

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233-1550

In the Matter of the Application of

JEAN SIMONELLI,

Applicant,

for a Freshwater Wetlands Permit pursuant to
Environmental Conservation Law Article 24 and
Part 663 of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of New York
To Construct a Two-Family Dwelling, Pool,
Driveway, and Drywells on
Lots 8 & 9, Block 7079, Bloomingdale Road and
Radigan Avenue (Unpaved), Staten Island, New York
in Class I Freshwater Wetland AR-7 (Claypit Ponds) in
the Arthur Kill Quadrangle.

DEC Project No. 2-6405-00417/00001

DECISION OF THE COMMISSIONER

July 25, 2011

DECISION OF THE COMMISSIONER

This matter involves the application of Jean Simonelli (applicant) for the construction of a single structure two-family residence on property, virtually all of which is located within a Class I freshwater wetland (AR-7), on Staten Island, New York. The property, which is located on the east side of Bloomingdale Road at the intersection of Radigan Avenue, consists of two lots identified as Lots 8 and 9 on Block 7079 of the tax map. The lots are 4,000 square feet and 6,921 square feet, respectively (see Hearing Exhibits [Exhs] 6 and 31), and together comprise approximately one-quarter ($\frac{1}{4}$) of an acre. The property represents a small fraction of the forty-three (43) acres that constitute freshwater wetland AR-7, and is separated from the main body of the wetland by Bloomingdale Road.

By letter dated April 1, 2010, staff of the New York State Department of Environmental Conservation (Department) denied the permit application based upon its determination that the proposal did not meet applicable regulatory standards. By letter dated April 29, 2010, applicant requested a hearing pursuant to section 621.10(a)(2) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

The matter was assigned to Administrative Law Judge (ALJ) Helene G. Goldberger, who prepared the attached hearing report. The ALJ recommends that the application be denied, but states that, if the application is granted, certain conditions should be incorporated into the permit. The ALJ notes that “[t]his is a difficult case because the property in question has been surrounded by development leaving it a tiny wetland island in a sea of development and degradation” (Hearing Report, at 16).

I concur with the ALJ’s characterization that this is a difficult case. On balance, leaving the property in its current state would provide for less protection than if the application were granted with express conservation and mitigation provisions. Currently the property is being used by others for illegal dumping and the illegal discharge of stormwater; in addition, the property is subject to rodent infestation (see Hearing Report, at 12; Hearing Exh 10, at 3 and Photos 1 and 2; Hearing Exh 53; Hearing Transcript, at 109 and 193). This quarter acre is surrounded by development and is presently “orphaned” in that it lacks a “viable steward” to prevent illegal dumping or to control rats or other vectors (see Hearing Report, at 11). As the ALJ states, “[w]hile technically the project would fill in more of this wetland, the reality is that this parcel has transitioned from wet meadow to a mature forested wetland area and due to illegal filling and the development on all sides, the site’s wetland attributes are in danger” (see Hearing Report, at 11).

Based upon my review of the record, I am granting the application, but conditioning this approval on the incorporation of several environmentally protective permit conditions, as discussed below. Except for the final recommendation to deny the permit application and the conclusions relating to that denial, I am otherwise adopting the Hearing Report as part of my decision.

DISCUSSION

The standards for issuance of permits for activities in freshwater wetlands are set forth in 6 NYCRR 663.5 (see also section 24-0705 of article 24 of the Environmental Conservation Law). The primary responsibility of the Department is to ensure that adverse impacts on wetlands and degradation of their functions and benefits are eliminated or minimized through application of permit issuance standards.

As set forth in the regulations, a freshwater wetlands 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” (see 6 NYCRR 663.5[e]). However, it is necessary to focus on the need for a project “only when such adverse impacts are identified” (see Matter of Rampulla Associates Architects, Decision of the Commissioner, November 8, 1988, at 1). Applicant here has demonstrated that its project would cause minimal impairment to the already significantly impaired wetland functions or benefits at the property. These impacts would be further minimized or addressed by permit conditions proposed by applicant and the ALJ in this proceeding, together with related conditions that I am imposing based on this record. With these conditions, the net adverse impacts of the project would be insignificant or nonexistent, and, accordingly, applicant is not required to satisfy the need standard for Class I wetlands.

This decision, however, should not be construed as establishing a general policy that would permit construction of residences along the edge of wetland boundaries or in small, separated portions of wetlands in the State. Each permit application must be judged on its own merits and based on its potential environmental impacts.

As noted above, the portion of the wetland potentially impacted by the project is significantly diminished and impaired in its wetland values. In consideration of the small size of the property, any loss of habitat due to the construction of the residence would not appreciably impair whatever wildlife benefits are provided by the property in its current state. Other wetland benefits have been impaired by property conditions and surrounding development. In contrast, applicant has outlined the benefits of her project for the wetland. She maintains that, by building a residence at this location, the illegal disposal will cease by virtue of the owner’s stewardship (see Hearing Transcript, at 109). Applicant also offered to modify the construction layout by eliminating the proposed pool and by relocating the residence so that it faces Bloomingdale Road, which would avoid opening up the unpaved portion of Radigan Avenue (see id. at 205-206; see also Hearing Exh 25A). Applicant represented that no septic system or holding tank would be required, and the residence would be hooked up to existing sewer lines (see Hearing Transcript, at 622). The proposed drywell(s) would receive stormwater runoff, which would then diffuse into the soil, thereby recharging the groundwater on the site (see id., at 618). The existing wetland functions relating to recreation and open space are, based on this record, insignificant or extremely limited.

As part of onsite mitigation, applicant proposes to set aside a portion of its property to maintain and support open space, mature trees, and appropriate wetland plants of a more diverse nature (see Ex. 31 [outlining the preservation and protection of trees, and the planting of wetland

species]; Hearing Report, at 9 [Finding of Fact 15][applicant proposing to maintain trees greater than 6-inch caliper, with 2,260 square feet of the property dedicated for the existing tree and critical root zones]; see also Hearing Transcript, at 156-58). In her closing brief, applicant offered to engage an environmental monitor to certify and report to the Department on the success of the mitigation project for a five to ten year period and to re-plant if any of the plantings are not successful (see applicant's closing br, at 29). Applicant has also offered to incorporate language relating to these wetland mitigation requirements in the deed to the property so that the obligations would run with the land and thereby subject any new owner to these requirements (see id.).

Although the construction of a home on the property will bring human activities closer to the wetland, the area is already surrounded by a busy road and other housing (see, e.g., Hearing Report, at 12). Accordingly, in these unique circumstances, the addition of this one home, subject to appropriate permit conditions, does not appear to be significant in terms of intrusion.

Department staff did not provide a draft permit in this matter, in light of its denial of the application. I am directing that staff issue a freshwater wetlands permit to applicant that contains the standard permit conditions for such wetlands permits. In addition, I have reviewed the permit conditions proposed by applicant and recommended by the ALJ. I am directing that staff incorporate these, as special conditions, into the freshwater wetlands permit for this project, with certain modifications. These conditions would include:

- 1) prior to construction or any soil disturbance on the property, applicant is to submit to staff a revised plan that removes the pool and relocates the residence to face and allow for access from Bloomingdale Road. The permit shall not authorize the opening of the unpaved portion of Radigan Avenue.

The relocated residence can be no larger than the dimensions for the residence and garage as set forth on the current plan (see Hearing Exhs 6 [Project Description and Purpose] and 25A), and applicant is encouraged to consider further reduction in the size of the residential footprint. In addition, applicant's plan contemplates a patio or surfaced area around the pool (see id.). The patio or surfaced area is not to be constructed and the area that was otherwise designated for the patio or surfaced area is to remain in a naturally vegetated state, to the extent that it is not used as part of the relocation of the residence. Applicant shall seek to minimize the area used for her driveway to the greatest extent. In addition, the driveway shall be constructed with pervious material. The revised plan shall also reflect those modifications. No outbuildings or other associated structures, including but not limited to storage sheds, may be constructed on the property without the approval of Department staff. The location of any drywell proposed to be located on the property shall be subject to the approval of Department staff.

- 2) prior to construction or any soil disturbance on the property, applicant shall submit an onsite wetland mitigation plan to Department staff for its review and approval. The plan, among other things, shall:

- a. designate that portion of the property that will be subject to wetland conservation and preservation activities;
 - b. list the wetland species of trees and vegetation to be planted on the property;
 - c. provide a timetable for wetland plantings and other wetland preservation activities on the property;
 - d. describe the proposed elimination of illegal discharges on the property and measures that will be taken to remove existing illegal fill and disposed material;
 - e. provide that Department staff may access the property to view wetland preservation activities. The plan shall provide for a monitoring schedule of the wetland-plantings and other related activities, and include language regarding applicant's commitment to engage an environmental consultant to oversee the wetland activities. Applicant shall submit a report to Department staff on the status of the wetland on the property immediately upon completion of the construction of the residence, and annually for the next ten years thereafter. Applicant shall consult with Department staff regarding the appropriate categories of information to be included in the consultant reports; and
 - f. provide that Department staff and applicant's consultant shall walk the property together to identify specifically which trees will be retained on the property, and in which locations plantings will occur. This onsite inspection should occur prior to the submission of the onsite plan, if possible. With respect to the planting of wetland species, applicant shall incorporate Department staff's determinations as to appropriate species in its onsite wetland mitigation plan. Any changes to the wetland mitigation plan recommended by Department staff shall be communicated to applicant in writing.
- 3) prior to any construction or soil disturbance on the property, applicant is to provide Department staff with written confirmation that it will be hooking up the residence to existing sewer lines. The permit shall prohibit the installation of a septic system or a holding tank on the property.

As set forth in the DEC's Freshwater Wetlands Regulations Guidelines on Compensatory Mitigation, issued by the Division of Fish, Wildlife and Marine Resources (Mitigation Guidance) in October 1993, "[m]itigation in the broadest sense is all those actions taken to counter adverse effects of a project" (Mitigation Guidance, at 2). The Mitigation Guidance states that compensatory mitigation should preferably be replacement of the same wetland type that is being lost and that it should be "on-site" or contiguous to the wetland affected by a project (see id. at 4-5).

Even with the mitigation that applicant proposes, some portion of the wetland on the property will be lost because of the construction of the residence and, as a result, will not be available for wetland conservation and preservation activities. Accordingly, prior to construction or any soil disturbance on the property, applicant shall submit a proposal to Department staff for its review and approval that provides for additional off-site mitigation in the vicinity or otherwise related to freshwater wetland AR-7 (off-site mitigation plan). Department staff may suggest other areas for wetland mitigation that may be suitable. I note that both the ALJ and Department staff referenced off-site mitigation with respect to this application (see, e.g., Hearing Report, at 15; see also Hearing Transcript, at 482-484).

The off-site mitigation plan shall provide for an acreage replacement ratio of at least one to one. However, Department staff may modify that ratio, considering the wetland functions and benefits lost or gained, the acreage involved, and the mitigation proposed (see Mitigation Guidance, at 7). Applicant is directed to discuss with Department staff appropriate off-site mitigation measures prior to submitting the proposal. No construction or soil disturbance on the property may occur until such time as Department staff approves an off-site mitigation plan.

Applicant offered to add language to the deed for the property to provide for the maintenance of plantings on the site and open space. The enforceability of restrictive deed covenants was discussed in this proceeding. Based upon my review of the record, as a condition of the permit, the deed for this property shall be revised to reference the Department's freshwater wetland permit and its conditions and provide for access by Department staff to evaluate the onsite mitigation. The deed is to provide that these restrictions will be expressly set forth in all subsequent deeds to the property, and the Department shall be notified of any conveyance of the property or a portion thereof. Applicant shall provide to Department staff for its review and comment the language that applicant will add to the deed. Applicant shall, after consultation with Department staff regarding this language, file the deed revision with the real property records maintained by New York City. Within two weeks following the filing of the revised deed, it shall submit proof to Department staff of the filing.

Depending upon future circumstances, Department staff and applicant may discuss modification of any of the permit conditions referenced in this decision. Nothing in this decision precludes consideration of such modifications; however, any modification must be accepted by both Department staff and applicant and must be memorialized in writing.

Applicant contends that Department staff failed to properly consider her application. I concur with the ALJ that this contention is rebutted by the record (see Hearing Report, at 15). Furthermore, as shown by this record, Department staff's review of this application, and its potential impacts, was thorough and appropriate, and carefully attentive to the potential environmental impacts. It is also clear that staff endeavored to assist applicant in the consideration of appropriate mitigation measures.

This matter, however, presents various unique factors, including, but not limited to, the small size of the property in question, the diminished wetland values on the property in light of illegal disposal and discharges, the lack of any significant cumulative impacts on the wetland as a whole, the property's location relative to the main body of the wetland, the lack of other

significant environmental impacts that cannot be addressed through mitigation, and the surrounding development. Taking these factors into account, together with the permit conditions that have been proposed and as modified by this decision, and the record of this matter, I conclude that this project is permissible. Accordingly, I hereby remand this matter to Department staff for the issuance of a freshwater wetlands permit to applicant in accordance with this decision.

For the New York State Department of
Environmental Conservation

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

Dated: July 25, 2011
Albany, New York

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233-1550

In the Matter of the Application of

JEAN SIMONELLI

For a freshwater wetlands permit pursuant to Environmental Conservation Law Article 24 and Part 663 of Title 6 of the New York Compilation of Codes, Rules and Regulations to construct a two family dwelling, pool, driveway, and drywells on Lots 8 & 9, Block 7079, Bloomingdale Road and Radigan Avenue (unpaved), Staten Island, New York in Class I freshwater wetland AR-7 (Claypit Ponds) in the Arthur Kill Quadrangle

DEC Project No. 2-6405-00417/00001

HEARING REPORT

- by -

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

May 12, 2011

PROCEEDINGS

Background

In June 2000, John Simonelli (the spouse of the current applicant Jean Simonelli) submitted a joint application for a freshwater wetlands permit to the New York State Department of Environmental Conservation (DEC or Department) to construct two two-family dwellings in wetland AR-7 at the intersection of Bloomingdale Road and Radigan Avenue in Staten Island. Subsequently, a series of notices of incomplete application and responses were exchanged between the applicant and the Department staff. In 2003, the applicant's environmental consultant, Carpenter Environmental Associates (CEA), performed two studies of the subject site and requested the Department staff demap the area based upon the produced information. The Department staff responded by performing two site visits, denying the CEA request, and suggesting to Mr. Simonelli that the application could not be granted.

In 2006, Jean Simonelli submitted a new application for the construction of one single family house at the same location. Again, a series of notices of incomplete application and responses were exchanged and on September 15, 2008, the staff sent a notice of complete application to Ms. Simonelli. By letter dated April 1, 2010, the staff denied the permit application based upon its determination that the project did not meet regulatory standards. By letter dated April 29, 2010, the applicant requested a hearing pursuant to § 621.10(a) (2) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). In May 2010, Chief Administrative Law Judge James T. McClymonds of the Department's Office of Hearings and Mediation Services (OHMS) designated me as the administrative law judge (ALJ) assigned to this matter.

The hearing notice was published in the October 13, 2010 editions of the *Environmental Notice Bulletin* and the *Staten Island Advance*. The legislative hearing and issues conference were held on November 3, 2010. The adjudicatory hearing began on November 3 and continued on November 4 and December 2, 2010. The proceedings were held at the Knights of Columbus Hall at 100 Kreischer Street in Tottenville, Staten Island with the exception of the last day of the hearing which was held at the Department's Region 2 office at 41-40 21st Street, Long Island City, New York.¹

The applicant was represented by Suzanne M. Avena, Esq. and John G. Martin, Esq. of Garfunkel Wild, P.C. of Great Neck, New York. Department staff was represented by Gail Hintz, Assistant Regional Attorney of DEC's Region 2 office in Long Island City, New York.

¹The December 2 hearing date was held in the Region 2 offices in Long Island City as all agreed this was a more convenient location than Tottenville. Because only the parties and their representatives were attending the adjudicatory sessions, there was no inconvenience to the public.

Legislative Hearing

There were approximately 15 members of the public in attendance at the legislative hearing in addition to a dozen students who were observing the process. The applicant and the staff each had about six people with them.

While I did not receive any petitions for party status, a letter from the Staten Island Taxpayer's Association (SITA) was faxed as well as hand-delivered to me at the hearing.² SITA opposes the permitting of this house based on its anticipation that this area will be included in the Clay Pit Area Bluebelt Program. In SITA's letter dated November 2, 2010, Ms. Vandenburg, also noted that she had "concerns over the land being altered in any way as this parcel seems to drain into a large stream across the street in NYS Clay Pit Pond Park." She suggested that the parcel be incorporated into the park for protection.

In addition to the SITA letter, residents of homes near the project area submitted a petition to DEC comprised of 47 signatures of people opposed to the construction of the house. These landowners object to the filling of the wetland and the opening of Radigan Avenue, which is currently a dead end street. In addition, in their petition, these residents note that there are no sewers in this area.

Ms. Avena started the comment session by providing some history to the application. She stated that the Simonellis bought the property in 2000 and started their application for a freshwater wetlands permit that same year. She explained that the site is one quarter acre in size and that, with the mitigation measures proposed, there would be minimal impact on the corpus of the wetland. She described these measures as including a deed restriction on subsequent development and the planting of DEC-approved wetland plants. Ms. Avena asserted that the wetland on the location was a wetland in name only because it is hydrologically disconnected from AR-7 by the construction of Bloomingdale Road and all the other development surrounding the site. She claimed that the property is converting to an upland community and no longer has the benefits of a wetland. She described the location as dark and a nuisance with frequent garbage dumping. She explained that the New York City (NYC) Department of Sanitation and the NYC Department of Health have issued violations to the landowners due to this dumping and that in its current state, the land serves no social purpose. She closed her remarks by noting that the Simonellis' purpose is merely to have their family live together.

Mr. Simonelli introduced himself and explained that he had bought the property 10 years ago to be closer to his daughter and to facilitate child care for her children. He explained that the advice he received from his first consultants was that there would be no problem in receiving a permit from DEC.

² SITA e-mailed the Department two weeks prior to the hearing complaining that the public hearing should be held in the evening when more people could attend. I contacted the president of SITA, Dee G. Vandenburg, and included her in a conference call with Ms. Hintz and Ms. Avena to discuss this issue. I explained that because neither the staff nor the applicant anticipated the involvement of many members of the public, the standard practice of this agency in scheduling legislative hearings for non-controversial matters – in the daytime – was followed. I also explained that written and oral comments have equal weight and encouraged her to submit a written statement. Ms. Vandenburg seemed satisfied with this response.

Ms. Hintz explained the permitting process and the staff's view that the project did not meet regulatory standards. She stated that the regulations provide for a weighing process for the Department to consider the economic and social values of a development that does not meet the wetland standards. She explained that if these values don't outweigh the damage to the wetland, the regulations call for permit denial. Ms. Hintz noted that the construction of a house in this area would remove wetland and bring human activity closer to the wetland.

In addition to the representatives of the applicant and staff, eight people spoke at the hearing, seven of whom opposed DEC's granting of a permit for this home. The seven individuals who opposed the application are all residents of the neighboring streets and object to the opening of Radigan Avenue, which may be required by the City of New York if the Simonelli home is constructed. These residents raised concerns about traffic, the lack of sewers, and protection of the wetlands. One individual stated that he had a restricted deed forbidding an inground swimming pool and inquired as to whether this restriction could be lifted.

Ms. Cindy Mastrola, the daughter of the applicant, spoke in favor of the home stating that it was not clear that the location contained wetlands. She pointed to the development of homes on three sides of her parents' property and the Simonellis' willingness to site the home so that it faces onto Bloomingdale Road and not Radigan Avenue. She described the property as an attractive place for illegal activities and dumping, and maintained that these actions would be stopped if a home is located there.

The legislative hearing was concluded with my reading of a statement submitted by Dee Vandenburg of SITA, described above.

Issues Conference

Prior to the start of the issues conference discussion, we adjourned in order to do a site visit. We traveled in two groups to the location of the proposed development. We drove close to the end of the paved section of Radigan Avenue and entered the Simonelli property walking towards and crossing Bloomingdale Road. After crossing Bloomingdale Road, we entered Clay Pit Ponds State Park Preserve briefly. Then we returned to the hearing location to commence the conference. To start, we took time off the record to organize the exhibits that the parties intended to submit.

As no intervenors filed petitions for party status, the issues conference was devoted solely to a discussion of the positions of the staff and the applicant. I began by summarizing the position of the Department staff as I understood it from the documents I had in my file. I stated that the staff had determined that the permit application is not compatible with the permitting standards of Part 663 of 6 NYCRR with respect to the preservation and protection of freshwater wetlands and the public health and welfare, and does not satisfy a compelling economic or social need that outweighs the detriment to AR-7. I asked the staff to provide more detail about its position.

Ms. Hintz explained that the entire site is wetland and that the box culvert that is on the site may or may not function but water flow is coming from all directions to the site. She stated

that development would negatively impact drainage, plants, the current filtering effect of flood waters, wildlife habitat, open space, erosion and sediment control, education and scientific research.

Ms. Avena responded on behalf of the applicant by stating that the location of the proposed project represents one-tenth of a percent of AR-7. She maintained that the construction of Bloomingdale Road and the surrounding development cut off this property from the wetland proper. She stated that the development would enhance the area by planting 40 appropriate wetland species and dedicating this area (1500 square feet) in the deed to ensure permanent protection. In addition, she stated that the applicant would improve the drainage and construct sediment basins. She provided that the resulting loss of wetland was less than .2% of AR-7 (5500 square feet) and that this does not support wildlife. Ms Avena described the garbage and debris that is deposited on the site, stating that there are no aesthetic or educational values in the land in its current state. Ms. Avena argued that, to the contrary, the land now encourages illicit activities. She maintained that the project would minimize negative impacts on the wetland and that the applicant is receptive to other mitigation measures. Ms. Avena noted that the prior record of this application has been one of delay and non-responsiveness to the Simonellis and prior owners and this has resulted in economic hardship.

Adjudicatory Hearing

The adjudicatory hearing proceeded after the close of the issues conference and continued for two more days (November 4 and December 2, 2010). Testifying on behalf of the applicant were: environmental consultants John B. Taylor, a managing principal with Quay Consulting, LLC and Nicholas Mann, a principal with Quay Consulting, LLC. In addition, John Simonelli, one of the landowners, testified.

Testifying on behalf of staff were: Harold Dickey, Deputy Regional Permit Administrator; Joseph Pane, Principal Fish and Wildlife Biologist; and Sam Yee Chan, Biologist.

During the break between the second and third sessions of the adjudicatory hearing, the applicant moved by letter dated November 24, 2010 (received by electronic mail on November 28, 2010) that I reconsider my ruling sustaining the staff's objection to the production of an internal staff e-mail directing the denial of the permit. The basis of my ruling was that the document was deliberative and therefore not subject to discovery. In her letter motion, the applicant requested that I view the document *in camera*. Because staff was able to quickly provide me with the document, I did review it and found it virtually identical to the April 1, 2010 denial letter. Accordingly, I provided it to the applicant's counsel by facsimile on December 1, 2010.

In addition, on November 22, 2010, pursuant to *Organization and Delegation Memo # 85-06 Development and Use of Draft Permit Conditions in Permit Hearings*, I requested that the staff provide a draft permit with conditions despite their denial determination. Staff declined to do so by letter dated November 26, 2010 and at the December 2nd hearing session, I advised staff that failure to provide conditions was risky in the event that the Commissioner decided to

permit the project. In such circumstances, the Commissioner would not have the full advantage of the staff's recommendations that would presumably be most protective of the environment.

At the conclusion of the adjudicatory hearing, the parties agreed to a briefing schedule that was extended several times at the requests of both the applicant and the Department staff. The closing memoranda were filed by electronic mail on April 18, 2011.³ Staff submitted its corrections to the transcripts on April 21, 2011 and the applicant did not provide corrections. As appropriate, I amended the transcripts that I had corrected on December 22, 2010. In addition, on April 22, 2011, the staff submitted a revised exhibit list; with one correction, I circulated the revised list to the parties on April 25, 2011. *See*, Exhibit List attached. The applicant filed her reply brief on May 2, 2011 and with the agreement of the applicant and my permission staff filed its reply memorandum on May 3, 2011 when the record was closed.

One of the extensions that the applicant requested to file its closing memorandum was based upon its Freedom of Information Law (FOIL) request to the Department staff with respect to several freshwater wetlands applications on Staten Island (Omni, Noce and Savo). Because the staff had no objection to the request of the applicant for additional time to file its brief, I granted the extension. However, in a conference call held with the parties on January 20, 2011, I inquired as to the intentions of the applicant regarding additional documents since the hearing record was closed. Ms. Avena stated that the applicant was not necessarily going to use the information but wanted the opportunity to review the records. Accordingly, there was no further discussion of this issue. In reviewing the applicant's closing memorandum, I note that the applicant has opted to reference these other applications in support of its argument that it received inequitable treatment in staff's review of its application. Because some of these records were not introduced at the hearing (nor was there any attempt to do so), to the extent that the applicant relies on those records in making its argument, I am not considering them in making my determinations herein. *See*, Applicant's Closing Brief, p. 45.

FINDINGS OF FACT

Project Site

1. The DEC Commissioner promulgated the official freshwater wetlands survey maps for Richmond County in 1987. Freshwater wetland AR-7 is identified on the Arthur Kill Quadrangle as a Class I wetland of 43 acres. Exhibit (Ex.) 41.

2. The features outlined in 6 NYCRR §§ 664.5(a)(7) and (b) that are associated with Freshwater Wetland AR-7, and which form the basis for its Class I designation are set forth in Ex.42, Final Freshwater Wetland Classification for Claypit Ponds Freshwater Wetland. The classification provides that AR-7 contains four or more Class II characteristics; specifically, that it is contiguous to a tidal wetland; contains two or more wetland structural groups; supports animal species in diversity or abundance unusual for county; contains an unusual geologic feature which is an excellent representative of type; is hydraulically connected to aquifer-potentially useful water supply; is within an urbanized area; and is within a publicly owned

³ The closing briefs were due on April 18, 2011. Due to some technical failures, the Department staff re-filed electronically on April 19, 2011.

recreation area. The main body of AR-7 is located in Clay Pit Ponds State Park Preserve on the western side of Bloomingdale Road. A Bird Conservation Area (BCA) is part of the Park Preserve. See, www.dec.ny.gov/animals/27648.html.

3. The project site is located in Freshwater Wetland AR-7 on the east side of Bloomingdale Road at the intersection of Radigan Avenue and consists of two lots – identified as Lots 8 and 9 on Block 7079 of the tax map – that are 4,000 square feet and 6,512 square feet, respectively. Exs. 6, 31. The project site is ¼ acre and represents a small fraction of the acreage of AR-7. The paved portion of Radigan Avenue ends just east of the subject lots. Ex. 6, Figure 5. In the event that the applicant receives the necessary permits to construct the house that is the subject of these proceedings, she will also need to extend Radigan Avenue to meet Bloomingdale Road per New York City regulation.⁴ Transcript page (TR) 480.

4. In 2000 and 2003, John and Jean Simonelli purchased the property in question. Exs. 49 and 50. In June 2000, Mr. John Simonelli applied for a freshwater wetlands permit from DEC to construct two two-family homes at this location.⁵ Ex.13. A series of notices of incomplete application (NOIAs) and responses were exchanged between Department staff and the applicant between July 2000 and March 2004. Exs. 9, 10, 13-23. In addition, Joseph Pane, a principal fish and wildlife biologist with DEC's Region 2 office since 1986, spoke with Mr. Simonelli as well as his consultants on several occasions regarding the wetland status of the property and the restrictions regarding development. TR 426-439.

5. In 1980, Mr. Pane visited the property as part of the freshwater wetland mapping process of Staten Island. TR 324-335. At that time, he described the site as a wet meadow off of Bloomingdale Road; noting wetland species of plants, trees, and grasses such as eleocharis, arum, birch, scirpus, juncus, oak, catbriar and phragmites. TR 341; Exs. 43C and 44A,B.

6. In 1980, Department staff documented Claypit Ponds, AR-7, as a wetland and it was incorporated into the final freshwater wetlands map promulgated by DEC in 1987. Exs. 41-44. The staff documented wetland plant species including red maple, willows, swamp white oak, alders, buttonbush, dogwoods, bulrushes, arrow arum, swamp loosestrife, water lily, spatterdock, duckweed, sedges, pondweeds, blue flag, and highbush blueberry. Ex. 42. In addition, staff noted a wildlife population including yellow warbler, kestrel, harrier, blue-winged teal, wood duck, sharp-shinned hawk, broad-winged hawk, towhee, muskrat, great horned owl and screech owl, among others. *Id.*

7. In 1994, in preparation for a proceeding related to a Freshwater Wetlands Appeals Board (FWAB) matter that had been initiated by the prior owner (Marazzo) to demap the property, Mr. Pane performed another visit to the site in question. Ex. 45a. At that time, he observed red maple, sweetgum, briar, fern and scirpus on the site. Exs. 45a,b; TR 336-341, 346. Because the property owner never perfected the appeal, no decision was rendered on that appeal.

⁴ Mr. Simonelli testified that it was possible that the house site could be changed so that it fronted on Bloomingdale Road, eliminating the requirement to extend Radigan Avenue. TR 205.

⁵ Mr. Simonelli testified on December 2, 2010 that the reason for the discrepancy in the dates of the two deeds and the application date is because there were “title” issues that had to be resolved prior to the legal transfer of Lot 9.

8. In or around 2000, Mr. Pane spoke with Mr. Simonelli about his application and explained that because the project was located directly in the wetland, it did not meet standards. Mr. Pane recommended that the applicant look into creating mitigation. TR 430-438.

9. In 2002 and 2003, on behalf of the applicant, Carpenter Environmental Associates (CEA) submitted two letters to DEC staff based upon the site investigations that CEA staff performed in support of its request that the Simonelli property be demapped from the Arthur Kill, DEC freshwater wetlands map. TR 355; Exs. 9, 10. Based upon its review of the site conditions, CEA concluded that the property, while historically wet, was transitioning to an upland community due to the changes in the surrounding landscape caused by the prior 25 years of development. Exs. 9, 10. Part of CEA's reports to DEC consisted of a stormwater review that it performed to demonstrate that the site's watershed had been reduced from approximately 9 acres to ¼ acre representing the site itself. Ex. 22. In this report, CEA concluded that the site was no longer receiving off-site stormwater due to the development of the area including the construction of Bloomingdale Road and various concrete walls that prevented the transfer of water to the site. *Id.*

10. In May and July of 2003, in response to the reports of Carpenter Environmental Associates, Mr. Pane undertook additional investigations of the site. Exs. 46, 47a-e. During the May visit, he noted that there was considerable fill and disturbance on the site and in the area that contains the bed of Radigan Avenue (undeveloped). He also documented a number of wetland species such as red maple, fern, arrowwood, sweetgum, cottonwood, sensitive fern, and tulip. Ex. 46. He observed also the exposure of some tree roots that was an indicator of change in hydrology of the area – wet and then dry conditions. Ex. 46c. On the July visit, Mr. Pane noted an area of standing water that he characterized as a possible vernal pool. TR 372. He noted that there were upland plants associated with the dirt piles that have been excluded from DEC jurisdiction. TR 374, Ex. 48. Mr. Pane observed, like CEA, that water was coming onto the site and he concluded also that the site's soils were retaining water and distributing some of it to the culvert that is described as a concrete box basin with 12 inch pipe on Figure 5 of the CEA report. TR 373, Ex. 47.⁶ This structure is the subject of photograph 5 contained in the March 19, 2002 report of CEA (dated February 17, 2002). Ex. 9.

11. As a result of his findings based upon his May and July visits to the property in 2003, Mr. Pane sent a letter dated May 21, 2004 to Ralph Huddleston, Jr., Senior Vice President of CEA, in which Mr. Pane concluded that the subject property remained freshwater wetland pursuant to Article 24 of the ECL. Ex. 48. Mr. Pane spoke to Mr. Huddleston after he sent him the letter and advised him that the proposal was “not going to get a permit.” TR 375. Mr. Pane explained that though he did observe changes in the site, such as the growth of trees that crowded out the previous wet meadow and the placement of fill material that changed an area to upland, his conclusions were that the property remained wetland. TR 379-382.

12. In March 2006, Quay Consulting, LLC submitted to DEC a new freshwater wetlands permit application on behalf of Mr. Simonelli (the application notes Jean Simonelli, his wife, as the applicant) for one two-family house on the same location. Ex. 6. The footprint of the house

⁶ Exhibit 47 contains Mr. Panes' notes and plant identifications from his July 28, 2003 visit superimposed on a map that was used by CEA and upon which CEA indicated its findings from its October 16, 2002 visit.

is proposed to be 2,700 square feet with an additional 500 square feet for driveways and stairs. The application also proposes a pool, two car garage, drywell, and sidewalks. Ex. 25A. The entire project is located in a portion of the mapped Class I freshwater wetland – Claypit Ponds (AR-7). Ex. 41.

13. Between March 2006 and September 2008, another series of NOIAs and responses were transmitted between the Department staff and the applicant's consultants. Exs. 24-35. By letter dated September 15, 2008, the Department staff issued a notice of complete application (NOCA) to Jean Simonelli. Ex. 36. The NOCA was published in the *Staten Island Advance* on September 23, 2008. Ex. 37. By letter dated March 2, 2010, Mr. Simonelli requested his permit or advice on "how to remove [his] property from wetlands . . ." Ex. 38. By letter dated April 1, 2010, the Department staff denied the Simonelli application. Ex. 4.

14. In February and May 2008, Sandy Chan, another DEC wildlife biologist, visited the Simonelli property in response to the applicant's continued efforts to obtain a permit. Her observations were similar to those of Mr. Pane in 2003. Exs. 53, 54. In February, she noted trees with buttressed roots (red maple and possibly pin oak) and illegal dumping through most of the lots with fill piles at the front of the lots off Bloomingdale Road. Exs. 53, 54, 55a-d. In May, she documented trees with multiple stems and noted that red maple was dominant in the overstory. Exs. 53, 54, 55a-c. She also observed a sparse understory with maple saplings, poison ivy, virginia creeper, sensitive fern, greenbriar, and sassafras seedlings. Ex. 53. Near the area where the neighbor planted a row of arborvitae, she noted black gum had grown on fill mounds. Ex. 53. In the bed of the unpaved Radigan Avenue, Ms. Chan observed sensitive fern, sweet pepperbush, beech and cherry trees, sweetgum, and arrowwood. Ex. 53, 54. Of these, sensitive fern, sweet pepperbush, sweetgum and arrowwood are wetlands species. On either side of the channel that contains the 12 inch pvc pipe (adjacent to the Simonelli property) that drains to a culvert that goes under Bloomingdale Road, she noted viburnum, greenbriar, spicebush, virginia creeper, and red maple trees with multiple stems and buttressed roots. Of these, viburnum, spicebush and the red maple trees are wetland species. Ex. 54. Many of the plants are either in the road bed of Radigan or near the stream channel – areas that are off the Simonelli lots. TR 560. The project would affect these adjacent areas if approved. Ms. Chan observed the red maples dispersed throughout the lots. Exs. 53, 55a-c. She also documented the presence of water draining from the pipe in the channel to the other side of Bloomingdale Road where the main body of AR-7 is located. Ex. 53.

15. The properties surrounding the Simonelli land are developed with housing. Exs. 55a, c. Some of this development was subject to DEC wetlands jurisdiction as the land was situated in the adjacent area of AR-7 but not in the wetland proper. TR 394.

16. The property has changed since the original mapping site visits were performed by DEC staff in the early 1980's. TR 461-462; Ex. 43c. At that time, the property appeared to be a relatively pristine wet meadow with substantial grasses. Ex. 43c. In the more recent site visits, the observations reveal an area of mature trees with little understory, perhaps due to the various disturbances of nearby construction, filling, and dumping. TR 573; Ex. 53. But the lack of understory could also be the result of a mature overstory that shades out the ability of smaller plants to grow. TR 442-443. The applicant has also documented the presence of non-permitted

pipes on the property that carry some kind of discharge. Ex. 10, p. 3, Figure 5, Photo 2. In addition, the site has been used by illegal dumpers. Ex. 53; TR 193.

17. The applicant proposes to maintain trees greater than 6-inch caliper, with 2,260 square feet of the property dedicated for the existing tree and critical root zones. In addition, the applicant proposes a 1,500 square foot wetland planting area comprised of freshwater wetland trees (white [pinus strobus] and tulip [liriodendron tulipifera]); shrubs (arrowwood viburnum [viburnum denotatum], redosier dogwood [cornus stolonifera], red chokeberry [aronia arbutifolia], and American holly [ilex opaca ait.]) totaling 3,760 square feet (0.086 acres/34% of the site) of dedicated open space. Ex. 31.

DISCUSSION

In short, the parties to this dispute do not significantly disagree about the nature of this property. The applicant's consultants do not disagree that the site is a wetland and the staff does not disagree that this site has been partially filled and is subject to dumping. And while the applicant disparages the Department staff's methodologies, I find that the credentials of all the expert witnesses in this proceeding are impressive. Exs. 11, 12, 40, and 52. What distinguishes their positions is the value of the property as a resource and its likely future. The applicant's position is that the site has been substantially encircled by development, illegal filling, illegal discharges, and dumping resulting in a property that is transitioning to upland and fulfills few if any wetland benefits. Although in his testimony, Mr. Taylor noted that the wetland does support some sedimentation control and provides an area of open space. TR 90-91. The staff views the site as changed from a former wet meadow state to a forested wetland, but adds that it still fulfills a number of wetland benefits such as stormwater control, wildlife habitat, sedimentation basin, subsurface water recharge, and open space/aesthetic appreciation. 6 NYCRR 664.3(b)(1), (2), (4), and (8); TR 450-451, 528-530; Staff Reply Br., p. 6.

The applicant argues that in its current state, the site will continue to receive waste and fill and lose all value as a natural resource. The applicant contends that by building a home at this location, the dumping and illegal filling will cease by virtue of the owner's stewardship. TR 109. As proposed, the project will save 57% of the existing trees and will eliminate the illegal drainage while maintaining the culvert that feeds the main part of AR-7 on the opposite side of Bloomingdale Road. TR 109-110. Mr. Simonelli offered to omit the pool and to relocate the house so that it faces Bloomingdale Road to avoid the necessity of opening up the unpaved portion of Radigan Avenue. TR 205-206. The proposal includes the construction of a drywell so that the flow of water onto the site could still be dispersed to groundwater. TR 157. The Simonellis are also offering to plant wetland species to enhance the wetland's current characteristics and provide a more diverse habitat. Ex. 31; TR 110. With respect to the maintenance of the plantings and open space (a total of .086 acres, 34% of the parcel set aside), the applicant is proposing a deed restriction that runs with the land. In her closing memorandum, the applicant stated her willingness to have the plantings monitored and replaced as necessary. Applicant Closing Brief (Br.), p. 29.

The staff's response to the mitigation proposal is that it does not adequately address the destruction of wetland, is a "hodgepodge" of plantings, and will be difficult to maintain, monitor and enforce. Staff's Reply Br., pp. 7-8

Freshwater Wetlands Permitting Standard – 663.5

The standards for issuance of permits for activities in freshwater wetlands are set forth in 6 NYCRR § 663.5. A determination regarding permit issuance must be based first upon a determination of compatibility. The activities proposed by the applicant entail filling and construction of a residence. The chart that sets forth the compatibility of these activities in a freshwater wetland provides that these activities are incompatible with the wetland and its functions and benefits. 6 NYCRR §§ 663.4(20), (42). For activities that are deemed "X" for incompatible in the chart, the compatibility tests are inapplicable. 6 NYCRR § 663.5(d)(2). Instead, the Department must examine whether the project meets the weighing standards for the classification of the wetland that would be affected by the proposed activity. *Id.*

Compelling Economic or Social Need

The property in question is part of AR-7, which has been classified as a Class I freshwater wetland. Ex. 42. A Class I wetland "provides the most critical of the State's wetlands 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. The applicant attempted to undermine the property's standing as part of a Class I wetland by asking the Department witness whether all the characteristics found in AR-7 were found on the Simonelli property. TR 444-455. However, that is not the manner in which wetlands are designated. *See*, 6 NYCRR § 664.5; TR 449; and Ex. 42. In its field observations, staff found certain characteristics and values that led to the classification of the wetland and the entire hydrologically connected area was included in this system. Ex. 42; TR 447. It would be illogical and impossible for the staff to find each characteristic on every inch of a wetland so designated. If that was the test, no wetlands system could be designated as a particular class. The applicant appears to acknowledge the absurdity of this test when counsel notes on p. 26 of the closing brief that "[t]he contention that every inch of mapped wetland in Staten Island is equally valuable, and that every fractional part of AR-7 is critical to New York State's public policy goals of preserving, protecting and conserving freshwater wetlands and the benefits derived from them makes no sense."

With respect to the requirement that the activity fulfills a compelling economic or social need that clearly outweighs the loss of or detriment to the benefit of the wetland, the project is not one that is unavoidable. The need that is satisfied by this proposal is a private one – that of the Simonellis for a home that is located close to their daughter and grandchildren. While this is of importance to them as a family, it does not rise to the level of a social benefit.⁷ The applicant lives in a home on Staten Island near his daughter and while the preference for this family is to build a home in this location that the Simonellis' other daughter could move into, this goal could

⁷ Mr. Simonelli testified that his first consultants led him to believe that the application would be approved and that is what led to his purchase of the property. TR 186.

be attained by other means. And, even if not attained, it is not an activity of “actual necessity”. 6 NYCRR § 663.5(f)(4)(ii). In two recent permit matters decided by the Commissioner, applications to construct private residences in adjacent areas of a Class I freshwater wetland were found not to present “a compelling economic or social need.” See, *Matter of Catherine Norton* (Commissioner’s Decision, 10/21/03); *Matter of Alexander Joachim*, (Commissioner’s Decision, 5/31/07).

In her closing memorandum, the applicant noted that this Department has determined in at least one prior case that if a project is “able to satisfy the weighing standards and entails minor or no adverse impacts to the wetlands and its functions and benefit, the project should not be denied solely on [this needs test].” See, Appendix G to *Matter of the Application of Rampulla Associates*, (Commissioner’s Decision, 11/8/88). However, I do not find that this application satisfies the weighing standards as discussed below and therefore, the requirement of fulfillment of a compelling economic or social need is mandated.

Weighing Standards

The next step in this analysis that is required where the activities identified are deemed incompatible with the standards is to apply the weighing standards set forth in 6 NYCRR § 663.5(e)(2). For wetlands classified as Class I, 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. 6 NYCRR § 663.5(e)(2). In addition, the proposed activity must minimize degradation to, or loss of, any part of the wetland or its adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides. 6 NYCRR § 663.5(e)(2).

Compatibility with Public Health and Welfare

With respect to compatibility with the public health and welfare, this quarter acre is surrounded by development and is presently “orphaned” in the sense that it lacks a viable steward to prevent the illegal dumping, draining, and vectors. While technically the project would fill in more of this wetland, the reality is that this parcel has transitioned from wet meadow to a mature forested wetland area and due to illegal filling and the development on all sides, the site’s wetland attributes are in danger. The applicant proposes to set aside a portion of the small parcel to maintain open space, mature trees, and appropriate wetland plants of a more diverse nature. These measures would appear to provide more protection to the viability of this segment of AR-7. However, as noted by staff in its closing memorandum, there is questionable assurance of how such enhancement would endure. While the parcel is small in comparison to the rest of AR-7, in an urban area like Staten Island even a small area of wetland can provide benefits such as wildlife habitat, aesthetic values, and sedimentation control due to the scarcity open space.⁸ The proposal is compatible with the public health and welfare, but only to the

⁸ See, e.g., *Matter of American Marine Rail, LLC*, (ALJ Ruling on Issues and Party Status (8/25/00), <http://www.dec.ny.gov/hearings/10969.html> (ALJ determined permit application for transfer facility should have been classified as Type I pursuant to SEQRA as it was proposed to be cited near public park in South Bronx – highly urban area with few open space resources).

extent that it would prevent future degradation by illegal dumping and other unpermitted activities and maintain a limited but healthy and more diverse wetland environment.⁹

Practicable Alternative

This project is not the only practicable alternative that could accomplish the applicant's objectives and there are practicable alternatives to building a house in this wetland. The applicant testified that he wished to build his own home as he was a contractor (now retired) and thus, it would be more cost effective and more tailored to his wife's design wishes. TR 198-199. However, there are other lots available in the vicinity and certainly other constructed homes for sale. The applicant currently resides on Staten Island. TR 202. Mr. Simonelli did testify to the considerable financial resources that have been invested in pursuing a permit for construction of a home on this site. TR 193-194. But the Simonellis did not provide specific financial information to establish that this site is the only economically feasible way for them to have a home in this Staten Island community. While Mr. Simonelli testified that "[f]inancially it hurt," he did not provide details supporting a finding that building the house in this site is the only alternative.¹⁰ TR 192-194. Section 663.5(f)(2) of 6 NYCRR defines "[o]nly practicable alternative" in terms of economic or physical feasibility.

Minimization of Degradation

With respect to minimization of degradation, the applicant has proposed a project that limits the development on this small lot so that a significant number of trees are retained and has also offered to "enhance" the wetland with the planting of wetland species. Ex. 31. In her closing brief, the applicant has offered to engage an environmental monitor to certify and report to DEC as to the success of the mitigation project for 5-10 years and require re-planting if plantings die. Applicant's Closing Br., p. 29. And, the applicant has proposed to make these requirements part of the deed so that they run with the land and a new owner would be subject to the requirements. *Id.*

At this time, the site is degraded given the areas of illegal fill, illegal drainage points, and the use of the area as a dump. The construction of a home will bring human activities closer to the wetland; however, at this time, the area is already surrounded by a busy road and other housing and thus, the addition of this one home does not appear to be significant in terms of intrusion. Moreover, the culvert that connects this small area of wetland to the main body of AR-7 under Bloomingdale Road is not maintained and subject to sedimentation. If a permit were issued to the applicant, a condition that enhanced the function of this culvert would be appropriate, if possible.

⁹ In its reply brief, the staff faults the applicant for the degradation by not being adequately vigilant. While an applicant should not be granted a wetlands permit due to actions caused by her own absenteeism or negligence, it is difficult to see in this instance how the various illegal activities could have been prevented without a 24-hour guard in residence.

¹⁰ In fact, Mr. Simonelli testified that he now lives on Staten Island in another residence. TR 202. His other daughter however remains in Brooklyn and the family is seeking to be closer together. TR 202-203. There was no testimony or evidence presented on the daughter's financial condition and whether she had a home to sell that would allow her to purchase one closer to the other members of her family.

The record indicates that a house at this location would require the extension of Radigan Avenue. TR 480. However, the applicant has offered to re-site the home so that it fronts on Bloomingdale Road, eliminating the necessity of development of that area. TR 205. If a permit were issued, that should be a requirement. In addition, Mr. Simonelli offered to exclude the pool from the plans; to minimize degradation of the area, the pool should be eliminated. TR 204, 206.

Given the illegal filling, dumping, and drainage, the project on balance addresses a social need of elimination of the area as a dump and with the possible enhancement of the culvert and planting of diverse wetland species, a potential improvement of the area as wetland, albeit in a smaller area. The siting of this one house would not substantially burden the public systems in the area given the already heavily developed nature of the site. 6 NYCRR § 663.5(f)(3).

The applicant has compared this project to the facts in *Matter of Palmeri*, Executive Deputy Commissioner's Decision (March 26, 2007). In that proceeding involving an application for a tidal wetlands application, there were a number of distinguishing factors in addition to it being an Article 25 application. In that matter, the Department determined that due to conditions at the site, without the development, sedimentation would continue to drain into the wetlands. Moreover, the project was largely in the adjacent area - not the tidal wetland area - and the decision called for more of the development to be moved into the adjacent area.

Mitigation

Section 663.5(g)(1) of 6 NYCRR provides that “[t]he applicant may suggest a proposal to enhance the existing benefit provided by a wetland or to create and maintain new wetland benefits in order to increase the likelihood that a proposed activity will meet the applicable standards for permit issuance.” This regulation sets the standards for acceptable mitigation. It must occur on or in the immediate vicinity of the project. Once the mitigation is completed, the site of the mitigation must be subject to regulation under Article 24 and the mitigation proposal “must provide substantially the same or more benefits that will be lost by the proposed activity.” 6 NYCRR §§ 663.5(g)(1)(i), (ii), (iii). To the extent that the mitigation proposal falls short of compensating for the wetland values lost, “the unmitigated net loss of wetland values must then be weighed according to standards contained in section 663.5 . . .” 6 NYCRR § 663.5(g)(3).

The applicant's proposal calls for the protection of a number of the trees (57% of existing tree credits) on the property as well as the planting of 40 wetland species that would provide more diversity. Ex. 31. According to the DEC *Freshwater Wetlands Regulation Guidelines on Compensatory Mitigation* (http://www.dec.ny.gov/docs/wildlife_pdf/wetlmit.pdf), p. 2, “[m]itigation in the broadest sense is all those actions taken to counter adverse effects of a project.” According to these guidelines, in addition to demonstrating that impacts to a wetland cannot be avoided entirely and that unavoidable impacts have been minimized, “an applicant **must** . . .” “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.” [*emphasis in original*]. This guidance states that compensation should preferably be replacement of the same wetland type that is being lost and that compensatory mitigation should be “on-site” or contiguous to the wetland affected by a project. *Id.*, pp. 4-5. The guidance sets forth a hierarchy of preference for “wetland restoration,

then creation, and finally enhancement.” *Id.*, p. 5. The guidance provides that the mitigation plans should be clear and specific with measurable performance criteria and monitoring provisions as well as guarantees. *Id.*, pp. 6-7. The guidance states that while there are no “mandated ratios for replacing lost wetland acreage,” replacement on at least a one to one ratio is desirable. *Id.*, p. 7.

The applicant has characterized the mitigation proposal as enhancement which the guidance defines as “altering an **existing functional** wetland to increase selected functions. . . . Restoration, in contrast, involves restoring lost or impaired functions in a degraded wetland.” [emphasis in original]. While the Simonelli property may hold a small degraded portion of a wetland, there was no demonstration that AR-7 is degraded as a whole. The applicant’s proposal is not the favored method of wetland mitigation as it does not provide a one to one compensation for what would be lost. It is not clear whether there may be appropriate sites elsewhere to perform mitigation, as apparently the applicant did not explore these options (*see*, Pane Testimony, TR 482-484). Thus, if the Commissioner were to consider granting this permit, it would be advisable to have the applicant explore whether other nearby properties exist that would be more suitable for a mitigation project. In the event that none were available, the Simonellis’ current plan to correct the illegal drainage points, clean up the site including any filled areas that are not part of the development project, retain as many trees as possible, plant appropriate wetland species, and provide a means to enhance the pipeline to the main body of AR-7 could be appropriate. In addition, if possible, the applicant’s plans should be amended so that the driveway is made of a permeable surface.

Due Process

The applicant alleges in the closing memorandum (pp. 42-47) that the Department staff has treated her unfairly because other projects allegedly received preferential treatment. In support of this argument, the applicant cites to sentences in documents that were apparently contained in other permit application files. *See*, references to Omnia application on page 45 of applicant’s closing memorandum. I decline to entertain these arguments as none of these records were part of the hearing exhibits. Therefore, I do not have the ability to examine the entirety of the referenced documents; nor does staff have the ability to present a case in opposition.¹¹ As cited in innumerable wetland matters both tidal and freshwater, each case is decided on its individual merits and it is difficult if not impossible to determine an application’s outcome solely on the facts in another matter. *See, e.g., Rampulla, Commissioner’s Decision* (November 8, 1988).

In *Matter of Haley*, Commissioner’s Decision (February 22, 2010), Commissioner Grannis explained that while each application must be determined on its own merits, the Department would consider evidence of inconsistent treatment in matters of substantially similar

¹¹ In its reply brief, staff does counter the applicant’s arguments regarding other neighboring parcels by contending that these other parcels were not “de-mapped” and nor were wetland boundaries moved as alleged by the applicant but rather, the projects were altered to eliminate development in the wetland. Staff Reply Br., pp. 15-17. In any case, these factual matters were not part of the record and therefore, I am not considering them in making my recommendations.

facts. However, the applicant did not offer to provide such evidence as part of the hearing record. Therefore, I have no basis to evaluate these allegations.

The applicant also cites to a case involving a landowner who sued neighbors for allegedly causing a wet condition on its property due to illegal discharges. The court denied the defendants' motion for summary judgment and ordered a trial. *Pland Realty Corp. v. Hauber et al*, Index No. 11917/02 (Sup. Ct. Richmond Co. 2007). However, I fail to see the relevance of this case other than to note that there, the plaintiff took action to stop the illegal discharges onto its property. Mr. Simonelli testified at the hearing that he did not wish to disturb his neighbors and therefore took no such action. TR 201. Further, if the applicant truly believed that the only basis for the wetland designation are these illegal discharges, one would think she would have made every effort to stop them during all the years that the applications and the demapping request were pending.

As for the applicant's repeated accusations that the staff ignored the Simonellis' application, that is rebutted by the record. In particular, the testimony of Joseph Pane credibly establishes that staff attempted to advise Mr. Simonelli and his consultants of its position repeatedly along with encouragement that other avenues such as an off-site mitigation project be explored, to no avail. TR 423-427, 430-439. In its reply brief, staff lays out the timelines and the various communications made by staff to the applicant with respect to this application – it is apparent that while there were delays, overall, the staff acted in a timely way but not in a manner that was satisfactory to the applicant. Staff Reply Br., pp. 10-15. In addition, as noted by staff in its brief, there was absolutely nothing preventing the applicant from making a five-day letter demand in order to obtain a faster response. ECL § 70-0109(3)(b); 6 NYCRR § 621.10(b). There is no criticism of the applicant(s) intended when I say they have been persistent. But that does not lead to a conclusion that the staff acted in an improper fashion.

ALJ Recommended Permit Conditions

If this project is approved by the Department, I recommend that the Department staff review the wetland plant species proposed by Quay Consulting Ltd. to determine if these species are the most appropriate or if others should be substituted. In addition, the staff and the applicant's consultants should walk the site together to identify specifically which trees will be retained and in which locations suitable plantings will occur. This will have to take place after plans are presented that remove the pool and re-site the home facing Bloomingdale Road so that Radigan Avenue does not have to be extended. If possible, the driveway should be constructed of a permeable material. In addition, based upon those changes, I recommend that the applicant be required to determine if additional wetland footage can be conserved and enhanced both on the property and elsewhere to present a more viable mitigation package. The staff would also have to devise conditions so that the wetland enhancement is properly planned, carried out, and monitored for an appropriate number of years.

As instructed by me, both parties provided some information about restrictive deed covenants in their closing briefs. Staff notes in its closing memorandum at p. 24 that restrictive covenants are only enforceable by the parties to the covenant, citing *Beineke v. Chemical Waste Management of Indiana, LLC*, 868 NE2d 534 (Ind. Ct. App. 2007). In her reply memorandum,

the applicant has suggested that ECL § 71-3605 may provide a useful mechanism to develop an environmental easement for the property that would adequately describe the property and provide for the restrictions that would run with the land and be incorporated into any instruments of conveyance until such time it is extinguished. According to ECL § 71-3605(10), the easement would provide for staff inspections and also enforcement by the grantor, the state or any affected local government against the owner of the property. This law was adopted by the Legislature to further the brownfield programs of the State (*see*, ECL § 71-3601). Therefore, I don't know that it could be applied in these circumstances. I recommend that if the Commissioner decides to grant this permit, this mechanism or a similar one be utilized so that it references the permit conditions, makes the property subject to DEC staff inspections, provides for enforcement by the State, and ensure that these provisions run with the land.

Any such permit should also include conditions that address the illegal discharges as well as proper enhancement and protection of the culvert that feeds into the body of AR-7 to the extent possible.¹²

CONCLUSIONS OF LAW AND RECOMMENDATION

This is a difficult case because the property in question has been surrounded by development leaving it a tiny wetland island in a sea of development and degradation. The need to protect adjacent areas is highlighted in this instance because the buffering effect has been lost to this property due to the concentration of proximate development. The property is still a wetland albeit no longer the wet meadow Mr. Pane found in the 1980's. Also, while there is a documented connection to the main body of AR-7, the continued illegal activities on the site foretell the continued transition of this property to upland.¹³

The requirements in Part 663 as applied to this application reveal that it does not meet all of the factors set forth as weighing standards. In particular, the proposed activity is not the only practical alternative that would accomplish the applicant's objectives, and there are practical alternatives on sites that do not involve disturbance of wetland or its adjacent area. While the applicant proposes a mitigation plan to conserve a portion of the property and plant appropriate wetland species, it is unclear whether these plans would suffice to overcome the loss of wetland and to prevent future degradation.

¹² Although there was hearing testimony about improvement of this link to AR-7(TR 157), it appears that the channel and culvert are not sited on the Simonelli property. Ex. 47, Figure 5 of CEA report. However, there may be means for the applicant to provide an environment that would enhance this outlet. In addition, perhaps the owner of this adjacent property could be enlisted to assist in this effort so as to benefit the stormwater drainage patterns as well as AR-7.

¹³ There was testimony regarding the viability of the placement of a fence to deter trespassers and dumpers. TR 170-171. However, it would appear given the site's location and lack of a steward, a fence may not prevent these activities. TR 201-202.

I find that the permit should not be issued.¹⁴ In the event that the Commissioner disagrees, I recommend that the conditions I discussed above be incorporated into the permit.

¹⁴ At the hearing and in its closing memorandum, the applicant's counsel and consultants stressed the length of time that this application has resided in Region 2. However, as brought out by the testimony of Mr. Pane and others, the staff did respond to the applicant but not in a manner that he found acceptable. This led to the applicant's continued pursuit of the application even after being advised that it would not meet standards in 2003. TR 390. As I indicated at the hearing through my questioning, it would have been preferable if the staff of the Divisions of Fish and Wildlife and Permits were more on the "same page" regarding their responses to the Simonellis by denying the permit earlier. TR 296-297, 390-391. However, I would urge any future reviewer of this application to not be prejudiced by the sole fact that the Simonellis first came before the Department with their initial application in 2000.

Hearing Exhibit List
Matter of Jean Simonelli

- 1A. Notice of Hearing
- 1B. Notice of Hearing – ENB
- 1C. Notice of Hearing w/affidavit of publication – Staten Island Advance
2. Hearing Request – May 13, 2010
3. DEC permit application detail
4. Notice of denial of permit application dated April 1, 2010
5. Letter dated April 29, 2010 from Suzanne M. Avena, Esq. to John Cryan requesting hearing
6. Application dated March 2, 2006
7. 1981 topographical map
8. Aerial photograph (need authentication)
- 8A. Authenticity Certificate
9. CEA report dated March 19, 2002
10. CEA report dated March 25, 2003
11. Resume – John B. Taylor, Jr.
12. Resume – Nicholas A. Mann
13. Permit application submitted in June 2000
14. NOIA dated July 13, 2000
15. Wohl & O’Mara, LLP response to 7/13/00 NOIA dated November 15, 2000
- 15A. June 20, 2000 plan showing proposed storm and sanitary drainage
16. NOIA dated February 28, 2001
17. Letter dated May 17, 2001 from Rocco J. DeFelippis, P.E. to DEC – Harold Dickey w/Authorization
18. Letter dated June 29, 2001 from Rocco J. DeFelippis, P.E. to DEC – Joseph Payne
19. NOIA dated July 27, 2001
20. Letter dated October 17, 2001 from Rocco J. DeFelippis, P.E. to DEC – John Cryan
21. NOIA dated December 19, 2001
22. Letter dated February 5, 2004 from John Simonelli to Commissioner Crotty w/attachments
23. Letter dated March 9, 2004 from John Simonelli to Commissioner Crotty
24. NOIA dated March 17, 2006
25. Response dated August 23, 2006 to 3/17/06 NOIA from John B. Taylor, Jr., Quay Consulting to Harold J. Dickey
- 25A. Plans – Moss & Sayad Architects – 6/19/06
26. NOIA dated September 8, 2006
27. August 23, 2006 letter from Mr. Taylor to Harold Dickey w/date stamp
28. Letter dated June 4, 2007 from Joseph J. Pane to John Simonelli
29. Response to NOIA of 9/8/06 from John B. Taylor, Jr. to Harold Dickey

30. NOIA dated September 7, 2007
31. Response to 9/7/07 NOIA dated October 1, 2007 from Nicholas Mann, Quay Consulting to Harold Dickey
32. NOIA dated October 30, 2007
33. Response to NOIA 10/30/2007 from Nicholas Mann dated March 21, 2008
34. Response to NOIA of 10/30/07 from Nicholas Mann dated April 17, 2008
35. Letter dated September 9, 2008 from Nicholas Mann to Harold Dickey
36. Letter dated September 15, 2008 from Harold Dickey to Jean Simonelli w/Notice of Complete Application
37. Affidavit of Publication of NOCA dated September 23, 2008
38. Letter dated March 2, 2010 from John Simonelli to Harold Dickey
39. Resume of Harold Dickey
40. Resume of Joseph J. Pane
41. Wetlands Map
42. Final Freshwater Wetland Classification - AR – 7 dated August 20, 1987
- 43 A-C. photographs taken by J. Pane – July 22, 1980
- 44A,B. field notes and map by J. Pane – July 22, 1980
- 45A,B. Letter dated July 26, 1994 from Betty Ann Hughes-Davies to Marrazzo and Balachandran
46. hand-drawn map – J. Pane – May 27, 2003 – Simonelli site visit
- 46 A-C. photos by J. Pane – May 27, 2003
47. notations on tax map and field notes
- 47 *A-E* photos by J. Pane – July 28, 2003
48. Letter dated May 21, 2004 from Joseph J. Pane to Ralph Huddleston, Jr.
49. deed dated February 3, 2003
50. deed dated May 16, 2000
51. One-page handwritten note headed “princewood Violation (Mason & Bloomingdale)”
52. Resume of Sam Yee Chan
53. Field notes of Sandy Chan dated 2/28/08
54. Field notes of Sandy Chan dated 5/28/08
- 55A-D. Four photographs
56. Field notes of Christina Dowd dated 2/11/88 and accompanying map