

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

In the Matter

- of -

the Application for Permits
Pursuant to Articles 24 and 34 of the Environmental
Conservation Law and Parts 505 and 663 of
Title 6 of the Official Compilation of
Codes, Rules and Regulations of
the State of New York

- by -

ROCHESTER REDEVELOPMENT, LLC,

Applicant.

Permit Application No. 8-2634-00365/00001

DECISION OF THE COMMISSIONER

November 29, 2018

DECISION OF THE COMMISSIONER

Rochester Redevelopment, LLC (applicant), applied to the New York State Department of Environmental Conservation (DEC or Department) for a freshwater wetlands permit pursuant to article 24 of the Environmental Conservation Law (ECL) and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

Applicant owns a parcel of land located on the shore of Irondequoit Bay at 1570 Bay Shore Boulevard, Town of Irondequoit, Monroe County, which is slightly less than one half acre in size (property). Applicant proposed to construct a single-family residence, improve the access road to the property, and install a dock, utilities, and retaining walls (project). Development of the property would entail clearing, filling and grading. The entire residential structure and much of the associated work would be located within the adjacent area of State-regulated freshwater wetland RE-1, a "Class I" wetland.

During the course of the Department's review of the application, Department staff directed applicant to submit materials necessary to evaluate whether applicant's proposed improvements to the access road would require a coastal erosion management permit pursuant to ECL article 34 and 6 NYCRR part 505.

Department staff denied the application for both permits, and applicant requested a hearing. Following a referral to the Department's Office of Hearings and Mediation Services, the matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman, and an adjudicatory hearing was held. By hearing report dated May 27, 2016, ALJ Sherman recommended that the freshwater wetlands application for the project be denied.

Upon my consideration of the ALJ's May 27, 2016 hearing report and the record that was then before me, I concluded that it was necessary to remand the matter to the ALJ for further development of the hearing record with regard to the following matters:

1. whether the parties wish to supplement their arguments in relation to coastal erosion management permit issues;
2. whether the proposed dock is the only structure to be built in the wetland;
3. whether applicant wants to propose any alternative configurations to the project to reduce impacts on wildlife habitat and minimize construction on steeper slopes;
4. whether applicant wants to supplement the record regarding its engineering plans; and
5. whether applicant wants to supplement the record with regard to the viability of a wetland mitigation plan, which may include on and off-site mitigation in the Irondequoit Bay area (see Interim Decision of the Commissioner, November 2, 2016, at 2-3).

Following efforts to settle the matter that were ultimately unsuccessful, the remand hearing was held on May 2 and 3, 2018 at which applicant proposed an alternative configuration of the project (alternative project) (see Hearing Exhibit 34). The ALJ prepared the attached supplemental hearing report in which he concludes that applicant's alternative project fails to meet the standards for issuance of a freshwater wetlands permit and recommends that the freshwater wetlands permit application be denied. I adopt the ALJ's supplemental hearing report as my decision in this matter, subject to my comments below.

DISCUSSION

An applicant has the burden of establishing that its application meets the statutory and regulatory requirements administered by the Department (see 6 NYCRR 624.9[b][1] [applicant has burden of proof to demonstrate that its proposal will comply with all applicable laws and regulations administered by the Department] and 6 NYCRR 663.5[a] [burden of showing that a proposed activity complies with the policies and provisions of the Freshwater Wetlands Act and its regulations “rests entirely on the applicant”]).

As noted, the proposed residential structure and much of the associated work would be located within the adjacent area of State-regulated freshwater wetland RE-1. These proposed activities in an adjacent area are identified in the Department's freshwater wetlands regulations as “P(N),” that is, they are “usually incompatible with a wetland and its functions or benefits” (see 6 NYCRR 663.4[d], item 42 [constructing a residence or related structures or facilities]; see also id. items 20 [filling], 23 [clear-cutting vegetation other than trees], and 25 [grading among other activity]).

Pursuant to the Department's regulations, activities identified as “P(N)” are evaluated to determine whether they meet three tests of compatibility (see 6 NYCRR 663.5[e][1]), that is, whether the activity would:

- be compatible with preservation, protection and conservation of the wetland and its benefits;
- result in no more than insubstantial degradation to, or loss of, any part of the wetland; and
- be compatible with public health and welfare.

Applications for projects that fail to meet any one or more of the three compatibility tests, are not automatically denied; they are then subject to the consideration of regulatory “weighing standards” (6 NYCRR 663.5[e][2]). The weighing standards vary according to the class of freshwater wetlands (see id.). For Class I wetlands those standards require that the proposed activity must:

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

The regulations further state that Class I wetlands "provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances," and that a permit shall be issued "only if it is determined that the proposed activity satisfies a compelling¹ economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (*id.*).

In the course of evaluating the alternative project, the ALJ addressed the issues that I directed be considered on remand (*see* Supplemental Hearing Report at 6-18). A review of these issues follows.

Coastal Erosion. The ALJ, in his 2016 Hearing Report, concluded that applicant's project did not require a coastal erosion management permit. As part of the remand, I afforded the parties an opportunity "to raise further arguments in support, or in opposition to the ALJ's conclusion" (Interim Decision at 2). Department staff did not offer further argument or otherwise supplement the record on the coastal erosion management permit issue (*see* Hearing Transcript at 355-356). Accordingly, I shall not disturb the ALJ's conclusion on this permit issue.

Dock. I stated in the Interim Decision that "[a]pplicant should reconfirm whether the only structure within the wetland will be a dock" (Interim Decision at 2). At the remand hearing applicant confirmed that the proposed dock was the only structure that was to be located in the wetland (*see* Hearing Transcript at 356).

Alternative Configuration. In the Interim Decision, I noted the issue of impacts of the project to "wetland wildlife, including mammals, birds and fish and their respective habitats" (Interim Decision at 3). I further stated that "[a]pplicant and Department staff need to address whether any modifications to the project and any offered mitigation would lessen these habitat impacts and otherwise affect the applicable regulatory compatibility tests and weighing standards" (Interim Decision at 3).

Applicant presented an alternative configuration of the project for consideration at the remand hearing (*see* Hearing Exhibit 34 [alternative project site plan dated April 2017 and related drawings dated either March or April 2017]). Pursuant to the alternative project, the location of applicant's residence was shifted to the south "to an area with less grade" (*see* Hearing Transcript at 370; *see also id.* at 414). Other modifications include a reduction in the footprint of the residence (*see id.* at 388-89) and an alteration of the path of the proposed sewer line (*see id.* at 371, 374).

The remand hearing addressed whether the alternative project reduced adverse impacts to wetland benefits derived from the property. Pursuant to ECL 24-0103, it is the "public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom." Further, "wildlife habitat" is expressly enumerated as one of the benefits derived

¹ The word "compelling" when applied to an activity undertaken in a Class I wetland "implies that the proposed activity carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable" (6 NYCRR 663.5[f][4][ii]).

from freshwater wetlands "by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare species such as the bald eagle and osprey" (ECL 24-0105[7][b]). The record demonstrates that the property provides wildlife habitat benefit for various species.

Department staff witness W. Scott Jones addressed the potential adverse impacts of the original project (at the first hearing) and the alternative project (at the remand hearing) on the wildlife habitat benefit of the property (see Supplemental Hearing Report at 8). He noted that the alternative project has relocated the residence more to the south, reduced the square footage of the residence, and made modifications to the stairs and deck around the residence (see Hearing Transcript at 607). He testified that, based on his review, the alternative project would be no more compatible with the preservation, protection and conservation of the wetland and its benefits than was the original proposal (see id. at 609).

Mr. Jones noted the project's adverse impact with respect to wetland wildlife that is dependent on intact, naturally vegetated diverse shoreline habitat (see e.g. Hearing Transcript at 609-10). He further noted how clearing, disturbing and grading in the wetland adjacent area where the proposed residence would be located would negatively impact the wetland, including but not limited to removal of a beneficial buffering impact, alteration of the habitat function of the wetland due to adjacent area development ("by virtue of the change in vegetation or loss of existing vegetative plant communities") (id. at 613), and erosion potential.

The ALJ concluded that applicant failed to satisfy its burden to demonstrate that the alternative project is compatible with the preservation, protection, and conservation of the wetland habitat benefit derived from the property (see Supplemental Hearing Report at 11). The ALJ further concluded that applicant failed to demonstrate that the alternative project would result in no more than insubstantial degradation to the wetland (see id.). Upon my review of the record of this proceeding, I concur with the ALJ's determinations.

As the alternative project failed to meet the compatibility standards, the weighing standards (see 6 NYCRR 663.5[e][2]) were then considered. As noted, freshwater wetland RE-1 is designated as a Class I wetland, the most protected class of the State's freshwater wetlands. Pursuant to the weighing standards where Class I wetlands are involved, the vast majority of proposed projects that cannot avoid reducing a benefit provided by a Class I wetland will not be approved (see 6 NYCRR 663.5[f][4][i]). To be approved, the proposed activity must satisfy a compelling social or economic need (see 6 NYCRR 663.5[f][4][ii]). Additionally, the need for the project must "clearly and substantially" outweigh the loss or detriment to the wetland benefit, and the margin for outweighing "must be large or significant" (6 NYCRR 663.5[f][4][iii]). Based on this record, applicant's proposal to build a residence on the property does not meet the weighing standards.

Engineering Plans. In my Interim Decision, I directed that applicant should consider further developing its engineering plans to address the deficiencies that the ALJ identified (which related to erosion and stormwater control, in part due to the property's steep slopes) or demonstrate how its engineering plans were satisfactory (Interim Decision at 3).

At the remand hearing, applicant submitted site plans, with associated engineering notes and details, for the alternative project (see Hearing Exhibit 34), a geotechnical report for the property (see Hearing Exhibit 36), and expert testimony related to the erosion control plan for the alternative project. In addition, the alternative siting of the proposed residence was intended to lessen the impact on the property's slope area.

The ALJ notes that the documents and testimony that applicant submitted sought to address the erosion and stormwater control issues that Department staff had previously raised (see Supplemental Hearing Report at 12). Where, as here, erosion and sedimentation issues are present, the Department must assess whether a proposed erosion control plan is protective of the wetland and its benefits and functions.

Department staff however continues to oppose construction of a residence on the property due to its steep slopes. Staff, noting that these slopes are within the regulated adjacent area above freshwater wetland RE-1, maintains that the slopes are prone to erosion.

During the hearing, Department witness Benjamin Groth, P.E., a civil engineer with the Department, whose work has included the review and evaluation of numerous erosion and sediment control plans, testified that the alternative project did not minimize construction on the steep slopes of the property. He indicated that the difference between the project as originally proposed and the alternative project was not significant, noting that they were both on "very steep slopes" (Hearing Transcript at 551). Mr. Groth further detailed the deficiencies of applicant's erosion and sediment control plan (see Hearing Transcript at 553-571; see also Supplemental Hearing Report at 13). Department witness Jones also noted the adverse impact of the alternative proposal with respect to erosion (see e.g. Hearing Transcript at 611).

The ALJ concluded that applicant's engineering plans for erosion and sediment control were inadequate and insufficient for permit issuance, and based on my review of the record, I concur.

Wetland Mitigation Plan. In the Interim Decision, I stated that "[a]pplicant should also review with Department staff the viability of a wetland mitigation plan, which may include on- and off-site mitigation in the Irondequoit Bay area, as part of consideration of its freshwater wetlands permit application" (Interim Decision at 3).

Department's guidance for mitigating impacts on freshwater wetlands (see Hearing Exhibit 37 [DEC Freshwater Wetlands Regulations, Guidelines on Compensatory Mitigation (mitigation guidelines), Oct. 26, 1993]) states that to "receive a freshwater wetland permit, an applicant must:

- first demonstrate that impacts to the wetland cannot be avoided entirely
AND
- then demonstrate that unavoidable losses or impacts on the functions or benefits of the wetland have been minimized
AND

- finally, fully compensate for (replace) any remaining loss of wetland acreage and function **unless** it can be shown that the losses are inconsequential or that, on balance, economic or social need for the project outweighs the losses" (mitigation guidelines at 2 [capitalization and emphasis in original]).

Mitigation in regulated freshwater wetlands adjacent areas "is considered in the context of replacement of the wetland functions and benefits being lost or impaired" (Hearing Exhibit 37 at 3 [emphasis in original]). Department staff's primary concern with regard to applicant's proposed alternative project related to the adverse impacts of the project on the wetland wildlife habitat benefit of the property.

Although applicant testified that it communicated with Department staff about the possibility of off-site mitigation options (see Hearing Transcript at 523), no formal proposal was presented at the remand hearing. Based on the record before me, applicant did not demonstrate that mitigation was available, either on-site or off-site, that would offset the alternative project's adverse impact to wetland wildlife habitat or other wetland benefits of the property, and applicant has not offered any formal compensatory mitigation plan (see Supplemental Hearing Report at 17).²

In the Interim Decision, I referenced applicant's proposal to install a forced main sewer line as part of the project as originally proposed (Interim Decision at 3 n 1). I further noted that the sewer line could have a potential environmental benefit if neighboring property owners connected to the line (see id.). I stated that "[o]n remand, applicant should indicate what, if any, impact these connections would have on the wetland and its adjacent area" (id.).

Under the alternative project, applicant proposes to reroute the forced main sewer line and run it to the west of the proposed residence and along a portion of Bay Bluff Lane (see Hearing Exhibit 34, sheet 1; see also Hearing Transcript at 373-374). The record, however, lacks information concerning whether any property owner along the proposed route has agreed to connect to the line.

As the ALJ notes, applicant in its closing brief only states that the proposed forced main sewer line "makes sewer available further south along Bayshore Boulevard and would enable six houses to connect" (see Supplemental Hearing Report at 17 [quoting Applicant Brief on Remand at 7]). Applicant's statement is insufficient as a demonstration that construction of the forced main sewer line would have an environmental benefit on the wetland and adjacent area.

² Applicant's erosion and sediment control plan does not replace wildlife habitat that would be lost or degraded by the alternative project and, accordingly, does not constitute compensatory mitigation.

CONCLUSION

Applicant's property is located almost entirely within the boundaries of the wetland and the adjacent area of State-regulated freshwater wetland RE-1, a Class I wetland. I concur with the ALJ that the original and the alternative project fail to meet the applicable compatibility tests and weighing standards established by 6 NYCRR part 663. Accordingly, applicant Rochester Redevelopment, LLC has not met its burden to demonstrate that its application meets the legal requirements for issuance of a freshwater wetlands permit, and its application for a freshwater wetland permit is hereby denied.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
November 29, 2018

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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ROCHESTER REDEVELOPMENT, LLC,

Applicant.

DEC Permit Application ID No. 8-2634-00365/00001

SUPPLEMENTAL HEARING REPORT

- by -

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

September 28, 2018

SUPPLEMENTAL HEARING REPORT

PROCEEDINGS

This supplemental hearing report addresses issues identified by the Commissioner in an Interim Decision (Interim Decision), dated November 2, 2016.

Applicant, Rochester Redevelopment, LLC, applied to the Department of Environmental Conservation (DEC or Department) for a freshwater wetlands permit pursuant to article 24 of the Environmental Conservation Law (ECL) and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Applicant is the owner of a parcel (property) located on the shore of Irondequoit Bay at 1570 Bay Shore Boulevard, Town of Irondequoit, Monroe County (tax map number 77.20-1-39). Applicant proposes to construct a single-family residence, improve the access road to the property, and install a dock, utilities, and retaining walls. The entire residential structure and much of the associated work would be located within the adjacent area of State-regulated freshwater wetland RE-1.

During the course of the Department's review of the application, Department staff directed applicant to submit materials necessary to evaluate whether applicant's proposed improvements to the access road would require a coastal erosion management permit pursuant to ECL article 34 and 6 NYCRR part 505.

By hearing report dated May 27, 2016, I recommended that the freshwater wetlands application be denied (see Interim Decision, Hearing Report [2016 Hearing Report] at 18). I also concluded in the 2016 Hearing Report that applicant's proposed project as then configured (former project) did not require a coastal erosion management permit (id.). The Interim Decision remanded this matter to further develop the hearing record with regard to several issues.

Briefly stated, the issues on remand are:

1. whether the parties wish to supplement their arguments in relation to coastal erosion permit issues;
2. whether the proposed dock is the only structure to be built in the wetland;
3. whether applicant wants to propose alternative configurations to the project to reduce impacts on wildlife habitat and minimize construction on steeper slopes;
4. whether applicant wants to supplement the record regarding its engineering plans; and
5. whether applicant wants to supplement the record with regard to the viability of a wetland mitigation plan (see Interim Decision at 2-3).

By letter dated December 14, 2017, applicant advised this office that its attempts to reach settlement with Department staff had been unsuccessful and requested that the remand hearing go forward. After consultations with the parties, I scheduled the remand hearing for May 2 and 3, 2018.

The remand hearing was held as scheduled on May 2 and 3, 2018. Amy Kendall, Esq., Knauf Shaw LLP, appeared on behalf of applicant and called the following witnesses: Gregory

W. McMahon, PE, Principal, McMahon LaRue Associates, P.C.; James M. Baker, PE, President, Foundation Design, P.C.; Frances Reese, MS; and Thomas Gangemi, sole member, Rochester Redevelopment, LLC. Dusty Renee Tinsley, Esq., appeared on behalf of Department staff and called the following witnesses: Benjamin Groth, PE, Civil Engineer, DEC Region 8; and W. Scott Jones, Regional Habitat Conservation Manager, DEC Region 8. A list of each of the exhibits proffered at the initial hearing in this matter (first hearing) or at the remand hearing is appended to this supplemental hearing report.

Both parties timely filed closing briefs with this office by email on June 19, 2018. I received a hard copy of Department staff's closing brief (staff brief on remand) on June 21, 2018, and of applicant's closing brief (applicant brief on remand) on June 25, 2018. I had previously advised the parties that no responses to closing briefs would be authorized unless I granted a request by a party to file a response (see letter to the parties dated May 29, 2018). Neither party filed a request to respond. Accordingly, I officially closed the remand hearing record on July 5, 2018, ten days after my receipt of the last filing by a party.

As discussed below, I conclude that applicant's proposed alternative configuration of the project (alternative project) does not meet the standards for issuance of a freshwater wetlands permit under 6 NYCRR 663.5 and, therefore, I recommend that the freshwater wetlands permit be denied.

FINDINGS OF FACT¹

1. Applicant is a limited liability company and Thomas Gangemi is its sole member (transcript [tr] at 17; exhibit 1 [attached NYS Department of State, Division of Corporations, entity information for applicant]).
2. Applicant purchased the property by quitclaim deed in October 2011 (exhibit 4 at 2; tr at 35).
3. The deed into applicant states that applicant acquired the property for one dollar (exhibit 4, at 2). Thomas Gangemi testified that, at the time applicant acquired the property, the seller owed approximately \$28,000 in back taxes on the property and that the seller deeded the property to applicant "for the back taxes" (tr at 34-35).
4. The property is currently vacant and undeveloped except for a former "ice house" and the remnants of a foundation from a cottage that once stood at the property (see tr at 31 [Gangemi testimony that there are structures on the property, consisting of "[a]n ice house and a foundation from a former cottage"], 98 [Gangemi testimony indicating that only a few feet of the cottage foundation remains visible]; exhibits 1 [application and attached site photographs], 2 [site plan depicting "existing ice house"], 19 [photographs 1, 10-17], 27, 28).

¹ Findings of fact numbers 1 through 15 are set forth in the 2016 Hearing Report (see 2016 Hearing Report at 3-4). They are repeated here for ease of reference and, except as modified by findings of fact number 16 through 18 below, remain in full force and effect.

5. The remnants from the foundation of the former cottage are unusable for construction of the proposed residence (tr at 164 [McMahon testimony that the foundation "is very old [and] [s]tructurally, it just would not be suitable for new construction").
6. On November 2, 2012, Thomas Gangemi filed a joint application, on behalf of applicant, for a DEC freshwater wetlands permit to construct a single-family residence and associated structures at the site (see exhibit 1).
7. The proposed residence would have a footprint of approximately 900 square feet and development of the property would entail clearing, filling and grading (see exhibit 2 [site plan]; tr at 77-79 [Gangemi testimony describing the site plan], 162-164 [McMahon testimony that the footprint is "approximately 900 square feet" and describing site work related to construction of the proposed residence]).
8. The property is roughly rectangular in shape, is less than one half-acre in size, and slopes steeply down to the bay (see exhibit 2 [site plan]; tr at 136 [McMahon testimony that "[b]ased on our calculations, [the property is] just under a half-acre"], 164 [McMahon testimony that "[t]he approximate slope [in the area where the residence is proposed] is about 30 percent"]; 224 [Reese testimony that "in this case, the adjacent area . . . we have a very steep slope"]).
9. Nearly the entire property is located within State-regulated freshwater wetland RE-1, a Class I wetland, or its adjacent area (see exhibit 2 [site plan]; tr at 85).
10. A small triangular portion of the upland area at the southwest corner of the property is located outside the wetland and its adjacent area, but it is not suitable for construction (see exhibit 2 [site plan]; tr at 85-86 [Gangemi testimony that the construction of a residence within the boundaries of the "southern triangle" would not likely "meet the minimum square footage [of] 600 square feet on the first floor that the town requires" even with a variance from the town setback requirements], 142-143 [McMahon testimony that the area of the "triangular piece" is only "560 square feet" and that construction in that area "would cause major disturbance" because of the steep slope and lack of vehicle access]).
11. Access to the property is by a dirt and gravel road (access road) that generally runs perpendicular to the slope of the hill to the north and west of the property (exhibit 2 [access to the property is labeled "DIRT LANE"]; tr at 21-22 [Gangemi testimony describing access to the property]; see also exhibit 19 [photographs 7-13]).
12. The access road is used and maintained by the Bay Bluff Lane Homeowners Association to gain access to a shared dock that is located on land adjacent to, and south of, the property (tr at 22, 27, 86; exhibits 3 [1977 subdivision plot identifying the location where the dock is located as "LAND IN COMMON TO ALL FOUR LOTS"], 24).
13. Applicant's proposed project includes improvements to the access road and installation of a water line and a forced main sewer line along the course of the access road (exhibit 2; McMahon testimony at 155).

14. A short section of the access road runs along the boundary of a designated Coastal Erosion Hazard Area (CEHA) (exhibit 2 [the CEHA is indicated by a thick black line identified on the exhibit as the "NPFA2 line"]; tr at 120 [McMahon testimony at 120-123]).

15. In or about August 2014, applicant gave permission to an upland neighbor to prune trees on applicant's property to remove "some branches that were in [the neighbor's] view" to the bay (tr at 68). The neighbor caused the trees on the property to be "topped" to a height of approximately ten feet (tr [Gangemi testimony that the neighbor "cut most of the trees to like a height of 10 feet tall"], 318 [Jones testimony that it was "unfortunate that those trees were topped in the manner in which they were, but they will in time grow back"]; exhibit 13 [applicant's report of the incident to the Department]).

16. Findings of fact paragraph 7 is modified as follows to reflect applicant's proposal to reduce the footprint of the residence. Under the former project, the residence was to have a footprint of approximately 900 square feet (findings of fact ¶ 7). Under the alternative project, applicant proposes to construct a residence with a footprint of approximately 750 square feet (exhibit 34, sheet 1 [depicting the residence as 22' x 34']; tr at 388-389).

17. Under the alternative project, the location proposed for the residence is on a steep slope, but the slope is slightly less steep than at the location that was proposed for the residence under the former project (tr at 370-371; 393-394 [McMahon testimony that the proposed residence had been on a slope of approximately 50 percent, but is now proposed on a slope that "is slightly less than that. It's probably in the 40 to 45 percent" range]; tr at 538 [Groth testimony describing "the decrease of slope as not significant . . . [b]ecause they're both [i.e., both of the locations proposed for the residence] still very steep slopes)").

18. Findings of fact paragraph 13 is modified to reflect applicant's proposal to reroute the forced main sewer line. As formerly proposed, the forced main sewer line was to run along the course of the access road to the property (findings of fact ¶ 13). Under the alternative project, applicant proposes to run the forced main sewer line to the west of the proposed residence and along a portion of Bay Bluff Lane (exhibit 34, sheet 1 [depicting the sewer line]; tr at 373-374).

POSITIONS OF THE PARTIES

Applicant argues that, by its proposed alternative configuration of the project, it has addressed all of the issues raised by the Commissioner in the Interim Decision. Specifically, applicant argues that the proposed alternative site plan, together with associated engineering plans, addresses concerns regarding slope stability and erosion control at the site (applicant brief on remand at 1). Applicant further argues that it has attempted to work with the Department to reduce impacts to the freshwater wetland and that it has demonstrated that any impact to the wetland "will be insignificant or non-existent" (*id.* at 1-2). Applicant also maintains that its proposed alternative project will result in no reduction to the wetland itself and that any potential impacts will be mitigated through the appropriate engineering and controls (*id.*).

Department staff argues that "[t]he Alternative Proposal is no more compatible with preservation, protection, and conservation of the wetland and its benefits, including wildlife

habitat, and erosion control than the Original Proposal" (staff brief on remand at 3). Staff further argues that the proposed alternative project fails to meet the regulatory weighing standards and, therefore, must be denied (id. at 10). Lastly, staff argues that, because applicant's proposed alternative project "has not met the [permit] issuance standards," applicant's proposed mitigation should not be considered or, if considered, should be rejected as unviable (id. at 11).

DISCUSSION

In accordance with 6 NYCRR 624.9(b)(1), applicant has the burden of proof to demonstrate that the proposed alternative project will be in compliance with all applicable laws and regulations administered by the Department.

Freshwater Wetlands Permit Standards

Activities proposed by an applicant that are designated under 6 NYCRR 663.4(d) as P(N) (i.e., "usually incompatible with a wetland and its functions or benefits")² are subject to three tests for compatibility that are set forth under 6 NYCRR 663.5(e)(1). Pursuant to the three compatibility tests, an applicant must demonstrate that the proposed activity "(i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare" (6 NYCRR 663.5[e][1]). A permit may be issued for the proposed activity, regardless of the wetland class, if all three of the compatibility tests are met (id.).

Activities proposed by an applicant that are designated as P(N) and fail to meet one or more of the compatibility tests, or that are designated as P(X) (i.e., "incompatible with a wetland and its functions and benefits"), must meet the weighing standards set forth under 6 NYCRR 663.5(e)(2), or the permit must be denied. For wetland Classes I, II and III, the weighing standards require that:

"the proposed activity must be . . . the only practi[ca]ble alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area . . . [and] 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" (6 NYCRR 663.5[e][2]).

In addition, with respect to Class I wetlands, such as the wetland at issue here, the weighing standards state that such wetlands:

² As set forth in the 2016 Hearing Report, several activities proposed by applicant are designated as P(N) within the regulated freshwater wetlands adjacent area, including the construction of a residence and related structures, clearing of vegetation, grading, and filling (see 2016 Hearing Report at 9; see also 6 NYCRR 663.4[d][20], [23], [25], [42]).

"provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (6 NYCRR 663.5[e][2]).

The word "compelling" when applied to an activity undertaken in a Class I wetland "implies that the proposed activity carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable" (6 NYCRR 663.5[f][4][ii]).

Issues on Remand

As noted above, the Interim Decision set forth several issues to be addressed on remand, each of which is discussed below, seriatim.

-- Coastal Erosion

As noted above, in the 2016 Hearing Report, I concluded that applicant's former project did not require a coastal erosion management permit. The Interim Decision affords the parties another opportunity "to raise further arguments in support, or in opposition to the ALJ's conclusion" (Interim Decision at 2).

At the opening of the remand hearing I asked Department staff whether it would seek to supplement the record on the coastal erosion issue (tr at 355-356). Staff stated that it would not (id.). Because staff did not challenge the 2016 Hearing Report conclusion that applicant's former project did not require a coastal erosion management permit, this issue was not the subject of further adjudication at the remand hearing.

-- Dock

The Interim Decision states that "[a]pplicant should reconfirm whether the only structure within the wetland will be a dock" (Interim Decision at 2).

At the opening of the remand hearing I asked applicant to confirm whether the proposed dock was the only proposed structure that was to be located in the wetland (tr at 356). Applicant confirmed that it was (id.). Therefore, this issue was not the subject of further adjudication at the remand hearing.

-- Alternative Configurations

In the Interim Decision, the Commissioner states that "[a]pplicant should consider presenting alternative configurations to the proposed residence and associated improvements to reduce the impacts of the proposed project on the property's wildlife habitat and to minimize construction on the steeper slopes of the property" (Interim Decision at 2). In response to this recommendation, applicant presented an alternative configuration for the project to Department

staff for consideration (see exhibit 34 [alternative project site plan and related drawings dated Apr. 2017]). The import of the alternative project with regard to reducing impacts on the property's wildlife habitat benefit and minimizing construction on steeper slopes is discussed below.

With regard to wildlife habitat, the Freshwaters Wetlands Act (Act), states that it is "declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom" (ECL 24-0103). The Act also expressly states that "wildlife habitat" is one of the "benefits to be derived from wetlands" (ECL 24-0105[7][b]), and that the "freshwater wetlands of the state of New York are invaluable resources for flood protection, wildlife habitat, open space and water resources" (ECL 24-0105[1]).

The 2016 Hearing Report states that "Department staff's primary concern with the proposed project is its impact on the wetland wildlife habitat" (2016 Hearing Report at 11 [citing tr at 263-266; staff brief, dated Jan. 28, 2016, at 4; ECL 24-0105(7)(b)]). Among other factors, the 2016 Hearing Report notes the testimony of staff's habitat expert, Mr. Jones, wherein he states that "[a]ny development, residential development and subsequent full-time occupation within a naturally vegetative 100 foot adjacent area, particularly in a wetland upland complex such as Irondequoit Bay, . . . will have a reduction in the amount of available habitat for wildlife" (id. [citing tr at 263-264]).

As set forth in the 2016 Hearing Report, on the basis of the record then before me, I concluded that applicant failed to meet its burden to demonstrate that the former project (i) was compatible with the preservation, protection, and conservation of the wildlife habitat benefit derived from the property (2016 Hearing Report at 12 [see 6 NYCRR 663.5(e)(1)(i)]); and (ii) would result in no more than insubstantial degradation to any part of the wetland (2016 Hearing Report at 13 [see 6 NYCRR 663.5(e)(1)(ii)]).

In the Interim Decision, the Commissioner notes the issue of impacts of the former project to "wetland wildlife, including mammals, birds and fish and their respective habitats" (Interim Decision at 3). The Commissioner states that "[a]pplicant and Department staff need to address whether any modifications to the project and any offered mitigation would lessen these habitat impacts and otherwise affect the applicable regulatory compatibility tests and weighing standards" (Interim Decision at 3).

At the remand hearing, applicant called Frances A. Reese, MS, to address the wildlife habitat issue. Ms. Reese, who also testified at the first hearing in this matter, has expertise in wetland delineations, soil science, and botany (see tr at 171 [Reese testimony that she has done "a lot of wetland delineation work" and is "certifi[ed] as a professional soil scientist"], 229 [Reese testimony that her "specialty is soil scien[ce] and botany"]). Ms. Reese acknowledged, however, that she is not a wildlife expert (tr at 489).

Ms. Reese testified that, in preparation for the remand hearing, she visited the property on April 30, 2018 (tr at 462). She had also visited the site in preparation for the first hearing in this matter (see 2016 Hearing Report at 11). Ms. Reese testified at the remand hearing that the vegetation she observed at applicant's property on April 30, 2018 consisted of "[a] lot of small

shrubs, prickly ash, dogwoods, small oak, small elm, small maple, and there were one or two sizable maples, maybe an oak or two, that were about 10 inches DBH [i.e., diameter at breast height]" (tr at 492-493). Ms. Reese also testified that, although she did not observe wildlife at the time of her visit "wildlife could use the site when I'm not there" (tr at 508).

When asked to describe the benefits that are derived from wetland RE-1 in general, Ms. Reese testified that "it provides good wildlife habitat, particularly down at the southern end where there's an emergent marsh wetland and there's eagle habitat. I know that some of the treed steep slope areas are pretty important for certain birds and other wildlife . . . fish, of course, fish reproduction, fishery resource" (tr at 467-468). With regard to specifics concerning wildlife and wildlife habitat associated with the wetlands and adjacent area on applicant's property, Ms. Reese testified repeatedly that she is "not an expert" (tr at 463 [Reese testimony that she is "not an expert" with regard to identifying what animal had constructed a nest she observed on the property], 493 [Reese testimony that she is "not an expert" with regard to whether wildlife would be expected to use the property seasonally], 493-494 [Reese testimony that she is "not an expert" with regard to what types of invertebrates would be expected to use the wetland habitat on the property]).

Department staff's habitat expert, Mr. Jones, testified extensively at the first hearing with regard to potential adverse impacts of the former project on the wildlife habitat benefit of the property (see e.g. tr at 263-266, 318-319, 325-327). Among other things, Mr. Jones noted in his testimony at the first hearing that bald eagles will perch "in the taller deciduous trees around the bay while they're hunting or watching for prey in the water [and] [t]hat's almost unique to the undeveloped portions, where there are no residential dwellings" (tr at 264 [also noting that ospreys "use trees the same way"]). Mr. Jones also named other wildlife species that use undeveloped sites along the bay (tr at 264-266 [naming beaver, mink, and neotropical migrant songbirds]), and noted that some species are "wetland dependent [and others] are dependent on uplands adjacent to wetlands" (tr at 266).

At the remand hearing Mr. Jones testified that he reviewed applicant's engineering report and site plans for the alternative project (tr at 607), and that he revisited the property on April 26, 2018 (tr at 595). On the basis of his review, Mr. Jones concluded that the alternative project is no more compatible with the preservation, protection and conservation of the wetland and its benefits than the former project (tr at 609). He further testified that, in assessing the wildlife habitat benefit of the property in the context of the freshwater wetland regulations, "it was the habitat type that was the driver of its importance, not whether or not one saw one or the other [wildlife species]" (tr at 649).

At the first hearing Mr. Jones testified that applicant's property was "within the active feeding range of bald eagles and young bald eagles" from an existing eagle's nest on Irondequoit Bay (tr at 264). At the remand hearing Mr. Jones testified that "the bay is habitat for nesting and wintering and migrating eagles, and that it wasn't limited to the area immediately around the nest, it's the bay entire" (tr at 642). Mr. Jones testified that, subsequent to the first hearing, a second eagle's nest was identified on the bay (tr at 605-606), and that the second nest is "within a half or three quarters of a mile" of the property (tr at 640). He further testified that "the

construction and use and successful rearing of chicks at a second eagle's nest on the bay seems to support" his testimony that the entire bay provides eagle habitat (tr at 642).

Mr. Jones acknowledged that applicant is not required to obtain an endangered or threatened species permit because the property is outside the protective areas established around the two eagle nests (tr at 641-642). He testified, however, that "there are areas remaining on the bay . . . that are sufficiently not developed that [the second pair of nesting eagles] were able to find a place in which they were comfortable nesting without undue human disturbance, including lines of sight" (tr at 642).

With regard to whether the alternative project reduces adverse impacts to wetland benefits derived from the property, Mr. Jones testified that "[i]t does not reduce the impact . . . to those benefits" (tr at 612). He testified that development "removes the buffering effect" and that "[i]n terms of disturbance, it can wildly alter the habitat function of the wetland adjacent to it" (tr at 613). Mr. Jones also testified that "[t]he impacts to wetland wildlife and wildlife that are dependent on intact, naturally vegetated, diverse shoreline habitat, remain the same with [the alternative project, and] should this be permitted, it would result essentially in the elimination of that habitat" (tr at 609-610).

Mr. Jones testified that he also inspected the "near shore area and the shoreline" of the property (tr at 602). He testified that he inspected this area to determine whether the "condition of some of that shoreline vegetation that we thought was important for fish and wildlife habitat previously [i.e., when staff evaluated the property prior to the first hearing]" remained the same (id.). Mr. Jones testified that the shoreline "is not a static system, logs move around, willow trees fall, but in essence all of the important habitat features that we discussed previously are still present here" (id.).

At both the first hearing and the remand hearing there was testimony regarding the impacts of the topping of taller trees on applicant's property that was done by a neighboring property owner in 2014 (see findings of fact ¶ 15; see also exhibit 19 [photograph, dated Nov. 25, 2014, depicting topped trees on property]). I note in the 2016 Hearing Report that Department staff's habitat expert agreed that the tree-topping degraded the property's wildlife habitat benefit, but that he also testified that the tree-topping is "a temporary disturbance, a temporary alteration of the habitat and its value to the wildlife accustomed to using it" (see 2016 Hearing Report at 11-12 [quoting tr at 318]).

At the remand hearing, Ms. Reese testified that she revisited the property on April 30, 2018, just prior to the remand hearing (tr at 426). With regard to the trees that were topped in 2014, Ms. Reese testified that "[m]ost of them were not alive" at the time of her April 30, 2018 site visit (tr at 496). She further testified that "[t]here was one tree that showed some evidence of recent rebranching" (id.). Ms. Reese estimated that three quarters of the taller trees on the property were topped in 2014 and that only "[o]ne, for sure" was still alive (tr at 497). Ms. Reese conceded, however, that with regard to the number of trees that survived being topped, she "couldn't say for sure. It's very early in the season" and the trees had not leafed-out (tr at 496-497).

Mr. Jones testified at the remand hearing that the trees that had been topped in 2014 are "for the most part, showing signs of continuing to grow" (tr at 595-596). He further testified that "it seemed apparent . . . that the trees did not all die and that they were beginning to reform the . . . canopy" (tr at 596). He estimated that "perhaps 10 percent of the originally topped trees did die or are stressed and . . . might not survive" (tr at 603-604).

Department staff also proffered several photographs of the property in support of Mr. Jones' assessment of the survival rate of the topped trees (see exhibit 40). The first photograph was taken from the access road on the west side of the property looking toward the northeast corner of the property (tr at 598 [Jones testimony describing the first photograph in exhibit 40]). Mr. Jones testified that the photograph depicts "two mature trees in the foreground" the tops of which are not visible, and "[i]n the background, there are five of the trees that had been topped previously, and you can see the abrupt end and then the two years' worth – two and a half years' worth of new growth that has sprouted up around the tops of those" (tr at 599). Mr. Jones testified that the other photographs in exhibit 40 show similar signs of new growth on several of the topped trees (tr at 600-603; see also exhibit 40). He also testified that beech trees "tend to resprout from the root" and that the topped beech trees on the property "showed signs that they were growing or had been growing since then" (tr at 596, 600).

The record demonstrates that a significant number of the trees on the property that were topped in 2014 have survived and are continuing to grow, while others are resprouting from their roots. This is consistent with Mr. Jones' testimony at the first hearing wherein he stated that the tree topping was "a temporary alteration of the habitat and its value to the wildlife" (tr at 318).

As I stated in the 2016 Hearing Report, "[t]he purposes of the Freshwater Wetlands Act would be ill-served if the temporary degradation of the wetland habitat caused by the actions of applicant's neighbor were to result in the permanent degradation of the habitat value of the property" (2016 Hearing Report at 12). To issue a permit under such circumstances would create a disincentive for landowners of property in wetlands or adjacent areas to be good stewards of these important lands.

As noted previously, pursuant to ECL 24-0103, it is the "public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom." Further, "wildlife habitat" is expressly enumerated under the Act as one of the benefits derived from freshwater wetlands "by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare species such as the bald eagle and osprey" (ECL 24-0105[7][b]). Accordingly, wildlife habitat is to be preserved, protected, and conserved.

On the record before me, Department staff has demonstrated that the property provides wildlife habitat benefit for various species, including eagles. Moreover, applicant has failed to demonstrate that the alternative project alters or in any way reduces the adverse impacts associated with the introduction of a permanent residence to a property that is currently unoccupied and vegetated.

Pursuant to 6 NYCRR 663.4(d)(42), applicant's proposal to construct a residence and related structures or facilities in the adjacent area of freshwater wetland RE-1 is a presumptively incompatible activity. I conclude that applicant failed to satisfy its burden to demonstrate that the alternative project is compatible with the preservation, protection, and conservation of the wetland habitat benefit derived from the property (see 6 NYCRR 663.5[e][1][i]). I further conclude the applicant failed to demonstrate that the alternative project would result in no more than insubstantial degradation to the wetland (see 6 NYCRR 663.5[e][1][ii]). Accordingly, applicant's proposal is subject to the weighing standards under 6 NYCRR 663.5(e)(2).

Freshwater wetland RE-1 is designated as a Class I wetland, the most protected class of the State's freshwater wetlands. Pursuant to the weighing standards, where Class I wetlands are involved, the vast majority of proposed projects that cannot avoid "the partial loss or reduction of a [wetland] benefit" will not be approved (6 NYCRR 663.5[f][4][i]). To be approved, the proposed activity must satisfy a social or economic need of such a compelling nature as to make it tantamount to an "actual necessity," something that "must be done" (6 NYCRR 663.5[f][4][ii]). Additionally, the need for the project must clearly outweigh the loss or detriment to the wetland benefits by a "large or significant" margin (6 NYCRR 663.5[f][4]). Applicant's proposal to build a residence on the property is plainly not an activity that "must be done."

With regard to minimizing construction on steeper slopes, this issue is interrelated with the engineering plans proffered by applicant for the alternative project and, therefore, is discussed in the section below.

-- Engineering Plans

In the Interim Decision, the Commissioner notes that issues "related to erosion and stormwater control, in part due to the site's steep slopes," were raised at the first hearing (Interim Decision at 3 [citations omitted]). The Commissioner states that "[a]pplicant should consider further developing its engineering plans to address the deficiencies that the ALJ identified or demonstrate how its current engineering plans are satisfactory" (id.). As previously noted, the Commissioner also stated that "applicant should consider presenting alternative configurations to the proposed residence and associated improvements to reduce the impacts of the proposed project on the property's wildlife habitat and to minimize construction on the steeper slopes of the property" (Interim Decision at 2).

At the remand hearing, applicant proffered site plans, with associated engineering notes and details, for the alternative project (see exhibit 34); a geotechnical report for the property (see exhibit 36); and expert testimony related to the erosion control plan for the alternative project (see generally tr at 364-459). Together, applicant's site plans and geotechnical report comprise the erosion and sediment control plan for the alternative project (see tr at 378-387 [McMahon testimony regarding the erosion control provisions set forth in the site plans and geotechnical report]; tr at 392 [McMahon testimony that erosion control measures at the property will be implemented "in accordance with New York State guidelines for urban erosion and sediment control" (quoting exhibit 34, sheet 4)]; tr at 536 [Groth testimony that exhibits 34 and 36 constitute the erosion and sediment control plan for the alternative project]).

Applicant's engineer, Mr. McMahon, testified that under the alternative project the proposed residence would be located to the south of the location that was proposed under the former project (tr at 370). He testified that this results in the proposed residence being located on a 40 to 45 percent slope, rather than a 50 percent slope as previously proposed (tr at 393-394). Mr. McMahon testified that "given the grades on this site, that was, I think, the best location to mitigate the steeper slope" (tr at 414).

Mr. McMahon opined that a residence could be constructed at the newly proposed location, but acknowledged that "again, we're talking about [building on] steep slopes" (tr at 383). He further testified that he has "seen many structures built on steeper sites than this . . . in the Finger Lakes [region]" and that his firm has "been involved in projects where we have done and seen construction on very similar-type slopes," although not specifically in "wetlands or wetland buffers" (tr at 383-384). Applicant's geotechnical engineer testified that, on the basis of his investigation of the slope and soil at the property, he had "some concerns in terms of elevations to set the house at and its location relative to the slope, but in general we felt that it was a reasonable project" (tr at 429-430). He further testified that he did not anticipate that there would be erosion into the bay if applicant followed the recommendations set forth in his report (tr at 434).

It is clear from the documents and testimony proffered by applicant at the remand hearing that applicant sought to more fully address the erosion and stormwater control issues that were raised by Department staff at the first hearing. As discussed below, however, staff continues to oppose construction of a residence on the property because the construction activities would occur on steep slopes that are prone to erosion and that are within the regulated adjacent area above freshwater wetland RE-1.

Department staff called Benjamin Groth, PE, a civil engineer with the Department, whose expertise includes the review and evaluation of hundreds of erosion and sediment control plans for the Department (see tr at 529 [Groth testimony that, during the period from September 2011 through July 2017, he reviewed four or five erosion and sediment control plans per month for the Department]). Mr. Groth testified that construction on steep slopes would be unavoidable at the property because "all of the slopes on this site are steep. Locating [the proposed residence] from one steep area to another steep area doesn't decrease the risk" (tr at 550). He acknowledged that, under the alternative project, the proposed residence would be located on a slightly less steep slope, but testified that the change is "not significant" because both proposed locations for the residence are on "very steep slopes"³ (tr at 550-551).

³ I note that the Department's SPDES General Permit for Stormwater Discharges from Construction Activity, Permit No. GP-0-15-002, defines a "Steep Slope" to mean "land area with a Soil Slope Phase that is identified as an E or F, or the map unit name is inclusive of 25% or greater slope, on the United States Department of Agriculture ('USDA') Soil Survey for the County where the disturbance will occur" (id. Appendix A [definitions]). Applicant's property falls within this definition because it is located within a USDA Soil Survey map unit name that is inclusive of a 25% or greater slope (see tr at 458-459 [Baker testimony confirming that the property is located within the Arkport, Dunkirk and Colonie soils map unit]; exhibit 33 at 3 [USDA Soil Survey identifying the map unit name for the property as "**Arkport, Dunkirk and Colonie soils, 20 to 60 percent slopes, eroded (AtF3)**"]).

Mr. Groth testified that the erosion and sediment control plan submitted by applicant for the alternative project was inadequate because necessary information was missing or incomplete (see generally tr at 553-571). Department staff proffered a copy of a guidance document entitled the New York State Standards and Specifications for Erosion and Sediment Control, dated November 2016 (see exhibit 38). Mr. Groth testified that this document, commonly referred to as the "Blue Book" (tr at 531), "[d]escribes how to design and implement erosion and sediment control practices" (tr at 533). Notably, applicant's erosion and sediment control plan includes references to, and excerpts from, the Blue Book (see exhibit 34, sheet 4 [stating under the erosion control notes that "ALL EROSION CONTROL MEASURES SHALL BE IN ACCORDANCE WITH N.Y.S. GUIDELINES FOR URBAN EROSION AND SEDIMENT CONTROL"⁴]; id. sheet 5 [containing extensive excerpts from the August 2005 version of the Blue Book]).

Among other things, Mr. Groth testified that the plans were missing a "project narrative, soils maps and descriptions, statement of erosion potential, drainage area maps, construction sequencing, inspection and maintenance schedules and site pollution prevention methods," all of which, he testified, are required by the Department's Blue Book (tr at 553). He testified at length regarding specific requirements under the Blue Book and noted numerous deficiencies in applicant's plans (tr at 553-567).

Applicant argues that "[c]ompliance with the [Blue Book] Standards is required by the Town Code of the Town of Irondequoit, but the [alternative project] is not yet before the Town of Irondequoit. The Department does not have jurisdiction or authority to enforce the Town of Irondequoit's laws" (applicant brief on remand at 3; see also id. at 5-6 [arguing that the "Town of Irondequoit, not the NYSDEC, is responsible for ensuring that the Applicant has met the extensive stormwater management program"]).

Applicant's argument is without merit. Erosion control is one of the enumerated freshwater wetlands benefits under the Act (see ECL 24-0105[7][f]) and applicant has "[t]he burden of showing that the proposed activity will comply with the policies and provisions of the act and [6 NYCRR part 663]" (6 NYCRR 663.5[a]). As set forth under the controlling regulations, construction of "a residence or related structures or facilities" is a presumptively incompatible activity in a freshwater wetlands adjacent area (6 NYCRR 663.4[d][42]), in part, because such activities may result in "more erosion and sedimentation" (6 NYCRR 663.4[d] [narrative above item 42]). Accordingly, where, as here, erosion and sedimentation issues are present, the Department must assess whether a proposed erosion control plan is protective of the wetland and its benefits and functions.

Consistent with the foregoing, the Commissioner stated in the Interim Decision that "[a]pplicant should consider further developing its engineering plans [for erosion and stormwater control] to address the deficiencies that the ALJ identified" in the 2016 Hearing Report (Interim

⁴ Mr. Groth testified that the N.Y.S. Guidelines for Urban Erosion and Sediment Control was "a parent document to the Blue Book" (tr at 533; see also exhibit 38, preface at 1 [describing the lineage of the Blue Book and referring to the N.Y.S. Guidelines for Urban Erosion and Sediment Control as "[t]he parent document"]).

Decision at 3). As Department staff's habitat expert testified, proposed projects in freshwater wetlands will frequently require multiple permits, including, as here, a town building permit (tr at 628-629). The Department, however, makes its own determination on each permit application before it and does not rely upon documentation submitted to other entities (tr at 629-630).

Applicant's geotechnical expert, Mr. Baker, testified that there have been occasions where he has found the USDA Soil Survey for a particular site to be incorrect (tr at 455-456). With regard to applicant's property, however, he found no such error (tr at 457). As Mr. Baker testified at the remand hearing, for the mapping unit where the property is located, the USDA Soil Survey states that "[l]imitations to all uses of this mapping unit are severe. Where undisturbed, this mapping unit should remain in its natural state. The vegetative cover should be restored if it has been removed. Steep slopes make this mapping unit highly susceptible to continued erosion" (tr at 459 [quoting exhibit 33 at 3]).

In the 2016 Hearing Report I noted that staff's habitat witness, Mr. Jones, is not a soil scientist, but that "in his experience, construction on steep slopes along the bay 'has been . . . very difficult' because 'of the highly erodible nature, inherent, I think, instability of these soils, combined with steep slopes and alterations to the vegetative community both above and on the slopes, the change of the course and velocity and frequency of water that flows through them and over them'" (2016 Hearing Report at 12). At the remand hearing he testified that "changing this site from naturally vegetative to otherwise maintain[ed] and disturb[ed], there's a very real risk of the erosion potential coming true that could adversely impact the adjacent area . . . and in almost any case it's going to result in additional sedimentation and erosion into the bay proper" (tr at 613-614).

I conclude that applicant's engineering plans for erosion and sediment control remain inadequate. Even in the absence of Department staff's concerns regarding the impact of the alternative project on the property's wildlife habitat benefit, staff would not issue a permit for the alternative project based on the engineering plans that have been submitted by applicant. Although, as noted by the Commissioner, "it may be possible to engineer sufficient safeguards against post-construction erosion and slope failure at the property" (Interim Decision at 3), applicant's erosion and sediment control plans remain insufficient for permit issuance.

-- Wetland Mitigation Plan

In the Interim Decision, the Commissioner states that "[a]pplicant should also review with Department staff the viability of a wetland mitigation plan, which may include on- and off-site mitigation in the Irondequoit Bay area, as part of consideration of its freshwater wetlands permit application" (Interim Decision at 3).

Applicant's wetlands expert, Ms. Reese, testified that applicant asked her to investigate the availability of off-site "mitigation credits" (tr at 481). Ms. Reese testified that such credits are set up through "mitigation banks" and are intended to "help mitigate the loss of wetland resources" (tr at 479-480). She further testified that mitigation banks "basically grant a credit against wetland impacts that do occur, and this is only after the process of looking at opportunities for avoidance and minimization" of impacts is complete (tr at 480). Lastly, she

testified that "[i]f there is no other opportunity to mitigate on-site, then mitigation banks are generally a good resource to be used" (tr at 480).

Department staff's habitat expert, Mr. Jones, testified that mitigation is considered when "there are in fact unavoidable impacts, and the design and implementation of the project minimize those impacts, . . . a compensatory mitigation plan or proposal is then developed to restore the functions, benefits and acreage of lost wetland" (tr at 624).

The testimony of these experts with regard to when mitigation will be considered in the permitting process is consistent with the Department's guidance for mitigating impacts on freshwater wetlands (see exhibit 37 [DEC Freshwater Wetlands Regulations, Guidelines on Compensatory Mitigation (mitigation guidelines), Oct. 26, 1993]). The mitigation guidelines state that to "receive a freshwater wetland permit, an applicant must:

- o first demonstrate that impacts to the wetland cannot be avoided entirely
AND
- o then demonstrate that unavoidable losses or impacts on the functions or benefits of the wetland have been minimized
AND
- o finally, fully compensate for (replace) any remaining loss of wetland acreage and function **unless** it can be shown that the losses are inconsequential or that, on balance, economic or social need for the project outweighs the losses" (mitigation guidelines at 2).

Essentially, mitigation is considered after applicant has first sought to avoid adverse impacts to wetlands functions or benefits, and second sought to minimize those impacts that cannot be avoided.

With regard to mitigation, applicant argues that it "proposed measures to mitigate any concerns regarding erosion" and that it "explored off-site mitigation opportunities, which were rejected by Department staff" (applicant brief on remand at 5). Department staff argues that "no viable wetland mitigation plan has been proposed by Applicant" (staff brief on remand at 11).

As stated in the mitigation guidelines, mitigation in regulated freshwater wetlands adjacent areas "is considered in the context of replacement of the wetland functions and benefits being lost or impaired" (exhibit 37 at 3). Further, "lost functions and benefits should be replaced as closely as possible, consistent with the requirements of [6 NYCRR] Part 663" (id. at 4). As discussed above, Department staff's primary concern with regard to applicant's proposed alternative project relates to the adverse impacts of the project on the wetland wildlife habitat benefit of the property (see supra at 6-11). Accordingly, any mitigation proposed by applicant should be directed at replacing the lost or degraded wildlife habitat benefit of the property.

With regard to mitigating erosion and sedimentation impacts, applicant argues that "[a]ny potential impacts will be mitigated through the appropriate engineering and compliance with the Town of Irondequoit's erosion control requirements" (applicant brief on remand at 2). Staff argues that "erosion control measures or mitigation which prevent or minimize disturbance or

development impacts but do not create wetland or otherwise restore or enhance wetland" are not compensatory mitigation (staff brief on remand at 11).

The erosion and sediment control plan proffered by applicant at the remand hearing is not compensatory mitigation. Rather, the erosion and sediment control plan is designed to minimize the impact of the alternative project on the erosion control benefit of the property.

As noted above, the Department's mitigation policy states that mitigation is considered after the applicant "first demonstrate[s] that impacts to the wetland cannot be avoided entirely" and "then demonstrate[s] that unavoidable losses or impacts on the functions or benefits of the wetland have been minimized" (mitigation guidelines at 2). Consistent with this, both the expert proffered by applicant and the expert proffered by staff testified that mitigation is considered only after unavoidable impacts to wetland resources have been identified and those impacts have been minimized.

Erosion and sediment control plans are not mitigation, but rather are intended to avoid or minimize impacts. Moreover, even if applicant's erosion and sediment control plan were to be considered as a form of compensatory mitigation, the plan does not address the primary impact of the alternative project. That is, the erosion and sediment control plan does not address the impact of the proposed permanent residence on the wetland wildlife habitat benefit of the property.

With regard to possible off-site mitigation, Ms. Reese testified that she identified a mitigation bank that could be used to mitigate impacts of the alternative project (tr at 483-484). She testified that the mitigation bank is located in Wayne County near Red Creek, New York (tr at 484). She acknowledged that the mitigation bank is "not specifically in the Irondequoit watershed area" but stated that it is "in the Lake Ontario watershed area" (id.).

Department staff's habitat expert, Mr. Jones, testified that "[t]here is a single freshwater wetland [mitigation bank]" available in Monroe County, the county in which applicant's property is located (tr at 625-626). Mr. Jones testified that mitigation banks have a designated "service area . . . in which permittees can purchase credits for use against their impacts" (tr at 626). Although the mitigation bank in Monroe County is located in Chili, considerably closer to applicant's property than the mitigation bank identified by Ms. Reese, the property is outside the mitigation bank's service area (id.). Therefore, Mr. Jones testified, "the bank is not available to consider for impacts here" (id.).

In its closing brief, applicant argues that Ms. Reese testified "that Applicant requested that she determine whether any credits were available in the Irondequoit Bay watershed" and that Ms. Reese "located an off-site mitigation option wherein Applicant could purchase credits in a mitigation bank" (applicant brief on remand at 4). This argument fails to acknowledge that the mitigation bank identified by Ms. Reese is not located in "Irondequoit Bay watershed." Rather, as noted above, Ms. Reese testified that the mitigation bank is "not specifically in the Irondequoit watershed area" (tr at 484).

Moreover, nothing in the record demonstrates that credits purchased from the mitigation bank identified by applicant would in any way address the impact of the alternative project on the wildlife habitat benefit of the property. The property is on a vegetated slope that rises directly from freshwater wetland RE-1 and Irondequoit Bay. Department staff has demonstrated the property provides wetland wildlife habitat benefit to a variety species, including eagles.

Lastly, I note that applicant did not submit a formal mitigation proposal to the Department. Mr. Gangemi testified that applicant conveyed the possibility of using a mitigation bank to the Department (tr at 523), but no formal proposal was proffered at the remand hearing. Moreover, applicant argues that "given that there is no proposed loss of wetlands associated with the Project, there does not appear to be a need to purchase credits in a mitigation bank" (applicant brief on remand at 4).

I conclude that applicant did not demonstrate that mitigation was available, either on-site or off-site, that is suitable to offset the adverse impact to the wetland wildlife habitat benefit of the property.

-- Forced Main Sewer Line

In a footnote to the Interim Decision, the Commissioner notes that applicant "proposes to install a forced main sewer line" (Interim Decision at 3 n 1). The Commissioner further notes that the sewer line "could have a potential environmental benefit" if, for example, neighboring property owners connect to the line (see id.). The Commissioner states that "[o]n remand, applicant should indicate what, if any, impact these connections would have on the wetland and its adjacent area" (id.).

Under the alternative project applicant proposes to reroute the forced main sewer line. Under the former project, the forced main sewer line was to run along the course of the access road to the property (findings of fact ¶ 13). Under the alternative project, applicant proposes to run the forced main sewer line to the west of the proposed residence and along a portion of Bay Bluff Lane (exhibit 34, sheet 1; tr at 373-374).

Although the new route for the forced main sewer line runs closer to existing residences on Bay Bluff Lane, applicant provided no information concerning whether any property owner along the proposed route has agreed to connect to the line. Applicant's wetlands expert, Ms. Reese, testified that she did not know whether any other property owner had agreed to connect to the line (tr at 504). In its closing brief, applicant only states that the proposed forced main sewer line "makes sewer available further south along Bayshore Boulevard and would enable six houses to connect" (applicant brief on remand at 7).

Moreover, there is nothing in the record that indicates homes along the proposed route of the forced main sewer line are affecting the wetland or its adjacent area in any way. Department staff's habitat expert, Mr. Jones, testified that the sewer line could be beneficial to the wetland if there were "evidence of failed septic systems that were currently affecting the wetland or another water body from upslope development" (tr at 615). He testified, however, that staff "had no

inquiries or complaints or issues brought to our attention of problems that had affected our regulated area of the wetland or the bay proper" (id.).

On this record, I conclude that applicant has not demonstrated that construction of the forced main sewer line would have an environmental benefit or otherwise impact the wetland or adjacent area.

CONCLUSIONS

Applicant's property is located almost entirely within the boundaries of the wetland and the adjacent area of State-regulated freshwater wetland RE-1, a Class I wetland. The alternative project proposed by applicant includes activities that are identified by regulation as "usually incompatible" with the freshwater wetland and its functions and benefits. These proposed activities do not meet the compatibility tests nor do they meet the weighing standards.

Accordingly, I conclude that applicant Rochester Redevelopment, LLC has not met its burden to demonstrate that the alternative project meets 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
Matter of Rochester Redevelopment, LLC
Application No. 8-2634-00365/00001

Exhibit No.	Description
1	Joint Application Form, dated November 2, 2012, with attachments
2	Detail Site Plan, McMahan LaRue Associates, P.C. (McMahan LaRue), Engineers & Surveyors, dated December 2014
3	Shadow Wood Subdivision, Final Site Plan, Passero-Scardetta Associates, Engineers-Planners-Surveyors, dated May 1977
4	Quitclaim Deed into Applicant for Property, dated October 31, 2011
5	Zoning Map, Town of Irondequoit
6	Abstract of Title for Property
7	Historical Maps of Property and Vicinity
8	Preliminary Site Plan & Elevations and Concept Photographs
9	Excerpt from Joint Application Form
10	DEC Notice of Incomplete Application (NOIA), dated November 15, 2012
11	Response to NOIA, dated November 20, 2012
12	DEC Request for Additional Information, dated June 27, 2013
13	Responses to Request for Additional Information, dated August 11 & 13, 2014
14	DEC NOIA & Request for Additional Information, September 9, 2014
15	DEC Letter of Denial, dated September 4, 2015
16	Irondequoit Town Code (excerpts)
17	Gregory W. McMahan, PE, Resume
18	Overall Site Plan, McMahan LaRue, dated December 2014
19	Photographs of Property and Vicinity
20	McMahan LaRue Letter to DEC, dated December 22, 2014
21	Plat Book Map, 1924
22	DEC NOIA, dated January 8, 2015
23	Response to NOIA, dated February 10, 2015
24	Declaration of Covenants, Conditions and Restrictions, dated October 5, 1977
25	Frances Reese, MS, Resume
26	DEC Environmental Resource Mapper (depicting wetland & "Wetland Checkzone" in vicinity of property)
27	Photograph at Property (depicting remnant of a foundation)
28	Photograph at Property (depicting ice house)
29	DEC Wetlands Map, Prepared by Monroe County, Department of Planning and Development (for general planning purposes), dated December 4, 2006
30	Applicant Email to DEC, dated October 6, 2014 (with attached plans)
31	DEC NOIA, dated November 21, 2014
32	DEC Notice of Complete Application, dated June 22, 2015
33	Excerpt from USDA, Soil Conservation Service, Soil Survey, Monroe County (1973)

EXHIBIT LIST
Matter of Rochester Redevelopment, LLC
Application No. 8-2634-00365/00001

The Following Exhibits Were Proffered at the Remand Hearing

34	Alternative Project Plan, McMahon LaRue, dated April 2017
35	Resume of James M. Baker
36	Geotechnical Report, Foundation Design, P.C., dated April 11, 2017
37	DEC Freshwater Wetlands Regulations, Guidelines on Compensatory Mitigation, dated October 26, 1993 (reprinted May 1997)
38	New York State Standards and Specifications for Erosion and Sediment Control, dated November 2016
39	Memo by Benjamin Groth Re: Erosion and Sediment Control Plan Comments
40	Site Photographs, taken April 26, 2018