

In the Matter of the Application of

WILLIAM HALEY,

ISSUES RULING

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

DEC Case No.
1-4736-06627/00001

(September 18, 2008)

Introduction

William Haley, (the "Applicant") has applied to the New York State Department of Environmental Conservation (the "Department") for Freshwater Wetlands and Tidal Wetlands Permits pursuant to Environmental Conservation Law Articles 24 and 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Parts 661 and 663. Applicant seeks to construct a two-story single family dwelling, driveway, and sanitary system within the regulated (100-foot) adjacent area of a Class II freshwater wetland, and within the (300-foot) adjacent area of a regulated Tidal Wetland. The location of the proposed project is 12 Magnus Lane, in the unincorporated Hamlet of East Quogue, within the Town of Southampton, Suffolk County, New York (the "site").

On June 4, 2008, at 10:00 a.m., a legislative hearing was held before Administrative Law Judge ("ALJ") Kevin J. Casutto, at the Westhampton Beach Village Hall, 165 Mill Road, Westhampton Beach, New York, 11978. At the legislative hearing, no members of the public appeared to offer comments on the permit application; however, Joan Hughes, Chairperson of the East Quogue Citizens Advisory Committee, appeared to observe the proceedings. In November 2004, the East Quogue Citizens Advisory Committee sent letters to the Southampton Town Conservation Board and the Department's Region 1 Office, regarding this proposed project.

Immediately following the legislative hearing, an issues conference was held at the same location. The deadline for receipt of filings for party status was May 28, 2008. No applications for party status were received, and therefore, Applicant and Department Staff are the only parties to this proceeding.

A stenographic record of the proceedings was received by the ALJ on June 12, 2008. Following the issues conference, a schedule was set for post-issues conference filings, extending to August 5, 2008.

At the issues conference, the Applicant appeared by James N. Hulme, Esq., Kelly and Hulme, P.C., 323 Mill Road, Westhampton Beach, New York, 11942. Appearing with counsel at the issues conference were environmental consultant, Aram Terchunian, President, First Coastal Corporation, and permit Applicant, William Haley.

Department Staff appeared by Gail Rowan, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 1. Appearing with counsel were technical staff, Robert Marsh, NYSDEC Regional Manager, Bureau of Habitat, Division of Fish, Wildlife and Marine Resources; and Karen Graulich, Regional Manager, Bureau of Marine Habitat Protection.

Following receipt of the post-issues conference filings, by letter dated August 21, 2008, Assistant Regional Attorney Rowan requested to reopen the issues conference record in the above referenced matter to include two letters which Department Staff contends are relevant to the jurisdictional issue discussed below. Mr. Hulme did not make any responsive filing to the request, and I granted Department Staff's request to reopen the record. I provided a schedule for Ms. Rowan to file the letters with cover letter providing argument or comment upon the relevance or import of the letters, and for Mr. Hulme's response by September 12, 2008. Mr. Hulme provided no response to Department Staff's filings, which are discussed further below.

Background

On September 7, 2004, Applicant filed permit application No. 1-4736-06627/00001, above referenced. Department Staff deemed the permit application complete on December 3, 2004. On February 3, 2006, Department Staff sent Applicant a letter "Notice of Permit Denial," denying the permit application. Applicant timely requested a hearing on the permit denial. Subsequently, once Applicant retained counsel, a hearing schedule was set. A

combined Notice of Complete Application and Public Hearing was published in the Department's Environmental Notice Bulletin on May 1, 2008 and in the Southampton Press on May 8, 2008.

For purposes of State Environmental Quality Review ("SEQR"; ECL Article 8, 6 NYCRR Part 617), Department Staff has determined that the regulated project is a Type II Action, exempt from SEQR environmental review.

Pursuant to Departmental regulations, Applicant bears the burden of proof to demonstrate that the project complies with all applicable laws and regulations administered by the Department. See, 6 NYCRR 624.9(b)(1), 6 NYCRR 661.9 and 6 NYCRR 663.5(a).

At Applicant's request, scheduling of the adjudicatory hearing has been adjourned without date to allow for a written issues ruling.

Applicant's Position

- Jurisdiction

As a preliminary matter, Applicant challenges the Department's permitting jurisdiction in the Town of Southampton. Regulation of freshwater wetlands in New York is governed by ECL Article 24 (the "Freshwater Wetlands Act," effective September 1, 1975, pursuant to L.1975,c.614) and regulations issued pursuant thereto, including 6 NYCRR Parts 662, 663, 664 and 665. Prior to enactment of the Freshwater Wetlands Act, local governments exercised jurisdiction over regulation of freshwater wetlands. Pursuant to the Freshwater Wetlands Act, the Department is vested with authority to implement and enforce the Freshwater Wetlands Act. See, for example, ECL §24-0301 and §24-0701. However, ECL §24-0501 and 6 NYCRR 665.4 provide procedures whereby a municipality may retain or acquire exclusive jurisdiction over freshwater wetlands within its municipal boundaries.

ECL §24-0501 established the opportunity for local governments to administer the Freshwater Wetlands Act by adopting wetland ordinances by September 1, 1977 or the date the wetlands map is filed, whichever occurred later. A locality which did not adopt a law yielded that prerogative to the county, which had 90 days after the locality's final date to do so. If the county failed to act, the Department retained jurisdiction over the freshwater wetlands. See, generally, ECL §24-0501(4); and McKinney's Consolidated Laws of New York (2007), ECL §24-0501, Practice Commentaries by Philip Weinberg.

Local Law No. 36-1994, Town of Southampton Chapter 325A, Wetlands, Freshwater, was adopted by the Town Board of the Town of Southampton on August 20, 1994 ("Chapter 325A"). Applicant contends that the Town of Southampton's adoption of Chapter 325A complies with the requirements of ECL §24-0501(6) and 6 NYCRR 665.4 to provide the Town of Southampton with exclusive jurisdiction over freshwater wetlands within its municipal boundaries. However, Applicant has failed to provide any interpretation or explanation of the provisions of 6 NYCRR 665.4 to support Applicant's conclusion that the Town of Southampton has exclusive jurisdiction over freshwater wetlands within its municipal boundaries.

By amendment in 1977, the legislature added ECL §24-0501(6) which provides a procedure by which a locality or county may regain jurisdiction otherwise time barred by adopting a local law consistent with ECL Article 24 and notifying the Department, and if applicable, the county. ECL §24-0501(6), adopted by L.1977, c.654, §4.

ECL §24-0501(6) provides that "[a]ny local government which defaults or transfers its authority pursuant to subdivision four of this section or section 24-0503 of this article, may recover such authority at any time by adopting a local freshwater wetland protection local law or ordinance consistent with this article and notifying the county and the department of the adoption. Such notice shall be given by certified mail within ten days of adoption thereof. Such local law or ordinance shall not become effective in less than sixty days nor more than one hundred days from the adoption thereof." ECL §24-0501(6).

In applying the provisions of ECL §24-0501(6), the regulatory provisions of 6 NYCRR 665.4, Assumption of Regulatory Authority (effective May 15, 1984), also are applicable. Pursuant to 6 NYCRR 665.4(e), the municipality must forward to the Department a copy of the local law or ordinance, indicating the date of adoption, and a statement that it was adopted pursuant to ECL §24-0501. Following the Department's receipt of an ECL §24-0501 local government notice of adoption, the Commissioner must either certify to the local government that the filing has satisfied the requirements for assumption of regulatory authority for 6 NYCRR 665.4(e) or notify the local government that has not met the conditions stated in the Freshwater Wetlands Act and 6 NYCRR Part 665. 6 NYCRR 665.4(e).

The two letters Department Staff filed are a November 1, 2006 letter from Applicant to Martin Shea, Chief Environmental Analyst of the Town of Southampton, and Chief Environmental Analyst

Shea's responsive letter to Applicant, dated November 6, 2006. Applicant requested that Southampton Town Code 325A-2 be implemented for Southampton Town freshwater wetlands application #04-99, presumably Applicant's Town permit application for the project at issue in this proceeding. Chief Environmental Analyst Shea responded that the Town of Southampton has not yet implemented Southampton Town Code 325A-2, nor does the Town have any plans to proceed with implementation of this law at present. He further stated that, "the Conservation Board does not have the authority to implement Chapter 325A for the purpose of reviewing your application, as there are many legal steps that the Town would still need to take, in order to assume the transfer of State jurisdiction under ECL Article 24 within Southampton Town." In sum, the Town of Southampton has unequivocally acknowledged that it has not complied with all legal requirements necessary for the Town to assume the transfer of State jurisdiction under ECL Article 24 of freshwater wetlands regulation within the Town of Southampton.

In conclusion, Applicant's challenge to the Department's freshwater wetland permitting jurisdiction in the Town of Southampton must fail.

- Applicant's Alternative Mitigation Proposal

Apparently, communications between Applicant and DEC Staff continued after Applicant's timely request for hearing. Subsequently, by letter dated February 9, 2007, Applicant's environmental consultant (predecessor to First Coastal Corporation) submitted an informal revised mitigation plan proposal to Department Staff for consideration.¹ The consultant's cover letter erroneously indicated that the mitigation plan was filed "[p]ursuant to a letter from administrative law judge Kevin Casutto..." Moreover, I was not provided with a copy of this letter at the time it was filed with Department Staff.

During the issues conference, the referenced "ALJ letter" was identified as my November 3, 2006 letter to Applicant, then unrepresented by counsel (with copy to Department Staff counsel). In my November 3, 2006 letter to Applicant, I did not direct that

¹ Such informal proposals, including this one, do not contain the plans and detail necessary for a determination of "complete application," but are intended to provide enough information for Department Staff to indicate whether such a project, with proposed modification or mitigation, may be approvable.

Applicant file a revised mitigation plan, but merely summarized the substance of Applicant's intentions as set forth in Applicant's November 1, 2006 letter: "In your November 1st letter you state that your environmental consultant, En-Consultants, Inc., is preparing a mitigation plan that you intend to submit to DEC Staff to as an offer of settlement in this matter, seeking to avoid the hearing process. Therefore, this permit hearing matter will continue to be held in abeyance as you have requested." Letter, Casutto to Haley, November 3, 2006.

By letter dated November 28, 2007, Department Staff responded to Applicant's informal revised mitigation plan proposal, indicating that it would not meet standards for permit issuance, and identifying four reasons why the informal proposal fails to meet the standards for permit issuance.

During the issues conference, Applicant sought to have the February 9, 2007, informal revised mitigation plan proposal considered with the initial permit application. Department Staff objected to this request, explaining that the hearing request was based upon Staff's review of the initial application, which had been deemed complete. In addition, Department Staff stated that the February 9, 2007 informal revised mitigation plan proposal is not a complete permit application. Department Staff explained that such informal proposals provide permit applicants with a less expensive method to obtain Department Staff's input before going to the time and expense of making a new revised formal permit application. In this instance, Department Staff determined that the revised proposal would not meet permitting standards, consequently, no new formal complete permit application was filed.²

- Applicant's Assessment of Site Conditions

Applicant contends that the site and surrounding area have been subject to human disturbance, including several nearby residences.

During the Issues Conference, Applicant contended that the proposed project will be located much further from the wetlands because the location of the wetlands boundary on the site survey is not correct. (The site survey, part of the permit application

² Hypothetically, if Department Staff indicates that an informally submitted revised project could be approved, then Applicant could withdraw the initial permit application and submit a new permit application based upon the revised proposal.

submitted by Applicant, was prepared by Applicant's predecessor environmental consultant, not First Coastal Corporation.) Subsequently, in response to Department Staff's objection, Applicant withdrew this issue. Issues Conference Transcript, page 47, line 14, through page 52, line 5.

Department Staff's Position

Department Staff contends that this permit application fails to satisfy the standards for permit issuance contained in 6 NYCRR Part 663.5 (Freshwater Wetlands Regulations), for the following reasons:

a) Applicant proposes to install a septic system within 52 feet of a Class II freshwater wetland.

b) The proposed construction of the dwelling and associated structures are within 6 feet of the wetlands, and the additional clearing, grading and ground disturbance are within 3 feet of the wetlands.

c) A substantial amount of the wetland's (100-foot) "adjacent area" will be disturbed and permanently occupied by the proposed activities/structures. The proposed project will be constructed entirely within the 100 foot adjacent area. The wetlands adjacent area significantly contributes to maintaining the functions and benefits provided by this Class II freshwater wetland. Important wildlife habitat and wetland buffering values provided by the wetland's adjacent area would be permanently lost as a result of the clearing, disturbance and construction of structures in the adjacent area.

d) In addition, 6 NYCRR 663.4 states that "constructing buildings, accessory roads, and parking areas can have several effects on wetlands, not the least of which is the increased pressure to continue development beyond the initial construction." By allowing the proposed project the agency would be setting a precedent for future encroachment and cumulative impacts.

e) The project will result in significant adverse impacts to freshwater wetland Q-10 and its adjacent area, and the project is not compatible with the preservation, protection

and conservation of the wetland and its benefits.³ Consequently, the application does not meet the compatibility tests listed in 6 NYCRR 663.5(e)(1) and must therefore meet each of the weighing standards in 6 NYCRR 663.5(e)(2).

f) 6 NYCRR 663.4(d)(38) lists the introduction of sewage effluent in the adjacent area of a freshwater wetland as "(X)", meaning this activity is incompatible with a wetland and its functions or benefits. The regulations state that sanitary systems near wetlands "may contaminate ground and surface waters with undesirable chemicals, nutrients and organisms." In addition, Department Staff finds that human pathogens, particularly viruses, can enter surface waters creating a potential human health risk. Pursuant to 6 NYCRR 663.5(e)(2), any activity identified as incompatible also must meet each of the weighing standards listed in Part 663.5(e)(2).

g) Pursuant to 6 NYCRR 663.5(e)(2), "Class II wetlands provide important wetland benefits, the loss of which is acceptable only in very limited circumstances. 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." Department Staff contends that Applicant has failed to demonstrate that the proposed activities satisfy a pressing economic or social need that clearly outweighs the detriment to the benefits of this Class II wetland and its adjacent area.

h) Department Staff asserts that no alternatives to the proposed project have been identified or appear to exist that would support a single family dwelling use.

Therefore, for the above reasons, Department Staff has determined that this permit application fails to satisfy the standards for permit issuance contained in Part 663.5. As a result, the project application must be denied.

In addition, Department Staff states that this proposed project is within the adjacent area of regulated tidal wetlands.

³ The final Suffolk County freshwater wetlands map depicting Applicant's property (map identification code Q-10) was filed with the Suffolk County Clerk on May 26, 1993.

Rulings

- 1) The issues for adjudication are: a) whether the project complies with the permitting standards (6 NYCRR 663.5) and procedural requirements for various activities (6 NYCRR 663.4); and b) whether the project complies with the permitting provisions for a tidal wetlands permit, 6 NYCRR Part 661.

- 2) At the Applicant's request, this matter is adjourned without date to allow for further discovery. Upon request of the Applicant or DEC Staff, following conclusion of the discovery process, a schedule will be set for the adjudicatory hearing.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis.⁴ Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.⁵ Allowing additional time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6(g), any appeals must be received by the Commissioner (Executive Office, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010 [Attention: Assistant Commissioner Louis A. Alexander]) before 3 p.m. on October 9, 2008. All replies to appeals must be received before 3 p.m. on October 23, 2008.

One copy of each appeal or reply must be filed with the Commissioner. In addition, send one copy of any appeal and reply to the Chief Administrative Law Judge and two copies of any appeal and reply to the Administrative Law Judge. Parties who use word processing equipment to prepare their brief and/or reply must also submit a copy of their appeal and/or reply to the Administrative Law Judge in electronic form, by E-mail attachment formatted in either Adobe Acrobat, WordPerfect for Windows or Microsoft Word for Windows.

⁴ 6 NYCRR 624.8(d)(2).

⁵ 6 NYCRR 624.6(e)(1).

Alternatively, parties may file electronically via E-mail to "laalexan@gw.dec.state.ny.us," "jtmcclym@gw.dec.state.ny.us," and "kjasutt@gw.dec.state.ny.us," to be followed by one paper copy each to the Commissioner and the Chief ALJ and two paper copies to the ALJ by first class mail, all postmarked by the date(s) specified above. This alternative service will satisfy service upon the Commissioner, Chief ALJ and the ALJ.

In addition, send one copy of any appeal or reply to opposing counsel for this case. The parties shall ensure that transmittal of all filings is made to the ALJ and opposing counsel at the same time and in the same manner as transmittal is made to the Commissioner. No submissions by facsimile/telecopier will be allowed or accepted.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.

Albany, New York
September 18, 2008

/s/

Kevin J. Casutto
Administrative Law Judge

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