

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 Broadway  
Albany, New York 12233-1010

In the Matter

- of -

the Application for a New York State Tidal Wetlands Permit, DEC ID No. 2-6403-00316/00001,  
pursuant to Environmental Conservation Law (ECL) Article 25 and Title 6 of the Official  
Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 661,

- by -

MAGGIES RUN LLC

DECISION OF THE COMMISSIONER

March 20, 2024

## DECISION OF THE COMMISSIONER

Maggies Run LLC (applicant) filed an application with the New York State Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit pursuant to ECL article 25 and 6 NYCRR part 661. Applicant proposes to construct a commercial automobile storage facility (proposed project) at property located at 422 Chelsea Road, Staten Island, Richmond County, New York (property).<sup>1</sup> The property is approximately 3.71 acres in size and includes DEC regulated tidal wetlands and regulated adjacent area. The proposed project would encompass approximately 0.39 acres of the property and would be located entirely within the adjacent area to the regulated tidal wetlands.

By letter dated October 27, 2022, Department staff denied the application. Applicant requested an adjudicatory hearing with respect to the denial pursuant to 6 NYCRR part 621. The proceeding was referred to the Department's Office of Hearings and Mediation Services, and Administrative Law Judge (ALJ) Michael S. Caruso was assigned to the matter. The ALJ held a virtual legislative public comment hearing on March 22, 2023 and also received written comments up until March 29, 2023 with respect to the proceeding. No petitions for party status were received. The ALJ held an issues conference on April 19, 2023, and the parties agreed to adjudicate the issues as contained in Department staff's denial letter, applicant's statement of issues dated March 31, 2023 (Statement of Issues), and Department staff's response to the statement of issues dated April 6, 2023.

The ALJ held an adjudicatory hearing on August 22, 2023 and prepared the attached hearing report, dated February 6, 2024 (Hearing Report) recommending that the permit application be denied. Upon due consideration, I adopt the hearing report as my decision in this matter, subject to the following comments.

### **The Property**

The property is an irregularly shaped parcel that is approximately 3.71 acres in size (see Hearing Exhibit [Exh] 8 at 190 [Site Plan, dated February 3, 2020, revised through October 26, 2021]). The property was historically disturbed (previously used as an automobile salvage facility) but has been vacant since around 2005 (see Hearing Report at 9 [Finding of Fact No. 3]). It is currently vegetated with invasive and non-invasive species (see Hearing Transcript [Tr] at 33).

The property consists entirely of regulated tidal wetlands, as delineated by Department staff in 2018, and regulated adjacent area (see Exh 8 at 190; Hearing Report at 9 [Finding of Fact No. 3]). Except for approximately 139 feet of the property which borders Chelsea Road, the property is surrounded by Maggie's Creek, a tidal creek, and associated tidal wetlands, and the

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<sup>1</sup> The property address is also identified in the record as 425 Chelsea Road, Staten Island, New York (see Hearing Transcript at 68-69; Hearing Exhibit 1 at 4 [permit application stating that the project would be located at 425 Chelsea Road]). Department staff's denial letter indicates that the correct mailing address for the property appears to be 422 Chelsea Road (see Hearing Exhibit 11 at 212 n 1). As noted in the Hearing Report, all exhibits are Bates Stamped and page numbering referenced for all exhibits are references to the Bates Stamped numbering (see Hearing Report at 1, n 2).

tidal wetlands adjacent area in the center of the parcel forms a roughly “L” shaped peninsula of upland terrain (see Exh 8 at 190; Hearing Report at 9 [Finding of Fact Nos. 3-4] and 14 [“The property is effectively a peninsula extending away from the road in excess of 400 feet into the Saw Mill Creek wetlands complex”]). Importantly, the tidal wetlands which border approximately two-thirds of the property are part of the Saw Mill Creek Pilot Wetlands Mitigation Bank (Mitigation Bank), a 54-acre area of restored, improved or newly created wetlands (see Hearing Report at 10 [Finding of Fact No. 11]; see also Exh 8 at 190 [Site Plan] and Exhibit 1 to the Prefiled Testimony of Steve Zahn [depicting the Mitigation Bank site]).

The Sawmill Creek wetlands system is one of the largest and most important wetlands systems in New York City (see Hearing Report at 9-10 [Finding of Fact Nos. 6-7]; Tr at 157, 213). According to Department staff, the presence of the Mitigation Bank “serves to elevate the ranking of the [tidal wetland] complex as it ensures a sustained high level of function over time” (Tr at 213; see Hearing Report at 10 [Finding of Fact No. 10]).

### **Applicant’s Proposed Project**

As revised by applicant during Department staff’s review of the permit application,<sup>2</sup> applicant proposes to construct an automobile storage facility on the property encompassing approximately 0.39 acres of tidal wetland adjacent area (see Exh 8 at 190; Hearing Report at 9 [Finding of Fact No. 2]). Applicant represents that only new, undamaged vehicles awaiting delivery to dealerships would be stored at the facility (see Tr at 31; Exh 8 at 185-186) and that the facility would provide parking for 43 new vehicles (see Exh 8 at 183; Hearing Report at 9 [Finding of Fact No. 2][“approximately 43”]).

According to applicant, its proposed project would require clearing and minimal grading of the 0.39-acre project area (Tr at 34), installing a 22-foot-wide gravel driveway extending the length of the project area, installing an 8-foot high chain link fence surrounding the project area and planting the remaining areas where cars would be parked with fast-growing perennial grass seed mix (see Tr at 34; Exh 1 at 8-9; see also Exh 8 at 190). Upon recommendation of Department staff, applicant also proposes that the project area be physically separated from the tidal wetland by a 50-foot buffer zone, at all locations possible, between the landward edge of the tidal wetland and the proposed development (see Tr at 34; Exh 8 at 183). The buffer zone would comprise approximately 0.71 acres and would be restored with mitigative plantings (see Exh 8 at 195; Hearing Report at 9 [Finding of Fact No. 2]). Applicant contends that the proposed project would not result in any disturbance of the tidal wetland itself or the placement of fill in the wetland or its adjacent area (see Exh 8 at 190; Tr at 34; Statement of Issues at 6).

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<sup>2</sup> As detailed in the hearing report (see Hearing Report at 1-4), during the course of staff’s consideration of applicant’s permit application, staff from 2020 to 2022 issued several notices of incomplete application to applicant which resulted in revisions of the proposal by applicant.

## Discussion and Analysis

### --Regulatory Background

The Department's tidal wetlands regulations, set forth in 6 NYCRR part 661, implement the policy of New York State "to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the State" (6 NYCRR 661.1; see ECL 25-0102).

Section 661.9 of 6 NYCRR sets forth standards for the issuance of, among other things, permits for proposed regulated activity on an adjacent area of a tidal wetland, as here. As set forth in 6 NYCRR 661.9[c], "[t]he department shall issue a permit for a proposed regulated activity on an adjacent area only if it is determined that the proposed regulated activity . . .

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

(4) complies with the use guidelines contained in section 661.5 of this Part."

Pursuant to 6 NYCRR 661.5(b)(48), the activities which applicant proposes to conduct here, namely, "[c]onstruction of commercial and industrial use facilities not requiring water access . . . and undertaking commercial and industrial use activities not requiring water access," constitute presumptively incompatible uses in the adjacent area of a tidal wetland. With respect to compliance with the use guidelines set forth in 6 NYCRR 661.5, "there shall be a presumption that the proposed activity may not be undertaken on the adjacent area because it is not compatible with the preservation, protection, or enhancement of the present and potential values of tidal wetlands if undertaken in that area." It is the applicant's burden to overcome such presumption and to "demonstrate[e] that the proposed regulated activity will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands" (6 NYCRR 661.9[c][4]).

The burden is on an applicant to establish that the applicable standards set forth in 6 NYCRR 661.9(c) will be met (see 6 NYCRR 661.9[a]). "Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation" (6 NYCRR 624.9[c]).

### --ALJ Recommendation that Requested Permit be Denied

In this matter, Department staff determined that applicant failed to meet the applicable permit issuance standards set forth in 6 NYCRR 661.9(c)(3) and (4) (see Exh 11 at 212-215). The ALJ agrees, and recommends that I deny the requested permit.

In the hearing report, the ALJ addressed and discussed in detail the impacts of the proposed project on each present or potential wetland value set forth in 6 NYCRR 661.9(c)(3), as well as the social and economic benefits which may be derived from the proposed project. Based on that comprehensive review, the ALJ determined that the record clearly established that the proposed project may or would have undue adverse impacts on the present or potential value of (i) the adjacent and nearby tidal wetlands for marine food production (see Hearing Report at 15-16), (ii) wildlife habitat (see id. at 16-18), (iii) education and research (see id. at 20), and (iv) open space (see id. at 20-21).

In addition, the ALJ thoroughly reviewed the adverse impacts associated with the proposed project (see Hearing Report at 21-23), concluding that the adverse impacts “significantly outweigh the social and economic benefits that might be derived from the proposed project” (id. at 23). The ALJ further concluded that, as a result of the undue adverse impacts of the proposed project on wetland values and functions, applicant failed to overcome the presumption of incompatibility and failed to demonstrate that the proposed project will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands (see id. at 23-24).

#### Evaluation of Permit Applicant’s Evidence and Argument

A review of the evidence and argument presented by applicant underscores the appropriateness of Department staff’s finding that applicant did not meet its burden on the application. At the hearing, applicant offered the testimony of Greg Fleischer, a certified professional wetland specialist with Capital Environmental Consultants, Inc., who was retained by applicant to prepare the tidal wetlands permit application (see Tr at 28-29). Mr. Fleischer testified, among other things, that the proposed project will have an “extremely minimal” impact after the construction phase (Tr at 35), in part because the property will be used only for the storage of new, undamaged vehicles awaiting delivery to a dealership, “making it extremely unlikely that they would leak any contaminants, such as oil, or shed tire fragments” (Tr at 42; see id. at 35-36).

However, in addition to the new cars that will be stored at the parking lot, the operation of the parking lot will require the introduction of truck traffic to move the new vehicles in and out of the lot. Applicant failed to sufficiently address this fact, and failed to provide sufficient assurance that trucks coming onto the property to move vehicles will not unduly contribute to the introduction of pollutants to the tidal wetlands. On this point, Matthew James, a Biologist 1 employed at DEC’s Region 2 office, testified that the presence of vehicles at the parking lot would negatively impact marine food production inasmuch as there would be a “net increase [in] the amount of tire crumb rubber” entering the tidal wetlands system which could be expected to enter the food chain and because “marine food production could be compromised if, as can be expected, leakage of motor vehicle fluids gets washed into the wetlands system and chemical constituents of those fluids are absorbed by marine organisms (Tr at 159). Although Mr. Fleischer testified that “it is anticipated that only two vehicles will be moved off the site at any given time,” that the vehicles “will only be sporadically dropped off and retrieved” and that “[a]ctivity on the site will be limited to movement by a flatbed at a very slow speed solely during

daylight hours to retrieve and drop off vehicles” (Tr at 36-37), applicant did not provide sufficient detail as to the amount of truck activity that is anticipated. On this record, I cannot find that there will not be undue adverse impacts to tidal wetlands values arising from the new truck traffic entering the tidal wetland adjacent area if this project were approved.

Mr. Fleischer additionally testified that the only infrastructure present at the property would be the 8-foot high chain link fence (see Tr at 36). Applicant contended that the minimal infrastructure lessens the impact of the parking facility on the surrounding wetlands (see Post Hearing Brief on Behalf of Applicant [Applicant Brief], dated November 2, 2023, at 18). However, both Mr. James and Department witness Steve Zahn, a biologist who retired from the position of Regional Director of DEC’s Region 2 office in 2021, testified that the installation of the fence on the property would adversely impact wildlife habitat in the tidal wetlands by restricting movement and migration of wildlife across the property (see Tr at 159, 163, 213-214). On this record, I find that applicant failed to demonstrate that the presence of the fence would not cause an undue adverse impact to the surrounding wetland value for wildlife habitat. In addition, given the location of the proposed project within the wetlands complex, it is difficult to see how the installation of the fence would not result in an undue adverse impact upon the tidal wetlands value for open space. Indeed, Mr. Zahn testified that, given that the property “juts deeply into the heart of the wetland complex[, t]he construction and operation of the commercial facility would create an envelope of sound and visual impacts that would extend far beyond the property boundaries” (Tr at 214).

Mr. Fleischer also testified that “baseline human activity, movement, and noise levels from . . . adjacent transportation facilities, major thoroughfares used by cars, motorcycles and commercial trucks for daily travel, and planes flying overhead from an international airport, will exceed any human activity, movement, and noise levels associated with the proposed project, therefore limiting the impact that the proposed project may have on migratory birds, non-migratory birds and other species” (Tr at 37). Mr. Fleischer’s testimony on this point, however, is conclusory, as he did not offer any testimony as to current baseline noise levels at the property as compared with anticipated noise levels arising from the project. The record reflects that the addition of human noise to the adjacent area can have an adverse impact upon the habitat value of the tidal wetlands, especially for species which are sensitive to human noise and movement (see Tr at 159). I note again that Mr. Zahn testified that the proposed project “would create an envelope of sound” that would cause an adverse impact beyond the boundaries of the property (Tr at 214). As such, I find that applicant failed to demonstrate that the additional noise will not unduly impact the tidal wetlands value for wildlife habitat.

Mr. Fleischer further testified that the project’s 50-foot setback would be a “vegetative buffer [that] would provide long-term protection to the nearby wetland’s character, quality, values and functions” (Tr at 35) and would also improve the usability of the property for wildlife (see Tr at 41-42). Although the mitigative plantings that applicant has proposed might lead to some improvement of habitat and stormwater control (see Hearing Report at 20-21), applicant has offered no evidence that the plantings will lessen or mitigate the impact of the additional noise, human movement and chain link fencing that will be introduced into the tidal wetland adjacent area. In addition, no mitigative plantings are proposed along the property line that separates the proposed driveway and fencing from the Mitigation Bank to the south (see Exh 8 at

195), leaving a significant portion of the surrounding tidal wetlands without the protective vegetative barrier that applicant proposes. As such, I do not find that applicant has demonstrated that its proposed 50-foot buffer zone with mitigative plantings sufficiently reduces or eliminates the undue adverse impacts on the surrounding tidal wetlands values that have been identified in this record and by Department staff and the ALJ.

### Conclusion

Based upon my review of the record,, I concur with and adopt the ALJ's analysis and conclusions and offer the following additional comments.

It is clear that the installation of the proposed parking lot on the property would bring human activity and presence, including noise, truck traffic, pollutants associated with the trucks, and chain link fencing into the tidal wetland adjacent area where there currently is none (see Tr at 163-164, 213-214; see also Exh 11 at 213). Moreover, the record demonstrates that the impacts of the proposed project on the surrounding tidal wetlands are heightened by several factors. These factors include:

- 1) due to the unique geographic shape of the property, the proposed project would be surrounded on three sides by tidal wetlands such that the project would effectively "fragment[]" the tidal wetland complex and cause a "much higher level of impact than a similar project located along a margin of the system" (Tr at 214). This fragmentation is a significant environmental concern which negatively impacts the unique configuration of the surrounding tidal wetlands;
- 2) the tidal wetlands which border much of the property have a unique value as part of the Mitigation Bank (see Tr at 213); and
- 3) as the ALJ observed (see Hearing Report at 14, 17), part of the driveway and fencing proposed by applicant would be placed on the property line separating the Mitigation Bank from the property, and no mitigative plantings are proposed along that property line, adding to the direct impact of the proposed project on the adjacent tidal wetlands.

Given these specific circumstances and upon my review of the record, applicant has not demonstrated that the proposed new human presence and activity on the property will cause minimal disturbance and will not unduly impact the values of the surrounding wetlands. I also find that applicant has failed to overcome the presumption of incompatibility and failed to demonstrate that "the proposed regulated activity will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands" (6 NYCRR 661.9[c][4]).

Finally, I have considered "the social and economic benefits which may be derived from the proposed activity" (6 NYCRR 661.9[c][3]), based on the record including but not limited to the ALJ's analysis (see Hearing Report at 21-23), and conclude that any social and economic benefits arising from the proposed project do not outweigh the undue adverse impacts that the

proposed project would have on tidal wetland values identified by Department staff, the ALJ, and the applicable regulations.

Based on the record of this proceeding, applicant's application for a tidal wetlands permit is denied.

For the New York State Department  
of Environmental Conservation

/s/

By:

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Basil Seggos  
Commissioner

Dated: March 20, 2024  
Albany, New York



**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Denial of the Application for New York State Tidal Wetlands Permit,  
DEC ID No. 2-6403-00316/00001 Pursuant to Environmental Conservation Law Article 25 and  
Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6  
NYCRR), Part 661,

- of -

**MAGGIES RUN LLC,**

Applicant.

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**HEARING REPORT**

**BACKGROUND**

This hearing report arises from an application before the New York State Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit sought by Maggies Run LLC (Maggies Run or applicant) to construct a commercial parking area with a driveway and surrounding 8-foot high chain link fence over approximately 0.39 acres of DEC regulated tidal wetlands adjacent area. The applicant proposed to enhance approximately 0.71 acres of existing tidal wetlands adjacent area on the property.

Maggies Run submitted a tidal wetlands permit application, dated April 15, 2020, to DEC to construct a new automobile storage site at 425 Chelsea Road, Richmond County, New York (site) on approximately 34,631 square feet (0.8 acres) of regulated tidal wetlands adjacent area associated with Maggie's Creek.<sup>1</sup> As originally proposed, the project was designed to include a crushed stone entrance drive and allow storage for approximately 125 new cars destined for dealerships. The parking area and drive would be enclosed by chain link fencing, and the site would include a 30-foot setback from the tidal wetlands, erosion controls, and mitigative plantings covering 0.69 acres. (*See* Hearing Exhibit 1, at 1-7, 26 [Site Plan], and 31 [Mitigation Plan].)<sup>2</sup>

On July 21, 2020, Department staff issued a notice of incomplete application, which (i) advised applicant that the wetlands delineation was incomplete, (ii) advised applicant that a 50-

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<sup>1</sup> Maggie's Creek is the name of the creek otherwise known as Sawmill Creek in DEC regulations and maps and refers to a section of Sawmill Creek upstream from the bridge on Chelsea Road, Staten Island, New York.

<sup>2</sup> All exhibits are Bates Stamped, and page numbering referenced for all exhibits are references to the Bates Stamped numbering.

foot setback was required for commercial activities to help overcome the presumption of incompatibility, (iii) recommended the removal of existing impervious surfaces, (iv) requested the revision of the Mitigation Plan sheet, and (v) requested the submission of a draft deed restriction (*see* Hearing Exhibit 2).

On November 19, 2020, Maggies Run submitted a response to the July 21, 2020 notice of incomplete application. Applicant's response included a topographical survey of the site and several revised plans. The applicant advised Department staff that the remainder of the tidal wetlands was delineated as confirmed by Department staff, and the proposed project had been modified to maintain an average 51.88 foot setback from the tidal wetlands. The applicant also agreed to remove any existing impervious cover at the site and replace the impervious areas with either fast growing perennial grass seed mix or gravel. The mitigation plan was revised as requested and a draft deed restriction was attached. With the proposed 50-foot setback, the space available for storing vehicles was reduced to space for 76 vehicles. (*See* Hearing Exhibit 3, at 120-140.)

Department staff issued a February 4, 2021 notice of incomplete application noting that the revised site plan still had many areas with a setback of less than 50 feet and requested that applicant revise the plan accordingly. Department staff also requested (i) an explanation why the proposed 22-foot driveway width was required, and (ii) information and materials to support why the proposed storage area size is the minimum required to achieve economic viability. Department staff provided revisions to applicant's deed restrictions and requested those be incorporated into the draft deed restriction. (*See* Hearing Exhibits 4, 5.)

Maggies Run responded to the February 4, 2021 notice of incomplete application on March 31, 2021 providing Department staff with a revised site plan, mitigation plan, and draft deed restriction as well other revised plans. Maggies Run explained that the 22-foot road width was the minimum aisle width allowed under New York City zoning regulations. At the entryway from Chelsea Road, the maintenance of a 50-foot setback would make the property inaccessible. In addition, applicant adjusted the site layout to allow for additional space for cars and provide increased setback from the NYSDEC tidal wetland in other areas of the site. Applicant also provided an economic analysis demonstrating that a minimum space for 75 cars would be required to cover monthly overhead costs. With the revised site layout, applicant would be able to allow for the parking of 85 cars. (*See* Hearing Exhibit 6.)

By its September 20, 2021, notice of incomplete application, Department staff expressed its skepticism that the project could meet the standards for permit issuance pursuant to 6 NYCRR 661.9(c) even if the application met the development restrictions of 6 NYCRR 661.6. Staff quoted the language of 6 NYCRR 661.9(c)(3) and (4) and noted that, pursuant to 6 NYCRR 661.9(a) it is applicant's burden to establish that the applicable standards will be met. Staff instructed applicant that staff's comments on the most recent submissions should be viewed in the context of the requirements of the regulatory standards and advised that "the applicant should be mindful that completing the application does not mean a permit will be issued." (*See* Hearing Exhibit 7, at 177-178.)

Department staff again advised applicant that staff maintains its position that a minimum setback of 50 feet would improve applicant's chances of overcoming the presumption of incompatibility. Staff also found that applicant had not provided adequate support for its need

for a 22-foot wide driveway, and requested that applicant provide citation to the specific zoning regulation and explain how it is applicable to applicant's proposal. Staff asked applicant to provide more information supporting the need for a driveway through the entire storage yard, as well as confirmation that the proposed driveway is the minimum required width for its entire length. Staff also expressed concern over runoff from the site introducing vehicle fluids and tire fragments into the wetlands. Staff requested more information to demonstrate that those pollution sources will not impact the Saw Mill Creek<sup>3</sup> tidal wetlands system as well as how water quality will be maintained or improved following the construction of the proposed project, including how the site, once operational, would be managed to prevent stormwater impacts. If SPDES Multi-Sector General Permit ("MSGP") coverage is required for the proposed facility, staff requested that applicant indicate that coverage will be sought and explain how the facility will meet SPDES MSGP requirements. (See Hearing Exhibit 7, at 178-179.)

Staff also directed applicant to revise one of the plans to indicate the location and type of lighting that was proposed and the location of the utility connection. Staff noted that artificial light could have significant adverse impacts on natural resources and requested more information to demonstrate that any proposed increase in artificial nighttime light output will not rise above potential thresholds that would alter wildlife behavior and/or physiology. Also because the proposed commercial activity would introduce reoccurring human activity, movement and noise deeper into the wetland complex than current activity, staff requested "information that demonstrates that the proposed new development and use of the subject site will not have an undue adverse impact on the existing and future wildlife resources in the adjoining wetlands complex, taking into consideration the habitat improvements resulting from the Sawmill Creek Wetland Mitigation Bank." Lastly, staff requested that the draft deed restriction provide greater detail related to the mitigation area and that the deed restriction reflect any modifications to the proposal. (See Hearing Exhibit 7, at 179.)

On November 19, 2021, Maggies Run responded to Department staff's September 20, 2021 notice of incomplete application. Applicant stated that the 50-foot setback was established at every feasible location and provided staff with the New York City code provision requiring the 22-foot drive aisle width. Because the setback in that area was limited to 33 feet, applicant requested relief from the 50-foot setback in order to comply with the zoning code. Applicant also noted that compliance with the 50-foot setback on the remainder of the site would reduce the number of vehicles that could be stored from 85 to 43. Although the storage of 43 vehicles would not cover all of applicant's carrying costs, applicant was willing to reduce the footprint of the site to lessen its overall financial burden. Applicant explained that the drive aisle through the site was necessary to accommodate the loading and unloading of new vehicles. (See Hearing Exhibit 8, at 183-185.)

Applicant also asserted that because only new and undamaged vehicles would be stored at the site that it was highly unlikely that any fluids would leak from the vehicles. Applicant also noted that the mitigative plantings would constitute a natural riparian buffer between the project area and the tidal wetlands and concluded that the planted mitigation area and areas of conservation further seaward would treat stormwater and maintain water quality. Applicant also

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<sup>3</sup> Reference to the tidal wetlands, marsh and mitigation bank herein will be to "Saw Mill Creek" as used in the DECinfo Locator and mitigation bank documents unless a direct quote from the parties uses "Sawmill Creek". References to the creek will be to "Sawmill Creek" as referenced in 6 NYCRR 890.6 (Table 1, Item No. 41).

advised staff that the project would not require coverage under the MSGP, but stated that the site would implement best management practices during operation including inspection of vehicles upon entry for leaks, routine inspection of stored vehicles for leaks, onsite drip pans for use under vehicles if leaks are detected, and onsite spill kits. (*See* Hearing Exhibit 8, at 185-188.)

Applicant also advised staff that lighting was no longer proposed for the project, and operations at the facility would only be conducted from dawn to dusk. Therefore, no impacts to wildlife behavior or physiology are anticipated from the proposed project. (*See* Hearing Exhibit 8, at 187.)

In response to Department staff's concern regarding the introduction of human activity further into the wetlands complex, applicant stated that,

“the baseline human activity, movement, and noise levels associated with the nearby transportation facility will exceed any human activity, movement, and noise levels associated with the proposed project, therefore limiting the impact that the proposed project may have on migratory birds, non-migratory birds and other species. Additionally, the property is bordered to the west by an adjacent roadway, Chelsea Road. The baseline noise levels from Chelsea Road alone, a major thoroughfare for car, motorcycle, and commercial truck traffic will exceed any noise levels associated with the proposed project. Based on the existing roadway and transportation facilities in the immediate vicinity of the proposed project, there will be no increase above existing baseline human activity and noise pollution with the proposed project. It is anticipated that operation of an extremely limited number of vehicles at one time may occur due to drive aisle constraints (i.e., maximum 2). Therefore, no disturbance to wildlife and wildlife resources.” (Hearing Exhibit 8, at 187-188.)

Furthermore, applicant represented that the proposed mitigative plantings would improve onsite habitat by enhancing the Sawmill Creek shoreline habitat by providing food, habitat, and cover for area wildlife, and enhancing the subject area by providing vegetative cover. Based on that representation, applicant concludes that there will be no significant disturbance to wildlife and wildlife resources. (*See* Hearing Exhibit 8, at 188.)

Applicant also revised the draft deed restriction as requested by staff. The revised draft deed restriction and revised plans reflecting the reconfigured site plan were attached to the November 19, 2021 response. (*See* Hearing Exhibit 8, at 190-206.)

On July 29, 2022, Department staff issued a notice of complete application that included Department staff's tentative determination to deny the application. Department staff also issued a negative declaration of the same date. The notice was published in the Environmental Notice Bulletin (ENB) on August 3, 2022. (*See* Hearing Exhibits 9, 10.)

On October 27, 2022, Department staff issued a notice of denial of the tidal wetlands permit. Staff's denial of the tidal wetlands permit application was based upon DEC's determination that the project failed to meet the applicable permit issuance standards of 6 NYCRR 661.9(c) because applicant failed to meet its burden to demonstrate: (1) that the project would not have undue adverse impacts on the present and potential values of the adjacent tidal

wetlands of Saw Mill Creek, and (2) that the project would comply with the use guidelines in 6 NYCRR 661.5. The denial letter further detailed the reasons for the denial. (*See* Hearing Exhibit 11.) Maggies Run submitted a request for an adjudicatory hearing dated November 18, 2022 (*see* Hearing Exhibit 12). On December 8, 2022, the matter was referred to DEC's Office of Hearings and Mediation Services (OHMS) to conduct the permit proceeding pursuant to 6 NYCRR part 624. At the request of the parties, a preliminary conference was scheduled for January 31, 2023.

## PROCEEDINGS

I caused a notice of public comment period, legislative public comment hearing, deadline for petitions for party status and issues conference (combined notice) to be published in the ENB on February 15, 2023. Applicant published the combined notice in the *Staten Island Advance* on February 17, 2023. I convened a legislative public comment hearing on March 22, 2023 and written comments were received until March 29, 2023.

Both applicant and DEC staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). In accordance with 6 NYCRR 624.5(b), and as set forth in the combined notice, any other person seeking full party status or amicus status was required to file a written petition with OHMS. No petitions for party status were submitted to OHMS. As instructed in the combined notice, I received a timely statement of issues from applicant and a timely response to applicant's statement of issues from Department staff (*see* Hearing Exhibits 13, 14). I convened the issues conference on April 19, 2023.

The tidal wetlands permit application is an unlisted action under ECL article 8 (State Environmental Quality Review Act [SEQRA]) for which Department staff determined there would be no significant environmental impacts pursuant to 6 NYCRR 617.7 and is not subject to further review under SEQRA.

### Legislative Public Comment Hearings and Written Comments

As referenced above, I convened a legislative public comment hearing on March 22, 2023 by Webex webinar platform. Two people spoke at the hearing opposing the project and supporting staff's denial. Carl Alderson spoke on his own behalf and on behalf of the National Oceanic and Atmospheric Administration (NOAA). Mr. Alderson expressed his concern that the site has a high potential to be affected by high tide flooding, storm surges and sea level rise. He also cited the financial investment in the surrounding tidal wetlands community made by NOAA and New York City over the years as well as the creation of the Saw Mill Creek wetlands mitigation bank and resulting restoration of the wetlands and marsh. He also noted that salt sparrow, a species of special concern, nest in Saw Mill Creek marsh and that the mitigation bank has greatly enhanced their habitat. (March 22, 2023, Public Comment Hearing Transcript [PCH T.] at 9-14.)

Sarah Murphy, a senior project manager with the New York City Economic Development Corporation (EDC) spoke about the Saw Mill Creek mitigation bank. Saw Mill Creek wetlands are owned by the City of New York, and in 2015, portions of the wetlands were designated as a

wetlands mitigation bank. To date, approximately 54 acres of Saw Mill Creek's tidal wetlands and marsh have been cleaned and restored and are actively monitored and protected long term by the City of New York. To implement the Saw Mill Creek mitigation bank, the city has invested over 12 million dollars plus additional funds granted by New York State. EDC has concerns about the long term protection of the restored mitigation bank. The mitigation bank supports investment in coastal infrastructure while protecting and preserving the City's valuable wetlands. (PCH T. at 14-16.)

Written comments were received from the City of New York Parks & Recreation (Parks), Protectors of Pine Oak Woods, Natural Resources Protective Association, and NYC Audubon. Each of the commenters opposes the project and supports DEC staff's denial of the permit application. Protectors of Pine Oak Woods notes that the site once was home to an auto salvage yard with oil and antifreeze legacy contamination that has over the years been reclaimed by grasses, shrubs, small trees and flowers. According to the commenter, the area supports a myriad of nesting birds including salt sparrow. Protectors of Pine Oak Woods is concerned with unearthed toxins entering the wetland complex, the displacement of wildlife, pollution of Sawmill Creek and the impact on fish and amphibians. (Protectors of Pine Oaks Woods, Comment Letter dated March 23, 2023.)

Natural Resources Protective Association comments that applicant has not met the requirements to be granted a permit and notes that the wetlands purify New York City's estuary waters (Natural Resources Protective Association, Comment Email dated March 14, 2023). NYC Audubon comments that the project would impair a Significant Coastal Fish & Wildlife Habitat and threaten wildlife, and impervious surfaces would contribute to runoff, all of which would be detrimental to the ecological health of New York harbor and contribute to the loss of biodiversity and the destabilization of a larger wetlands complex. NYC Audubon also references the at risk and in-decline species that rely on Saw Mill Creek wetlands such as the saltmarsh sparrow and Atlantic Coast leopard frog and the importance of wetlands as a storm buffer at a time when extreme storm surge protection measures are being considered by New York City. (NYC Audubon, Comment Letter dated March 29, 2023.)

Parks notes that the proposed project is surrounded by wetlands except the western border that fronts Chelsea Road. According to Parks, the project site has a 1,400 foot border with Sawmill Creek, and the site is enclosed within Parks' Saw Mill Creek Marsh Preserve. Parks argues that the "construction and operation of the proposed project will have significant impacts on the ecological condition of the wetland and habitat it provides" – citing noise and night lighting impacts disturbing breeding birds, runoff containing particulates and fluids from the cars and polynuclear aromatic hydrocarbons (PAHs) from tire wear entering the wetlands and creek, and the risks from sea-level rise and coastal floods, which will increase the hydrological connection between the proposed project and the Saw Mill Creek Marsh Preserve. (Parks, Comment Letter dated March 29, 2023 [Parks], at 1.)

According to Parks, the area surrounding the proposed project is ecologically important as demonstrated by the designation of the Arthur Kill, including Saw Mill Creek Marsh Preserve, as a Significant Coastal Fish and Wildlife Habitat (SCFWH) by New York State Department of State. Parks states that the Saw Mill Creek Marsh Preserve is also a part of the Harbor Herons Wildlife Complex, which consists of 2,196 acres of undeveloped land and was designated a State

Bird Conservation Area in 2001. In addition, the wetland also supports NYSDEC New York Natural Heritage Program state-listed animals in need of conservation within the project site. If developed, the proposed project will adversely impact critical habitat for protected birds. “Therefore the development would significantly impair the viability of the habitat and, pursuant to the Significant Coastal Fish and Wildlife Habitat Form, should not be undertaken.” (Parks, at 1-2.)

Parks also posits that the proposed project will undermine the millions of dollars of investment the City and State have made since the 1990s in restoring Saw Mill Creek Marsh. Parks restored over 5 acres of salt marsh at Sawmill Creek, beginning with the Exxon Oil Spill in the Arthur Kill and to date, NYC Economic Development Corporation (EDC) has restored approximately 54 acres of salt marsh with more restoration planned in the future. Parks also notes the importance of the first wetland mitigation bank and how the restoration of the 54 acres surrounding the proposed project site has improved habitat as exemplified by an overall increase in bird species observed including three New York State Species of Special Concern, Seaside Sparrow (*Ammodramus maritimus*), Osprey (*Pandion haliaetus*) and Black Skimmer (*Rynchops niger*), and two High Priority Species of Greatest Conservation Need, Saltmarsh Sparrow (*Ammodramus caudacuta*) and Brown Thrasher (*Toxostoma rufum*). (Parks, at 2-3.)

Parks concludes that “fragmented development such as for parking lots compromises the integrity of the existing marsh complex ecosystem and the investment the City of New York has made in restoring and protecting the wetlands of Saw Mill Creek Marsh Preserve.” (Parks, at 3.)

### **Issues Conference**

In accordance with the February 15, 2023 combined notice, I convened the issues conference by Webex webinar on April 19, 2023, at 10 a.m. Applicant was represented by Amy Cassidy, Esq. and Michael Bogin, Esq., Sive, Paget & Riesel, P.C. DEC staff was represented by Udo Drescher, Esq., Office of General Counsel.

During the issues conference, I confirmed with applicant and Department staff that the issues the parties sought to adjudicate involved the basis for staff’s denial of the tidal wetlands permit. Applicant’s statement of issues elaborated on the factual issues to be adjudicated. Applicant argues:

- that the proposed facility would not “introduce a commercial use with corresponding human activities and anthropogenic disturbances, including movement of vehicles and personnel, noise, and associated impacts” different from the multiple disturbances in the area, noting that (a) movement on the site is minimal, and (b) mitigative plantings will provide food and cover and minimize disturbance,
- the project will not “extend significantly further east into the wetlands system” than the current existing nearby uses as argued by staff, noting that no disturbance will occur within the wetland and no fill will be placed within the wetland or the tidal wetland adjacent area,
- there is no explanation for DEC’s conclusion that noise levels will stretch deeper into the wetland, especially given the fact that the site is surrounded by property

that is heavily trafficked by large, loud vehicles and a road, and the site will have the least amount of traffic of any other current uses in the vicinity,

- DEC's claim that the project will negatively affect bird populations that utilize the wetlands is speculative and ignores applicant's claim that its mitigative plantings will improve and enhance the habitat for bird species, and
- DEC's view that applicant's stormwater management plan fails to demonstrate how water quality will be maintained or improved is contradicted by the application materials. (*See* Hearing Exhibit 13, at 223-226.)

Applicant also argued that there are two legal issues in dispute:

- Whether DEC applied the correct standards to determine whether the applicant met the requirements of 6 NYCRR 661.9(c)(3) and (4).
- Whether, using the correct standards, the applicant met the requirements of those provisions.

The parties agreed that the issues to be adjudicated are contained in the Department staff's denial letter, applicant's statement of issues and Department staff's response as summarized during the issues conference (*see e.g.* Hearing Exhibits 11, 13, 14). I advised the parties that legal issues may be addressed in oral argument during the hearing and briefed after hearing. Because no petitions for party status were received, and I did not limit the facts that the parties proposed to adjudicate, I advised the parties that there would be no written ruling resulting from the issues conference. Accordingly, I directed the parties to submit pre-filed direct testimony with accompanying exhibits by July 21, 2023. Subsequently, the adjudicatory hearing was scheduled for August 22 and 23, 2023.

I timely received the pre-filed direct testimony of Greg Fleischer on behalf of Maggies Run and the pre-filed direct testimony of Matthew James and Steve Zahn on behalf of Department staff. I published a notice of the adjudicatory hearing in the ENB on August 9, 2023.

### **Adjudicatory Hearing**

The hearing was convened on August 22, 2023 via Webex webinar electronic platform. Applicant was represented by Amy Cassidy, Esq. and Michael Bogin, Esq. (Sive, Paget & Riesel, P.C.). Applicant presented one witness, Greg Fleischer, PWS, President, Capital Environmental Consultants, Inc.

DEC staff was represented by Udo Drescher, Esq., Office of General Counsel. Staff's witnesses were Matthew James, Biologist 1, DEC Region 2, and Steve Zahn, former Regional Director, DEC Region 2 (2016-2021), (retired).<sup>4</sup>

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<sup>4</sup> Mr. Zahn also served in the following capacities during his career with DEC Region 2 - Assistant Regional Director (2014-2016), Natural Resources Supervisor (2007-2014), Biologist 1, 2 and 3 (1993-2007).



## FINDINGS OF FACT

### I. Location and Description of the Site and Proposal

1. Maggie's Run LLC owns the real property located on Chelsea Road, Richmond County, New York (Block 1780 Lot 15).<sup>5</sup> The members of the limited liability company are Richard Holmes and Melsa Skrapalliu. (See Hearing Exhibit 1, at 4, 34, 62-63, 99-116.)
2. As revised during Department staff's review, applicant submitted a tidal wetlands permit application proposing to construct a new automobile storage facility on approximately 0.39 acres of tidal wetlands adjacent area surrounded by 8 foot high chain link fencing with a 50-foot setback from the tidal wetlands at every location possible. The proposal would provide storage for approximately 43 new vehicles with a gravel driveway through the site. Applicant proposed a 50 foot wide mitigative planting between the parking lot and Maggie's Creek totaling approximately 0.71 acres. (See Hearing Exhibit 1, at 1-7, 26, 31; Exhibit 3, at 120-140; Exhibit 6, at 156-165; Exhibit 8, at 183-188, 190, 195.)
3. The property was formerly the site of an automobile salvage yard, but has been vacant since approximately 2005 and consists of 3.71 acres located within DEC regulated tidal wetlands and tidal wetlands adjacent area. Maggie's Creek, a tidal creek, runs along the western, northern and eastern borders of the property, and the southern property boundary is bordered by high marsh and intertidal marsh. According to the application, "[t]he NYSDEC tidal wetland adjacent area extends completely into the Proposed Project's boundaries." (See Hearing Exhibit 1, at 5; Hearing Exhibit 11, at 214.)
4. The western side of applicant's property has approximately 139.21 feet of road frontage on Chelsea Road. The property line extends into Maggie's Creek in places and has approximately 1531.62 feet of frontage with Maggie's Creek to the west, north and east. Approximately 1965.87 feet of the property's boundary consists of tidal creek, marsh, wetlands and wetlands adjacent area inside and outside the western, northern, eastern and southern boundaries of the property. (See Hearing Exhibit 8, at 190.)
5. The proposed gravel driveway will be situated up to the fence separating the site from the mitigation bank property and cars will be parked in close proximity to mitigation bank property. (See Hearing Exhibit 8, at 190-195.)

### II. Sawmill Creek and Maggie's Creek

6. The Saw Mill Creek wetlands system, including Maggie's Creek, is an intertidal system that exists around Sawmill Creek and Maggie's Creek and is one of the last remaining meandering tidal creeks in the City of New York. The wetlands system includes intertidal marshes and high marshes as mapped on tidal wetlands maps. The Saw Mill Creek wetlands system is one of the largest remaining tidal wetlands complexes in New York City and provides important ecological and habitat functions that smaller wetlands

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<sup>5</sup> The property address has been referenced as 422 or 425 Chelsea Road in this proceeding.

cells cannot provide. (Matthew James Testimony [James], Hearing Transcript [T.] at 157.)<sup>6</sup>

7. The Saw Mill Creek wetlands are among the most important natural systems in NYC and one of the largest remaining tidal wetland complexes in DEC's Region 2. "Large, unfragmented wetland acreage is critical for many native and transitory wildlife species, especially birds but also mammals and insects. . . . various bird species depend on large, undisrupted tracks of grassland or marshland for roosting or nesting." (Steve Zahn Testimony [Zahn], T. at 213.)

### III. Saw Mill Creek Pilot Wetland Mitigation Bank

8. The Saw Mill Creek Pilot Wetland Mitigation Bank (Mitigation Bank) is the first and only wetland mitigation bank in New York State. (James, T. at 161; Zahn, T. at 212.)
9. The Mitigation Bank restored many acres of high quality wetlands and buffer areas and ensures desirable ecological conditions persist in perpetuity. (Zahn, T. at 213.)
10. The Mitigation Bank serves to elevate the ranking of the Saw Mill Creek wetland complex as it ensures a sustained high level of function over time. (Zahn, T. at 213.)
11. Currently, the Mitigation Bank consists of approximately 54 acres of restored, improved or newly created wetlands, marsh, wetland adjacent area, and a tidal branch to Maggie's Creek. The Mitigation Bank borders applicant's property on the northeast, east and south for approximately 1325.41 feet, or roughly two-thirds of that property's perimeter. (*See* Hearing Exhibit 11, at 214; *compare* Hearing Exhibit 8, at 190 and Zahn Hearing Exhibit 1.)
12. The entire southern border of applicant's property, 434 feet, is bounded by the Mitigation Bank with the proposed project site running along that border for approximately half that distance. (*See* Hearing Exhibit 8, at 190.)
13. The Mitigation Bank provides a valuable ecological resource 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. Those values will increase or improve as the Mitigation Bank matures. (Zahn, T. at 213-214.)
14. A variety of wildlife has been observed in the Mitigation Bank in recent years including 58 bird species, white-tailed deer, red fox, diamond back terrapin, a variety of shellfish, crab, shrimp, eel and fish. Two species of special concern – osprey and seaside sparrow, and two high priority species of greatest concern – saltmarsh sparrow and brown thrasher have also been observed in the Mitigation Bank. (James, T. at 159; James Hearing Exhibit 2.)

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<sup>6</sup> Page numbering referenced for all hearing transcripts are references to the Bates Stamped numbering.

#### IV. Potential Adverse Impacts

15. Stormwater runoff from the proposed commercial new vehicle storage site would potentially transport leakage of motor vehicle fluids into the wetland and impact wetland organisms. (James, T. at 159.)
16. The introduction of noise and movement caused by the construction and operation of a commercial parking lot would disturb wildlife and alter wildlife behavior. The installation of the perimeter fence would limit the ability of some species to traverse the site. (James, T. at 159.)
17. The construction and operation of a commercial parking lot would inhibit the tidal wetland and adjacent area's ability to reduce the impacts of flooding caused by storm events and surges. (James, T. at 160.)
18. Parking and driving vehicles on the site would increase the potential for pollutants to enter the wetlands and reduce the cleansing function of the adjacent area and wetland. (*Id.*)
19. The coverage of the adjacent area with vehicles would reduce the ability of the adjacent area to absorb silt and organic material with the result that the site itself may become a contributor of silt and organic material into the wetlands system. (*Id.*)
20. The construction and operation of a commercial parking lot would adversely impact the value of the educational and research benefits offered by the Saw Mill Creek wetland complex and Mitigation Bank. (James, T. at 161.)
21. The construction and operation of a commercial parking lot would have a negative impact on the open space value of the site, surrounding wetlands and Mitigation Bank. (*Id.*)
22. The proposed commercial parking facility would have a negative impact on potential values of the surrounding wetlands and Mitigation Bank as the Mitigation Bank is expanded and matures. (*Id.*)
23. Applicant's proposed mitigative plantings will provide some new and enhanced tidal wetland adjacent area values such as wildlife habitat, storm control and ecosystem cleansing. (*See* Hearing Exhibit 1, at 15.)
24. Applicant's proposed use of a gravel driveway, and removal of impervious surfaces, will slow the rate of runoff from the site and reduce turbidity. (Greg Fleischer Testimony [Fleischer], T. at 40; *see* Hearing Exhibit 3, at 122.)

## DISCUSSION

The tidal salt waters of Saw Mill Creek and Maggie's Creek are categorized as a Class SD saline surface waters (*see* 6 NYCRR 890.6 Table 1, Item No. 41; Fleischer, T. at 40). The best usage for Class SD saline surface water is fishing. Class SD waters are also suitable for fish, shellfish and wildlife survival (*see* 6 NYCRR 701.14.) Applicant's property consists of lands within the tidal waters of Maggie's Creek, tidal wetland and tidal wetland adjacent area. The proposed construction of a commercial vehicle storage area for new vehicles, and associated improvements to the site, within the adjacent area, is a regulated activity involving the erection of a fence, construction of a facility or road, and the excavation of the site and the depositing of top soil and stone (*see* 6 NYCRR 661.4[ee][1][i], [ii], [iii]).

Pursuant to 6 NYCRR 661.5(b)(48), the proposed construction of commercial facilities and the undertaking of commercial use activities in a tidal wetland adjacent area not requiring water access, such as proposed here, is a presumptively incompatible use that requires a permit. A presumptively incompatible use "shall be presumed not to be compatible with the type of area involved or with the preservation, protection or enhancement of the present and potential values of tidal wetlands if undertaken in that area. Any such use is subject to the permit requirements of this Part" (6 NYCRR 661.5[a][3]).

The standards for issuing tidal wetland permits for a proposed regulated activity are set forth in 6 NYCRR 661.9. Maggie's Run has the burden of establishing that the applicable standards of section 661.9 will be met (*see* 6 NYCRR 661.9[a]). The applicable standards for regulated activities occurring within an adjacent area are provided in subdivision 661.9(c):

"(c) Standards for permits on adjacent areas. The department shall issue a permit for a proposed regulated activity on an adjacent area only if it is determined that the proposed regulated activity:

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

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

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

"(4) complies with the use guidelines contained in section 661.5 of this Part. If a proposed activity is a presumptively incompatible use for adjacent areas under such section, there shall be a presumption that the proposed activity may not be undertaken on the adjacent area because it is not compatible with the preservation, protection, or enhancement of the present and potential values of tidal wetlands if undertaken in that area. The applicant shall have the burden of overcoming such presumption and demonstrating that the proposed regulated activity will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands. If a use is a type of use listed as an

incompatible use, it shall not be undertaken on such adjacent area.” (6 NYCRR 661.9[c].)

As noted above, staff based its denial on 6 NYCRR 661.9(c)(3) and (4).

It is undisputed that activity from neighboring properties and roadways has some impact on the Saw Mill Creek tidal wetlands and the Mitigation Bank. Those properties, however, are not applying for a tidal wetlands permit for the construction of a new commercial activity. In its present state, the site for the proposed commercial activity does not introduce any anthropomorphic noise, movement, fencing, motorized vehicles or other structures into the wetlands adjacent area. The parties do not dispute the tidal wetland values and benefits of the Saw Mill Creek wetlands in general, or those of the wetlands located on and adjacent to applicant’s property. The parties also do not dispute that the Saw Mill Creek wetlands complex and the Mitigation Bank provide habitat for many species, including species of special concern.

The record also demonstrates that the proposed project site, which is entirely within the tidal wetlands adjacent area, contains habitat of limited quality including non-native and invasive species of vegetation, but the site is also not a total wasteland in its current condition as it is vegetated and contains several trees. The site, as is, provides habitat.

Applicant’s consultant acknowledges that there may be impacts from the construction and operation of the proposed parking lot, but asserts that any impacts will be mitigated by the planting of a vegetative buffer outside the proposed facility’s fencing or the institution of best management practices (BMPs). Accordingly, applicant asserts that (i) potential spills could be addressed by BMPs such as inspection of vehicles and a spill kit left on site, (ii) light penetration will be avoided by only accessing the site during daylight hours, (iii) noise and movement will be limited by the number of cars that can be moved at any one time and the infrequency of visits to the site, and (iv) any impacts from noise and movement will not be noticeable compared to the background noise and movement from the surrounding roads and commercial activities. Applicant also takes issue with staff’s assertion that the proposed project intrudes further east into the wetlands complex than any of the other local commercial activities. In brief, applicant contends that potential impacts, if any, are not unduly adverse given the size, scope and nature of the operation of the proposed commercial parking lot. Staff, however, maintains that potential impacts are unduly adverse and would lead to the impairment of the adjacent area at the site and the benefits of the surrounding wetlands and Mitigation Bank.

I. Undue Adverse Impacts (6 NYCRR 661.9[c][3])

1. Review Standard

First, I must address applicant’s argument that a determination to issue a negative declaration pursuant to ECL article 8, the State Environmental Quality Review Act (SEQRA), because no significant adverse environmental impacts are anticipated from the proposed project, estops Department staff or the Commissioner from denying a permit based upon a determination that the proposed project will have an undue adverse impact on the present or potential value of any of the beneficial functions of the tidal wetland. In comparing the standard for SEQRA

review and permitting standards, it was previously held that, “[t]he decision to issue a negative declaration does not mean that the proposed action also meets the standards for issuance of a tidal wetlands permit” (*In the Matter of Peter Harrison*, Commissioner’s Decision, February 28, 2000, *adopting* Hearing Report at 8, *citing Brotherton v Dept. of Env’tl. Conservation*, 189 AD2d 814, 592 [2d Dept, 1993] and *Goldhirsch v Flacke*, 114 AD2d 998 [2nd Dept, 1985]).

Accordingly, the permitting standards are the standards applied in this proceeding, not the standards used to determine whether further SEQRA review is warranted pursuant to ECL article 8 or 6 NYCRR part 617. The negative declaration issued pursuant to SEQRA has no bearing on whether the permit standards are met.

## 2. The Site

The parties dispute whether the site will introduce a commercial activity and any potential impacts further into the wetlands complex than existing commercial activity along Chelsea Road. As noted above, the site is practically surrounded by creek, wetlands, adjacent area and marsh except for approximately 139 feet bordering Chelsea Road to the west. The property is effectively a peninsula extending away from the road in excess of 400 feet into the Saw Mill Creek wetlands complex. The other commercial activities along Chelsea Road share an eastern border with the wetlands complex and are located along the wetland margins. Four hundred and thirty-four feet of the southern border of the property is bounded by the Mitigation Bank. No mitigative plantings are proposed along the southern border, mostly likely due to siting constraints. The gravel driveway will be situated up to the fence separating the properties and cars will be parked in close proximity to Mitigation Bank property (*see* Hearing Exhibit 8, at 190-195).

Applicant claims that staff’s assertion that the proposed project will extend further east into the wetlands system is incorrect because the project is sited entirely within the upland area of the site. Applicant goes on to argue that staff’s assertion in this regard cannot be the grounds for a denial, and that the project will benefit the existing site by repurposing the site of a former junkyard and providing mitigative plantings that will improve habitat. Applicant, however, conflates the position taken by staff. Staff asserts that potential impacts resulting from the site’s location in relation to the wetlands in this matter are relevant to staff’s analysis. Staff testified that property extending deeply into a wetland complex, as here, creates fragmentation of the wetlands system and poses a higher level of impact than a project located along the margin of the system (Zahn, T. at 214).

Here, the proposed project is surrounded by tidal surface water, wetlands, marsh and adjacent area for all but 139.21 feet of the site boundary that borders Chelsea Road. Two-thirds of applicant’s property boundary is adjacent to the Mitigation Bank, a burgeoning wetland complex. As discussed above, no mitigative plantings or other vegetative barriers are proposed for the property line bordering the Mitigation Bank parcel to the south. An examination of the present and potential values of the tidal wetlands adjacent to applicant’s property must include the present and potential values of those tidal wetlands that are part of the 54-acre Mitigation Bank. To conclude otherwise, would ignore the benefits and values of the improved and created functionality of the 54-acre Mitigation Bank. In brief, the establishment and presence of the Mitigation Bank enhances the present and potential values of the tidal wetlands as well as the

social and public importance of preserving the tidal wetlands and its multitude of beneficial functions.

Accordingly, I conclude that the location of the site in reference to the wetlands system and potential fragmentation of that system by the proposed commercial activity must be considered when assessing whether there are undue impacts from the proposed project. Applicant's arguments that Department staff relied upon an unpromulgated standard or criteria is without merit, and therefore rejected.

### 3. Marine Food Production

Department staff presented testimony that marine food production could potentially be impacted by polynuclear aromatic hydrocarbons (PAHs) from tire fragments generated from wear on tires at the site and spills or leaks of automotive fluids into the wetlands from the site. In regard to the PAHs, staff asserts that "As the vehicles and their tires move across the gravel on the site, abrasion of small tire particles can be expected. As a result, there would be a net increase [in] the amount of tire crumb rubber entering the Sawmill Creek wetlands and at least some of that material could be expected to enter the marine food chain" (James, T. at 159). Although there is a potential net increase in PAHs that may result from vehicles entering the site, nothing in the record supports a finding that such a net increase would cause an undue adverse impact on marine food production, especially given the fact that cars traverse Chelsea Road and the bridge crossing Sawmill Creek near the entry to the site on a regular basis.

Applicant asserts that no pollutants are expected to be introduced at the site because the vehicles to be stored will be new, undamaged vehicles with new tires, rendering it unlikely that the vehicles would leak fluids or shed tire fragments (Fleischer, T. at 42). Applicant also asserts no used vehicles will be present at the site (*id.*). Applicant, however, overlooks the fact that during construction and during delivery and retrieval of the new cars stored at the site, used trucks and equipment will be present at the site. Vehicles such as the tow trucks and flatbeds used to deliver and retrieve new vehicles from the lot will presumably be in different states of repair and likely have more hydraulic equipment (and associated fluids) to accommodate the loading and unloading of new vehicles.

To address what applicant refers to as the unlikely event of a spill, applicant proposes to "implement a variety of best management practices to prevent release of contaminants into the tidal wetland, including inspecting all vehicles upon entry for leaks and conducting routine inspections of stored vehicles at the site for leaks. In the unlikely event a spill does occur, drip pans and spill kits will be available onsite" (Fleischer, T. at 39).

It is unclear, however, who will have access to the site after construction is complete, who would ensure the proposed BMPs are followed or who would educate those personnel delivering and retrieving vehicles as to those practices and ensure the practices are followed. What is clear is that the most highly traveled area of the proposed site, and the area most likely to experience impacts associated with spills or vehicles leaking fluids, would be the entrance drive which abuts the Mitigation Bank parcel to the south and is located 50 feet from the restored or newly created tidal wetlands. In enacting ECL article 25, Tidal Wetlands, the legislature noted the importance of tidal wetlands to marine food production as follows: "tidal wetlands are an essential area of retention, conversion and availability of nutrients for crustaceans and shellfish;

they are the nursery ground and sanctuary for many fin fish; they sustain microscopic marine organisms and vegetation which are essential in other food chains; two-thirds of the fish and shellfish are commercially harvested and two-thirds of sport fish depend on the marsh-estuarine system of the tidal wetlands at some point in their life cycle” (Tidal Wetlands Act, L 1973, ch 790 §1, reprinted in McKinney’s Cons Laws of NY, Book 17½, ECL 25-0101, Historical and Statutory Notes, at 5 [2023]).

The tidal wetlands map demonstrates that the Mitigation Bank south of the site is identified as high marsh or intertidal marsh (James, T. at 157, figure 1). That area also includes a newly created tidal branch of Maggie’s Creek. Staff also testified that a commercial parking lot would impact the ability of the site “to provide space for the landward migration of tidal marshes” (James, T. at 160).

On this record, I conclude that marine food production on the site and surrounding wetlands complex may experience undue adverse impacts from the siting of a commercial parking lot in close proximity to the marsh-estuarine system of the Saw Mill Creek tidal wetlands and from the potentially uncontrolled and untrained access to the site. Applicant failed to demonstrate by a preponderance of the evidence that its proposed commercial parking lot facility and asserted BMPs would comply with the permit issuance standard at 6 NYCRR 661.9(c)(3).

#### 4. Wildlife Habitat/Vegetation

As noted above, the proposed location of the commercial parking lot consists of habitat of limited quality. Staff presented testimony that the “physical alterations within that footprint would likely have little impact on many of the wetland values listed in the regulations. Direct impact would be caused by possible leakage of automotive fluids leaked onto the site, especially if those fluids were to enter the adjacent wetland, and by the installation of a fence, which could restrict the migration of some wildlife across the site” (Zahn, T. at 213-214). Mr. Zahn, however, went on to emphasize that the proposed project, “even if well contained at the site, would have a marked impact to wildlife utilization. The property juts deeply into the heart of the wetland complex. Such fragmentation poses a much higher level of impact than a similar project located along a margin of the system. The construction and operation of the commercial facility would create an envelope of sound and visual impacts that would extend far beyond the property boundaries. Many species will avoid the impacted area, greatly diminishing the current value of the wetland complex” (Zahn, T. at 214). Mr. Zahn also testified that there is no dispute that the Saw Mill Creek Wetlands are among the most important natural systems in NYC. “The Sawmill Creek system is one of the largest remaining tidal wetland complexes in Region 2. Large, unfragmented wetland acreage is critical for many native and transitory wildlife species, especially birds but also mammals and insects . . . [and] various bird species depend on large, undisrupted tracks of grassland or marshland for roosting or nesting. The presence of the [Mitigation Bank] serves to elevate the ranking of the complex as it ensures a sustained high level of function over time” (Zahn, T. at 213).

Staff also presented evidence that the construction of the proposed commercial parking lot would diminish the habitat value on the site and the surrounding wetlands especially for species that are vulnerable to human noise and movement that cause changes in behavior. Staff



also cited a study in Jamaica Bay that found birds were present thirty percent more often when people were absent. (James, T. at 159.) Staff also testified that because the Saw Mill Creek wetlands system is improving and the Mitigation Bank will be expanding, the proposed commercial activity on the site would have a negative effect on the anticipated increased use of the wetlands system by fish, wildlife and plant species. Moreover, because of habitat loss due to sea level rise and climate change, valuable tidal wetlands systems like Saw Mill Creek and the Mitigation Bank will be more heavily used by species displaced from their traditional habitat. (James, T. at 161.) The Mitigation Bank has experienced an increase in the number of bird species frequenting the Mitigation Bank's improved habitat (*see* James Hearing Exhibit 2).

Species currently using the site would be displaced during construction and operation of the proposed commercial activity. Staff also testified that the negative impacts associated with the construction and operation of the proposed facility outweigh any beneficial impacts from the proposed mitigative planting. (James, T. at 163-164.) Staff asserts that the proposed mitigative plantings would not be sufficient to contain or offset the impacts associated with wildlife disturbance or habitat reduction (James, T. at 164).

Applicant on the other hand presented testimony that the proposed mitigative plantings will provide more habitat, food and cover where wildlife habitat does not currently exist on the site (Fleischer, T. at 31-32, 34-35, 37, 41-42, 78; *see also* Hearing Exhibit 1, at 15). According to applicant, the mitigative vegetive buffer would restore a portion of the tidal wetland adjacent area, providing new and enhanced value, including more suitable wildlife habitat and improved storm control, ecosystem cleansing, and aesthetic value (Fleischer, T. at 31-32). Furthermore, applicant's expert testified that the "project is not expected to have any undue adverse impacts on any species, their habitats, or the wetland ecosystem" (*id.* at 44). In large part, applicant relies upon the asserted ability of the mitigative planting to provide improved habitat for wildlife and to offset unavoidable impacts. Applicant, however, inaccurately states in argument and testimony that the mitigative planting (and the asserted wildlife benefits thereof) will extend around the entire site (*see e.g.* T. at 14-15; Fleischer, T. at 41-42). The application materials demonstrate that there will be no plantings or buffer between the proposed driveway and commercial parking lot and the Mitigation Bank parcel that borders the site on the south.

The record demonstrates that the proposed project extends into and is practically surrounded by the tidal wetlands complex and the Mitigation Bank. The record also demonstrates that the Mitigation Bank has resulted in improved wetland values in the surrounding wetland complex and those values will continue to improve as the Mitigation Bank restoration matures. Due to its improved wildlife habitat, the Mitigation Bank has experienced an increase in the number of bird species frequenting the Saw Mill Creek wetlands. Although applicant's mitigative plantings on the site may provide some initial habitat improvement on the site, the site is not barren and presently provides some habitat.

Department staff also requests that I take official notice of the definition of habitat found in 6 NYCRR 182.2. Part 182 is applicable to endangered and threatened species of fish and wildlife, species of special concern and incidental take permits. To be clear, as argued by applicant, 6 NYCRR part 182 is not applicable to this proceeding. For the purpose of Part 182, occupied habitat is defined so as to protect habitat where any protected species exhibits one or more essential behaviors, such as breeding, hibernation, reproduction, feeding, sheltering,

migration and overwintering (6 NYCRR 182.2[f],[p]). While Part 182 is instructive, Part 182 is limited to habitat that is actually used by protected species for essential behaviors. Part 661 on the other hand includes habitat that may potentially be used by wildlife regardless of whether the wildlife is a protected species. In short, the review of impacts on wildlife habitat pursuant to ECL article 25 and Part 661 is broader than the scope of Part 182. Accordingly, staff's request is denied.

I conclude that potential impacts, which are associated with the fragmentation of the larger wetlands complex and the siting of the facility along the Mitigation Bank property to the south without any mitigative plantings, would be unduly adverse to the current and potential values of the affected tidal wetland with respect to wildlife habitat. Applicant failed to demonstrate by a preponderance of the evidence that its proposed commercial parking lot facility would comply with the permit issuance standard at 6 NYCRR 661.9(c)(3).

#### 5. Flood, Hurricane and Storm Control

The site is located within the 100 year flood plain (Fleischer, T. at 33). It is fundamentally understood that tidal wetlands help reduce wave action, absorb and control release of storm water and provide a protective buffer between tidal waters and upland development. Staff testified that the construction and operation of the proposed commercial parking lot will diminish the potential for the wetlands to perform those functions by allowing floatable material to enter the wetlands, and decreasing the amount of available adjacent area on the site that could perform those functions. With projected sea level rises, Department staff asserts that a commercial parking lot would impact the ability of the site "to provide space for the landward migration of tidal marshes" (James, T. at 160). Staff noted that a 2012 wetland delineation demonstrated that the wetland had migrated landward, and the 2018 wetland delineation demonstrated that the wetland had migrated further landward (James, T. at 180).

Applicant asserts that the vehicles would be moved to higher ground in the event flooding did occur (Fleischer, T. at 40, 120-122). Applicant emphasizes that the proposed project will not increase any impervious surfaces, and "the quality and quantity of the stormwater leaving the property is also not expected to change, other than the gravel driveway likely slowing the rate at which runoff leaves the site, which would improve stormwater attenuation by storing and filtering overland runoff from the site and reduce turbidity, thereby, improving the overall quality of the tidal wetlands, adjacent areas, and Maggie's Creek. The vegetated buffer would also function as a means of slowing and filtering stormwater runoff, would improve the stability of the shoreline, and would decrease the likelihood of erosion" (Fleischer, T. at 40; *see also* Exhibit 1, at 12-13, 15, 88-89). Staff asserts that proposed mitigative plantings would not be sufficient to contain or offset the impacts associated with flooding (James, T. at 164).

Because applicant is proposing to improve the site by removing impervious surfaces and installing a gravel drive and vegetative buffer, I conclude that impacts to flood and storm control functions of the adjacent area and surrounding wetlands and adjacent areas are not unduly adverse. If I had not already concluded that the proposed project will have undue adverse impacts on the current and potential values of the Saw Mill Creek wetlands, I would recommend that the gravel drive be extended under the parking area near the Mitigation Bank and that

applicant extend the mitigative plantings between the parking area and the fence line that separates the parcels.

#### 6. Cleansing Ecosystems, Absorption of Silt and Organic Material

Department staff testified as to the filtering capabilities of tidal wetlands for intercepting surface water runoff from upland areas, retaining excess nutrients, removing pollutants and reducing sediment discharge before the runoff reaches open water. When vegetated tidal wetland adjacent areas get temporarily flooded, the adjacent area can absorb contaminants from the water and filter the receding water. According to staff, installing a commercial parking lot at the site would reduce the adjacent area's ability to perform ecosystem cleansing compared to its current condition. In addition, staff asserts that parking and driving cars at the site would increase the potential for pollutants from vehicles to be released, which would increase the pollutant load the wetlands have to cleanse in the first instance. Staff also takes the position that the anticipated coverage of the adjacent area with vehicles would, especially during heavy rain events, impair the ability of the adjacent area to absorb silt and organic material. As a result the site may become a contributor of silt and organic material into the wetlands system. (James, T. at 160.)

Again, applicant largely depends on the mitigative planting to address any impacts on these wetland capabilities (Fleischer, T. at 40; Exhibit 1, at 14-15, 88-89). During construction and until at most three years after planting the mitigation area, applicant will also rely on silt fencing and hay bales to control runoff from the site (Fleischer, T. at 38-39).

As noted above, the southern border of the site will not have any mitigative plantings. Silt fencing and hay bales will be installed along the property line and the remaining proposed facility footprint. Those storm water controls, however, will be removed according to the application materials (*see* Exhibit 8, at 194, 195). The Mitigation Bank parcel abutting the proposed facility to the south consists of restored wetland, marsh, adjacent area and a newly created tidal branch of the creek. This area is still maturing as is much of the Mitigation Bank (*see* Zahn, T. at 213-214).

Staff's assertion that the construction of a commercial parking lot at the site would reduce the adjacent area's ability to perform ecosystem cleansing compared to its current condition overlooks the fact that applicant will remove impervious surfaces that exist on the site as well as the debris scattered around the site. The proposed installation of a gravel drive and mitigative plantings will slow down the rate of some run off to the tidal wetland. These components of the proposed project would be an improvement over the current site conditions.

I conclude that the applicant's proposed commercial activity on site would not have undue adverse impacts on the ability of the site and surrounding wetland areas to cleanse the ecosystem and absorb silt and other material. As mentioned above, if I was recommending that the tidal wetlands permit be granted, I would also recommend that the gravel drive be extended under the parking area near the Mitigation Bank and that applicant extend the mitigative plantings between the parking area and the fence line that separates the parcels.

## 7. Recreation, Education and Research

Staff testified that because of its size and location, the Saw Mill Creek wetlands system provides research and educational opportunities. Moreover, the Mitigation Bank is itself the subject of research as the first wetlands mitigation bank of its kind in New York. As demonstrated by staff, the Mitigation Bank property bordering the site on the south served as an avian observation point as well as other monitoring transects for the Saw Mill Creek Pilot Wetland Mitigation Bank Year 3 Post-Construction Monitoring Report (*see* Zahn Exhibit 1). Staff takes the position that the introduction of a commercial parking lot on property directly abutting the Mitigation Bank will have an adverse impact on the educational and research benefits offered by the site and surrounding wetlands system that currently has limited human activity. (James, T. at 161.)

Applicant does not address this wetland value directly except to state that the application meets the requirement of demonstrating that the proposed activity will not have an undue adverse impact on any of the present or potential values of the wetland functions (Fleischer, T. at 31). Applicant further asserts that the proposed project is not expected to cause or contribute to a violation of the Use Classification SD for saline surface waters (*id.* at 40).

The research opportunities provided by the surrounding Mitigation Bank are the first of their kind in New York State. Whether it is research and monitoring related to the effectiveness of the wetland and vegetative restoration and maintenance; or research and monitoring related to wildlife species that utilize the area or any of the other important wetland functions, any potential impacts on the Mitigation Bank must be examined. As concluded above, the proposed project will have undue adverse impacts on wetland functions. Those adverse impacts will also have a direct impact on the educational and research benefits offered by the Mitigation Bank as a source of wildlife habitat and marine food production.

I conclude that the proposed commercial parking lot would have an undue adverse impact on the educational and research benefits of the adjacent and nearby tidal wetland, which includes the Mitigation Bank. Applicant failed to demonstrate by a preponderance of the evidence that its proposed commercial parking lot facility would comply with the permit issuance standard at 6 NYCRR 661.9(c)(3).

## 8. Open Space and Aesthetic Appreciation

According to Department staff, the Saw Mill Creek wetlands system provides opportunities to enjoy nature through “hiking, kayaking, fishing, bird watching, and photography,” and wetland users can experience aesthetic appreciation of the resource through those activities. In staff’s opinion, “[e]ncountering a commercial parking lot adjacent to the tidal wetlands would have a negative impact on the aesthetic value of the wetlands” (James, T. at 161).

Again, applicant does not address this wetland value directly, but makes the blanket statement that the application meets the requirement of demonstrating that the proposed activity will not have an undue adverse impact on any of the present or potential values of the wetland functions (Fleischer, T. at 31-32). The application states that the proposed mitigative plantings will improve the aesthetic value of the tidal wetlands adjacent area (Exhibit 1, at 15).

Again, applicant's reliance on the mitigative plantings to remedy or offset most impacts is misplaced, especially in light of the fact that the southern border of the proposed site will have no plantings and it directly abuts the Mitigation Bank. In its current state, however, the site has little aesthetic quality due to some tires and car parts remaining from its former life as an automobile junkyard that are scattered around the site, as well as a trailer near Chelsea Road (*see* Fleischer, T. at 33, 127-129; James, T. at 182-183, 203-204; Hearing Exhibit 1, at 36; James Hearing Exhibit 3, at 259). Applicant proposes to remove much of the waste as well as any impervious surfaces on the site, but applicant also proposes to remove several trees within the footprint of the proposed parking lot.

Staff admits that access to the Saw Mill Creek wetlands is limited to a few controlled public access areas (*see* Zahn, T. at 213), but it is unclear on this record whether public access to the Saw Mill Creek wetlands, Mitigation Bank area or Maggie's Creek by foot, kayak or canoe is currently allowed.

Although the sight of a commercial parking lot within the wetland complex may not be consonant with aesthetic appreciation, I conclude that the impact to aesthetic appreciation will not be unduly adverse as a result of the proposed mitigative plantings around much of the site and proposed removal of debris from the site.

Open space, however, is a different consideration. The legislature recognized that open space in wetland areas provides a significant benefit to the public (*see* Tidal Wetlands Act, L 1973, ch 790 §1). Applicant cites *In the Matter of American Marine Rail, LLC*, ALJ Rulings on Issues and Party Status and Environmental Significance, August 25, 2000, for the premise that the loss of open space is not an issue when private property is involved. The ALJ in that matter, however, was determining whether an issue had been presented for adjudication related to SEQRA and whether the facility should have been deemed a Type 1 action (*id.* at 13, 77). The ALJ's ruling did not address open space as a present or potential wetland value.

Here the issue before me is not solely a question of open space on private property but also a question of how a proposed project impacts open space as a wetland value. I already found above that the fragmentation of wildlife habitat that would be caused by permitting the proposed commercial activity is an undue adverse impact on that wetland value and function in part because staff demonstrated that large, unfragmented wetland acreage is critical for many wildlife species. The reduction and fragmentation of open space that would be created by the proposed project is likewise an adverse impact that cannot be addressed by plantings or runoff controls.

I conclude that the fragmentation of the open space provided by the Saw Mill Creek wetlands is an undue adverse impact of the proposed project. Applicant failed to demonstrate by a preponderance of the evidence that its proposed commercial parking lot facility would comply with the permit issuance standard at 6 NYCRR 661.9(c)(3).

## 9. Social and Economic Benefits

Applicant asserts that the proposed project will provide a service essential to car dealerships and claims that the project will help keep local dealerships in business and their workers employed. As a result, the local economy will be supported with a resulting collection

of taxes that eventually provide services to New Yorkers. In addition, revenue from the project will help the owner pay overhead and retain the property (Fleischer, T. at 45).

Department staff, however, asserts that a commercial storage facility for new vehicles is not a social institution, it does not create products that are essential for society, add to the general welfare or fill a gap in social services. “The State’s economy would not measurably benefit from the project. The applicant cannot claim any impact on overall employment from the creation of a parking lot that will not have any on site personnel. Similarly, the economic benefit for the economy at large would be negligible – and certainly not depend on the use of this particular site” (James, T. at 162).

Applicant argues that the language of 6 NYCRR 661.9(c)(3) does not require an applicant to show any public benefits of the project or show any social or economic benefits will result from the project. Applicant further argues that 6 NYCRR 661.9(c)(3) does not exclude an applicant’s commercial economic benefit from consideration. (Applicant Brief, at 27.)

Applicant asserts that Department staff’s reliance on *In the Matter of Kelleher*, Decision of the Assistant Commissioner, December 24, 2008 (*Kelleher*) is misplaced. Even if applicant must demonstrate that a project will serve a public benefit, applicant claims its proposal does just that. Applicant, however, argues that staff’s reading of *Kelleher* is inconsistent with other decisions. Applicant cites *In the Matter of Palmeri*, Decision of the Acting Executive Deputy Commissioner, March 26, 2007 (*Palmeri*) for the premise that an applicant privately benefitting from a proposed project can still meet the requirements of the regulations if the proposed project also benefits neighboring properties. Here, applicant claims that neighboring properties, including the wetland and Mitigation Bank, will benefit from applicant removing debris and impervious surfaces and creating the “50-foot vegetative buffer, which will help filter runoff leaving the Site.” (Applicant Brief, at 28.)

In *Palmeri*, the Commissioner agreed with the ALJ’s conclusion that the project as modified would help mitigate or eliminate the negative impacts the site’s existing conditions had on the wetland and its values (*Palmeri*, at 6). Unlike the case at hand, the proposed presumptively incompatible use in *Palmeri*, a bulkhead in the wetlands, was converted to a generally compatible use by moving the bulkhead to the adjacent area as recommended by the ALJ.

The question in both *Kelleher* and *Palmeri* was whether the project would have undue impacts after taking into account any social and economic benefits that may be derived from the proposed activity. In *Palmeri*, it was determined that the wetland and its values would benefit from the removal of debris and the prevention of runoff from neighboring properties and the site. In brief, a social benefit to the public was demonstrated that outweighed any adverse impact that would result from the construction of a house and bulkhead, with the result being that the adverse impact on wetland values was not undue. In *Kelleher*, however, no public benefit was demonstrated by the applicant, and it was determined that the construction of the house and septic system would have undue adverse impacts.

In this matter, the economic benefit belongs solely to the applicant. Any purported economic benefit to car dealerships or their employees is purely anecdotal and speculative. Applicant has not demonstrated any pressing need for new car storage lots or a shortage of

existing parking lots that would elevate the privately owned parking lot to a social or public benefit. There is, however, some benefit to the wetlands and its values to cleaning up the property by removing debris and impermeable surfaces that presently exist at the site as well the planting of a vegetative buffer. The question is whether those benefits are sufficient to establish that the impacts from the proposed commercial activity are not undue adverse impacts.

In *Palmeri*, it was demonstrated that existing conditions on the site were negatively impacting the wetland and its values and that the proposal would mitigate or eliminate those negative impacts (*see Palmeri*, at 4, 6, 8). In this matter, there was no testimony or evidence that the site in its current condition is negatively impacting the wetland. Yes, there is debris on the site as well impervious surfaces and invasive species of plants, but there was no testimony demonstrating that siltation or runoff from the site is negatively impacting the wetland and its values. The removal of the debris on the site would likely benefit the environment and improve the site's appearance, regardless of whether a commercial parking lot is constructed. Staff, however, testified that nature is remediating the site on its own and pointed out that the wetlands have been migrating landward on the site as depicted by the 2012 and 2018 wetland delineations performed by Department staff (James, T. at 180).

Although there is some environmental benefit to be gained from cleaning up the site, applicant has failed to demonstrate by a preponderance of the evidence that the environmental benefit adequately addresses the adverse impacts noted above. While there may be some habitat improvement on site, that alone does not demonstrate that the overall impacts from the proposed construction and operation of a commercial parking lot will not have undue adverse impacts on the surrounding Saw Mill Creek wetland and its values.

The record in this matter demonstrates that the adverse impacts noted above significantly outweigh the social and economic benefits that might be derived from the proposed project. Accordingly, the requirement for a tidal wetlands permit that a proposed activity not have an undue adverse impact on the present or potential values of the affected tidal wetland or its adjacent areas has not been satisfied (*see* 6 NYCRR 661.9[c][3]).

## II. Presumption of Incompatibility (6 NYCRR 661.9[c][4])

As referenced above, the proposed construction of commercial facilities and the undertaking of commercial use activities in a tidal wetland adjacent area not requiring water access is a presumptively incompatible use that requires a permit. There is no dispute that applicant's proposed commercial parking area is a presumptively incompatible use of the tidal wetlands adjacent area. As a result, it is presumed that the proposed project "may not be undertaken on the adjacent area because it is not compatible with the preservation, protection, or enhancement of the present and potential values of tidal wetlands if undertaken in that area" (6 NYCRR 661.9[c][4]. Applicant has the burden of "overcoming such presumption and demonstrating that the proposed regulated activity will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands" (*id.*).

Department staff concluded that applicant did not meet its burden to overcome the presumption of incompatibility because the project would have undue adverse impacts on the present and potential values of the Saw Mill Creek wetlands at and near the site (James, T. at

162-163; Hearing Exhibit 11, at 215). In addition, staff testified that in this matter where the “natural resource value of the impacted wetland complex is so incredibly high, the risks are too great to meet the standards for permit issuance” (Zahn, T. at 215).

Applicant argues that it has demonstrated that there will be no undue adverse impacts from its proposed commercial parking lot because any impacts would be offset by the benefits of the enhanced mitigative plantings proposed by applicant. Applicant further asserts that it will meet the 50-foot setback from the tidal wetland at every location feasible on the site, and therefore has overcome the presumption of incompatibility.

To be clear, Department staff never stated that a 50-foot setback would automatically or by itself overcome the presumption of incompatibility. Staff asserted in its notices of incomplete application that a 50-foot setback would “help overcome that presumption” or it would “improve the prospect that the application can overcome the presumption” (*see* Hearing Exhibit 2 at 117; Hearing Exhibit 4 at 141; Hearing Exhibit 7 at 178). Applicant attempts to make an issue of the fact that the regulations require a minimum 30-foot setback in New York City (*see e.g.* 6 NYCRR 661.6[a][1]). Staff argues that development restriction is not relevant here because the denial is not based on 6 NYCRR 661.9(c)(2) and the development restriction only concerns principal buildings and structures, which are not proposed in this matter.

I note, however, that even if applicable, the 30-foot setback restriction is a “minimum” setback requirement. The Commissioner previously recognized “that the 30 foot setback (as well as the 75 foot setback provided for projects outside the City) are both ‘minimum’ setbacks. Thus, if the facts in the record establish that a greater setback is necessary in order to satisfy the purposes and policy of the Tidal Wetlands Act, then the Department may require such further setbacks” (*In the Matter of F.L.D. Construction Corp.*, Decision of the Commissioner, August 28, 1984, at 3-4, upheld by *F.L.D. Constr. Corp. v Williams*, 122 AD2d 189, 190-191 [2nd Dept 1986], *appeal dismissed* 68 NY2d 996 [1986]). In this matter, applicant’s witness acknowledged that “DEC also has a long history of considering a 50-foot setback from tidal wetland sufficient to overcome any presumption of incompatibility for parking uses in tidal wetland adjacent areas” (Fleischer, T. at 35; *see also id.* at 99-101). Although applicant was unable to achieve a 50-foot setback in the area near the entrance to the site (*see* Hearing Exhibit 8 at 183, 190), Department staff did not base its denial pursuant to 6 NYCRR 661.9(c)(4) on applicant’s failure to achieve a 50-foot setback in that area. Staff’s denial is based on the undue adverse impacts that make the proposed project incompatible with the preservation, protection, or enhancement of the present and potential values of tidal wetlands.

I concluded above that the proposed construction and operation of a commercial parking lot on the site would have an undue adverse impact on wetland values and functions. Accordingly, I conclude that applicant has failed to prove by a preponderance of the evidence that the proposed project has overcome the presumption of incompatibility and will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands (*see* 6 NYCRR 661.9[c][4]).



## CONCLUSIONS

1. The record in this matter shows that the construction of a commercial parking lot for the storage of new vehicles destined for dealerships would result in undue adverse impacts to marine food production, wildlife habitat, education, research, and open space, taking into account the social and economic benefits which may be derived from the proposed activity. Applicant did not demonstrate by a preponderance of the evidence that its proposed commercial parking lot would comply with the permit issuance standard of 6 NYCRR 661.9(c)(3).
2. The record in this matter shows that the current proposal is not compatible with the preservation, protection or enhancement of the present and potential uses of the Saw Mill Creek tidal wetland. A preponderance of the evidence indicates that the proposed Project would cause undue adverse impacts on marine food production, wildlife habitat, education, research, and open space. Applicant did not demonstrate by a preponderance of the evidence that its proposed commercial parking lot would comply with the permit issuance standard of 6 NYCRR 661.9(c)(4).
3. No convincing evidence was presented regarding any significant social and economic benefits that would accrue from the proposed project except that applicant will benefit financially from the construction and operation of the commercial parking lot.
4. The proposed project would have undue adverse impacts on the only Mitigation Bank established in New York State to date which has been established to restore, preserve and maintain one of the largest remaining wetland complexes in New York City.

## RECOMMENDATION

Because the permit issuance standards would not be met, I recommend that the requested permit be denied.

/s/

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Michael S. Caruso  
Administrative Law Judge

Dated: February 6, 2024  
Albany, New York

**HEARING  
EXHIBIT CHART**

*Matter of Maggies Run LLC*  
Chelsea Road, Staten Island, New York – DEC ID No. 2-6403-00316/00001

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Bates No.
1	April 2020 DEC Title Wetlands Permit Application	✓	✓	Applicant	000001
2	July 21, 2020 Notice of Incomplete Application	✓	✓	Applicant	000117
3	November 19, 2020 Response to July 21, 2020 Notice of Incomplete Application	✓	✓	Applicant	000120
4	February 4, 2021 Notice of Incomplete Application	✓	✓	Applicant	000141
5	Maggies Run LLC Deed Restriction Revised December 29, 2020	✓	✓	Applicant	000144
6	March 31, 2021 Response to February 4, 2021 Notice of Incomplete Application	✓	✓	Applicant	000155
7	September 20, 2021 Notice of Incomplete Application	✓	✓	Applicant	000177

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Bates No.
8	November 19, 2021 Response to September 20, 2021 Notice of Incomplete Application	✓	✓	Applicant	000182
9	July 29, 2022 Notice of Complete Application	✓	✓	Applicant	000207
10	July 29, 2022 Short Environmental Assessment Form	✓	✓	Applicant	000210
11	October 27, 2022 Permit Denial Letter	✓	✓	Applicant	000212
12	November 18, 2022 Request for Hearing on Permit Denial	✓	✓	Applicant	000217
13	Maggies Run LLC Statement of Issues	✓	✓	Applicant	000218
14	Department Staff Response	✓	✓	Applicant	000232
Fleischer 15	Fleischer CV	✓	✓	Applicant	000235
Fleischer 16	1974 Aerial Image of Site	✓	✓	Applicant	000246
Fleischer 17	1979 Aerial Image of Site	✓	✓	Applicant	00248

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Bates No.
Fleischer 18	2002 Aerial Image of Site	✓	✓	Applicant	000250
Fleischer 19	May 2023 Aerial Image of Site	✓	✓	Applicant	000252
James 1	James Resume	✓	✓	Staff	000254
James 2	Pages 20-22 of Saw Mill Creek Pilot Mitigation Bank – Year 3 Post-Construction Monitoring Report	✓	✓	Staff	000256
James 3	Aerial of 425 Chelsea Road	✓	✓	Staff	000259
James 4	FEMA Flood Map	✓	✓	Staff	000260
James 5	Two photos of site	✓	✓	Staff	000261
James Figure 1	Excerpt from Tidal Wetlands Map 568_494 depicting the Site	✓	✓	Staff	000262
James Figure 2	Aerial Image of Sawmill Creek, Arthur Kill, and Pralls Island	✓	✓	Staff	000263
Zahn 1	Aerial Image of Mitigation Bank from page 7, Figure 2 of Saw Mill Creek Pilot Mitigation Bank – Year 3 Post-Construction Monitoring Report	✓	✓	Staff	000264

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Bates No.
Zahn 2	Zahn CV	✓	✓	Staff	000265