-first day of November, 2023

Present, Hon. Rowan D. Wilson, *Chief Judge,* ***presiding***.

Mo. No. 2023-402
In the Matter of Call-A-Head Portable Toilets, Inc., et al.,
Appellants,
v.
New York State Department of Environmental Conservation et al.,
Respondents.

Appellants having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

/s/ Lisa LeCours
Lisa LeCours
Clerk of the Court

State of New York
Court of Appeals

Decided and Entered on the twentieth day of April, 2023

Present, Hon. Rowan D. Wilson, *Chief Judge,* ***presiding***.

SSD 18
In the Matter of Call-A-Head Portable Toilets, Inc., et al.,
Appellants,
v.
New York State Department of Environmental Conservation, et al.,
Respondents.

Appellants having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Judge Halligan took no part.

/s/ Lisa LeCours
Lisa LeCours
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D70486
T/htr

___AD3d___ Argued - October 6, 2022

COLLEEN D. DUFFY, J.P.
REINALDO E. RIVERA
DEBORAH A. DOWLING
JANICE A. TAYLOR, JJ.

2019-10579

In the Matter of Call-A-Head Portable Toilets, Inc., et al., petitioners/appellants, v New York State Department of Environmental Conservation, et al., respondents/respondents.

(Index No. 707956/19)

DECISION, ORDER & JUDGMENT

(Filed Feb. 15, 2023)

The Scher Law Firm, LLP, Carle Place, NY (Austin Graff of counsel), for petitioners/appellants.

Letitia James, Attorney General, New York, NY (Judith N. Vale, Ari J. Savitzky, and Sarah E. Coco of counsel), for respondents/respondents.

Proceeding pursuant to CPLR article 78 to review so much of a determination of the New York State Department of Environmental Conservation dated March 4, 2019, as adopted the recommendation of an administrative law judge dated February 14, 2018, made after a hearing, sustaining 10 causes of action alleging

that the petitioners violated ECL 17-0803 and 25-0401, and related regulations, and imposed a civil penalty in the sum of $300,000, jointly and severally payable by the petitioners, $100,000 of which would be suspended if the petitioners/appellants complied with the terms and conditions of the determination, including complying with a restoration plan, and assessed an additional civil penalty against the petitioner Charles W. Howard in the sum of $7,500, which proceeding was transferred to this Court by order of the Supreme Court, Queens County (Pam Jackman Brown, J.), dated August 12, 2019, and appeal by the petitioners from the same order.

ORDERED that the appeal is dismissed (*see* CPLR 5701[b]; 7804[g]); and it is further,

ADJUDGED that the determination is confirmed insofar as reviewed, the petition is denied, and the proceeding is dismissed on the merits; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

In 2004, the respondent/respondent New York State Department of Environmental Conservation (hereinafter the DEC) commenced an administrative enforcement proceeding against the petitioners, alleging that their activities at three sites in Broad Channel (hereinafter Site 1, Site 2, and Site 3) violated the Environmental Conservation Law and related DEC regulations. The DEC filed an amended complaint in 2012, and an administrative hearing was commenced before an administrative law judge (hereinafter the ALJ) on June 13,

2016. The violations at issue here involved, inter alia, the petitioners' alleged expanding of commercial structures without a permit, and discharging of the residual content of portable toilets into Jamaica Bay, also without a permit. Site 1 was previously the subject of a consent order issued in 1994, based, inter alia, upon a prior inspection in 1992. The consent order gave the petitioner Call-A-Head Corp. temporary authority to operate on Site 1 for 120 days from the effective date of the consent order, noted that the temporary authorization would expire unless renewed by the DEC, and stated that the DEC would not renew the temporary authorization unless Call-A-Head Corp. applied for the permit necessary to operate the site. At the administrative hearing, an employee of the DEC testified that an application for the necessary permit was received by the DEC in 2004, approximately 10 years later, and consideration of that application was suspended due to pending violations.

In February 2017, after the DEC had rested its case, the petitioners discharged their attorney, and the ALJ granted them an extended adjournment so that they could engage new counsel. In May 2017, the petitioners purportedly engaged new counsel, but that attorney subsequently declined to represent them. The ALJ declined to grant a further adjournment, and the administrative hearing was closed without the petitioners having put on a case. Each side was permitted to submit posthearing briefs, through which the DEC withdrew the causes of action pertaining to Site 2.

During the administrative hearing, the DEC presented surveys, photographs, maps, inspection reports, the previously issued summonses, and the testimony of multiple DEC employees who testified as to their observations with respect to the charged violations. Largely crediting the DEC's evidence, the ALJ sustained 10 causes of action against the petitioners, and recommended a civil penalty in the sum of $300,000 for the violations at Site 1, jointly and severally assessed against the petitioners, and an additional civil penalty in the sum of $7,500 for the violation at Site 3, assessed against the petitioner Charles W. Howard. On March 4, 2019, the DEC issued a determination which largely adopted the ALJ's findings and recommendations, but, additionally, suspended $100,000 of the $300,000 civil penalty imposed for the Site 1 violations, contingent upon the petitioners' compliance with the terms and conditions of the determination, including complying with a restoration plan. The petitioners commenced this proceeding pursuant to CPLR article 78 to review the determination, and the Supreme Court transferred the proceeding to this Court (*see* CPLR 7804[g]).

"Judicial review of an administrative determination made after a hearing required by law, and at which evidence was taken, is limited to whether that determination is supported by substantial evidence" (*Matter of Clan Fitz, Inc. v New York State Liq. Auth.*, 144 AD3d 1024, 1025 [internal quotation marks omitted]; *see* CPLR 7803[4]). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact"

(*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). While substantial evidence is "'more than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt'" (*Matter of S & S Pub, Inc. v New York State Liq. Auth.*, 109 AD3d 933, 934, quoting *300 Gramatan Ave. Assoc.*, 45 NY2d at 180-181). "The standard demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [internal quotation marks omitted]).

After the close of the administrative hearing, the petitioners contended that the DEC lacked subject matter jurisdiction over Site 1 and Site 3, because those sites were not adjacent to tidal wetlands as defined in the applicable regulations, i.e., 6 NYCRR 661.4(b)(l), in that railroad tracks and roads ran parallel to, and separated the petitioners' property from, the boundaries of the tidal wetlands. Although an objection on the ground of subject matter jurisdiction "may be raised at any time and may not be waived" (*Lacks v Lacks*, 41 NY2d 71, 74-75), the ALJ properly rejected the petitioners' argument. "Subject matter jurisdiction 'refers to objections that are fundamental to the power of adjudication of a court.' 'Lack of jurisdiction' should not be used to mean merely 'that elements of a cause of action are absent,' but that the matter before the court was not the kind of matter on which the court had power to rule" (*Garcia v Government Empls. Ins. Co.*, 130 AD3d 870, 871, quoting *Manhattan Telecom. Corp.*

v H & A Locksmith, Inc., 21 NY3d 200, 203). Here, the petitioners have not actually raised an objection on the basis of subject matter jurisdiction, as their argument does not address the DEC's statutory powers to adjudicate the underlying controversy (*see* ECL 3-0301). To the contrary, the petitioners' contention that Sites 1 and 3 are not adjacent to tidal wetlands within the meaning of the applicable regulation (*see* 6 NYCRR 661.4[b][l]) bears on "a substantive element of the cause[s] of action and not a jurisdictional element" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166). In any event, the ALJ rejected the petitioners' argument on the merits, crediting the evidence presented by the DEC during the administrative hearing, including witness testimony and the official tidal wetlands map for the area. Accordingly, the ALJ's conclusion on this matter is supported by substantial evidence in the record.

Contrary to the petitioners' contention, the additional findings and recommendations set forth in the challenged determination are supported by substantial evidence (*see Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d at 499; *300 Gramatan Ave. Assoc.*, 45 NY2d at 180-181). We further note that hearsay evidence was properly admitted at the administrative hearing (*see People ex rel. Vega v Smith*, 66 NY2d 130, 139; *Matter of Bracco's Clam & Oyster Bar, Inc. v New York State Liq. Auth.*, 156 AD3d 629, 630; *Matter of Graham v New Hampton Fire Dist.*, 131 AD3d 1168; 6 NYCRR 622.11[a][6][vii]).

Since an administrative hearing was held on the DEC's petition, the petitioners were not entitled to a separate hearing regarding the penalty to be imposed (*see* 6 NYCRR 622.12[f]; *Matter of Howard v Cahill*, 290 AD2d 712, 715-716). In any event, there was no triable issue of fact warranting a separate hearing. Contrary to the petitioners' contentions, the penalties imposed are not shocking to the conscience of the court (*see Matter of Stasack v New York State Dept. of Envtl. Conservation*, 176 AD3d 1456, 1460; *Matter of Zahav Enters., Inc. v Martens*, 150 AD3d 748, 751; *Matter of Venditti v New York State Dept. of Envtl. Conservation*, 57 AD3d 685, 686; *Matter of Oil Co. v New York State Dept. of Envtl. Conservation*, 277 AD2d 241, 241-242).

Further, the petitioners failed to state a claim sounding in selective enforcement. To establish a claim of selective enforcement, "a litigant must show that the law was enforced with both an 'unequal hand' and an 'evil eye'; 'to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification'" (*People v Blout*, 90 NY2d 998, 999, quoting *Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 686, 693; *see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631; *Matter of Kings Point Holdings, LLC v Kings Point Vil. Justice Ct.*, 83 AD3d 714). "To establish enough of a case to trigger an evidentiary hearing as of right, a petitioner must show, on the strength of sworn affidavits and other proof supplying factual

detail, that he [or she] is more likely than not to succeed on the merits" (*Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d at 695-696).

As to the first prong of the analysis, the petitioners contend that two companies which operate similar businesses in nearby facilities have not been subject to the same permitting requirements, nor any administrative enforcement proceedings. However, the petitioners have not alleged that, like them, these companies had interactions with the DEC extended over a lengthy period, involving allegations of wrongdoing over a substantial period of time, resulting in a prior consent order. Nor have the petitioners provided any actual evidence of these other companies' activities, or any details of their purportedly similar violations. Accordingly, the petitioners have failed to establish that they and these other companies are similarly situated. Further, and especially in light of the petitioners' unique history, their additional allegations concerning the DEC's counsel furnish no basis for finding that the DEC had an improper motive for pursuing the case against them. Accordingly, the petitioners' showing was insufficient to trigger an evidentiary hearing regarding selective enforcement (*see id.*).

The petitioners' remaining contentions are without merit.

DUFFY, J.P., RIVERA, DOWLING and TAYLOR, JJ., concur.

ENTER:

/s/ Maria T. Fasulo
Maria T.Fasulo
Clerk of the Court

FILED: QUEENS COUNTY CLERK 08/20/2019 04:01 PM INDEX NO. 707956/2019

NYSCEF DOC. NO. 103 RECEIVED NYSCEF: 08/20/2019

NEW YORK SUPREME COURT -
COUNTY OF QUEENS

IAS PART 19

SHORT FORM ORDER

Present: Hon. Pam Jackman Brown, JSC

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CALL-A-HEAD PORTABLE TOILETS, INC., CALL-A-HEAD CORP., and CHARLES W. HOWARD,

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS, Commissioner,

Respondents.

Index No.: 707956/2019

Motion Date: 7/22/19

Cal. No. 7 &8

Mot. Seq. No.: 1&2

(Filed Aug. 20, 2019)

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Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered Ito 35 and, 37 to 102 to read on this Notice of Petition and Order to Show Cause by Petitioner.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Notice of Petition - Affirmation Annexed	1-2	38-39, 44
Order To Show Cause- Exhibits Annexed	1,3, 29, 37	4-28,30-35, 40-42,
Stipulation- Time to Answer	43	
Answer in Special Proceeding	45	46-100
Affirmation in Response to Petitioner's Motion for Preliminary Injunction	101	
Verified Reply	102	

Upon the papers listed above, this Notice of Petition and Order to Show Cause is hereby decided in accordance with this Decision/Order.

Upon review of the parties' submissions and after conference with the Court on July 22, 2019, the Court finds that the instant petition raises question regarding whether a determination made as a result of a hearing, held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence, in accordance with CPLR § 7803(4). Thus, in accordance with CPLR § 7804(g), this matter shall be transferred for disposition to the Supreme Court of the State of New York Appellate Division, Second Judicial Department. Accordingly, it is hereby

ORDERED, that the instant proceeding is transferred to the Supreme Court of the State of New York

Appellate Division, Second Judicial Department; and it is further

ORDERED, that, pursuant to the parties' Stipulation, dated July 22, 2019, the Decision and Order, dated March 4, 2019, issued by Commissioner Seggos shall not be enforced until this proceeding is finally decided, except that the stay shall end if this proceeding is not timely perfected in accordance with the Rules of the Appellate Division, Second Judicial Department. A copy of the Stipulation, dated July 22, 2019, is annexed herewith.

Dated: August 12, 2019
Jamaica, NY

/s/ Jackman Brown
HON. PAM JACKMAN BROWN, J.S.C.

Supreme Court Civil Term

COUNTY OF QUEENS Index No. 707956/2019

Motion Calendar No. 6&7

Call-A-Head **Plaintiff** Portable Toilets Inc. et al *-against-* NMS DEC, et al **Defendant**.	**STIPULATION** HON. Pam Jackman-Brown JSC Date 7/22/19

The parties to this action agree as follows:

~~1. The parties agree that this proceeding should be transferred to the Appellate Division, Second Judicial Department.~~

2. The parties agree that the Decision and Order dated March 4, 2019 issued by Commissioner Seggos shall not be enforced until this proceeding is finally decided, except that the stay shall end if this procedure is not timely perfected in accordance with the Rules of the Appellate Division, Second Judicial Department.

/s/ Austin Graff	/s/ Elizabeth Morgan
Austin Graff	Elizabeth Morgan
The Scher Law Firm	Asst Atty General
Petitioners	on behalf of Respondents

FILED: QUEENS COUNTY CLERK 05/06/2019 04:30 PM INDEX NO. 707956/2019

NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/06/2019

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 17 and 25 of the New York State Environmental Conservation Law (ECL) and Parts 661 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

-by-

CALL-A-HEAD PORTABLE TOILETS, INC.;

CALL-A-HEAD CORP.;

CHARLES W. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.;

KENNETH HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.; and

CHARLES P. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.;

Respondents.

DEC File Nos. R2-20030505-128, R2-20030505-129

DECISION AND ORDER OF THE COMMISSIONER

March 4, 2019

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding addresses violations by respondents Call-A-Head Portable Toilets, Inc. (Call-A-Head, Inc.), Call-A-Head Corp., Charles W. Howard (C.W. Howard), Kenneth Howard, and Charles P. Howard (C.P. Howard), of New York State's laws and regulations pertaining to tidal wetlands and the State Pollutant Discharge Elimination System (SPDES). Staff of the New York State Department of Environmental Conservation (Department or DEC) alleged that these violations occurred at two sites, designated as Site 1 and Site 3, in Queens County.[1]

SUMMARY

Site 1 is located at 302-304 Cross Bay Boulevard, Broad Channel, Queens (Site 1) (*see* Hearing Report at 2-3 [Findings of Fact 1 and 2]). Site 1 is the principal place of business of Call-A-Head, Inc. and Call-A-Head Corp. (collectively, Call-A-Head) and is comprised of two tax parcels owned by one or more respondents (Queens County Tax Blocks 15375 Lot 48 [Lot 48] and 15376 Lot 45 [Lot 45]) (*see* Hearing Report at 4 [Finding of Fact 8]). Lot 45 and Lot 48 are located entirely within the adjacent area of a regulated tidal wetland

[1] Department staff included causes of action numbered 17 and 18 relating to a parcel designated as Site 2 in its amended complaint dated May 8, 2012 (2012 Complaint), but subsequently withdrew those causes of action (*see* Hearing Report at 5 n 4; DEC Staff's Closing Brief dated July 27, 2017 [Staff Closing Brief], at 20).

as depicted on map number 598-496 (*see* Hearing Report at 4-5 [Finding of Fact 16]).

Site 1 also consists of a portion of an adjacent parcel which is owned by the federal government and is part of the Gateway National Recreation Area (*see* Hearing Report at 4 [Finding of Fact 9]). This adjacent parcel is located within a regulated tidal wetland and adjacent area (*see* Hearing Report at 4-5 [Findings of Fact 9 and 16]).

Site 3 is located at 40 West 17th Road, Broad Channel, Queens (Site 3) (*see* Hearing Report at 5 [Finding of Fact 18]). Site 3 is comprised of two tax parcels (Queens County Tax Block 15322 Lots 19 and 20) (*see* Hearing Report at 5 (Finding of Fact 18]). All of Site 3 is located within a regulated tidal wetland and its adjacent area (*see* Hearing Report at 43). Respondent Charles W. Howard acquired Site 3 on October 1, 2002 and was the owner of record at the time of the alleged violation (*see* Hearing Report at 5 [Finding of Fact 18]).

Department staff commenced this administrative enforcement proceeding by service of a complaint, dated July 2, 2004 (*see* Hearing Report at 1). By an amended complaint dated May 8, 2012 (2012 Complaint), staff alleges nineteen causes of action. Specifically, staff alleges that respondents conducted the following activities without a permit issued by the Department:

Site 1[2]

1. "constructing a commercial use facility not requiring water access within a regulated tidal wetland area and tidal wetland adjacent area" in violation of section 25-0401 of the Environmental Conservation Law (ECL) and section 661.8 and 661.5(b)(48) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR);[3]

2. "undertaking commercial or industrial use activities not requiring water access within a regulated tidal wetland area and tidal wetland adjacent area" in violation of ECL 25-0401, 6 NYCRR 661.8 and 661.5(b)(48);[4]

3. "[installing] a structure or structural components" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(48) and (51);[5]

6. "creating a ditch within the regulated tidal wetland adjacent area without a DEC permit" in

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[2] The following numbers correspond to the causes of action alleged by staff in the 2012 Complaint but excludes those causes of action withdrawn by Department staff. Department staff withdrew causes of action numbered 4, 5, 13, 14, 15, 16, 17 and 18, and accordingly, those are not listed here and will not be addressed in this decision and order.

[3] The first cause of action relates to respondents' alleged expansion of a garage.

[4] The second cause of action relates to respondents' operation of a portable toilet facility.

[5] As discussed in the hearing report, the third cause of action relates to the installation of structures including large steel containers used for office and storage space, oil tanks, asphalt driveways, paths and a parking area and fences.

violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(51) and (57);

7. "draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, directly into the waters of Jamaica Bay" in violation of ECL 17-0803 and 6 NYCRR 751.1(a);

8. "draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, directly into the waters of Jamaica Bay" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(44) and (52);

9. "placing gravel to create a storage yard/parking lot measuring 50 feet by 80 feet immediately east of the facility approximately 7 feet landward of the tidal wetland boundary" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30) and (51);

10. "placing a metal container, portable toilets, vehicles & trailers in the [gravel storage] area" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(48) and (51);

11. "placing fill in the tidal wetland adjacent area" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30);

12. "clearing and removing vegetation within the tidal wetland adjacent area" in violation of ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(57); and

Site 3

19. "placing fill in the regulated tidal wetland and/or tidal wetland adjacent area" in violation of ECL 25-0401 and 6 NYCCR 661.8 and 661.5(b)(30).[6]

In its 2012 Complaint, staff requested a penalty of no less than three hundred thousand dollars ($300,000) for the violations at Site 1 (*see* Hearing Report at 50).[7] With respect to remedial relief, the ALJ noted that staff requested that respondents discontinue use of Site 1 as a portable toilet facility, remove all structures and impervious surfaces that were not in place at the time that respondents took possession of the site, and restore the tidal wetland adjacent areas to the satisfaction of the Department (*see* Hearing Report at 50; *see also* 2012 Complaint, at 16, § III). With regard to Site 3, Department staff requested an order assessing a separate penalty of $7,500 on respondent Charles W. Howard (*see* Hearing Report at 50).[8]

By answer dated June 22, 2012, respondents generally denied Department staff's allegations and asserted two affirmative defenses. Specifically, respondents argued that Department staff failed to state a cause of action and that a hearing should not be held

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[6] The nineteenth cause of action relates to activities conducted by the individual respondent Charles W. Howard at Site 3.

[7] In its closing brief, staff requested "at least a doubling" of the penalty amount sought under the 2012 Complaint (*see* Staff Closing Brief, at 33).

[8] Department staff withdrew its request for remedial relief at Site 3 because the new owner of the site entered into an order on consent to remediate the site (*see* Staff Closing Brief, at 28-29).

until staff complies with respondents' disclosure request.[9] The matter was originally assigned to Administrative Law Judge (ALJ) Susan DuBois, and subsequently reassigned to ALJ Richard Sherman.

In accordance with 6 NYCRR 622, an adjudicatory hearing was held by ALJ Sherman over the course of eleven months, with seven days of testimony. On May 9, 2017, the ALJ denied respondents request for another adjournment and closed the evidentiary hearing. By motion papers dated June 28, 2017, respondents moved (i) to dismiss the matter for want of subject matter jurisdiction, or (ii) in the alternative, to reopen the evidentiary hearing.[10] Department staff opposed respondents' motions. In the attached hearing report, ALJ Sherman denied both motions (*see* Hearing Report at 8-19).

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[9] By bench ruling dated June 14, 2016, the ALJ authorized respondents to plead a third affirmative defense, specifically that the alleged tidal wetland violations predate the effective date of the tidal wetland land use regulations (August 20, 1977) and therefore the alleged activities do not require a permit.

[10] In their motion papers dated June 28, 2017, respondents argued that Site 1 does not contain a regulated tidal wetland or tidal wetland adjacent area and, therefore, the Department lacks subject matter jurisdiction. The issue of subject matter jurisdiction relates to whether the Commissioner has the authority to hear and decide tidal wetlands enforcement matters, not whether Department staff established that respondents' property is located in a regulated tidal wetland or adjacent area (*see Manhattan Telecom Corp. v H & A Locksmith, Inc.*, 21 NY3d 200 [2013]). Furthermore, respondents failed to establish that the ALJ overlooked or misapprehended any matters of law or fact. Thus, the ALJ correctly denied the motions.

ALJ Sherman prepared the attached hearing report in which he concludes that with regard to Site 1, Department staff met its burden of proof relating to the first, second, third (in part), seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action. ALJ Sherman did not find that respondents violated that part of the third cause of action that relates to the installation of oil tanks on Site 1. In addition, the ALJ determined that Department staff failed to prove the sixth cause of action pertaining to the creation of a ditch by respondents in the tidal wetland adjacent area.

In the hearing report, ALJ Sherman recommended that a civil penalty in the amount of $300,000 be assessed, jointly and severally, against respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. for the violations at Site 1 (*see* Hearing Report at 55 and 58). In addition, ALJ Sherman concluded that respondents must develop and implement an approvable restoration plan consistent with the restoration requested by staff, except that ALJ Sherman declined to recommend that respondent remove the addition to the garage building (formerly L-shaped building) (*see* Hearing Report at 56-58). The ALJ also noted that the request that respondents remove all gravel and other imported fill be limited to the fill associated with the proven violations at Site 1 (*see* Hearing Report at 57-58).

Regarding the violations on Site 3, ALJ Sherman concluded that Department staff established that respondent Charles W. Howard is liable for the violation set forth in the nineteenth cause of action and

recommended a civil penalty in the amount of $7,500 (*see* Hearing Report at 55).

Based upon my review of the hearing record, I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.[11]

DISCUSSION

Corporate Respondents – Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.

In the hearing report, ALJ Sherman concluded that neither Department staff nor respondents distinguish between the operations of the two corporate entities – Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp. (corporate respondents) – with respect to the allegations in the 2012 Complaint. I agree with ALJ Sherman that the two corporations, among other things, are both longstanding established legal entities engaged in the portable toilet business with their principal place of business located at Site 1. Based on this record, I concur with the ALJ that Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. should be held jointly and severally liable for the violations at Site 1.

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[11] At various times, this proceeding was suspended for considerable periods of time as efforts to resolve the matter through settlement or mediation were undertaken. These efforts proved unsuccessful. In addition, disputes over document production, respondents' efforts to change legal representation, and other "dilatory behavior" attributed to respondents caused further delays (*see* Hearing Report at 11-19).

Responsible Corporate Officer Doctrine

Regarding respondents Charles W. Howard, Kenneth Howard, and Charles P. Howard, ALJ Sherman determined that Department staff failed to establish whether these individual respondents, although corporate officers, had the authority and responsibility to prevent the alleged violations at issue. It is well settled that a corporate officer can be held personally liable for violations by the corporate entity that threaten public health, safety, or welfare (*see e.g. Matter of Galfunt*, Order of the Commissioner, May 5, 1993, at 2). A corporate officer need only have responsibility over the activities of the business that caused the violations to be held individually liable (*see id.*).

Here, while Department staff alleged in the 2012 Complaint that each of the individual respondents was at all pertinent times responsible for and directly involved in the day-to-day business activities of the corporation, staff did not raise the responsible corporate officer doctrine at hearing. Accordingly, I agree with ALJ Sherman that based on the record, individual respondents Charles W. Howard, Kenneth Howard, and Charles P. Howard, may not be held personally liable under the responsible corporate officer doctrine for the violations of the corporate respondents.

Individual Respondents

– Charles W. Howard

A review of the hearing record indicates that Charles W. Howard is the controlling owner of Lot 45,

and the sole owner of Lot 48 at Site 1 wherein the alleged violations occurred (*see* Hearing Report at 4 [Findings of Fact 13 and 15]). Additionally, Charles W. Howard is the longstanding president of corporate respondents, was directly involved in the negotiation of a 1994 consent order to resolve violations at Site 1, and has regularly attended the Department's inspections of the site (*see* Hearing Report at 8).[12] Therefore, based on the record before me and the reasons set forth by ALJ Sherman in the hearing report (*id.*), respondent Charles W. Howard is personally liable for the violations at Site 1. As noted, regarding the violations at Site 3, the ALJ concluded that respondent Charles W. Howard is liable for the Site 3 violation set forth in the nineteenth cause of action (*see* Hearing Report at 55).

– Kenneth Howard

Department staff failed to provide any evidence that Kenneth Howard was directly involved in the unlawful activities alleged to have occurred at Site 1. Accordingly, I concur with ALJ Sherman that Kenneth Howard cannot be found personally liable for the violations set forth in the 2012 Complaint.

– Charles P. Howard

The record indicates that respondent Charles P. Howard began conducting business at 79-18 Road,

[12] The 1994 Consent order, executed January 27, 1994, was signed by respondent Charles W. Howard to resolve violations at Site 1 (*see* Exhibit 1).

Broad Channel Queens, under the name Call-A-Head on or before May 16, 1977 (*see* Hearing Report at 3 [Finding of Fact 7]).[13] On November 4, 1982, Call-A-Head, Inc. was incorporated with its principal place of business at 302-304 Cross Bay Boulevard, Broad Channel, Queens (*see* Hearing Report at 2 [Finding of Fact 1]). Although Charles P. Howard founded Call-A-Head, respondent Charles W. Howard has been the president of Call-A-Head, Inc. since at least December 30, 1993 (*see* Hearing Report at 3 [Finding of Fact 4]).

Here, the violations that staff seeks to impose liability for are post-1994. Absent from the record is any evidence that Charles P. Howard was directly involved in the unlawful activities that occurred at Site 1 after May 22, 1994.[14] Therefore, I agree with ALJ Sherman that Charles P. Howard may not be held personally liable for the violations set forth in the 2012 Complaint.

Liability – Site 1

The causes of action in the 2012 Complaint allege that corporate respondents and respondent Charles W. Howard engaged in various regulated activities at Site 1 without a Department issued permit. Department staff cites ECL 25-0401(1) and 6 NYCRR 661.8 as the

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[13] This address was the residence of Charles P. Howard.

[14] The 1994 consent order granted Call-A-Head temporary (January 27, 1994 - May 27, 1994) authority to operate its portable toilet business at Site 1 (*see* §§ XI and XII of the 1994 consent order).

legal basis for respondents' liability for the various causes of action.[15]

ECL 25-0401(1) provides that no person may conduct a regulated activity without a permit issued by the Department. Regulated activities include, excavating, dumping, filling, or depositing fill of any kind, the erection of any structures, and any other activity within the wetland or adjacent area which may substantially impair or alter the tidal wetland (ECL 25-0401[2]). The regulations at 6 NYCRR part 661 set forth the land use guidelines and permit requirements for various activities that may be undertaken within tidal wetlands and their adjacent areas (*see* 6 NYCRR 661.8 [permit requirements for activities in tidal wetlands and wetland adjacent areas]).

In the hearing report, ALJ Sherman has comprehensively evaluated each of Department staff's causes of action (*see* Hearing Report at 21-44). Therefore, I will limit my analysis to a brief summary.

– First and Second Causes of Action

ALJ Sherman concluded that Department staff demonstrated that corporate respondents and respondent Charles W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by expanding the existing garage building

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[15] Department staff cites ECL Article 17 and former Part 751.1(a) of 6 NYCRR in support of the seventh cause of action. Department staff also cites ECL article 17 and other legal authorities in support of several causes of action which it subsequently withdrew.

and operating a non-water dependent commercial use facility (portable toilet operation) without a permit (*see* 6 NYCRR 661.5[b][48]; Hearing Report at 22-24). Specifically, respondents are alleged to have squared off the formerly L-shaped garage building and operated a portable toilet facility at Site 1 for a considerable number of years without ever having obtained permits from the Department. These violations were set forth in the first and second causes of action and were addressed by Department staff in hearing testimony.

In response to these allegations, respondents indicated that operation of the portable toilet facility business is a continuation of a "lawfully existing use" and therefore does not require a permit (*see* 6 NYCRR 661.5[b][1] [continuance of lawfully existing commercial uses and the continuance of all activities normally associated with the use does not require a permit]). However, respondents failed to provide any evidence that their portable toilet facility operation was in lawful existence at Site 1 as of August 20, 1977 (the effective date of the tidal wetlands land use regulations).[16]

Therefore, Department staff has established the violations alleged in the first and second causes of action.

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[16] This exemption, if it were applicable (which is not the case here), would not cover the reconstruction or expansion of existing buildings. Substantial reconstruction or expansion of existing functional structures requires a permit (*see* 6 NYCRR 661.5[b][24], [25]).

– Third Cause of Action

In the third cause of action, Department staff alleges that corporate respondents and respondent Charles W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by conducting the following regulated activities in a tidal wetland adjacent area without a permit: installation of two structures – an 80-foot long structure and 100-foot long structure; paving; and erecting fences (*see* 6 NYCRR 661.5[b][48] and [51]).

The hearing record indicates that, as of the effective date of the tidal wetlands land use regulations (August 20, 1977), the only building on Site 1 was the garage building (*see* Exhibits 38 and 39). On January 15, 1998, Department staff inspected Site 1 for the purpose of assessing compliance with the terms of a 1994 consent order.[17] During that inspection, staff observed that an 80-foot long structure had been erected at Site 1. Sometime between April 9, 2006 and March 10, 2008 a second large 100-foot long structure was erected on Site 1 (*see* Exhibit 14). These structures did not receive permits from the Department.

In addition, the record supports Department staff's allegations that portions of Site 1 were paved sometime after August 20, 1977 (*see* Exhibits 21, 22 and 38). Finally, sometime before the May 27, 2005, site inspection, a low white panel fence and posts were placed on Site 1 (*see* Hearing Report at 31). Evidence

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[17] Respondent Charles W. Howard signed the consent order on December 30, 1993. The consent order was subsequently executed by the Department on January 27, 1994 (*see* Exhibit 1).

in the hearing record indicates that all of these activities postdate the effective date of the land use regulations for tidal wetlands. Respondents did not obtain permits from the Department for any of these activities.[18] In light of the foregoing, I adopt the ALJ's analysis and conclusions regarding the third cause of action.

– Fourth and Fifth Causes of Action (withdrawn by Department staff)

– Sixth Cause of Action

In the sixth cause of action, Department staff alleges that corporate respondents and respondent Charles W. Howard created a ditch within the regulated tidal wetland adjacent area in violation of ECL 25-0401 and 6 NYCRR 661.8. In support of this cause of action, staff relies on a case initiation form and ticket issued by Environmental Conservation Officer (ECO) A.M. Mat to respondent Charles W. Howard. However, while both the case initiation form and the ticket issued by ECO Mat reference respondent having created a "point source discharge" in violation of ECL article 17, neither document references a violation of ECL article 25. Department staff did not provide

[18] In the 2012 Complaint, staff also alleges under the third cause of action that respondents installed oil tanks at Site 1 (*see* 2012 Complaint at 7 [par 47] and 12 [par 89]). Staff did not offer any evidence of the presence of an oil tank on Site 1. Moreover, the only testimony offered by Department staff with regard to the oil tanks at Site 1 was that of a DEC witness who stated that she did not recall observing oil tanks (*see* Hearing Report at 29-31).

corroborating evidence to demonstrate that respondents created a ditch as alleged in the 2012 Complaint (*see* Hearing Report at 33).

Accordingly, I concur with ALJ Sherman that Department staff did not meet its burden of proof with regard to the sixth cause of action.

– Seventh and Eighth Causes of Action

In his hearing report, ALJ Sherman determined that on April 30, 2003, respondents drained untreated residual content of portable toilets, including sewage, chemicals, and wash-down fluids directly into the waters of Jamaica Bay. This activity is violative of the permitting requirements of both ECL 17-0803 and ECL 25-0401 (*see* 6 NYCRR 751.1[a] and 6 NYCRR 661.5[b][44] and [52]).

The hearing record indicates that on April 30, 2003, ECO Mat observed washdown fluids, cleaning liquids, and the residual contents of portable toilets disposed of on the ground and discharging into the tidal wetland and regulated adjacent area and issued tickets regarding those activities. In addition, ECO Mat completed a case initiation form on May 1, 2003, in relation to these tickets. The ALJ determined that the ECO's statements in the tickets and the accompanying case initiation form to be sufficiently reliable and probative to form the basis for respondents' liability. In light of the foregoing, I agree that Department staff established these violations.

– Ninth, Tenth, Eleventh and Twelfth Causes of Action

These causes of action all relate to Department staff's allegations that corporate respondents and respondent Charles W. Howard placed gravel to create an area measuring 50 x 80 feet, and subsequently used that area for storage and operation of the portable toilet facility. In response to these allegations, respondents argued that staff failed to proffer any evidence that these activities substantially impaired the tidal wetland.

Based upon my review of the record, respondents' interpretation of the statutory and regulatory provisions at issue is contrary to their express terms. Both ECL 25-0401(2) and 6 NYCRR 661.4(ee)(1) provide a comprehensive list of regulated activities that if conducted in regulated tidal wetland or adjacent area, require a permit. These activities are regulated because, by their very nature, they are incompatible with the functions and benefits of tidal wetlands. Thus, these provisions do not require a separate showing that the alleged activities have substantially impaired the functions and benefits of the tidal wetland area.

During an inspection of Site 1 on June 3, 2003, Department staff observed the storage of a variety of items used in the portable toilet business in a gravel covered area, including a pile of fill as well as cut wetland vegetation. These activities are regulated pursuant to ECL article 25 and were conducted by respondents without a permit.

Department staff has proved these allegations by a preponderance of the evidence.

– Thirteenth through Eighteenth Causes of Action (withdrawn by Department Staff)

Liability – Site 3

– Nineteenth Cause of Action

The evidence in the hearing record supports Department staff's nineteenth cause of action with regard to Site 3, specifically, that on or about April 22, 2003, respondent Charles W. Howard placed fill in tidal wetland adjacent area without a permit in violation of ECL 25-0401 and 6 NYCRR 661.8 (*see* Hearing Report at 42-44). In support of this cause of action, staff relies on a ticket issued on April 25, 2003 by ECO Mat to respondent Charles W. Howard, and a site inspection conducted by Department employee Stephen Zahn on May 9, 2003 (*see* Exhibits 33 and 43).

I agree that Department staff has established this violation.

Based upon my review of the evidence in the hearing record, I concur with ALJ Sherman's recommendations and analysis. Department staff has proved by a preponderance of the evidence that: (i) the corporate respondents and respondent Charles W. Howard, jointly and severally, are liable for the violations set forth in the first, second, third (in part), seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action; and (ii) respondent Charles W. Howard is liable

for the violation set forth in the nineteenth cause of action.

Civil Penalty

ECL 71-2503(1)(a) provides that any person who violates the provisions of article 25 shall be liable for a civil penalty of not to exceed ten thousand dollars per day for each violation. Penalties may be assessed on a daily basis for ongoing violations, and each illegal activity is deemed a separate and distinct violation. The Commissioner has the authority to require restoration of damaged wetlands and the removal of illegal structures (*see* ECL 71-2503[1][c]).

In addition, ECL 17-0803, provides that it is unlawful to discharge pollutants to the waters of the State from any outlet or point source without a SPDES permit. The foregoing provision of the ECL is implemented through 6 NYCRR part 750, the SPDES permit regulations. At the time of the alleged violation, ECL 71-1929 provided for a penalty not to exceed $25,000 per day for each violation of ECL 17-0803.

In the 2012 Complaint, Department staff requests a penalty of at least $300,000. In its closing brief, staff requests a doubling of that amount since additional evidence of alleged misconduct by respondents was presented during the hearing (*see* Hearing Report at 50). ALJ Sherman rejected staff's request to double the penalty on the grounds that Department staff did not provide respondents with notice of their intent to increase the penalty (*see id.*). Furthermore, Department

staff withdrew several of the causes of action in the 2012 Complaint (*see* Hearing Report at 50). Accordingly, I agree with ALJ Sherman's recommendation and decline to assess a penalty amount in excess of that requested in the 2012 Complaint.

Respondents argue that they are not liable for the causes of action in the complaint, however, if they are, they maintain that any penalty imposed must be proportionate to the offense (*see* Hearing Report at 50). Furthermore, respondents assert that, if they are required to cease operations at Site 1, it would be an illegal taking of property in violation of the Fifth Amendment to the United States Constitution (*see* Hearing Report at 50). As discussed by the ALJ, this administrative proceeding is not the proper forum for a takings issue (*see* Hearing Report at 50 n 24).

The record in this matter makes clear that respondents have a long history of noncompliance with the Tidal Wetlands Act (ECL article 25) as well as the SPDES program (ECL article 17) at these sites. Respondents' liability for violations of the tidal wetlands and water pollution control laws and regulations arising from their unpermitted activities is clearly established on this record. Furthermore, several of these violations are continuing violations and therefore are subject to the imposition of daily penalties.

ALJ Sherman recommends that for the violations at Site 1, corporate respondents and Charles W. Howard jointly and severally be assessed a civil penalty in the amount of $300,000 (*see* Hearing Report at 55). I

concur with this recommendation. I note that this amount is but a small fraction of the potential statutory maximum penalty (*see* Hearing Report at 51-55). As discussed in the hearing report, the penalty for violation of ECL article 25 is $10,000 per day, assessed on a daily basis for the duration of the violation (*see* Hearing Report, Appendix A, Penalty Chart). As the record demonstrates, respondents conducted several regulated activities without a permit in regulated tidal wetland and adjacent area. Furthermore, respondents continued and substantially expanded their activities, despite having full knowledge that these activities were being conducted in violation of the law.

Restoration

In addition to a civil penalty for the violations, Department staff requests that respondents implement a restoration plan that includes the removal of all structures and impervious areas at Site 1, other than those that existed at the time that respondents took possession of Site 1.[19] Specifically, in its closing brief, Department staff indicates that restoration should include the following: removal of the unauthorized addition to

[19] Department staff also requests an order of the Commissioner, directing respondents to cease using Site 1 for the operation of a portable toilet facility. Respondents' activities at Site 1 constitute continuous violations of the Tidal Wetlands Act. ECL 71-2503(1)(a) states that in the case of a continuing violation, each day's continuance is deemed an additional violation. Therefore, a cease and desist order is unnecessary (*see Matter of Adonai*, Order of the Commissioner, Feb. 19, 2016, at 2; *see also* Hearing Report at 56).

the garage building (formerly L-shaped); removal of the 100-foot long structure along the southern boundary of Lot 45; removal of the 80-foot long structure on the east side; removal of all containers; removal of the concrete footing underneath the staked metal containers; removal of asphalt and other impervious surface areas; and removal of the fence and footings from the parcel adjacent to Lot 45 and Lot 48 (*see* Staff Closing Brief, at 28; *see also* 2012 Complaint at 16, § III).

Pursuant to ECL 71-2503(1)(c), the Commissioner has the authority to require restoration of the affected tidal wetland and adjacent area, and to order removal of the illegal structures. In addition, the Department's tidal wetlands enforcement policy is clear that the primary objective in enforcement of the Tidal Wetland Act (ECL article 25) is the restoration of wetlands adversely affected by unlawful acts (*see* Tidal Wetlands Enforcement Policy, Commissioner Policy DEE-7, Feb. 8, 1990, § III [listing restoration as the first goal of enforcement]).

ALJ Sherman has recommended restoration as requested by Department staff with certain modifications. ALJ Sherman however has declined to recommend removal of the unauthorized addition to the garage building (formerly L-shaped) (*see* Hearing Report at 57). According to the ALJ, although the unauthorized addition is substantial (approximately 16 x 24 feet), it is located on the southwest corner of the building and is further from the tidal wetland than much of the original structure (*see id.*). ALJ Sherman further states that although a permit would be required for

the expansion of an existing commercial building within regulated tidal wetland adjacent area, such activity is a generally compatible use "GCP" (6 NYCRR 661.5[b][25]). Therefore, ALJ Sherman does not recommend removal of the addition.

I disagree. Based on my review of this record, the removal of the unauthorized addition to the garage building is warranted and appropriate. The expansion of an existing commercial building within regulated tidal wetland adjacent area requires a permit. Furthermore, respondents did not seek to obtain the required approval from the Department for the addition to the garage building. Accordingly, the unauthorized addition to the garage building (formerly L-shaped) should be removed.

The remainder of the restoration plan recommended by ALJ Sherman, which includes among other things, the removal of fill and certain structures from regulated tidal wetland and adjacent areas is authorized and appropriate (*see* Hearing Report at 57-58).[20] Specifically, no later than ninety (90) days after service of this decision and order upon respondents, respondents are directed to submit an approvable (i.e., approvable as written or with only minimal revision) Site 1 restoration plan to Department staff for its review and

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[20] The ALJ also noted that the request that respondents remove all gravel and other imported fill should be limited to the fill associated with the proven violations at Site 1 (*see* Hearing Report at 57-58).

approval. The plan shall, at a minimum, provide for the following with regard to Site 1:

- the removal of the unauthorized addition to the garage building (formerly L-shaped);
- the removal of the 100-foot long structure along the southern boundary of Lot 45;
- the removal of the 80-foot long structure on the east side;
- the removal of the metal containers and concrete footings;
- the removal of asphalt and other impervious surface areas;
- the removal of the fence and footings from the parcel adjacent to Lots 45 and 48;
- removal of all gravel and imported fill associated with the proven violations;
- the creation of a gentle natural slope between the existing tidal wetland and the adjoining upland and the preparation of the soil and the installation of site-appropriate native plantings as well as their monitoring consistent with the New York State Salt Marsh Restoration and Monitoring Guidelines;[21]

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[21] ALJ Sherman has evaluated Department staff's request for a barrier fence to be installed along the property boundary of Lots 45 and 48 and has declined to make that recommendation (*see* Hearing Report at 58). I concur with the ALJ.

- the use of best management practices in all restoration activities to prevent erosion of soil and sediments; and
- a timetable for the completion of each task.

Upon good cause shown by respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp., Department staff at its discretion may modify the restoration plan. Respondents must submit any requested modification to the plan in writing to Department staff with appropriate supporting documentation. If Department staff approves the modification, Department staff shall notify respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. in writing of its approval.

Within fourteen (14) days of the completion of all work required under the restoration plan, respondents shall submit a written report, including photographs, to Department staff documenting that respondents have completed all the restoration work.

To the extent that any of the remedial activity at Site 1 requires respondents to gain entry onto the adjacent parcel which is owned by the United States and is part of the Gateway National Recreation Area, I direct that respondents make all reasonable efforts to secure permission from the Gateway National Recreation Area.

In recognition of the cost of the restoration work that respondents are being directed to undertake and in consideration of Department policy regarding

wetland restoration, I am suspending $100,000 of the $300,000 civil penalty, contingent upon respondents' implementation of the required restoration plan to Department staff's satisfaction and compliance with all other terms and conditions of this decision and order. The unsuspended portion of the penalty ($200,000) shall be due and payable within ninety (90) days of the service of this decision and order upon respondents.

NOW, THEREFORE, having considered these matters and being duly advised, it is **ORDERED** that:

I. Respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp., jointly and severally, are adjudged to have violated the following provisions of the tidal wetlands law and regulations and the water pollution control law and regulations at Site 1:

- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(48) by expanding a garage building within the regulated tidal wetland adjacent area without a permit;
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(48) by operating a commercial portable toilet facility within the regulated tidal wetland and tidal wetland adjacent area without a permit;
- ECL 25-0401 and 6 NYCRR 661.8, 661.5(b)(48) and (51) by constructing two structures, paving portions of Site 1, and erecting fences within the regulated tidal wetland adjacent area without a permit;

- ECL 17-0803 and 6 NYCRR 751.1(a) by draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, on April 30, 2003, directly into the waters of Jamaica Bay without a permit;
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(44) and (52) by draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, on April 30, 2003, directly into the waters of Jamaica Bay without a permit;
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30) and (51) by placing gravel to create a storage yard/parking lot measuring 50 feet by 80 feet immediately east of the facility, approximately 7 feet landward of the tidal wetland boundary without a permit;
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(48) and (51) by placing a metal container, portable toilets, vehicles and trailers in the gravel storage area within the regulated tidal wetland adjacent area without a permit;
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(30) by placing fill without a permit on June 3, 2003 within the regulated tidal wetland adjacent area; and
- ECL 25-0401 and 6 NYCRR 661.8 and 661.5(b)(57) by clearing and removing vegetation on June 3, 2003, without a permit

within the regulated tidal wetland adjacent area.

II. Respondent Charles W. Howard is also adjudged to have violated ECL 25-0401 and 6 NYCCR 661.8 and 661.5(b)(3) by placing fill, on or about April 22, 2003, without a permit in the regulated tidal wetland adjacent area at Site 3.

III. The charges against Kenneth Howard and Charles P. Howard are dismissed.

IV. For the violations at Site 1, respondent Charles W. Howard and corporate respondents Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. are jointly and severally assessed a civil penalty in the amount of three hundred thousand dollars ($300,000). One hundred thousand dollars ($100,000) of the civil penalty shall be suspended provided that respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. comply with the terms and conditions of this decision and order, including but not limited to the timely payment of the non-suspended portion of the civil penalty (two hundred thousand dollars [$200,000]), the submission of an approvable restoration plan no later than ninety (90) days after service of this decision and order upon them, and the implementation of the restoration plan to the satisfaction of Department staff. If respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. fail to comply with any of the terms or conditions of this decision and order, the suspended portion of the penalty (that is, one hundred thousand dollars

[$100,000]) shall immediately become due and payable and shall be submitted to Department staff in the same form and to the same address as the non-suspended portion of the penalty.

The non-suspended portion of the civil penalty, that is, two hundred thousand dollars ($200,000), shall be due and payable within ninety (90) days after service of this decision and order upon respondents Charles W. Howard and corporate respondents Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.

V. For the violation at Site 3, respondent Charles W. Howard is assessed a civil penalty in the amount of seven thousand five hundred dollars ($7,500). This penalty shall be due and payable within ninety (90) days after the service of the decision and order upon respondent Charles W. Howard.

VI. Payments of the civil penalties shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and hand-delivered or mailed to the Department at the following address:

Udo Drescher, Esq
Assistant Regional Attorney
New York State Department of
Environmental Conservation, Region 2
One Hunters Point Plaza
47-40 21st Street
Long Island City, New York 11101-5401

VII. No later than ninety (90) days after service of this decision and order upon respondents, respondents are directed to submit an approvable (i.e., approvable as written or with only minimal revision) restoration plan to Department staff for its review and approval. The plan shall, at a minimum, provide for the following with regard to

Site 1:

- the removal of the unauthorized addition to the garage building (formerly L-shaped);
- the removal of the 100-foot long structure along the southern boundary of Lot 45;
- the removal of the 80-foot long structure on the east side;
- the removal of the metal containers and concrete footings;
- the removal of asphalt and other impervious surface areas;
- the removal of the fence and footings from the parcel adjacent to Lots 45 and 48;
- removal of all gravel and imported fill associated with the proven violations;
- the creation of a gentle natural slope between the existing tidal wetland and the adjoining upland and the preparation of the soil and the installation of site-appropriate native plantings as well as their monitoring consistent with the New York State Salt

Marsh Restoration and Monitoring Guidelines; and

- the use of best management practices in all restoration activities to prevent erosion of soil and sediments; and
- a timetable for the completion of each task.

Upon good cause shown by respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp., Department staff at its discretion may modify the restoration plan. Respondents must make any requested modification to the plan in writing with appropriate supporting documentation. If Department staff approves the modification, Department staff shall notify respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. in writing.

Within fourteen (14) days of the completion of all work required under the restoration plan, respondents shall submit a report, including photographs, to Department staff documenting that respondents have completed all the restoration work

VIII. Respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. shall notify Department staff, by certified mail or such other means as may be agreed to by Department staff, at least fourteen (14) days prior to the date of commencement of the work under the approved restoration plan. Within fourteen (14) days of the completion of all work required under the restoration plan, respondents shall

submit a written report, including photographs, to Department staff documenting that respondents have completed all the restoration work.

IX. All communications from respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. to the Department concerning this decision and order shall be made to Udo Drescher Esq., Assistant Regional Attorney, at the address listed in paragraph VI of this decision and order.

X. The provisions, terms, and conditions of this decision and order shall bind respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp., their agents, successors and assigns, in any and all capacities.

For the New York State Department of Environmental Conservation

By: /s/ Basil Seggos
Basil Seggos
Commissioner

Albany, New York
Dated: March 4, 2019

TO:

Call-A-Head Portable Toilets, Inc. By Certified Mail
302-304 Cross Bay Blvd.
Broad Channel, New York 11693-1026

Call-A-Head Corp. By Certified Mail
302-304 Cross Bay Blvd.
Broad Channel, New York 11693-1026

Charles W. Howard — By Certified Mail
302-304 Cross Bay Blvd.
Broad Channel, New York 11693-1026

Kenneth Howard — By Certified Mail
302-304 Cross Bay Blvd.
Broad Channel, New York 11693-1026

Charles P. Howard — By Certified Mail
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Broad Channel, New York 11693-1026

New York City Corporation Counsel — By Certified Mail
100 Church Street
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City of New York Law Department — By Certified Mail
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Long Island City, New York 11101-5401

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Alleged Violations of the New York State Environmental Conservation Law, Articles 17 and 25, and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

CALL-A-HEAD PORTABLE TOILETS, INC.; CALL-A-HEAD CORP.; CHARLES W. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.; KENNETH HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.; and CHARLES P. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp.,

Respondents.

DEC File Nos. R2-20030505-128, R2-20030505-129

HEARING REPORT

- by -

/s/ Richard A. Sherman
Richard A. Sherman
Administrative Law Judge

February 14, 2018

SUMMARY

A portable toilet supply business, conducted under the name Call-A-Head, has operated in Broad Channel, Queens County, New York, for decades. During that time, the business expanded from a small proprietorship operated from the owner's residence to one of the largest portable toilet suppliers in the City of New York.

As detailed in this hearing report, I conclude that, for much of its existence, Call-A-Head has operated in blatant violation of the tidal wetlands law and regulations. Because of the egregious and continuing nature of some of those violations, I recommend that the Commissioner issue an order (i) assessing a penalty in the amount of $300,000 against those respondents held to be liable; and (ii) directing that the liable respondents undertake corrective measures at Call-A-Head's principal place of business. I also conclude that respondent Charles W. Howard violated the tidal wetlands law at a property he owned in Broad Channel that is not related to the Call-A-Head operation. For that violation, I recommend that the Commissioner assess a penalty

against respondent Charles W. Howard in the amount of $7,500.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this administrative enforcement proceeding by service of a complaint, dated July 2, 2004, on respondents. The matter was assigned to Administrative Law Judge (ALJ) Susan J. DuBois. Over the next several years, ALJ DuBois issued a series of rulings on the matter (see http://www.dec.ny.gov/hearings/2479.html). This matter was assigned to me in October 2011, after ALJ DuBois retired from the Department (see letter to the parties, dated Oct. 3, 2011).

As authorized by ALJ DuBois, Department staff served an amended complaint (2012 complaint), dated May 8, 2012, by certified mail, on respondents. Among other things, the 2012 complaint alleges that respondents operate a large-scale commercial portable toilet facility and that respondents' operation of that facility violated numerous provisions of the tidal wetlands law and regulations, as well as provisions of the water pollution control law and regulations. Respondents served an answer (answer), dated June 22, 2012, wherein they generally deny staff's allegations and assert two affirmative defenses.

Pursuant to section 622.9(e) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), this office provided a

written notice of hearing to respondents by letter dated May 12, 2016. The hearing was held in accordance with the provisions of the Department's uniform enforcement hearing procedures (6 NYCRR part 622) and testimony was taken on the following seven hearing dates: June 13, 14, 15, 2016; November 15, 16, 17, 2016; and January 10, 2017.[1]

Assistant Regional Attorney Udo Drescher, DEC Region 2, represented Department staff and called the following witnesses: Tamara Greco, DEC Environmental Analyst 2; Leigh DeMarco, former DEC Marine Biologist 1; Captain Francisco Lopez, DEC Environmental Conservation Officer; George Stadnik, DEC Marine Resource Specialist 1; and Stephen Zahn, Director, DEC Region 2. Jonathan Scher, Esq, The Scher Law Firm, LLP (Scher Law Firm), represented respondents at the hearing until he was dismissed by respondents at the close of staff's direct case. After Mr. Scher was dismissed, respondent Charles Howard represented respondents at the hearing. Respondents called no witnesses.

At the close of the evidentiary hearing, I authorized the parties to file written closing briefs within 45 days (see transcript [tr] at 1198-1199; 6 NYCRR 622.10[a][5]). Accordingly, closing briefs were due on or before June 23, 2017. At the request of respondents,

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[1] As discussed below, numerous other dates were scheduled for hearing (see infra at 12-18). For a variety of reasons, these other dates were adjourned either prior to or on the day of hearing (id.).

and with the agreement of Department staff, I extended the date for closing briefs to July 28, 2017.

By letter dated May 12, 2017, I directed the parties to file their respective closing briefs electronically, with hard copy to follow. I also advised the parties that I would entertain requests to file responses to closing briefs, provided that such requests were filed within 10 days of the receipt of the opposing party's closing brief. Both parties timely submitted closing briefs with this office by email on or before July 28, 2017, and subsequently filed hard copies. This office received hard copy of respondents' post-hearing brief (respondents' closing brief), dated July 26, 2017, on July 28, 2017. This office received hard copy of Department staff's closing brief (staff's closing brief), dated July 27, 2017, on August 8, 2017. Neither party submitted a request to file a brief in response. Accordingly, the hearing record closed on August 18, 2017, ten days after the hard copy of staff's closing brief was filed with this office.

Prior to the close of the hearing record, respondents moved to (i) dismiss this matter for want of subject matter jurisdiction; or (ii), in the alternative, to reopen the evidentiary hearing (see respondents' motions, dated June 28, 2017). Department staff opposed the motions (see staff's reply, dated July 5, 2017). As discussed below, I deny respondents' motions in their entirety.

FINDINGS OF FACT

Respondents

1. Call-A-Head Portable Toilets, Inc. (Call-A-Head, Inc.), is a domestic business corporation, incorporated on November 4, 1982, with its principal place of business located at 302-304 Cross Bay Boulevard, Broad Channel, Queens County (2012 complaint ¶ 5; answer ¶ 1; see also New York State Department of State, Corporation & Business Entity Database, https://www.dos.ny.gov/corps/bus_entity_search.html [accessed Sept. 13, 2017]).

2. Call-A-Head Corp. is a domestic business corporation, incorporated on November 1, 2001, with its principal place of business located at 302-304 Cross Bay Boulevard, Broad Channel, Queens County (Call-A-Head Corp. and Call-A-Head, Inc. are, collectively, referred to herein as the "corporate respondents") (2012 complaint ¶ 6; answer ¶ 1; see also New York State Department of State, Corporation & Business Entity Database, https://www.dos.ny.gov/corps/bus_entity_search.html [accessed Sept. 13, 2017]).

3. Charles W. Howard (C.W. Howard or Mr. Howard) was, at all times pertinent to the allegations in the 2012 complaint, a corporate officer of the corporate respondents responsible for and directly involved in the day-to-day business activities of the corporate respondents (2012 complaint ¶ 8; answer ¶ 1).

4. Respondent C.W. Howard has been the president of Call-A-Head, Inc., since at least December 30, 1993, and has been the president of Call-A-Head

Corp. since it was incorporated on November 1, 2001 (see exhibit 1 at 9 [consent order[2] between DEC and Call-A-Head Corp., signed by C.W. Howard, as president, on December 30, 1993]; exhibit 34 [2004 plea agreement "between Call-A-Head (also known as Call-A-Head Corp., Call-A-Head Portable Toilets, Inc [sic], Call-A-Head Portable Toilet, Inc., and Call-A-Head Portable Toilet, Corp.; hereinafter 'Call-A-Head') and the Queens County District Attorney's Office," signed by C.W. Howard as "President" of "Call-A-Head"]).

5. Kenneth Howard was, at all times pertinent to the allegations in the 2012 complaint, a corporate officer of the corporate respondents responsible for and directly involved in the day-to-day business activities of the corporate respondents (2012 complaint ¶ 9; answer ¶ 1).

6. Charles P. Howard (C.P. Howard) was, at all times pertinent to the allegations in the 2012 complaint, a corporate officer of the corporate respondents

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[2] Note that the referenced consent order (1994 consent order) was signed by respondent C.W. Howard on December 30, 1993, and became effective upon its execution by the Department on January 27, 1994 (see exhibit 1 at 3 [¶ IX], 5 [signature page]; see also respondents' motion, dated Mar. 21, 2005 [attached affidavit of respondent C.W. Howard, sworn on Mar. 21, 2005, ¶ 1 (stating, "I am president of Call-AHead Portable Toilets Inc., d/b/a/ Call-A-Head Portable Toilets [CAH]"), ¶ 5 (stating "I entered into a Consent Order on or about December 30, 1993")]; respondents' motion, dated Jan. 3, 2007 [attached affidavit of respondent C.W. Howard, sworn on Jan. 3, 2007, ¶ 1 (stating, "I am president of Call-A-Head Portable Toilets Inc., d/b/a/ Call-A-Head Portable Toilets [CAH]"), ¶ 6 (stating "I entered into a Consent Order on or about December 30, 1993")]; respondents' closing brief at 42 [stating C.W. Howard "executed the [1994] Order on Consent"]).

responsible for and directly involved in the day-to-day business activities of the corporate respondents (2012 complaint ¶ 10; answer ¶ 1).

7. Respondent C.P. Howard filed a "Certificate of Conducting Business under an Assumed Name" with Queens County on May 16, 1977 (exhibit 3). The certificate states that respondent C. P. Howard is conducting or transacting business under the name Call-A-Head at 79-18 Road, Broad Channel, Queens County, and names the same address as C. P. Howard's residence (id.).[3]

Sites

8. The Corporate respondents' principal place of business (Site 1) is located at 302-304 Cross Bay Boulevard, Broad Channel, Queens County. As used in this hearing report, Site 1 is comprised of two tax parcels that are owned by one or more of the respondents (Queens County Tax Block 15375 Lot 48 [Lot 48], and Queens County Tax Block 15376 Lot 45 [Lot 45]) (2012 complaint ¶¶ 12-13; answer ¶ 1; exhibits 8-10) and portions of an adjacent parcel to the east (adjacent parcel) where respondents are alleged to have engaged in activities relevant to this matter (see e.g. 2012 complaint ¶ 55 [alleging various activities on the adjacent parcel]; exhibit 36 at 2 [DEC inspection report drawing of Site 1]).

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[3] This address, "79-18 Road, Broad Channel," appears elsewhere in the record as "79 West 18th Road, Broad Channel" (see exhibit 4 [deed into Charles P. Howard]).

9. The adjacent parcel is owned by the United States of America and is part of the Gateway National Recreation Area (Gateway) (see exhibit 11 [deed into the United States of America]; tr at 21-26 [discussion of exhibit 11]; tr at 710 [Stadnik testimony that the intertidal marsh at Site 1 "is part of the Jamaica Bay Wildlife Refuge system, which is also part of the Gateway National Park system"]; see also exhibit 39 [survey identifying the boundary with the adjacent parcel as "GATEWAY NATIONAL RECREATION AREA"]; https://www.nps.gov/gate/planyourvisit/upload/JBayRefugeMap_2014-Update-2.pdf [National Park Service map of Gateway National Recreation Area, Jamaica Bay Wildlife Refuge (Broad Channel is shown in grey at bottom right of map)] [accessed Sept. 13, 2017]).

10. Lot 45 is the larger of the two tax parcels at Site 1 that are owned by a respondent, and measures 75' x 100' (2012 complaint ¶ 14; answer ¶ 1; exhibit 4 [deed into C.P. Howard]; exhibit 6 [deed into C.W. Howard and Ken Howard]).

11. Prior to May 4, 1990, Lot 45 was owned by the City of New York and occupied by respondents under an agreement with the City (2012 complaint ¶ 20, answer ¶ 1).

12. Lot 45 was acquired by respondent C.P. Howard on May 4, 1990 (2012 complaint ¶ 21, answer ¶ 1; exhibit 4 [deed into C.P. Howard]).

13. Lot 45 was acquired by respondents C.W. Howard (holding a 60 percent interest) and Kenneth Howard (holding a 40 percent interest) on February 11, 2002 (2012 complaint ¶ 22; answer ¶ 1; exhibit 6 [deed into C.W. Howard and Kenneth Howard]).

14. Lot 48 is the smaller of the two tax parcels at Site 1 that are owned by a respondent, and measures 30' x 100' (2012 complaint ¶¶ 15, 25; answer ¶ 1; exhibit 7 [deed into C.W. Howard]).

15. Lot 48 was acquired by respondent C.W. Howard on December 10, 2001 (2012 complaint ¶¶ 15, 25; answer ¶ 1; exhibit 7 [deed into C.W. Howard]).

16. A portion of Site 1 is located within a regulated tidal wetland, as depicted on the official tidal wetlands map number 598-496, and the remainder of Site 1, including all of Lot 45 and Lot 48, is located within a regulated tidal wetland adjacent area (2012 complaint ¶¶ 16-17, answer ¶ 1; exhibit 2 [tidal wetlands map 598-496]; tr at 117 [Greco marking exhibit 2 with a blue line indicating the tidal wetlands boundary]; tr at 360-361 [Greco marking exhibit 2 with orange dot indicating the location of Site 1]).

17. At Site 1, the corporate respondents operate one of the largest commercial portable toilet operations in the City of New York (2012 complaint ¶ 35, answer ¶ 4).

18. Respondent C.W. Howard acquired property (Site 3[4]) located at 40 West 17th Road, Broad Channel, Queens County, on October 1, 2002 (2012 complaint ¶¶ 30-31; answer ¶ 2; exhibit 12 [deed into C.W. Howard]). Site 3 is comprised of two tax

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[4] The 2012 Complaint included causes of action relating to a parcel (Site 2) located approximately 400' north of Site 1 on Cross Bay Boulevard. Department staff withdrew those causes of action.

parcels: Queens County Tax Block 15322 Lot 19 and Lot 20 (id.).

19. Respondent C.W. Howard was "present at each of the DEC's inspections" (respondents' closing brief, exhibit F [affidavit of C.W. Howard, sworn on June 28, 2017, ¶ 16]).

20. Respondent C.W. Howard sold Site 3 on October 18, 2011 (exhibit 13).

DISCUSSION

Respondents

The 2012 complaint had named the City of New York, Department of Citywide Administrative Services (DCAS), as a respondent in this matter. By ruling dated June 9, 2015, I granted DCAS' motion to be dismissed from the proceeding and directed staff to remove DCAS from the caption (see http://www.dec.ny.gov/hearings/102097.html).

With regard to the two corporate respondents (Call-A-Head, Inc. and Call-A-Head Corp.) neither Department staff nor respondents attempt to distinguish the corporations' respective operations in relation to the allegations in the 2012 complaint. Indeed, both parties generally refer to the corporate respondents as a single entity (see e.g. 2012 complaint ¶ 7 [stating that the corporate respondents "are hereinafter jointly referred to as 'Call-A-Head' "]; respondents' closing brief at 1 [defining "CAH" to mean Call-A-Head Corp. and stating that CAH has been in a "twenty year fight"

with the Department[5]]; id. at 63 [respondents' conclusion that "DEC has not presented any evidence of ongoing concerns or environmental impact relating to CAH's activities"]).

This melding of the corporate entities has a long history. I note, for example, that Call-A-Head Corp. is identified as the respondent in the 1994 consent order, despite the fact that only Call-A-Head, Inc. was incorporated at that time and Call-A-Head Corp. was not incorporated until 2001 (see exhibit 1; findings of fact ¶ 1, 2). Nevertheless, respondent C.W. Howard signed the 1994 consent order as the President of Call-A-Head Corp. (respondents' closing brief at 42 [stating that respondent C.W. Howard "executed the Order on Consent"]; exhibit 1 at 9).

I also note that a 2004 plea agreement (2004 plea) "between Call-A-Head . . . and the Queens County District Attorney's Office" makes no distinction between the corporate entities (see exhibit 34 ¶ 1). Rather, the 2004 plea treats the corporate respondents collectively (see id. [stating that Call-A-Head is "also known as Call-A-Head Corp., Call-A-Head Portable Toilets, Inc [sic], Call-A-Head Portable Toilet, Inc., and Call-A-Head Portable Toilet, Corp."]). Lastly, I note that Department of State records indicate that both of the corporate respondents are long-established legal entities,

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[5] Although Call-A-Head, Inc. was incorporated more than twenty years ago, Call-A-Head Corp. was not incorporated until 2001 (see findings of fact ¶¶ 1, 2). Accordingly, Call-A-Head Corp. has not been in a twenty-year fight with DEC.

and that the principle executive office of both corporations is located at Site 1 (see findings of fact ¶¶ 1-2).

Given the foregoing, unless indicated otherwise, this hearing report does not distinguish between the two corporate respondents.

With regard to the individual respondents named in the 2012 complaint (C.W. Howard, Kenneth Howard, and C.P. Howard), respondents argue that Department staff failed to proffer testimony to demonstrate "whether the responsible corporate officer doctrine applies" (respondents' closing brief at 34-35). Therefore, respondents argue, the allegations against the individual respondents must be dismissed (id.).

By its 2012 complaint, Department staff alleged that each of the individual respondents "is and was at all pertinent times a corporate officer of [the corporate respondents] and as such is and was at all pertinent times responsible for and directly involved in the corporation[s'] day-to-day business activities" (2012 complaint ¶¶ 8-10). By their answer, respondents admit the foregoing (answer ¶ 1). This, standing alone, is not sufficient to establish that the responsible corporate officer doctrine should be applied here.

The Department has long held that liability may attach to a corporate officer who has the "authority and responsibility to prevent the violation" (Matter of Galfunt, Order of the Commissioner, May 5, 1993, at 2). More recently, in Matter of Supreme Energy Corporation, the Commissioner held that a "corporate officer can be held personally liable for violations of the

corporate entity that threaten the public health, safety, or welfare [and] need only have responsibility over the activities of the business that caused the violations" (id., Decision and Order of the Commissioner, Apr. 11, 2014, at 25 [citing Galfunt (additional citations omitted)]).[6]

The allegations in the 2012 complaint are not sufficient to establish whether any of the individual respondents had the authority and responsibility to prevent the alleged violations. Further, Department staff did not raise the responsible corporate officer doctrine at hearing or in its closing brief. Indeed, the only individual respondent that was the subject of testimony in relation to the alleged violations at Site 1 was C.W. Howard (see e.g. tr at 180-181, 527-528). Accordingly, it is not clear that staff sought to impose vicarious liability upon the individual respondents through the responsible corporate officer doctrine.

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[6] On judicial review, the Appellate Division upheld the Commissioner's determination that the individual was liable for the corporation's violations, but did not reach the issue of vicarious liability under the responsible corporate officer doctrine (Supreme Energy, LLC v Martens, 145 AD3d 1147, 1151 [3d Dept 2016] [holding "we find no error in respondent's determination to pierce the corporate veil and to hold [the individual respondent] personally responsible for the imposed financial penalties. In light of this determination, it is unnecessary for us to reach whether personal liability attaches under the responsible corporate officer doctrine"]).

On this record, I conclude that the individual respondents may not be held liable for the actions of the corporate respondents through application of the responsible corporate officer doctrine.

This does not, however, warrant dismissal of all of the individual respondents from this matter. I discuss the respective liability of each of the individual respondents below.

With regard to Kenneth Howard, Department staff offers no argument in support of holding him personally liable for the violations alleged in the 2012 complaint. The record is devoid of any evidence that he was directly involved in the unlawful activities alleged in the 2012 complaint and I find no basis to infer that he was directly involved. Accordingly, I conclude that Kenneth Howard may not be held personally liable for the violations set forth in the 2012 complaint.

Respondent C.P. Howard began conducting business under the name Call-A-Head on or before May 16, 1977 (see exhibit 3 [business certificate, dated May 16, 1977, wherein respondent C.P. Howard certifies that "I am conducting business under the name or designation of CALL-A-HEAD"]). Accordingly, respondent C.P. Howard may be held personally liable for any violations attributable to Call-A-Head until November 4, 1982, the date that Call-A-Head, Inc. was incorporated. Department staff, however, does not seek to impose liability for violations dating back to that time.

Although respondents' activities at Site 1 date back to at least 1979, Department staff seeks to impose

liability only for those violations that occurred after May 27, 1994, the date that the 1994 consent order expired (see 2012 complaint ¶¶ 39-42 [noting that the 1994 consent order granted "Call-A-Head Corp." "temporary authority to operate [that] became effective on January 27, 1994 and expired on May 27, 1994"]; staff's closing brief at 35-36 [seeking penalties for violations commencing on or after May 27, 1994]; see also infra at 47-48 [discussion of the expiration of the 1994 consent order]). Accordingly, respondent C.P. Howard's operation of Call-A-Head as a d/b/a predates the period for which staff seeks to impose liability.

The record is devoid of any evidence that respondent C.P. Howard was directly involved in the unlawful activities alleged in the 2012 complaint that occurred after May 27, 1994 and I find no basis to infer that he was directly involved. Accordingly, I conclude that respondent C.P. Howard may not be held personally liable for the violations set forth in the 2012 complaint.

With regard to respondent C.W. Howard, however, I conclude that the record demonstrates that he may be held personally liable for alleged violations at Site 1. Respondent C.W. Howard is the controlling owner of Lot 45 and the sole owner of Lot 48 at Site 1 (see findings of fact ¶ 13, 15). Respondent C.W. Howard has owned a majority interest in Lot 45 since February 11, 2002 (findings of fact ¶ 13) and has owned Lot 48 since December 10, 2001 (findings of fact ¶ 15). He also applied, as the owner of Lot 45, for a tidal wetlands permit in February 2004 (see exhibit 19 [Joint Application for Permit, signed by C.W. Howard as the property

owner, item 2 (naming C.W. Howard as applicant), item 4 (naming C.W. Howard as the owner)]).

Additionally, respondent C.W. Howard is the longstanding president of the corporate respondents, further demonstrating his control over Site 1 (see findings of fact ¶ 4). He was directly involved in the negotiations of the 1994 consent order and signed that order on behalf of Call-A-Head Corp. (id.; see also respondents' motion, dated Jan. 3, 2007 [attached affidavit of C.W. Howard, sworn on Jan. 7, 2007, ¶ 3 (stating "I was involved with and participated in negotiations" relating to the 1994 consent order), ¶ 6 (stating "I entered into [the 1994 consent order] on or about December 30, 1993"), ¶ 8 (stating "I diligently complied with all . . . aspects" of the 1994 consent order)]; respondents' motion, dated Mar. 21, 2005 [attached affidavit of C.W. Howard, sworn on Mar. 21, 2005, ¶¶ 2, 5, 7]). He has also regularly attended the Department's inspections of Site 1 (see respondents' closing brief, exhibit F ¶ 16 [affidavit of C.W. Howard, sworn on June 28, 2017 (stating "I have been present at each of the DEC's inspections and can respond, based upon my personal knowledge, to the allegations and testimony set forth in the hearing")]).

I conclude that respondent C.W. Howard, as the longtime owner of Lot 45 and Lot 48 and the president of the corporate occupants of Site 1, had control over Site 1. Accordingly, respondent C.W. Howard may be held liable for the unlawful activities at Site 1 alleged in the 2012 complaint (see Matter of Francis, Order of the Commissioner, April 26, 2011, adopting Hearing

Report at 12 [holding that "[t]he benefits derived from [unlawful] activities at the site, inured to the fee owners. As such, and absent evidence to the contrary, a reasonable inference may be drawn that the [activities were] done at the direction, or with the consent, of the fee owners"]; Matter of Zatarain, Order of the Commissioner, July 17, 1992, at 2 [rejecting a respondent's argument that she should not be held liable for the actions of a contractor, and holding that the respondent was liable "as the owner of the property and in her role as supervisor of the work"]).

Ruling on Respondents' Post-Hearing Motion

By motion dated June 28, 2017, respondents moved to dismiss this matter for want of subject matter jurisdiction or, in the alternative, to reopen the evidentiary hearing. Department staff opposed the motions (see staff's reply to respondents' motion, dated July 5, 2017). For the reasons discussed below, I deny respondents' motions.

– Subject Matter Jurisdiction

With regard to subject matter jurisdiction, respondents correctly assert that this defense may be raised at any time and is non-waivable (see Lacks v Lacks, 41 NY2d 71, 74–75 [1976]). Accordingly, despite the fact that respondents only raised the issue after this proceeding had been before the Department for many years, and the evidentiary hearing had been

concluded, I will consider the merits of respondents' argument on subject matter jurisdiction.

Respondents' motion papers consist of a memorandum of law (respondents' memorandum), notice of motion, affirmation of Austin Graff, affidavit of Charles W. Howard, each dated June 28, 2017, and seven exhibits. Respondents also filed a letter, dated July 7, 2017, in further support of respondents' motion. Staff did not object to the July 7 letter and I considered its contents in my determination of respondents' motion. Department staff filed a reply, dated July 5, 2017, to respondents' motion. Staff's reply included one exhibit.

Respondents argue that a railroad track to the east of Site 1 "cuts off the DEC's jurisdiction over Respondent's [sic] property" and "requires the dismissal of this proceeding with prejudice based upon subject matter jurisdiction" (respondents' memorandum at 1). Respondents' argument is without merit, both on the law and on the facts.

Respondents confuse the issue of the whether Department staff has sustained its burden to prove that Site 1 falls within a regulated tidal wetland or adjacent area with the issue of subject matter jurisdiction.

This distinction, between subject matter jurisdiction and the elements of a cause of action, was addressed by the Court of Appeals in Manhattan Telecom. Corp. v H & A Locksmith, Inc., 21 NY3d 200 (2013). The Court noted that

> "the word 'jurisdiction' is often loosely used. But in applying the principle that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived, it is necessary to understand the word in its strict, narrow sense. So understood, it refers to objections that are fundamental to the power of adjudication of a court. 'Lack of jurisdiction' should not be used to mean merely that elements of a cause of action are absent, but that the matter before the court was not the kind of matter on which the court had power to rule" (id. at 203 [internal quotation marks and citations omitted]).

Accordingly, the issue of subject matter jurisdiction relates to whether this office, and ultimately the Commissioner, has the authority to hear and decide tidal wetlands enforcement matters. On this, there can be no dispute. The Department is authorized by law to hear tidal wetlands enforcement matters (see e.g. ECL 3-301[2][g] [authorizing the Department to "[e]nter and inspect any property or premises . . . for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated" pursuant to the Environmental Conservation Law], ECL 3-301[2][h] [authorizing the Department to "[c]onduct investigations and hold hearings"], ECL 71-2503[1][a] [authorizing the Commissioner to assess penalties against "[a]ny person who violates, disobeys or disregards any provision of [the Tidal Wetlands Act] . . . after a hearing or opportunity to be heard"]). Consistent with that authority, the Department has a long

history of adjudicating tidal wetlands matters, including those in which the tidal wetland or adjacent area boundary is in dispute (see e.g. Matter of Frie, Order of the Commissioner, Dec. 12, 1994; Matter of Tubridy, Order of the Commissioner, Oct. 12, 2000; Matter of Mezzacappa Brothers, Inc., et al., Order of the Commissioner, Dec. 27, 2010).

Whether Site 1 falls within a regulated tidal wetland or adjacent area is not an issue of subject matter jurisdiction. Rather, the issue represents one of the elements that staff must prove to prevail on certain causes of action in the 2012 complaint. By its first cause of action, for example, Department staff alleges that "[b]y constructing a commercial use facility not requiring water access within a regulated tidal wetland area and tidal wetland adjacent area without having a DEC permit to do so, as described in paragraph 46 above, Respondents Call-A-Head Portable Toilets, Inc.; Call-A-Head Corp.; Charles W. Howard; Kenneth Howard; and Charles P. Howard violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(48)" (2012 complaint ¶ 87). To prevail on this cause of action, staff must prove that the named respondents:

1.) constructed ("and/or expanded" [2012 complaint paragraph 46])

2.) a commercial use facility

3.) not requiring water access

4.) within a regulated tidal wetland area and tidal wetland adjacent area

5.) without having a DEC permit to do so (id.; see also ECL 25-0401; 6 NYCRR 661.5[b][48], 661.8).

Department staff must prove each element above to prevail. Staff's failure to meet its burden with regard to any one of these elements, including the existence of a regulated tidal wetland, will result in the dismissal of the cause of action; it will not deprive this office of subject matter jurisdiction.

Moreover, even assuming that the existence of a tidal wetland or tidal wetland adjacent area at Site 1 is an issue of subject matter jurisdiction, respondents' factual assertions in relation to this issue are in error. As previously noted, respondents argue that a railroad track to the east of Site 1 "cuts off the DEC's jurisdiction" and "requires the dismissal of this proceeding with prejudice" (respondents' memorandum at 1). Respondents misapprehend the basis for the Departments' assertion that Site 1 is located partly in a regulated tidal wetland (2012 complaint ¶ 16), and partly in a regulated adjacent area (id. ¶ 17).

Respondents' assertion that the railroad track to the east of Site 1 "cuts off" the Department's jurisdiction is premised on the erroneous assumption that the wetland at issue derives its status as a regulated tidal wetland from its connection to tidal waters east of the railroad track. It does not. Rather, the regulated tidal wetland at Site 1 is connected to tidal waters to the west of Cross Bay Boulevard. This is clearly shown on the official tidal wetlands map for the area (see exhibit

2 [the tidal wetlands nearest Site 1 are outlined in blue marker at the bottom right (southeast) corner of the tidal wetlands map, and the connection of those wetlands to the tidal waters to the west is shown crossing under Cross Bay Boulevard below (south of) the area outlined in blue]).

Respondents' argument that the railroad track east of Site 1 deprives the Department of subject matter jurisdiction is rejected both on the law and on the facts.

– Motion to Reopen the Evidentiary Hearing

Respondents' June 28, 2017 motion to reopen the evidentiary hearing seeks to reargue their request for an adjournment.[7] Specifically, respondents seek reargument in relation to my May 9, 2017 bench ruling (bench ruling) whereby I denied respondents' request for another adjournment and, thereby, concluded the evidentiary hearing.

As an initial matter, I note that respondents' motion to reargue is untimely. The Department's enforcement

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[7] Respondents do not characterize their filing as a motion to reargue. Rather, respondents argue that the bench ruling "essentially granted a default to the DEC for the Respondents' failure to appear" and that the default should be reopened in accordance with 6 NYCRR 622.15(d) (respondents' memorandum of law, dated June 28, 2017, at 10-11). As discussed herein, Department staff did not seek, nor did I grant, a default judgment. This hearing report considers the causes of action set forth in the 2012 complaint on the merits of staff's direct case as presented over 6 1/2 days of testimony.

hearing regulations do not expressly provide for motions to reargue and, therefore, the CPLR may be consulted for guidance (see Matter of Grout, Ruling, Aug. 14, 2015, at 6 [noting that "[m]otions for leave to reargue prior rulings issued in Department enforcement hearing proceedings are analyzed applying the standards governing CPLR 2221(d)"]). Pursuant to CPLR 2221(d)(3), a motion to reargue must be filed within 30 days of the disputed ruling.

Here, I issued the bench ruling on the record at the May 9, 2017 hearing (see tr at 1196-1203) and, therefore, respondents should have filed their motion to reargue on or before June 8, 2017. Accordingly, respondents' June 28, 2017 motion is untimely, having been filed more than seven weeks after my issuance of the bench ruling. Despite respondents' delay in filing their motion, I address the merits of respondents' motion below.

Pursuant to 6 NYCRR 622.10(g), "[a]fter a date has been set for the hearing adjournments will be granted only for good cause and with the permission of the ALJ" (see also Park Lane N. Owners, Inc. v Gengo, 151 AD3d 874, 875 [2d Dept 2017] [holding that whether to grant an adjournment "rests within the sound discretion of the Supreme Court" and that "[i]t is not an improvident exercise of discretion to deny an adjournment where the need for such request is based on the movant's failure to exercise due diligence"]).

On May 9, 2017, four months after the last live testimony had been taken in this matter, I denied

respondents' request for yet another adjournment (tr at 1196-1203; see also letter to the parties, dated May 12, 2017 [May 12 letter]). I also authorized the parties to file written closing briefs and, with the agreement of the parties, allowed 45 days for the parties to file their respective briefs (tr at 1199; see also May 12 letter at 2). The procedural context in which I issued the bench ruling is discussed below.

As noted previously, Department staff commenced this administrative enforcement proceeding by service of a complaint on respondents in 2004. The matter was assigned to former ALJ DuBois and she oversaw the matter until her retirement in 2011. In October 2011 the matter was assigned to me. At that time, I inquired whether staff had served an amended complaint, as had been authorized by ALJ DuBois (see letter to the parties, dated Oct. 3, 2011). Subsequently, staff served the 2012 complaint on respondents.

In late October 2012 the remnants of Hurricane Sandy caused massive destruction in the New York City area (see http://www.nytimes.com/newsgraphics/2012/1120-sandy/survey-ofthe-flooding-in-new-york-after-the-hurricane.html [accessed Dec. 12, 2017] [map depicting damage and destruction caused by Hurricane Sandy]). In the aftermath of Sandy, Department staff and respondents sought to resolve this matter through mediation and an ALJ was assigned to facilitate that process. The mediation proved unsuccessful and, in August 2014, the matter was referred back to me for adjudication (see letter to the parties, dated Aug. 21, 2014).

Additional motion practice ensued. By ruling dated June 9, 2015, I granted the motion by DCAS to be dismissed as a respondent in this matter (see Matter of Call-A-Head, Ruling [2015 ruling], at 4). My 2015 ruling also stated that "I will contact the remaining parties shortly after they have been served with this ruling to discuss the status of discovery and to schedule the hearing on this matter" (id.).

During a conference call with the parties on July 28, 2015, I stated that it was my understanding that disclosure was complete and that the parties were ready to proceed to hearing. We then discussed possible hearing dates and, after considering input from the parties, I scheduled the hearing to commence on October 27, 2015, and to continue on October 28 and 29, 2015 (see letter to the parties dated July 28, 2015 [memorializing discussions with the parties, and again noting that it was my understanding that disclosure was complete]; see also hearing notice, dated Oct. 2, 2015).

On October 26, 2015, on the eve of the first hearing date, I was contacted by the parties and advised that an agreement in principle had been reached to settle the matter. Nevertheless, I convened the hearing, as scheduled, October 27, 2015 to afford the parties the opportunity to formally request an adjournment on the record.[8] The parties represented on the record that site

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[8] Because of the limited purpose of the hearing on October 27, 2015, I canceled the court reporter for the day and arranged for an audio recording (see 6 NYCRR 622.17[a] [providing that the proceedings must be recorded verbatim by means the ALJ

plans to address the matters raised in the 2012 complaint had been exchanged between the parties' technical and legal representatives and that settlement appeared likely (see letter to the parties, dated Oct. 28, 2015 [memorializing the discussion]; hearing CD at 2:15-4:30). Accordingly, I granted an adjournment and set a control date of November 24 for the parties to provide a status update (id.).

Settlement discussions continued for several months with the parties providing this office with regular updates of their progress. Although the parties indicated at times that they were close to reaching agreement on settlement terms, on March 4, 2016, respondents advised that the parties had reached an impasse. Subsequently, after a series of conference calls and other communications between this office and the parties, hearing dates were set for June 13-15, and July 12-13, 2016 (see letter to the parties, dated Apr. 21, 2016).

Shortly before the initial hearing date, on June 10, 2016, respondents' lead counsel, David Grech, advised this office that he would be leaving the Scher Law Firm. During discussions with the parties later that day, Mr. Grech advised that he remained available to represent respondents during the June hearing dates, but that he would not be available for July or any subsequent dates. Respondents further advised

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deems appropriate]). The audio is included in the hearing record on a compact disc (hearing CD) (see hearing CD, dated Oct. 27, 2015).

that Jonathan Scher, who had been engaged in this matter for several months (see email from the Scher Law Firm, dated Feb. 10, 2016 [stating that Mr. Scher "has become more actively involved in this case"]), would become lead counsel for respondents. Despite his prior involvement in this matter, Mr. Scher advised that he would not be prepared to proceed without Mr. Grech on the July hearing dates. Accordingly, we proceeded with the June hearing dates, and I adjourned the two hearing dates set for July.

On June 13, 2016, I convened the hearing and testimony was taken for the first time in this proceeding (see tr at 6-167). The hearing continued, and testimony was taken, on June 14 and 15, 2016. As I noted on the record, respondent C.W. Howard was delayed in traffic on June 14 and, therefore, we did not commence the proceeding until 10:40 a.m. (see tr at 175 [I note the delay and state that "[t]omorrow I would like us to start on time"]; see hearing notice, dated May 12, 2016 [setting a 10:00 a.m. start time]).

On June 15, 2016, the third day of testimony in the proceeding, the parties and I held discussions off the record regarding scheduling of additional hearing dates. No dates were agreed to at that time (see letter to the parties, dated June 16, 2016 [noting that our discussions had demonstrated that "for both personal and professional reasons, scheduling hearing dates during the summer months may prove difficult"]). I set June 22, 2016 for a conference call to discuss potential hearing dates (id.). During that conference call, Mr. Scher advised that respondents would not be available to

proceed in either July or August, and he suggested hearing dates of September 14, 15, and 16, 2016 (see conference call notes, dated June 22, 2016).

Shortly after the June 22 conference call, Mr. Drescher advised that staff was available to continue with the hearing on the dates suggested by Mr. Scher (see email from Drescher, dated June 22, 2016). On the following day, however, Mr. Drescher suggested postponing the hearing until September 21, 2016 because one of his witnesses had a scheduling conflict on September 14 (see email from Drescher, dated June 23, 2016). At that time, I directed the parties to continue to hold the dates previously agreed to (September 14, 15, and 16), pending the outcome of Mr. Scher's consultation with respondents on their availability during the week of September 19 (see email to the parties, dated June 23, 2016).

On July 7, 2016 I again inquired with Mr. Scher regarding respondents' availability for any of the potential September hearing dates (see email to the parties, dated July 7, 2016, 2:25 p.m. [also advising the parties that I was inclined to reconvene on September 15]). Mr. Scher responded that, despite my request that the parties hold the dates, he had "canceled the September 14-16 dates, based on the last call with [Mr. Drescher]"[9] and that he would confer with respondents

[9] The last call this office participated in with the parties was on June 22, during which Mr. Drescher advised he would consult with Department staff regarding their availability for hearing on September 14, 15 and 16. As noted, Mr. Drescher advised via email on June 23 that his witness had a conflict on September 14.

with regard to the week of September 19 (email from Mr. Scher, dated July 7, 2016).

I advised the parties that I would convene another conference call to discuss hearing dates for September, and requested that, in the interim, Mr. Scher advise me of his clients' availability for hearing (see email to the parties, dated July 7, 2016, 3:41 p.m.). On July 13, I again inquired of Mr. Scher with regard to respondents' availability for hearing in September (see email to the parties, dated July 13, 2016). Having received no response, on July 21 I again contacted Mr. Scher regarding respondents' availability for hearing in September (see email to the parties, dated July 21, 2016). Mr. Scher responded that he had been "on trial, or in hearings" causing a delay in his response, and that he still did not know respondents' availability for the week of September 19 (email from Mr. Scher, dated July 21, 2016).

On August 2, 2016, I held a conference call with the parties to discuss hearing dates. In follow-up communications with the parties, we confirmed hearing dates for October 26, 27 and 28, 2016 (see email to the parties, dated Aug. 2, 2016). I also requested that Mr. Scher confer with respondents regarding hearing dates in November (id.).

On August 11, 2016, Mr. Drescher sought to ascertain whether Mr. Scher had confirmed his clients' availability for hearing dates in November (see email from Mr. Drescher, dated Aug. 11, 2016). On August 18, I noted that it had been 16 days since I had requested

confirmation from Mr. Scher with regard to proposed November hearing dates (see email to the parties, dated Aug. 18, 2016). I also advised the parties that I would issue a hearing notice on August 23 setting forth the agreed upon hearing dates for October and, absent a reply from respondents, directing the parties to appear for hearing on November 15, 16, and 17 (id.).

After again receiving no response from respondents, on August 23, 2016 I issued a hearing notice setting forth the agreed upon hearing dates for October, and directing the parties to appear for hearing on November 15, 16, and 17 (Hearing Notice, dated Aug. 23, 2016).

I opened the hearing record as scheduled on October 26, 2016. However, no testimony was taken that day. Respondents' counsel appeared, but advised that he had a medical issue arise that precluded him from proceeding with the hearing. Accordingly, I adjourned the proceedings "with the hope that we will reconvene tomorrow" (tr at 582). Unfortunately, Mr. Scher later advised that he was not able to continue with the hearing for the remainder of the week and requested a further adjournment (see email from Scher, dated Oct. 26, 2016). I adjourned the October 27 and 28 hearing dates (see email to the parties, dated Oct. 26, 2016).

On November 3, 2016, I issued another hearing notice stating that, in addition to the already scheduled hearing dates on November 15, 16, and 17, the hearing would continue on January 10, 11, and 12, 2017.

On November 15, 2016, I convened the hearing, noting that it would be the fourth day of testimony in the proceeding (tr at 587). I again noted on the record that the hearing was scheduled to commence at 10:00 a.m., but that "time and again we are getting off to a late start" (tr at 588-589). I also stated that "counsel for both sides and the parties [should] be here at 10:00 o'clock so we can start the proceedings on time" (tr at 589). The hearing continued and testimony was taken on November 16 and 17, 2016.

On January 10, 2017, I convened the hearing, noting that it was the seventh day of testimony in the proceeding (tr at 1108). I again noted on the record that the proceedings were delayed by respondents' late arrival and further noted that I had previously requested that Mr. Scher work with his client, C.W. Howard, "to ensure that we get underway on time" (id.). Mr. Scher offered apologies for the delay and stated that he and his client were delayed by "the heavy snow" (tr at 1109).

Prior to going on the record on January 10, Mr. Scher advised that his medical issue had recurred and that he would need to leave at 1:00 p.m. (tr at 1108). During the day's already abridged proceedings, Mr. Scher requested "a five-minute recess" to review a document with his client (tr at 1128). Staff objected to the recess, arguing that "[t]here is really no need to take a recess every time we introduce documents" (tr at 1129). Although I granted the recess, I noted on the record that "our recesses tend to run long," and admonished respondents to "keep it tighter than five

minutes" (tr at 1128). Despite my admonition, the recess lasted nearly an hour (tr at 1130).

Department staff called its final witness on its case in chief during the hearing on January 10, and completed its direct examination of the witness (tr at 1158). Because it was nearly 1:00 p.m. and Mr. Scher had to leave for the day, respondents did not commence their cross examination of the witness (id.).

At the close of the January 10 proceedings, I noted that we were scheduled to reconvene at 10:00 a.m. on the following morning and stated that "I expect Mr. Howard and counsel to be here . . . so we can get under way on time" (tr at 1158). Mr. Scher cautioned that his medical issue might interfere with his ability to proceed and stated that he would advise me and Department staff later that day whether he would be able to go forward (id.). Later that day, Mr. Scher advised that an adjournment of the remaining hearing dates for that week was necessary (see email from Mr. Scher, dated Jan. 10, 2017). Accordingly, I adjourned the January 11 and 12 hearing dates.

Following a conference call with the parties on January 11, 2017, respondents confirmed their availability to continue the hearing on February 28, March 1 and 2, 2017 (see email from Scher, dated Jan. 11, 2017). Department staff's last witness was not available for cross examination on February 28 and, therefore, I directed respondents to be prepared to commence their direct case on the morning of February 28 (see letter to the parties, dated Jan. 24, 2017; hearing notice, dated

Feb. 1, 2017). I also stated that respondents would have the opportunity to conduct their cross examination of staff's last witness on or after March 2 (id.).

On February 28, 2017, the date that I had directed respondents to be prepared to present their direct case, respondent C.W. Howard (i) dismissed respondents' attorney, Jonathan Scher; (ii) declined to proceed without counsel; and (iii) requested an adjournment (see tr at 1165-1184). Neither this office nor Department staff were advised in advance that Mr. Howard intended to dismiss Mr. Scher.

Department staff opposed respondents' request for another adjournment and objected to respondents' "request to relieve [their] counsel yet again" (tr at 1172). Mr. Drescher stated that respondents' prior counsel, Mr. Monaghan, had been "dropped at the last minute when it became clear that we were moving towards a hearing" (id.). Mr. Drescher noted that, after respondents dismissed their previous counsel, Mr. Howard had elected to represent respondents himself for several months before reconsidering that decision and engaging the services of the Scher Law Firm shortly before the hearing was to begin (id.). Mr. Drescher requested that Mr. Howard "either present his own direct testimony or present it through Mr. Scher" and argued that "it is unwarranted to postpone this hearing any further" (tr at 1173).

Department staff also questioned whether respondents were prepared to proceed with their direct case in accordance with my directive (tr at 1183). Staff

counsel stated that, contrary to the disclosure agreement the parties made several months earlier, respondents had not disclosed the exhibits that they intended to introduce at the hearing[10] (id.) Mr. Drescher stated that staff had "not received one document" from respondents (id.). Mr. Scher responded that he "was prepared to move forward up until Friday [i.e., February 24, 2017]. I did not finalize document production for today, and I would need to allow Mr. Howard to finalize that" (tr at 1184).

The fact that respondents had not, as of February 24, 2017, produced any of the documents that they had agreed to produce in June 2016 is remarkable. This is particularly so given that, several months earlier, I made the following statement at the opening of the November 15, 2016 hearing:

> "At close of our proceedings on June [15th], the parties agreed on the record to exchange copies of all exhibits they intended to introduce during the remainder of the hearing. I trust that has . . . taken place and that should expedite the matter going forward"

(tr at 587). Notably, in response, Mr. Scher stated that "[r]espondents have not had a chance yet to produce all of our documents . . . to the DEC. We are working on that and should have them shortly. I apologize for the delay" (tr at 588). Notwithstanding Mr. Scher's

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[10] The parties had agreed on the record to disclose such documents during the hearing on June 15, 2016 (tr at 571-573).

representations, respondents never fulfilled their obligation to produce documents.

As the hearing record reflects, I attempted to dissuade Mr. Howard from his decision to dismiss Mr. Scher. I noted that staff had already completed the presentation of its direct case, and stated that to change counsel at this stage of the proceeding would be highly unusual and disruptive (tr at 1171). I directed Mr. Howard to speak privately with Mr. Scher to ascertain whether they could resolve their differences (tr at 1178-1180). I also advised Mr. Howard that, given that he was about to dismiss his counsel on the morning of a hearing that had long been scheduled, I was inclined to have Mr. Howard present respondents' direct case that day with or without Mr. Scher (id. at 1178).

Despite the foregoing, and after consulting privately with Mr. Scher, Mr. Howard elected to dismiss Mr. Scher and seek new counsel (tr at 1181). Mr. Scher stated that he would "do everything in [his] power to get that new counsel up to speed with whatever I have, whatever I know, as fast as humanly possible" (tr at 1182).

Although I had advised Mr. Howard that I might direct him to proceed with the hearing pro se, after considering the parties' arguments, I granted respondents' request to adjourn the proceeding to afford Mr. Howard time to secure new counsel (tr at 1184-1185). Mr. Scher had twice offered to work with respondents' incoming counsel to prepare for hearing and ensure a

smooth transition (see tr at 1176, 1182), and I encouraged Mr. Howard to retain Mr. Scher for that purpose (tr at 1185). Lastly, after hearing from Mr. Howard, I set March 9, 2017, as a control date for respondents to provide me with the name and contact information for their new counsel (tr at 1186).

In early March, respondents advised this office that they were in discussions with new counsel, but respondents did not provide the name of the attorney (email exchange with the parties, dated Mar. 8-9, 2017). On April 12, 2017, because respondents still had not provided this office with the name of their new counsel, I convened a conference call with the parties. At that time, it had been 43 days since Mr. Howard dismissed Mr. Scher.

During the April 12 conference call, Mr. Howard confirmed that respondents still did not have counsel. I stated that respondents' delay was unacceptable and further stated that I intended to reconvene the hearing in this matter in early to mid-May (see letter to the parties, dated April 12, 2017, at 1 [memorializing aspects of the conference call]). I subsequently advised the parties that, in the absence of further input from the parties, I would reconvene the hearing on May 9, 2017 (id. at 2).

On April 19, 2017, I issued a hearing notice specifying that I would reconvene the hearing on May 9, and the hearing would continue on May 10 and 11, 2017 (hearing notice, dated Apr. 19, 2017).

Despite the foregoing, respondents did not advise this office that they had engaged new counsel until May 2, 2017, 63 days after Mr. Scher was dismissed by Mr. Howard and just seven days before the May 9 hearing date (see email from respondents, dated May 2, 2017). Two days later, on May 4, 2017, this office received its first communication from respondents' new counsel, James Periconi, Esq., advising that "upon further reflection and learning some of the background of this matter, we are unable to help [Mr. Howard] reach his goals" and that the attorney would not represent respondents (Periconi email, dated May 4, 2017).

In accordance with the hearing notice, I reconvened the hearing on May 9, 2017. Department staff, the court reporter and I were present and ready to proceed at 10:00 a.m., as scheduled, but respondents had not appeared (see tr at 1192 [noting that respondents had not appeared]). At 10:35 a.m., Mr. Howard appeared without counsel and again requested an adjournment (tr at 1193-1194). Department staff objected and requested that the hearing proceed as scheduled (tr at 1194-1195).

Mr. Howard asserted that Department staff counsel, Mr. Drescher, was at fault for the withdrawal of Mr. Periconi, the attorney that respondents had engaged on May 2 (tr at 1194). Mr. Howard provided an audio recording wherein Mr. Periconi advises Mr. Howard that he will not represent respondents in this matter

(see exhibit 47[11]). That recording confirms that respondents' newly retained counsel had not met face-to-face with Mr. Howard, had not received the case file, was not familiar with the hearing record, and was returning Mr. Howard's uncashed retainer check (id.). This information only serves to underscore the extent of respondents' dilatory behavior in the aftermath of their dismissal of Mr. Scher on February 28, 2017. The failure of respondents' belated and ineffectual attempt to engage counsel rests entirely with respondents.

Although Mr. Howard had been unable to secure the services of a new attorney for more than two months after discharging Mr. Scher, he now advised that he had successfully engaged new counsel in just two business days (tr at 1194 [Mr. Howard's statement that the new attorney "can't be here today" but had advised Mr. Howard to "push forward and get a future [hearing] date"]).

I denied respondents' request for another adjournment. After briefly summarizing respondents' actions relating to this proceeding since the last day of testimony (i.e., since January 10, 2017), I advised Mr. Howard that his delays in securing new counsel were "inexcusable" and that the hearing would not be adjourned again (tr at 1197).

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[11] As proffered by Mr. Howard, exhibit 47 bore the label "PHONE CALL SOUND FILE 5/8/17." I note that, as reflected in the record, the phone call between Mr. Howard and Mr. Periconi occurred on May 4, 2017 (see email from Periconi, dated May 4, 2017; tr at 1197).

I note that, with their closing brief, respondents filed an affidavit of C.W. Howard (June 28 affidavit) (see respondents' closing brief, exhibit F [sworn on June 28, 2017]). That affidavit sets forth a timeline with regard to Mr. Howard's efforts to secure new counsel that is inconsistent Mr. Howard's representations at the hearing.

In Mr. Howard's June 28 affidavit he states that, after he dismissed Mr. Scher, he "attempted to retain two sets of attorneys to defend the Respondents in this proceeding" (respondents' closing brief, exhibit F ¶ 3). He further states that he met first with attorney Charles Warren, who "felt comfortable with the representation" until he spoke with Mr. Drescher and then "Mr. Warren refused to represent the Respondents and returned the retainer down payment" (id. ¶ 11). Mr. Howard states that "[w]hen Mr. Warren refused to represent Respondents, I then met with James Periconi" (id. ¶ 12). Again, however, after speaking with Mr. Drescher, "Mr. Periconi returned the retainer deposit and refused to represent the Respondents" (id.).

As discussed above, at the May 9 hearing it was clear that Mr. Howard had attempted to engage Mr. Periconi first. Only after Mr. Periconi declined to represent respondents did Mr. Howard attempt to engage Mr. Warren (tr at 1194).

The timeline set forth by Mr. Howard at the May 9 hearing is consistent with the numerous communications between this office and the parties that occurred between respondents' dismissal of Mr. Scher on

February 28 and the May 9 hearing. The timeline set forth by Mr. Howard in his June 28 affidavit is not consistent with those communications.

On this record, I conclude that Mr. Howard's June 28 affidavit misrepresents the facts surrounding his efforts to engage new counsel.

In addition to respondents' delays in securing counsel, I also note that, as of date that I denied respondents' request for another adjournment, respondents had not rectified their longstanding failure to disclose proposed exhibits. Contrary to the parties' June 15, 2016 agreement, respondents' counsel acknowledged on November 15, 2016 and again on February 28, 2017 that respondents had not disclosed their exhibits to Department staff. At the May 9, 2017 hearing, Mr. Howard stated that he was unprepared to go forward with respondents' direct case and again provided no documents to Department staff. Thus, over the course of nearly 11 months, from June 15, 2016 through the May 9, 2017 hearing date, respondents failed to fulfill their obligation to disclose the exhibits that they intended to introduce at the hearing.

Although I advised Mr. Howard that I would not grant another adjournment and that no additional hearing dates would be scheduled, he declined to proceed. Accordingly, I closed the evidentiary hearing and provided the parties 45 days to file written closing briefs (tr at 1198-1203; letter to the parties, dated May 12, 2017).

Neither the record that was before me on May 9, 2017, nor respondents' June 28, 2017 motion, demonstrate good cause for respondents' request for another adjournment. Respondents' dilatory behavior in securing new counsel and in other aspects of this proceeding are well documented. Moreover, respondents have failed to demonstrate that any matters of fact or law were overlooked or misapprehended in relation to my May 9, 2017 ruling to deny their request for an adjournment (see CPLR 2221[d]).

Accordingly, respondents' motion to reopen the evidentiary hearing is denied.

Statutory Bases for Department Staff Allegations

The statutory bases for the violations alleged by Department staff are found in articles 17 and 25 of the Environmental Conservation Law (ECL).

Section 17-0505 of the ECL provides, that:

> "[t]he making or use of an outlet or point source discharging into the waters of the state, and the operation or construction of disposal systems, without a valid SPDES permit as provided by section 17-0701 or title 8 hereof are prohibited."

Section 17-0803 of the ECL provides, in part:

> "[e]xcept as provided by subdivision five of section 17-0701 of this article, it shall be unlawful to discharge pollutants to the waters of

> the state from any outlet or point source without a SPDES permit issued pursuant hereto."

The foregoing provisions of ECL article 17 are implemented through 6 NYCRR part 750, the state pollution discharge elimination system (SPDES) permit regulations.

> With regard to tidal wetlands, ECL 25-0401 provides, in part:
>
> > "1 . . . 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 . . .
> >
> > "2. Activities subject to regulation hereunder include . . . any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads . . . 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."

The foregoing ECL provisions are implemented through 6 NYCRR part 661, tidal wetlands – land use regulations.

Burden and Standard of Proof

Department staff bears the burden of proof on all charges and matters that it affirmatively asserts in the 2012 complaint (see 6 NYCRR 622.11[b][1]). Respondents bear the burden of proof on any affirmative defenses (see 6 NYCRR 622.11[b][2]). The party that bears the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

Summary of Respondents' Position

Respondents deny each of the violations alleged in the 2012 complaint (see answer ¶ 13). Respondents also raised two affirmative defenses in their answer.

By their first affirmative defense, respondents assert that the 2012 "[c]omplaint, per se, fails to state a cause of action upon which relief can be granted. It is premature . . . attempting to rush this case to judgment" (answer ¶ 16). Respondents further assert under their first affirmative defense that their "fundamental due process rights would be violated" if the matter were brought "*immediately*" to hearing upon the filing of the 2012 complaint "BEFORE Respondent [sic] has had an opportunity for discovery and the filing of the instant Answer and Affirmative Defenses" (id. [emphasis in original]).

By their second affirmative defense, respondents note that a 2005 ruling by ALJ DuBois denied respondents' request to schedule a hearing "forthwith," and

asserts that the hearing should not be held "unless and until, DEC substantially complies with [respondents' disclosure] requests" (answer ¶ 16).

Pursuant to 6 NYCRR 622.4(c), a respondent must explicitly assert any affirmative defenses in its answer. Additionally, where a complaint alleges that a respondent engaged in an activity without a required DEC permit, "a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense" (id.).

Despite the forgoing, respondents did not assert "the inapplicability of the permit requirement" as an affirmative defense in their answer.

Nevertheless, by bench ruling on June 14, 2016, I authorized respondents to plead a third affirmative defense (see tr at 212-214; see also 6 NYCRR 622.4[d] [stating that affirmative defenses not pled in the answer may not be raised at the hearing unless allowed by the ALJ]).

By their third affirmative defense, respondents assert that the operations giving rise to the alleged tidal wetlands violations in the 2012 complaint commenced prior to August 20, 1977 and, therefore, do not require a DEC permit. This affirmative defense relates to the provisions of 6 NYCRR 661.8, which provide 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 pursuant to this Part."

Causes of Action

Causes of Action Pertaining to Site 1

As set forth in the 2012 complaint and admitted by respondents, Site 1 includes two contiguous tax parcels (2012 complaint ¶¶ 12-15; answer ¶ 1). These two parcels are identified on the Queens County Tax Map as Block 15376, Lot 45 and Block 15375, Lot 48.[12] Lot 45 and Lot 48 are located entirely within the adjacent area of a regulated tidal wetland (id.). The larger of the two parcels, Lot 45, was acquired by respondent Charles P. Howard in May 1990, and sold to respondents Charles W. Howard and Kenneth Howard in February 2002 (see findings of fact ¶¶ 10, 12, 13). Lot 48 was acquired by respondent Charles P. Howard in December 2001 (see findings of fact ¶ 15).

Department staff alleges that respondents have operated a commercial portable toilet facility at Site 1 continuously since the early 1980s (2012 complaint ¶ 34). Respondents deny the foregoing and instead assert that Site 1 "has been continuously operated as a commercial portable toilet facility since early 1971" (answer ¶ 3). Accordingly, the parties are in agreement that a portable toilet facility has operated at Site 1 for decades, but do not agree upon the date that the operation commenced.

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[12] As previously noted, for the purposes of this hearing report, Site 1 is comprised of Lot 45, Lot 48 and portions of an adjacent parcel where respondents are alleged to have engaged in unlawful activities (see findings of fact ¶ 8).

The aerial photographs in the record shed light on the question of when respondents began using Site 1 for, at a minimum, the storage of portable toilets. An infrared aerial photograph taken in 1974 depicts Site 1 and the surrounding area (see exhibit 37; tr at 717 [Stadnik testimony that exhibit 37 is a "standard tool [used] to determine which structures previously existed as of the date of the [tidal wetlands] regulations"]). At Site 1, the 1974 aerial photograph depicts one building and several man-made structures that appear to be vehicles (see exhibit 37; tr at 886-887). No portable toilets are visible (exhibit 37; tr at 1023-1024 [Stadnik testimony that the 1974 aerial photograph depicts vegetation in areas later used for storage of portable toilets and that there were no portable toilets located on Site 1 at the time the 1974 photograph was taken]). There is also a 1979 aerial photograph in the record that depicts approximately two dozen portable toilets at Site 1 (exhibit 38[13]; tr at 997). These aerial photographs indicate that sometime between 1974 and 1979 Site 1 transitioned from being a site used for parking, storing, or repairing of vehicles to a site used for the storage of portable toilets.

The earliest reference to Call-A-Head in the documents entered into evidence is found in a Queens County Business Certificate (certificate) (see exhibit

[13] Exhibit 38 is a photocopy of a high resolution black and white aerial photograph of the Broad Channel area, and lacks the detail of the original photograph (see tr at 887-889). The original high resolution photograph, which is maintained at the Department's Region 2 offices, must be placed on a light table and viewed through a magnifying scope to observe its detail (id.).

3). The certificate states that, on May 16, 1977, respondent Charles P. Howard filed a "Certificate of Conducting Business under an Assumed Name" (certificate) with Queens County (exhibit 3). The certificate further states that respondent Charles P. Howard is conducting or transacting business under the name Call-A-Head at 79-18 Road, Broad Channel, Queens County, and names the same address as his residence (id.). There is no indication on the certificate that Call-A-Head was operating in any capacity at Site 1 in 1977.

– First Cause of Action

Department staff alleges that "[b]y constructing a commercial use facility not requiring water access within a regulated tidal wetland area and tidal wetland adjacent area without having a DEC permit to do so, as described in paragraph 46 above, Respondents . . . violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(48)" (2012 complaint ¶ 87). Paragraph 46 of the 2012 complaint alleges that respondents "constructed and/or expanded a building(s) that had existed on Site 1 prior to Respondents' taking possession of the site."

Pursuant to 6 NYCRR 661.8, "[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 pursuant to this Part." "Land use and development" and "use" are broadly defined under the tidal wetlands regulations

to include "any construction or other activity which materially changes the use or appearance of land or a structure or the intensity of use of land or a structure, including but not limited to any regulated activity" (6 NYCRR 661.4[p]). Pursuant to 6 NYCRR 661.5(b)(48) "[c]onstruction of commercial and industrial use facilities not requiring water access" is a presumptively incompatible use within a tidal wetland adjacent area for which a permit is required. Additionally, with certain exceptions not applicable here, the "[e]xpansion or substantial modification of existing . . . structures" is a generally compatible use within a tidal wetland adjacent area for which a permit is required (6 NYCRR 661.5[b][25]).

With regard to the issue of commercial operations that require water access, the tidal wetlands regulations state that:

> "[t]idal wetlands are located at the critical interface between land and tidal waters, and the amount of this land-water boundary is limited. Certain types of land use and development require access to tidal waters, while others do not. Given the critical values served by tidal wetlands, the limited extent of the land-water boundary, and the many types of land use and development that require water access and should be located where they will not substantially impair tidal wetland values, land use and development that does not require water access generally should not be located in tidal wetlands or adjacent areas" (6 NYCRR 661.2[m]).

There is nothing in the record to suggest that respondents' operation of a portable toilet facility requires access to tidal waters. I take official notice that such facilities are located throughout the State, regardless of whether there is access to tidal waters.

The record establishes that a building has existed on Site 1 since at least 1974 (see exhibit 37 [1974 aerial photograph depicting one building on Site 1 (the building is marked with a black "X")]), and that it likely stood there long before that time (see exhibit 19 [attached engineering drawing depicting the building at Site 1 and noting additions were made to the building after 1946]). The building is identified or depicted as a garage in several exhibits (see exhibit 19 [enclosing a 1999 survey and a 2004 engineering drawing, both identifying the building as a garage]; exhibit 21, photograph 4 [1998 photograph depicting the north side of the garage building with two garage doors]; exhibit 35A [2003 photograph depicting a portion of the north side of the garage building with a garage door]; exhibit 39 [survey (1987 survey) of Site 1 for "Charles Howard," surveyed Oct. 10, 1984, revised Nov. 19, 1987, identifying the building as a garage]). Accordingly, to distinguish it from other structures at Site 1, I will refer to the building as the "garage building" throughout this hearing report.

As noted above, paragraph 46 of the 2012 complaint alleges that respondents "constructed and/or expanded a building(s) that had existed on Site 1 prior to Respondents' taking possession of the site." The record establishes that the garage building was L-shaped

until sometime after 1987 (see exhibit 39 [1987 survey, depicting the garage building as L-shaped]; exhibits 37, 38 [aerial photographs from 1974 and 1979, respectively, showing the garage building as L-shaped]; tr at 897 [Stadnik testimony that the aerial photographs from 1974 and 1979 show "the identical building]; tr at 898 [Stadnik testimony that the building was the shape of an "upside down L both on [the] '74 and '79" aerial photographs]; tr at 949 [Stadnik testimony confirming that the 1974 aerial photograph shows the garage building as L-shaped]).

Sometime after 1987, the garage building was expanded by "squaring off" the structure (tr at 954 [Stadnik testimony that the garage building was altered by "squaring off" the footprint with an addition to the southwest corner]; see also exhibit 15 [1996 aerial photograph showing the garage building as rectangular]; exhibit 19 [Haynes architectural survey, Nov. 29, 1999, depicting the garage building as rectangular]). The extension measures approximately 16' by 24' (see exhibit 19, attached engineering drawing [the extension was built on the southwest corner of the garage building]; tr at 736 [Stadnik testimony regarding the size of the extension]).[14]

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[14] Department staff's witness testified that, in addition to the expansion that resulted in the transformation of the garage building from L-shaped to rectangular, the building was enlarged by expanding to the east (eastern enlargement) (tr at 737 [Stadnik testimony that the eastern enlargement shown on a 2004 engineering drawing (exhibit 19) does not appear on the 1974 aerial photograph (exhibit 37)]). On cross, however, staff's witness equivocated on whether there had been an eastern

The expansion of the garage building, by squaring off the formerly L-shaped building to a rectangular building required a permit under 6 NYCRR 661.8. Accordingly, as charged by Department staff, the expansion was in violation of ECL 25-0401 and 6 NYCRR 661.8. Although the garage building existed prior to August 1977, the continuance of its use is only exempt from the permit requirement where such use "does not involve expansion" (6 NYCRR 661.5[b][1]).

I note that each day that the expansion of the garage building remains in place is a separate and distinct violation, and is subject to the imposition of daily penalties (see ECL 71-2503[a] [stating that "each day's continuance [of a violation] shall be deemed a separate and distinct violation"]; Matter of Valiotis, Order of the Commissioner, March 25, 2010, at 5-6 [holding that, until removed, unauthorized structures or fill placed in a tidal wetland or its adjacent area are ongoing violations]).

Department staff has met its burden of proof to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by expanding the garage building without a permit.

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enlargement to the garage building after 1974 (see tr at 931 [Stadnik testimony that he "can't say for certain" whether the garage building was expanded eastward]). To the extent that staff sought to prove that the garage building had been expanded eastward, I conclude staff did not carry its burden on that issue.

– Second Cause of Action

Department staff alleges that "[b]y undertaking commercial or industrial use activities not requiring water access within a regulated tidal wetland area and tidal wetland adjacent area without having a DEC permit to do so as described in paragraphs 38 et seq., above, . . . Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(48)" (2012 complaint ¶ 88). Paragraph 38 of the 2012 complaint alleges that, with the exception of 120 days covered under a 1994 consent order with the Department, respondents "failed to obtain a permit or other authorization from the Department for the construction and operation of the portable toilet facility at Site 1."

Department staff argues that "[r]espondents' continuation of the commercial activities [at Site 1] after . . . the 1994 [consent order] expired constitutes the unauthorized undertaking of a commercial activity not requiring water access within the tidal wetlands adjacent area" (staff's closing brief at 10).

Respondents argue that "the entirety" of their portable toilet operation at Site 1 was in existence at the time that the tidal wetland regulations became effective (respondents' closing brief at 10 [stating that "the entirety of the Respondents' operations have existed prior to, and have continued since, 1976, which predates the August 20, 1977," effective date of the tidal wetlands permit requirements set forth under 6 NYCRR 661.8]; see also tr at 213-215).

Respondents' argument is without merit. The record establishes that, if there was a commercial portable toilet operation at Site 1 as of August 20, 1977, it was only a small fraction of the operation that exists there today.

As discussed above (see supra at 22), there is nothing in the record that indicates that Site 1 was used for a portable toilet operation in or before 1974, when the aerial photographs were taken that were used to create the tidal wetlands maps (see exhibit 2 [tidal wetlands map, "from color infrared photographs taken 10 August through 9 October 1974"]; exhibit 37 [1974 infrared photograph]; tr at 687 [Stadnik testimony regarding use of infrared photographs to develop tidal wetlands maps]). Further, it is undisputed that there was only one large structure located at Site 1 as of 1979, the then L-shaped garage building. At the time that the 1979 aerial photographs were taken, there were also what appear to be approximately two dozen portable toilets located on Lot 45 (see exhibit 38; tr at 996-997).

The record establishes that, since at least April 1996, over 100 portable toilets have been routinely stored at Site 1 (see exhibits 14-15 [numerous aerial photographs dating from April 1996 to March 2016]; tr at 240 [Greco testimony noting the portable toilets depicted on the 1996 aerial photograph (exhibit 15 at 2)]; tr at 635-636 [Lopez testimony regarding his familiarity with Site 1 and agreeing that there could be hundreds of portable toilets stored there at any time]; tr at 1070 [Stadnik testimony identifying portable toilets

depicted on the 1996 aerial photograph (exhibit 15 at 2)]). The record also establishes that, sometime after 1979, two large structures were erected on Site 1 (see exhibits 14-15 [numerous aerial photographs dating from April 1996 to March 2016]).[15]

On this record, regardless of whether respondents were lawfully engaged in the portable toilet business at Site 1 as of August 20, 1977, respondents' substantial expansion of their operations after 1979 required multiple tidal wetlands permits (see 6 NYCRR 661.5[b][1] [exempting the continuance of lawfully existing uses from the tidal wetlands permitting requirement provided that such use "does not involve expansion"]). Accordingly, the affirmative defense that respondents' operation at Site 1 predates August 20, 1977, if proven, would not shield respondents from liability.

Moreover, it was respondents' burden to plead and prove that their portable toilet operation at Site 1 predates August 20, 1977 and that it did not, therefore, require a permit (see 6 NYCRR 622.4[c] [stating that, where a complaint alleges that a respondent engaged in an activity without a required DEC permit, "a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense"]; 6 NYCRR 622.11[b][2] [stating that respondents bear the burden of proof on affirmative defenses]). Over the many years that this matter has

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[15] These additional structures are discussed in more detail under the third cause of action below.

been pending before the Department, respondents have never proffered evidence sufficient to establish that their operations at Site 1 were "lawfully existing" as of August 20, 1977.

Respondents filed an affidavit of Rick O'Neil, sworn May 1, 2016 (see respondents' closing brief, exhibit I [O'Neil affidavit]). Mr. O'Neil is a former employee of the U.S. Department of the Interior at the Gateway National Recreation Area (O'Neil affidavit ¶ 2). Mr. O'Neil attests that "[i]n or about April or May 1976, Gateway hired Call-A-Head Portable Toilets, Inc. ('Call-A-Head') to supply the park with ten (10) portable toilets" and that "Call-A-Head" was selected "because it was located at 304 Cross Bay Boulevard" (id. ¶¶ 4, 5).

There are errors in the O'Neil affidavit. For example, Call-A-Head Portable Toilets, Inc. did not exist in May of 1976 (see findings of fact ¶ 1 [Call-A-Head Portable Toilets, Inc. was not incorporated until November of 1982]). I also note that it was not until May of 1977 that respondent C.P. Howard filed a "Certificate of Conducting Business under an Assumed Name" with Queens County wherein he certified that he was operating under the name "Call-A-Head" from his residence at 79-18 Road, Broad Channel (see findings of fact ¶ 7). Given this, it may well be that it was May 1977 rather than "April or May 1976" that Gateway first engaged the services of Call-A-Head.

Nevertheless, assuming that Gateway hired Call-A-Head in 1976, and that Call-A-Head had begun

using Site 1 for aspects of its portable toilet operation at that time, these facts would not establish that respondents' operation was "lawfully in existence" at Site 1 in 1976. As defined under 6 NYCRR 661.4(q), "[l]awfully" means that the activity is "in full compliance with all applicable statutes, rules and regulations." The O'Neil affidavit makes no assertion that respondents' operation at Site 1 was in full compliance with all applicable statutes, rules and regulations.

Notably, the area where Site 1 is located has been zoned as R3-2, a "Residence District," since 1961 (see exhibit 41 at 1 [letter from the Department of City Planning, City of New York]; id. at 2, 3 [certified copies of zoning maps in the custody of the Department of City Planning of the City of New York[16]]; exhibit 42 [Article II: Residence District Regulations]). Accordingly, respondents' use of Site 1 for commercial purposes is not consistent with City of New York zoning regulations. Department staff proffered the applicable zoning maps at hearing and, after respondents' off the record review of the documents, the maps were received in evidence without objection (tr at 1111-1112). Despite the forgoing, respondents did not address the zoning issue in their closing brief.

I also note that the record does not establish that respondents had legal possession of any portion of Site 1 as of August 20, 1977. It was not until May 4, 1990

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[16] Site 1 is located at the far left on the zoning maps, at the intersection of "CROSS BAY BLVD" and "189th AVE." It is to the immediate south of a small commercial district (zoned "C2-2").

that respondent C.P. Howard first obtained ownership of a portion of Site 1 (see findings of fact ¶ 12). Prior to that time, respondents apparently leased Lot 45 from the City of New York (see findings of fact ¶ 11).

In reply to a motion by respondents, Department staff filed a stipulation (civil court stipulation) relating to 304 Cross Bay Boulevard, that was entered before the Civil Court of the City of New York, Queens County (staff's reply, dated May 23, 2016, exhibit 6). Pursuant to the civil court stipulation, the "occupant of premises . . . Charles Howard" agreed to pay $2,000 rent to the City of New York to cover rent through April 30, 1981 (id. [capitalization omitted]). The civil court stipulation further states that, upon payment of the $2,000 rental to the City, "Charles Howard shall then become the tenant of record with [the City of New York]" (id. [capitalization omitted]). Staff argues that this indicates that, prior to 1981, Charles Howard was "not a legitimate tenant but rather a trespasser" (staff's reply, dated May 23, 2016, at 4-5). Although staff raised this issue and filed the stipulation with this office in May 2016, and again in July 2017 (see staff's reply, dated July 5, 2017, at 8-10, exhibit I), respondents do not address the civil court stipulation in their closing brief.

The record lacks evidence to support the conclusion that any aspect of respondents' portable toilet operation was "lawfully existing" at Site 1 as of August 20, 1977. Accordingly, respondents have failed to meet their burden to prove this affirmative defense.

Moreover, as detailed above, regardless of whether any aspect of respondents' operation lawfully existed at Site 1 on August 20, 1977, staff established that respondents' operations at Site 1 underwent substantial expansion without a permit.

Department staff has met its burden to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8. by their operation of the portable toilet facility at Site 1 without a permit.

– Third Cause of Action

Department staff alleges that "[e]ach installation of a structure or structural components without a DEC permit, as described in paragraph 47 above, constitutes a separate violation of ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(48) and (51)" (2012 complaint ¶ 89). Paragraph 47 of the 2012 complaint alleges that "Respondents installed various structures and structural components, including but not limited to a) various large steel containers used for office and storage space[;] b) oil tanks[;] c) asphalt driveways, paths, parking areas[; and] d) fences." Each of these structures is discussed below.

a) various large steel containers used for office and storage space

The record demonstrates that, other than the garage building, no substantial structures were located on

Site 1 as of August 20, 1977, the effective date of the permit requirements set forth under 6 NYCRR 661.8 (see e.g. tr at 961-962 [Stadnik testimony that the 1979 aerial photograph (exhibit 38) depicts "certain items" on Site 1 but "not structures" (except for the original garage building)]; exhibit 38 [1979 aerial photograph]; exhibit 39 [1987 survey, depicting the garage building and fencing on Site 1, but no other structures]).

Sometime between the execution of the 1994 consent order and April 1996, an 80-foot long, two-story structure (80-foot long structure) was erected on the east side (rear) of Site 1, just seven feet landward of the tidal wetland boundary (see exhibit 22 at 2 [diagram of Site 1]). The 1994 consent order makes no mention of an 80-foot long, two-story structure in place along the edge of the tidal wetland at Site 1 (see exhibit 1). Rather, the order states that "Respondent had permitted portable toilets components to enter a regulated tidal wetland in and adjacent to the site" and that "[u]pon further investigation . . . [the Department] determined that Respondent has not obtained the required DEC permit to conduct [a commercial portable toilet operation] within the regulated tidal wetland and adjacent area in and adjacent to the site" (id. ¶¶ 4-5). To prevent future encroachments onto adjacent properties, the 1994 order required the respondent to "erect and maintain a . . . fence no less than eight feet in height along the entire perimeter of the Call-A-Head site" (exhibit 1 [Schedule A ¶ 7]).

On January 15, 1998, Department staff inspected Site 1 to determine the extent of Call-A-Head Corp.'s

compliance with the terms of the 1994 consent order (tr at 110-111 [Greco testimony that the 1998 inspection report (exhibit 22) addressed "compliance with the Schedule A of the [1994] consent order"]). The 1998 inspection report identifies several alleged violations of the 1994 consent order and also cites a violation of 6 NYCRR 661.5(b)(51) (exhibit 22 at 1 [items noted under "USE GUIDELINES"). Pursuant to 6 NYCRR 661.5(b)(51), construction of accessory structures for a commercial use not requiring water access is a "[p]resumptively incompatible use" that requires a DEC tidal wetlands permit.

The inspection report notes the "[p]lacement of . . . storage buildings in the adjacent area of a wetland" (exhibit 22 at 1; see also exhibit 21, photographs 3-4 [depicting what appear to be four stacked metal containers at the location of the 80-foot long structure]; tr at 227-228 [Greco testimony that the "storage buildings" identified in the inspection report refer to the 80-foot long structure located at the edge of Site 1 and "seaward of the property line"[17]]; tr at 347 [Greco testimony that the 80-foot long structure is seven feet landward of the tidal wetland boundary]). The earliest evidence of this structure in the record is an aerial photograph taken in April 1996 (see exhibit 15 at 2 [aerial

[17] The witness clarified that one edge of the 80-foot long structure is on property owned by respondents, and that the rest of the structure is on the adjacent parcel (tr at 228). The adjacent parcel is part of Gateway National Recreation Area (see findings of fact ¶ 9).

photograph "taken in April, 1996," depicting the 80-foot long structure on the east side of Site 1]).

There is now a second large structure located on Site 1 that was not present on August 20, 1977. This structure, which is approximately 100 feet long and 10 feet wide (100-foot long structure), was erected sometime between April 9, 2006 and March 10, 2008 (see exhibit 14 at 1, 3 [Apr. 9, 2006 aerial photograph depicting a large number of portable toilets stored along the southern boundary of Site 1], 4 [Mar. 10, 2008 aerial photograph depicting the 100-foot long structure along the southern boundary of Site 1]).

Department staff has met its burden of proof to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by the installation of the 80-foot long structure and the 100-foot long structure at Site 1 without a permit.

b) oil tanks

Department staff concedes that it "did not introduce direct evidence of the presence of an oil tank" (staff's closing brief at 12). Staff argues, however, that the 2012 complaint alleges that respondents' activities include "fueling of delivery vehicles" and that respondents admitted to this activity in the answer (id.). Staff further argues that "[t]he fueling of vehicles requires that fuel is available [and] [i]t follows therefore, that the installation and operation of oil tanks is part of Respondents' operation" (id.).

Respondents assert, among other things, that the only testimony regarding oil tanks at Site 1 was from a DEC witness who stated she did not recall observing oil tanks at the site (respondents' closing brief at 46).

Department staff's arguments are not sufficient to establish that respondents "installed . . . oil tanks" at Site 1, as alleged in paragraphs 47 and 89 of the 2012 complaint. First, staff failed to proffer evidence of the installation of oil tanks at the site.

Second, I decline to draw the inference, as suggested by staff, that respondents' answer is sufficient to establish the alleged violation. In its 2012 complaint, staff lists numerous activities related to the operation of respondents' portable toilet facility, with "fueling of delivery vehicles" listed as the last item (2012 complaint ¶ 36). I do not read respondents' admission of "the general portent" (answer ¶ 5) of staff's description of respondents' operation to be an express admission of each item listed. Moreover, while many of the activities listed in the 2012 complaint are clearly essential to the operation of a portable toilet facility, on-site refueling is not. Lastly, even assuming that respondents undertake on-site refueling of their vehicles, this may be accomplished through the use of fuel trucks, thereby eliminating the need for an "installed" tank at the site.

I conclude that the Department failed to establish that respondents "installed . . . oil tanks" at Site 1 as alleged in paragraphs 47 and 89 of the 2012 complaint.

c) asphalt driveways, paths, parking areas

Respondents state that the 1994 consent order "required [Call-A-Head Corp.] to 'install a four (4" inch curb at the pavement edge toward the wetland and regrade the paved area of the site' " (respondents' closing brief at 46 [quoting exhibit 1 at 6 (Schedule A ¶ 4)]). Respondents argue that "there is no testimony that [Call-A-Head Corp.] installed any structures that were not existing at the time of the Consent Order or in violation of the Consent Order or installed any new structures since the Consent Order was executed" (id.).

Department staff argues that the 1994 consent order "did not condone or retroactively authorize improvements" that were undertaken after the enactment of ECL article 25 (staff's closing brief at 13). Staff asserts that "areas of asphalt" at Site 1 were "dirt and vegetation" at the time ECL article 25 was enacted (id.). Staff further asserts that respondents installed "a parking area east of lots 73 and 75 [sic[18]], on the same parcel that was supposed to be vacated pursuant to the 1994 Order" (id.). This last assertion is addressed under the ninth cause of action, and will not be addressed here.

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[18] Probably should read "lots 45 and 48," the parcels owned in whole or in part by respondent C.W. Howard (see findings of fact ¶¶ 13, 15). The 1994 consent order directed Call-A-Head Corp. to vacate lots adjacent to 304 Cross Bay Boulevard (see exhibit 1 at 6 [Schedule A ¶ 3] [directing removal of "all things associated with the operation of Call-A-Head Corp. from the lots" adjacent to the site]).

The 1994 consent order expressly states that "[t]his Order constitutes the entire agreement of the parties hereto" (1994 consent order at 3, decretal ¶ IX). Nowhere in the 1994 consent order does it state that it resolves any and all violations of the ECL at Site 1, regardless of whether such violation is set forth in the order.

As stated in the 1994 consent order, "Respondent violated ECL Section 25-0401, as well as [6] NYCRR Part 661" by "permit[ing] portable toilets components to enter a regulated tidal wetland" and by failing to "obtain[ ] the required DEC permit to conduct the commercial [portable toilet business] within a regulated tidal wetland and adjacent area in and adjacent to the site" (id. at ¶¶ 3-5, 7). Those are the violations identified in the 1994 consent order. To the extent that other violations of the ECL existed at Site 1 at the time that the 1994 consent order was executed, nothing in the order prohibits the Department from initiating an enforcement action to address those additional violations.

The record establishes that portions of Site 1 that were not paved as of August 20, 1977, are now paved. Mr. Stadnik testified that, on the basis of his assessment of aerial photographs from 1974 and 1979, "fill was initially placed [on Lot 48] in 1974" and that "[b]y 1979, based on that detailed photograph, which is Exhibit 38, it shows vegetation in that filled-in road" (tr at 1007; see also exhibit 38). Lot 48 is sometimes identified in the record as the location of East 3rd Road. It is not clear from the 1994 consent order whether Lot

48 was paved at the time that the order was executed. It is clear, however, that Lot 48 was paved at the time of the January 15, 1998 inspection (see exhibit 21, photograph 4 [depicting a paved area on the north side of the garage building]; exhibit 22 at 2 [diagram of Site 1 depicting that area between the garage building and the norther property line as "paving area"]).

Department staff has met its burden of proof to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by paving portions of Site 1 without a permit.

d) fences

Department staff asserts that the record demonstrates that respondents installed unauthorized fences on the adjacent parcel to the east of Lot 45 (staff's closing brief at 13).

Respondents argue that the 1994 consent order "required [Call-A-Head Corp.] to erect and maintain a chain link or stockade type fence . . . along the entire perimeter of the Call-A-Head site" and, therefore, respondents may not be held liable for erecting fences at Site 1 (respondents' closing brief at 46 [internal quotation marks omitted]).

Respondents argument is unavailing. Department staff is not seeking to hold respondents liable for construction of a fence along the perimeter of lots 45 and 48 at Site 1. Rather, staff seeks to hold respondents

liable for the construction of fences on the adjacent parcel at Site 1 (see staff's closing brief at 13). The adjacent parcel is owned by the United States of America and is part of the Gateway National Recreation Area (see findings of fact ¶ 9).

The record shows that respondents erected fences perpendicular to, and east of, the property line of lots 45 and 48. Respondents installed a low green plastic mesh fence and supporting posts extending eastward from northeast corner of the 80-foot long structure at the rear of lots 45 and 48 (see exhibit 36 at 2 [diagram depicting "Green Plastic Fence" running perpendicular to the 80-foot long structure]; 35A [photograph from the Department's June 3, 2003 inspection depicting a low green fence and posts extending eastward from the 80-foot long structure]; tr at 708 [Stadnik testimony describing the fence]). The green fence was not present at the time of the Department's January 15, 1998 inspection of Site 1 (see exhibit 22 at 2 [diagram depicting Site 1 and showing no fence extending eastward from the 80-foot long structure]; exhibit 21, photograph 3 [depicting the east side of the 80-foot long structure with tires stacked at the location where the fence was later erected]).

The green fence was replaced with a low white panel fence sometime before May 27, 2005 (see exhibit 28A, B, D [photographs from the Department's May 27, 2005 inspection depicting a low white panel fence and posts extending eastward from the 80-foot long structure]; exhibit 30 [Department inspection report, dated May 27, 2005, at 2 [diagram depicting a "white fence

48'" long]; tr at 413-414 [DeMarco testimony describing the fence]).

Department staff has met its burden of proof to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 by erecting fences at Site 1 without a permit.

As detailed above, I conclude that Department staff has met its burden to demonstrate that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8. by installing (i) various large containers used for office and storage space; (ii) asphalt driveways or parking areas; and (iii) fences at Site 1 without a permit. Department staff failed to meet its burden to demonstrate that respondents violated ECL 25-0401 and 6 NYCRR 661.8. by installing oil tanks at Site 1.

– Fourth Cause of Action

Department staff alleges that "[b]y excavating within the regulated tidal wetland adjacent area without a DEC permit as described in paragraph 48 above, the Call-A-Head Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(57)" (2012 complaint ¶ 90). Paragraph 48 of the 2012 complaint alleges that, on or about June 18, 2002, "Respondents utilized construction equipment and excavated within in [sic] the tidal wetlands adjacent area at the rear of Site 1."

Department staff withdrew this cause of action (see staff's closing brief at 13). Accordingly, it will not be considered herein.

– Fifth Cause of Action

Department staff alleges that "[b]y placing fill from the excavation within the regulated tidal wetland adjacent area without a DEC permit as described in paragraph 49 above, the Call-A-Head Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30)" (2012 complaint ¶ 91). Paragraph 49 of the 2012 complaint alleges that, subsequent to the alleged excavation at issue under the fourth cause of action, Respondents "placed fill into the excavation and covered it and the surrounding area with asphalt."

Department staff withdrew this cause of action (see staff's closing brief at 14). Accordingly, it will not be considered herein.

– Sixth Cause of Action

Department staff alleges that "[b]y creating a ditch within the regulated tidal wetland adjacent area without a DEC permit as described in paragraph 51 above, the Call-A-Head Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(51) and (57)" (2012 complaint ¶ 92). Paragraph 51 of the 2012 complaint alleges that, on April 30, 2003, "staff of DEC's Law Enforcement Division

observed that Respondents had created a ditch and placed the excavated fill in the tidal wetlands adjacent area."[19]

To prevail on this cause of action Department staff must demonstrate that respondents either (i) constructed an "accessory structure or facilities" (6 NYCRR 661.5[b][51]), or (ii) engaged in "[a]ny type of regulated activity not specifically listed" under 6 NYCRR 661.5(b) (6 NYCRR 661.5[b][57]).

Respondents argue that this cause of action should be dismissed because Ms. Greco, the only witness to testify concerning a ditch on respondents' property, testified that she did not recall observing a ditch at Site 1 (respondents' closing brief at 47-48 [citing tr at 310]). Ms. Greco, however, was testifying to her observations concerning a 1998 inspection of Site 1 (tr at 310). Therefore, her testimony has little bearing on the allegation that "Respondents had created a ditch" at the site on April 30, 2003 (2012 complaint ¶ 51).

Moreover, Department staff does not rely upon Ms. Greco's testimony to support the allegations set forth

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[19] Although paragraph 51 of the 2012 complaint references both an alleged ditch and alleged fill at Site 1, the express terms of the sixth cause of action concern only respondents' alleged "creat[ion of] a ditch within the regulated tidal wetland adjacent area" (2012 complaint ¶ 92). I also note that the case initiation form and tickets issued by Environmental Conservation Officer (ECO) A. M. Mat make no reference to disturbed soil or fill (see exhibit 32). Accordingly, as to the sixth cause of action, I address only whether respondents violated the tidal wetlands law by creating a ditch within the tidal wetland adjacent area.

under the sixth cause of action. Rather, staff argues that respondents' lability for this cause of action is established by ECO Mat's written narrative on a Department case initiation form and the tickets that he issued to respondent C.W. Howard (staff's closing brief at 14 [citing exhibit 32 at 2]).

The case initiation form does not, however, state that respondents created a "ditch" in the adjacent area. The form states that ECO Mat observed "washdown fluids" from portable toilets "enter a constructed trough on the property" (see exhibit 32 at 2). The "constructed trough" is not further described on the case initiation form. Importantly, none of the tickets issued by ECO Mat in relation to his observations at the Call-A-Head facility on April 30, 2003 state that he observed a "ditch" or similar structure (see exhibit 32 at 4-11).

Moreover, none of the tickets issued by ECO Mat allege a violation of ECL 25-0401 or NYCRR 661.8, as alleged under the sixth cause of action (id. at 4-11). Rather, one of the tickets alleges the violation of a solid waste regulation and the other three tickets allege violations under ECL article 17 (Water Pollution Control) (id.). On one of the tickets, ECO Mat states that he observed respondent C.W. Howard "operator of Call-A-Head Portable Toilet Corp. having allowed to be created a point source discharge" in violation of ECL 17-0505 (id. at 6-7 [capitalization omitted]). The term "point source" is broadly defined under ECL article 17 to mean:

> "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged"

(ECL 17-0105[16]). Although this definition includes "ditch" as a type of point source, it also includes a "channel," "conduit," "discrete fissure," or "any discernible, confined and discrete conveyance" (id.).

Accordingly, among other issues, Department staff has not demonstrated that ECO Mat's observation of a "point source" within the context of alleged violations of ECL article 17, establishes that respondents created a "ditch" within the context of an alleged violation of "6 NYCRR §661.8 in combination with §661.5(b)(51) and (57)" as charged in the 2012 complaint (2012 complaint ¶ 92). Staff also failed to proffer evidence or set forth argument to establish that the alleged "trough" at the Call-A-Head facility constitutes an "accessory structure or facilities" under 6 NYCRR 661.5(b)(51), or that it is a "type of regulated activity not specifically listed" under 6 NYCRR 661.5(b)(57).

Absent clarifying testimony from ECO Mat or other corroborating evidence to demonstrate that respondents created a ditch, as alleged in the 2012 complaint, I hold that Department staff did not meet its burden of proof with regard to the allegations set forth under the sixth cause of action.

– Seventh Cause of Action

Department staff alleges that "[b]y draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, directly into the waters of Jamaica Bay without a DEC permit as described in paragraph 53 above, the Call-A-Head Respondents violated ECL § 17-0803 and 6 NYCRR §751.1(a) as it was in effect at that time" (2012 complaint ¶ 93). Paragraph 53 of the 2012 complaint alleges that, on April 30, 2003, "Respondents drained untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, through [a] conveyance directly into the waters of Jamaica Bay."

At the time of the alleged violation, April 30, 2003, 6 NYCRR 751.1(a) provided that, with certain exceptions not applicable here, "no person shall discharge or cause a discharge of any pollutant without a [State Pollution Discharge Elimination System (SPDES)] permit having been issued to such person." Pursuant to 6 NYCRR 750.2(a), the following definitions applied on April 30, 2003:

- Person means "any individual, . . . corporation, . . . or any other legal entity whatsoever" (6 NYCRR 750.2[a][2]; ECL 17-0105[1]).
- Discharge means "any addition of any pollutant to State waters, waters of the contiguous zone, or the ocean through an outlet or point source" (6 NYCRR 750.2[a][9]).

- Pollutant includes "solid waste, . . . sewage, . . . sewage sludge, . . . chemical wastes, . . . industrial, municipal, and agricultural waste discharged into water" (6 NYCRR 750.2[a][2]; ECL 17-0105[17]).

- Waters or waters of the State include "bays, sounds, ponds, . . . estuaries, marshes, inlets, canals, the Atlantic [O]cean within the territorial limits of the state of New York and all other bodies of surface or underground water, . . . inland or coastal, fresh or salt" (6 NYCRR 750.2[a][2]; ECL 17-0105[2]).

- Outlet means "the terminus of a sewer system, or the point of emergence of any waterborne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state" (6 NYCRR 750.2 [a] [2]; ECL 17-0105 [11]).

- Point source includes "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch, channel, . . . conduit, . . . discrete fissure" (6 NYCRR 750.2[a][20]).

Factual allegations corresponding to each of the elements necessary to establish a violation of 6 NYCRR 751.1(a) are set forth in tickets ECO Mat signed and affirmed under penalty of perjury on April 30, 2003. Each of the tickets is also signed, without admission of guilt, by respondent C.W. Howard (id.). In three of the tickets he issued, ECO Mat alleged violations under ECL article 17 (see exhibit 32 at 6-11). The narrative descriptions in these tickets state that, at

the Call-A-Head facility, ECO Mat observed respondent C.W. Howard:[20]

- "having allowed to be created a point source discharge on the grounds of [the] facility, which was actively discharging liquid into the waters of Jamaica Bay" (id. at 7).
- "having caused the waters of the State to be contaminated by discharging . . . residual contents of portable toilets, and cleaning liquids" (id. at 9).
- "having caused contamination of the waters of the State by allowing cleaning liquids and residual contents of portable toilets to be directly discharged into the waters of Jamaica Bay" (id. at 11).

In addition to the tickets he issued on April 30, 2003, ECO Mat completed a DEC case initiation form on May 1, 2003 in relation to the tickets (see exhibit 32 at 1-3). The case initiation form was approved by Captain Lopez who, at that time, was a Lieutenant with the Department (see id. at 1 [supervisor's approval]; tr at 522, 524 [Lopez testimony]). The narrative portion of the case initiation form states that ECO Mat observed the discharge of "residual content of portable toilets and washdown fluids . . . enter a constructed trough on the property . . . flowing directly into the waters of Jamaica Bay" (exhibit 32 at 2).

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[20] Some of the capitalization used in the narratives has been omitted for readability.

These narratives establish that respondent C.W. Howard allowed or caused a discharge of a pollutant into the waters of the State within the context of 6 NYCRR 751.1(a) (see Matter of Reliable Products, Order of the Commissioner, Apr. 15, 1991, at 1 [holding that a respondent had violated 6 NYCRR 751.1(a) "by rinsing barrels . . . at its . . . facility, and allowing the soap residue and rinsewater to spill on the ground and enter ditches which ultimately discharge to Cowaselon Creek, without a SPDES permit"]). Residual contents of portable toilets, washdown fluids, and cleaning liquids fall within the broad definition of a "pollutant." Jamaica Bay, including its estuaries, marshes and inlets, falls within the definition of "waters of the State." ECO Mat's affirmation that he observed a "point source discharge" in the context of an alleged violation of ECL article 17, coupled with his statement that he observed pollutants "enter a constructed trough . . . flowing directly into the waters of Jamaica Bay" are sufficient to establish that the conveyance he observed falls within the definition of a "point source."

Finally, the lack of a SPDES permit authorizing the discharge at the Call-A-Head facility is established by the testimony of Ms. Greco. Ms. Greco testified that she is a deputy regional permit administrator for the Department and that her responsibilities include ascertaining whether the Department has issued a permit for a facility (tr at 44-45). Ms. Greco testified that the only DEC permits issued to Call-A-Head were waste transporter permits (tr at 45, 131-132).

Although, as respondents note, the statements made by ECO Mat in the tickets and the accompanying case initiation form are hearsay, such evidence is admissible in this proceeding (see 6 NYCRR 622.11[a][3] [stating that, in DEC enforcement hearings, "[t]he rules of evidence need not be strictly applied"]; see also Matter of Tubridy, Decision of the Commissioner, Apr. 19, 2001, at 10 [holding that "[t]he rules of evidence are not strictly applied in administrative proceedings, and hearsay is admissible. However, the weight given to a witness' testimony is based, in part, on the reliability of that evidence"]; Matter of Tractor Supply, Decision and Order of the Commissioner, Aug. 8, 2008, at 2 [stating that "unlike civil court proceedings, hearsay evidence is admissible in an administrative adjudicatory proceeding"]). I hold ECO Mat's statements to be sufficiently reliable and probative to form the basis for respondents' liability under the seventh cause of action. At the time he issued the tickets, ECO Mat was a sworn officer of the State. The statements made by ECO Mat on the tickets are affirmed by him under penalty of perjury and the statements in the case initiation form are consistent with, and elaborate on, the statements made by ECO Mat on the tickets.

I also note that, as part of a plea agreement with the Queens County District Attorney's Office, respondent C.W. Howard, on behalf of "Call-A-Head (also known as Call-A-Head Corp., Call-A-Head Portable Toilets, Inc [sic], Call-A-Head Portable Toilet, Inc., and Call-A-Head Portable Toilet, Corp.; hereinafter 'Call-A-Head')" pled guilty to one of the tickets issued on April

30, 2003 by ECO Mat (exhibit 34 at 2). That ticket states that ECO Mat observed respondent C.W. Howard "operator of Call-A-Head Portable Toilet Corp. having caused the waters of the State to be contaminated by discharging into waters of the marine district, Jamaica Bay, residual contents of portable toilets, and cleaning liquids" (exhibit 32 at 9 [capitalization omitted]).

I conclude that Department staff has met its burden of proof to establish that the corporate respondents and respondent C.W. Howard violated ECL 17-0803 and 6 NYCRR 751.1(a) on April 30, 2003 as alleged in the seventh cause of action.

– Eighth Cause of Action

Department staff alleges that "[b]y draining untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, directly into the waters of Jamaica Bay without a DEC permit as described in paragraph 53 above, the Call-A-Head Respondents also violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(44) and (52)" (2012 complaint ¶ 94). Paragraph 53 of the 2012 complaint alleges that, "Respondents drained untreated residual content of portable toilets, including sewage, chemicals and wash-down fluids, through [a] conveyance directly into the waters of Jamaica Bay."

Pursuant to 6 NYCRR 661.5(b)(44) a tidal wetlands permit is required for the discharge of any pollutant for which a SPDES permit is required where such

discharge is into a tidal wetland or adjacent area. As discussed above, the discharge observed by ECO Mat required a SPDES permit. Accordingly, because the discharge was into a tidal wetland from a regulated adjacent area, a tidal wetlands permit was also required.

Pursuant to 6 NYCRR 661.5(b)(52) a tidal wetlands permit is required for the "[d]isposal of any chemical, petrochemical or other toxic material" within a tidal wetland or adjacent area. As discussed above, ECO Mat observed washdown fluids, cleaning liquids and the residual contents of portable toilets disposed on the ground and discharging into the tidal wetland. Accordingly, because these materials were disposed of within a tidal wetland and a regulated adjacent area, a tidal wetlands permit was also required.

I conclude that Department staff has met its burden of proof to establish that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 on April 30, 2003 as alleged in the eighth cause of action.

– Ninth, Tenth, Eleventh, and Twelfth Causes of Action

These causes of action all relate to the factual allegations set forth in paragraph 55 of the 2012 complaint. Among other things, Department staff alleges that respondents "placed gravel to create a storage yard/parking lot measuring 50 feet by 80 feet immediately east of the facility" (2012 complaint ¶ 55[a]). Staff

further alleges that this activity, and respondents' subsequent use of the area for their portable toilet operation, violated ECL 25-0401 and 6 NYCRR 661.8 in combination with various provisions of 6 NYCRR 661.5(b) (2012 complaint ¶¶ 95-98).

Respondents argue that the ninth, tenth, eleventh, and twelfth causes of action should all be dismissed because Department staff did not proffer evidence to show that respondents' alleged activities "substantially . . . impaired . . . or altered the natural condition of the tidal wetland area" (respondents' closing brief at 52 [paraphrasing ECL 25-0401(2)]).

Respondents misread ECL 25-0401(2). This provision states, in its entirety:

> "Activities subject to regulation hereunder include any form of draining, 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, rubbish, or fill of any kind; 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."

By its express terms, each of the activities specified under ECL 25-0401(2) is subject to regulation

under the Act. In addition, "any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area" is also subject to regulation (id.). The Act's implementing regulations, 6 NYCRR part 661, reflect this broad definition of regulated activity. The regulations define regulated activity to include those activities specified under ECL 25-0401(2) (see 6 NYCRR 661.4[ee][1]) and provide an extensive list of activities that are regulated (see 6 NYCRR 661.4[ee][2] [incorporating all those activities listed under 6 NYCRR 661.5(b) that require a permit]).

Respondents' argument that regulated activities are limited to only activities that are demonstrated to "substantially impair or alter the natural condition of the tidal wetland area" is contrary to the express language of ECL 25-0401(2) and the provisions of 6 NYCRR part 661. Accordingly, respondents' argument is rejected.

Under the ninth cause of action, Department staff alleges that "[b]y placing gravel to create a storage yard/parking lot measuring 50 feet by 80 feet immediately east of the facility approximately 7 feet landward of the tidal wetland boundary as described in sub-paragraph 55 a) above, . . . Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30) and (51)" (2012 complaint ¶ 95). Paragraph 55(a) of the 2012 complaint alleges that, on June 3, 2003, "Department staff observed that Respondents had . . . placed gravel to create a storage yard/parking lot."

During an inspection of Site 1 on June 3, 2003, Department staff observed a gravel-covered storage area (gravel storage area) measuring 50 feet by 80 feet on the east side of Site 1 (see exhibit 35 [photographs from the June 3, 2003 inspection]; exhibit 36 at 2 [inspection report: notations in blue are observations from the June 3, 2003 inspection; notations in red relate to the photographs in exhibit 35 and indicate the camera location and direction]; tr at 699-700, 709-710, 809-810). The gravel storage area was not in place at the time of the Department's January 15, 1998 inspection of Site 1 (see exhibits 20, 21 [depicting little or no gravel in place at the site of the gravel storage area]; exhibit 22 at 2 [inspection report, the green and orange x's relate to the photographs in exhibits 20 and 21, respectively, and indicate the camera location]; tr at 157-160, 1070 [Stadnik testimony that the aerial photograph of Site 1 from 1996 (exhibit 15 at 2) depicts portable toilets and "[m]ostly grass vegetation" at the location that is now the gravel storage area]; tr at 1071-1072 [Stadnik testimony that photographs of Site 1 from 1998 (exhibits 20, 21) depict "[m]ostly dirt sediments, very loose limited gravel, and then in the background, grass vegetation" at the location that is now the gravel storage area]).

Department staff has met its burden to prove that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 in combination with 6 NYCRR 661.5(b)(30) and (51). Respondents did not have a permit for the placement of fill (i.e., gravel) or the construction of an accessory

structure (i.e., the gravel storage area) in the adjacent area of the tidal wetland as is required by 6 NYCRR 661.5(b)(30) and (51), respectively.

Under the tenth cause of action, Department staff alleges that "[b]y placing a metal container, portable toilets, vehicles & trailers in [the gravel storage area] as described in subparagraph 55 b) above, . . . Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(48) and (51)" (2012 complaint ¶ 96). Paragraph 55(b) of the 2012 complaint alleges that, on June 3, 2003, "Department staff observed that Respondents had . . . placed a metal container, portable toilets, vehicles & trailers" in [the gravel storage area]."

Turning first to the alleged violation of 6 NYCRR 661.5(b)(51), I conclude that Department staff did not meet its burden to prove that respondents' "place[ment of] a metal container, portable toilets, vehicles & trailers" (2012 complaint ¶ 55[b]) in the gravel storage area equates to "[c]onstruction of accessory structure[s] or facilities" (6 NYCRR 661.5[b][51]).

The inspection report from the Department's June 3, 2003 inspection of Site 1 depicts the newly created gravel storage area and identifies the location of a "container" thereon (see exhibit 36 at 2). Photographs taken during the inspection and testimony at the hearing establish that a variety of items, including portable toilets, a box truck and several trailers were stored in the gravel storage area (see exhibit 35; tr at 694-697). The record does not, however, provide any detail

regarding the container noted in the inspection report; the container's dimensions, construction, and purpose are not established.

At hearing, respondents questioned whether the items stored in the gravel storage area were "movable object[s]" (tr at 1020). Respondents raised similar question regarding materials stored in the same area prior to 2003 (see tr at 164 [respondents' counsel questioning whether the stored items were "permanent" structures or were "transportable"]).

In its closing brief, Department staff cites to hearing testimony and exhibits in support of the "presence of trailers, a flatbed truck, and portable toilets" in the gravel storage area, but does not address the issue of whether these items constitute "[c]onstruction of accessory structure[s] or facilities" as contemplated under 6 NYCRR 661.5(b)(51) (see staff's closing brief at 17).

On this record, I conclude that Department staff failed to meet its burden to demonstrate that the stored items observed on the gravel storage area during the 2003 inspection constituted a violation of 6 NYCRR 661.5(b)(51) (cf. Matter of Zaccaro, Order of the Commissioner, Aug. 24, 2000, adopting Hearing Report at 7 [holding a respondent liable under the freshwater wetlands regulations, for placing a trailer in the wetland because "it is a roofed, walled structure that has been constructed for permanent use"]).

Nevertheless, Department staff established that, at the time of the June 3, 2003 inspection, respondents

were storing a variety of items in the gravel storage area that are used in the operation of respondents' portable toilet facility. Accordingly, I conclude that staff has met its burden to prove that the corporate respondents and respondent C.W. Howard violated 6 NYCRR 661.5(b)(48) by "undertaking commercial and industrial use activities not requiring water access" within the gravel storage area.

Under the eleventh cause of action, Department staff alleges that "[b]y placing fill in the tidal wetland adjacent area as described in subparagraph 55 c) above, . . . Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30)" (2012 complaint ¶ 97). Paragraph 55(c) of the 2012 complaint alleges that, on June 3, 2003, "Department staff observed that Respondents had . . . placed a fill pile in the regulated tidal wetlands adjacent area."

During the June 3, 2003 inspection Department staff observed a fill pile that had been recently placed at the southeast corner of the gravel storage area (see exhibit 36 at 2; tr 709-710; 1020 [Stadnik testimony that the fill pile "wasn't vegetated so it had to be recent . . . vegetation would have started taking over within a year"]).

Department staff has met its burden to prove that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 in combination with 6 NYCRR 661.5(b)(30). Respondents did not have a permit for the placement of fill in the

adjacent area of the tidal wetland as is required by 6 NYCRR 661.5(b)(30).

Under the twelfth cause of action, Department staff alleges that "[b]y clearing and removing vegetation within the tidal wetland adjacent area as described in subparagraph 55 d) above, . . . Respondents violated ECL§25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(57)" (2012 complaint ¶ 98). Paragraph 55(d) of the 2012 complaint alleges that, on June 3, 2003, "Department staff observed that Respondents had . . . cleared and cut vegetation within the regulated tidal wetlands adjacent area to install [the gravel storage area]."

As previously noted, during the June 3, 2003 inspection Department staff observed that respondents had built the gravel storage area and that the gravel storage area was not in place at the time of the Department's January 15, 1998 inspection of Site 1. Mr. Stadnik testified that portions of the area now covered by the gravel storage area were vegetated at the time of the 1998 inspection (tr at 1071-1073; see also tr at 1070 [Stadnik testimony that the 1996 aerial photograph (exhibit 15 at 2) depicts portable toilets and "[m]ostly grass vegetation" at the location that is now the gravel storage area]). He also testified that "[h]istorically there was vegetation in that gravel storage area based on the 1979 detailed aerial [photograph]" (tr at 1050).

The use restriction cited by Department staff, 6 NYCRR 661.5(b)(57), applies to "[a]ny type of regulated

activity not specifically listed" in the chart under 661.5(b). Pursuant to 6 NYCRR 661.4(ee)(1)(vi), regulated activities include any "activity within a tidal wetland or on an adjacent area which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland."

Department staff proffered testimony regarding the importance of vegetation in a tidal wetland adjacent area (see tr at 712 [Stadnik testimony that "the biggest benefit for a tidal wetland adjacent area is [to] act as a buffer" and that "the vegetation provides a natural barrier as a screen, and it is usually a wildlife corridor for upland wildlife like raccoons, rabbits, and also it provides areas for shorebirds to roost and nest in"]; see also 6 NYCRR 661.2[a] [stating that "[t]idal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values [including] marine food production, wildlife habitat . . . and open space and aesthetic appreciation . . . Therefore, the protection and preservation of tidal wetlands are essential"]). Staff also proffered testimony that the removal of vegetation may impair the natural condition and function of the wetland (tr at 713 [Stadnik testimony that bringing commercial activity closer to the tidal wetland "could have a super negative [impact], just from the operation and noise, and any lack of vegetative buffer area to diminish that noise and diminish the activity"]).

On this record, I conclude that the clearing of vegetation to construct and maintain the 50' by 80' gravel storage area in the tidal wetland adjacent area at Site

1 constitutes a regulated activity under 6 NYCRR 661.4(ee)(1)(vi). Accordingly, Department staff has met its burden to prove that the corporate respondents and respondent C.W. Howard violated ECL 25-0401 and 6 NYCRR 661.8 in combination with 6 NYCRR 661.5(b)(57) by clearing vegetation in the adjacent area of the tidal wetland without a permit (see Matter of Francis, Order of the Commissioner, Apr. 26, 2011 [holding that respondents violated ECL 25-0401 and 6 NYCRR 661.8 "by clearing vegetation in a tidal wetland adjacent area at the site without a permit"]).

– Thirteenth Cause of Action

Department staff alleges that "[b]y placing fill in the tidal wetland adjacent area as described in paragraph 57 above, . . . Respondents violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30)" (2012 complaint ¶ 99). Paragraph 57 of the 2012 complaint alleges that, on or about December 15, 2003, "without having a DEC permit to do so, Respondents filled the drainage ditch they had created on or before April 30, 2003, with concrete."

Department staff withdrew this cause of action (see staff's closing brief at 18-19). Accordingly, it will not be considered herein.

– Fourteenth Cause of Action

Department staff alleges that "[b]y discharging untreated residual content of portable toilets and

wash-down fluids into a catch basin or other conveyance from where the residual content and wash-down fluids were allowed to drain untreated into the wetlands and navigable waters of Jamaica Bay as described in paragraph 58, . . . Respondents violated ECL §§17-0505, 17-0803 and 6 NYCRR §750-1.4" (2012 complaint ¶ 100). Paragraph 58 of the 2012 complaint alleges that, on or about December 15, 2003, "without having a permit from the Department to do so, Respondents discharged untreated residual content of portable toilets and wash-down fluids containing pollutants from Site 1 . . . into the wetlands and navigable waters of Jamaica Bay."

Department staff withdrew this cause of action (see staff's closing brief at 19). Accordingly, it will not be considered herein.

– Fifteenth Cause of Action

Department staff alleges that "[b]y discharging untreated residual content of portable toilets and wash-down fluids into a catch basin or other conveyance from where the residual content and wash-down fluids were allowed to drain untreated into the wetlands and navigable waters of Jamaica Bay as described in paragraph 58, . . . Respondents also violated ECL§25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(44) and (52)" (2012 complaint ¶ 101). Paragraph 58 of the 2012 complaint alleges that, on or about December 15, 2003, "without having a permit from the Department to do so, Respondents discharged untreated residual

content of portable toilets and wash-down fluids containing pollutants from Site 1 . . . into the wetlands and navigable waters of Jamaica Bay."

Department staff withdrew this cause of action (see staff's closing brief at 19-20). Accordingly, it will not be considered herein.

– Sixteenth Cause of Action

Department staff alleges that "[b]y discharging storm water from Site 1 without a SPDES permit as described in paragraph 59 above, . . . Respondents violated ECL §17-0803 as well as 6 NYCRR §751.1(a)" (2012 complaint ¶ 102). Paragraph 59 of the 2012 complaint alleges that, "[t]hroughout Respondents[‘] operation at Site 1 . . . , during every rain event, storm water is being discharged from a point source into Jamaica Bay." Staff further alleges that respondents' portable toilet operation requires, but does not have, either an individual SPDES permit or coverage under the Department's SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (2012 complaint ¶¶ 60-62).

Department staff withdrew this cause of action (see staff's closing brief at 20). Accordingly, it will not be considered herein.

Causes of Action Pertaining to Site 2

– Seventeenth Cause of Action

Department staff alleges that "[b]y discharging storm water from Site 2 without a SPDES permit as described in paragraph 59 above, . . . Respondents violated ECL §17-0803 as well as 6 NYCRR §751.1(a)" (2012 complaint ¶ 103). This cause of action relies upon the same allegations set forth under the sixteenth cause of action, but pertains to respondents' alleged activities at Site 2 rather than Site 1.

Department staff withdrew this cause of action (see staff's closing brief at 20). Accordingly, it will not be considered herein.

– Eighteenth Cause of Action

Department staff alleges that "[b]y altering, or allowing the alteration of, Site 2 through the placement of fill, addition of a fence and the continued storage of dozens of portable toilets[,] . . . Respondents have violated special condition 10 of Permit No. 2-6308-00357/0001" (2012 complaint ¶ 104).

Department staff withdrew this cause of action (see staff's closing brief at 20). Accordingly, it will not be considered herein.

Cause of Action Pertaining to Site 3

– Nineteenth Cause of Action

Department staff alleges that "[b]y placing fill in the regulated tidal wetland and/or tidal wetland adjacent area as described in paragraph 72 above, Respondent [C.W. Howard] violated ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30) (2012 complaint ¶ 105). Paragraph 72 of the 2012 complaint alleges that, on or about April 22, 2003, respondent C.W. Howard "placed or allowed the placement of fill in the regulated tidal wetland and/or tidal wetland adjacent area on Site 2 [sic]."

The hearing record establishes that, on April 25, 2003, Environmental Conservation Officer (ECO) A. M. Mat issued a criminal court information and summons (ticket) to respondent C.W. Howard for placing fill in the adjacent area of a tidal wetland without a permit (exhibit 33 [ticket affirmed by ECO Mat on Apr. 25, 2003]). ECO Mat affirmed, under penalty of perjury, that he interviewed C.W. Howard, the owner of Site 3, and determined that "[C.W.] Howard on or about 04/22/03 did cause/allow fill to be placed in an adjacent tidal wetlands area without having required permit" (id. at 5 [capitalization omitted]). Respondent C.W. Howard, without admitting guilt, signed the ticket (id. at 4).

ECO Mat is no longer employed by the Department and did not testify at the hearing (see tr at 526 [Lopez testimony that ECO Mat left the Department approximately two years ago]). Respondents objected

to the receipt of the ticket into the record because, without ECO Mat's testimony, the ticket contains "hearsay within hearsay" because it includes "a statement made by a third party" (tr at 534). After reviewing the document and considering the arguments from the parties, I received the ticket into evidence. As I stated at the time, the ticket "is an official record of the agency written by an officer of the agency, and I am going to accept it as hearsay, which is admissible in our proceedings. The weight that ultimately will be given that document is to be determined" (tr at 539; see e.g. Matter of Tubridy, Decision of the Commissioner, Apr. 19, 2001, at 10 [holding that "[t]he rules of evidence are not strictly applied in administrative proceedings, and hearsay is admissible. However, the weight given to a witness' testimony is based, in part, on the reliability of that evidence"]).

The hearsay evidence at issue, including the hearsay within hearsay, is contained within a criminal court information and summons that was issued and affirmed under penalty of perjury by an Environmental Conservation Officer. As such, I view this evidence to be reliable and, if uncontroverted, it would be sufficient to establish the factual assertions set forth in the ticket.

Here, however, Department staff did not rely upon the ticket alone to meet their burden of proof in relation to the allegations set forth under the nineteenth cause of action. Rather, staff called Stephen Zahn to testify regarding his inspection of Site 3 which was undertaken on May 9, 2003, approximately two weeks

after ECO Mat issued the ticket to respondent C.W. Howard (tr at 1121-1122 [Zahn testimony regarding the date of the inspection]; see also exhibit 43 [field notes from the inspection, dated May 9, 2003]). Mr. Zahn testified that he observed various forms of fill that had been recently placed at Site 3 (tr at 1139-1141 [testimony that fill in the form of "bluestone or gravel," "wooden poles," and "sod" had been recently placed], 1144 [testimony that there was other "fill material that was placed along the edge of the property"]; see also exhibit 44 [case initiation form with attached photographs of Site 3 taken during the May 9, 2003 inspection of Site 3]).

Mr. Zahn also testified that all of Site 3 is located within a regulated tidal wetland or its adjacent area (tr at 1150 [testimony describing the intertidal marsh on the south side of Site 3 and attesting that "the adjacent area [extends north] to the southern edge of West 17th"]; see also exhibit 45 [excerpt from DEC tidal wetlands map 598-494, depicting 40 West 17th Road outlined in red]). Respondents admitted same in their answer (see 2012 complaint 32; answer 2). Respondent C.W. Howard did not obtain a DEC permit for placing fill in the tidal wetland adjacent area (tr at 81 [Greco testimony that she "didn't find any permits issued for [the Site 3] address"]).

Pursuant to 6 NYCRR 661.5(b)(30), "[f]illing," either in a tidal wetland or an adjacent area, is a use that requires a permit. "Filling" is not specifically defined under the regulations, but falls with the broad definition of "[r]egulated activity" which is defined to

include "any form of dumping, filling or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish or fill of any kind" (6 NYCRR 661.4[ee][1][ii]).

I note that respondents object to the use of observations made during the Department's inspection of Site 3 on May 27, 2005 (see respondents' closing brief at 56). Respondents argue that the "2005 inspection should not be used to establish the allegations in the [2012] Complaint because they are unpled" and, therefore, "the [2012] Complaint failed to provide the Respondent with notice of the alleged violations alleged in the testimony regarding the May 2005 inspection" (id.).

Department staff, however, does not rely upon the May 27, 2005 inspection of Site 3 to establish the allegations set forth under the nineteenth cause of action. Rather, staff relies upon the April 25, 2003 ticket issued to respondent C.W. Howard and the May 9, 2003 inspection of Site 3 for that purpose. The May 27, 2005 inspection coincides with the end-date for staff's penalty calculation for the nineteenth cause of action (see staff's closing brief at 21 [referencing Ms. DeMarco's testimony[21] regarding the "presence of fill at Site 3"], id. at 36 [stating the violation at Site 3 continued for 766 days, from April 22, 2003 to May 27, 2005]).

[21] Department staff attributes this testimony to "Leigh Vogel" (staff's closing brief at 21). Vogel was Leigh DeMarco's last name at the time of the 2005 inspection (see exhibit 30 [DEC inspection report signed by Vogel]; tr at 438-439 [DeMarco testimony that she signed exhibit 30]).

Photographs taken at the May 27, 2005 inspection are consistent with the fill observed by Mr. Zahn at the May 9, 2003 inspection (see exhibit 31B, #1D [depicting stone along the road, two wooden poles, grass (now overgrown), silt fencing (partially down)]).[22]

I conclude that Department staff has met its burden to prove that respondent C.W. Howard placed fill at Site 3 on or about April 22, 2003 without a permit in violation of ECL 25-0401 and 6 NYCRR 661.8.

Other Issues Raised by Respondents

Discovery

Respondents argue that discovery should be reopened to afford respondents the opportunity to seek disclosure relating to their claim that the Department has engaged in selective enforcement (respondents' closing brief at 16-22 [concluding that "DEC should have been required to disclose the information . . . to enable the Respondents to make a valid and appropriate, fact based argument of selective enforcement"]). This issue was addressed in a previous ruling in this matter (see Matter of Call-A-Head, Ruling, June 3, 2016, at 3-4), and respondents have raised nothing in

[22] Ms. DeMarco also testified to the existence of concrete debris along the wetland (tr at 430; see also exhibit 31C). Ms. DeMarco testified that she could not determine how long the concrete had been in place (tr at 482-483). Accordingly, I do not hold respondent C.W. Howard liable for placement of that debris along the wetland.

their closing brief that would warrant reconsideration of that ruling.

In my June 3, 2016 ruling, I cite Matter of 303 West 42nd Street Corp. v Klein, 46 NY2d 686 (1979), in support of the holding that respondents' selective enforcement argument "is not adjudicable in this forum, but rather must be pursued in civil court" (ruling at 4 [quoting 303 West 42nd Street Corp. at 693]). Although respondents quote 303 West 42nd Street Corp. at length in their closing brief (see respondents' closing brief at 18-21), they do not cite to any holding in that case, or to any other authority, that is contrary to my June 3, 2016 ruling on the issue of respondents' selective enforcement claim. Other case law in New York is also consistent with my June 3, 2016 ruling (see e.g. Matter of Aria Contracting Corp. v McGowan, 256 AD2d 1204 [4th Dept 1998] [holding that the "claim [of discriminatory enforcement] may not be raised at an administrative hearing"]; Matter of Cannon v Urlacher, 155 AD2d 906 [4th Dept 1989] [holding that the "hearing officer properly refused to enforce the subpoena duces tecum [where] [p]etitioner sought to introduce . . . records to support his claim of discriminatory enforcement," and further holding that the "claim of discriminatory enforcement . . . cannot be raised at an administrative hearing"]; Matter of Bell v N.Y. State Liquor Auth., 48 AD2d 83, 84 [3rd Dept 1975] [holding that "the hearing officer and Special Term properly refused to permit appellants to develop the defense of discriminatory selective enforcement at

the administrative hearing level" and that "[s]uch questions must be submitted to a judicial tribunal"]).

Accordingly, my June 3, 2016 ruling on this issue stands.

Missing Witness Charge

In their closing brief, respondents request that "the ALJ as 'trier of fact' should draw a negative inference against the DEC because [ECO] Mat is a missing witness" (Respondents' closing brief at 41-42). This request, sometimes called a request for a "missing witness charge," requires a showing that the missing witness: has knowledge about a material issue in the case; would be expected to give noncumulative testimony; is under the control of the party against whom the charge is sought; and is available to that party (see DeVito v Feliciano, 22 NY3d 159, 165–166 [2013]). For the reasons set forth below, I conclude that respondents' request must be denied.

Respondents' request for a missing witness charge is untimely. As the Court of Appeals has made clear, "[t]he burden, in the first instance, is upon the party seeking the charge to promptly notify the court" (People v Gonzalez, 68 NY2d 424, 427-428 [1986]; see also Herman v Moore, 134 AD3d 543, 545 [1st Dept 2015] [holding that "[t]he party seeking a missing witness charge has the burden of promptly notifying the court when the need for such a charge arises . . . Here, the record does not reflect when defendants asked for a missing witness charge . . . This presents the

possibility that they did not do so until after plaintiff presented her case . . . Accordingly, since there is no indication that defendants met their burden, we find that the missing witness charge was improperly given"]). The Court further held that, "[i]n all events, the issue must be raised as soon as practicable so that the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid substantial possibilities of surprise" (Gonzalez at 428 [internal quotations and cites omitted]).

Here, respondents have known since the early 1990s that ECO Mat had inspected Site 1 and had identified alleged violations in 1992. The 1994 consent order, which was signed by respondent C.W. Howard on behalf of respondent Call-A-Head Corp. states that "[o]n December 10, 1992, [ECO] Mat conducted an inspection of [Site 1] and observed that [Call-A-Head Corp.] had permitted portable toilets components to enter a regulated tidal wetland in and adjacent to the site" (exhibit 1 ¶ 4). ECO Mat also issued five tickets in April 2003 that relate to allegations set forth in the 2012 complaint (see exhibits 32, 33). Each of the five tickets issued by ECO Mat is signed by respondent C.W. Howard (id.).

Prior to the first day of hearing, Department staff provided respondents with its witness list (see letter from DEC to respondents' counsel, dated May 27, 2016 [filed with staff's reply, dated Sept. 12, 2016]). The DEC witness list did not name ECO Mat as a witness. Had respondents raised the missing witness issue at that time, Department staff would have had ample

opportunity to "tailor their trial strategy" as suggested by the Court of Appeals (Gonzalez at 428). Respondents did not raise the issue at that time.

On June 15, 2016, the third day of the hearing, Department staff called Captain Lopez to the stand (tr at 521). On direct, Captain Lopez testified regarding ECO Mat's inspections of sites 1 and 3 (see tr at 526-533). Although respondents questioned Captain Lopez at length on cross examination, particularly with regard to ECO Mat's involvement in this matter, respondents did not request a missing witness charge (see tr at 540-670). Rather, at the June 15, 2016 hearing, respondents requested only that they be provided contact information for ECO Mat (tr at 573). There is no record before me indicating that respondents made any other effort to obtain contact information for ECO Mat. More importantly, neither at the close of Captain Lopez's testimony, nor at any other time during the hearing, did respondents request a missing witness charge.

Respondents did not "promptly notify the court" that they would seek a missing witness charge and negative inference (see People v Gonzalez at 427). Accordingly, respondents' request is denied as untimely.

I also note that, even where a missing witness charge may be appropriate, whether the fact finder chooses to draw a negative inference is permissive (Gonzalez at 431 [noting that "the inference that the jury may draw is permissive and the People are equally able to argue in summation against the inference"]). As discussed earlier in this hearing report, the out of court

statements of ECO Mat that were proffered by staff at the hearing are in a form that warrants considerable weight and, in some instances, the statements are corroborated by witness testimony at the hearing (see supra at 34-35).

Moreover, ECO Mat is no longer with the Department, thereby placing him outside the Department's control (see Coliseum Towers Assocs. v Cty. of Nassau, 2 AD3d 562, 565 [2d Dept 2003] [holding that "the trial court erred in drawing a negative inference against the County with respect to certain witnesses it failed to present at trial, since the witnesses were former County employees and thus, not under the County's direction or control"]; People v Parkes, 186 AD2d 89 [1992] [holding that "[n]or was it error for the court to refuse a missing witness charge as to . . . a retired detective since [the detective was not] shown to have material testimony or to be under the prosecutor's control]).

Respondents' request for a negative inference is denied.

Disqualification of Drescher
and Office of General Counsel

Respondents argue, once again, that Mr. Drescher and the entire DEC Office of General Counsel should be disqualified from prosecuting this matter (respondents' closing brief at 22-34). This issue was addressed by my ruling dated October 11, 2016, wherein I denied the same request (id. at 7). Respondents have raised

nothing in their closing brief that warrants reconsideration of my October 11, 2016 ruling and, therefore, the ruling stands.

I note that, in their closing brief, respondents again attempt to portray Mr. Drescher as an overzealous prosecutor who "has made it his life's mission to destroy CAH and its operations at Site 1" (id. at 34). Respondents cite to Mr. Drescher's "political activism" and to another Department enforcement proceeding in which Mr. Drescher was alleged to have acted overzealously (id. at 21).

First, Mr. Drescher's political activity has no bearing on this matter. Respondents' attempt to raise this issue as somehow demonstrating that Mr. Drescher is an overzealous prosecutor is rejected.

Second, respondents misquote the court's holdings in Joglo Realties, Inc. v Seggos, 2016 WL 4491409 [EDNY 2016]). Contrary to respondents' representation, the court did not describe Mr. Drescher's conduct as "outrageous" or "unreasonable" (respondents' closing brief at 21 n 5). Rather, the court noted that, as alleged by the plaintiffs, Mr. Drescher's conduct may be outrageous or unreasonable (id. at 7 [referring to Mr. Drescher's "alleged insistence" relative to a particular issue during settlement discussions as "unreasonable"]; id. at 14 [referring to Mr. Drescher's "alleged behavior outside of the environmental proceeding" as "outrageous"]). Notably, in January 2017, the court dismissed this matter "in its entirety with prejudice" (see

Joglo Realties, Inc. v Seggos, 229 F Supp 3d 146, 159 [EDNY 2017]).

Department's Alleged Breach
of the 1994 Consent Order

Respondents argue that the first and second causes of action should be dismissed because the Department breached the 1994 consent order (respondents' closing brief at 42). Respondents' argument is premised on their assertion that the Department breached the provision of the 1994 consent order that states that the Department "shall not unreasonably withhold" approval of a tidal wetlands permit for operations at Site 1 (id.; see also exhibit 1 at 4 [¶ XII]). Respondents' argument is without merit.

The 1994 consent order provided "temporary authorization" for certain operations of Call-A-Head Corp. to continue at Site 1 for 120 days (exhibit 1 at 3-4 [¶¶ XI-XII]). The order further provided that the temporary authority to operate would expire automatically unless Call-A-Head Corp. "pursues the permit applications required for Respondent's commercial operation at the site" (id. at 4 [¶ XII]; see also id. at 6 [Schedule A ¶ 2 (requiring respondent to submit a tidal wetlands permit application to the Department and "pursue the grant of such permit in good faith and with due diligence")]).

The tidal wetlands permit application (application) that respondents refer to in their closing brief was not submitted to the Department within the 120-day

period of temporary authority. The application was submitted to, and received by, the Department on February 5, 2004, nearly 10 years after the temporary authority to operate expired (see exhibit 19 at 1 [cover letter with DEC receipt stamp]; tr at 81-82 [Greco testimony that the Department suspended its review of the 2004 permit because of "violations"]).

Moreover, the application was not submitted to further the objectives of the 1994 consent order. Rather, it was submitted to enlarge an existing structure at Site 1 in order "to comply with [New York City] Zoning Regulations which require that the existing uses be fully enclosed" (exhibit 1 at 2 [item 9, "Project Description and Purpose"]).

Respondents failed to submit a tidal wetlands permit application to the Department as required by the 1994 consent order. Accordingly, under the terms of the order, the temporary authority to operate automatically expired on May 27, 1994 (i.e., 120 days from the effective date of the 1994 consent order).

Respondents' argument that the Department breached the 1994 consent order by unreasonably withholding a tidal wetlands permit is rejected.

Department's Jurisdiction Over East 3rd Road

Respondents argue that East 3rd Road "is a public road, more than 100 feet long and is not subject to DEC oversight" (respondents' closing brief at 58-59). Therefore, respondents argue, any allegations related

to activities that occurred on East 3rd Road must be dismissed (id.). Respondents' argument is without merit.

The portion of Site 1 that corresponds with the location of East 3rd Road is Lot 48, a 30' x 100' parcel, that was acquired by respondent C.W. Howard on December 10, 2001 (see findings of fact ¶¶ 14-15; exhibit 15 [aerial photographs depicting "E 3rd" immediately north of the garage building on Site 1]; exhibit 19 [attached survey, dated October 27, 1999, depicting "3rd ROAD" (also identified as "189th AVENUE") immediately north of the garage building]). Although East 3rd Road is identified on certain exhibits in evidence, the record does not establish that it was ever used as a public roadway.

The Department argues that East 3rd Road was never opened as a public roadway and that it was only a "paper street" (staff's closing brief at 5). Department staff witness, George Stadnik, testified that there are many "paper streets" in New York City, which he identified as "basically a proposed street . . . that hasn't been improved or constructed" (tr at 1069). On the basis of his assessment of aerial photographs from 1974 and 1979, he testified that "fill was initially placed [on East 3rd Road] in 1974" and that "[b]y 1979, based on that detailed photograph, which is Exhibit 38, it shows vegetation in that filled-in road" (tr at 1007).

According to a 1999 survey done for the City of New York Department of Citywide Services shortly before Lot 48 was sold to respondent C.W. Howard, the entire lot is contained within the boundaries of East

3rd Road (see exhibit 19 [respondents' Joint Application for Permit, attached survey]; see also id. [attached engineering drawing]). The 1999 survey identifies East 3rd Road (also identified as 189th Avenue) and notes that it is "40 feet wide as laid out on N.Y. City Alteration Map No. 3058" (id. [description of plot]). Both the narrative description and the survey map place Lot 48, which is 30 feet wide, entirely within the bounds of East 3rd Road (id.).

Despite the fact that Lot 48 is entirely within the boundaries of East 3rd Road, respondents have long used Lot 48 as an extension of their business operation and have consistently stored portable toilets and vehicles on the lot since at least 1996 (see exhibit 15 aerial photographs from 1996, 2004, 2008, 2010 and 2012; exhibit 19 [respondents' 2004 Joint Application for Permit, attached photographs depicting an open gate onto Lot 45 from Cross Bay Boulevard at the location of East 3rd Road, and portable toilets stored inside the gate]; exhibit 20 [first photograph, depicting five rows of portable toilets south of the fence that runs along the north side of Lot 48]; exhibit 21 [fourth photograph, depicting the side of a portable toilet stored at the east end of Lot 48 (the same portable toilet is depicted at the far left of the first photograph in exhibit 20)]).

As discussed above, the record demonstrates that vegetation was growing on the area corresponding with East 3rd Road in 1979 and, since at least 1996, the lot has been used for respondents' portable toilet business. There is nothing in the record to indicate that East 3rd Road was ever opened as a public roadway.

Moreover, even assuming that East 3rd Road is a public roadway, it would remain within the definition of an adjacent area and, therefore, respondents' activities on Lot 48 would be subject to the requirements of 6 NYCRR part 661.

As Department staff testified, the Department's "jurisdiction extends 150 feet from the tidal wetland boundary unless something breaks it" and "a lawfully existing manmade structure greater than 100 feet in length would break the jurisdiction" (tr at 242). This is a reference to the regulatory definition of an adjacent area (see also ECL 25-0103 defining "[t]idal wetlands" to "mean and include . . . those areas which border on or lie beneath tidal waters"]). Specifically, as relevant here, 6 NYCRR 661.4(b)(1)(ii) provides that, within the boundaries of the City of New York the adjacent area extends 150 feet landward of the tidal wetland boundary, or:

> "to the seaward edge of the closest lawfully and presently existing (*i.e.*, as of August 20, 1977), functional and substantial fabricated structure (including, but not limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings."

As this definition makes clear, "paved streets and highways" do not limit the extent of a regulated tidal

wetland adjacent area unless they are "a minimum of 100 feet in length as measured generally parallel" to the tidal wetland boundary. Here, the area identified as East 3rd Road runs generally perpendicular to the tidal wetland boundary (see exhibit 2 [tidal wetlands map] [Site 1 is located at the lower right-hand corner of the map, the garage building is marked with an orange dot, and East 3rd Road would be located on the north side of the garage building, generally running perpendicular to both Cross Bay Boulevard and the tidal wetland boundary]).

I conclude that Lot 48 falls within the definition of a tidal wetland adjacent area and, as such, respondents' activities at Lot 48 are subject to regulation under the provisions of 6 NYCRR part 661.

Relief

By its 2012 complaint, Department staff requests that the Commissioner issue an order assessing a penalty, jointly and severally on respondents, of no less than $300,000 for the alleged violations at Site 1.[23] Staff also requests that the Commissioner assess a separate penalty of $7,500 on respondent C.W. Howard for the alleged violations at Site 3. With regard to remedial relief, staff requests that the Commissioner prohibit respondents from using Site 1 for the operation of

[23] Department staff had also sought penalties and other relief with respect to Site 2, but staff withdrew its causes of action with regard to that site (staff's closing brief at 28). Accordingly, the relief sought in connection with Site 2 is not discussed herein.

a portable toilet facility, remove all structures and impervious surfaces from Site 1 that were not in place at the time respondents took possession of the sites, and restore the tidal wetland and adjacent areas to the satisfaction of the Department. (2012 complaint at 15-17.) Staff withdrew its request for restoration of Site 3 because an owner who acquired the site from respondent C.W. Howard entered into a consent order to remediate the site (staff's closing brief at 28-29).

I note that, in its closing brief, Department requests "at least a doubling" of the penalty amount sought under the 2012 complaint (staff's closing brief at 33). Staff asserts that its request for the penalty increase is warranted on the bases of the "additional evidence solicited during the hearing and . . . applicable guidance" (id.). Importantly, however, respondents did not have notice before or during the hearing that staff would seek to double the penalty sought under the 2012 complaint. Additionally, as noted in the discussion above, staff withdrew several of the alleged violations that were set forth under the 2012 complaint and failed to meet their burden to prove others. Under the circumstances presented here, I decline to recommend that the Commissioner assess a penalty in excess of that requested under the complaint.

Respondents argue that no liability should be found. If, however, respondents are held liable for certain causes of action, respondents argue that "any penalty imposed must be proportionate to the offense" (respondents' closing brief at 60). Respondents assert that the Department "has failed to show any

contamination or injury to the tidal wetlands area based upon CAH's activities" (id. at 61). Lastly, respondents argue that if they are required to cease operations at Site 1 it "would be an illegal taking in violation of the Fifth Amendment to the United States Constitution" (id. at 62).[24]

Penalty Provisions

For the violations alleged in the 2012 complaint involving tidal wetlands, ECL 71-2503(1)(a) provides, in part:

> "Any person who violates, disobeys or disregards any provision of article twenty-five shall be liable to the people of the state for a civil penalty of not to exceed ten thousand dollars for every such violation, to be assessed, after a hearing or opportunity to be heard, by the commissioner. Each violation shall be a separate and distinct violation and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation."

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[24] The takings issue is not properly before me as it must be raised on judicial review (see Matter of Haines v Flacke, 104 AD2d 26, 33 [2d Dept 1984] [holding that "[t]he proper practice is to assert [the takings] claim in the proceeding seeking judicial review" and that "an administrative hearing is not a suitable forum for that issue"]; see also ECL 25-0404 [stating that, on judicial review, "the court may find that the determination of the commissioner [on a tidal wetlands permit application] constitutes the equivalent of a taking without compensation"]).

At the time of the alleged violation of ECL article 17 (water pollution control) set forth in the seventh cause of action under the 2012 complaint (i.e., April 30, 2003), ECL 71-1929(1) provided, in part:

> "A person who violates any of the provisions of . . . titles 1 through 11 . . . of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto . . . shall be liable to a penalty of not to exceed twenty-five thousand dollars per day for each violation."[25]

Civil Penalty Policy

– Potential Statutory Maximum

The Department's Civil Penalty Policy (Commissioner Policy DEE-1 [DEE-1], dated June 20, 1990) states that "[t]he starting point for any penalty calculation should be a computation of the potential statutory maximum for all provable violations" (DEE-1 § IV.B).

As detailed above, Department staff met its burden to demonstrate that the corporate respondents and C.W. Howard violated numerous provisions of ECL 25-0401 and its implementing regulations.[26] Several of

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[25] Under current law, such violations are now subject to a maximum penalty of $37,500 per day (see 71-1929[1][a], effective May 15, 2003).

[26] This penalty discussion generally focuses the numerous proven violations of the tidal wetlands law and regulations that were committed by the corporate respondents and C.W. Howard, collectively, at Site 1. Where indicated, the one proven violation

the tidal wetlands violations are continuing violations and, therefore, are subject to the imposition of daily penalties (see Matter of Valiotis, Order of the Commissioner, Mar. 25, 2010, at 5-6 [holding that, until removed, unauthorized structures or fill placed in a tidal wetland or its adjacent area are ongoing violations]). Accordingly, the potential statutory maximum penalty that may be assessed for many of the violations is in the tens of millions of dollars.

For example, under the first cause of action, respondents' violation of ECL 25-0401 and 6 NYCRR 661.8 in relation to the expansion of the garage building at Site 1 continued for at least 6,557 days (commencing on May 27, 1994 and continuing through May 8, 2012,[27] the date of the 2012 complaint). This violation is subject to a maximum statutory penalty of $10,000 per day and, therefore, the potential statutory maximum penalty for this violation alone is $65,570,000.

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against these respondents under ECL article 17 (water pollution control) at Site 1, and the one proven violation of the tidal wetlands law and regulations by respondent C.W. Howard at Site 3 are also discussed.

[27] These dates correspond to the date range set forth in Department staff's closing brief in relation to the first cause of action (see id. at 35 [staff's penalty calculation table]). The beginning date, May 27, 1994, is the date that the temporary authority to operate under the 1994 consent order expired, and the end date is the date of the 2012 complaint. To calculate the potential statutory maximum for each proven violation, I use the date range requested by staff except where I conclude that the hearing record demonstrates a shorter date range should apply.

Department staff also met its burden to demonstrate that the corporate respondents and C.W. Howard violated ECL 17-0805 and 6 NYCRR 751.1(a) (the seventh cause of action). Because staff alleged only a single day of violation, the maximum statutory penalty for this violation is $25,000.

As shown in Appendix A below, the potential statutory maximum penalty for all of the violations for which I have held the corporate respondents and C.W. Howard liable is in excess of $370,000,000 (this amount excludes the penalty for the 19th cause of action for which I have held only respondent C.W. Howard liable).

With regard to Site 3, the potential statutory maximum penalty for respondent C.W. Howard's violation of ECL 25-0401 and 6 NYCRR 661.8 at that site is $7,670,000.

By its 2012 complaint, Department staff requests that the Commissioner assess a penalty of no less than $300,000, jointly and severally, on respondents for the violations at Site 1. This amount is a small fraction of the potential statutory maximum penalty. Similarly, staff's request for the assessment of a $7,500 penalty on respondent C.W. Howard for violations at Site 3 is only a small fraction of the potential statutory maximum penalty.

– Benefit Component

Under the "benefit component" of the Department's Civil Penalty Policy, the Department seeks to "calculate and recover the economic benefit of noncompliance" (DEE-1 § IV.C).

Here, Department staff asserts that respondents' economic benefit includes a number of avoided or delayed costs, the greatest of which "arises from the avoided costs of the rent or purchase of real estate where Respondents would be legally able to undertake their operation" (staff's closing brief at 29). Staff also asserts that respondents "gained a competitive advantage by avoiding compliance" (id.).

Although respondents' longstanding non-compliance clearly inured to their benefit, it is difficult to quantify the extent of that benefit. Indeed, Department staff does not attempt to calculate a dollar amount. Accordingly, I make no findings with regard to the extent of respondents' economic benefit.

– Gravity

As set forth in the Department's Civil Penalty Policy:

> "Developing and assigning dollar amounts to represent the gravity of a violation is a process which necessarily involves consideration of various factors and circumstances. The relative seriousness of violations has always been implicit in DEC's exercise of prosecutorial discretion. However, systematic exercise

> of that discretion requires an explicit analysis addressing these two 'gravity component factors':
>
> a. Potential harm and actual damage caused by the violation; and
>
> b. Relative importance of the type of violation in the regulatory scheme" (DEE-1 § IV.D.1).

Department staff argues that the gravity of respondents' violations is demonstrated both in the impact of respondents' violations on the natural resource benefits of the tidal wetland and the importance of the permitting requirements under the tidal wetlands regulatory scheme (staff's closing brief at 30).

At the hearing, staff's marine resource specialist testified that "the biggest benefit for a tidal wetland adjacent area is [to] act as a buffer to protect the values of the vegetated tidal wetlands, which consists of usually high marsh, and then intertidal marsh . . . it acts as a screen, and it provides a corridor for wildlife to use between the tidal wetland boundary and any potential development on the other side" (tr at 712 [Stadnik testimony]). This witness further testified that respondents' current operations at Site 1 "wouldn't meet the developmental restrictions for either setbacks or percent coverage, and with the minimum buffer that is involved right now between the facility – it would never meet the standards for permit issu[ance]" (id. at 713).

Department staff also proffered testimony regarding the importance of the tidal wetlands in Jamaica

Bay. Stephen Zahn, Regional Director, DEC Region 2, who has a master's degree in marine environmental science and over twenty years' experience with DEC's tidal wetland program in Region 2 (see tr at 1115-1120), testified that "Jamaica Bay is one of the most significant estuarine tidal wetland habitats in the northeast" (tr at 1152). Mr. Zahn, also testified that "Jamaica Bay has been very well studied and characterized over the years, and it is known to be an important location for all kinds of marine and estuarine organisms . . . and, if not more importantly, for migratory birds . . . dozens of migratory species rely on the wetlands and the estuarine conditions in Jamaica Bay as a key stopover in that migratory path" (id.; see also 6 NYCRR 661.2[a] [stating that "[t]idal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values [including] marine food production, wildlife habitat, . . . and open space and aesthetic appreciation"]).

Mr. Zahn further testified that the largest challenge facing the Jamaica Bay ecosystem is that the "encroachment by development over the decades, if not the last century, has altered the shoreline significantly, covered it with a lot more impervious surface, introduced a lot more runoff of chemicals and particles into the water from these developed areas" (tr at 1153).

As set forth under the tidal wetlands law, it is "the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state" (ECL

25-0102). This public policy is implemented through 6 NYCRR part 661 (see 6 NYCRR 661.1) and is reflected in the development restrictions and permitting system established under these regulations. Mr. Zahn testified that it "is a key foundation of the tidal wetlands regulations, to be mindful, very careful, of the type of development activity that takes place adjacent to the bay." 1154).

As stated at the outset of this hearing report, for much of its existence, Call-A-Head has operated in blatant violation of the tidal wetlands law and regulations. The proven violations relating to respondents' (i) longstanding use of Site 1 for commercial activity without a permit (second cause of action); (ii) installation of an 80-foot long, two-story structure at the very edge of the tidal wetland, and construction of a second large structure on the south side of Site 1, both without a permit (third cause of action); (iii) paving of portions of Site 1 without a permit (third cause of action); and (iv) expansion of their operations to the gravel storage area without a permit (ninth through twelfth causes of action) are all egregious violations of the tidal wetlands law and regulations.

As noted, the gravity component also considers the relative importance of the proven violations in relation to the regulatory scheme. Here, the development restrictions and permit requirements form the core of the tidal wetlands regulatory scheme. By disregarding the development restrictions and undertaking numerous regulated activities without first obtaining a tidal

wetlands permit, respondents' violations directly undermine these core aspects of the regulatory scheme.

– Penalty Adjustments

Lastly, the Civil Penalty Policy includes several "adjustment" factors to provide "flexibility and equity" to the Department's penalty calculations (DEE-1 § IV.E).

First among these adjustment factors is the violator's culpability, which may be considered only to increase a penalty (DEE-1 § IV.E.1). Respondents' culpable conduct in this matter is clear. Department staff seeks penalties for violations occurring, or continuing, after the expiration of the 1994 consent order. The 1994 consent order addressed violations of the tidal wetlands law and regulations by Call-A-Head Corp. at Site 1. Accordingly, respondents have long been aware that their activities at Site 1 are subject to, and in violation of, the tidal wetlands law and regulations. Despite this knowledge, respondents continued and expanded their portable toilet operation at Site 1.

Violator cooperation may be considered to reduce a penalty if a violator promptly self-reports the violation and that reporting was not otherwise required by law (DEE-1 § IV. E.2). This factor is not present here.

Where a matter involves a history of non-compliance by the violator, the penalty may be adjusted upward (DEE-1 § IV.E.3). Here, this factor warrants an upward adjustment of the penalty. Respondents' violations are

numerous and longstanding. Further, respondents failed to fully implement the corrective measures set forth under the 1994 consent order and, instead, have continued and expanded their operation at Site 1.

The adjustment factors also include consideration of a violator's ability to pay (DEE-1 § IV.E.4). However, "[t]he burden to demonstrate inability to pay rests with the respondent" (id.). Here, respondents made no attempt to raise this issue. Moreover, the record indicates that respondents' portable toilet operation at Site 1 has continued to expand and is now one of the largest such operations in the City of New York. Accordingly, this factor is not at issue.

Finally, "unique factors" not anticipated by the Civil Penalty Policy may be considered to adjust the penalty up or down (DEE-1 § IV.E.5). Neither party advances factors related to the penalty that are not addressed elsewhere in the Civil Penalty Policy.

The Department has also issued a tidal wetlands enforcement policy. That policy provides that the "calculation of the recommended penalty should begin at the maximum penalty amount" and further provides that "[e]xceptions to this general rule may be based on case-specific circumstances relating to [specified] factors" (Tidal Wetlands Enforcement Policy, Commissioner Policy DEE-7 [DEE-7], Feb. 8, 1990, § V.2). These factors generally mirror those set forth in the Department's Civil Penalty Policy and include consideration of economic benefit, environmental threat, violator conduct, deterrent effect, and other factors.

The Department has also issued a water pollution control enforcement policy. The policy lists a number of circumstances under which a payable penalty must be sought (see Water Pollution Control Enforcement Policy, Commissioner Policy DEE-3 [DEE-3], Dec. 13, 1984, § III [objective 1]). Most pertinent here, is the first listed circumstance, which states that "[w]here a discharger has engaged in willful, bad faith, or negligent conduct, which has resulted in a persistent or preventable violation, punitive penalties for this conduct must be sought. Unpermitted discharge violations are to receive special scrutiny for this type of conduct" (id.).

On this record, I conclude that the $300,000 penalty requested by Department staff in the 2012 complaint is both authorized and appropriate in relation to the proven violations at Site 1. Accordingly, I recommend that respondents Call-A-Head Portable Toilets, Inc., Call-A-Head Corp., and Charles W. Howard be assessed a penalty of $300,000, jointly and severally, for the proven violations at Site 1.

I also conclude that the $7,500 penalty requested by Department staff in the 2012 complaint is both authorized and appropriate in relation to the proven violation at Site 3. Accordingly, I recommend that respondent Charles W. Howard be assessed a penalty of $7,500 for the proven violation at Site 3.

Cease and Desist

By its 2012 complaint, Department staff requests an order of the Commissioner "[p]rohibiting

the Call-A-Head Respondents from using Site 1 for the operation of a portable toilet facility" (2012 complaint at 15 [wherefore clause ¶ I]). In its closing brief, staff renews its request for injunctive relief at Site 1 (staff's closing brief at 22). Staff asserts that the record shows that respondents were "not authorized to undertake the activities listed under [paragraph] I [of the wherefore clause in the 2012 complaint], all of which . . . are presumptively incompatible uses in an adjacent area" (id.).

The ECL authorizes the Commissioner, after a hearing has been held, to direct a violator to "cease and desist from violating the act" (ECL 71-2503[1][c]). As discussed above, Department staff has established that respondents are not authorized to operate a portable toilet facility at Site 1.

Nevertheless, the Commissioner has held that, where a respondent is acting in violation of the tidal wetlands law, a cease and desist order is, essentially, redundant (see Matter of Adonai, Order of the Commissioner, Feb. 19, 2016, at 2 [denying staff's request of a cease and desist order and holding that "[r]espondent is required to comply with the ECL and the applicable regulations, and further language to that effect is not needed"]). Because respondents' operation of a portable toilet facility at Site 1 violates the tidal wetlands law and regulations, each day the operation continues is a continuing violation. Accordingly, a cease and desist order is not necessary.

Restoration

By its 2012 complaint, Department staff requests an order of the Commissioner directing respondents to "remove from Site 1 all structures and impervious surface areas other than those that existed at the time respondents took possession and to restore the tidal wetland and tidal wetland adjacent area on Site 1 to the satisfaction of DEC staff" (2012 complaint at 16 [wherefore clause ¶ III]). In its closing brief staff states that "restoration should include . . . the removal of the unauthorized addition to the formerly L-shaped building, the removal of the building along the southern boundary of Lot 45 [i.e., the 100-foot long structure], the removal of all containers [including the containers that comprise the 80-foot long structure], the removal of the concrete footing underneath the stacked metal containers, the removal of asphalt and other impervious surface areas, and the removal of the fence and footings on Lot 888 [i.e., the adjacent parcel immediately east of lots 45 and 48]" (staff's closing brief at 28).

The ECL authorizes the Commissioner to direct a violator to "restore the affected tidal wetland or area immediately adjacent thereto to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the commissioner" (ECL 71-2503[1][c]). Consistent with this authorization, it is the policy of the Department to require restoration where unlawful activities have occurred within a regulated tidal wetland or adjacent area (see DEE-7 § V.1 [stating that "[r]estoration should be sought in substantially every case"]). Further, where

violations involve a project that does not meet the development restrictions under 6 NYCRR 661.6, "imposition of maximum sanctions and restoration of affected wetland values" are warranted (DEE-7 § VI. 1).

With certain exceptions for waterfront related activities, the development restrictions applicable to Site 1 set the minimum setback for structures larger than 100 square feet at 30 feet from the tidal wetland boundary (6 NYCRR 661.6[a][1]). For "hard surface driveways . . . and similar impervious surfaces exceeding 500 square feet" the setback is also 30 feet from the tidal wetland boundary (6 NYCRR 661.6[a][7]). At Site 1, both the 80-foot long and the 100-foot long structures are, in whole or in part, within 30 feet of the tidal wetland boundary. Additionally, the paved driveway on the north side of the garage building is larger than 500 square feet and is, in part, within 30 feet of the tidal wetland boundary. Accordingly, all of these structures must be removed.

Although, as discussed above, the Department has clear authority to direct respondents to remove the addition to the garage building, I do not recommend its removal. The addition is substantial, measuring approximately 16' by 24' (see exhibit 19, attached engineering drawing). It is, however, located on the southwest corner of the garage building and, therefore, the addition is further from the tidal wetland than much of the original structure. I also note that, although a permit is required for the expansion of an existing commercial building within a regulated tidal wetland adjacent

area, such expansions are deemed a "Generally Compatible Use" (see 6 NYCRR 661.5 [b] [25]).

In addition to the removal of structures, Department staff request that the restoration of Site 1

> "encompass the removal of all gravel and other imported fill; the creation of a gentle, natural slope between the existing tidal wetland and the adjoining upland; and the preparation of the soil and the installation of site-appropriate native plantings as well as their monitoring consistent with the New York State Salt Marsh Restoration and Monitoring Guidelines. The restoration activities should include best management practices to prevent erosion of soil and sediments. To reduce the risk of future encroachments, a barrier fence should be installed along the eastern boundary of Lots 45 and 48, along the southern boundary of Lot 45, and along the northern boundary of Lot 48. The installation of the fence and the proposed plantings should be subject to prior review and approval by Department Staff" (staff's closing brief at 28).

As discussed above, Department staff has established that respondents engaged in various activities at Site 1 in violation of the tidal wetlands law and regulations. Accordingly, staff is entitled to restoration of adjacent area land that was impacted by the unlawful activities.

On this record, I conclude that the restoration requested by Department staff in the 2012 complaint is

both authorized and appropriate, subject to the following comments. The proposed restoration calls for all unlawful structures and impervious surfaces to be removed. As discussed above, I recommend that all such structures be removed except for the addition to the garage building. I also note that, in its closing brief, staff requests that respondents remove "all gravel and other imported fill" from Site 1 (staff's closing brief at 28). This should be limited to the fill associated with the proven violations at Site 1 set forth under the ninth and eleventh causes of action.

In its closing brief staff also requests that respondents erect a fence along the property boundary of lots 45 and 48 "to reduce the risk of future encroachments" onto neighboring properties (staff's closing brief at 28). Although staff's concern is understandable given respondents' extensive use of the adjacent parcel east of lots 45 and 48, I decline to recommend the erection of a fence on the property line. The restoration plan should instead require that the area to the east of the garage building, extending to the tidal wetland boundary, remain open and free of structures. As staff notes, once the area is restored to staff's approval, respondents, or a subsequent owner, may seek a tidal wetlands permit for any regulated activity they may choose to pursue. Absent such permit, no regulated activity may lawfully occur on Site 1.

Because respondents engaged in regulated activities on the adjacent parcel at Site 1, remedial activity at Site 1 will require respondents to gain entry to the adjacent parcel. To that end, I recommend that the

Commissioner direct the corporate respondents and respondent C.W. Howard to make all reasonable efforts to secure permission from Gateway National Recreation Area to enter the adjacent parcel for purposes of the remediation.

Lastly, I recommend that the Commissioner direct the corporate respondents and respondent C.W. Howard to submit an approvable restoration plan to the Department within 90 days of service of the order.

CONCLUSIONS AND RECOMMENDATIONS

As detailed above, I conclude that Department staff has (i) established that respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. are liable for the violations set forth in the first, second, third (in part), seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action; (ii) established that respondent Charles W. Howard is liable for the violation set forth in the nineteenth cause of action; and (iii) failed to establish that a respondent is liable for the third (in part) and sixth causes of action. Department staff withdrew the fourth, fifth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth causes of action.

For the foregoing violations, except for that established under the nineteenth cause of action, I recommend that the Commissioner issue an order directing respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. to develop and implement an approvable restoration plan, consistent

with the restoration requested by staff, as modified herein. I further recommend that the Commissioner issue an order assessing a civil penalty of $300,000 jointly and severally upon respondents Charles W. Howard, Call-A-Head Portable Toilets, Inc., and Call-A-Head Corp. Lastly, for the violation set forth under the nineteenth cause of action, I recommend that the Commissioner issue an order assessing a civil penalty of $7,500 upon respondent Charles W. Howard.

APPENDIX A

PENALTY CHART

(Matter of Call-A-Head Portable Toilets, Inc., DEC File Nos. R2-20030505-128, R2-20030505-129)

Cause of Action	**Corporate Respondents Liable? (Y/N)**	**Charles W. Howard Liable? (Y/N)**
1st - constructing a commercial use facility	Y	Y
2nd - undertaking commercial use activities	Y	Y
3rd - installation of large steel containers for office and storage space	Y	Y
3rd - installation of oil tanks	N	N

3rd - installation of asphalt driveways, paths, parking areas	Y	Y
3rd - installation of fences	Y	Y
4th - excavating	N[A]	N[A]
5th - placing fill	N[A]	N[A]
6th - creating a ditch	N	N
7th - draining content of portable toilets into Jamaica Bay (ECL article 17)	Y	Y
8th - draining content of portable toilets into Jamaica Bay (ECL article 25)	Y	Y
9th - placing gravel to create storage area	Y	Y

Duration of Penalty and Statutory Penalty Per Day	**Maximum Statutory Penalty**
6557 Days (05/27/94 to 05/08/12) at $10,000 per day	$65,570,000
6557 Days (05/27/94 to 05/08/12) at $10,000 per day	$65,570,000
5853 Days (04/30/96 to 05/08/12) at $10,000 per day	$58,530,000
Not applicable	$0

5228 days (01/15/98 to 05/08/12) at $10,000 per day	$52,280,000
3263 Days (06/03/03 to 05/08/12) at $10,000 per day	$32,630,000
Not applicable	$0
Not applicable	$0
Not applicable	$0
1 Day (04/30/03) at $25,000	$25,000
1 Day (04/30/03) at $10,000	$10,000
3263 Days (06/03/03 to 05/08/12) at $10,000 per day	$32,630,000

Cause of Action	**Corporate Respondents Liable? (Y/N)**	**Charles W. Howard Liable? (Y/N)**
10th - placing equipment and materials	Y	Y
11th - placing fill	Y	Y
12th - clearing vegetation	Y	Y
13th - placing fill	N[A]	N[A]
14th - discharging content of portable	N[A]	N[A]

[A] Cause of Action was withdrawn by Department staff.

toilets into Jamaica Bay (ECL article 17)		
15th - discharging content of portable toilets into Jamaica Bay (ECL article 25)	N[A]	N[A]
16th - discharging storm water (Site 1)	N[A]	N[A]
17th - discharging storm water (Site 2)	N[A]	N[A]
18th - altering Site 2 by placement of fill, fence & portable toilets	N[A]	N[A]
19th - placing fill (Site 3)	N	Y

	Duration of Penalty and Statutory Penalty Per Day	**Maximum Statutory Penalty**
	3263 Days (06/03/03 to 05/08/12) at $10,000 per day	$32,630,000
	3263 Days (06/03/03 to 05/08/12) at $10,000 per day	$32,630,000
	1 Day (06/03/03) at $10,000	$10,000
	Not applicable	$0
	Not applicable	$0
	Not applicable	$0

[A] Cause of Action was withdrawn by Department staff.

	Not applicable	$0
	Not applicable	$0
	Not applicable	$0
	767 Days (04/22/03 to 05/27/05) at $10,000 per day	$7,670,000
Total[B]		**$380,185,000**

APPENDIX B

EXHIBIT LIST

(Matter of Call-A-Head Portable Toilets, Inc., DEC File Nos. R2-20030505-128, R2-20030505-129)

Exhibit No.	Rec'd (Y/N)	Description
1	Y	Order on Consent, executed January 27, 1994
2	Y	Tidal Wetlands Map (Map 598-496) (Not scalable, see exhibit 40)
3	Y	Queens County Business Certificate for Call-A-Head (May 1977)
4	Y	Deed (Block 15376, Lot 45), dated May 4, 1990, between New York City and Charles P. Howard

[B] Respondent C.W. Howard and the Corporate respondents are jointly and severally liable for all penalties except that imposed under the 19th Cause of Action, for which only respondent C.W. Howard is liable.

5	Y	Deed (Block 15376, Lot 45), dated May 4, 1990 between Charles P. Howard and Charles P. Howard and Margaret Mary Howard
6	Y	Deed (Block 15376, Lot 45), dated February 11, 2002, between Charles P. Howard and Charles W. Howard and Ken Howard
7	Y	Deed (Block 15376, Lot 48), dated December 10, 2001, between New York City and Charles W. Howard
8	Y	Certified Tax Map for Block 15376
9	Y	Certified Tax Map for Block 15375
10	Y	Tax Map for Block 15375 & 15376
11	Y	Deed, dated March 1, 1974, between New York City and the United States of America
12	Y	Deed (Block 15322 Lots 19 and 20), dated October 1, 2002 between Henry Black and Charles Howard
13	Y	Deed dated (Block 15322, Lots 19 and 20), dated October 18, 2011, between Charles Howard and Andres Tajes and Ramiro Tajes
14	Y	Six Aerial Photographs of Site 1 (labelled exhibits A-F, dated April 2006 through March 2016)
15	Y/N	Seven Aerial Photographs of Site 1 (dated April 1996 through April 2012) (Note: photographs from 2002

		and 2006 were not attested to by records officer and were not received in evidence)
16	Y	Aerial Photograph of Site 1 (dated April 2014)
17	N	DEC Letter to Call-A-Head, dated March 16, 1983 (not received on relevancy grounds)

Exhibit No.	**Rec'd (Y/N)**	**Description**
18	N	DEC Letter to Call-A-Head, dated March 21, 1983 (not received on relevancy grounds)
19	Y	Joint Application Permit by Charles Howard, dated February 3, 2004 (with attached Engineer Drawing, dated January 2004; and survey dated October 27, 1999)
20	Y	Three Photographs of Site 1, dated January 15, 1998
21	Y	Four Photographs of Site 1, dated January 15, 1998
22	Y	Application/Enforcement Inspection Report, dated January 15, 1998
23	Y	DEC Letter to Call-A-Head, dated November 18, 2014 (re: CD of disclosure documents)

24	Y	DEC Letter to Miele Associates, dated March 2, 2004 (re: Call-A-Head application)
25	Y	Miele Associates letter to DEC, dated February 27, 2004 (re: Call-A-Head application)
26	Y	ACAT Issued to Call-A-Head, dated January 15, 1998
27	Y	Meeting Roster, dated April 2, 1998
28	Y	Photographs of Site 1 (labeled A through E), dated May 27, 2005
29	Y	Photographs of Site 1 (labeled A through E), dated May 27, 2005
30	Y	Application/Enforcement Inspection Report, dated May 27, 2005
31	Y	Photographs of Site 3 (labeled A through E), taken during May 27, 2005 inspection
32	Y	Case Initiation Form – Tidal Wetlands (Site 1), Case No. R2-20030505-129, dated May 5, 2003 (with attached criminal court informations and summonses, dated April 30, 2003)
33	Y	Case Initiation Form – Tidal Wetlands (Site 3), Case No. R2-20030505-128, dated May 5, 2003 (with attached criminal court information and summons, dated April 30, 2003)

34	Y	November 23, 2004 Plea Agreement (signed by Charles Howard, Jr.)
35A-C	Y	Three Photographs of Call-A-Head Site (taken by DEC staff on June 3, 2003)
36	Y	DEC Inspection Report, June 3, 2003 (update of 1998 inspection report, exhibit 22)
37	Y	1974 Infrared Aerial Photograph

Exhibit No.	**Rec'd (Y/N)**	**Description**
38	Y	April 1979 Aerial Photograph
39	Y	Bianco Survey 1984 (Revised November 1987)
40A, B	Y	Scalable Tidal Wetlands Map (40A Legend & Scale; 40B Map of area surrounding Call-a-Head)
41	Y	Letter from New York City Department of City Planning to DEC, dated December 20, 2016 re: 302 Cross Bay Blvd.
42	Y	New York City Zoning Resolution. Article II: Residence District Regulations, Chapter 2 – Use Regulations (Web Version)
43	Y	Field Notes re: Site 3 Inspection, dated May 9, 2003

44	Y	Case Initiation Form re: Site 3, dated August 6, 2003
45	Y	Excerpt from Tidal Wetlands Map 598-494 (south of Map 598-496 [exhibits 2, 40A, 40B])
46	Y	Haynes Survey of West 17th Road Property (Site 3), dated October 28, 2002
47	Y	Compact Disc recording of telephone conversation between C.W. Howard and James Periconi