

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Application of

24-06

MAL NEVEL, SUPERVISOR, TOWN OF SHELTER ISLAND

for a Declaratory Ruling Pursuant to the State  
Administrative Procedure Act Section 204 and  
6 NYCRR Part 619

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On September 20, 1982, Mal Nevel, Town of Shelter Island Supervisor, requested a determination from the General Counsel as to the applicability of Articles 24 and 25 of the Environmental Conservation Law ("ECL") to the Town of Shelter Island ("Town") and the jurisdiction of the New York State Department of Environmental Conservation ("DEC") to enforce these statutes and the regulations thereunder.

I. ISSUES

Two programs under the ECL are at issue: the 1973 "Tidal Wetlands Act" program under ECL Article 25 and the Freshwater Wetlands Act enacted in 1975 under ECL Article 24. The questions presented are: Which agency has jurisdiction over tidal wetlands located in the Town of Shelter Island? Which entity has jurisdiction under ECL Article 24 for the protection of all freshwater wetlands over 12.4 acres. Two associated questions concern freshwater wetlands smaller than 12.4 acres: (a) How does the designation of a wetland as one of "unusual local importance" affect jurisdiction in the interim period, and (b)

how does the "Class I" determination affect jurisdiction after filing of maps in the post interim phase of the program?

## II. BACKGROUND

Mr. Nevel requested this ruling at the suggestion of Administrative Law Judge A. Marshall Irving. The suggestion arose because Mr. Nevel objected to DEC's tidal and freshwater wetlands jurisdiction during a hearing being conducted upon the application of the Town of Shelter Island for a permit to dredge freshwater wetlands in the vicinity of Ice Pond. [See Hearing Transcript pp. 9-17, Freshwater Wetlands, Tidal Wetlands, 10-82-0370, held September 9, 1982 at the Shelter Island Hall of Justice.]

DEC's jurisdiction over the wetland in the vicinity of Ice Pond is based on both the Tidal Wetlands Act and the Freshwater Wetlands Act. Tidal Wetlands Act jurisdiction comes about because the wetland is within 300 feet of an intertidal wetland.\*

\* The DEC Administrative Law Judge in any permit hearing may take testimony and consider evidence as to the factual basis pertaining to jurisdictional matters. The General Counsel in making a declaratory ruling is permitted to rule as to the applicability of laws based on any state of facts described by a petitioner. [N.Y.S. Power Authority v. DEC, N.Y.S. Court of Appeals March 30, 1983].

The factual basis for jurisdiction in this matter pertains to the distance between Ice Pond wetland and the intertidal marsh. The General Counsel in this ruling is permitted to assume that the Department's professional environmental analysts are correct in asserting jurisdiction based upon the distance from intertidal marsh. The Town of Shelter Island may submit additional information to the ALJ on this particular matter (or on any other related matter) before the record closes. The Town may also dispute the jurisdictional facts before a court or the Freshwater Wetlands Appeals Board once a final permit decision is rendered by the Commissioner. If the facts are that the Ice Pond wetland is not within the adjacent area of the tidal wetland boundary, then DEC jurisdiction under the Tidal Wetland Act would fail. [See Definition of Adjacent Area, 6 NYCRR §661.4(b)(1)].

Freshwater wetlands jurisdiction is based on the premise that it is one of "unusual local importance". (The statutory significance of this is discussed in more detail later.) This latter determination was made by the DEC's Division of Regulatory Affairs in response to initiatives taken by the Museum of Long Island Natural Sciences. The Museum wrote the Department on May 14, 1981 indicating that it believed that certain freshwater wetlands on Shelter Island should be protected under ECL Article 24. The Museum forwarded its geological and ecological analyses\* of the freshwater wetlands and information pertaining to their critical relationship to the sole source aquifer of Shelter Island. DEC staff also reviewed a study completed in 1978 by Julian Soren of the U.S. Geological Survey. The U.S. Geological Survey Report is entitled "Hydrogeologic Conditions in the Town of Shelter Island, Suffolk County, Long Island, New York," (Water-Resources Investigations 71-77).

On the basis of the information submitted by the Long Island Natural Sciences Museum, the U.S. Geological Survey Report, and site visits, DEC designated the Pine Swamp Complex as wetlands of unusual local importance. Mr. Michael J. Fiscina, Senior Environmental Analyst for the Department of Environmental

\* --"Geology of the Pine Swamp Complex, Shelter Island, New York" by Steven Englebright, Dep't of Earth and Space Sciences, SUNY at Stony Brook, Stony Brook, L.I. (7 pages), 1981.

--"An Ecological Evaluation of 'Pine Swamp', Shelter Island, New York" by Steven Daniel, Project Coordinator, Mashomack Preserve Master Plan, Museum of L.I. Natural Sciences. (2 pages), 1981.

--Site Report on Pine Swamp by Ron Roza, 2 pages, April 26, 1981.

Conservation, wrote Mr. Steven Englebright, the Director of the Museum and Curator of Geology at S.U.N.Y.-Stony Brook, in a letter dated December 17, 1981 concerning the designation. A copy of this letter was sent to the Town Supervisor. 6NYCRR §662.4 provides that any person may make inquires as to applicability of ECL Article 24 to any land. Specifically, §662.4(b) provides that "... [a]ny person may petition the commissioner for a determination that a freshwater wetland, having a surface area of less than 12 and four-tenths acres, has unusual local importance for one or more of the specific benefits set forth in §24-0105.[7] of the act." One of the benefits enumerated in ECL §24-0105(7) is: "protection of subsurface water resources and provision for valuable watersheds and recharging ground water supplies." It was in response to such an inquiry that DEC acted in designating the Pine Swamp Complex.

The investigation prompted by the Museum's petition led DEC to the conclusion that virtually all of Shelter Island's freshwater wetlands are connected to and are a part of the Town's sole source aquifer system. The wetland near Ice Pond comes under DEC's jurisdiction by virtue of this conclusion. This conclusion also led to the tentative decision to designate additional wetlands as wetlands of unusual local importance. Communications prior to designation had taken place with the Town Board and Mr. Nevel regarding provisions of the Freshwater Wetlands Act and the jurisdictional implications of the Island's hydrogeology. [See testimony of Mr. Fiscina regarding meeting at

) Shelter Island Town Hall on April 26, 1982, Hearing Transcript pages 20-22 and letter of June 17, 1982 from DEC Region I Director Donald Middleton to Supervisor Nevel.]

DEC's characterization of individual freshwater wetlands on Shelter Island are matters which can be disputed before the Freshwater Wetlands Appeals Board or a Court of competent jurisdiction. A declaratory ruling is not the appropriate mechanism to resolve the factual and technical issues pertinent to wetlands characterization.\*

### III. DISCUSSION

#### ECL Article 25

The Tidal Wetlands Act itself has no provision for either the delegation to or automatic assumption by local government of any of the inventorying, regulatory or enforcement provisions of the Act. However, ECL §3-0301, the section of law pertaining to the general functions, powers and duties of the Department, authorizes the delegation of certain duties to other agencies or governmental entities where special qualifications, adequate authority, expertise, staff, funding and other considerations, as determined by the Commissioner, would make such a delegation

\* It is recommended that a meeting of Town and DEC officials be conducted to discuss the precise status of the designations of particular wetlands. It is imperative that persons seeking to challenge the Department's designation be given all pertinent information concerning determinations on which to seek review.

) appropriate. Delegation of Tidal Wetlands Act functions has not been provided for under any of the Department's regulations or policies. There are, however, provisions in ECL Article 25 which require notification to local government of certain regulatory activities. ECL §25-0301 requires DEC to confer with local officials to establish programs for protection of State inventoried tidal wetlands. ECL §25-0301 also authorizes cooperative agreements between DEC and local government for the special protection of and maintenance of the natural or the enhanced state tidal wetlands. In areas of special interest to the Town, arrangements of this nature may be helpful in coordinating state and local wetlands protection programs.

) The vesting of sole and exclusive regulatory power with DEC under ECL Article 25 does not preclude local government from exercising any lawful zoning and land use control it already possesses with regard to tidal wetlands. The Town may develop its own program for control concurrently with the State's program. The "Wetlands Ordinance of the Town of Shelter Island" Chapter 129, without passing on the legal sufficiency of said ordinance, appears to give the Town the regulatory mechanism to carry out an independent program of tidal wetland control. The Town may always opt to be more restrictive and more protective of wetland values, but no action of the Town can lawfully abrogate the minimum protection afforded to wetlands under the DEC administered ECL Article 25 program.

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ECL Article 24

Title 3 of ECL Article 24 details the DEC's responsibility to map and inventory the state's freshwater wetlands. Title 7 specifies that permits are required for certain activities in or adjacent to regulated wetland and that prior to promulgation of the final wetlands maps, DEC shall be the permit issuing authority. The period prior to promulgation of final maps is denominated in Part 662 of the regulations as the "Interim" period, during which "interim permits" shall be issued. For the purposes of mapping and interim regulation, a 12.4 acre size is the threshold for state regulation except where a smaller wetland is of "unusual local importance" or is defined as a wetland under controls established for the Adirondack Park. The criteria for DEC to declare a smaller wetland outside the Adirondack Park as protected under the Freshwater Wetlands Act is whether the wetland is of such a nature and location as to be of "unusual local importance" in providing one or more of the several benefits enumerated in ECL §24-0105(7). "Protection of subsurface water resources and provision for valuable watersheds and recharging ground water supplies" is one benefit which justifies protection under ECL Article 24 of a wetland or complex of wetlands, even though it is smaller than 12.4 acres.

During the "interim" period, DEC's Article 24 jurisdiction exists over all freshwater wetlands and adjacent areas greater than 12.4 acres and in those less than 12.4 acres which are of unusual local importance. Jurisdiction automatically attaches on the basis of the character of the land until the time for filing

of final wetlands maps. Prior to filing, any interested person may make, as previously noted, an inquiry as to applicability of the Freshwater Wetlands Act to any parcel of land under 6NYCRR §662.4. The filing of final wetlands maps and the classification of the wetlands will involve individual landowner notice, public hearing and comment.

Only after mapping is completed, does the matter of local assumption of ECL Article 24 responsibilities come into focus. ECL Article 24, Title 5 - "Local Implementation" bears directly on the issues presented. ECL §24-0501(1) indicates that each local government may adopt and amend a freshwater wetlands protection law or ordinance in accordance with ECL Article 24. The local government may implement such a law or ordinance only upon the filing of the "appropriate wetlands map". The "maps" refer to the Commissioner's study conducted under ECL Article 24 Title 3. These maps have not yet been filed anywhere in the State and therefore, no local government may yet assert jurisdiction to the exclusion of DEC.

The "Freshwater Wetlands Maps and Classifications" regulations, 6 NYCRR Part 664, were promulgated, after notice, comment and public hearings, to systematically classify mapped wetlands according to benefits and characteristics. These classification regulations are consistent with the benefits enumerated in ECL §24-0105(7). Four wetland classes have been made. Class I wetlands are the highest class, and are afforded the most protection of law. The existing regulations contain the

criteria for making final classifications for wetlands maps to be filed (6 NYCRR Part 664). To date then, all classifications of wetlands are tentative and not yet in effect. However, Class I wetlands less than 12.4 acres would, by definition, be wetlands of unusual local importance, but not all wetlands of unusual local importance will be Class I wetlands, 6 NYCRR §664.7(c).

One of the enumerated characteristics of a Class I wetland is that: "It is adjacent or contiguous to a reservoir or other body of water that is used primarily for public water supply, or it is hydraulically connected to an aquifer which is used for public water supply..." 6 NYCRR §664.5. If individual wetlands on Shelter Island are determined by DEC to possess this characteristic they must be classified as Class I wetlands.

One consequence of a Class I determination is that under ECL §24-0505, DEC is to retain jurisdiction for those wetlands. ECL §24-0505 provides for "Exemptions from Local Implementation" for those freshwater wetlands, regardless of size, which "... by reason of their size or special characteristics of unique environmental value... are appropriately to be administered... by the department alone." The regulatory provision implementing ECL §24-0505 is 6 NYCRR 663.3(d)(3). Provisions exist for notice to local government. Challenges to such determinations may be made by requesting reconsideration by the Commissioner [See 6 NYCRR §664.4(g)]. In addition, any person may seek review by the Freshwater Wetlands Appeals Board or a court of competent jurisdiction, [See 6 NYCRR §664.8].

Where the State initially retains jurisdiction for Class I wetlands, there is yet another method for assumption of local jurisdiction. 6 NYCRR 663.3(g) provides that the Commissioner may delegate to a local government the department's regulating authority for Class I wetlands in accordance with ECL §3-0301(2). "For such delegation, the Commissioner shall consider the degree to which the local government's prior performance demonstrates a commitment to wetland preservation, protection and conservation, and a high level of technical and administrative capacity."

ECL §24-0507 refers to the reserved jurisdiction of cities, towns, and villages over wetlands which are smaller than the 12.4 acres threshold size and not designated by DEC as being of unusual local importance. Local governments retain jurisdiction over these smaller wetlands.

As with tidal wetlands management, the Town is free to use its Wetlands Ordinance to carry out an independent and concurrent program of freshwater wetlands control subject to the remarks above. This program may be more restrictive of wetlands alteration than the DEC program. [See ECL §24-0509. "Relationship to other laws".] Note, however, ECL Article 24 can not be used by the State or local government as the statutory authority for affecting activities specifically exempted from permit by ECL §24-0701, e.g. certain agricultural or public health activities.

It should also be noted that the Legislature in Title 11 of Article 24 of the ECL created the Freshwater Wetlands Appeals

Board. The Board has power to review determinations and orders made by the commissioner as long as the appeal is made in a timely manner. (See 6 NYCRR Part 647 for Rules of Procedure.)

Activities requiring both Town and DEC approvals may involve "lead agency" determinations for the purpose of satisfying the requirements of the State Environmental Quality Review Act (See ECL Article 8). Guidance on making these determinations can be found at 6 NYCRR §§617.6. The regulations require coordination on lead agency designation in prescribed situations. Agencies are also strongly encouraged to enter into cooperative agreements with other agencies regularly involved in carrying out or approving the same actions for the purposes of coordinating their procedures [6 NYCRR 617.4(d)].

V. SUMMARY AND CONCLUSION

The DEC has properly asserted jurisdiction over the wetland near Ice Pond on the basis of both the Tidal Wetlands Act and the Freshwater Wetlands Act. The Administrative Law Judge hearing the permit application matter may consider evidence submitted by any party as to the factual basis necessary to justify jurisdiction in the Ice Pond wetland in relation to it being within the adjacent area of tidal wetlands. With regard to freshwater wetlands during the interim period, a permit applicant may seek to have the application treated as a request for a determination that the Act does not apply to the alteration proposed in the application or that the lands are not subject to

regulation. [See 6 NYCRR 662.5(c)]. The Administrative Law Judge in turn, would entertain new evidence or information introduced to contradict the factual basis upon which the DEC exercised its discretion to make such a designation in the first instance. The opportunity for public hearing on a designation of "unusual local importance" is intended to correspond with the Legislature's intent to hold public hearings upon completion of the tentative freshwater wetland maps [See ECL 24-0301(4)]. Thus, in the case of Ice Pond wetland, Administrative Law Judge Irving has correctly permitted testimony on the "unusual local importance" designation.

The DEC is the sole and exclusive regulatory authority under Article 25 of the ECL for the purpose of administration and enforcement of the State Tidal Wetlands Act and there are no statutory provisions for the automatic assertion of local jurisdiction under this Act.

At this time, and until final wetland maps are filed, the DEC is the sole and exclusive regulatory authority for administration of the State Freshwater Wetlands Act (ECL Article 24). State jurisdiction extends to all freshwater wetlands greater than 12.4 acres in size and to those smaller wetlands which are determined to be of "unusual local importance".

Upon filing of the final maps, the Town of Shelter Island may assume administration of ECL Article 24 wetlands except those determined to be Class I wetlands. Irrespective of the State

Freshwater Wetlands Act and the State Tidal Wetlands Act, the Town may assert jurisdiction over wetlands not reached by the State programs and over wetlands under State jurisdiction in order to provide greater environmental protection to such lands.

DATED: Albany, New York  
April 12, 1983



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Thomas A. Ulasewicz  
Acting General Counsel