

NEW YORK STATE:  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION

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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

Further Proceedings and  
Draft Scheduling Order

Town/Village of Harrison, New York  
Applicant.

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

October 31, 2014

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### **Background**

In 1997, the Town and Village of Harrison, New York (Harrison) began a brownfield remediation project on a 14-acre site identified as the Beaver Swamp Brook site (B00109-3). The remedial action was consistent with the Department of Environmental Conservation's Brownfield Cleanup Program (*see* Environmental Conservation Law [ECL] 27-1401, et seq.), and was funded, in part, by a United States Department of Agriculture, Natural Resources Conservation Service (USDA/NRCS) grant, a Department brownfield grant, and a Department Clean Water/Clean Air Bond Act grant. Staff from the Department's Division of Environmental Remediation (DER) issued a Record of Decision (ROD) on March 31, 2003. By letter dated July 3, 2008, DER Staff approved the Final Engineering Report (FER) for the brownfield remediation project.

The Beaver Swamp Brook site is located on the southeast side of Oakland Avenue between Glen Oaks Drive and Osborn Road in Harrison. A portion of the remediated property includes State regulated Freshwater Wetland J-3 (Class II). To mitigate impacts to Freshwater Wetland J-3 that were associated with the brownfield remediation, Harrison provided one acre of enhanced 100-foot adjacent area. The remediated property is also adjacent to Beaver Swamp Brook, which flows between Harrison and the City of Rye, then through the Village of Mamaroneck to Mamaroneck Harbor and, finally, to Long Island Sound.

In November 2006, Harrison filed an application with Staff from the Department's Region 3 Office (New Paltz, New York) (Department staff) for a consolidated permit, pursuant to ECL Articles 17 and 24, and implementing regulations 6 NYCRR Part 663 (Freshwater Wetlands Permit Requirements) and Part 750 (State Pollutant Discharge Elimination System [SPDES] Permits), as well as federal Clean Water Act § 401 (*see also* 6 NYCRR 608.9), to redevelop the Beaver Swamp Brook site. Initially, the redevelopment proposal was a recreational complex that would have involved filling and grading approximately 0.39 acres of Freshwater Wetland J-3 and 1.7 acres of the 100-foot adjacent area.

Consistent with the requirements set forth in 6 NYCRR Part 624 (Permit Hearing Procedures), a legislative hearing and issues conference convened. The City of Rye, New York, (Rye) and Douglas B. Schaper filed petitions for full party status. Michael G. LaDore filed a petition for amicus status. On May 29, 2009, I ruled on issues and petitions for party status. On August 21, 2009, I issued a ruling concerning SEQRA compliance. Subsequently, on July 15, 2011, I issued supplemental rulings. After considering appeals and replies from the issues conference participants, the Commissioner issued an Interim Decision dated June 12, 2013.

On November 19, 2013, the matter was referred to mediation with the consent of the parties. In August 2014, the parties agreed that a mediated settlement could not be reached, and asked me to schedule the adjudicatory hearing.

### **Proposed Modification**

With a cover letter dated August 19, 2014, Harrison filed a joint permit application and supporting documents with Department staff to modify the original redevelopment project for the Beaver Swamp Brook site. The August 19, 2014 proposed modification would reduce the size of the athletic fields and would reposition them in a manner to avoid undertaking any regulated activities within Freshwater Wetland J-3. The August 2014 proposed modification would limit grading and filling to 2.0 acres of the regulated adjacent area of the wetland; no grading or filling would take place within Freshwater Wetland J-3. To mitigate impacts to the portion of the adjacent area that would be graded and filled, the August 2014 proposed modification includes a 1.07-acre wetland buffer enhancement plan. The proposed enhancement plan would include removing all invasive plant species and replacing them with a combination of native plants and a seed mix to provide a vegetated buffer to the wetlands.

### **Proceedings**

On August 28, 2014, I convened a telephone conference call with the parties to discuss the hearing schedule. During the August 28, 2014 telephone conference call, counsel for Harrison advised the parties about the recently filed joint permit application and proposed modification. Subsequent to the telephone conference call, counsel for Harrison circulated an electronic version of the joint permit application and supporting documents for the proposed modification to the parties and me.

Department staff reviewed Harrison's August 19, 2014 proposed modification. With a cover letter dated September 15, 2014, Department staff subsequently issued a Notice of Complete Application (NOCA), and instructed Harrison to publish the NOCA in *The Journal News*. In addition, the NOCA appeared in the Department's *Environmental Notice Bulletin* on September 17, 2014. The NOCA provided a public comment period of 15 days. With the NOCA, Department staff issued a Negative Declaration dated September 15, 2014, and a draft permit, which incorporated by reference the project plans for the proposed modification filed with Harrison's August 19, 2014 joint permit application. Department staff circulated these documents to the parties and me.

In a letter dated September 18, 2014, I provided the parties with the opportunity to review and comment about Harrison's August 2014 proposed modification, and Department staff's draft permit conditions. I received the following comments. Harrison's counsel filed a letter dated October 3, 2014. Mr. Schaper filed a letter dated September 17, 2014 that the Office of Hearings and Mediation Services received on October 1, 2014. Counsel for Rye filed a letter dated October 10, 2014. In an email dated October 8, 2014, Mr. LaDore requested additional time to review and comment about Harrison's proposed modification and Department staff's draft permit. Mr. LaDore explained that he had been hospitalized since the end of August 2014, and was recently discharged. I granted Mr. LaDore's request, and requested that he advise me when he completed his review. The parties' comments are discussed below.

In an email dated October 27, 2014, counsel for Department staff advised that Department staff did not receive any comments in response to the September 15, 2014 NOCA about the August 2014 proposal from members of the public, other than the intervenors in this matter.

#### I. Harrison's Comments

In the October 3, 2014 letter, counsel for Harrison stated that Harrison does not object to any of the conditions outlined in Department staff's September 15, 2014 draft permit. Based on the proposed modification, Harrison argued there were no longer any issues for adjudication, and concluded that the hearing should be canceled.

With the proposed modification, Harrison explained that two of the four regulated activities related to the initial redevelopment of the Beaver Swamp Brook site would not be undertaken. These activities were grading and filling in the regulated freshwater wetland area. Pursuant to 6 NYCRR 663.4(d), Item No. 20 is "filling, including filling for agricultural purposes," and Item No. 25 is "grading and dredging not included in item 26." When these two regulated activities are proposed to be undertaken in a freshwater wetland, they are considered "incompatible with a wetland and its functions and benefits" (6 NYCRR 663.4[d][Levels of Compatibility]). When these two regulated activities are proposed to be undertaken in the adjacent area, however, they are considered "usually incompatible with a wetland and its functions or benefits, *although in some cases the proposed action may be insignificant enough to be compatible*" (6 NYCRR 663.4[d][Levels of Compatibility] [emphasis added]).

Based on the following, Harrison argued that the proposed filling and grading in adjacent area of Freshwater Wetland J-3 would meet the three compatibility tests outlined at 6 NYCRR 663.5(e)(1). First, the two incompatible activities proposed in the freshwater wetland were eliminated. Second, the August 19, 2014 proposed modification consists of two usually incompatible activities in the adjacent area. Harrison argued further that the weighing standards, outlined at 6 NYCRR 663.5(e)(2), were no longer relevant and, therefore, did not need to be considered because the August 19, 2014 proposed modification would meet the compatibility tests for permit issuance.

To support its arguments, Harrison included a letter dated July 31, 2014 from Beth Evans, PWS, from Evans Associates, Environmental Consulting, Inc., and a project narrative prepared by Ms. Evans for the August 19, 2014 proposed modification.

II. Intervenors' Comments

A. Douglas B. Schaper

In his September 17, 2014 letter, Mr. Schaper said that the freshwater wetlands at the site have been destroyed. He characterized the proposal as a development project rather than a restoration project. According to Mr. Schaper, the soils brought to the site as part of the remediation are not hydrologic. Consequently, Mr. Schaper explained that any groundcover growing on the site has very shallow roots that would require continuous and significant maintenance in the form of weed control and fertilizer.

With specific reference to Harrison's August 2014 EAF and the August 7, 2014 amended negative declaration, Mr. Schaper commented about the veracity of the statements and conclusions outlined in the two documents filed by Harrison. For example, contrary to Harrison's assertion at No. 6 on page 2 of 4 of Part 1 of the EAF, Mr. Schaper contended that the proposed action would not be consistent with the predominant character of the existing built or natural landscape. Mr. Schaper stated that Leonard Jackson Associates was a paid consultant, and that Department staff ignored "glaring conflicts of interest." With respect to Part 2 of the EAF, Mr. Schaper was similarly critical of Harrison's responses, and asserted that many adverse environmental impacts have already occurred at the site, and would be further exacerbated by the proposed development.

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's Avenue and, now, there are none anywhere on the site.

B. The City of Rye

In its October 10, 2014 letter, Rye objected to Department staff's September 15, 2014 negative declaration. These objections are discussed below in Section III(B).

In addition, Rye recommended amendments to Department staff's draft permit conditions Nos. 6, 8, and 10. With respect to draft condition No. 6, Rye stated that the draft permit should specifically outline what controls Harrison must implement to avoid contaminating Beaver Swam Brook. Rye noted that the site has a history with respect to soil and water contamination.

Draft condition No. 8 would require Harrison to monitor the survival rate of the vegetation initially planted in the adjacent area and freshwater wetlands. If, after the first year, the survival rate is less than 85%, Harrison would be required to replace the lost vegetation. If, after subsequent years, the survival rate is less than 85%, or the increase in invasive species is greater than 10-15%, Harrison would be required to evaluate the reasons for these results and develop a remediation plan for Department staff's review. After Department staff reviews and approves the remediation plan, Harrison would be required to implement the approved plan. With respect to draft condition No. 8, Rye requested that Harrison be directed to provide copies of the required reports to Rye by December 31 of each year.

Draft condition No. 10 would require Harrison to monitor the soil elevations of fill in the adjacent wetlands for five years from the date of final grading. Monitoring would be required quarterly for the first year, and then annually for the next four years. The number and locations of monitoring stations are prescribed in the draft permit condition. The purpose of the monitoring is to assess any changes in the wetland soil elevations that may result from the displacement of subsurface material. The draft permit condition would require Harrison to present the monitoring data in a report, and to file two copies of the report, every year, by December 31 with the Region 3 Permit Administrator. If the data show that displacement has occurred and additional fill is needed to restore the elevation, Harrison would be required to provide written recommendations about how to remedy the displacement.

Rye requested copies of the reports that Harrison would be required to prepare pursuant to the terms of draft condition No. 10. Rye observed that the effective period of the draft permit is not known. Rye recommended that the monitoring outlined in draft condition No. 10 should be longer than five years. Rye also contended that this draft permit condition does not address concerns related to the project's potential impacts to the flood storage capacity of the site. Rye requested Department staff to undertake an in-depth review of the issues surrounding soil characteristics and flood storage capacity at the site.

With respect to the proposed modification, Rye argued that Harrison did not show how the Department's no-net-loss standard for wetlands would be met. Rye argued further that the proposed modification does not consider any mitigation measures or alternatives to the August 19, 2014 proposed modification. Rye concluded that the draft permit does not adequately address, or otherwise resolve, any of the issues initially proposed by Rye in its July 2007 petition and its October 2008 supplement.

Contrary to Harrison's assertion, Rye contended that the August 2014 proposed modification would not meet the three compatibility tests set forth in 6 NYCRR 663.4(e)(1). Rye argued that the proposed modification would not be compatible with the preservation, protection and conservation of Freshwater Wetland J-3 (*see* 6 NYCRR 663.4[e][1][i]). Rye said that Harrison should not be permitted to rely on the remediation project as the basis for meeting this compatibility test when on-going maintenance is already part of the remediation project.

Rye contended further that the proposed modification would degrade Freshwater Wetland J-3 (*see* 6 NYCRR 663.4[e][1][ii]) because the fill brought to the site as part of the remediation degraded the wetland in the first instance. Rye said that the draft permit conditions that would require Harrison to monitor the vegetation and soil displacement on the site would not mitigate impacts from the proposed modification.

With respect to the third compatibility standard (*see* 6 NYCRR 663.4[e][1][iii]), Rye argued that Harrison has not set forth any basis for why the proposed modification is needed. According to Rye, the public health and welfare would be better served by increasing the flood storage capacity of the site.

Finally, Rye requested that Harrison produce any additional computer-aided design (CAD) data that Harrison may have relied upon in developing the August 19, 2014 proposed modification.

C. Mr. LaDore

Based on his petition and the discussion held at the July 24, 2007 issues conference, Mr. LaDore requested amicus status. I granted Mr. LaDore's request as noted in the May 29, 2009 rulings on issues and petitions for party status. The Commissioner affirmed this ruling in the June 12, 2013 Interim Decision.

Mr. LaDore's rights to participate in this proceeding are limited due to his amicus status (*see* 6 NYCRR 624.5[e][2]). As provided by the regulations, Mr. LaDore will have the right to attend the hearing and review the record. He may file a closing brief. However, he does not have the right to present witnesses or cross-examine other parties' witnesses. Because a hearing is necessary, Mr. LaDore may provide his comments about the August 19, 2014 proposed modification, and Department staff's draft permit and September 15, 2014 negative declaration at the end of the hearing in the form of a closing brief.

III. Rulings on Issues for Adjudication

A. Standards for Permit Issuance

Factual issues about the redevelopment of the Beaver Swamp Brook site persist. Therefore, an adjudicatory hearing about whether Harrison's August 19, 2014 proposed modification would meet the standards for permit issuance is necessary. The Commissioner's June 12, 2013 Interim Decision (at 9-10) is the starting point for determining the scope of the issues to be adjudicated.

1. Compatibility Standards

Based on the August 19, 2014 proposed modification, the regulated activities that remain are filling and grading a portion of the adjacent area of Freshwater Wetland J-3 (*see* 6 NYCRR 663.4[d][Items Nos. 20 and 25]). In the adjacent area, these regulated activities are considered usually incompatible. The parties dispute, however, whether the proposed modification is one of those cases, contemplated by the regulations, where the proposed actions may be insignificant enough to be compatible (*see* 6 NYCRR 663.4[d][Levels of Compatibility]). Harrison asserted that the actions associated with the proposed modification would be insignificant enough to be compatible. Department staff agrees with Harrison and, accordingly, Department staff developed the September 15, 2014 draft permit. The City of Rye and Mr. Schaper, however, disagree. Therefore, at issue is whether the August 19, 2014 proposed modification would meet the three compatibility tests outlined at 6 NYCRR 663.5(e)(1).

2. Weighing Standards

Harrison's contention that the weighing standards no longer apply is premised on the following. First, all regulated activities would take place in the adjacent area of Freshwater Wetland J-3. Second, the regulated activities associated with the proposed modification would be insignificant in this case. Such a contention depends upon whether Harrison can demonstrate that the proposed modification would meet the three compatibility standards outlined at 6 NYCRR 663.5(e)(1). This contention is rebuttable. If Harrison cannot demonstrate compatibility, then the weighing standards outlined at 6 NYCRR 663.5(e)(2) must be adequately addressed in order to obtain a permit (*see* 6 NYCRR 663.5[e][2]). Therefore, at the adjudicatory hearing, the parties will have the opportunity to develop a record about whether the August 19, 2014 proposed modification would meet the weighing standards outlined at 6 NYCRR 663.5(e)(2) for a Class II wetland. (*See* Commissioner's June 12, 2013 Interim Decision at 9-10.)

B. Environmental Review

The application materials for the proposed modification included an amended negative declaration dated August 7, 2014 issued by Harrison as the lead agency. As an involved agency, Department staff also issued a negative determination on September 15, 2014. In their respective correspondence, Mr. Schaper and Rye objected to Harrison's August 7, 2014 amended negative declaration, and to Department staff's September 15, 2014 negative declaration.

The May 29, 2009 ruling on issues and party status (at 42-46) discussed the issues proposed by the intervening parties about Harrison's compliance with the requirements outlined in the State Environmental Quality Review Act (SEQRA). On August 21, 2009, I issued a ruling concerning SEQRA compliance. The July 15, 2011 supplemental rulings on issues for adjudication (at 4-9) further discussed issues related to SEQRA.

In the June 12, 2013 Interim Decision (at 7), the Commissioner determined that Harrison's SEQRA review including its June 2004 negative declaration were beyond the scope of this proceeding (*see also* 6 NYCRR 624.4[c][6][ii][a]). In addition, the Commissioner determined (*see* June 12, 2013 Interim Decision at 7) that Department staff's March 8, 2011 negative declaration was not irrational or otherwise affected by an error of law (*see* 6 NYCRR 624.4[c][6][i][a]).

As with Harrison's June 2004 negative declaration, the August 7, 2014 amended negative declaration 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.

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

Specifically with respect to *Impacts on Land, Surface Water, and Groundwater* (*see* page 1 of 4, September 15, 2014 negative declaration), Rye asserted that Department staff inappropriately concluded that the 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 Beaver Swamp Brook that would be exacerbated with the addition of every square foot of impervious surface. According to Rye, "DEC and Harrison are turning a blind eye to the additional cumulative impacts that each and every square foot of impervious surface add."

With respect to *Traffic* (*see* page 3 of 4, September 15, 2014 negative declaration), 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.

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). Any review is limited to whether the SEQRA determination was irrational or otherwise affected by an error or law. Based on their respective comments, I conclude that Rye and Mr. Schaper are asserting that Department staff's September 15, 2014 negative declaration is irrational. Therefore, before I can decide this legal question, Department staff and Harrison will have the opportunity to respond to the intervenors' comments concerning the September 15, 2014 negative declaration with respect to the following two topics. The first relates to impacts on land, surface water, and groundwater (*see* page 1 of 4, September 15, 2014 negative declaration), and the second is traffic (*see* page 3 of 4, September 15, 2014

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<sup>1</sup> Rye did not number the pages of its October 10, 2014 letter.

negative declaration). The date for the response is identified below in the proposed scheduling order. I will rule on this issue before the hearing commences.

IV. Appeals

These issues rulings are appealable pursuant to 6 NYCRR 624.8(d)(2)(i) (*also see* 6 NYCRR 624.6[e]). However, I will not adjourn the hearing while any appeals are pending (*see* 6 NYCRR 624.8[d][7]).

V. Draft Scheduling Order

I would like to schedule a telephone conference call with the parties during the second week in November (12, 13, or 14) to discuss the following hearing schedule.

**Draft Scheduling Order**

Telephone Conference Call	November 12, 13 or 14	The purpose of the conference call is to discuss the hearing schedule
Response to Mr. Schaper's and Rye's comments about Department staff's September 15, 2014 negative declaration	December 5, 2014	Responses are authorized from Department staff and Harrison. No further submissions are authorized.
Service of Discovery Demands	December 19, 2014	The parties served discovery demands in July 2013. They were held in abeyance while the matter was mediated. Are the July 2013 demands relevant given the proposed modification? Do the parties need to revise their initial requests?
Response to Discovery Demands	January 19, 2015	
Adjudicatory Hearing	February 9-13, 2015	Hearing held in Harrison, New York. The hearing will continue from day to day until it is completed.

As the parties prepare for the hearing, please note the following.

- Harrison is responsible for reserving a location for the hearing and the stenographer.
- Before the telephone conference call, the parties shall confer with their respective witnesses about their availability for the hearing. If parties and witnesses will not be available during the week of February 9, 2015, the parties shall propose alternative hearing dates. If need be, I am available during the weeks of February 17 and 23, 2015 for the adjudicatory hearing. Please note that Presidents' Day is Monday, February 16, 2015.
- Prior to the telephone conference call the parties are encouraged to confer about the schedule to resolve any potential scheduling conflicts and, as appropriate, propose alternative dates during the telephone conference call.

For the telephone conference call, please advise by November 5, 2014 via email whether you are available on November 12, 13, or 14 and during what time of the day.

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge

Dated: Albany, New York  
October 31, 2014

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