

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

In the Matter

- of -

the Application for a Freshwater Wetlands Permit
Pursuant to Article 24 of the Environmental Conservation Law
and Part 663 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York

- by -

AUGUST J. LARUFFA, JR.,

Applicant.

Permit Application No. 1-4724-01628/00001

DECISION OF THE COMMISSIONER

August 28, 2009

DECISION OF THE COMMISSIONER

August J. LaRuffa, Jr. ("applicant") filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation ("Department") for the construction of a single-family dwelling, garage, septic system and driveway on property located at 20 Gloucester Avenue, Montauk, Town of East Hampton, Suffolk County, New York (the "project"). The project construction would be within the boundaries of freshwater wetland MP-25.

Department staff made a determination to deny the permit application and applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was initially assigned to Administrative Law Judge ("ALJ") Molly McBride and then reassigned to ALJ Edward Buhrmaster.

The ALJ, in his hearing report, a copy of which is attached, recommends that the determination of Department staff to deny Mr. LaRuffa's application for a freshwater wetlands permit be upheld. I hereby adopt the ALJ's hearing report as my decision in this matter.

In proceedings conducted pursuant to the Department's permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see section 624.9[b][1] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 624.9[c]). To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and prevent their despoliation and destruction (see Environmental Conservation Law 24-0103).

Freshwater wetland MP-25, which would be impacted by the proposed project, is classified by the Department as a "Class I" wetland. "Class I" wetlands provide "the most critical of the State's wetland benefits," and the Department may only issue a permit in the "most unusual circumstances" (see 6 NYCRR 663.5[e][2]). Accordingly, the project must satisfy stringent permit issuance standards designed to protect this natural resource (see id.).

As the ALJ's hearing report details, applicant failed to establish by a preponderance of the evidence that the proposed project could satisfy the standards for permit issuance set forth in 6 NYCRR part 663. Department staff testified that activities proposed by applicant were incompatible with the functions and benefits of freshwater wetlands (see, e.g., Hearing Report, at 13-14; Hearing Transcript, at 276, 283-285 [Department staff discussion of, among other things, the proposed project's adverse environmental impacts on wildlife habitat, filtration, and stormwater and flood control]).

Based on the record before me, applicant failed to carry his burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application of August J. LaRuffa, Jr., for a freshwater wetlands permit for the proposed project is denied.

For the New York State Department
Environmental of Conservation

/s/

By: _____
Alexander B. Grannis,
Commissioner

Albany, New York
August 28, 2009

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

In the Matter

- of -

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Permit pursuant to Article 24 of the
Environmental Conservation Law and Part 663
of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State
of New York

- by -

AUGUST J. LARUFFA, JR.,
Applicant

Permit Application No. 1-4724-01628/00001

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

PROCEEDINGS

Background and Brief Project Description

August J. LaRuffa, Jr. proposes to construct a single-family dwelling, garage, septic system and driveway at his property located at 20 Gloucester Avenue, Montauk, Town of East Hampton, Suffolk County.

Because construction would occur entirely within a Class I freshwater wetland identified as MP-25 by the New York State Department of Environmental Conservation ("DEC"), the project requires a freshwater wetlands permit pursuant to Environmental Conservation Law ("ECL") Article 24 and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The project also requires approvals from the Town of East Hampton and, for the septic system, the Suffolk County Health Department.

In accordance with 6 NYCRR 617.5(c)(9), DEC Staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act (ECL Article 8) 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 July 7, 2008, and issued a notice of permit denial (Exhibit No. 20) on August 14, 2008. Mr. LaRuffa requested a hearing on the denial by letter of September 5, 2008.

After a pre-hearing calendar call at DEC's Region 1 office in Stony Brook on October 15, 2008, this matter was assigned to Administrative Law Judge ("ALJ") Molly McBride, and May 19 and 20, 2009, were scheduled as hearing dates. Subsequently, the hearing was rescheduled to May 27 and 28, 2009, and reassigned to me.

James T. McClymonds, DEC's chief ALJ, issued a combined notice of legislative hearing, issues conference, and adjudicatory hearing, dated April 29, 2009 (Exhibit No. 1). It was published as a legal notice in the East Hampton Star on April 30, 2009 (see Exhibits Nos. 2 and 3, the notice as published and the affidavit of publication) and also appeared in DEC's on-line Environmental Notice Bulletin (as shown in Exhibit No. 4). The notice was released to Mr. LaRuffa under a cover letter dated April 24, 2009 (Exhibit No. 5) which confirmed the hearing arrangements, and was also sent to relevant state and local officials pursuant to a distribution list prepared by DEC's

Office of Hearings and Mediation Services ("OHMS") (Exhibit No. 6).

As announced in the hearing notice, the hearing went forward on May 27 and 28, 2009, at the Amagansett Public Library in Amagansett, New York.

DEC Staff appeared by Kari E. Wilkinson, assistant regional attorney, whose office is at DEC's Region 1 headquarters in Stony Brook, New York.

Mr. LaRuffa, who lives in Port Jefferson, New York, appeared on his own behalf, without an attorney.

Legislative Hearing

The hearing notice allowed for written and oral comments on the permit 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 concerning the permit application. No filings were received by the deadline set in the hearing notice, or subsequently. As a result, the only hearing participants were Mr. LaRuffa and DEC Staff, and the only issues that were identified involved DEC Staff's grounds for permit denial, as outlined in its notice of August 14, 2008 (Exhibit No. 20).

The hearing went forward on a slight modification of the project originally proposed by Mr. LaRuffa in his application dated December 29, 2007. The original application (Exhibit No. 7) included a site plan showing a house with a 40' x 24' footprint, a garage with 24' x 24' footprint, and a driveway that swings in from Gloucester Avenue. At the hearing, Mr. LaRuffa presented DEC with a modified site plan and floor plans (all included in Exhibit No. 8) showing the house with a 30' x 30' footprint and the garage with a 16' x 24' footprint. A 12' x 30' second-story deck, not part of the original application, had been added, and the driveway reconfigured so it runs straight from the road to the garage. The amount of clearing is about the same in both site plans, though the limits of clearing have been redrawn on the second plan due to the reconfiguration of development.

Because it had not seen the new site plan prior to the hearing, DEC Staff expressed surprise and said it needed to compare it to the previous site plan to determine whether it was prepared to proceed with the hearing. Staff also questioned whether the project, as revised, should be considered a new application and, on that basis, remanded to Staff for a separate review.

Mr. LaRuffa said he wanted the hearing to proceed on the project as revised, with the understanding that the new plans would substitute for those he provided initially. After an opportunity to compare the old and new plans, DEC Staff agreed to this arrangement because Mr. LaRuffa's changes did not alter Staff's basic objections to the project, and because Staff said the impacts under either plan would be the same. (Transcript, page 11.) Even as revised, the project is true to the description of it in the hearing notice, as it still involves the construction of a single-family dwelling, garage, septic system and driveway, all entirely within the wetland on Mr. LaRuffa's property.

Adjudicatory Hearing

The adjudicatory hearing was held immediately after the issues conference on May 27 and continued on May 28, 2009. Mr. LaRuffa testified on his own behalf, and Robert F. Marsh, Region 1 manager of DEC's Bureau of Habitat, testified for DEC Staff. To view conditions at and near the project site, I conducted a site visit during the late afternoon of May 27 with counsel and other representatives of both parties.

Hearing Record

The hearing record includes the transcript of testimony and argument, as well as 33 marked exhibits. Some of Mr. LaRuffa's proposed exhibits were received without objection from DEC Staff, and others were excluded from evidence on the basis of DEC Staff's objections on grounds of relevance, as noted in the exhibit list attached to this report.

The exhibits excluded from evidence -- and therefore not considered in my permitting recommendation -- concern DEC's approval of an application by the Town of East Hampton for tidal and freshwater wetlands permits to replace clogged, impaired culvert pipe under West Lake Drive, near Mr. LaRuffa's property, and a subsequent permit amendment that allowed for excavation of freshwater wetland and its regulated adjacent area to create a storm water detention basin on property at the corner of West

Lake Drive and Gloucester Avenue, which the Town purchased from John Csajko.

Mr. LaRuffa offered the exhibits as establishing a DEC precedent authorizing the excavation of wetlands and the destruction of wetland shrubs "to dig a hole," and said this precedent should be applied to his application as well. DEC Staff disagreed, arguing that the Town's project, which involved building a basin in the excavated area, was not comparable to Mr. LaRuffa's proposal, which is to build a house. According to DEC Staff, the basin's construction was approved because the basin was intended to catch, desedimentize and polish runoff coming into the culvert by way of Peter's Run, a stream that runs along Gloucester Avenue before entering Lake Montauk on the other side of West Lake Drive. Staff said the area excavated for the basin was both wetland and adjacent area, and that creation of the basin converted the adjacent area to wetland and improved the wetland benefits of the former Csajko property, particularly for improving water quality. Staff added that, unlike the Town's project, Mr. LaRuffa's does not involve the creation of new wetland area, only the loss of wetland to housing development, and for that reason the two projects are not comparable.

I agreed with DEC Staff that its decisions on the Town's proposals to replace the culvert and build the detention basin did not establish a precedent applicable to Mr. LaRuffa's project, and were not relevant to whether his project complies with standards for issuance of a freshwater wetlands permit. For that reason, I sustained Staff's objections to various documents related to these proposals.

Mr. LaRuffa offered various objections to the Town's application documents -- calling them inaccurate, improper, and even invalid -- but I responded that the Town's proposals were not before me for review, and that if Mr. LaRuffa had any concerns about DEC's approvals of the Town's activities, he should raise them directly with the DEC Commissioner or DEC's Region 1 director.

Also, Mr. LaRuffa objected to the hearing notice for his project, which was issued by Chief ALJ James T. McClymonds (Exhibit No. 1). In particular, he objected to the inclusion of DEC Staff's arguments against permit issuance and the exclusion of his arguments for permit issuance. I pointed out that according to DEC's permit hearing procedures, the hearing notice may specify the issues of concern to DEC Staff [see 6 NYCRR 624.3(e)], and that, to the extent Staff's position is known, it is normally stated in the notice to alert potentially interested

parties, many of whom consider Staff's position in deciding whether or how to involve themselves in the proceeding.

Mr. LaRuffa said that the inclusion of Staff's position, and not his own, in the hearing notice indicated the Chief ALJ's endorsement of Staff's views and a predetermination of issues. However, I responded that the notice is not considered evidence for or against permit issuance, and that my recommendations would be based on the evidentiary record which consists of the testimony of witnesses and the documents presented by Mr. LaRuffa and DEC Staff. I introduced the hearing notice as my own exhibit, but only to confirm its issuance, publication and distribution, to demonstrate that adequate and timely notice was given consistent with the requirements of 6 NYCRR 624.3.

Mr. LaRuffa said that the statement of Staff's position, as included in the hearing notice, was excessive in length, and added unnecessarily to his cost to publish the notice in the East Hampton Star. While the statement is in fact lengthy, I note that it basically repeats Staff's arguments as included in its notice of permit denial. Also, as I reminded Mr. LaRuffa, DEC's permit hearing procedures state that a permit applicant "must provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located" [6 NYCRR 624.3(a)]. There is no provision to relieve the applicant of all or part of this cost, and it must be paid before a final decision is issued [6 NYCRR 624.11(c)].

Finally, Mr. LaRuffa objected to the receipt of photographs of wetlands at his property, taken by Mr. Marsh on May 19, 2009, on the grounds that Mr. Marsh had not requested or received his permission to conduct a site inspection on that date. I received the photographs as offered by DEC Staff, noting that by seeking permits for regulated activities from DEC, Mr. LaRuffa's permission for DEC to access his property was implied, though I agreed it would have been better had Staff arranged the inspection with him in advance. Also, I noted that the property is open and undeveloped, with no signs prohibiting trespass, which suggests a diminished expectation of privacy. Finally, three of the four photographs offered by DEC Staff were taken at or close to the public road, where the wetlands are in plain view, and only the fourth, depicting standing water, was taken well within the property. The photographs, I said, provided relevant information about the wetland habitat, and, even had they been excluded, Mr. Marsh still could have described that habitat on the basis of a prior site visit, authorization for which Mr. LaRuffa did not contest.

Closing Arguments

To expedite a decision in this matter, I requested that the parties deliver oral closings at the conclusion of testimony, rather than hold the record open for written closings. Mr. LaRuffa delivered his own closing statement, and Ms. Wilkinson delivered the closing for DEC Staff.

Request to Reopen the Record

On June 10, 2009, Mr. LaRuffa called me to request that the record of the hearing be reopened on the basis of a letter to him, dated May 27, 2009, from the Town of East Hampton, which he said he had received on June 2. As Mr. LaRuffa had not included DEC Staff on the call, I told him to provide the Town's letter and submit his request in writing to me and Ms. Wilkinson. I also issued a letter of June 16, noting that once the request was received, DEC Staff would have an opportunity to respond, and I would set up a conference call for that purpose.

By letter of June 12, 2009, Mr. LaRuffa requested that I reopen the record based on information in the Town's letter, which he enclosed. That letter, from the chairman of the Town's zoning board of appeals, said that the board could not process Mr. LaRuffa's application, dated April 6, 2009, for a Natural Resources Special Permit and associated variances, because it needed additional information to complete its review. Among other things, the Town requested that Mr. LaRuffa provide an archaeological report that Mr. LaRuffa said was not completed for the Town's culvert and drainage basin project, even though the state's Office of Parks, Recreation and Historic Preservation ("OPRHP") had told him that both his and the Town's projects are in an area considered archaeologically sensitive.

The Town also requested that Mr. LaRuffa make application to the Suffolk County Department of Health Services, whose approval is needed for his septic system, and provide an amendment to his building plans that includes the depth of penetration of his proposed foundation. Mr. LaRuffa wrote that he could not make his application to the County, or determine the depth of the house's foundation, without first performing a soil boring to determine subsoil conditions and depth to groundwater, and that the Town had not responded to his written and verbal requests, dating back to May 2007, to do a soil boring. He also wrote that a soil boring was essential to assess the environmental impact, if any, of his septic system discharge on surface and ground water, which DEC Staff cited as a concern in its notice of permit denial.

Upon receipt of Mr. LaRuffa's letter, I scheduled a conference call with him and Ms. Wilkinson. During that call, held on July 3, DEC Staff objected to the request that the record be reopened, and I sustained Staff's objection. DEC's permit hearing procedures allow the ALJ, at any time prior to the issuance of a final decision, to reopen the hearing record to consider "significant new evidence" [6 NYCRR 624.13(e)]. However, based on the information provided by Mr. LaRuffa and the discussion of it during the conference call, I told the parties I saw no basis to reopen the evidentiary record, and confirmed that determination in a letter of July 6.

As I pointed out during the call, Mr. LaRuffa's application to the Town is separate from his application to DEC, though they are both for the same project, and DEC has no jurisdiction to review the Town's requests for additional information. Also, the Town's request for an archaeological report is not relevant to the issues adjudicated in relation to the DEC permit, which have nothing to do with archaeological impacts. Finally, issues concerning DEC's approval of the Town's application, including whether that application was complete in the absence of an archaeological report, are not before me, as I am concerned only with Mr. LaRuffa's application and whether he has demonstrated compliance with DEC's permitting standards.

As Mr. LaRuffa notes, the information provided by a soil boring would be relevant to issues concerning impacts of his septic system, one of the matters as to which he and Mr. Marsh both testified. However, DEC did not deny Mr. LaRuffa permission for a boring in the wetland, and Mr. LaRuffa did not request that DEC's hearing be postponed until he secured permission from the Town. Instead the hearing went forward with indirect evidence, including evidence of area topography, to suggest the depth to groundwater.

Mr. LaRuffa says that a soil boring is necessary to provide the information that the Town and the County Department of Health Services will need to review his project, but that the Town has withheld permission for the boring, which means that the information cannot be supplied. This is a matter for Mr. LaRuffa to address with those other permitting authorities, which did not participate in this hearing, but not a matter for DEC to resolve. The information provided by a soil boring could arguably be considered "significant new evidence" warranting reopening the hearing record, but the alleged need for a soil boring is not. Nor is it new information that Town and County approvals are required for this project; Mr. LaRuffa acknowledged this is in his DEC permit application, and he testified repeatedly about

these approvals, and the problems he might have securing them, at the hearing I conducted. For these reasons, the request to reopen the record is denied.

Transcript Corrections

On August 18, 2009, I sent the parties a list of proposed corrections to the hearing transcript, and set a deadline of August 26, 2009, for any objections to them. No objections were received. 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, the issues here concern the compliance of Mr. LaRuffa's project with the weighing standards at 6 NYCRR 663.5(e)(2), which apply to all activities identified in the chart at 6 NYCRR 663.4(d) as P(X), meaning that they are presumed to be incompatible with a wetland and its functions and benefits.

According to DEC Staff, Mr. LaRuffa's project would involve the following activities within the Class I freshwater wetland on his property: filling (Item No. 20 on the activities chart), clear-cutting vegetation (Item No. 23), grading (Item No. 25), introducing sewage effluent (Item No. 38), and construction of a residence and related structures or facilities (Item No. 42).

Because these activities are all charted as P(X), they may be permitted only if it is determined that they are compatible with the public health and welfare, the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area. Also, they must minimize degradation to, or loss of, any part of the wetland, and must minimize any adverse impacts on the functions and benefits that the wetland provides. Finally, because Class I wetlands provide the most critical of the state's wetland benefits, reduction of which is acceptable only in the most unusual circumstances, the proposed activities must satisfy a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefits of the wetland. [See 6 NYCRR 663.5(e)(2), weighing standards.]

Position of DEC Staff

The construction of a single-family house, driveway, deck, and sanitary system in the wetland on Mr. LaRuffa's property, and the associated clear-cutting, grading and filling of the wetland, would not be compatible with the wetland and its functions and benefits. The project is not compatible with the public health and welfare because of the risk that effluent from the septic system would contaminate ground and surface waters. There are other upland lots in Montauk where a house can be built, eliminating the need to build in a wetland. Construction of a house in this Class I wetland serves Mr. LaRuffa's private interest, but not the public interest, and satisfies no economic or social need. It would result in the elimination of wetland that provides important benefits such as wildlife habitat and open space, and performs functions such as groundwater protection and flood and storm water control. By allowing the project, DEC would be setting a precedent allowing for future wetland encroachment at this site and others.

Position of Applicant

The construction of the house would provide Mr. LaRuffa a retirement home on property he has owned and paid taxes on since 1980, as well as a legacy for his grandchildren. It would benefit not only him and his family, but also the community by increasing the property tax base and providing work in a period of high unemployment. These economic advantages outweigh the environmental impact caused by the loss of wetland shrubs and other vegetation that is common to the area. The precedent for building the house is already established through the construction of houses at neighboring properties, which also destroyed wetlands. The sewage discharge would be normal household effluent, uncontaminated by pathogens, and released at such a depth that it could not contaminate surface water. The alternative of building elsewhere in Montauk is not practicable because it would provide Mr. LaRuffa no financial benefit from the property he owns now, which has too little upland for a house that is not at least partially in a wetland. Mr. LaRuffa owns no other property on which to build a house, and it would cost several hundred thousand dollars, money he does not have, to buy another buildable lot in Mountauk. To help compensate for the loss of wetland at his project site, Mr. LaRuffa would agree to a permit condition allowing wetland vegetation to grow into the adjacent upland area, or requiring that shrubs displaced due to clearing be transplanted to that area, thus creating new wetlands.

FINDINGS OF FACT

1. August J. LaRuffa, Jr. proposes to construct a two-story, single-family dwelling with attached garage, second-story deck, driveway and septic system at his 0.42-acre property located at 20 Gloucester Avenue, Montauk, Town of East Hampton, Suffolk County.

2. Mr. LaRuffa and his wife purchased the property in 1980, with the idea of someday building a retirement home there. After his wife's death in 1996, Mr. LaRuffa abandoned the idea, but revived it recently at the encouragement of his daughter. Mr. LaRuffa lives in a townhouse in Port Jefferson, and, apart from his Montauk property, owns no other land on Long Island.

3. Mr. LaRuffa submitted his initial application to DEC (Exhibit No. 7) on December 29, 2007. The application included a site plan drawn on top of a map developed from a property survey performed on November 21, 2006. A revised site plan (part of Exhibit No. 8) was developed on January 8, 2009, and submitted at the hearing to represent Mr. LaRuffa's current proposal.

4. All construction proposed by Mr. LaRuffa would occur in a DEC-regulated freshwater wetland that is part of the MP-25 system in Montauk. [See Exhibit No. 29, DEC's Montauk Point Quadrangle wetlands map, as promulgated in 1993, which depicts the MP-25 wetland, on which the LaRuffa property has been highlighted with a pink marker.]

5. The MP-25 wetland is connected to Lake Montauk at its eastern edge, and consists of a series of segments broken up by roads, though many segments are connected by culverts. In the vicinity of Mr. LaRuffa's property, the wetland runs along the north side of Gloucester Avenue, and includes Peter's Run, a stream that empties into the lake after passing through a culvert at the intersection of Gloucester Avenue and West Lake Drive.

6. At the project site, the wetland boundary was flagged by the Town of East Hampton in 2006 and verified by DEC Staff in 2008. [The boundary is shown on the current site plan, Exhibit No. 8, and its location is not contested by Mr. LaRuffa.] Only 3,750 square feet of the 18,000-square-foot property -- all of it the deepest part of the lot, away from Gloucester Avenue -- is outside the wetland.

7. All construction activities would occur within the wetland, 6,462 square feet of which would be cleared of

vegetation. [The limit of clearing, grading and ground disturbance is shown on Exhibit No. 8.]

8. The proposed house, with a 30' x 30' footprint, would be built in the middle of the wetland at the LaRuffa property. An attached garage, 16' x 24', would be built onto the west side of the house, and a second-story deck, 12' x 30', would be built onto the east side of the house. The house and garage would be built on a poured concrete foundation. With two stories, the house would have 1,800 square feet of living space, including four bedrooms on the first floor and, on the second floor, a combination living room and dining room, a den and a kitchen. There would be three bathrooms, two on the first floor and one on the second. [See floor plans, included in Exhibit No. 8.]

9. A driveway would connect the garage with Gloucester Avenue, and Peter's Run would flow through a culvert under the driveway.

10. The septic system, to be installed in the area between the house and Gloucester Avenue, would consist of a rectangular septic tank connected to a leaching pool 15 feet from Peter's Run. [Drawings of the tank and leaching pool are included in Exhibit No. 8.] The bottom of the leaching pool is intended to be 12 to 14 feet below grade, to protect surface waters from contamination.

11. The north side of Gloucester Avenue, east of Mr. LaRuffa's lot, has been developed with houses during the last three decades. A house was built at 16 Gloucester Avenue, adjacent to Mr. LaRuffa's property, in 1979, and houses were built on the next succeeding lots, at 8 and 12 Gloucester Avenue, at some time after 1983. It has not been established whether the houses were built in regulated wetland or adjacent area, or whether the houses were permitted by DEC.

12. Adjacent to Mr. LaRuffa's property on the west is an undeveloped lot which also includes part of the MP-25 wetland.

13. MP-25 is a Class I wetland, meaning it provides the most critical of the state's wetland benefits [6 NYCRR 663.5(e)(2)], though the reasons for its classification were not explained at the hearing.

14. Wetlands are identified in the field on the basis of the plant community (most of the vegetation must be wetland species), the soils (hydric soils are required), and hydrology.

(Wetland hydrology requires standing water within 18 inches of the surface for at least two weeks during the growing season.)

15. At the LaRuffa property, wetland indicator species include highbush blueberry, red chokeberry, shad bush, soft rush, skunk cabbage, cinnamon fern, royal fern, sensitive fern, pepperbush, arrowwood, and tupelo trees. The shrubs and trees are at least 20 years old, indicating a wetland that is well-established and not the product of recent flooding.

16. The top 18 inches of soil in the wetland area include a fairly thick organic layer followed by layers of low chroma gleyed clay that results from waterlogging and a lack of oxygen.

17. Apart from Peter's Run, which flows year-round, the wetland includes an area of standing water in the east-central portion of the site, a low, marshy area where storm water collects.

18. Peter's Run collects street runoff, including runoff from Gloucester Avenue, as well as runoff from the golf course at Montauk Downs state park, and channels it through the culvert at the intersection of Gloucester Avenue and West Lake Drive. After becoming clogged, the culvert was recently replaced pursuant to an application by the Town of East Hampton that was approved by DEC. Prior to the culvert's replacement, storm water would back up in Peter's Run during heavy rain events, then flood Gloucester Avenue as well as properties on the north side of it, including the LaRuffa property.

19. At the suggestion of DEC Staff, the Town has created a detention basin and additional wetland habitat on the west side of West Lake Drive, north of Gloucester Avenue, on property it purchased from John Csajko. The basin and its associated wetlands are intended to catch, desedimentize and polish runoff coming into the culvert by way of Peter's Run before that runoff reaches Lake Montauk.

20. The freshwater wetlands on Mr. LaRuffa's property provide various benefits. They control flooding, absorb storm water, and filter pollutants and excess nutrients from water at the surface and in the ground. Also, they provide habitat and food for a range of wildlife including deer, rabbits and other small mammals, as well as migratory birds that use the wetlands as a water source, particularly during droughts. Finally, they provide open space in an area that, in the last several decades, has become increasingly residential.

21. The clearing, grading and excavation associated with site development would destroy wetland vegetation that cannot be relocated to the upland portion of Mr. LaRuffa's property.

22. The septic system could introduce pathogens, including viruses, into groundwater and, from there, into surface waters, including Peter's Run and Lake Montauk, creating a human health risk.

23. The construction of the house and garage would create an impermeable surface lacking the wetland's benefit of absorbing storm water. It would increase the risk of fertilizers and pesticides reaching surface waters. Also, it would increase the pressures for additional development both at the project site and at lots in the neighborhood which remain undeveloped, including the lot to the west of the LaRuffa property, which also contains part of the MP-25 wetland.

DISCUSSION

As noted above, the issues in this hearing concern the compliance of Mr. LaRuffa's project with the weighing standards at 6 NYCRR 663.5(e)(2). When performed in a wetland, all the the regulated activities involved in this project -- the construction of the house and garage, the introduction of sewage effluent via a septic system, the clear-cutting of vegetation, and the construction-related filling and grading of the property -- are deemed incompatible with the wetland and its functions and benefits. Therefore, to be permitted, certain standards must be met, and the need for the project must be weighed against its impact to the wetland.

In this case, the wetland in question (MP-25) is a Class I wetland, meaning that it provides the most critical of the state's wetland benefits. According to 6 NYCRR 664.4(e), the classification of each wetland shall be set forth in a written order of the DEC Commissioner, and a copy of that order shall be filed in the office of the clerk of each local government in which the wetland is located and in the appropriate regional office of DEC. DEC Staff did not present the order for MP-25 at the hearing, nor did it offer testimony as to why MP-25 was determined to be a Class I wetland. However, Mr. LaRuffa did not contest the Class I designation, and Mr. Marsh testified to various benefits that the wetland provides, including benefits for flood and storm water control, wildlife habitat, water supply, water quality, fisheries and open space. [A discussion of these benefits, as applied to wetlands generally, is included

at 6 NYCRR 664.3(b).] Mr. Marsh also explained how these benefits would be affected by the project proposed by Mr. LaRuffa.

- - Impacts to Wetland

According to Mr. Marsh, the construction of a house and garage would create impermeable surfaces that would reduce the wetland's ability to handle excess storm water and control flooding that has been a problem along Gloucester Avenue. The clearing would destroy wildlife habitat, and the disturbance tied to human activities would drive most animals from the property. Development would affect the wetland's ability to filter out pollutants and excess nutrients from groundwater. The sanitary system, being 15 feet from Peter's Run, could introduce pollutants, including human pathogens, into that waterway, which flows into Lake Montauk, where they could impact fisheries and finfish resources. The project entails the loss of natural vegetation that provides food for deer and birds, and open space in an area that has been increasingly developed.

Mr. LaRuffa did not deny that his project would have an adverse wetland impact, but said the impact would be no different from that caused by the construction of houses, each with its own septic system, at other properties along the north side of Gloucester Avenue. Such construction appears to have taken place since the Freshwater Wetlands Act took effect, based on a series of aerial photographs that were presented at the hearing. Mr. LaRuffa said these other houses were also built in "cut-outs" of wetland shrubbery, and that their septic systems release the same effluent, and have the same groundwater impact, that his would. From what he saw in the aerials, Mr. Marsh agreed that it appeared three houses had been built along Gloucester Avenue east of Mr. LaRuffa's property, one about thirty years ago and two others in the early 1980's, but he said he did not know whether they were permitted by DEC, or whether they were in the wetland or its regulated adjacent area. Without knowing whether or on what basis any approvals were granted, there is no basis for comparison among these projects, though Mr. Marsh said that since coming to DEC in 2001, he has never issued a freshwater wetland permit for a single-family dwelling and septic system in a DEC-regulated freshwater wetland, nor is he aware of any such permit being issued within the state.

- - Project Need

Because Class I wetlands provide such critical wetland benefits, permitted activities must fulfill a "compelling" economic or social need that "clearly and substantially"

outweighs the loss of or detriment to the Class I wetland. According to Mr. Marsh, such need was not demonstrated in this case "because those kinds of social needs that they specifically mention in the regulations speak to schools, hospitals, projects that are . . . for the better good of the entire community. And even in those circumstances, only if [the activity] cannot be located at any other location. So if you had an existing hospital that needed to do an expansion and it happened to be adjacent to a wetland, and the only place that you could put this expansion would be the wetland and there is no other place they could locate it, that would be considered potentially a compelling social need. But certainly if they had the ability to locate the expansion in an upland area, they would have to do so." [Transcript, page 290.]

According to DEC Staff, Mr. LaRuffa has not demonstrated a compelling economic or social need to build a house in the wetland on his property. I agree, and on that basis alone DEC's permit may be denied. As a private dwelling, the house serves no public use, benefit, or purpose. While its construction would, as Mr. LaRuffa argued, provide jobs in a recession, and the house, once completed, would add to the local property tax base, such benefits do not demonstrate the need required to support permit issuance. According to 6 NYCRR 663.5(f)(4)(ii), a "compelling" economic or social need "implies that the proposed activity carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable." In this sense, building a house in the wetland on Mr. LaRuffa's property is unnecessary, because, as Mr. Marsh pointed out, Montauk has upland lots that one can build on instead. Even for Mr. LaRuffa, there is no compelling need to build a house on his Montauk property, only a desire for a retirement home he can leave to his family, and for a return on the investment he made when purchasing his property. As Mr. LaRuffa himself testified, as a non-buildable lot, the property cannot be sold on the commercial market, but if it is buildable, it is probably worth hundreds of thousands of dollars, so there is "a significant economic loss" by "not being allowed to do something that has been in the works for 30 years." [Transcript, pages 162-163.]

Mr. LaRuffa purchased his Montauk property in 1980, after the Freshwater Wetlands Act took effect but before the wetland map offered by DEC Staff at the hearing (Exhibit No. 29) had been promulgated. Mr. LaRuffa said that when he purchased the property, he had no reason to assume he needed a freshwater wetlands permit to build on it, since the survey upon which the purchase was based (included in Exhibit No. 10) showed no

evidence of any freshwater wetlands. [Transcript, page 226.] However, as Mr. Marsh explained, wetlands are not typically shown on a survey, and surveyors are not qualified to delineate them; they would be shown only upon request, if the property owner had them delineated by the state or local government, or by a consultant, typically a biologist, who is qualified to locate their extent.

Mr. LaRuffa suggested that there were no freshwater wetlands on his property when he bought it, and that they have since grown across the property because of flooding from Gloucester Avenue and a several-year-old breach in the earthen berm along Peter's Run, which he said has allowed runoff to enter his property from the lot at 16 Gloucester Avenue, where the breach is located. Mr. Marsh refuted the notion that wetlands had only recently colonized the LaRuffa property, noting that hydric soils, on which wetlands depend, take at least 40 years to form, and that the large wetland shrubs he observed there were at least 20 years old, and some of the wetland trees were at least 30 years old. Mr. Marsh acknowledged that Mr. LaRuffa's property may have been flooded from Gloucester Avenue, particularly before the culvert was replaced at the intersection of Gloucester Avenue and West Lake Drive. But he said that the breach in the berm did not likely contribute to any such flooding, and that, in all likelihood, the breach was made by the owner of 16 Gloucester Avenue to drain water from that property to Peter's Run, as a way to control mosquitos.

During the course of the hearing, Mr. LaRuffa said he was willing, as a condition of any DEC permit, to allow the "natural migration" of wetlands into the northernmost, upland part of his property, which is considered wetland adjacent area, or, if DEC prefers, to plant that area with shrubs that would be displaced by his project or brought in from offsite. Mr. Marsh convincingly rejected this idea, noting that the wetlands would not spread into the adjacent area on their own, and that, to create new wetland there, additional excavation would be required, creating even more site disturbance.

Apart from the issue of need, Mr. LaRuffa did not demonstrate compliance with the other weighing standards applicable to activities that would occur in Class I wetlands, as discussed below.

- - Compatibility with the Public Health and Welfare

The septic system proposed by Mr. LaRuffa is not compatible with the public health because its leaching pool would be as

close as 15 feet from Peter's Run, a year-round flowing stream that empties into Lake Montauk.

Mr. LaRuffa said that the septic system would not contaminate surface water because the bottom of the leaching pool would be 12 to 14 feet below grade. Mr. Marsh responded that at such a depth, the system would in all likelihood be in the groundwater, and that pathogens, including viruses, released from the system could reach Peter's Run, which is groundwater-fed. While no soil boring or test hole has yet been dug to confirm the depth to groundwater at this site, Mr. Marsh said that based on the contour lines on the survey map (which he said indicate the property is seven to eight feet above mean sea level) and the proximity of Lake Montauk and its associated tidal wetlands, groundwater could not be more than four or five feet from the surface of most of the lot. [Transcript, page 271.] I find this conclusion to be credible and substantiated by the record. Mr. LaRuffa said that, when a soil boring is done, his septic system will be reviewed by the County's Department of Health Services, and suggested that issues about its design be left for that agency's consideration. As Mr. Marsh explained, however, the County defers to DEC about the impacts of such systems on wetlands and surface water bodies. While not a sanitary engineer, Mr. Marsh can address such impacts as a biologist trained in how these systems operate.

- - Practicable Alternatives

Mr. LaRuffa's proposal to build a house in the wetland on his property is not the only practicable alternative that could accomplish his objective, which is to build a house for his retirement. Mr. LaRuffa said he had no other land to build on, and Mr. Marsh acknowledged "there is really not much room to do anything" on Mr. LaRuffa's lot, due to its limited amount of upland area. [Transcript, page 281.]

On the other hand, Mr. Marsh said there are other upland lots in Montauk where a house could be built, providing Mr. LaRuffa an alternative to building in a wetland or its adjacent area. Mr. LaRuffa said building at another lot is not practicable because it would cost him \$400,000 to \$500,000 to purchase a buildable lot, and doing so would present a financial hardship when the property he already owns, if developed, represents a significant part of his retirement nest egg. While I appreciate the expense involved in purchasing another property, any hardship it presents should be considered self-created. It was Mr. LaRuffa's choice to buy where he did, when a site inspection should have alerted him to the presence of wetlands

that could limit the property's development potential and prevent him from realizing his objective. Mr. Marsh testified convincingly that the wetlands are well-established and did not appear at or spread across the property since Mr. LaRuffa purchased it.

Mr. LaRuffa pointed out that, based on information he provided in 1987, seven years after he purchased his property, DEC issued a letter (Exhibit No. 10) confirming that it was more than 300 feet from inventoried tidal wetlands, and that no tidal wetlands permit would be needed for activities there. However, as he admitted during cross-examination, he did not receive any such letter, in relation to freshwater wetlands, before his property purchase.

- - Wetland Loss and Degradation

Mr. LaRuffa's proposed house does not minimize degradation to, or loss of, any part of the wetland or its adjacent area, nor does it minimize adverse impacts on the functions and benefits that the wetland provides.

In an effort to reduce wetland impacts, Mr. LaRuffa submitted a revised site plan at the hearing, one that slightly reduced the footprints of both the house and the garage. However, as Mr. Marsh points out, the project remains entirely within the wetland, and the house has not been downsized to the minimum footprint allowed by zoning.

CONCLUSION

On the record developed at this hearing, the Applicant, August J. LaRuffa, Jr., has not demonstrated that his project meets the weighing standards at 6 NYCRR 663.5(e)(2) for issuance of a freshwater wetlands permit.

RECOMMENDATION

The application for a freshwater wetlands permit should be denied.

EXHIBIT LIST

AUGUST J. LARUFFA, JR.
FRESHWATER WETLANDS PERMIT HEARING
Application No. 1-4724-01628/00001

1. Combined Notice of Legislative Public Hearing, Issues Conference, and Adjudicatory Hearing (4/29/09)
2. Hearing notice as published in East Hampton Star (4/30/09)
3. Affidavit of publication of notice in East Hampton Star (4/30/09)
4. Hearing notice as published in DEC's Environmental Notice Bulletin
5. Cover letter transmitting hearing notice to Mr. LaRuffa (4/24/09)
6. Hearing notice distribution list (4/22/09)
7. Original Application for Permit, with attachments, signed by Mr. LaRuffa (12/29/07), completed Environmental Assessment Form, property photographs, and site plans showing area of project development and freshwater wetland boundary as delineated by Town of East Hampton
8. Modifications to permit application, including a revised site plan (1/8/09), first and second story floor plans, details on sewage disposal system, and profile view of house, garage, and second-story deck
9. Aerial lithographs and photographs of project site area from 1933, 1947, 1960, 1983 and 2005
10. Letter to Mr. LaRuffa from DEC (11/16/87) confirming no tidal wetlands permit is necessary for his project, and Mr. LaRuffa's request for such letter, with attachments (11/2/87)
11. Letter to Mr. LaRuffa from Town of East Hampton Planning Department (6/5/95) confirming identification of freshwater wetlands, with attached map
12. Survey map of LaRuffa property (12/21/79)
13. Survey map of LaRuffa property (8/11/95)
14. Survey map of LaRuffa property (11/21/06), with attached letter to Mr. LaRuffa from Town of East Hampton Planning Department (3/22/07) confirming accuracy of wetland boundary depicted on map
15. Photographs taken at and near the project site (pages 1 to 12), a hand-drawn drawing showing neighborhood housing development (page 13), and tax map depiction of general area (pages 14 and 15) [Pages 1, 7, 13, 14 and 15 were received in evidence; all others were marked for identification only]
16. Application to DEC by Town of East Hampton for freshwater and tidal wetlands permits to replace culvert pipe under West Lake Drive, Montauk (5/18/05)

17. DEC's freshwater and tidal wetlands permit for the replacement of culvert pipe under West Lake Drive, Montauk (3/6/06)
18. Letter to DEC from Town of East Hampton (8/22/06) requesting modification of permit identified in Exhibit No. 17; letter to DEC from Town of East Hampton (10/12/06) confirming project revisions; and letter to Town of East Hampton from DEC (5/14/07) approving permit modification to authorize excavation of material to create a storm water detention pond
19. Letter to NYS Office of Historic Preservation from East Hampton Natural Resources Protection Department (11/2/06), re: Town's permit application for culvert replacement, with attached aerial views
20. DEC's Notice of Permit Denial, by letter to Mr. LaRuffa (8/14/08)
21. DEC Memorandum (10/31/06) recommending issuance of permit to Town of East Hampton, with attachments
22. Letter to Town of East Hampton from DEC (4/18/07) authorizing modification of Town permit to allow creation of storm water detention pond
23. Letter to Town of East Hampton from DEC (2/28/07) with attached Notice of Complete Application for creation of storm water detention pond
24. East Hampton Town Board resolution addressing purchase of land on West Lake Drive, Montauk, from John Csajko, and attachments
25. Site plan for culvert maintenance and replacement at West Lake Drive and Gloucester Avenue, Montauk (site plan prepared 5/13/05)
26. Revised site plan for culvert project (10/06)
27. Records access request to East Hampton Town Clerk from Mr. LaRuffa, in relation to former Csajko property and its sale to Town of East Hampton
28. Resume of Robert F. Marsh, Manager of the Bureau of Habitat, DEC Region 1
29. New York State Freshwater Wetlands Map, No. 10 of 39 for Suffolk County, Montauk Point Quadrangle
30. Aerial photograph depicting LaRuffa property
31. Photographs of vegetation and standing water at LaRuffa property
32. Photographs of Town of East Hampton drainage ditch, and breach in ditch, at 16 Gloucester Avenue, Montauk, next to LaRuffa property (4/29/07)
33. Photograph of mailbox and fence at 16 Gloucester Avenue, Montauk

NOTE: All exhibits were received in evidence except for Nos. 16, 17, 18, 19, 21, 22, 23 and 24, and portions of No. 15 (as noted above), which were marked for identification but excluded from evidence on the objection of DEC Staff as not being relevant to whether Mr. LaRuffa's proposal meets standards for issuance of a freshwater wetlands permit. The first six exhibits were introduced by the ALJ to confirm the issuance, publication and distribution of the hearing notice.