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
to Develop Property on Westminster Road
in Water Mill, Town of Southampton,
Suffolk County,

– by –

DENIS AND CAROL KELLEHER

Application No. 1-4736-06413/00001

DECISION OF THE ASSISTANT COMMISSIONER

December 24, 2008

DECISION OF THE ASSISTANT COMMISSIONER[1]

Denis and Carol Kelleher ("applicants" or "Kellehers") filed an application with the New York State Department of Environmental Conservation ("Department") for a tidal wetlands permit to construct a two-story, single-family dwelling with an on-site waste water treatment system on a parcel they own on Westminster Road in Water Mill, Town of Southampton, Suffolk County ("project").

In conjunction with their permit application, applicants request variances from two development restrictions contained in section 661.6(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), specifically:

(1) the restriction in 6 NYCRR 661.6(a)(1) requiring that principal buildings be set back at least 75 feet landward from the most landward edge of any tidal wetland, in that the residence would be as close as 33 feet from the boundary of a tidal wetland associated with Calf Creek, a tributary of Mecox Bay; and

(2) the restriction in 6 NYCRR 661.6(a)(2) requiring that any on-site sewage disposal system be set back at least 100 feet landward from the most landward edge of any tidal wetland, in that the Kellehers' system would be as close as 44 feet from the tidal wetland boundary.

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached hearing report. The ALJ recommends that the permit application, including the requested variances, be denied. I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

The Kellehers have the burden of proof to demonstrate that their project would be in compliance with the provisions governing issuance of a tidal wetlands permit (see 6 NYCRR 624.9[b]), as well as the burden of showing that a variance from any of the relevant development restrictions should be granted (see 6 NYCRR 661.11[a]).

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[1] By memorandum dated November 24, 2008, Commissioner Alexander B. Grannis delegated his decision making authority in this matter to Assistant Commissioner for Hearings and Mediation Services Louis A. Alexander. A copy of this memorandum is being forwarded to the parties in this proceeding, together with the Decision.

The Kellehers have failed to meet these burdens. As discussed in the ALJ's hearing report, the project would not be compatible with the public health and welfare (see 6 NYCRR 661.9[c][1]), given, in part, the risk of shellfish contamination, and would have an undue adverse impact on the values of the adjacent tidal wetland (6 NYCRR 661.9[c][3]), particularly those values for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, and recreational fishing.

Both the proposed residence and the sewage disposal system are not set back sufficiently from the wetland to meet the development restrictions at 6 NYCRR 661.6(a)(1) and (2). Although the Kellehers demonstrated that practical difficulties exist in complying with these development restrictions, granting the requested variances would have an undue adverse impact on wetland values.

In addition, this project must be denied on the basis of the same impacts that support the denial of the variances. An additional ground for permit denial is the project's incompatibility with public health and welfare, because, as Department staff testified, the pathogens and toxins associated with the septic system could be expected to impact water quality, thereby affecting shellfishing, crabbing, clamming and fishing in the creek and, by extension, the bay to which it is connected.

At the issues conference, Department staff proposed a new objection to permit issuance: an alleged failure of the project to comply with a development restriction at 6 NYCRR 661.6(a)(8), which requires that runoff control measures, including dry wells, be designed and constructed to handle the runoff produced on a project site by a five-year storm ("runoff control measures"). The Kellehers objected to this as an issue for adjudication because it was raised for the first time at the issues conference, with no prior notice so they could develop a response. Department staff stated at the issues conference that it had not identified the issue until the day before the hearing, while reviewing the Kellehers' dry well design calculations.

Although the ALJ ultimately ruled that the issue be heard, he noted that he shared the Kellehers' frustration that staff's review of the application had not been careful enough to identify the issue sooner. The hearing then proceeded on all issues identified through staff's objections to permit issuance, with the Kellehers offering testimony to show that their dry well is adequately designed for its intended purpose, which is to handle

runoff from the roof of their proposed house. The ALJ's hearing report draws no conclusions about runoff control measures, because, as the ALJ explains, the record was insufficiently developed by the parties.

I share the concern that this issue of runoff control measures was not raised until the day of the issues conference. Department staff issued its notice of permit denial to applicants by its letter dated August 29, 2006. No mention of deficiencies in runoff control measures was made at any time prior to the issues conference (see Hearing Transcript, at 28, 29-30, 39-40, 42). Why dry well design calculations were not examined during the review of the permit application or at any time in the two years between Department staff's notice of denial and the day before the hearing is unclear.

Where Department staff identifies an additional ground for permit denial, it must immediately notify an applicant to avoid the kind of surprise that occurred in this proceeding. An applicant is entitled to know the grounds upon which its permit application is denied so that, if it seeks a hearing on the denial, it is able to prepare for that hearing including the identification and preparation of witnesses, as well as to consider appropriate modification or mitigation to the project that may address the concern.

Where Department staff identifies a new ground for denial of a permit application following issuance of a denial letter, Department staff must also provide a reasoned explanation regarding why that ground was not identified at an earlier date. Absent such an explanation, it would be an appropriate exercise of discretion by the ALJ to exclude consideration of a newly raised ground for permit denial.

Although the hearing process is intended to address all legitimate environmental concerns, Department staff has an obligation to identify issues upon which its denial is based in a timely fashion to avoid creating unfairness in the hearing context. As noted, however, in this matter the issue of runoff control measures did not serve as a basis for the ALJ's recommendation for permit application denial.

Based on the record of this proceeding and in consideration of the other issues addressed in the ALJ's hearing report, the Kellehers' application for a tidal wetlands permit, and the requested variances, is denied.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Louis A. Alexander
Assistant Commissioner

Dated: December 24, 2008
Albany, New York

To: Denis & Carol Kelleher (Via Certified Mail)
112 Circle Drive
Staten Island, NY 10304

Stephen R. Angel, Esq. (Via Certified Mail)
Esseks, Hefter & Angel, LLP
108 East Main St.
P. O. Box 279
Riverhead, NY 11901-0279

Susan Schindler, Esq. (Via Intra-Agency Mail)
NYS Department of
Environmental Conservation
Region 1 Office
SUNY at Stony Brook
50 Circle Rd.
Stony Brook, NY 11790-3409

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

In the Matter

- of -

the Application of **DENIS AND CAROL KELLEHER** for a tidal wetlands permit to develop property on Westminster Road in Water Mill, Town of Southampton, Suffolk County

Application No. 1-4736-06413/00001

HEARING REPORT

- by -

/s/
Edward Buhrmaster
Administrative Law Judge

October 31, 2008

PROCEEDINGS

Background and Brief Project Description

Denis and Carol Kelleher propose to construct a two-story, single-family dwelling with an on-site waste water treatment system on a 17,334 square-foot parcel they own on Westminster Road in Water Mill, Town of Southampton, Suffolk County.

To move ahead with the project, the Kellehers request a tidal wetlands permit pursuant to Environmental Conservation Law ("ECL") Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). In conjunction with their permit application, the Kellehers request variances from two development restrictions contained in 6 NYCRR 661.6(a):

(1) a restriction in 6 NYCRR 661.6(a)(1) requiring that principal buildings be set back at least 75 feet landward from the most landward edge of any tidal wetland, in that the residence would be as close as 33 feet from the boundary of a tidal wetland associated with Calf Creek, a tributary of Mecox Bay; and

(2) a restriction in 6 NYCRR 661.6(a)(2) requiring that any on-site sewage disposal system be set back at least 100 feet landward from the most landward edge of any tidal wetland, in that the Kellehers' system would be as close as 44 feet from the tidal wetland boundary.

In accordance with 6 NYCRR 617.5(c)(9), Department of Environmental Conservation ("DEC") Staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act because it involves construction of a single-family residence on an approved lot, along with installation of a septic system. DEC Staff deemed the application complete pursuant to 6 NYCRR Part 621 on March 17, 2005, and issued a notice of permit denial (Exhibit No. 6) on August 29, 2006. The Kellehers, by their attorney, requested a hearing by letter dated September 22, 2006 (Exhibit No. 7), and that request, with supporting documents, was forwarded to DEC's Office of Hearings and Mediation Services ("OHMS"), where it was received on November 6, 2007.

This matter was initially assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick, and was later reassigned to ALJ Richard Wissler for a conference that was held on May 7, 2008, at DEC's Region 1 office in Stony Brook. On May 19, 2008, the matter was reassigned to me for the purpose of conducting a hearing. I had a conference call with the parties' counsel on

May 23, during which the dates and location of the hearing were established.

On June 11, 2008, James T. McClymonds, DEC's chief administrative law judge, issued a combined notice of complete application and notice of public hearing (Exhibit No. 1). It was published as a legal notice in the Southampton Press, Eastern Edition, on June 19, 2008 (see affidavit of publication, Exhibit No. 2) and also appeared in DEC's Environmental Notice Bulletin on June 18, 2008 (as shown in Exhibit No. 3). The notice was released to the parties' counsel under a cover letter (Exhibit No. 4) confirming the hearing arrangements, and was also circulated to other state agencies, and to relevant local officials, on a distribution list prepared by OHMS (Exhibit No. 5).

As announced in the notice, the hearing went forward on July 15 and 16, 2008, at the Southampton Town Hall, 116 Hampton Road, Southampton, New York.

DEC Staff appeared by Susan Schindler, Esq., assistant regional attorney at DEC's Region 1 office in Stony Brook, New York.

The Kellehers appeared by Stephen R. Angel, Esq., of Esseks, Hefter & Angel, LLP, in Riverhead, New York.

Legislative Hearing

The hearing notice provided for written and oral public comments on the project application. No written comments were provided before or at the hearing, and no one appeared at the hearing to offer oral comments.

Issues Conference

The hearing notice provided an opportunity for persons and organizations to make written filings for party status, and to propose issues for adjudication with regard to the permit application. No filings were received by the deadline set in the hearing notice, or subsequently. As a result, the only participants at the hearing were the Kellehers and DEC Staff, and the only issues that were identified involved DEC Staff's bases for denying the permit application.

DEC Staff's bases for permit denial were stated initially in its letter of August 29, 2006 (Exhibit No. 6). However, as Staff counsel acknowledged when the hearing notice was prepared,

that letter contained erroneous references to the standards at 6 NYCRR 661.9(b), concerning permits for proposed regulated activities in a tidal wetland, when in fact all the regulated activities would occur in the area adjacent to a wetland, as to which the standards at 661.9(c) apply. Also as acknowledged by Staff counsel, the hearing referral, though not the denial notice itself, stated erroneously that the project required a variance from a minimum lot size requirement at 6 NYCRR 661.6(a)(5)(ii), when in fact the project is exempt from that requirement pursuant to 6 NYCRR 661.6(b).

The hearing notice, as issued by Judge McClymonds, identified DEC Staff's bases for permit denial as specified by Staff at the time the notice was prepared. At the issues conference, however, Staff added one new objection to permit issuance: an alleged failure to comply with a development restriction at 6 NYCRR 661.6(a)(8) which requires that runoff control measures, including dry wells, be designed and constructed to handle the runoff produced on a project site by a five-year storm. The Kellehers objected to this as an issue for adjudication because it was raised for the first time at the issues conference, with no prior notice so they could develop a response. DEC Staff replied that it had not identified the issue until the day before the hearing, while reviewing the Kellehers' dry well design calculations. Ultimately, I ruled that the issue be heard, finding that, Staff having raised it at the issues conference, it was timely presented, though I added that I shared the Kellehers' frustration that Staff's review of the application had not been careful enough to identify the issue sooner. The hearing then proceeded on all issues identified through Staff's objections to permit issuance, with the Kellehers offering testimony to show that their dry well is adequately designed for its intended purpose, which is to handle runoff from the roof of their proposed house.

Adjudicatory Hearing

The hearing issues were adjudicated on the basis of witness testimony on July 15 and 16, 2008. Also, to view conditions at and near the Kelleher property, I conducted a site visit during the late afternoon of July 15, during which I was accompanied by counsel for both parties.

The Kellehers presented as their witnesses Steven Maresca, a licensed professional engineer and owner of Maresca Associates Consulting Engineers in Hampton Bays, and Roy Haje, president of En-Consultants, Inc., in Southampton.

DEC Staff presented as its witness Matthew Richards, a biologist at DEC's Region 1 office in Stony Brook.

Closing Statements

After my and the parties' receipt of the hearing transcript, I held a conference call on August 15 with the parties' counsel, during which a deadline of September 22, 2008, was established for the postmarking of closing briefs. I received both briefs on September 24, 2008, and the record closed on that date, as confirmed in a letter I sent to the parties' counsel on October 23, 2008.

Transcript Corrections

With my letter of October 23, 2008, I sent the parties' counsel a list of proposed transcript corrections, and gave them until October 31, 2008, to state any objections to them. Both counsel provided e-mails on October 31 indicating they had no objections. Therefore, the corrections are considered adopted, and have been written into the transcript.

STATEMENT OF HEARING ISSUES

According to 6 NYCRR 624.4(c)(1)(ii), an issue is adjudicable if it relates to a matter cited by DEC Staff as a basis to deny the permit and is contested by the permit applicant. Based on Staff's objections to permit issuance, as identified at the issues conference, the following issues were identified:

- - Whether the project is compatible with the public health and welfare, due to alleged negative impact on water quality and fisheries in Mecox Bay [6 NYCRR 661.9(c)(1)];

- - Whether the dry well proposed as part of the project is designed, or can be designed, to handle the water runoff produced on the project site by a five-year storm [6 NYCRR 661.9(c)(2) and 661.6(a)(8)];

- - Whether the project would have an undue adverse impact on the present or potential value of the tidal wetlands 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 [6 NYCRR 661.9(c)(3)]; and

- - Whether granting the requested variances to the development restrictions at 6 NYCRR 661.6(a)(1) and (2) would ensure that the spirit and intent of these provisions are observed, that public safety and welfare are secured, that substantial justice is done, and that there would be no undue adverse impact on the present or potential values of the tidal wetlands [6 NYCRR 661.11(a)].

APPLICATION DOCUMENTS

By stipulation of the parties, the following documents were received as constituting the permit application:

(1) A completed one-page permit application form, submitted on behalf of the Kellehers on August 13, 2003, for a project described as “construction of a 2-story, single family residence and individual sanitary system on a 17,334 square foot parcel abutting tidal wetlands” (Exhibit No. 8-A)

(2) A map of the Kelleher property, depicting project features and including a profile through the proposed sanitary system, as revised September 23, 2004 (Exhibit No. 8-B)

(3) A statement, filed pursuant to 6 NYCRR 661.11(a), constituting the Kellehers’ request for variances from 6 NYCRR 661.6(a)(1) and (2), submitted at the ALJ’s request by Mr. Angel, dated May 28, 2008 (Exhibit No. 8-C)

(4) A map illustrating properties within 500 feet of the Kelleher property, prepared October 30, 2003 (Exhibit No. 8-D)

Other documents received as part of the parties’ respective cases for and against permit issuance were marked and received, as shown in the exhibit list attached to this report.

FINDINGS OF FACT

1. Denis and Carol Kelleher of Staten Island, New York, propose to construct a two-story, single-family house on a 17,334 square-foot parcel on Westminster Road in Water Mill, Town of Southampton, Suffolk County.

2. Carol Kelleher purchased the property, which is undeveloped, from Calvin and Anne Frost of Lake Forest, Illinois, on March 12, 1999, according to a deed (Exhibit No. 11) filed with the Suffolk County Clerk's office.

3. The property, which is rectangular, is bounded on the north by Westminster Road, and on the south by Calf Creek, a tributary and arm of Mecox Bay. The property to the east, now or formerly that of Patricia Wood, is developed with a house, and the property to the west, now or formerly that of Nevitt N. Jenkins, is vacant.

4. The Kelleher property is on a stretch of Calf Creek that is developed with houses on both sides, many with docks and floats extending into the water, as shown in a map (Exhibit No. 8-D) depicting the area within a 500-foot radius of the property. In fact, within that radius, the Jenkins property, adjacent to the Kellehers', is the only other property bordering the creek that does not contain a single-family house.

5. The Kelleher property includes both an area of tidal wetland along Calf Creek and an upland area along Westminster Road where the proposed house would be built, as shown on Exhibit No. 8-B, which is a site plan showing the property's anticipated development.

6. The house, which would have three bedrooms, would be built on a footprint of 754 square feet in the upland area, in the northeast portion of the property. A deck would be built on the south side of the house, facing the creek, and there would be two sets of stairs: one on the east side of the house, connecting to a cellar, and another on the southeast side of the house, connecting to the deck. The southeast corner of the deck, as well as the foot of the stairway leading to the house, would be about 33 feet from the wetland's landward edge, and the southeast corner of the house would be about 34 feet from the wetland's landward edge. The entire house footprint would be within 75 feet of the wetland's landward edge, even with the house being set back only 15 feet from the road.

7. At the far northeast corner of the property, a dry well, eight feet wide and four feet deep, would collect the runoff from the house's roof. The dry well is designed to provide 169 cubic feet of storage, more than enough to handle two inches of rainfall in a one-hour period, which the Town of Southampton considers to be a ten-year storm. If necessary, the dry well could be widened by as much as two feet, and deepened by as much as three feet, to provide more storage capacity.

8. A sanitary system would be built in the northwest corner of the site. The system would consist of a 1,000-gallon septic tank and five cesspools (each one denoted on the site plan as a circle containing the letters "CP"). Each cesspool would be eight feet wide and two feet deep, and there is a space allowance for two more cesspools (each one denoted on the site plan as a broken circle containing the letter "F") that could be added later. Because of the size limitations of the Kelleher property, the entire sanitary system would be built within 100 feet of the tidal wetland's landward edge. One of the cesspools to be built contemporaneously with the house would be as close as 46 feet from the wetland's landward edge, and one of the cesspools that could be added later, but for which approval is sought now, would be as close as 44 feet from the wetland's landward edge. The septic system would use the existing grade, meaning that its construction would not require the importation of fill. Also, it would be built in a location about 10 feet above mean sea level, so that the bottoms of the cesspools would be at least three feet above groundwater.

9. A circular gravel driveway would be built between the house and Westminster Road, and pervious footpaths, each five feet wide, would be built along the west and east sides of the house.

10. The Kellehers would limit clearing, grading and ground disturbance to an upland area designated on their site plan (Exhibit No. 8-B), to maintain a densely vegetated zone separating the house and septic system from the tidal wetland associated with Calf Creek. Also, to protect the wetland, no fertilizers would be used in the disturbed areas near the house, including the lawn.

11. Two fingers of tidal wetland extend onto the Kelleher property, and their limits, as flagged by the Town of Southampton, are shown on Exhibit No. 8-B. One encompasses the southwest portion of the property and extends onto the Jenkins property to the west. The other exists along the southeast perimeter of the Kelleher property and extends onto the Wood property to the east. The wetland area of the Kelleher property is classified by DEC as coastal fresh marsh (designated as FM on DEC's tidal wetland inventory map, the relevant portion of which was received as Exhibit No. 22). Coastal fresh marsh is a tidal wetland zone found primarily in the upper tidal limits of riverine systems where significant fresh water inflow dominates the tidal zone [see 6 NYCRR 661.4(hh)(1), DEC's definition of coastal fresh marsh].

12. Fresh water enters the tidal wetland from the upland part of the property, through groundwater flow and surface runoff. Within the wetland, which makes up about 25 percent of the Kelleher property, there are thick stands of phragmites, notably along Calf Creek, but also Baccharis (a high marsh plant that favors salty water and needs occasional flooding), chairmaker's rush (another high marsh species), and rose mallow (which is often found in freshwater-dominant wetlands). In the upland, which makes up the remainder of the property, there is dense vegetation that includes non-wetland species such as raspberry, currant, ironwood, poison ivy, briars and cherry trees.

13. Calf Creek, where it flows past the Kelleher property, is itself a tidal wetland, classified by DEC as littoral zone (with the designation LZ on the tidal wetland map, Exhibit No. 22). Littoral zone consists of all lands under tidal waters which are not included in any other of DEC's tidal wetland categories, but no littoral zone exists under waters deeper than six feet at mean low water [see 6 NYCRR 661.4(hh)(4), DEC's definition of littoral zone]. At the Kelleher property, Calf Creek is generally about two feet deep, and its water level is relatively stable. At times, however, the water level recedes so that mud flats are exposed.

14. The portion of Calf Creek south of Mecox Road, including the stretch along the Kelleher property, is regulated as littoral zone with Class SA saline surface waters, indicating suitability for the widest variety of uses. According to 6 NYCRR 701.10, the best usages of Class SA waters are shellfishing for market purposes, primary and secondary contact recreation and fishing, and such waters are deemed suitable for fish, shellfish and wildlife propagation and survival.

15. Despite the SA classification, Calf Creek, in the vicinity of the project site, is closed to shellfishing due to high levels of water contaminants, as determined by DEC. Mecox Bay is open to shellfishing, but only seasonally, while Calf Creek is closed to shellfishing year-round.

16. Unlike other coastal bays on the south shore of Long Island, Mecox Bay is open to the Atlantic Ocean only intermittently, generally a few times each year. For that reason Mecox Bay is less saline than the other bays, and receives less tidal flushing.

17. Openings connecting Mecox Bay to the Atlantic Ocean, mostly man-made but sometimes caused by natural events, occur

along a barrier beach separating the two water bodies. Water sometimes empties from the bay to the ocean after heavy rainfalls, and ocean water sometimes enters the bay during storms. Otherwise, water passes between the bay and the ocean through inlets dug by the Town of Southampton, which are created to regulate such things as the bay's water elevation and salinity. The bay's water elevation is raised during the summer to facilitate recreational uses such as fishing and swimming, and the bay's salinity is controlled to support shellfish populations.

18. Mecox Bay is a predominantly freshwater to slightly brackish, shallow coastal bay less than three feet deep at mean low water. DEC considers it to be irreplaceable significant coastal fish and wildlife habitat, according to a rating form received as Exhibit No. 20. DEC considers Mecox Bay to be especially significant as a waterfowl wintering area, as well as a productive area for marine finfish and shellfish. The creeks and wetlands that drain into the bay, such as Calf Creek and its associated wetlands, contribute to the biological productivity of the area. The bay contains populations of many estuarine species, including soft clam, American oyster, blue claw crab and white perch. Significant opportunities for recreational or commercial shellfishing exist in Mecox Bay, though the health of the resource depends on there being an open inlet to provide adequate water circulation and mixing.

19. Tidal wetlands constitute one of the most vital and productive areas of the natural world and have many values that include, but are not limited to, marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, sedimentation control, education and research, and open space and aesthetic appreciation. [See 6 NYCRR 661.2(a).]

20. The tidal wetland at the Kelleher property provides value for marine food production by converting nutrients and decomposing vegetation into food for plants and animals. Clearing associated with construction of a house would reduce the size of the vegetative buffer that protects the wetland, creating the possibility that excessive amounts of nutrients -- as well as contaminants, toxins, and pathogens associated with the septic system -- would reach Calf Creek. An increase in nutrients would facilitate the growth of water-clouding algae which make it both more difficult for marine species to feed, and more likely for vegetation growth to be curbed at depths where sunlight cannot penetrate.

21. The tidal wetland at the Kelleher property provides value as habitat for upland mammals including deer, raccoons, and opossums, whose sheltering area is limited by development in the surrounding neighborhood. The Kellehers would minimize impacts on wildlife by limiting clearing of the property to that area closest to Westminster Road. However, the presence of the house and proximity to human activity would deter some species from using the property, even as others (like deer) would be attracted by features such as plants used for landscaping.

22. The tidal wetland at the Kelleher property serves as bird habitat, both for waterfowl and wading birds that use Calf Creek, and for songbirds like robins and red-winged blackbirds. Project construction would eliminate nesting areas in the wetland's adjacent area, but birds are not likely to abandon their use of the wetland for feeding, resting, and other purposes, provided there remains an adequate buffer between the house and the creek.

23. Shellfish, clams and crabs reside in the wetlands along the Kelleher property, and the wetlands are also a nursery for juvenile fish. The health of these resources would be jeopardized by contaminants, particularly fecal coliform bacteria, viruses and pathogens from the planned septic system, all of which could reach the wetland through groundwater.

24. Runoff and contaminants from the septic system also create the possibility that phragmites would become more dominant in the fresh marsh, squeezing out other vegetation that deer and other animals depend on for food and cover.

25. The tidal wetland at the Kelleher property provides value for flood, hurricane and storm control, by absorbing water from surges and flooding that are commonly associated with hurricanes and large storms. Wave energy is dissipated by the dense vegetation, particularly by the strong Baccharis shrubs, which are more effective in this regard than standard reeds and rushes, but at risk of displacement by phragmites.

26. The tidal wetland at the Kelleher property provides value for cleansing ecosystems, metabolizing nutrients and filtering contaminants before they can reach Calf Creek. Should the project go forward, there is some risk that the wetland could be overwhelmed by upland inputs, particularly given the close proximity of the septic system.

27. The tidal wetland at the Kelleher property provides value for absorbing silt and organic material, slowing water

flows and acting as a strainer to reduce turbidity and maintain water quality in Calf Creek. Construction of a house in the upland would reduce the buffer of dense vegetation that now protects the wetland, and would result in an increase in runoff and the possibility that some wetland plant species could be smothered by the silt and organics in that runoff.

28. The tidal wetland at the Kelleher property provides values for recreation, open space and aesthetic appreciation, particularly for boaters, bird watchers and people fishing on Calf Creek. These values would largely be retained because the house, as viewed from the creek, would be obscured by the remaining vegetation in the area where no ground disturbance is intended, an area that, directly between the house and the creek, would remain quite extensive (as shown on Exhibit No. 8-B). However, fishing could be jeopardized by contaminants entering the creek from the Kelleher property.

29. As private property, the tidal wetland at the Kelleher property provides no significant value for education and research, and it would not gain such value if a house were built there.

DISCUSSION

The issues in this hearing concern whether the Kellehers' application meets permitting standards at 6 NYCRR 661.9(c) for regulated activities in the adjacent area of a tidal wetland, and whether variances from certain development restrictions at 6 NYCRR 661.6 are warranted. The Kellehers have the burden of proof to demonstrate that their proposal will be in compliance with the provisions governing issuance of a tidal wetlands permit [6 NYCRR 624.9(b)], as well as the burden of showing that a variance to any of the relevant development restrictions should be granted. To meet these burdens, the Kellehers presented their case first, offering testimony from two witnesses: Steven Maresca, an engineer who addressed the design of the sanitary system and dry well, and Roy Haje, an environmental scientist who considered what impacts the project would have on the wetlands at and near the project site. After the Kellehers' witnesses testified, Matthew Richards, a DEC biologist, testified primarily about tidal wetland values and how they would be affected if the project goes forward as planned.

Mr. Haje was not involved in the application's development, but reviewed it after being retained as a consultant in May 2008. Mr. Haje visited the Kelleher property twice in July 2008,

specifically to examine the wetland, and Mr. Richards visited the property in December 2006 and July 2008 for the same purpose. Of the two witnesses, I find that Mr. Richards provided a more comprehensive depiction of both the wetland and its functions, as well as the potential impacts of site development, and my findings on these points are taken primarily from his testimony.

Construction of single family dwellings and installation of sewage disposal septic tanks and cesspools (uses 46 and 45 respectively in the use guideline chart at 6 NYCRR 661.5(b)) are considered generally compatible with a tidal wetland's adjacent area and with the preservation, protection and enhancement of the present or potential value of the wetland if undertaken in the adjacent area. However, as noted in 6 NYCRR 661.5(a)(2), such construction is subject to the permit requirements of Part 661, and the compatibility of a particular use depends on the particular location, design and probable impact of the proposed use.

In this case, the locations of the house and septic system are of particular concern, since, as the Kellehers acknowledge, these features do not comply with two development restrictions at 6 NYCRR 661.6: a restriction at 6 NYCRR 661.6(a)(1) requiring that principal buildings and all other structures that are in excess of 100 square feet be set back at least 75 feet landward from the most landward edge of any tidal wetland, and a restriction at 6 NYCRR 661.6(a)(2) requiring that any on-site sewage disposal septic tank or cesspool be set back at least 100 feet landward from the most landward edge of any tidal wetland.

As noted in the Kellehers' variance application (Exhibit No. 8-C) and confirmed in their site plan (Exhibit No. 8-B) and my findings of fact, the landward edge of the tidal wetland is, at its closest to these features, 34 feet from the proposed house, 33 feet from the house's rear deck, and 44 feet from the proposed sewage disposal system. All these features would be twice as close to the wetland boundary as the development restrictions anticipate, meaning that the requested variances are quite substantial.

According to the variance provisions of the DEC's tidal wetland regulations, where there are "practical difficulties" in the way of carrying out any of the provisions of the development restrictions, DEC shall have the authority in connection with its review of a permit application 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, that 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" [6 NYCRR 661.11(a)].

Variance applications are to be made in conjunction with permit applications, and include a discussion of the practical difficulties claimed, possibilities in relation to alternate sites and changes of project objective, and environmental impact reduction or mitigation measures to be employed [6 NYCRR 661.11(a)].

The Kellehers' permit application was deemed complete by DEC Staff even though it was clear from the site plan that the above-referenced variances were needed and no applications for them had been made. To correct this deficiency and to eliminate surprise at the hearing, I directed Mr. Angel, the Kellehers' counsel, to make a written variance application, as required by Section 661.11(a), when the matter was assigned to me for hearing.

In that variance application (Exhibit No.8-C), which is dated May 28, 2008, Mr. Angel says the Kelleher property cannot be used without the requested variances, and that this constitutes practical difficulties. As he argues, and as was confirmed at the hearing by testimony from Mr. Haje, the Kellehers have already reduced the size of their proposed house to less than the minimum required under the Town of Southampton zoning code. Mr. Haje testified that a first floor size of 800 square feet is mandated by the zoning code for a house in an R-15 residential zone (a zone with a minimum lot size is 15,000 square feet). According to the DEC permit application, the Kelleher property is 17,334 square feet in size; however, the footprint of the house would be only 754 square feet, according to the "description of permitted activity" in the town's wetlands permit (Exhibit No. 15-A). The Kellehers have received a variance from the town zoning board of appeals (Exhibit No. 17) which allows the area of the first floor to be 750 square feet, rather than 800 square feet as required by local law.

Mr. Angel also says that the Kellehers have sited the house and the septic system as close to the road and as far from the landward edge of the tidal wetlands as possible. According to the site plan (Exhibit No. 8-B), the front of the house is set back only 15 feet from Westminster Road, less than the 40 feet Mr. Haje said is required by town code. Mr. Haje said the Kellehers received a variance from this requirement as well, so

that the distance from the back of the house to the wetlands would be maximized.

Even with variances as to the size of the house and its proximity to the road, the house's setback from the wetland is not even half the 75 feet required by DEC regulation. In fact, given the size of the Kelleher property and the location of the wetland boundary, one could not site the house on a footprint where compliance with 6 NYCRR 661.6(a) would be achieved. As shown on the site plan (Exhibit No. 8-B), the land closest to Westminster Road is more than 10 feet above sea level, so that, pursuant to 6 NYCRR 661.4(b)(iii), it is not considered wetland adjacent area, despite its proximity to the wetland. A house built beyond the adjacent area would not require a tidal wetlands permit; however, there is not enough area above the 10-foot contour line to situate a house that would not be virtually at the roadside.

There is no evidence whether the Kellehers own other property on which to build a house, and likewise no evidence about other allowable uses they could make of the project site. The variance application states that the property is located in a residentially zoned area, which is essentially fully developed with single-family homes on similarly sized lots each served by its own on-site sewage disposal system. Furthermore, the application states that failure to grant a variance would be, in effect, a condemnation of the Kellehers' property without compensation.

Based on the available information, there are practical difficulties maintaining the required separation of the house from the tidal wetland, and these difficulties extend to the sewage disposal system as well. Like the house, the septic system is, at its closest to the wetland, less than half as far from the wetland as DEC's development restriction intends (44 feet, rather than 100 feet). Mr. Maresca testified that the system employs a design, in terms of the sizes of the septic tank and cesspools, that has been pre-qualified by Suffolk County for use in areas of high groundwater, though it fails to meet the county's requirements that the tank be set back 75 feet from a wetland (the actual setback for the tank is 56 feet), and that the cesspools (or, as the county refers to them, leaching pools) be set back 100 feet from the wetland. Mr. Maresca said that, in other cases, he has been successful in obtaining variances from the county's setback requirements, but added, under cross-examination, that the county defers to DEC to establish approvable distances from wetlands, and would not grant its

variances unless DEC issued its own permit, including all required DEC variances, first.

Given the lot size and the location of the wetlands on the property, the sewage disposal system, like the house, cannot be moved sufficiently far from the wetland to maintain compliance with DEC's development restrictions, nor can it be feasibly moved outside the adjacent area altogether, given how close it is to the road already.

The practical difficulties encountered by the Kellehers allow DEC the authority to grant the requested variances, but only to the extent that the spirit and intent of the development restrictions are observed, that public safety and welfare are secured, that substantial justice is done, and that the action pursuant to the variance will not have an undue adverse impact on the wetland values. Here, the spirit and intent of the development restrictions are to provide an adequate buffer between the wetland, on the one hand, and the house and septic system on the other. That buffer would be significantly diminished -- and wetland values significantly impacted -- if variances as great as those sought were granted.

For instance, if the variance for the house were granted, there would be an increased risk of surface water runoff entering the wetland, particularly on the east side of the property, where there would be considerable thinning of the adjacent area buffer, which is now covered by thick vegetation. As Mr. Richards explained, silt and organic material that is carried in the runoff can fill in wetland areas, smothering vegetation and causing certain plants. particularly phragmites, to dominate, while reducing species diversity. According to Mr. Richards, a wetland exhibiting a variety of wetland plants, such as this one, has enhanced value because each species fulfills wetland values in its own unique way. As an example, he cited the Baccharis shrub, which, because of its strength, is better than reeds or rushes in dissipating wave energies associated with large-scale storms. Mr. Richards added that many animal species need more than phragmites for food, cover and general survival, and that a wetland overtaken by phragmites has diminished value for wildlife such as deer.

Not only is the wetland at risk from surface runoff, it is at risk from contaminants emanating from the proposed sewage disposal system, Mr. Richards explained. If a variance for this system were granted, its close proximity to the wetland increases the likelihood that fecal coliform, viruses and other pathogens would pass through the groundwater from the cesspools to the

wetland, jeopardizing the health of the shellfish population. As Mr. Richards explained, an appropriate distance between septic systems and wetlands is needed so that subsurface soils can filter contaminants from groundwater. The development restriction intends that there be a 100-foot separation, but here that separation would be reduced to as little as 44 feet.

According to Mr. Richards, sandy soils exhibit the highest rates for percolation and groundwater flow, both of which enhance contaminant travel. In response to my question, he said he did not know enough about the soil at the Kelleher property to make a site-specific assessment. However, the Kellehers' own test hole data, for a location between the septic system and the wetland, indicate that the top three feet of soil is "mixed sand and loam," and that, at a depth from six to 13 feet, there is "water in pale brown fine to coarse sand." (The test hole data and test hole location are shown on Exhibit No. 8-B.)

Testimony at the hearing and observations from the site visit both indicate that Calf Creek suffers from eutrophication, a process by which its water has become enriched in dissolved nutrients that stimulate the growth of aquatic plant life, which depletes the dissolved oxygen and makes the waters less suitable for fish and invertebrates. According to the testimony of Mr. Haje for the Kellehers and Mr. Richards for DEC Staff, the nutrients are carried to the creek via overland runoff and, in the case of cesspools, groundwater flow. The water in the creek then enters Mecox Bay, which likewise suffers.

Eutrophication is exhibited by the cloudy, greenish water in the creek, and the brown tides that appear in many of Long Island's bays. According to Mr. Richards, it results in algae blooms that have reduced visibility in Mecox Bay to about two inches, so much that it affects the ability of fish to feed, and inhibits the penetration of light through the water column. Eutrophication is a particular problem for Mecox Bay because, as noted in my findings of fact, it receives little tidal flushing, having no permanent opening to the ocean.

On behalf of the Kellehers, Mr. Haje sought to portray their project as typical of the development that now exists along Calf Creek and in the Mecox Bay basin, noting at one point that if there were to be cumulative impacts of such development, they would already have occurred, and referring to the undeveloped Kelleher lot as "one of the last of the Mohicans." It was noted that while the waters of the creek, at least in the site vicinity, are classified as having a best use for shellfishing, they are now closed to shellfishing due to water contamination.

While one could argue that, given the scope of past development, one more house would not make a difference to the creek and bay ecology, one could likewise argue that it would not help restore these waters to the best use for which they are still designated, and would likely further diminish wetland values, particularly given the risks posed by a septic system so close to the wetland boundary. The wetland marsh on the Kelleher property, with its diversity of plant life, is an unusual feature along Calf Creek, and serves tidal wetland values not provided by the littoral zone within the creek itself, which makes it especially worthy of protection.

As to whether the project would have "undue" impacts on wetland values, one must note, as Mr. Richards did, that building a house serves the interests of the Kellehers while providing no public benefit. The standards for tidal wetland permits say one must take into account "social and economic benefits" which may be derived from proposed activities, in determining whether the impacts of those activities are "undue." [See 6 NYCRR 661.9(c)(3), standards for permits on adjacent areas.] Here, such benefits do not exist, as the house serves no public purpose, and there is no public interest behind its construction.

The conclusions that granting the requested variances would not be consistent with the intent of the relevant development restrictions, and would have an undue adverse impact on wetland values, are sufficient to warrant denial of the variances. Also, the project itself may be denied on the basis of the same impacts that support the denial of the variances, and the failure to comply with the development restrictions unless the variances are approved. A separate ground for permit denial is the project's incompatibility with public health and welfare, because, as Mr. Richards testified, the pathogens and toxins associated with the septic system could be expected to impact water quality, thereby affecting shellfishing, crabbing, clamming and fishing in the creek and, by extension, the bay to which it is connected.

The Kellehers' arguments on behalf of the requested variances, and on behalf of permit issuance, emphasize the measures they have taken to mitigate project impacts, which include siting the house and septic system as close to Westminster Road and as far from the landward edge of the tidal wetland as possible. These measures, though commendable, do not warrant permit issuance, because given the size of the site and the location of the wetland boundary, which both parties agree to, there is no way to allow the project to go forward and adequately protect the wetland at the same time. Whether a denial of the permit would constitute a taking of the property

without just compensation, as the Kellehers argue, is not an issue for this hearing to determine, and must be litigated in civil court. However, it should be emphasized that Mrs. Kelleher purchased the property in 1999, more than two decades after the tidal wetland regulations were promulgated, and knew or should have known the problems she and her husband would encounter in building a house there.

As for the development restriction at 6 NYCRR 661.6(a)(8), the Kellehers deny that a variance is needed, maintaining, on the basis of Mr. Maresca's testimony, that their dry well can be enlarged to handle roof runoff produced by a five-year storm. According to Mr. Richards, a map included among state guidelines for urban erosion and sediment control (and received as part of Exhibit No. 23) indicates that, for Long Island, a five-year storm consists of four inches of rainfall over a 24-hour period. The dry wells were not designed with this standard in mind, and Mr. Richards, who is not an engineer, offered no opinion whether the proposed dry well would comply with the development restriction or, if it would not, if or how it could be redesigned to do so. This report draws no conclusions about these matters, because, as to them, the record was insufficiently developed. However, it must be emphasized that the dry well was not designed for runoff from the property generally, and it can be expected that some of this runoff, particularly in heavy storms, would reach Calf Creek.

As reflected in the hearing notice (Exhibit No. 1), DEC Staff contends that the project would have cumulative impacts if approved, though Staff did not explain or develop this contention at the hearing. In a similar tidal wetland permitting case, Matter of Palmeri (Decision of the Acting Executive Deputy Commissioner, March 26, 2007), DEC Staff argued that if the application, which there too was for a house, were approved, it would have cumulative impacts upon tidal wetlands generally, as there were other small pockets of undeveloped wetland in the vicinity of the project site, and other, similar applications could follow from approval of the one that was then under review. In that case, I responded that should other, similar applications be made, they would have to be reviewed on their own merits, and issuance of a permit in one matter would not dictate the same result elsewhere, as each project is unique, as is the setting for which it is proposed (Palmeri, ALJ's report, pages 33 and 34, attached to the Commissioner's decision). For the same reasons, it follows that denial of a permit in one matter would not dictate the same result elsewhere.

In this case, as in Palmeri, DEC Staff said it was raising cumulative impacts as an issue under ECL 3-0301(1)(b). That provision requires the Commissioner to take into account the cumulative impact upon water, land, fish, wildlife and air resources in making permitting decisions. Here, all relevant project impacts have been considered through application of the standards for issuance of tidal wetland permits. According to those standards [at 6 NYCRR 661.9], in determining whether to issue a permit for a proposed regulated activity, DEC must consider the adverse impact such activity would have on various specified values, as delineated in this report, that wetlands have.

ECL 3-0301(1)(b) does not require that impacts of one project be evaluated with impacts of other, similar but unrelated projects that may be proposed in the future. For that reason, I said in Palmeri and repeat here, any reliance on ECL 3-0301(1)(b) is misplaced.

CONCLUSIONS

The regulated activities proposed by the Kellehers, which involve construction of a house and sewage disposal system, do not meet the standards for issuance of a tidal wetlands permit.

More particularly, these activities would not be compatible with the public health and welfare [6 NYCRR 661.9(c)(1)], particularly given the risk of shellfish contamination, and would have an undue adverse impact on the values of the adjacent tidal wetland [6 NYCRR 661.9(c)(3)], particularly those values for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, and recreational fishing.

Finally, both the house and the sewage disposal system, as proposed, are not set back sufficiently from the wetland to meet the development restrictions at 6 NYCRR 661.6(a)(1) and (2) [6 NYCRR 661.9(c)(2)]. The Kellehers have demonstrated that there are practical difficulties in the way of compliance with these provisions. However, granting them the variances they have requested would not ensure that the spirit and intent of the pertinent provisions are observed, and would have undue adverse impact on wetland values [6 NYCRR 661.11].

RECOMMENDATION

The permit application, including the requested variances, should be denied.

EXHIBIT LIST

DENIS AND CAROL KELLEHER
TIDAL WETLANDS PERMIT HEARING
Application No. 1-4736-06413/00001

1. Combined Notice of Complete Application and Notice of Public Hearing (6/11/08)
2. Affidavit of publication of hearing notice in Southampton Press, Eastern Edition (6/19/08), along with copy of notice as published
3. Hearing notice, as it appeared in DEC's Environmental Notice Bulletin (6/18/08)
4. ALJ's transmittal letter for hearing notice (6/11/08)
5. Hearing notice distribution list (6/11/08)
6. Notice of permit denial (8/29/06)
7. Request for hearing, filed by Gilbet G. Flanagan, Esq., for the Kellehers (9/22/06)

8-A. Joint Application for Permit (8/13/03)
8-B. Map of Kelleher property, with site plans (as revised, 9/23/04)
8-C. Variance request (5/28/08)
8-D. Map of 500-foot radius from Kelleher property (10/30/03)

9. Suffolk County tax map, sheet No. 103, depicting Kelleher property and vicinity
10. Google Earth map, depicting Kelleher property and vicinity
11. Kelleher deed (3/12/99)
12. Resume of Steven L. Maresca
13. Town of Southampton Wetlands Permit (No. 03-86), issued to Kellehers (5/26/04)
14. Modification of Town of Southampton Wetlands Permit (10/27/04)

15-A. Extension of Town of Southampton Wetlands Permit (effective 5/26/07)
15-B. Extension of Town of Southampton Wetlands Permit (effective 5/26/08)

16. Covenants and Restrictions recorded against Kelleher property
17. Variances issued by Town of Southampton Zoning Board of Appeals (12/2/04)
18. Curriculum Vitae of Roy L. Haje
19. Resume of Matthew Richards
20. Coastal Fish and Wildlife Habitat Rating Form for Mecox Bay and Beach (3/15/87)
21. DEC tidal wetlands map (No. 724-532)
22. Portion of DEC tidal wetlands map, depicting Kelleher property and Calf Creek
23. New York Guidelines for Urban Erosion and Sediment Control, pages 10.30 to 10.34 (October 1991 - Third Printing)