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MEMORANDUM FROM
LANGDON MARSH, Acting Commissioner

New York State
Department of Environmental Conservation

May 5, 1994

TO: Executive Staff, Division and Regional Directors
FROM: Langdon Marsh *Langdon Marsh*
RE: ORGANIZATION AND DELEGATION MEMORANDUM 94- 13
Organization: Effect of Stipulations on Decision-Making
in Permit and Enforcement Hearings

Introduction

On March 25, 1985, the Department issued Organization and Delegation ("O&D") memorandum #85-13. That memorandum established the procedures by which the presiding Administrative Law Judge ("ALJ") reviews and passes on to the Commissioner stipulations that have been reached among the permit and enforcement hearing participants that resolve all hearing issues. That O&D memorandum required a high level of involvement of the Office of Hearings to oversee and finalize stipulations, particularly with respect to permit hearings. Subsequent experience has shown that it is unnecessary to follow those procedures, since the vast majority of stipulations have been accepted, essentially without change. Therefore, it is the intent of this O&D memorandum to accelerate the process by establishing new stipulations procedures which will supersede ones previously established.

Permit Hearings

In order to expedite the decision-making process, where a permit application has been referred for an adjudicatory hearing and the parties reach a stipulation which resolves any or all of the issues in dispute, the agreement eliminates the need for the permit hearing and any substantive involvement of the ALJ or the Commissioner with respect to the stipulated issues.

Department Staff must work closely with the project attorney to ensure that the terms of each stipulation are clear; consistent with the law, regulations and Department policy; within the jurisdiction of the Department to enforce; adequate to ensure compliance with the law and regulations and responsive to the legitimate concerns raised by the parties. Conditions arising out of any stipulation that are unrelated to the Department's permit jurisdiction or to the fulfillment of the Department's responsibilities under the State Environmental Quality Review Act ("SEQRA") (e.g., a host community benefit package) must not be incorporated as part of any Department permit.

Where the parties¹ reach a stipulation that resolves some, but not all, of the disputed issues, the signed stipulation and any stipulated permit conditions must be submitted as part of the hearing record. Oral stipulations must be committed to writing.

Stipulations resolving all issues must be incorporated to the extent appropriate in the draft permit prepared by the Department Staff and accepted by all parties. The stipulation and any revised draft permit must be accompanied by a statement that the stipulation and any revised permit conditions resolve all the issues between the parties. The statement must contain the signature of all these persons or their representatives. The Department Staff must submit the agreed upon permit, together with the signed statement, to the assigned ALJ or to the Chief ALJ.

Whenever such a statement is filed, the ALJ, within five business days of receipt, will issue a letter which briefly summarizes the transaction between the disputants and which remands the application to the Department Staff. The Staff will complete the processing of the application consistent with the stipulation. Where a draft environmental impact statement ("EIS") was subject to the hearing, the Staff shall be responsible for finalizing the EIS, including responding to all substantive comments. The ALJ's involvement in this instance is ministerial and is solely for the purpose of closing the record.

In instances where permit applications were submitted prior to January 10, 1994, the effective date of the amendments to 6 NYCRR Part 624, the rules provided that stipulations resolving issues "...do not alter the responsibility of the commissioner to make a determination on the application consistent with all applicable laws" (see the former 6 NYCRR §624.9). To satisfy this requirement the Department Staff is delegated the authority to pass on the adequacy of the stipulated permit conditions.

Enforcement Hearings

The Uniform Enforcement Hearing Procedures (6 NYCRR Part 622) allow the Department Staff and Respondent to resolve any or all matters by stipulation at any time before they receive the ALJ's report or recommended decision. Where a stipulation is reached which resolves any or all of the issues in dispute, the agreement eliminates the need for a hearing and any substantive involvement of the ALJ or the Commissioner with respect to those issues [see 6 NYCRR §622.18(c)].

¹ Since a stipulation may occur before a determination of those who have party status, the term "party," as used in this context, includes persons who have applied for party status and who have not received a final denial or acceptance.

The ALJ must be notified whether the stipulation resolves some or all of the charges in the complaint. Where a person has been granted third party intervenor status, that person must be a party to the stipulation with regard to the issue for which party status was granted. Where some of the charges are still outstanding, the ALJ will continue with the hearing and forward a report, which addresses only the remaining charges, to the Commissioner for decision [see 6 NYCRR §622.17(b)].

Where the stipulation resolves all of the charges, the ALJ will cancel the hearing. The case will be removed from the hearing docket by the ALJ upon Staff's notification that a consent order has been executed. No hearing report will be prepared by the ALJ.

The ALJ is not obligated to review or approve stipulations resolving contested enforcement actions. Therefore the parties to the enforcement action must take care to ensure the terms of the settlement are enforceable.