

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Freshwater Wetlands Permit Pursuant to Article 24 (Freshwater Wetlands) of the Environmental Conservation Law and Part 663 (Freshwater Wetlands Permit Requirements) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and a Tidal Wetlands Permit pursuant to Article 25 (Tidal Wetlands) of the Environmental Conservation Law and Part 661 (Tidal Wetlands - Land Use Regulations) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

WILLIAM HALEY,

Applicant.

DEC #1-4736-06627/00001

DECISION OF THE COMMISSIONER

February 22, 2010

DECISION OF THE COMMISSIONER

William Haley ("applicant") filed an application for a freshwater wetlands permit and a tidal wetlands permit with the New York State Department of Environmental Conservation ("Department") for the construction of a two-story, single-family dwelling and on-site septic system (the "project"). The project would be located on property applicant owns at 12 Magnus Lane, East Quogue, in the Town of Southampton, Suffolk County, New York (the "site"). Construction would occur within the adjacent area of freshwater wetland Q-10.

Department staff denied the permit application and applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was initially assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto. In an interim decision dated June 22, 2009 ("Interim Decision"), I held that the project's compliance with tidal wetland permitting standards would not be an issue for adjudication or a basis for project denial and that a February 2007 mitigation plan (the "mitigation plan") that applicant prepared would be considered as a modification of the original project for purposes of the adjudicatory hearing. Accordingly, the only issue for adjudication was whether applicant's project, as modified by the mitigation plan, complied with the permitting standards for a freshwater wetlands permit (see Interim Decision, at 8).

Subsequent to the issues conference, ALJ Casutto left the Department and, following his departure, the matter was reassigned to ALJ Edward Buhrmaster. ALJ Buhrmaster, in his hearing report, a copy of which is attached, recommends that Mr. Haley's application for a freshwater wetlands permit be denied. I hereby adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

In proceedings conducted pursuant to the Department's permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see section 624.9[b][1] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 624.9[c]). To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve,

protect and conserve freshwater wetlands and prevent their despoliation and destruction (see Environmental Conservation Law 24-0103).

Freshwater wetland Q-10 is classified by the Department as a "Class II" wetland. "Class II" wetlands provide important wetland benefits, "the loss of which is acceptable only in very limited circumstances" (see 6 NYCRR 663.5[e][2]). According to the regulations, a permit shall be issued "only if it is determined that the proposed activity satisfies a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland" (see id.).

The activities proposed for this project include several that are designated in the regulations as "P(N)," which means that they are usually incompatible with a wetland and its functions and benefits. The P(N)-designated activities here involve filling, clear-cutting vegetation other than trees, grading, and constructing a residence or related structures or facilities (see 6 NYCRR 663.4[d]). The proposed use of a septic system for the residence, as discussed in the hearing report, is designated as "P(X)," incompatible with a wetland and its functions and benefits. Based upon my review of the record, the ALJ correctly concluded that the proposed project would not satisfy the standards for permit issuance set forth in 6 NYCRR part 663.

I also concur with the ALJ's determination that applicant has not demonstrated a pressing economic or social need to build a house in the wetland adjacent area of his property. Any need for the house is outweighed by the impacts that the project would have on this Class II wetland (see Hearing Report, at 18; see, e.g., Hearing Transcript at 325-26 [clearing of vegetation], 327 [increased impermeable surfaces], 332-34 [importance of adjacent area to the wetland], 338-39, 347-48 [health risks and excessive nutrients associated with sanitary effluent from septic system entering wetlands]).

In reaching my decision, I have given consideration to the mitigation plan that applicant has proposed. I recognize and appreciate the effort that applicant has made to consider mitigation measures that would reduce degradation to the wetland and its adjacent area, and would thereby reduce the impacts of the project (see Hearing Report, at 19-20). Applicant has, as part of the mitigation, repositioned the proposed residence and

reduced its footprint.¹ Nevertheless, even with this mitigation, the remaining impacts of the proposed construction (including but not limited to the proposed septic system) to the wetland and its adjacent area are significant, and the regulatory weighing standards are not satisfied.

During the course of the hearing, applicant offered three exhibits (nos. 13-A, 13-B and 14) which related to permits issued for construction of a residential dwelling on an adjoining parcel. Specifically, those included:

13-A. DEC permit (No. 1-4736-01022/00001-0) issued to John Moran for construction of a single family dwelling (4/20/93) on a parcel adjacent to applicant's property;

13-B. Survey map associated with the Moran permit; and

14. DEC permit (No. 1-4736-04875/00001) issued to Robert H. Glinski, Jr. for construction of a single family dwelling (9/8/00), including a survey map associated with the Glinski permit, on a parcel adjacent to applicant's property.

The ALJ excluded the three offered exhibits from the record (see Hearing Report, at 23; Hearing Transcript, at 218-19). Applicant, in his post-adjudicatory hearing brief dated December 11, 2009, appealed from the ALJ's ruling (see Summation and Appeal dated December 11, 2009 ["Appeal"], at 10-13; see also 6 NYCRR 624.8[d][1] ["(a)ny ALJ ruling may be appealed to the commissioner after the completion of all testimony as part of a party's final brief"]). For the reasons discussed below, I conclude that the three exhibits should be received into the record.

Even though freshwater permit applications are determined on a case-by-case basis, this does not render evidence of comparable projects with different outcomes inadmissible in Department permit hearing proceedings. Agencies must treat factually similar cases consistently or offer an explanation for

¹ To compensate for impacts that cannot be mitigated adequately through on-site measures, applicant has offered to restore and revegetate portions of a parcel owned by the Town of Southampton to the north and to donate money to a town fund for the preservation and cleanup of other wetlands in the Weesuck Creek watershed (see Hearing Report, at 20). However, there is no indication in this record that the Town of Southampton is interested in pursuing these proposals (see id.).

reaching a different result (see Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516, 518-520 [1985]; see also Borchers and Markell, New York State Administrative Procedure and Practice, § 3.15 [1998]; 2 Pierce, Administrative Law Treatise § 11.5 [5th ed 2010]).

An applicant who has been denied a permit may seek to develop a record that, on substantially similar facts, the Department has granted, rather than denied, a permit. To the extent that an applicant offers evidence that the Department has issued permits for substantially similar projects, such evidence is admissible, and record development should be allowed (see, e.g., Matter of Zazulka, Hearing Report, at 19, adopted by Decision of the Commissioner, Dec. 27, 2004; Matter of Jaral Props., Inc., Decision of the Assistant Commissioner, Dec. 31, 2009, at 2 [examining proposed comparable properties and permits]).

Although an agency, when confronted with substantially similar cases, is required to either adhere to established precedent or explain its departure therefrom, it is not required to distinguish every arguably similar case it has previously decided (see Matter of Blount [Whalen's Moving & Stor. Co.--Sweeney], 217 AD2d 879, 880 [3d Dept 1995]; Matter of Carlos [Newsday, Inc.--Sweeney], 234 AD2d 849 [3d Dept 1996]). Thus, an applicant need only be allowed the opportunity to develop a limited record of comparable projects and permits. The ALJ retains the discretion to exclude evidence of projects and permits that are insufficiently comparable, and to exclude evidence of comparable projects that is unduly repetitious (see 6 NYCRR 624.8[b][1][x]). Nor should an applicant's opportunity to make a record concerning agency precedent be allowed to devolve into relitigation of prior cases in a pending proceeding.

In this case, the exhibits offered by applicant related to two wetland permits granted by the Department for the construction of a single family residence and a septic system on a property directly adjacent to the subject site. The property for which the permits was issued included wetland Q-10 and its adjacent area.

I have reviewed the ALJ's ruling, and the arguments of the parties in that regard. I agree with the ALJ that decision making with respect to a freshwater wetlands permit application is influenced by a number of factors, which change from site to site, and from project to project. I also concur with the ALJ that the evaluation of a freshwater wetlands permit application involves consideration of the specific activities proposed for

the site in light of the applicable legal standards. Impacts will vary from one site to another, and even where such sites may be in the same vicinity and the proposed projects may be of a similar nature (e.g., construction of a single family residence), the impacts will not necessarily be identical.

However, based upon my review, I conclude that the property, which adjoins applicant's parcel, and the permits proffered are sufficiently comparable to the subject property and application to be admissible and to require an explanation for the differing result in this case. The exhibits are hereby admitted into the record of this proceeding. In this regard, I note that Department staff also testified as to other freshwater wetland permit applications in addressing the proposed distances from the septic system to the wetland boundary (see, e.g., Hearing Transcript, at 475). Furthermore, to the extent, as here, Department staff argues that the issuance of a permit may have adverse precedential effect in future permit application proceedings (see Appeal, at 12; see also Hearing Transcript, at 331-32), an applicant should be allowed to develop a record in rebuttal, including introduction of comparable permits.

Although applicant in its appeal requests that the ALJ be required "to consider same in his ultimate determination in this matter" (see Appeal, at 12), I do not see the need to remand the matter to the ALJ but shall consider the three exhibits in the context of my decision.

In considering the three exhibits, I note that applicant concedes that its proposed project is different in size, shape and distance from the wetland in comparison to the activity permitted on the adjoining parcel (see Appeal, at 11-12). A critical issue is that applicant's proposed septic system (which is identified as "P(X)" [an activity that is incompatible with a wetland and its functions and benefits]) is located much closer to the wetland boundary (i.e., 51 feet; see Hearing Transcript at 303) than the septic system that was approved on the adjoining parcel (i.e., approximately 80 feet; see Hearing Transcript, at 209 [statement of Department attorney]; Exhs 13-B & 14).

The impacts arising from the use of a septic system were addressed in the Hearing Report and, as stated at the hearing, sanitary effluent could certainly reach wetland Q-10 from a septic system located 51 feet from the wetland boundary (see Hearing Transcript, at 338). The separation distance from the septic systems to the wetland boundaries is a significant distinguishing factor, and demonstrates that the proposed

activity, and its environmental impacts, are not comparable to the activity that was permitted on the adjoining parcel.

Based on the record before me, applicant failed to carry his burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application of William Haley for a freshwater wetlands permit for the proposed project is denied.

For the New York State Department
Environmental of Conservation

/s/

By:

Alexander B. Grannis,
Commissioner

Albany, New York
February 22, 2010

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- by -

WILLIAM HALEY,

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HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

PROCEEDINGS

Background and Brief Project Description

William Haley ("the Applicant") proposes to construct a new two-story, single-family dwelling with covered porch, pervious driveway and on-site septic system on property he owns at 12 Magnus Lane, East Quogue, in the Town of Southampton, Suffolk County. Construction and related ground disturbance would occur within the regulated adjacent areas of state-designated freshwater and tidal wetlands.

To move ahead with the project, Mr. Haley requests a freshwater wetlands permit pursuant to Environmental Conservation Law ("ECL") Article 24 and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") and a tidal wetlands permit pursuant to ECL Article 25 and 6 NYCRR Part 661.

Staff of the New York State Department of Environmental Conservation ("DEC") determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act ("SEQRA"). By letter of February 3, 2006 (Exhibit No. 8), DEC Staff denied Mr. Haley's application on the ground that it failed to satisfy the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit. On February 10, 2006, a hearing was requested on Mr. Haley's behalf, and that hearing request was forwarded to DEC's Office of Hearings and Mediation Services ("OHMS"), where it was assigned to Administrative Law Judge ("ALJ") Kevin J. Casutto on July 3, 2006.

Scheduling of the hearing was initially deferred while Mr. Haley's environmental consultant developed a plan to mitigate impacts of his project, which was submitted to DEC Staff under a cover letter of February 9, 2007 (Exhibit No. 9). By letter of November 28, 2007 (Exhibit No. 10), DEC Staff determined that even with the proposed mitigation, the project still failed to meet the permitting standards at 6 NYCRR 663.5, and that there did not appear to be any alternatives that would support use of the project site for a single-family dwelling.

James T. McClymonds, DEC's chief ALJ, issued a combined notice of complete application and public hearing, dated May 1, 2008 (Exhibit No. 1). The notice was published in the Southampton Press on May 8, 2008 and also appeared in DEC's on-

line Environmental Notice Bulletin on May 7, 2008. As announced in the notice, the hearing went forward on June 4, 2008, at the Westhampton Beach Village Hall at 165 Mill Road, Westhampton Beach.

DEC Staff appeared by Gail Rowan, an assistant regional attorney at DEC's Region 1 headquarters in Stony Brook.

Mr. Haley, who lives in East Quogue, New York, appeared by James Hulme, Esq., of Kelly & Hulme, P.C., at 323 Mill Road, Westhampton Beach.

Legislative Hearing

The hearing notice allowed for written and oral comments on the permit application. No written comments were provided before or at the hearing, and no one appeared at the hearing to offer oral comments.

Issues Conference

The hearing notice provided an opportunity for persons and organizations to make written filings for party status, and to propose issues for adjudication concerning the permit application. No filings were received by the deadline set in the hearing notice, or subsequently. As a result, the only conference participants were Mr. Haley and DEC Staff.

The issues conference was held on June 4, 2008, and the conference record remained open afterwards for written submittals, as discussed in ALJ Casutto's issues ruling, dated September 18, 2008 (Exhibit No. 2). In that ruling, the ALJ identified two issues for adjudication: (1) whether the project complies with the permitting standards (at 6 NYCRR 663.5) and the procedural requirements for various activities (at 6 NYCRR 663.4), in relation to the application for a freshwater wetland permit; and (2) whether the project complies with the permitting provisions (at 6 NYCRR Part 661), in relation to the application for a tidal wetlands permit. [See Exhibit No. 2, page 9, Rulings.]

Mr. Haley appealed from the ALJ's ruling on October 8, 2008, in a letter from his attorney, Mr. Hulme. The letter said that the February 2007 mitigation plan should be considered part of the overall application and evaluated as such in determining whether Mr. Haley is entitled to the permits he has requested. Also, the letter said that compliance with the tidal wetlands

regulations should not be an issue, in that DEC Staff's permit denial letter (Exhibit No. 8) indicated that Staff's rejection of the permit application was based solely on the freshwater wetlands regulations.

In an interim decision dated June 22, 2009, the Commissioner agreed with Mr. Haley on both points, determining that the project's compliance with tidal wetland permitting standards would not be an issue for adjudication or a basis for project denial, and that the February 2007 mitigation plan would be considered as a modification of the original project for purposes of the adjudicatory hearing. (See Exhibit No. 3, Interim Decision, page 2.)

The Commissioner pointed out that while Staff's denial letter said the project site is within 300 linear feet of a DEC-regulated tidal wetland, the letter failed to state that the project did not comply with the tidal wetlands law, nor did it identify any tidal wetlands standard that the application did not meet. He also noted that at the issues conference, where DEC Staff contended that compliance with tidal wetlands regulations should be an issue for adjudication, Staff failed to identify any specific tidal wetland provisions that the project would not satisfy. This, he said, was insufficient to raise an adjudicable issue under 6 NYCRR 624.4(c)(1)(ii) because it did not "adequately specify the matter that Staff was citing as a basis to deny the permit."

At the issues conference, DEC Staff had argued that for the February 2007 mitigation plan to be considered, Mr. Haley would be required to withdraw his original application and file a new one incorporating the plan. The Commissioner disagreed, noting that the hearing process is an iterative one where an applicant may offer changes to a project that are meant to address environmental concerns or provide for further mitigation, and that he encouraged this practice as an "administratively efficient and practical way to both protect the environment and enable project proponents to pursue their goals."

The Commissioner also rejected DEC Staff's argument that the February 2007 mitigation plan should be deemed inadmissible at the hearing as an offer of settlement, noting that this is not an enforcement hearing where settlement proposals are excluded from consideration.

The Commissioner acknowledged that circumstances may exist where modifications to a proposed project so substantially

change an application that a pending proceeding would have to be terminated, and the applicant would have to file a new application, in effect restarting the review process. However, he added that such circumstances, which would include substantially increasing the footprint of a proposed residential dwelling, did not exist here, where, as he noted, the mitigation proposed in the plan included a reduction of the proposed dwelling's size.

Adjudicatory Hearing

Because of ALJ Casutto's departure from DEC, this matter was reassigned to me after the interim decision was issued. On July 8, 2009, I held a conference with the parties' counsel, during which we agreed that the hearing on the identified issues would be held on September 29 and 30, 2009, at the Westhampton Beach Village Hall. The adjudicatory hearing went forward on those dates, Mr. Hulme appearing again as counsel for Mr. Haley, and DEC Staff represented by Jennifer Ukeritis, an assistant regional attorney at DEC's Region 1 headquarters in Stony Brook.

Mr. Haley testified on his own behalf, and also called as his witness Aram V. Terchunian, president of First Coastal Corporation in Westhampton Beach, which provides consulting and construction services for coastal property owners. (Mr. Terchunian's resume was received as Exhibit No. 4.)

DEC Staff offered one witness: Robert Marsh, Region 1 manager of DEC's Bureau of Habitat, who works at DEC's Region 1 headquarters in Stony Brook. (Mr. Marsh's resume was received as Exhibit No. 15.)

After the conclusion of testimony on September 30, I conducted an inspection of the project site, accompanied by counsel and witnesses for both parties.

Closing Statements

The parties' counsel agreed to submit written closings after receipt of the hearing transcript. Both closings were received in hard copy on December 15, 2009, and I advised the parties that I considered the record closed as of that date, pursuant to 6 NYCRR 624.8(a)(5).

Transcript Corrections

On December 1, 2009, I provided the parties' counsel with a list of proposed transcript corrections and requested that they provide any objections, or additional corrections, with their written closings. Neither party proposed any additional corrections, and the corrections I proposed have now been adopted, as noted in my letter of December 18, 2009, which confirmed the closure of the hearing record.

FINDINGS OF FACT

1. William Haley, who lives on Montauk Highway in East Quogue, owns an undeveloped lot of about 1.33 acres at the end of Magnus Lane, a private road connected to Old Country Road in East Quogue, an unincorporated hamlet within the Town of Southampton, Suffolk County.

2. Mr. Haley acquired the property in May 1986 as a gift from his maternal grandfather, Leslie Magnus. Apart from the lot, Mr. Haley has a 0.3-acre right-of-way that allows him and others access to their properties along Magnus Lane, most of which have been developed with single-family houses. (See Exhibit No. 5, an aerial view of Magnus Lane with the Haley lot highlighted in yellow.)

3. The only undeveloped properties on Magnus Lane, Mr. Haley's lot and the adjacent lot to his north, which is owned by the Town of Southampton, have ponds that were dug into them at some point during the 1800's as part of an ice harvesting operation that is now defunct. The ponds are along a branch of Weesuck Creek, which flows from north to south across the two properties before draining into tidal wetlands south of Montauk Highway, which are connected to Shinnecock Bay.

4. The two ponds are connected by a concrete culvert with piping two feet in diameter, over which an existing road bed provides access to Mr. Haley's lot from Magnus Lane. There is a wooden bulkhead, between 30 to 40 feet in length, along the northern edge of the pond on Mr. Haley's property, east of the inlet from the culvert. A wood-frame weir at the south end of the pond maintains the water level artificially, and water exiting the pond spills over the weir before running into another impoundment area just north of Montauk Highway, then under the highway and into the brackish part of the creek.

5. The ice harvesting operation involved damming the creek and excavating the ponds, from which ice was removed during the winter. The ice was stored in wooden houses and then shipped offsite during the warmer months of the year, prior to the use of electric refrigeration.

6. DEC-regulated freshwater wetland (the edge of which is highlighted in red on a survey map received as Exhibit No. 7) constitutes about one acre of Mr. Haley's lot, including the entirety of the open-water pond and a wooded wetland that exists primarily in the southernmost portion of the property, where ice had once been stored. The wooded wetland, whose soils are damp, includes red maple, tupelo, sweet pepperbush, spice bush, cinnamon fern, swamp azalea and other shrubs.

7. The wetland on Mr. Haley's lot is part of a larger Class II wetland associated with Weesuck Creek, identified as "Q-10" on DEC's freshwater wetlands map. (See Exhibit No. 16, Map 31 of 39 for Suffolk County, on which Mr. Haley's property is highlighted with a pink marker.)

8. The northwest portion of the site is DEC-regulated freshwater wetland adjacent area that has been subject to past disturbance, including agricultural activity that continued up until the 1950's. At one point cultivated with corn, the area now includes oak and pitch pine, as well as a shrub understory. Some of the oak trees have a trunk diameter of 8 to 10 inches, which indicates that they are several decades old.

9. The wetland adjacent area, which slopes gently downward from north to south, includes two mounds of dirt created during the excavation of the pond on Mr. Haley's property and the pond on the property to the north. These mounds are stabilized by a cover of shrubs.

10. The wetland adjacent area also includes some thick-gauge wood timbers at the northwest corner of the property, which may have been used as skids to drag ice from the ponds to a loading or storage area. Finally, it includes some debris consisting of boulders, tar and cement, apparently the residue of past site activities.

11. Mr. Haley, who is 50 years old, is familiar with the property from his childhood, having grown up in the area. He lives nearby in a house owned by his mother, but would like to build his own house at the project site because he "grew up" there and it was always his grandparents' wish that he have the

property. His objective is to build a house that is both comfortable and affordable.

12. Mr. Haley's lot is in an area zoned "R-40" by the Town of Southampton, meaning that it is zoned for residential development on lots at least 40,000 square feet in area. (The total area of Mr. Haley's lot, less the area of the right-of-way, is 58,210 square feet.) Permitted uses are the construction of a single-family residence and customary accessory uses such as a garage, pool or deck, provided they are associated with that residence. (Non-residential development is specifically prohibited by the zoning code.)

13. Mr. Haley proposes to build a new two-story, single-family residence in the northwest corner of his property, with a covered porch, a pervious driveway between the house and the end of Magnus Lane, an underground water line along the south side of the driveway, and a septic system consisting of a tank and five leaching pools, the minimum number for a house with one to three bedrooms.

14. Construction of the house, porch, driveway and septic system, the placement of the water line, and all clearing, grading and ground disturbance associated with the project would occur in the DEC-regulated adjacent area of the freshwater wetland.

15. As originally proposed in a permit application dated July 27, 2004, the house and covered porch had a combined 30' x 50' footprint, with the house occupying 1,100 square feet and the porch, located at the east end of the house, occupying 400 square feet.

16. In the February 2007 mitigation plan, the combined footprint of the house and porch was reduced to 26' x 48', with the house occupying 980 square feet and the porch 268 square feet. Also, the house was moved five feet to the west and five feet to the north of the location shown on the original site plan (Exhibit No. 6-A), to keep it as far as possible from the on-site wetland, while still maintaining compliance with existing zoning. (The mitigation plan (Exhibit No. 9) includes a revised site plan that includes the downsizing and relocation of the house.)

17. Mr. Haley's driveway would be built from the existing turnaround at the end of Magnus Lane, along the northern edge of his lot, and over the culvert pipe connecting the pond on his

property with the pond on the property to the north. As part of the February 2007 mitigation plan, a steel reinforced concrete apron would be installed over the culvert to protect the culvert from damage or collapse, thus maintaining the exchange of water between the two ponds.

18. The end of Magnus Lane and the neck of adjacent area between the two ponds provides the only access to Mr. Haley's property that would not involve crossing wetlands themselves.

19. The septic tank is designed to collect, bacterially digest and clarify liquid and solid waste, retaining the solids and releasing the liquids to the leaching pools. The leaching pools would be surrounded by sand, and the sand would filter the effluent before it enters the groundwater. The septic system is necessary because there is no sewage treatment plant serving the area in which the house would be built.

20. As part of the mitigation plan offered in February 2007, Mr. Haley would relocate the septic system to keep it as far from wetlands as possible, and construct a concrete retaining wall (as shown on the map in Exhibit No. 9) to limit the amount of fill required for the system, and to maximize the distance between the fill and the onsite wetlands. Also, Mr. Haley would reduce the distance between the leaching rings and the retaining wall from 10 feet to 5 feet, which would further reduce the amount of fill, by seeking a variance from the Suffolk County Health Department, which must approve the septic system.

21. Mr. Haley's septic system design includes a separation of three feet between the bottoms of the leaching pools and the groundwater table, which is 4.8 feet above sea level, based on a test hole done in 2004 in the wetland adjacent area. The Suffolk County Health Department requires a separation of at least two feet, to protect the groundwater from contamination.

22. The mitigation proposed in February 2007 includes removal of the scattered debris and re-grading of the dirt mounds in the wetland's adjacent area, to restore the landscape's original contours. The area of the mounds would then be planted with sweet pepperbush, a native species that provides food and shelter for wildlife.

23. The mitigation plan also includes the use of a line of staked hay bales and silt fencing along the southern limit of clearing, grading and ground disturbance, to prevent runoff and

sedimentation toward and into the wetland while the project is carried out.

24. Finally, the mitigation plan includes an offer by Mr. Haley to restore and revegetate any areas of the parcel to his north that the Town deems appropriate. The Town owns that property and a property to the west of Mr. Haley's lot (as shown on Exhibit No. 5), having acquired them through its Community Preservation Fund, which is derived from a 2 percent land transfer tax. Both properties are undeveloped, and pursuant to the terms of their acquisition, must remain in their natural state in perpetuity.

25. As additional mitigation for project impacts, Mr. Haley is willing to donate \$20,000 to the Town's Community Preservation Fund, to preserve and clean up wetlands elsewhere in the Weesuck Creek watershed. (According to Mr. Haley, this amount is equal to the value of his property, as determined by an appraisal approved by the Town.)

26. Apart from the mitigation offered as part of the February 2007 plan, Mr. Haley is willing to place French drains along both sides of the driveway, to capture the estimated 20 percent of runoff that would not penetrate the pervious driveway surface. French drains are pebble-filled excavations often used in areas of high groundwater, and are intended here to restrict runoff from the driveway to the wetlands north and south of it.

27. Mr. Haley is also willing to install a dry well or French drains along the south side of his house, to control stormwater runoff, particularly from the roof. Roof runoff could be directed into these features by a combination of gutters, leaders and downspouts.

28. Uncontrolled runoff has the potential to erode exposed areas and flow directly into the pond and wooded wetlands, whereas dry wells and French drains are intended to capture the runoff and allow it to infiltrate the ground, where it can be filtered before reaching the groundwater table.

29. Mr. Haley proposes to limit his lawn area to within 10 feet of his house, and to landscape with native vegetation such as mountain laurel and eastern red cedar in a non-fertilization buffer zone between the house and the on-site wetland.

30. Freshwater wetlands provide particular benefits that DEC is mandated to protect, as explained in ECL 24-0105(7) and a

description of wetland functions and values (Exhibit No. 11) posted on DEC's website. These benefits would be affected to varying degrees by Mr. Haley's project.

31. Freshwater wetlands provide flood and storm control because of their hydrologic absorption and storage capacity. This benefit would be retained as the project does not involve disturbance of the existing wetlands, and the project involves various measures to limit runoff from the developed upland area. For these reasons, the wetlands' ability to soak up and hold water, while slowly releasing it to the creek, should remain unchanged.

32. Freshwater wetlands provide breeding, nesting and feeding grounds and cover for many forms of wildlife, waterfowl and shorebirds. It is difficult to ascertain exactly what impact the project would have on the wetland's value as wildlife habitat; however, clearing and development of the adjacent area, the loss of vegetation used for food and shelter, and the introduction of human activity would likely inhibit some wildlife (including deer and waterfowl) in their use of the wetland. Also, pollutants, particularly from the septic system, could enter the on-site pond, potentially impacting the food chain there and downstream.

33. Freshwater wetlands protect subsurface water resources and recharge groundwater supplies. Development in the regulated adjacent area would reduce that area's ability to filter pollutants, though the capacity of the wetland (including the on-site pond) to recharge groundwater would be unaffected by the project. Also, measures to restrict stormwater runoff and maintain existing recharge patterns in the adjacent area, such as the use of French drains and dry wells, would help to maintain existing benefits in that area. Finally, maintaining a proper separation between the septic system and the groundwater table, and keeping the septic system as far from the wetland as possible, would help maintain groundwater quality.

34. Freshwater wetlands provide recreational opportunities for hunting, fishing, boating, hiking, bird watching, photography, camping and other uses. However, because these wetlands are on private property, at the end of a private street, there is no opportunity for the general public to enjoy them.

35. Freshwater wetlands provide pollution treatment by serving as biological and chemical oxidation basins. As the

wetlands themselves would remain intact, this benefit would continue even after project development. However, the introduction of excess nutrients, particularly from the septic system, could lead to eutrophication of the pond water, generating heavy algal and plant growth that, as it dies off, causes the pond to fill in. To limit this risk, Mr. Haley would be willing to include a substantial planting of native species (including grasses, shrubs and small trees) at and near the septic system, whose roots could capture nutrients that otherwise would move toward the wetlands. On the other hand, sanitary effluent leaves from the bottom of the septic system, and tree roots intended to intercept that effluent could damage the system and its piping, negating any benefit that plantings could achieve.

36. Freshwater wetlands provide erosion control by serving as sedimentation areas and filtering basins, absorbing silt and organic matter. This benefit should not be affected, and the project incorporates measures to limit erosion and siltation from the adjacent area.

37. Freshwater wetlands provide opportunities for education and scientific research as readily accessible outdoor bio-physical laboratories and living classrooms. Again, because the wetlands are on private property, such opportunities do not exist at this site.

38. Freshwater wetlands provide open space and opportunities for aesthetic appreciation in areas that are otherwise heavily developed. While the wetlands would remain, the construction of the house in the northern portion of the lot would diminish the property's overall value as open space, which is enhanced because it is contiguous to two Town-owned properties whose development is prohibited. On the other hand, there are no parking areas or trail systems to encourage people to use these other properties, so the ability to enjoy the site as part of a natural corridor does not exist, at least at present.

39. Freshwater wetlands provide sources of nutrients in freshwater food cycles and nursery grounds and sanctuaries for freshwater fish. However, the introduction of excess nutrients from the septic system could lead to algal blooms, increasing the risk of fish kills in the pond. Also, pathogens from the septic system, if released to the pond, could pose a risk to shellfish downstream.

DISCUSSION

As noted above, the only issue adjudicated in this matter is whether the project, as modified by the mitigation plan submitted in February 2007, complies with the relevant standards for issuance of a freshwater wetlands permit. The standards must be applied to each of the activities proposed by Mr. Haley, all of which would be conducted in the regulated adjacent area, with due consideration of whether those activities would be compatible with the wetland and its functions or benefits.

According to an activities chart provided at 6 NYCRR 663.4(d), Mr. Haley's project involves various activities that require permits when conducted in wetlands or their adjacent area, here defined as the land outside the wetland and within 100 feet of the wetland's boundary. (See definition of adjacent area at 6 NYCRR 663.2(b).)

Those activities include several that are deemed P(N), meaning they are usually incompatible with a wetland when conducted in the adjacent area. These activities include filling (Item No. 20 on the activities chart), clear-cutting vegetation other than trees (Item No. 23), grading (Item No. 25), and constructing a residence or related structures or facilities (Item No. 42).

As the parties agree, filling is needed in the area of the septic system, to raise the grade and elevate the system above the groundwater table. Clear-cutting is needed to remove vegetation in the area to be occupied by the house, lawn, driveway and septic system. Grading is needed to level the site for construction of the house, driveway and septic system, and to remove existing soil mounds in the zone of disturbance, in effect restoring the natural ground contours. The actual construction of the residence is the goal of the project, and related to it is the construction of the porch and driveway.

According to 6 NYCRR 663.5(e), an activity deemed P(N), or usually incompatible with a wetland and its functions and benefits, may still be permitted if it is determined that, as proposed in a particular application, the activity (1) would be compatible with the preservation, protection and conservation of the wetland and its benefits, (2) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (3) would be compatible with the public health and welfare.

Here, the clear-cutting of vegetation, coupled with the construction of the residence and driveway, would be particularly incompatible with the wetland and its benefits, as they would remove cover for wildlife and introduce regular human activity, and the noise associated with such activity, to the wetland's adjacent area, the combination of which is likely to inhibit deer, waterfowl and other species in their use of the wetlands not only at the project site, but at the undeveloped property immediately to the north.

As Mr. Marsh explained, the clearing of 15,000 square feet of adjacent area would reduce that area's buffering capacity, by limiting the uptake of pollutants and nutrients and making it more likely that they would enter the onsite wetland. It would also remove natural vegetation that provides the basic building block of the food web, including browse for herbivores and leaves for detritivores, which feed on organic waste.

Finally, construction of the driveway as close as six feet from the wetland creates some risk of oil and other pollutants running into the onsite pond, though this risk could be reduced by curbing to ensure the effectiveness of the planned French drains.

The filling associated with the septic system would provide an environmental benefit, by reducing the threat of groundwater contamination. The grading, by itself, would have no impact on the wetland.

Mr. Terchunian suggested that removing the soil mounds and planting the ground beneath them with sweet pepperbush, a native plant that provides food and shelter for wildlife, would provide an appreciable environmental benefit. However, Mr. Marsh explained that the mounds have already revegetated naturally, and present no risk of erosion, meaning that their presence is not harmful to wetland functions.

Because the clear-cutting and construction activities cannot be considered compatible with the wetland and its benefits, they may be permitted only if they meet the weighing standards applicable to Class II wetlands. Pursuant to 6 NYCRR 664.5, DEC divides wetlands into four ranked regulatory classes, depending upon the degree of benefits that they provide. Class I wetlands provide the most critical of the state's wetland benefits, and therefore receive the most protection under DEC's regulations, followed by Class II wetlands, and then wetlands

delineated as Class III and IV. As Mr. Marsh explained, wetland "Q-10", the one on Mr. Haley's property, is deemed Class II because it has certain enumerated characteristics, any one of which would be sufficient to support the classification:

(1) It contains two or more of the wetland structural groups identified at 6 NYCRR 664.6(b)(1), attributable to the wetland's combination of deciduous swamp and open water [6 NYCRR 664.5(b)(2)];

(2) It is contiguous to tidal wetlands, in this case those at the end of Weesuck Creek [6 NYCRR 664.5(b)(3)]; and

(3) It is associated with permanent open water outside the wetland, in this case Shinnecock Bay [6 NYCRR 664.5(b)(4)].

The weighing standards applicable to Class II wetlands must also be applied to another activity associated with Mr. Haley's project, that being the introduction of sewage effluent to the adjacent area of the wetland. Such activity is considered P(X) - - or incompatible with a wetland and its functions and benefits - - pursuant to Item No. 38 of the activities chart, which covers, with certain exceptions for pesticide applications, "introducing or storing any substance, including any chemical, petrochemical, solid waste, nuclear waste, toxic material, sewage effluent or other pollutant."

As DEC Staff points out, this application of the chart is consistent with past DEC practice, where Item No. 38 has been used to determine whether the introduction of sewage effluent, such as through a proposed septic system, is compatible with a freshwater wetland and its functions and benefits. (See, for example, Matter of Alexander Joachim, Decision of the Commissioner, May 31, 2007, page 4, and Matter of Gino Antonini, Decision of the Commissioner, June 17, 2009, pages 1 and 2, other cases involving residences and associated septic systems, both proposed for the adjacent areas of freshwater wetlands.)

Mr. Haley contends that his septic system should be considered P(N) under Item No. 42 of the activities chart ("construction of a residence or related structures or facilities"), because the system is to support the house, and because it provides the only way to treat sanitary waste, there being no off-site treatment facility available at this location. A similar attempt to include a septic system under this item number was rejected in a recent permitting case, Matter of John O. Beyernheimer, where it was again confirmed that a proposed septic system in a freshwater wetland adjacent area should be categorized as P(X) under Item No. 38. (See ALJ's Hearing

Report, page 8, attached to the Interim Decision of the Assistant Commissioner, dated December 17, 2009.)

Mr. Haley argues that it would not be appropriate to consider the product of the septic system as "sewage effluent" because the effluent is treated by the system before its release. As Mr. Terchunian explained, the only material that leaves the septic tank is predigested, clarified liquid, which is then filtered through the leaching pools before it reaches the groundwater. However, as Mr. Marsh countered, what comes out of the bottom of a sanitary system is not drinking quality water; some but not all of the nutrients and suspended solids have been removed from the liquid, but it is still sewage effluent and it does constitute pollution.

As additional support for DEC Staff's position, one should note that "introducing sewage effluent" as a regulated activity under Item No. 38, falls under the heading of "Pollution and Pesticides," from which follows a discussion noting that "[i]ntroduction of sewage effluent . . . may contaminate ground and surface water with undesirable . . . nutrients or organisms," which is precisely Staff's concern. On the other hand, "constructing a residence or related structures or facilities," as an activity under Item No. 42, falls under the heading of "Buildings," from which follows a discussion specifically addressing impacts from the construction of "buildings, accessory roads and parking areas," with no mention of septic systems or impacts of their operation. Finally, pursuant to 6 NYCRR 663.2(z), the term "regulated activity" includes in its definition "any form of pollution, including but not limited to installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquefied wastes into or so as to drain into a wetland." This too suggests that No. 38, which falls under a "pollution" heading, is the appropriate item, not No. 42.

At the hearing and in his closing brief, Mr. Haley cites an ALJ's issues ruling in a tidal wetlands case, Matter of Joseph and Margaret Kelly, to support the view that construction of the septic system should be viewed as a component of the overall project, which is construction of a house, and not independently, as a separate item. (The ALJ's issues ruling, dated July 20, 2006, was received as Exhibit No. 18, and given official notice.) In the Kelly matter, the ALJ ruled that the installation of a sanitary system in the adjacent area of a tidal wetland would be considered as a single regulated use (use No. 45 in the classification chart at 6 NYCRR 661.5(b)), rather

than, as Staff proposed, a set of uses that would include excavating, installing a retaining wall and other sanitary system components, and backfilling. While acknowledging that the Kelly case did not involve the freshwater wetland regulations, Mr. Haley argues that, in a similar fashion, his septic system should be deemed subsumed within the construction of his house, as a necessary project component rather than a separate activity.

I disagree, noting that while a septic system is required for this site, it would not be for another location that is sewerred, as Staff pointed out at the hearing. For that reason, construction of a septic system is not "related" to construction of a house in all instances. Also, more importantly, there is a separate activity item under the freshwater wetland regulations addressing the introduction of sewage effluent to a wetland or its regulated adjacent area. In the adjacent area of a freshwater wetland, construction of a residence or related structure or facility is deemed P(N), meaning it is usually incompatible with a wetland and its functions or benefits, although in some cases the proposed action may be insignificant enough to be compatible. However, introducing sewage effluent in the adjacent area of a freshwater wetland is deemed P(X), meaning that, in all instances, it is deemed incompatible with a wetland and its functions and benefits. As a P(X) activity, introducing sewage effluent in the adjacent area of a freshwater wetland can be permitted only under the weighing standards at 6 NYCRR 663.5(e) (2).

The weighing standards at 6 NYCRR 663.5(e) (2) apply to the introduction of sewage effluent in the adjacent area of the freshwater wetland, as this is identified as P(X) in the activities chart at 6 NYCRR 663.4(d). They also apply to the clear-cutting of vegetation and the construction of the residence and driveway, also in the adjacent area, as these activities, identified in the chart as P(N), cannot be considered compatible with preservation, protection and conservation of the wetland and its benefits, as discussed above.

Because "Q-10" is a Class II wetland, a permit may be issued for each of these activities only if it is determined that such activity is compatible with the public health and welfare, and the only practicable alternative that could accomplish the applicant's objectives, with no practicable alternative on a site that is not a freshwater wetland or adjacent area. Also, the proposed activity must minimize

degradation to, or loss of, any part of the wetland or its adjacent area, and must minimize any adverse impacts on the functions and benefits that the wetland provides. Finally, the proposed activity must satisfy a pressing economic or social need that clearly outweighs the loss of or detriment to the wetland benefits, on the understanding that Class II wetlands provide important wetland benefits, the loss of which is acceptable only in very limited circumstances. (See 6 NYCRR 663.5(e)(2), application of weighing standards to activities affecting Class II wetlands.)

According to DEC Staff, Mr. Haley has not demonstrated a pressing economic or social need to build a house in the wetland adjacent area of his property. I agree, and on that basis alone the necessary permit can be denied. At the hearing, Mr. Haley did not even allege any need for his project, only a desire to live at property that he was gifted by a relative, and which he has been familiar with all his life. Because he did not pay for the property, building a house there is not necessary to get a return on any investment that he made in it. In fact, he already lives close to the property, and, to the extent he wants to access it, he can do so given his right-of-way along Magnus Lane, a private road. The house is not intended to have any public use, benefit, or purpose; constructing it would be of benefit only to Mr. Haley, as Mr. Marsh pointed out at the hearing.

As defined at 6 NYCRR 663.5(f)(5)(ii), a "pressing" economic or social need suggests that for the need to outweigh the loss of or detriment to a benefit of a Class II wetland, it must be "urgent and intense, though it does not have to be necessary or unavoidable." Asked to identify a project that would satisfy a pressing economic or social need, Mr. Marsh gave the examples of a school, hospital or firehouse that had to expand, and could do so only in a wetland's adjacent area, there being no other feasible alternative. He also gave the example of a school expanding its ball field, where to do so requires use of a wetland adjacent area, and the only alternative is to put in a new field elsewhere, at a site whose purchase would be an undue financial hardship for the community.

Mr. Marsh acknowledged that individuals, as well as the general public, may have pressing economic or social needs to perform regulated activities in a freshwater wetland or its adjacent area, and a discussion of such needs is posted on DEC's website. According to the posting (a copy of which was received as Exhibit No. 12), an applicant's needs may include "reasonable

access to and use of property, a safe and healthy place to live, [and] the ability to repair property damage." It is reasonable that a landowner would want to build a house on property that is zoned for residential use. However, as the posting also indicates, the applicant's needs must be weighed against the public burdens associated with his activities (such as the need for additional services, which DEC Staff did not put in issue), as well as the level of net losses or impacts to the wetland. The posting indicates that, in general, the more important the wetland functions, values, and benefits and the greater the potential loss or reduction of these attributes, the greater the amount of economic and social need that the applicant must demonstrate and document to prevail in obtaining a permit.

I find that, whatever need Mr. Haley has to build a house, it is outweighed by the impacts the project would have on the "Q-10" Class II wetland. As discussed above, the wetland's value as wildlife habitat would be particularly diminished by construction of the house coupled with associated clear-cutting of vegetation, which would eliminate food and cover in the adjacent area, and bring a human presence close to a wetland that, in its present state, is relatively sheltered from development in the surrounding neighborhood. Despite the relocation of the house as part of the 2007 mitigation plan, its southwest corner is still only 45 feet from the flagged wetland boundary.

The project also involves construction of a sanitary system as close as 51 feet from the wetland boundary, resulting in the introduction of sewage effluent to the adjacent area, a P(X) activity that is not compatible with the public health and welfare. As Mr. Marsh explained, pathogens have been found to travel more than 100 feet in soils, especially the coarse sandy soils of Long Island, and the potential exists for pathogens and viruses to reach the wooded wetland and, through that conduit, the surface water of the dug pond on the project site, the other open water areas just north of Montauk Highway, and the tidal waters south of the highway. In addition, said Mr. Marsh, sanitary systems also discharge other pollutants such as grease, drain cleaner and bleach that are not treated before release, and can likewise reach wetlands and surface water bodies, degrading opportunities for fishing and shellfishing and putting people's health at risk.

Mr. Marsh acknowledged that by putting the bottoms of the leaching rings three feet above groundwater instead of the required minimum of two feet, Mr. Haley's septic system would be

more protective of the environment, but he added that it made little difference when considering the filtering qualities of the coarse sand found at the site. As Mr. Terchunian pointed out, the septic system is in the northwest corner of Mr. Haley's property, more than 100 feet from the flagged wetland boundary generally east of the system, and more than 150 feet from the dug pond along the property's eastern border. However, as Mr. Marsh countered, the focus must remain on the portion of the boundary that is closest to the system, because the wetland is a conduit to the pond and the other surface waters downstream. Here, that is the boundary generally south of the system, which is of special concern because groundwater flows generally from north to south across the property. Mr. Marsh added that in his nine years working at DEC's Region 1 office, he had never seen a permit issued for a new sanitary system within 50 feet of a freshwater wetland.

Mr. Terchunian testified that septic systems similar to Mr. Haley's have been approved by the Suffolk County Health Department, and that where such approvals have been granted, preservation of the public health is presumed. However, compatibility with the public health is also a factor in DEC's permitting of activities, such as the introduction of sewage effluent, which are regulated under Part 663.

Mr. Marsh said that, working within the property boundaries, there is no place to build a house that would not be in the wetland or regulated adjacent area. He added, however, that there are other, non-wetland sites in the Quogue area that are potentially buildable. Among practicable onsite alternatives, Mr. Marsh said there was the potential for the house to be downsized further, which could further reduce the amount of clearing and grading, though not by much. Mr. Marsh also raised the potential of exploring some unspecified "alternative-style" sanitary system, but he could not say whether such a system would be able to secure other approvals.

Overall, I find that a house such as the one now proposed is the only practicable alternative that could accomplish Mr. Haley's objective of living at his property on Magnus Lane. As noted above, the mitigation plan involves relocating the house five feet to the west and five feet to the north, and reducing its footprint to 1,248 feet, which is modest, particularly for the neighborhood. The house and septic system have been located where they would pose the least risk to the wetland and its functions, given the physical limitations of the project site.

As Mr. Marsh testified, there is always the alternative of building elsewhere, but it is not clear whether this is practicable for Mr. Haley, who would have to acquire another property in order to build on it. For that reason, I make no findings whether Mr. Haley has a practicable alternative on a site that is not freshwater wetland or adjacent area.

In terms of the remaining weighing standard, I find that, with the additional mitigation outlined in the 2007 plan and in Mr. Terchunian's testimony, the overall project minimizes degradation to, and loss of, the wetland and its adjacent area, and minimizes the adverse impacts the project would have on the functions and benefits that the wetland provides.

While the project entails development in the adjacent area, it has been designed to limit as much as reasonably possible the area of clearing, grading and ground disturbance, and to leave some undisturbed buffer between the house and the wetland, particularly the dug pond. Lawn area would be limited to within 10 feet of the house, and landscaping would be done with native vegetation that does not require fertilization. Standard measures, such as the use of hay bales and silt fencing, have been incorporated to prevent runoff during construction, and dry wells and French drains are proposed to capture runoff from the completed house and driveway. Its south side as close as six feet from the dug pond, the driveway is the project component presenting the greatest risk for contaminants entering directly into the open water of the pond. However, this risk would be diminished by making the driveway surface pervious, and by incorporating French drains with curbing, as discussed above.

To compensate for impacts that cannot be mitigated adequately through on-site measures, Mr. Haley is willing to restore and revegetate portions of the Town-owned parcel to his north, and to donate money to a Town fund for the preservation and cleanup of other wetlands in the Weesuck Creek watershed. While laudable, there is no indication that the Town is interested in pursuing these proposals. The Town did not appear at or participate in the hearing on this application. However, the hearing referral includes correspondence of November 12, 2004, from the East Quogue Citizens Advisory Committee to DEC and the Town's conservation board. Elizabeth Harderer, committee chairperson, proposed that Mr. Haley's property be acquired by the Town and protected against development in the same manner as the property to its north, both to prevent the drainage of sewage into Weesuck Creek and Shinnecock Bay and to preserve so-called "endangered" plant and animal species. (DEC

Staff did not identify any endangered species that use or inhabit the site.)

In its permit denial letter (Exhibit No. 8), DEC Staff said that allowing this project "would be setting a precedent for future encroachment and cumulative impacts" to the regulated wetland. At the hearing, Mr. Marsh elaborated on these points, citing a statement in the activities chart [at 6 NYCRR 663.4(d)] that constructing buildings "can have several effects on wetlands, not the least of which is the increased pressure to continue development beyond the initial construction."

According to Mr. Marsh, "Once the house is built and finished, there is the potential for increased development on site with additions to the house, pools, additional decking, wanting additional yard space. Even if Mr. Haley agreed to leave the house as is, future homeowners may want additional work done on site. So once this project is allowed, there's the precedent to continue additional development on site." (Transcript, pages 329 and 330.)

In addition, he said, "There's also the precedent set for allowing similar projects on other undeveloped lots in the area. Once we allow a house 45 feet from the wetland and the sanitary system, 50 feet from the wetland and a neighbor comes in for a similar project . . . there's certainly more pressure on the department to continue allowing additional development off site." (Transcript, pages 331 and 332.)

While I appreciate these concerns, I consider them overstated, and they do not factor into my permitting decision. Any onsite development beyond that permitted as part of this project would require a separate permit application, and could be addressed in that context. In terms of offsite development, any such development on nearby properties seems unlikely. As noted in Mr. Haley's closing brief, the proposed project is located in a residential neighborhood that is almost completely built out (as shown in the aerial view received as Exhibit No. 5). The vacant properties adjacent to the site on the north and west are owned by the Town and expected to remain undeveloped in perpetuity. The undeveloped property immediately to the south, also along the creek, is privately-owned, but has no ready access, and the property south of that, which borders on Montauk Highway, is almost entirely open water, and would be difficult, if not impossible, to develop, as Mr. Marsh acknowledged.

According to Mr. Marsh, a western branch of the "Q-10" wetland comes up from Montauk Highway through the Town's property west of the Haley parcel before reaching some lots off Carters Road, as shown on Exhibit No. 5. Not having flagged the wetlands there, Mr. Marsh said he did not know whether these lots have enough upland to build on, but suggested that any development would likely require a wetland permit.

A decision to approve this application could arguably set a precedent for development not only of the affected wetland, but other wetlands around the state. On the other hand, should other, similar applications be made, they would have to be reviewed on their own merits, and issuance of a permit in one matter would not dictate the same result elsewhere, as each project is unique, as is the setting for which it is proposed. (See Matter of Palmeri, page 34 of my hearing report, attached to the Decision of the Acting Executive Deputy Commissioner, dated March 26, 2007.)

At the hearing Mr. Haley offered two permits that DEC had issued for development of the property immediately to the north of his parcel. Prior to the Town's acquisition of that property, DEC twice issued permits for a house, pervious driveway and septic system: first, to John Moran, on April 20, 1993 (see Exhibit No. 13-A, the permit itself, and Exhibit No. 13-B, the survey map associated with that permit), and second, to Robert H. Glinski, Jr., on September 8, 2000 (see Exhibit No. 14, the permit and associated survey map, marked together). The permits were offered to establish a precedent for issuance of a permit to Mr. Haley, it being noted that the Town's and Mr. Haley's properties have a similar layout (with a dug pond on the eastern portion and a regulated adjacent area in the western portion), and that the projects approved under the prior permits were very similar to what Mr. Haley proposes now.

DEC Staff objected to admission of the permits, noting discrepancies between Mr. Haley's project and the ones approved previously on the neighboring property. In fact, the houses that were approved for the neighboring property appear to be closer to the delineated wetland boundary than the house proposed by Mr. Haley, though their septic systems have a greater setback, at least measured from the wetland's closest point. Mr. Haley argued that these discrepancies go to the weight to be given the other permits. However, I ruled that the permits were irrelevant to the issues before me, which were to be determined by weighing Mr. Haley's project against the standards for permit issuance.

It should be noted that the permits offered by Mr. Haley were issued in 1993 and 2000, before staff counsel and its witness, Mr. Marsh, joined DEC, though no question was raised about the permits' authenticity, as they were secured from DEC files pursuant to a Freedom of Information Law request by Mr. Terchunian. Because the permits were not issued pursuant to a hearing process, there is no written rationale for their issuance, though it may be presumed that they were granted because the projects were deemed to meet the freshwater wetland permitting standards.

In excluding the permits from the record, I noted that decision making is influenced by a number of factors that change from site to site, and from project to project. I said that I would not get into a comparison of Mr. Haley's project with others approved in the past, noting too, that if such a comparison were to be made, it would require further development of the record, particularly about the circumstances presented in the other applications.

While not received for the purpose proposed by Mr. Haley, the permits for development of the Town's property were marked for identification, and the parties were afforded an opportunity through their closing briefs to reargue their positions to the Commissioner, which they have done. As the briefs contain no new arguments, I find no basis to reconsider my prior ruling.

In his closing brief, Mr. Haley argues that if he is denied a permit for a single-family residence, he will have no viable use for his property, given the development restrictions imposed by Town zoning. This report draws no conclusions on that point, as it is concerned solely with the application's compliance with the freshwater wetland permitting standards.

CONCLUSION

Even with the additional mitigation offered in the February 2007 mitigation plan and subsequently at the adjudicatory hearing, Mr. Haley's project does not meet the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit.

RECOMMENDATION

The application for a freshwater wetlands permit should be denied.

EXHIBIT LIST

WILLIAM HALEY
FRESHWATER WETLANDS PERMIT HEARING
Application No. 1-4736-06627/00001

1. Notice of Complete Application and Public Hearing (5/1/08)
2. Issues Ruling of Administrative Law Judge ("ALJ") Kevin Casutto, Matter of Haley (9/18/08)
3. Interim Decision of the Commissioner, Matter of Haley (6/22/09)
4. Resume of Aram Terchunian, Applicant's consultant (9/21/09)
5. Aerial view of project site and vicinity, prepared by Aram Terchunian from Southampton Town Geographic Information System (9/29/09)
- 6-A. Haley permit application (as submitted 9/7/04), with attached Environmental Assessment Form, area map showing site location, and property photographs
- 6-B. Survey map submitted with application
7. Survey map, with DEC wetland boundary highlighted in red ink
8. DEC Staff Notice of Permit Denial (2/3/06)
9. Applicant's proposed mitigation plan (2/9/07), including revised site plan (1/18/07)
10. DEC Staff response to proposed mitigation plan (11/28/07)
11. Itemization of freshwater wetland functions and/or benefits, as printed from DEC's website (9/28/09)
12. Standards for issuance of freshwater wetland permits, as printed from DEC's website (9/28/09)
- 13-A. DEC permit (No. 1-4736-01022/00001-0) issued to John Moran for construction of a single family dwelling at property adjacent to Haley lot (4/20/93)
- 13-B. Survey map associated with Moran permit
14. DEC permit (No. 1-4736-04875/00001) issued to Robert H. Glinski, Jr. for construction of a single family dwelling at property adjacent to Haley lot (9/8/00), including survey map associated with permit
15. Resume of Robert Marsh, DEC's Region 1 Manager of the Bureau of Habitat
16. Map 31 of 39 of DEC's Freshwater Wetlands Maps for Suffolk County
17. Aerial view of project site and vicinity, prepared by DEC Staff to display Suffolk County tax map lines and freshwater wetland boundaries
18. Issues Ruling of ALJ Daniel O'Connell, Matter of Kelly (7/20/06)

NOTE: All exhibits were received in evidence except Nos. 13-B and 14, which were marked for identification only. Also, Exhibit No. 13-A was received for the limited purpose of illustrating a permit condition employed by DEC to require the inclusion of particular covenants in recorded property deeds, and not for the purpose proposed by the applicant, which was to establish a precedent for development of his property with a single-family house.