

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

In the Matter

- of -

the Application for a Tidal Wetlands Permit
Pursuant to Article 25 of the Environmental
Conservation Law and Part 661 of Title 6 of
the Official Compilation of Codes, Rules and
Regulations of the State of New York for the
Construction of an Addition to an Existing
Dwelling and Installation of a Sanitary
System at 558 Dune Road, Westhampton, Town of
Southampton, Suffolk County, New York
SCTM # 0900-392-1-10.3,

- by -

STEVEN and BARBARA SUMMER,

Applicants.

DEC Application No. 1-4736-00432/00004

DECISION OF THE ASSISTANT COMMISSIONER

September 3, 2008

DECISION OF THE ASSISTANT COMMISSIONER¹

Steven and Barbara Summer ("Summers" or "applicants"), applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for a tidal wetlands permit pursuant to article 25 of the Environmental Conservation Law ("ECL") and part 661 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Applicants are proposing to construct a two-story addition to their single family dwelling and to install a new sanitary system with a retaining wall and 400 cubic yards of fill ("project") at 558 Dune Road in Westhampton, Town of Southampton, Suffolk County, New York ("site").

The project would be constructed in an adjacent area to a tidal wetland. It is also proximate to Moriches Bay, which has been designated as part of the Long Island South Shore Estuary Reserve. Because the proposed addition to the dwelling and sanitary system fail to meet the setbacks established by the tidal wetland regulations, applicants are requesting a variance from those requirements.

Department staff made a determination to deny the Summers' application. Among the grounds for its determination, Department staff noted that the project would have negative impacts on water quality, would not be compatible with the public health and welfare, would cause an increase in runoff to Moriches Bay, and would destroy the absorption and filtering properties of the buffer area vegetation (see Hearing Exhibit 6).

Following the Summers' request for a hearing, the matter was referred to the Office of Hearings and Mediation Services ("OHMS") and assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger. The attached hearing report of ALJ Goldberger, which recommends denial of the application and variance, is hereby adopted as my decision in this matter, subject to the following comments.

In proceedings conducted pursuant to the Department's Part 624 permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in

¹ By memorandum dated August 21, 2008, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Assistant Commissioner Louis A. Alexander. A copy of the memorandum is being forwarded to the parties together with this Decision.

compliance with all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]). Furthermore, with respect to a variance from the tidal wetlands regulations, the "burden of showing that a variance . . . should be granted [rests] entirely on the applicant" (see 6 NYCRR 661.11[a]).

The New York State Legislature has declared it to be the public policy of the State to preserve and protect tidal wetlands (see ECL 25-0102). The Department's regulations contain the standards that implement this legislative policy (see 6 NYCRR part 661).

The Department shall issue a permit for a proposed regulated activity on an adjacent area to a tidal wetland only if it is determined that the proposed activity:

"(1) is compatible with the public health and welfare;

"(2) complies with the development restrictions contained in section 661.6 of [Part 661];

"(3) will not have an undue adverse impact on the present or potential value of any adjacent or nearby tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity; and

"(4) complies with the use guidelines contained in section 661.5 of this Part" (6 NYCRR 661.9[c]).

As noted, a variance is required because applicants' proposal does not meet the minimum setback requirements established by the development restrictions in the tidal wetland regulations. Specifically, the proposed project does not meet the seventy-five (75) foot setback for structures or the 100 foot setback for on-site septic systems from the most landward edge of a tidal wetland (see, respectively, 6 NYCRR 661.6[a][1] and 661.6[a][2]).

The record demonstrates that the proposed project, by its intrusion into the adjacent area, would have an undue adverse

impact on the present and potential value of the tidal wetland. The values of the adjacent area, the tidal wetland and Moriches Bay are detailed in the record (see, e.g., Hearing Report, at 5-6 [Findings of Fact #3-10]). Applicants' proposal, by locating the new sanitary system closer to the wetland boundary than the existing system and enlarging the current residence, would reduce adjacent area to the tidal wetland and remove currently existing vegetation. As a result, vegetation that protects the wetlands and Moriches Bay from contamination and siltation, provides food and habitat for wildlife, serves as buffer from storm events, and provides open space would be lost (see, e.g., Hearing Transcript at 113-124). Changes in habitat type (from salt-tolerant or salt-dependent species) would also result from the changes in grade associated with the proposed project (see id. at 204-205).

Based on the project's adverse environmental impacts, the Summers' application for a tidal wetlands permit and variance must be denied. In addition, I note that the tidal wetland regulations require that, for "[a]ny substantial increase in surface water runoff to tidal waters classified SA . . . or to any other surface waters which are within 1,000 feet of any SA waters and are adjacent or tributary to such SA waters," stormwater runoff control measures be "designed and constructed to handle the water runoff produced on the project site by a five-year storm" (see 6 NYCRR 661.6[a][8]). For Long Island, a five-year storm would be four inches of rainfall in a twenty-four hour period (see Hearing Transcript, at 132). Moriches Bay is classified as SA waters (see id. at 105).

Department staff in its denial of the permit application stated that the proposed addition, which would add 521 square feet of impervious surface (see Hearing Transcript, at 152-53), "will cause an increase in runoff" which would adversely impact Moriches Bay (see Hearing Exhibit 6, at 1). The current residence which is significantly larger than the proposed addition (see Hearing Exhibits 9b & 17a), lacks any stormwater controls to capture runoff. Although it is a reasonable inference that the existing residence resulted in a substantial increase in surface water runoff, the record does not indicate why it was constructed without any controls (see Hearing Transcript, at 156-57).

Applicants, as part of the proposed project, would include stormwater controls on the proposed addition and also on the existing home, deck, pool deck and driveway. This stormwater design represents an environmental improvement over the current uncontrolled conditions and, if only the addition were considered, would satisfy the five-year storm requirement.

However, if runoff from the entire residence and related structures is considered (and not simply the addition), applicants' proposed stormwater design would only capture the runoff resulting from a two-inch storm.

I concur with the ALJ that "project site" as referenced in the regulations speaks to the entire property, and in this case would include all existing structures and would not be limited to the proposed addition. Applicants' proposal, although adequate to address the surface water runoff for the addition, does not satisfy the regulatory requirements for stormwater controls to address a five-year storm event (that is, a four-inch storm) when all structures on the property are considered.

Based on the record before me, applicants failed to carry their burden of establishing that their proposed project would comply with all applicable laws and regulations administered by the Department and failed to meet the standards required for a variance from the tidal wetland development restrictions set forth in 6 NYCRR 661.6. Accordingly, the application of Steven and Barbara Summer for a tidal wetlands permit and variance is denied.²

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____
Louis A. Alexander,
Assistant Commissioner

Dated: September 3, 2008
Albany, New York

² The ALJ, in her hearing report, makes certain recommendations with respect to possible modifications of applicants' proposal (see Hearing Report, at 21-22). I encourage the parties to give consideration to those recommendations.

TO: Steven and Barbara Summer (Via Certified Mail)
1 Roned Road
Shirley, New York 11967-3044

Linda U. Margolin, Esq. (Via Certified Mail)
Bracken & Margolin, LLP
One Suffolk Square - Suite 300
1601 Veterans Memorial Highway
Islandia, New York 11749-1543

Keri Wilkinson, Esq. (Via First Class Mail)
Assistant Regional Attorney
Region 1
New York State Department
of Environmental Conservation
SUNY at Stony Brook
50 Circle Road
Stony Brook, New York 11790-3409

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

the Application of **STEVEN and BARBARA SUMMER**
for a tidal wetlands permit to construct an addition to
the existing family dwelling and to install a new
sanitary system with a retaining wall at 558 Dune Road,
Westhampton, Town of Southampton, Suffolk County,
SCTM # 0900-392-1-10.3

DEC Project No. 1-4736-00432/00004

HEARING REPORT

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

PROCEEDINGS

Background and Brief Project Description

By joint application dated April 20, 2006, Steven and Barbara Summer, proposed to construct a two story addition to their single family dwelling within sixty-one feet of the tidal wetland boundary and to install a new sanitary system with a retaining wall and 400 cubic yards of fill within fifty-eight feet of the wetland boundary. Hearing Exhibit (Ex.) 19b. The location of this project is 558 Dune Road in Westhampton in the Town of Southampton, Suffolk County, SCTM # 0900-392-1-10.3. The applicants desire to enlarge this home although the number of bedrooms (4) and bathrooms (3 ½) will remain the same.

In order to construct this addition and to install the new septic system, the Summers must obtain a tidal wetlands permit pursuant to New York State Environmental Conservation Law (ECL) Article 25 and Part 661 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR).¹ Because the proposal does not meet the development requirements that require dwellings to be set back at least 75 feet from the tidal wetland boundary [6 NYCRR § 661.6(a)(1)] and require sanitary systems to be set back at least 100 feet from the wetland boundary [661.6(a)(2)], the applicants have requested a variance from these requirements.

Department staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act (SEQRA). Ex. 12.

By letter dated June 22, 2007, New York State Department of Environmental Conservation (DEC or Department) Region 1 Permit Administrator, George W. Hammarth, sent a notice of permit denial in response to the Summers' tidal wetlands permit application. Ex. 6. In response, by letter dated June 27, 2007, Mr. Summer requested a public hearing in accordance with 6 NYCRR § 621.10. Ex. 5.

On March 7, 2008, the Department's Office of Hearings and Mediation Services (OHMS) issued a notice of complete application, legislative public hearing, issues conference and adjudicatory hearing (Ex. 1) that announced a hearing would be

¹ The captions on the staff's closing and reply briefs indicate that this application is also for a protection of waters permit (Article 15 and Part 608 of 6 NYCRR) and a water quality certification. However, there was no information in the hearing record produced by either party regarding these statutory and regulatory provisions.

held on April 8, 2008 at the Westhampton Beach village offices at 165 Mill Road. The OHMS distributed the notice to the applicants' counsel, the Department staff, the adjacent landowners as well as interested state and local officials. The OHMS also published the notice in the on-line *Environmental Notice Bulletin* on March 12, 2008 and the applicants published the notice in the March 14, 2008 edition of *Newsday*. Exs. 2, 3.

The hearing proceeded on the scheduled date. Assistant Regional Attorney Kari Wilkinson represented the DEC Region 1 staff. Linda U. Margolin, Esq. of Bracken & Margolin in Islandia, New York appeared for the applicants.

Legislative Hearing

Because this matter had been the subject of a March 2008 mediation process that was facilitated by Administrative Law Judge Richard Wissler of the OHMS, I asked the parties whether there was any possibility of a resolution without a hearing. Ms. Margolin informed me that the only possible resolution would be a relocation of the addition and the Town of Southampton (Town) would not allow this change. Ms. Margolin provided me with a copy of an environmental analysis performed by the Town of Southampton's Chief Environmental Analyst Marty Shea dated September 3, 2004. Ex. 20. In Mr. Shea's analysis, he recommends that the addition be redesigned (from the original proposal that had the addition on the southerly side of the home) so that it is located on the east side of the residence. DEC staff did not concur with this recommendation. Because the applicants did not wish to return to the Town to discuss this conflict, the parties did not believe that a settlement was possible.

Other than the interested parties to this proceeding, no members of the public were in attendance to give comments.

Issues Conference

I opened the issues conference immediately following the above described discussion. Because no petitions for party status were filed, the issues to be adjudicated were limited to those matters in dispute between the staff and the applicants who are automatically parties to the hearing. 6 NYCRR §§ 624.4(c)(1)(ii); 624.5(a). I summarized the staff's position on the application as set forth in the denial letter of June 22, 2007 (Ex. 6) and inquired as to whether the staff wished to augment this summary. Ms. Wilkinson stated that the staff based its denial on the development restrictions contained in 6 NYCRR

§§ 661.6 (a) (1), (2), (3), and (8). She reiterated that the applicants' proposal did not meet the minimum setback requirements, that there was insufficient distance between the proposed septic system and the seasonal groundwater level, and that the applicants were proposing to employ insufficient stormwater runoff controls. Citing ECL § 3-0301(1)(b), Ms. Wilkinson stressed that the detrimental cumulative impacts of the project dictate that the variance should not be granted. Finally, Assistant Regional Attorney Wilkinson argued that the project did not protect the public health and welfare, would not preserve and protect the tidal wetlands, and therefore failed to meet the requirements necessary to obtain a variance. 6 NYCRR § 661.11(a).

In response, Ms. Margolin explained that there was no quarrel regarding the applicants' failure to meet the setback requirements. However, she disagreed with staff's assessment that the septic system design did not meet the two foot separation requirement. Ms. Margolin pointed to the detail of work on the survey and contended that the proposal called for the subliner to be two feet above groundwater level. Ex. 9b. Ms. Margolin noted that while the house and pool were legally permitted, there were no stormwater controls and the proposal calls for the placement of leaders and gutters on the entire structure that discharge into drywells, including the current residence. Based upon the applicants' plan to install an improved septic system and control the stormwater runoff, Ms. Margolin argued that the proposal meets the standards for a variance. She noted that the Town approved this project in consideration of environmental factors. Ex. 23.

Site Visit

Prior to the commencement of the adjudicatory hearing, the parties agreed with me that a site visit was appropriate. Ms. Margolin and Mr. Summer, Ms. Wilkinson, and Department staff were present. We drove in separate vehicles to the site and walked around the exterior of the house as well as on the common boardwalk that provides a view of the wetlands and Moriches Bay. The Department staff pointed out the various wetland plants as well as a few species of birds that were visible. Mr. Summer provided a directional perspective by noting that the driveway abutting the neighbors' property is towards the south, the house is towards the north, and the proposed addition, septic system and retaining wall would be on the east side. He noted that the house was built 8 years before the Summers moved in and that the 8 houses in this development were all built with driveways encroaching on adjacent landowners' property.

Adjudicatory Hearing

We returned to the Village Hall about 11:30 a.m. and began the hearing after I reviewed our site visit observations on the record. The applicants presented two witnesses, the applicant, Mr. Summer, and Shawn Barron of Suffolk Environmental Consulting. The Department staff called Matthew Richards and Stephanie Larkin, staff biologists. The hearing concluded at approximately 5 p.m.

The transcript was received on April 22, 2008 and I circulated an *errata* sheet on April 24, 2008. As agreed, the parties submitted closing briefs on June 6, 2008 and reply briefs on June 25, 2008.² The receipt of the replies constituted the close of the record.

FINDINGS OF FACT

1. Steve and Barbara Summer own a home, decking, hot tub, pervious gravel driveway, and swimming pool located at 558 Dune Road, Westhampton, Town of Southampton, Suffolk County, New York. This home is located on a common driveway off of Dune Road that is shared by several homeowners in the development known as Hampton Villas. See, map annexed to Ex. 20. The Summers have owned this 30' x 39' house since 1988. Exs. 17a, 19g. The home was built in 1980 by prior landowners. TR 149. In 1990, with DEC approval, the Summers added the pool, pool deck, hot tub, and enclosure. Ex. 17a; TR 150. In the late 1990's, the applicants along with their neighbors (Hampton Villas Association) constructed a shared boardwalk to Moriches Bay pursuant to a DEC permit. Ex. 17a; map annexed to Ex. 20. Currently, the impervious coverage on the upland portion of the Summer lot is 4,448 square feet out of 28,116 square feet - 15.8% of the upland property. Ex. 9b. The proposal increases the coverage to 17.6% of the upland property (4,969 square feet). Ex. 9b; TR 191.

2. The Summers propose to build an attached 798 square foot two story addition on the east side of the residence with a footprint of 588 square feet located within 61 feet of the tidal wetland boundary to the west of the property and to install a new sanitary system with a retaining wall and 400 cubic yards of fill within 58 feet of the wetland boundary to the east and a 75-foot setback from the western tidal wetlands. Exs. 9b, 19b, 20; TR 127-128. Because the proposed addition does not meet the setback

² The briefing schedule set at the conclusion of the hearing was extended by request of the parties to the ALJ.

requirements in 6 NYCRR §§ 661.6(a)(1) and (2), the applicants have requested a variance from these requirements.

Wetland Values

3. This Dune Road community is developed heavily; however, there are large areas of vacant land including a scenic easement between the homes and the tidal wetland boundary and Moriches Bay. Exs. 9b, 22, 25d and 25e; TR 143-147. The tidal wetlands at the site are made up of high marsh and intertidal marsh. There is significant vegetation in the adjacent area on this site. *Frutescens iva* (marsh elder) and *Spartina patens* (salt hay) can be seen on the western side of the Summer property. TR 96; Ex. 25f. A salt pan and salt marsh are located in the eastern wetland and *Spartina patens* and *Distichlis spicata* (spike grass) can be found there. TR 94, Exs. 25d, e. These wetlands to the east are separated from the project site by a common driveway. Ex. 9b; TR 94. On the project site where the seaward most portion of the septic system retaining wall is proposed, *Baccharis halimifolia* (groundsel) grows. TR 95; Ex. 25f.

4. Staff have observed a number of species of birds in the wetlands including Canada geese, oystercatchers, mergansers, black ducks and black-necked stilt. Exs. 25a, b, c; TR 93-94. On the project site, staff has also observed deer hoofprints, a buck rub on the southern portion of the applicants' driveway and duck blinds and gunshells along the boardwalk to the north of the project site. Exs. 25g, h, i; TR 96-97.

5. Moriches Bay is classified as an SA water meaning that it is Saline A providing for primary and secondary contact, commercial fishing, and shellfishing. TR 105. In 1987, the Department of State (DOS) designated the 8,900 acres of the Bay a significant coastal fish and wildlife habitat noting that it is "[o]ne of the largest, protected, shallow, coastal bays in New York States [sic]." In the Coastal Fish & Wildlife Habitat Rating Form, DOS notes that the roseate tern and common tern rely upon the area for nesting and feeding and the area provides habitat for wintering waterfowl (scaup, brant, black ducks, red-breasted mergansers, Canada geese, mallards, common golden-eye, bufflehead, oldsquaw, American wigeon, and canvasback). Ex. 27. The rating form also lists a number of other species that use this coastal bay area such as black skimmers, mallard, gadwall, great black-backed gull, herring gull, willet, clapper rail, fish crow, sharp-tailed sparrow and seaside sparrow. Id. The form notes that the salt marshes are used "extensively" as a feeding area by birds nesting in the area including herons, egrets, and other shorebirds. Id.

6. In addition to the bird life found in and around the Bay, the DOS rating form notes that Moriches Bay is a "productive area for marine finfish, shellfish and other wildlife." DOS attributes this productivity to the salt marshes and tidal flats that surround the Bay. DOS identifies the Bay as a nursery and feeding area for bluefish, winter flounder, summer flounder, tomcod, American eel, Blue claw crab, and forage fish species such as Atlantic silverside, striped killifish, pipefish and sticklebacks. Ex. 27. DOS also notes that the Bay is inhabited by hard clams, bay scallops, and bank mussels. Id. Moriches Bay is used heavily for recreational and commercial fishing as well as commercial shellfishing. Id.

7. Moriches Bay has also been designated part of the Long Island South Shore Estuary Reserve. Executive Law, Article 46; TR 111. The National Marine Fisheries Service has identified 29 federally managed species that use the Bay to sustain population. TR 111. The tidal wetlands provide feeding areas for fish species directly and when the wetlands flood, larger fish species can feed on the smaller ones. TR 112-113. The discharge of pollutants into these wetlands would cause a decrease in marine food production by causing unwanted algae growth that fish do not feed on such as "brown tide." TR 113-114, 118-119.

8. The project site and surrounding area are heavily naturally vegetated, providing a buffer for storm waters. In contrast, hard structures tend to increase the magnitude of storms when stormwaters hit them. The construction of structures in the wetlands and adjacent areas decreases this buffering ability of the wetland. TR 116-118, 195.

9. The undeveloped areas on and around the project site absorb silt and organic matter providing a filter for the Bay. Further development on the applicants' property will decrease the buffering function of the adjacent area. TR 118-122.

10. There is currently year round shellfishing in the adjacent wetlands. The addition of contaminants from septic systems into this environment may degrade these shellfish beds. TR 122-123. A common boardwalk that parallels Moriches Bay behind the homes of the applicants and their neighbors provides a place to observe wildlife and the Bay. Ex. 22. In addition, the naturally vegetated portions of the Summers' property provides open space for wildlife as well as a natural area that is aesthetically pleasing to the community. TR 124. To the extent that development degrades a portion of the surrounding habitat, this experience will be diminished.

Summer Proposal

11. The Summers' proposal will personally benefit the homeowners as it will enlarge the living space but it does not serve any public benefit. TR 125. The purpose is to enlarge the size of the rooms and to add closet space. The Summers desire "more space to spread out" and to allow for accommodations when grandchildren visit. TR 55-56; Ex. 17a. The project does not increase the number of bedrooms and bathrooms. TR 46.

12. The original design proposed by the Summers to the Town of Southampton had the addition on the south side of the home where it would have been largely constructed over the existing driveway. TR 42-43; Ex. 20. After receipt of the Town of Southampton's environmental analysis, the applicants revised their plan to place the addition on the east side. TR 65; Exs. 9b, 20.

13. The toilets in the house use 3-4 gallons per flush and the proposed plumbing would replace these with toilets that use 1.8 gallons per flush. TR 47. Similarly, the showers will have flow restricters installed to decrease the amount of water utilized. TR 47.

14. The applicants propose to replace the current septic system (tank and 1 effluent ring in a mound system) with a septic tank, five effluent rings and three expansion pools contained within a concrete enclosure. TR 48, 50, 54-55, 70, 183; Ex. 9b. The applicants have stated that the system will meet requirements that it be installed at least two feet above groundwater. TR 48; 6 NYCRR § 661.6(a)(3); Summer Reply Br., p. 2. The proposed septic system detail provided in the Summer survey indicates that the septic tank will hold 1,200 gallons with an eight foot diameter and four foot liquid depth. TR 129; Ex. 9b. The outlet elevation described is 6 feet so that the water will reach that level and then drain out the outflow pipes and into the leaching pools. Id. Subtracting the four foot liquid depth that the tank is designed for from this 6 foot elevation leaves an elevation of two feet for the bottom of the inside of the tank. Id. And the tank is constructed with a bottom thickness of four inches - leaving an elevation of 1.7 feet which is below the groundwater elevation of 2.3 feet. Id. Similarly, the calculations with respect to the leaching pool dimensions do not result in a two foot separation from groundwater elevation. TR 130-131; Ex. 9b. The applicant has committed to modify the project to ensure that every component of the proposed septic system will maintain a minimum of two feet of separation from groundwater. TR 179; Summer Br., p. 10; Summer Reply Br., p. 2.

15. The septic tank would be 5 feet from the house and the rings 10 feet from the house. TR 49, 77. The proposed septic system will be 58 feet from the eastern tidal wetland and 75 feet from the western wetland. TR 127-128, 169. The system occupies a horizontal distance of approximately 30 feet. TR 170. The applicant proposes to pump the existing septic system clean and remove it in compliance with Suffolk County Health Department (SCHD) requirements. Ex. 9b. The SCHD has not reviewed the septic system proposal yet as it will only consider applications that DEC has approved. The current system may be partially within the groundwater table. TR 70-75, 178, 184, 189.

16. A properly designed septic system will allow for anerobic digestion of septage that will then flow to leaching pools to oxidize effluent that will discharge harmless by products. One of the purposes of such a system that is separated from the groundwater table by at least two feet is to remove nitrates. The excessive discharge of nitrates causes algae blooms and increases in turbidity. TR 73-75.

17. In addition to bacteria, septic effluent may harbor other contaminants or pathogens such as viruses. TR 179-180. These pathogens require at least 10 feet of soil passage before they are filtered out and made harmless. TR 180. If these pathogens get into the wetlands and waterway, they may contaminate shellfish resulting in the closure of the beds. TR 181. But when a virus is traveling in soil that is comprised of a large proportion of organic material, the viruses will bind to the organic material and entrap the viruses. TR 216. Because the viruses would travel through intertidal marshes that contain a great deal of organic material, the viruses may be so entrapped prior to reaching the water. TR 217.

18. The current home has no gutters or other controls for stormwater runoff from the roof, decking and driveway. TR 51, 75. The addition will add 521 square feet of impervious surface. TR 51, 152. The applicant proposes to add gutters to the entire home (existing residence and the addition) as well as to install 11 drywells to address runoff from house, pool/deck area, and driveway that will have a capacity of 454 cubic feet. TR 52-53, 154. These drywells are designated by "A", "B", and "C" on the survey. Ex. 9b. This stormwater system is engineered for a two-inch rain event. TR 52-53, 75, 155. When looking at the addition alone, the stormwater controls provide sufficient containment for a four-inch rainfall. TR 155, 160-161. The Summers propose to remove a shed that stands currently below the house to house heating/cooling equipment and move it above the 11-foot pilings thereby eliminating one hard structure. TR 195-196.

19. The applicants have also designated a "non-disturbance/non-fertilization buffer" that surrounds the property from the southwesterly boundary to the northeasterly boundary - between the developed portion of the property and the wetland. TR 53-54.

20. The Town of Southampton Town Conservation Board issued a resolution at its meeting on June 22, 2005 approving the issuance of a wetlands permit to the Summers contingent upon the applicants' establishment of the non-disturbance/non-fertilization buffer, submission of revised surveys, installation of leaders and gutters that empty into drywells, and installation of a project-limiting fence. Ex. 23. This resolution was based upon an application that provided for the Summers to move their residence east and to construct the addition in the location of the current residence. Id.; TR 56, 58-59; Ex. 19a. However, because the applicants determined that moving the home would be a greater disturbance than constructing the addition to the east, the Summers are not proposing the scenario described in the resolution. TR 59. Otherwise, the application before the Department is the same as the one that was reviewed by the Town. TR 59.

DISCUSSION

The central issue in this hearing is whether the application meets the requirements set forth in 6 NYCRR 661.11 - Variances.³ The applicants recognize that their application does not conform to the development restrictions set forth in Part 661 as the proposed structure and septic systems do not meet the minimum setback requirements in 6 NYCRR §§ 661.6(a)(1) and (2). See, Summer Br., p. 2. Section 661.11(a) of 6 NYCRR provides in part:

Where there are practical difficulties in the way of carrying out any of the provisions of section 661.6 of this Part or where in the department's judgment the strict application of the provisions of section 661.6 of this

³ Although a written request by the applicants for a variance does not appear in the record before me, the staff's hearing referral to the OHMS references a request for a variance. Ex. 4, Project Description, ¶ 6. In addition, counsel for the applicants made clear at the beginning of the adjudicatory hearing that the Summers were seeking a variance pursuant to 6 NYCRR § 661.11. TR 21-24.

Part would be contrary to the purposes of this Part, the department shall have authority in connection with its review of an application for a permit under this Part to vary or modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, the public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation.

In addition, this regulation requires that the applicant bears the burden of showing that a variance be granted. As part of this burden, the applicant is responsible for identifying the environmental impact reductions and mitigation that would be employed and alternative site possibilities.

In essence, the variance provision echoes the standards set forth in 6 NYCRR § 661.9(c) with respect to requiring the applicant to demonstrate that granting a variance will be compatible with environmental and public health and welfare considerations.

Overview of Testimony

The applicants' position is that the variance should be granted because the environmental improvements - new septic system and stormwater controls - outweigh any negative impact of the addition because the applicants will not be adding more bedrooms or bathrooms that would greatly increase the numbers of people using the house. The Summers maintain that the installation of a new septic system will be of benefit to the environment by resulting in a better quality effluent. Moreover, the applicants contend that the removal of the utility shed, the creation of a non-disturbance/non-fertilizer zone, and the addition of stormwater devices constitute substantial mitigation that offset the further encroachment of the adjacent area. The applicants did not produce testimony to rebut the staff's descriptions of the quality of the wetland and adjacent area and the benefits they afford. Rather, counsel for the applicants challenged Department staff on cross-examination as to the

specific applicability of some of these qualities with respect to the site. Similarly, Ms. Margolin questioned staff's assertions regarding its conclusions with respect to degradation of the wetland and Moriches Bay resulting from the project.

The applicants also presented evidence about the increase in development of the area to indicate that this project would be a negligible contribution. TR 67-70, 146-147. Particularly, Ms. Margolin pointed out the loss of some significant wetlands when a marina was filled in to the west of the project site. Compare, Exs. 21 and 22; TR 144. Mr. Barron also testified that several structures within 500 feet of the Summers' property pre-dated the Tidal Wetlands Act.⁴

The Department staff provided testimony and documentary evidence regarding the various benefits of the project site to the wetlands and Moriches Bay. Ms. Larkin and Mr. Richards gave testimony with respect to the specific plants and wildlife that can be found in the adjacent area and wetlands, the significance of Moriches Bay in terms of fish habitat and as a commercial and recreational fishery, the importance of vegetated areas for flood protection and as pollutant filters, and the significance of this area for recreation and aesthetic values. Mr. Richards also provided a critique of the applicants' proposed septic system.

With respect to the stormwater devices that the applicants propose to add to the entire structure including the existing one, Mr. Richards testified that because it is not designed for a four-inch rainfall event (5-year storm), it is inadequate. 6 NYCRR § 661.6(a)(8); TR 160. The applicants point out that currently there is no stormwater mitigation at this property and that therefore, this proposal will be a substantial improvement. TR 160. Mr. Richards indicated that if the Summers designed the stormwater system to receive a four-inch rain event just for the addition, that would be in compliance with the regulations. TR 160; 6 NYCRR § 661.6(a)(8). A five-year storm is defined as producing four inches of rain within a 24-hour period. TR 132.

Wetland Values

The testimony by staff, the photographs of the site introduced by staff, and our brief site visit all confirm that Moriches Bay and the wetlands that surround this project site are

⁴ The applicants have not stated at the hearing or in their closing briefs that they are seeking an exemption from the wetlands regulations pursuant to 6 NYCRR § 661.6(a)(1).

a rich environment for fish, birds, and other wildlife. While there is also significant development in the vicinity of the project, the vegetation that remains is important in providing a buffer to pollutants that would otherwise enter the Bay and providing important habitat for many species of wildlife including fish when the marshes flood. TR 112-113. While Ms. Margolin questioned the relevance of the Department of State's designation of Moriches Bay as a significant fish and wildlife habitat in 1987, there is absolutely no evidence that the qualities identified are less essential.⁵ Ex. 27.

Ms. Margolin objected to the descriptions of the area and to potential pollutants as being non-specific or speculative. See, e.g., TR 163. For example, Mr. Richards testified regarding the impact of cleaning materials and peeling paint, and other contaminants that result in polluted run-off that can degrade the wetlands and Bay. TR 161-162. Ms. Margolin challenged the staff to identify the specific actions by the applicants that would result in such contamination. TR 161-163. However, the every day activities of people - those currently living in a home and those who may live and visit there in the future - affect the environment. The cleaning of one's home, leaks from one's car, and the use of fertilizers, herbicides, pesticides can and do contribute to the impacts described by staff. TR 202. As noted by Mr. Richards during his cross-examination by the applicants' counsel and in Ms. Margolin's closing brief, DEC does not regulate the number of people that reside in or use a residence. TR 173; Summer Br., p. 5. The practicality of enforcement of measures such as no-fertilizer zones is questionable. Rather, regulations are based upon the general evidence of the impacts from human activities. Accordingly, the Department has established setbacks to minimize these impacts.

Mr. Richards testified to the value of the project site vegetation that serves to filter contaminants as well as buffer during storm events. TR 117-122. He also identified the adjacent wetlands as certified for shell fishing - an activity that could be threatened through an increase of contaminants entering the waterway. TR 122-123.

⁵ In the Town of Southampton's Department of Land Management's Environmental Division's review of the project, Mr. Shea notes the Department of State's designation as well as Moriches Bay's inclusion within the Long Island South Shore Estuary Reserve. Ex. 20.

Septic System

Sections 661.6(a)(2) and (3) of 6 NYCRR require that on-site sewage disposal systems be placed at least 100 feet landward from the tidal wetland boundary and that there be a minimum of two feet of soil between the bottom of the system and groundwater. The applicants' proposed septic system will include a septic tank and six leaching rings and three expansion pools with the nearest septic cesspool ring 58 feet from the eastern tidal wetland boundary.⁶ For the wetland boundary to the west, the nearest cesspool ring would be 88 feet. The septic tank has a proposed setback of 75 feet from the western tidal wetland boundary and an 80 foot setback from the eastern tidal wetland boundary. TR 127-128, 169; Ex. 9b. The system occupies about 30 feet horizontally. TR 170. As described previously, the septic system detail reveals that there will not be 2 feet of groundwater separation.

The applicants presented testimony by Mr. Barron, an environmental analyst (not a sanitary engineer as noted by staff in its reply brief), that the system would be an improvement over the current mounded one. TR 71-77. However, Mr. Richards demonstrated that the plans provided by the applicant indicate that the septic system would not meet the two foot separation required by the regulations. TR 129-131, 182-184; 6 NYCRR § 661.6(a)(3). Mr. Barron did not rebut the specific critique that Mr. Richards provided with respect to the calculations on the survey not meeting the applicants' contention about meeting groundwater separation with the new system. TR 70-75. The applicants are willing to commit to modify the project to ensure that the new system would have a two foot separation to groundwater. TR 178-179; Summer Br., p. 10; Summer Reply Br., p. 2.

While a new system would seem an improvement, Mr. Richards testified that the proposed system would be closer to the wetlands than the existing one. TR 170, 202. Staff had offered to applicants the alternative of replacement of the septic system without the addition and Mr. Richards noted that this suggestion

⁶ The applicants' closing brief reveals a discrepancy regarding whether the cesspool ring is 58 feet from the eastern or western tidal wetland boundary. Applicants' Br., p. 2. If there is any dispute over this issue, it was not a subject of any testimony. In any case, as acknowledged by the applicants and staff, the proposal does not meet any setback requirements contained in Part 661. Applicants' Br., p. 2; Staff's Br., p. 10.

was based upon placement of a new system in the vicinity of the old one. TR 201-202; Ex. 10. The placement of a new system would likely not fit into the footprint of the existing one due to the inclusion of a multi-ring system. TR 211. But Mr. Richards noted that to the extent that part of the new system was placed in the old system's footprint, that area remains unchanged. TR 213. Both parties conceded that the proposed septic system will result in a loss of vegetative cover. TR 194-195. Mr. Richards testified that if an alternative septic system was approved by the Department, the staff would likely require replanting with native species as mitigation. TR 197-198. But due to the fact that the planting substrate will be altered, the plant species will change from those species that are salt tolerant to those that do not have a dependence on salt. TR 204-205.

Mr. Richards also testified that septic effluent contains pathogens including viruses that can elude destruction by aerobic digestion that septic systems afford and that two feet of separation to groundwater, assuming that the applicants' system provided that separation, would still be inadequate to address this problem. TR 179-181. However, Mr. Barron responded convincingly with respect to the difficulty that virus pathogens would have to survive the heavy organic composition of the surrounding wetland soils. TR 216-217.

As a result of the testimony, there was no definitive evidence of the condition of the current septic system. TR 176. This is in contrast to one of the cases that the applicants have cited in their closing brief - Matter of Hanrahan, 2006 WL 1381632 (Commissioner's Decision, 5/16/06). In Hanrahan, the evidence which included testimony from a member of the Suffolk County Health Department, revealed that the existing septic system was failing.⁷

In order for the Department to approve the applicants' replacement of that system it would be necessary for the proposal to be redrawn in order to address the groundwater separation issue. But as currently proposed, apart from the groundwater separation issue, the proximity of the proposed system would present additional impacts on the adjacent area and wetlands by destroying the vegetation that currently exists and potentially introducing contaminants into the wetlands.

⁷ In Hanrahan, as noted by staff in its reply brief, the project consisted of a second story addition on the existing structural footprint as well as mitigation measures.

Stormwater Controls

For "[a]ny substantial increase in surface water runoff to tidal waters . . .", the regulations require stormwater runoff control measures "designed and constructed to handle the water runoff produced on the project site by a five-year storm." 6 NYCRR § 661.6(a)(8). The applicants' proposal results in the addition of approximately 521 square feet of impervious surface. Ex. 9b. Currently, the Summers' residence does not have any stormwater controls such as leaders, gutters or retention basins that would capture runoff. TR 51, 75. The applicants propose to include such controls not only on the addition but on the existing home, deck, pool deck and driveway. Ex. 9b. The applicants acknowledge that the stormwater system is designed to capture the runoff resulting from a two-inch storm. TR 52, 75-76, 80. Mr. Barron testified that currently there is no evidence of erosion on the property and therefore, this proposed system should eliminate any potential for it. TR 78.

It was the position of Mr. Richards that this stormwater proposal does not meet the regulatory requirements because the design is not meant to address the five-year storm event for the entire structure including the existing one. TR 131-132, 151-160, 206-209.

Mr. Richards acknowledged that if the applicants were to limit their proposed system to address only the addition, they would be in compliance with the regulations. TR 160. What the applicants find perplexing about this position is that the current structure has no stormwater controls and therefore, it would appear that the proposal would not only comply with the regulations with respect to the addition but would also be an improvement for the entire site. TR 78.

The regulations are not entirely clear as applied to these circumstances. While the trigger for the stormwater controls is "any substantial increase", the provision speaks to the "project site." In this case, the project site would appear to be the Summers' entire residence and related structures. In that case, the proposal does not meet the regulatory standard of controls to address a five-year storm.

Mitigation

The position of the applicants is that their proposal should be accepted because it will result in benefits to the environment. The Summers maintain that the new septic system will result in a better quality effluent. TR 73-74. In addition, they propose a "non-disturbance/non-fertilization

buffer on the northern and western portion of their property and include this as a deed restriction in order to maintain native plantings and minimize contamination entering the wetland. Ex. 9b; TR 53-54. As noted, the current home has no stormwater controls and the applicants are proposing to install such controls on the entire home in addition to the residence. TR 75-76. The applicants have stated their intention to move the heating/cooling shed above the pilings that support the house so that structure will no longer have an impact with respect to wave energy. TR 135. Finally, the applicants propose a project-limiting fence to ensure that construction is maintained within the permitted area of the site. TR 134.

Staff disagrees with this assessment because it concludes that these mitigation measures offered by the applicants will not overcome the intrusion of the addition into the adjacent area resulting in the destruction of vegetation that serves to protect the wetlands and Bay from contamination and siltation; provides food and habitat for wildlife; provides buffer from storm events; and provides important open space that serves an aesthetic function. TR 133-135. Specifically, Mr. Richards noted that the septic system will be located closer to the wetlands, does not meet the groundwater separation requirements in the regulations, and may not be an improvement over the current system. TR 134. 181-182. He also testified that the proposed stormwater control system does not meet the requirements in 6 NYCRR § 661.6(a)(8). TR 135. With respect to the non disturbance area, Mr. Richards stated that this area is already a buffer area and thus the proposal offers no additional benefits. TR 135. As for moving the heating/cooling shed, Mr. Richards remarked that this area of the property is already developed and that moving this shed is most likely required under FEMA regulations. Id. Because a project limiting fence is a standard condition of wetland permits, he did not find this to be a mitigation measure. TR 134.

Mr. Richards also testified that the applicants did not provide a discussion of site alternatives pursuant to 6 NYCRR § 661.11(a). TR 135-136.

Section 661.11 specifically requires that applicants volunteer the mitigation measures they will employ as part of their application for a variance. Section 661.9(e) of 6 NYCRR provides that the Department, in determining whether an application conforms to the standards for issuance of tidal wetlands permits, may consider ". . . any proposal made by the applicant in his application to enhance the existing values served by a wetland on or in the vicinity of the site of the proposed regulated activity or to create and sustain new wetland

values in or in the vicinity of the site of the proposed regulated activity . . ." While this section is not specifically identified as defining "mitigation", it tracks the language in the freshwater wetland regulations (6 NYCRR § 663.5(g) entitled *Mitigation of impacts*.

The applicants have put forward their new septic system as the key feature of their mitigation proposal. The problem however with concluding that this would be a benefit or enhancement to the surrounding wetlands is that there was no proof produced at the hearing to indicate that the current mounded system is not working properly. Moreover, the proposed system would be placed closer to the wetlands. Therefore, even assuming that the new system, due to its updated construction, was superior, it may transport pollutants more readily into the environment due to its greater proximity to the wetlands. As noted by the Department staff in Ms. Gerbino's letter of March 7, 2007, an upgraded septic system that occupies the area in the vicinity of the current system and maximizes the setbacks to the wetlands is an alternative. Ex. 10; TR 168.

With respect to the other features of the project that the applicants identify as mitigation measures, the staff has aptly pointed to their deficiencies. The non-fertilization/non-disturbance area is already a buffer area, the removal of the shed will provide minimal improvements in terms of decreasing the hard structures, the stormwater system does not meet the regulatory requirements, and the project limiting fence is a standard feature of DEC wetland permits. Thus, none of these measures amount to an enhancement of the wetland values that would mitigate the impacts of the disturbance that the applicants' project would cause by the construction of the addition and septic system in the adjacent area.

The applicants cite to Matter of Palmeri, 2007 WL 1610488 (Acting Executive Deputy Commissioner's Decision, 3/26/07) in support of their argument that adequate mitigation measures should result in a variance. However, in contrast to the facts present in this matter, in Palmeri, the ALJ and Deputy Commissioner found that the site had already been substantially degraded, did "not serve to enhance wetland values," and the proposed project would in fact protect the tidal wetland from further siltation.

As for alternatives, we started the adjudicatory hearing with a discussion that revealed that the applicants' original design for the addition had it placed on the south end of the current residence where the driveway is now sited. TR 9. As a result of the Town of Southampton's (Department of Land

Management - Environment Division) analysis that the addition should be "redesigned to provide a greater setback from wetlands . . ." the Summers moved the addition to the east side of the residence. Ex. 20; TR 9-10. When I asked whether the parties would consider a meeting between Department staff, the applicant and the Town of Southampton personnel, Ms. Margolin explained that her clients did not wish to return to the Town based upon the lengthy time it had taken to get approvals there. TR 10-15. As noted by the applicants' counsel, this site is very limited given the small amount of space (155-169 feet) between the two wetlands. TR 13, 166. While the applicants state in their reply brief that the Town has already rejected the placement of the addition in any other location than where it has approved it, the Town did not have the benefit of the Department's input at the time of its consideration. It is still possible that the option of moving the addition could be reconsidered among the various interested parties.

"Average Setbacks" and Jurisdiction

Although Ms. Margolin began the applicants' case by acknowledging the fact that the Summers' application does not meet the permit restrictions and requires a variance, in reviewing the transcript it appears that one of the applicants' arguments is that they are situated to take advantage of the "average setback" provisions in 6 NYCRR § 661.6(a)(1).⁸ This section provides that "no person shall undertake any new regulated activity on any tidal wetland or on any adjacent area except in compliance with the following development restrictions:

(1) . . . Further provided, where numerous and substantially all structures which are (i) of the type proposed by the applicant, (ii) lawfully existing on August 20, 1977, and (iii) within 500 feet of the subject property, are located closer to the subject tidal wetland than the minimum setback required by this paragraph, placement of a structure as close as the average setback of these existing structures from the subject tidal wetland shall fulfill the requirements of this paragraph."

⁸ Ms. Margolin did not cite to this provision in the hearing. Because she made inquiries of Mr. Barron with respect to pre-1976 structures within 500 feet of the Summer property, I concluded that she meant to invoke this regulation.

At the hearing, Mr. Barron testified regarding the 1976 aerial black and white photograph (the same photograph that serves as the basis of the tidal wetlands map 694-516 - Ex. 7a) of the vicinity of the applicants' home.⁹ Ex. 21. Although this photograph predates the applicants' construction of their home, Mr. Barron noted the current location of the home on the photograph with a yellow highlighter. Id.; TR 66, 68. As noted above, Mr. Barron described one structure to the southeast of the property and one to the west. TR 67. In addition, Mr. Barron described development on the south side of Dune Road. TR 67. He also noted that this development is all about zero to ten feet from the wetland boundary. TR 67. In response to Ms. Margolin's question regarding the distance between these structures and the Summer property, Mr. Barron stated that almost all of the structures "would appear to be within 500 feet."

Based upon this testimony, it appears that the applicants are attempting to make the case that the "average setback" provisions in 6 NYCRR § 661.6(a)(1) apply. I do not make such a finding. First, a review of the map presented reveals only one house and the old motel that Mr. Barron described that lie closer to the wetland to the west of the Summer location. The development to the south of Dune Road lies in an entirely different area than the wetlands which are adjacent to the Summer home. Thus, the two structures identified do not constitute "numerous and substantially all structures . . ."

This provision was intended to apply when an applicant's lot is situated in a vicinity where there are a group of homes (pre-dating the tidal wetlands law) that do not comply with the current wetland provisions. In such instances, a strict application of the regulations would result in a setback that is completely out of conformity with this other development. See, e.g., Matter of Gazza (Rulings of ALJ Bentley, 1/30/91) (tidal wetlands permit application in which Department staff provides an analysis for application of a § 661.6(a)(1) setback that requires the pre-1977 structures to be of the same type as proposed by the applicant, numerous, and substantially all closer to the subject tidal wetland than the required setback). That is not the case here. The Summer residence is in keeping with the other homes nearby - they were all part of the post-jurisdictional Hampton Villas development and have very similar setbacks. Accordingly, I do not find that this exemption is applicable.

⁹ Ms. Larkin and Mr. Richards agreed with Mr. Barron's identification of the location of the Summers' residence. TR 89, 104; Exs. 21, 22.

In the hearing referral that I received on this application, the Department staff indicated that "[a]pplicant requested a jurisdictional determination based on the existence of a substantial structure (paved road) constructed prior to August 20, 1977, which is greater than 100 ft. in length, and has remained functional." Ex. 4. This reference is to the definition of adjacent area contained in 6 NYCRR § 661.4(b)(1)(ii). The applicants did not present any testimony or evidence at the hearing with respect to this specific claim nor did they address it in their briefs. Department staff maintained in the same hearing referral that, "[n]either the dwelling nor the paved road is shown on Tidal Wetland Map #694-516; therefore, the subject property is within tidal wetland jurisdiction." Id. My review of the tidal wetlands map reveals no such road other than a faint line that appears to have been some kind of dirt two-track. Exs. 7a; 21. Accordingly, there is no jurisdictional issue with respect to the alleged paved road.

CONCLUSION

The applicants have failed to demonstrate that the proposed project warrants a variance from the development restrictions contained in 6 NYCRR § 661.6. The project, if permitted, would diminish the essential adjacent area available to protect the tidal wetlands and Moriches Bay. As stated above, the removal of adjacent area would result in an increase of pollutants to the Bay and wetlands that currently provide year round shellfishing, a diminished wildlife habitat, a loss of vegetation that buffers during storm surges, and a loss of open space that provides important aesthetic values in the community. Thus, it fails to meet the standards set forth in 6 NYCRR § 661.11(a) - in terms of conserving wetland attributes and in ensuring that ". . . public safety and welfare are secured and substantial justice done."

The applicants objected to the testimony provided by staff with respect to these concerns by contending that it was not specific enough to identify the Summers' project as a cause of these potential impacts. However, as noted by staff, the cumulative loss of adjacent area and wetlands lead to these results. As cited to by Ms. Wilkinson, ECL § 3-0301(1)(b) specifically provides the Department with the directive to:

"Promote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enchancement [sic], provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the

cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion;" [emphasis added].

The applicants correctly pointed to the influx of development in the vicinity of the project since 1976. Hampton Villas, the subdivision that the subject site is located in, constitutes part of that trend. The Tidal Wetlands Act and Part 661 strike a balance between allowing development and limiting it so that the wetlands and Bay can continue to function. This application goes beyond that tipping point in seeking to further encroach on the limited vegetated adjacent areas that remain.

As agreed by all, the applicants' proposal fails to meet the development restrictions in 6 NYCRR § 661.6. Moreover, the actions that the applicants identify as mitigation measures do not serve to enhance the wetlands. Rather, the project would be a detriment to the wetlands by reducing the available vegetated area that currently serves to protect it and by moving structures including a septic system, closer to these fragile systems.

I do not find the existence of "numerous and substantially all structures" within 500 feet of the Summers' residence that predated the Wetlands Act and were located closer to the subject wetland than now permitted. Therefore, the Summers' application is not exempt from the development restrictions pursuant to 6 NYCRR § 661.6(a)(1). Nor is there any evidence of a pre-existing "functional and substantial" road that would undermine the Department's adjacent area jurisdiction pursuant to 6 NYCRR § 661.4(b)(1)(ii).

As noted above, it is possible that a redesign of the project may lessen these impacts in a manner that is acceptable; however, this will necessitate the applicants' involvement of the Town. In any case, if the Summers wish to upgrade the septic system without the addition, the Department staff has indicated its willingness to approve a correctly sited project.

RECOMMENDATIONS

Based upon the foregoing, I recommend that the application for a tidal wetlands permit and variance be denied. If the applicants reconsider their decision not to return to the Town of Southampton, I encourage the Department staff to work with the Town and applicants to discern whether a redesign of the addition that is compatible with Part 661 is possible. And, in the event

that the applicants wish to consider the installation of an upgraded septic system without the addition, I recommend that the Department staff work with the Summers to expedite such application.

Albany, New York
August 13, 2008