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

In the Matter

- of –

the Application for Permits pursuant to Articles 17 and 24 of the Environmental Conservation Law (ECL), Section 401 of the Federal Clean Water Act (CWA), and Parts 663 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

-by-

TOWN/VILLAGE OF HARRISON,

Applicant.

DEC Application Nos. 3-5528-00104/00001 and 3-5528-00104/00002

INTERIM DECISION OF THE COMMISSIONER

June 12, 2013

INTERIM DECISION OF THE COMMISSIONER

The Town and Village of Harrison (Harrison or applicant) proposes to develop an outdoor recreational complex at a brownfield remediation site in Harrison (Project Home Run or project). As currently designed, Project Home Run will involve filling and grading approximately 0.162 acre of New York State regulated Freshwater Wetland J-3 (Class II) and 2.0 acres of the wetland's adjacent area.[1] In connection with the project, Harrison has applied for permits pursuant to articles 17 and 24 of the Environmental Conservation Law (ECL), section 401 of the federal Clean Water Act (CWA), and parts 663 and 750 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

Currently before me are appeals by the City of Rye (Rye) and Douglas Schaper from two rulings by Administrative Law Judge (ALJ) Daniel P. O'Connell: (i) May 29, 2009 Rulings on Issues and Party Status (May 2009 Rulings); and (ii) July 15, 2011 Supplemental Rulings on Issues for Adjudication (July 2011 Supplemental Rulings). I have also considered the September 15, 2011 papers filed by Michael LaDore, to whom the ALJ granted amicus status in the May 2009 Rulings. I affirm the ALJ's rulings, subject to my comments below.

BACKGROUND AND PROCEDURAL HISTORY

In April 2002, Harrison declared itself lead agency under the State Environmental Quality Review Act (SEQRA), ECL article 8 and 6 NYCRR part 617 with respect Project Home Run, and prepared a notice of intent to serve as lead agency for the project (see April 11, 2002 Town/Village of Harrison Board Resolution). Harrison characterized the project as an unlisted action and, after determining that the project would not have a significant effect on the environment, issued a negative declaration dated June 23, 2004. In November 2006, Harrison submitted to Department staff a permit application relating to the project (see Exhibit [Ex.] 3), and Department staff deemed the application complete on February 21, 2007 (see Ex. 1A).

A public legislative hearing was held on July 23, 2007, and the first session of the issues conference was held on July 24, 2007. Between July 2007 and October 2008, issues conference participants exchanged and reviewed additional information relating to the project. During that period, in May 2008, Department staff circulated a consolidated draft permit. In October 2008, the prospective parties (Rye, Mr. Schaper and Mr. LaDore) filed supplemental petitions.

I. May 2009 Rulings

Following the second session of the issues conference, held on November 18, 2008, issues conference participants conducted another round of document and information exchange and filed comments and replies. ALJ O'Connell thereafter issued the May 2009 Rulings, in which he (i) granted petitioner Rye's and petitioner Schaper's requests for party status, and petitioner LaDore's request for amicus status; (ii) identified certain issues for adjudication; (iii)

[1] Although initially designed to include a full baseball/softball stadium, youth soccer and multipurpose field, children's playground, parking lots and associated infrastructure, Harrison significantly revised and reduced the size of the project. The project now consists of plans for a "pick-up ball field, an open grass area, a walking trail that loops around the property and connects to the existing wood plank river walk and two gravel parking areas" (Beaver Swamp Brook Project Home Run SEQRA Negative Declaration Update [Jan. 21, 2011]).

denied requests to adjudicate other issues; and (iv) determined that he needed additional information to enable him to address other issues. These holdings are described in more detail immediately below.

A. Issues Identified for Adjudication

Department staff initially proposed as an issue for adjudication whether the functions and benefits of the wetland in terms of floodplain storage would be affected adversely by the project (see May 2009 Rulings, at 10, 46). Staff withdrew the issue after Harrison consultant Leonard Jackson Associates (LJA) provided additional analyses and other information (id. at 46). Because Harrison accepted the terms and conditions of the May 2008 draft permit, and Department staff identified no issues for adjudication, the ALJ determined that, as between applicant and staff, no issues required adjudication (id. at 41).

The ALJ held, however, that the prospective parties raised substantive and significant issues[2] about whether the project would meet the weighing standards applicable to a Class II freshwater wetland (see 6 NYCRR 663.5[e][2]), and granted Rye's request to adjudicate the following issues: (i) whether the project meets the Department's policy concerning "no net loss" of wetlands, and whether the project would satisfy the regulatory requirement of wetland mitigation sequencing (Rye Proposed Issue II); (ii) whether the project meets permit issuance standards, including compatibility and weighing standards (Rye Proposed Issues V.A and V.B); [3] and (iii) whether Harrison considered alternatives requiring less fill and grading (Rye Proposed Issue VI) (see May 2009 Rulings, at 50-51). In addition, with respect to the weighing standards, the ALJ specifically held that a question remained concerning whether the project "would satisfy a pressing economic or social need that clearly outweighs the loss of, or detriment to, the benefits of the wetland" (id. at 51; see also 6 NYCRR 663.5[e][2]).[4] On the appeals, none of the parties challenged the ALJ's determination in the May 2009 Rulings that the foregoing issues will be adjudicated.

B. Issues as to which the ALJ Denied Requests for Adjudication

In the May 2009 Rulings, the ALJ also rejected several of the prospective parties' proposed issues for adjudication. First, the ALJ held that whether Harrison had complied with its local law relating to flood damage protection (Rye Proposed Issue VII) was beyond the scope of the hearing, because such compliance was to be determined by Harrison, not the Department (see id. at 48). In that regard, he noted that a condition of the draft permit required Harrison to comply with other applicable law, including local law (see id. at 19, 24-25; see also Ex. 6, at page 3 of 5, General Condition No. 3).

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[2] Where the Department has determined that a project as conditioned by a draft permit would satisfy statutory and regulatory requirements, prospective parties have the burden of persuasion to demonstrate that issues proposed for adjudication are both substantive and significant (see 6 NYCRR 624.4[c]).

[3] The ALJ determined that the scope of the issue relating to the public health and welfare weighing standard would include consideration of the possible adverse impact on flood storage capacity resulting from filling in a portion of the floodway as part of the project (see May 2009 Rulings, at 51).

[4] The ALJ noted that issues raised by Mr. Schaper essentially mirrored Rye's proposed issues for adjudication (see id. at 50-51).

The ALJ also rejected the following proposed issues for adjudication: (i) whether the LJA October 2007 report was "inadequate" (Rye Proposed Issue VIII; see May 2009 Rulings, at 25, 48); (ii) Rye's claim that the draft permit had various deficiencies (Rye Proposed Issue IX; see May 2009 Rulings, at 51-52); and (iii) prospective parties' request to include in the Project Home Run proceeding a review of "substantial and significant deviations" from the remediation project Record of Decision (ROD) (Rye Proposed Issue X; see also Rye Proposed Issue I [remediation project modifications resulted in adverse environmental impacts, and Harrison's underlying SEQRA review "incomplete"]; see May 2009 Rulings, at 52-53).[5]

C. Issues Requiring Additional Information

In the May 2009 Rulings, the ALJ determined that three issues required additional information. The first issue concerned a procedural aspect of Harrison's SEQRA review of the project (see May 2009 Rulings, at 54). Rye and Department staff differed on whether the Department had received Harrison's lead agency coordination letter and, thus, whether Harrison had conducted a coordinated review (see id. at 23, 33, 44-45; 6 NYCRR 617.6[b][3]). The record did not at that time contain sufficient information to determine which party was correct. The ALJ directed Harrison to provide the ALJ and parties with copies of its lead agency coordination letter, attachments, and other SEQRA documents, and requested that the other participants submit relevant documents as well (May 2009 Rulings, at 54).[6]

The second and third issues as to which the ALJ also required further information overlap, and are related to (i) the extent to which the project may be located in a floodway, and (ii) the issue of compensatory flood storage. Harrison's consultant LJA had determined that, in light of a September 2007 Federal Emergency Management Agency (FEMA) amendment to the flood insurance rate map, a portion of the project (as it was then designed) would be located in the floodway (id. at 17, 36; see also Ex. 10). According to Department staff, given the September 2007 revisions to the FEMA flood insurance rate map, Harrison had two options: Harrison could implement the project under the 2007 map (which reflected that a portion of the project would be located in the floodway). In such circumstance, however, a local law concerning flood damage prevention would require mitigation and compensatory flood storage (id. at 19, 38, 40-41). In the alternative, Harrison could file a letter of map revision (LOMR) with FEMA and, if FEMA revised the floodway so that the project was no longer encumbered by the floodway, mitigation and compensatory storage may be unnecessary (id. at 38, 40).

Based upon the LJA analysis, Harrison stated that it intended to file a LOMR with FEMA to request a modification of the floodway limits (id. at 36, 41, 46). The ALJ directed Harrison to advise when it filed its LOMR with FEMA, and to provide a timeframe within which FEMA was expected to issue a determination (id. at 48, 55). The ALJ also directed Department staff to

[5] The ALJ held appropriately that no authority requires the Department to duplicate review of Harrison's remediation project within the context of the Project Home Run permit proceeding (id. at 52).

[6] SEQRA-related issue are not reviewable in a Department permit hearing proceeding where, as here, the Department is not the lead agency, and the lead agency determines that no draft environmental impact statement is required (see 6 NYCRR 624.4[c][6][ii][*a*]). The ALJ directed that the SEQRA documentation be provided in this case, however, to avoid proceeding through a hearing notwithstanding a possible procedural defect in the SEQRA process that "could render the Commissioner's final determination about the pending permit application, or other approvals that may be necessary for Project Home Run, a nullity" (id. at 45).

identify additional information it needed in order to determine whether the pending wetlands permit application should be modified (id. at 48, 55). Department staff requested that Harrison provide additional information concerning Harrison's position on the applicability of its local law and if wetlands, adjacent area and flood analysis would be impacted at the project site (id. at 40).

II. August 2009 SEQRA Ruling

As directed by the ALJ in his May 2009 Rulings, Harrison and Department staff provided several documents to the ALJ and the parties relating to Harrison's SEQRA review of the project. The submissions indicated that Department staff did not receive Harrison's April 2002 notice of intent to serve as SEQRA lead agency until more than four years after Harrison issued the notice (see August 2009 SEQRA Ruling, at 5). The ALJ therefore determined that Harrison did not conduct a coordinated review, and remanded the matter to Department staff to make its own independent determination of significance under SEQRA (id. at 7). None of the parties appealed from the August 2009 SEQRA Ruling.[7]

III. July 2011 Supplemental Rulings

After the May 2009 Rulings, (i) FEMA issued a LOMR dated June 24, 2009 in response to Harrison's request, modifying the flood insurance rate map in the area of the project (see July 2011 Supplemental Rulings, at 2); (ii) Harrison revised and reduced the scope of the project, and provided drawings relating to wetlands disturbance and mitigation, as well as drawings reflecting that, based on the revised floodway limit, all the features related to the proposed project would be located landward (outside) of the floodway (id.); (iii) Harrison prepared Part 1 of an Environmental Assessment Form (EAF) dated May 27, 2010 (id. at 4); (iv) Harrison prepared a SEQRA Negative Declaration Update dated January 21, 2011 addressing noise and visual impacts; (v) Department staff completed Parts 2 and 3 of the EAF in March 2011 (see July 2011 Supplemental Rulings, at 4); (vi) Department staff conducted its own SEQRA review of the project, and issued a negative declaration dated March 8, 2011 (id.); and (vii) Department staff issued a revised draft permit dated March 8, 2011 (id. at 3). All participants except Harrison thereafter submitted another round of written comments and responses relating to SEQRA, the draft permit and other issues.

In the July 2011 Supplemental Rulings, the ALJ held that the SEQRA procedural defect identified in the August 2009 SEQRA Ruling had been cured by the Department staff's independent environmental review of the project. Rye, Mr. Schaper and Mr. LaDore claimed, however, that Department staff's SEQRA review was insufficient (id. at 4). The ALJ stated that the scope of his review of Department staff's SEQRA determination was limited to determining whether it is irrational or otherwise affected by error of law, and the scope of his authority was limited to remanding to Department staff for another SEQRA determination (id. at 7 [citing 6 NYCRR 624.4(c)(6)(i)(*a*)]). He held that Department staff's negative declaration was not irrational or affected by an error of law, and that SEQRA review of the project was complete (id. at 9).

[7] In response to Rye's characterization of the project as consisting of both the brownfield remediation project and Project Home Run, the ALJ reiterated that the scope of the adjudicatory hearing is limited to the pending application for a consolidated permit relating to Project Home Run, and does not involve issues relating to the brownfield remediation project at the site (id. at 6).

According to Department staff, the revised project, subject to the conditions in the March 8, 2011 revised draft permit, complies with the freshwater wetlands permit criteria (id. at 11). Because Harrison accepted the terms and conditions of the March 8, 2011 revised draft permit, no issues as between Department staff and Harrison required adjudication (id. at 9). The intervening parties objected to the terms and conditions of the draft permit, however, and proposed additional issues for adjudication (id. at 9-12).

In light of the FEMA LOMR, pursuant to which neither the modified project nor any fill associated therewith would be located within the floodway limit, and Harrison's commitment to comply with its local law regarding compensatory flood storage (compliance with which was also a condition of the Department's revised draft permit), the ALJ revised one aspect of his May 2009 Rulings. The ALJ held that "the scope of the issue concerning the public health and welfare weighing standard … will not include any consideration of potential adverse impacts to the compensatory storage capacity" (id. at 12; compare May 2009 Rulings, at 51). The ALJ otherwise adhered to the May 2009 Rulings with respect to issues for adjudication (July 2011 Supplemental Rulings, at 12).

IV. Issues Raised on this Appeal

Rye argues the following three issues on appeal: (i) the ALJ erred by finding that the Department's SEQRA negative declaration was rational and not otherwise affected by an error of law (see Rye's Notice of Appeal of May 2009 Issues Ruling and July 2011 Supplemental Rulings [Rye Br.], at 2-7); (ii) Harrison's 2004 negative declaration is stale and does not consider the cumulative impacts and changed circumstances (id. at 7-9); and (iii) the ALJ erroneously concluded that Harrison complied with its local law regarding flood damage prevention (id. at 9-10).

Although Mr. Schaper does not identify a specific ruling that he is challenging, his September 2011 filing appears to focus on the character of the soil and the quantity of fill at the site (see e.g. Schaper Sept. 15, 2011 Filing, at first, third and fifth un-numbered pages).

As discussed below, I hold that (i) the ALJ did not err in holding that the Department's SEQRA negative declaration was rational and not otherwise affected by an error of law; (ii) Harrison's 2004 SEQRA determination is beyond the scope of this proceeding; and (iii) the ALJ did not conclude that Harrison complied with its local law.

DISCUSSION

To receive a freshwater wetlands permit from the Department, Harrison must demonstrate that its project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and their benefits, and prevent their despoliation and destruction, "consistent with the general welfare and beneficial economic, social and agricultural development of the state" (ECL 24-0103). In this permit proceeding, Harrison bears the ultimate burden of proof to demonstrate that its project satisfies the freshwater wetlands permit issuance criteria outlined at 6 NYCRR 663.5(e) (see 6 NYCRR 624.9[b][1] [applicant has burden of proof to demonstrate proposal will be in compliance with all applicable laws and regulations administered by the Department]).

Neither Department staff nor Harrison has identified any issues for adjudication. Department staff has determined that the revised project, subject to the conditions in the March 8, 2011 revised draft permit, complies with the freshwater wetlands permit criteria, and Harrison has accepted the terms and conditions of the March 8, 2011 revised draft permit. No party or intervenor challenges the ALJ's identification of certain issues for adjudication. Rye and Schaper essentially challenge the SEQRA process and the ALJ's denial of requests to adjudicate issues relating to the public health and welfare weighing standard (see 6 NYCRR 663.5[e][2]) as it applies to flood storage capacity and Harrison's local law.

I. Rye's SEQRA Challenges

Rye raises two SEQRA issues on appeal, claiming that: (i) Department staff's negative declaration was irrational or affected by an error of law; and (ii) Harrison's 2004 negative declaration is "stale." Neither of Rye's arguments has merit, as discussed immediately below.

A. Department Staff's Negative Declaration Was Not Irrational

As lead agency, Harrison conducted its own environmental review, prepared a negative declaration dated June 23, 2004 which attached a four-page narrative explaining the reasons supporting its determination, prepared Part 1 of an EAF dated May 27, 2010, and prepared a negative declaration update dated January 21, 2011 addressing noise and visual impacts anticipated from the "significantly reduced" project. The ALJ properly held that, because Harrison was lead agency and determined that the proposed action did not require the preparation of a draft environmental impact statement, he cannot entertain any issues related to SEQRA, including Rye Proposed Issues I, III and IV (see May 2009 Rulings, at 43; see also 6 NYCRR 624.4[c][6][ii][*a*]).

Where, as here, however, the lead agency did not conduct a coordinated review of an unlisted action under SEQRA, each involved agency must conduct its own independent environmental review of the proposed project (see 6 NYCRR 617.6[b][4]). Because the Department is an involved agency and had not conducted its own environmental review, the ALJ properly remanded the matter to Department staff to conduct such review. Staff thereafter conducted an environmental review of the project, completed Parts 2 and 3 of an EAF in March 2011, and issued a negative declaration dated March 8, 2011, which included several pages of narrative explaining the reasons supporting its determination.

As part of its independent review of environmental significance under SEQRA, Department staff considered and addressed the potential impacts of the project on land, surface water, groundwater, air, traffic, and noise, as well as visual impacts and impacts on cultural and other resources. In addition, Department staff "requested additional information and studies several times ... [and] [a]dditional statements regarding the compatibility and weighing standards and flood analyses" (Staff Reply dated Oct. 14, 2011, Ex. A [July 1, 2011 Letter from Department staff], at 2). In addition, Department staff also "reviewed the intervenors' submissions," which included "comments and/or alternative analysis" (id.).

Therefore, upon review of the record and giving due consideration to the objections to Department staff's negative declaration, I conclude that Department staff took the requisite "hard look," and presented a reasoned elaboration in support of its negative declaration (see Matter of

Chemical Specialties Manufacturers Assoc. v Jorling, 85 NY2d 382, 396-97 [1995]). Accordingly, I affirm the ALJ's determination that Department staff's negative declaration was not irrational or affected by any error of law (see 6 NYCRR 624.4[c][6][i][*a*]).

Matter of New City Office Park v Planning Board, Town of Clarkstown (144 AD2d 348 [2d Dept 1988]), which Rye cites repeatedly in its brief on appeal, is not controlling. In that case, the Second Department held that it was not irrational for a planning board to deny final site plan approval for the construction of an office building in a floodplain due to the petitioner's inability to provide a proportionate increase in the amount of compensatory storage. The rationality of the Clarkstown board decision relating to a different project involving different facts, and occurring almost a quarter of a century ago, in no way bears on the rationality of the Department's decision here to issue a negative declaration with respect to Project Home Run. The issue here is whether Department staff's SEQRA review with respect to Project Home Run was rational, and I hold that it was.[8]

B. Harrison's Negative Declaration is Beyond the Scope of this Proceeding

Rye asserts that Harrison's 2004 Negative Declaration is "stale" and fails to consider "cumulative impacts" and "changed circumstances" (Rye Br., at 7). Rye makes a sweeping claim that the project, some regulations (which Rye fails to identify), the surrounding neighborhood and the environmental impacts, have all changed since 2004 (id. at 7-9), and that Harrison's SEQRA review of the remediation project was "incomplete" (see Petition for Full Party Status For City of Rye [July 16, 2007], at sixth and seventh un-numbered pages; see also Amended/Supplemented Petition For Full Party Status by the City of Rye [Oct. 16, 2008], at 8-10).

Without citing any authority, Rye simply requests that Harrison be required to conduct additional reviews of the potential impacts of the project related to flood storage capacity "using the original site prior to remediation as the basis for comparison of impacts" (Rye Br. at 9). As the ALJ properly held, however, Harrison's SEQRA review is beyond the scope of this proceeding (see May 2009 Rulings, at 43 [citing 6 NYCRR 624.4(c)(6)(ii)(*a*)]), and Rye's argument on this issue is rejected.

II. The July 2011 Supplemental Rulings Did Not Hold that Harrison Complied With Its Local Law

Rye claims that the ALJ's July 2011 Supplemental Rulings conflict with his May 2009 Rulings, and that "[i]t appears … the ALJ has irrationally concluded that Harrison has complied and is consistent with Harrison Town Code Chapter 146" (Rye Br. at 9). Rye requests that I either strike the portion of the ALJ's July 2011 Supplemental Rulings limiting the issues relating the public health and welfare weighing standard, or remand the issue to the ALJ "for further clarification" (Rye Br. at 9-10). As discussed below, I reject Rye's argument on this issue.

Chapter 146 of Harrison's Code, entitled "Flood Damage Prevention," is intended to, among other things, "minimize public and private losses due to flood conditions in specific areas

[8] As discussed below, the adjudicatory hearing will still include consideration of flood control and storage issues as part of the Class II wetland weighing standard relating to pressing economic or social need and loss of or detriment to the functions and benefits of the wetland.

by," among other things, "control[ing] the alteration of natural floodplains, stream channels, and natural protective barriers that are involved in the accommodation of flood waters" and "control[ing] filling, grading, dredging and other development which may increase erosion or flood damages" (Local Law No. 3 [2007] of Town/Village of Harrison § 146-1.2 [C], [D]). With respect to encroachments, the local law states in relevant part as follows:

> "Whenever any portion of a floodplain is authorized for development, the volume of space occupied by the authorized fill or structure below the base flood elevation shall be compensated for and balanced by a hydraulically equivalent volume of excavation taken from below the base flood elevation at or adjacent to the development site"

(id. § 146-5.1-2[3]).

At the time of the ALJ's May 2009 Rulings, the project design would have included filling part of the floodway.[9] ALJ O'Connell stated that further inquiry was necessary to determine whether the project would adversely impact the compensatory storage capacity of that portion of the floodway to be filled in as part of the project (see May 2009 Rulings, at 51). He also stated as follows: "I conclude that Harrison would comply with the public health and welfare standard for a freshwater wetlands permit if Harrison can demonstrate compliance with Local Law Chapter 146 and any other applicable FEMA requirements" (id.). This is clearly a reference to the concern under the public health and welfare weighing standard relating to "consistency [of the proposed project] with related Federal, State and local laws, regulations and policies" (6 NYCRR 663.5[f][1][ii]).

As discussed above, after the May 2009 Rulings, FEMA issued a LOMR, and Harrison modified the project so that it no longer included placing fill in the floodway. In addition, the Department issued a draft revised permit containing a condition requiring that Harrison comply with other applicable law, including local law (see Ex. 6, at page 3 of 5, General Condition No. 3). As the Department correctly noted, the Department has no authority to enforce a local law, but may include a permit condition relating to compliance with such law. Given (i) that the project no longer implicated the floodway, (ii) that the Department included as a permit condition that Harrison must comply with all applicable law, and (iii) Harrison's assurance that it would comply with the local law Chapter 146 regarding compensatory flood storage (see May 2009 Rulings, at 25), the ALJ held in the July 2011 Supplemental Rulings that "the scope of the issue concerning the public health and welfare weighing standard, therefore, will not include any consideration of potential adverse impacts to the compensatory storage capacity" (July 2011 Supplemental Rulings at 11-12).

The ALJ has made no determination regarding Harrison's compliance with its local law. He has simply determined that no issue with respect to compensatory storage capacity is adjudicable in this permit proceeding in relation to the public health and welfare weighing standard. Rye's argument on this issue is rejected.

[9] In a March 9, 2009 letter, Harrison acknowledged that the local law requires compensatory storage for the placement of fill within the 100-year floodplain, and that the project would be subject to the local law.

III. The Hearing Shall Include Weighing Any Loss of Flood Control Benefits of the Wetland Against the Pressing Economic or Social Need For the Project

The proposed project involves filling and grading in the wetland and adjacent area. Under the regulations, placing fill in, and grading, a regulated wetland are both "incompatible" activities, and performing those activities in a wetlands adjacent area are "usually incompatible" activities (see 6 NYCRR 663.4(d) [activities chart "levels of compatibility," and items 20 and 25]). Thus, the ALJ held correctly that the project did not satisfy the compatibility standard for permit issuance (see 6 NYCRR 663.5[e][1]), and that Harrison would have to satisfy the weighing standards in order to obtain a permit for the project (see 6 NYCRR 663.5[e][2]).

Pursuant to the regulatory weighing standards applicable to this Class II wetland, the project must:

(i) be compatible with the public health and welfare;
(ii) be the only practicable alternative that could accomplish the applicant's objectives;
(iii) have no practicable alternative on a site that is not a freshwater wetland or adjacent area;
(iv) minimize degradation to, or loss of, any part of the wetland or its adjacent area; and
(v) minimize any adverse impacts on the functions and benefits that the wetland provides.

(see 6 NYCRR 663.5[e][2]). The regulations expressly recognize the import of wetland benefits, and that permit applicants bear a heavy burden to demonstrate entitlement to a permit for an activity that would result in loss of or detriment to such benefits:

> "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."

(id.).

The regulations further clarify the terms used in the provision quoted above, and reflect the intent of these provisions to protect wetlands (see 6 NYCRR 663.5[f][5]). For example, a "pressing" economic or social need "must be urgent and intense, though it does not have to be necessary or unavoidable" (id. at 663.5[f][5][ii]). In addition, for such need to "clearly outweigh" the loss of or detriment to a Class II wetland benefit, it must outweigh the loss "in a way that is beyond serious debate, although there does not have to be a large or significant margin between the need and the loss" (id. at 663.5[f][5][iii]).

The ECL and the Department's regulations reflect that one of the benefits of a freshwater wetland is flood control, including storage capacity (see ECL 24-0105[7][a]; 6 NYCRR 664.3[b][1]). Harrison will bear the burden at the hearing to demonstrate that the project (i) shall

"minimize any adverse impacts on" the flood control and the other benefits of the wetland, and (ii) "satisfies a pressing economic or social need that clearly outweighs the loss of or detriment to" the flood control and the other benefits of the wetland (6 NYCRR 663.5[e][2], [f][3], [5]).[10] Thus, the ALJ will consider the issues of flood control and storage capacity in the context of this weighing standard.

To the extent that petitioners have raised other issues on their appeals, these have been considered and are lacking in merit.

CONCLUSION

I hereby affirm the ALJ's May 2009 Rulings and July 2011 Supplemental Rulings, and remand this matter to ALJ O'Connell for further proceedings consistent with this Interim Decision.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 12, 2013
Albany, New York

[10] This aspect of the adjudicatory hearing will also address the soil- and flood-related concerns raised by Mr. Schaper in his appeal, and by Mr. LaDore in his amicus filing.

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