

M E M O R A N D U M

July 22, 1988

TO: Natural Resources Supervisors

FROM: Kenneth F. Wich

RE: Interpretation of Standards for Issuance of Freshwater Wetland Permits (Supersedes April 6, 1987 Memo)

Background: Standards for issuance of freshwater wetland permits are contained in 6NYCRR Sections 663.5 and 665.7. I provided guidance for their application in April, 1987 to achieve greater statewide consistency. This guidance was considered interim in recognition of its limitations.

Working experience since that time has confirmed these limitations. While that interpretation of the standards was a literally correct reading of the regulations, it did not adequately consider the need for "balancing" inherent in the Act. Nor did it properly accommodate the role of mitigation as reflected in Section 663.5(g).

The goal of the freshwater wetland regulatory process is to prevent the loss of wetland functions and benefits. The fundamental regulatory issue regarding a proposal is that of its adverse impacts.

We have reexamined the regulations and the underlying Act in conjunction with the Division of Legal Affairs. Clearly the emphasis on the "need" standard in my previous memo has unnecessarily restricted the application of the "weighing" standards whereby the regulatory goal can be satisfactorily achieved through proper consideration of mitigation.

The revised guidance contained herein supersedes that of my memo of April 6, 1987. It has been determined to be consistent with Part 663 as currently written and can be immediately applied in decision making. These Permit issuance standards will be clarified when Part 663 is revised.

Standards for Permit Issuance:

1. Statewide minimum land-use regulations contained in Section 665.7(g) establish compatibility categories for 43 types of activities that may be proposed to take place in regulated freshwater wetlands.
2. A specific determination of compatibility must be made for any regulated activity not listed or listed as P(C), usually compatible or P(N), usually incompatible. If the project meets all three compatibility tests contained in Section 663.5(e)(i) a permit, with or without conditions, can be issued regardless of the classification of the affected wetland. No other weighing standards need be applied or met. Wetland loss will be inconsequential by definition.
3. Activities listed as P(X), incompatible and any unlisted regulated activity or P(C) or P(N) activity that does not meet all three compatibility tests are considered to be incompatible with the preservation, protection and conservation of the wetland and its benefits. Before a permit can be issued, each of the weighing standards contained in Section 663.5(e)(2) must be met for the class of wetland to be impacted.
 - a. The proposed activity must be compatible with the public health and welfare, regardless of the wetland class.
 - b. The proposed activity must be the only practicable alternative that can accomplish the applicant's objectives, regardless of the wetland class.
 - c. The proposed activity must have no practicable alternative on a site that is not a freshwater wetland or adjacent area, regardless of the wetland class.
 - d. If these three thresholds are all satisfied, a proposed activity must then minimize degradation or loss of any part of the wetland or its adjacent area and must minimize adverse impacts on the functions and benefits of the wetland if it affects a Class I, II or III wetlands. A reasonable effort must be made to minimize degradation or loss of any part of a Class IV wetland or its adjacent area.
 - e. A showing and balancing of economic or social need are then required if these standards are satisfied and there remains an unmitigated net loss or adverse impact. This balancing must be commensurate with the magnitude of the unmitigated adverse impacts or losses and the classification of the wetland. The burden on the applicant to demonstrate need is larger as the net impact or loss is greater and/or the wetland class is higher.

- f. A permit, with or without conditions, can be issued when all standards are satisfied and unmitigated net losses or adverse impacts are non-existent or inconsequential, regardless of a demonstration of economic or social need.

This revised guidance shifts review emphasis from a demonstration of need to a weighing question based on magnitude of unmitigated impacts. This approach is more workable and more legally defensible. It is also more consistent with the balancing process expressed as public policy in the Act.

It is important to recognize that the standards still represent a rigorous test. The applicant must first demonstrate that physical losses and/or impacts on wetland functions and benefits cannot be avoided entirely. Unavoidable impacts to the affected wetland must then be minimized. Finally, net remaining losses or impacts must be fully compensated for or must be shown to clearly outweigh losses to a degree commensurate with the class of the affected wetland.

In this process, a fundamental principle must be that mitigation cannot be used as the "currency" by which wetland alteration can be easily bought. Avoidance remains the first priority. Guidance will be forthcoming for consistent consideration of acceptable mitigative measures.

Director
Division of Fish and Wildlife