

NEW YORK STATE:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for Permits pursuant to Articles 17 and 24 of the Environmental Conservation Law, Section 401 of the federal Clean Water Act, and Parts 663 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and 6 NYCRR 608.9, by

Town/Village of Harrison, New York
Applicant.

Issues Ruling on
Department Staff's
September 15, 2014
Negative Declaration and
Appeal's Schedule

DEC Application No.:
3-5528-00104/00001
3-5528-00104/00002

December 9, 2014

Proceedings

After reviewing the Town and Village of Harrison's (Harrison) August 19, 2014 proposed modification, Department staff issued a negative declaration dated September 15, 2014 pursuant to Environmental Conservation Law (ECL) Article 8 (State Environmental Quality Review Act [SEQRA]) and implementing regulations at 6 NYCRR Part 617. Department staff circulated the September 15, 2014 negative declaration with the Notice of Complete Application (NOCA) of the same date, and a revised draft permit among the parties for review and comment. Counsel for the City of Rye (Rye) filed a letter dated October 10, 2014. Mr. Schaper filed a letter dated September 17, 2014 that the Office of Hearings and Mediation Services (OHMS) received on October 1, 2014. In their respective letters, Rye and Mr. Shaper commented about the September 15, 2014 negative declaration, among other things.

As discussed during the November 13, 2014 telephone conference and subsequently outlined in a letter of the same date, Harrison and Department staff were provided until December 5, 2014 to respond to the comments filed by Rye and Mr. Schaper concerning the September 15, 2014 negative declaration. Attached to an email dated December 1, 2014, Harrison responded in a letter of the same date. With an email dated December 5, 2014, Department staff filed a letter of the same date.

Without leave, Mr. Schaper filed an email dated December 1, 2014 wherein he reiterated his opposition to the project, and reasserted that the September 15, 2014 negative declaration is irrational.

I. Environmental Review

The scope of the review of Department staff's September 15, 2014 negative declaration is prescribed by 6 NYCRR 624.4(c)(6)(i)(a), and is limited to whether the SEQRA determination was irrational or otherwise affected by an error of law. The parties' arguments are addressed below.

A. City of Rye and Mr. Schaper

Concerning Department staff's September 15, 2014 negative declaration, Rye argued in its October 10, 2014 letter that Department staff did not undertake the requisite hard look required by the applicable statute and regulations. In its letter,¹ under the heading, *SEQRA Related Issues – Negative Declaration*, Rye characterized the September 15, 2014 negative declaration as “incredible.”

Specifically with respect to *Impacts on Land, Surface Water, and Groundwater* (see September 15, 2014 negative declaration at 1 of 4 and 2 of 4), Rye asserted that Department staff inappropriately concluded that Harrison's August 19, 2014 proposed modification would not adversely impact Beaver Swamp Brook because the area around the site is already densely developed with impervious surfaces. Rye noted there is a flooding issue associated with this part of the Beaver Swamp Brook watershed that would be exacerbated with the addition of every square foot of impervious surface. According to Rye, Harrison and Department staff are “turning a blind eye” to the potential cumulative impacts associated with additional impervious surfaces.

With respect to *Traffic* (see September 15, 2014 negative declaration at 3 of 4), Rye noted further that Harrison had recently approved development projects in the downtown area and in the area near the MTA train station. Rye contended that the potential traffic impacts associated with these recent development projects were not considered in Harrison's traffic study, which had been undertaken 3½ years ago. According to Rye, Harrison's traffic study is not an adequate basis for Department staff to conclude that no significant adverse impacts to traffic are expected to result from the August 19, 2014 proposed modification.

In his letter dated September 17, 2014, Mr. Schaper criticized Harrison's August 7, 2014 amended negative declaration. According to Mr. Schaper, the document “sets new standards for being disingenuous.” He argued that Harrison and Department staff did not undertake any “real, objective analysis of the soils on the site since determining that the site did require a cleanup.” Mr. Schaper observed that cattails used to grow on the site up to Oakland Avenue and, now, there are none anywhere on the site.

B. Town and Village of Harrison

Referring to the September 15, 2014 negative declaration (at 1 of 4), Harrison noted that the August 19, 2014 proposed modification would “construct an outdoor recreation complex within the 100-foot adjacent area of State-regulated Freshwater Wetland J-3 (Class II).” In addition, “[t]he proposed action initially included grading and filling of 0.162 acres of State-regulated Freshwater Wetland J-3. This current proposal has been modified to avoid direct

¹ Rye did not number the pages of its October 10, 2014 letter.

impact to this 0.162 acres of State-regulated Freshwater Wetland J-3.” (September 15, 2014 negative declaration at 1 of 4.)

Harrison noted further that the Commissioner previously determined (*see* Interim Decision dated June 12, 2013 at 7) that the prior negative declaration dated March 8, 2011 was not irrational or otherwise affected by an error of law (*see* 6 NYCRR 624.4[c][6][i][a]). Because the construction activities associated with the August 19, 2014 proposed modification are no longer proposed to take place within Freshwater Wetland J-3, Harrison argued that any potential adverse environmental impacts would be considerably less than what Department staff considered in the March 8, 2011 negative declaration. Harrison concluded that the September 15, 2014 negative declaration is not irrational or otherwise affected by an error of law based on the scaled-back version of the project.

Harrison observed, generally, that the intervenors’ objections about the September 15, 2014 negative declaration are broad and vague. Harrison noted further that the intervenors did not proffer any data or other information to substantiate their respective claims.

Referring to the topic identified as *Impacts on Land, Surface Water and Groundwater* (September 15, 2014 negative declaration pages 1 of 4 and 2 of 4), Harrison noted that Rye did not provide any documentation or technical support concerning the nature of any adverse “cumulative impacts” alleged in its October 10, 2014 letter. Harrison pointed to the paragraph in the September 15, 2014 negative declaration on page 2 of 4 that begins with the words: “No significant adverse impacts to the Beaver Swamp Brook are expected from the project.” In this paragraph, Department staff acknowledged that impervious surfaces would be associated with the project, and would include two gravel parking lots and a walking trail. However, Department staff concluded that the potential cumulative impacts of the impervious surfaces associated with the project would be negligible because extensive areas in the watershed are already paved. With respect to construction, the September 15, 2014 negative declaration states that stormwater management features would be installed at the site to control potential adverse impacts related to erosion and sedimentation.

Furthermore, according to the September 15, 2014 negative declaration, all project activities would be located outside the floodway, which obviates the need to undertake an encroachment analysis to meet flood plain standards. Nevertheless, Department staff reviewed Harrison’s hydraulic modeling along Beaver Swamp Brook, and concluded that the study was performed in accordance with an accepted Federal Emergency Management Administration (FEMA) model and methodology. (September 15, 2014 negative declaration at 2 of 4.)

Harrison argued that Rye’s concerns about potential traffic impacts were unsubstantiated. In the September 15, 2014 negative declaration (at 3 of 4), Department staff acknowledged that the project would generate additional vehicle trips, in the short term, from construction, as well as additional vehicle trips from users of the proposed recreational facilities. The basis for Department staff’s conclusion that no significant adverse impacts to traffic are expected is a traffic impact study dated February 17, 2011. Harrison argued that Rye did not provide any

objective basis to conclude that the data from the February 2011 traffic study should no longer be relied upon.

Finally, Harrison argued that the required scope of Department staff's review was limited to an assessment of the environmental impacts associated with the substantive changes that are proposed in August 19, 2014 proposed modification. In this case, the required scope of review would have been limited to the potential impacts to the adjacent area of Freshwater Wetland J-3 (*see* 6 NYCRR 617.7[e][1][iii]). According to Harrison, the September 15, 2014 negative declaration, however, goes beyond the required scope of review. Therefore, Department staff's environmental review of the August 19, 2014 proposed modification was more comprehensive than what was required by statute and regulations.

C. Department Staff

According to Department staff, intervenors' objections about the September 15, 2014 negative declaration are the same as those concerning the March 8, 2011 negative declaration. Department staff noted that the Commissioner determined that Department staff undertook the requisite environmental review and presented a reasoned elaboration in support of the March 8, 2011 negative declaration. Accordingly, the Commissioner concluded that the March 8, 2011 negative declaration was not irrational or otherwise affected by an error of law. (*See* June 12, 2013 Interim Decision at 7.) Because Harrison's August 19, 2014 proposed modification would be a scaled-back version of what Harrison had previously proposed, Department staff argued that the potential impacts from the proposed modification would be substantially less.

With respect to potential impacts on land, surface water, and groundwater, Department staff identified the following information that served as the basis for the conclusion stated in the September 15, 2014 negative declaration (at 2 of 4) that the addition of 0.5 acres of impervious surfaces in the form of gravel parking lots would be negligible, resulting in an insignificant impact. The information submitted with the August 19, 2014 proposed modification included Harrison's hydrological study and related engineering plans and drawings, compliance with NYS SPDES requirements that include developing a stormwater pollution prevention plan, and conformance with Westchester County best management practices for stormwater management.

Concerning potential impacts associated with traffic, Department staff provided an excerpt from the Department's *Short Environmental Assessment Form Workbook* (EAF Workbook) (*see* <http://www.dec.ny.gov/permits/90470.html>). According to the EAF Workbook, a project generating fewer than 100 peak hour vehicle trips per day will not result in a significant increase in traffic. The September 15, 2014 negative declaration identified a maximum of 18 peak hour trips for the Saturday peak hour based on Harrison's February 17, 2011 updated traffic study. Because the expected maximum peak hour trips of 18 would be substantially less than 100, Department staff concluded no potential adverse impact would be associated with traffic. Department staff noted that intervenors offered nothing to refute the information presented in Harrison's February 17, 2011 updated traffic study.

D. Rulings

In the June 12, 2013 Interim Decision (at 7) concerning the captioned matter, the Commissioner determined that Harrison's SEQRA review including its June 2004 negative declaration was beyond the scope of this proceeding (*see also* 6 NYCRR 624.4[c][6][ii][a]). As with Harrison's June 2004 negative declaration, the August 7, 2014 amended negative declaration, which Harrison included with its August 19, 2014 proposed modification, is beyond the scope of this proceeding (*see* 6 NYCRR 624.4[c][6][ii][a]). Therefore, Harrison's August 7, 2014 amended negative declaration will not be addressed in this proceeding.

The scope of the review of Department staff's September 15, 2014 negative declaration is prescribed by 6 NYCRR 624.4(c)(6)(i)(a), and is limited to whether the SEQRA determination was irrational or otherwise affected by an error of law. I conclude that Department staff's September 15, 2014 negative declaration concerning the captioned matter is rational and not otherwise affected by an error of law. In making this determination, I have considered the comments and arguments provided by the parties. In the September 15, 2014 negative declaration, Department staff took the required hard look at potential environmental impacts of the August 19, 2014 proposed modification, and provided a reasoned elaboration for the negative declaration. Consequently, the environmental review of the August 19, 2014 proposed modification, as required by ECL Article 8 and implementing regulations at 6 NYCRR Part 617, is complete.

II. Appeals

Pursuant to 6 NYCRR 624.8(d)(2)(i), rulings by the ALJ either to include or exclude issues for adjudication may be appealed to the Commissioner on an expedited basis (*see also* 6 NYCRR 624.6[e]). During the November 13, 2014 telephone conference call, the parties agreed on a schedule to file appeals from my rulings outlined in the October 31, 2014 memorandum to proceed with the hearing (at 6-7), and this ruling concerning the September 15, 2014 negative declaration.

Appeals will be due by 4:00 PM on Friday, **January 16, 2015**. Replies are authorized, and will be due by 4:00 PM on Friday, **January 30, 2015**.

The original and two copies of each appeal and reply thereto must be filed with Commissioner Joseph Martens (Attention: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief Administrative Law Judge James T. McClymonds and me. In addition, one copy of each submittal must be sent to all others on the service list (revised 10/28/2014) at the same time and in the same manner as the submittals are sent to the

Commissioner. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

III. Telephone Conference Call

At the end of the November 13, 2014 telephone conference call, the parties agreed to participate in a telephone conference call after the appeals and replies were filed. The purpose of the call is to discuss whether the parties want to proceed with the hearing and, if so, to develop a schedule for the hearing.

I have scheduled the telephone conference call for 10:00 AM on Wednesday, February 4, 2015. The toll free telephone number for the conference will be: **866-394-2346**. The 10-digit conference code will be: **6639826173**.

IV. Harrison's December 5, 2014 Request

In an email dated December 5, 2014, Harrison objected to Mr. Schaper's December 1, 2014 email, which commented about Harrison's December 1, 2014 response. Harrison noted that Mr. Schaper's December 1, 2014 email was not authorized and, therefore, should not be considered. In addition, Harrison asserted that Mr. Schaper continues to attack the honesty, integrity, ethics, and motives of Harrison's employees and representatives. Harrison noted that it had previously objected to Mr. Schaper's comments, which have been of a similar nature. Citing the authority outlined at 6 NYCRR 624.8(b)(1), which allows the ALJ to control the conduct of the proceedings, Harrison requested an order from me directing Mr. Schaper to refrain from making further derogatory comments.

Mr. Schaper responded in an email dated December 5, 2014.

I would appreciate if the parties would refrain from making personal attacks against any other party, its representatives, and consultants. The parties are entitled to have differing views about the merits of the pending permit application, and will have the opportunity to present their respective cases during the adjudicatory hearing. If, during the hearing, the conduct of a party's representative becomes disruptive, I will take the measures necessary to maintain order (*see* 6 NYCRR 624.8[b][1][xv]).

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
December 9, 2014

To: Service List (Revised 10/28/2014)