
NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of an Applications for a Protection of Water and a Tidal Wetlands consolidated Permit pursuant to Environmental Conservation Law (ECL) Article 15, Title 5 and Article 25, and Title 6 of the Official Compilation of Codes, Rules and Regulations the Public Hearing of the State of New York (6 NYCRR) Parts 608 and 661, as well as a Water Quality Certification pursuant to Section 401 of the federal Clean Water Act and 6 NYCRR 608.9 by

Ruling on Department Staff's Motion to Postpone the Public Hearing, and Applicant's Cross-Motion to Schedule the Public Hearing

DEC Application No.:
2-6405-00222/00011

PC Group, LLC
Applicant.

June 26, 2009

Background

With a cover letter dated July 3, 2007, Sheldon Reich, P.E. from Sheldon L. Reich, P.C., Engineers and Architects (Staten Island, New York), filed an application for a consolidated permit, on behalf of the PC Group, LLC (Applicant) with the Staff from the Department's Region 2 Office (Department staff). At the time the application was filed, Applicant proposed to construct a new timber recreational pier (8 feet by 700 feet), and a bulkhead about 690 feet long of steel sheetpile in the Arthur Kill near 15 Tides Lane in the Charleston area on Staten Island. The Arthur Kill is a navigable water of the State (*see* Environmental Conservation Law [ECL] Article 15, Title 5 [Protection of Water]) and a regulated tidal wetland (ECL Article 25 [Tidal Wetlands Act]).

Applicant subsequently amended the project, which now consists of the following elements. The proposed timber pier would be 8 feet by 910 feet and include 56 boat slips with two ramps and mooring piles. The proposed bulkhead would be 125 linear feet and would be located at the approximate mean high water line. A parking area is proposed in the adjacent area. Prior to constructing the pier and bulkhead, Applicant proposes to remove sunken barges and other debris that has accumulated in the Arthur Kill offshore from Applicant's property.

In a letter dated February 3, 2009, Applicant's legal counsel (Michael D. Zarin, Esq., and Sarah H. Sarch, Esq. from Zarin & Steinmetz, White Plains, New York) requested a determination about the pending consolidated permit application pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR) 621.10(b) (*i.e.*, a five-day letter demand). Department staff timely responded with a notice of permit denial dated February 12, 2009 (*see* 6 NYCRR 621.10[c]). With a letter dated March 12, 2009, Applicant requested a public hearing (*see* 6 NYCRR 621.10[a][2]). To date, Department staff has not made any

determination of significance pursuant to ECL Article 8 (State Environmental Quality Review Act [SEQRA]) and 6 NYCRR 617.7.

Proceedings

The captioned matter was referred to the Office of Hearings and Mediation Services on April 2, 2009. In a letter dated April 7, 2009, the Chief Administrative Law judge advised Applicant's counsel and Department staff that the matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell. With a letter dated April 13, 2009, I sent a letter to the parties' representatives outlining the information that was needed to complete the notice of public hearing, as well as a draft notice for the parties' review and comment.

In a letter dated May 18, 2009, Udo Drescher, Esq., Assistant Regional Attorney, on behalf of Department staff, requested that the public hearing concerning the referenced matter tentatively scheduled for June 18 and 19, 2009 be postponed pending Staff's determination of significance. According to Mr. Drescher's May 18, 2009 letter, Department staff intends to issue a positive declaration and require the preparation of an environmental impact statement (EIS). To support Staff's request, Mr. Drescher cited administrative precedent and case law, which is discussed below.

Michael D. Zarin, Esq. (Zarin & Steinmetz, White Plains, New York), on behalf of his client, the PC Group, LLC, responded with a letter dated May 21, 2009. Applicant objects to Staff's request to postpone the public hearing. In the alternative, Mr. Zarin proposes that the public hearing begin as scheduled to consider whether Applicant's proposal would meet the applicable protection of water and tidal wetlands permit issuance standards. According to Mr. Zarin, Applicant is reluctant to devote resources to the preparation of an EIS now, if the Commissioner should decide to affirm Staff's permit denial. With reference to case law, Mr. Zarin argued that to require Applicant to comply with the requirements of SEQRA after Department staff has issued a notice of permit denial would be futile and, therefore, unnecessary. Applicant's referenced case law is discussed below.

I convened a telephone conference call with the parties' representatives on May 22, 2009 to discuss the parties' respective requests. Among other things, the parties agreed to the following schedule during the telephone conference call, and I authorized the following submissions. Department staff was authorized to file a response to Applicant's May 21, 2009 letter by Wednesday, May 27, 2009. Applicant was authorized to file a reply by Thursday, May 28, 2009. I stated that I would issue a ruling that would advise the parties whether the public hearing would commence. In the event that Applicant's request to commence the public hearing is granted, the parties reserved June 30, 2009 and July 1, 2009 for that purpose.

Consistent with the schedule established during the May 22, 2009 telephone conference call, Mr. Drescher, on behalf of Department staff, filed a letter dated May 27, 2009. Subsequently, Mr. Zarin, on behalf of his client, the PC Group, LLC, filed a letter dated May 28, 2009.

Discussion

I. Department Staff's Motion to Adjourn

Reference is made to Staff's May 18, 2009 letter. Staff requests that the public hearing concerning the referenced permit applications be adjourned pending compliance with the requirements outlined in ECL Article 8 and its implementing regulations at 6 NYCRR Part 617. According to Department staff, Applicant's proposal is an unlisted action within the meaning of 6 NYCRR 617.2(ak). Although Staff has not issued a written determination of significance, Staff is inclined to issue a positive declaration, which would mean that the proposed action may have a significant adverse impact on the environment, and that an EIS would need to be prepared (*see* 6 NYCRR 617.2[n] and 617.2[ac]).

Staff recommends that the ALJ remand the captioned matter to Staff so that Department staff may conduct an expedited SEQRA review. To support this recommendation, Staff references *Matter of 628 Land Associates*, Commissioner's Interim Decision, September 12, 1994; *Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 (2d Dept. 1997), *appeal withdrawn* 95 NY2d 792 (2000); and *Matter of B. Manzo and Son, Inc.*, Hearing Report and Order of Disposition, May 2, 2000. Staff notes that one of the purposes of the public hearing is to provide members of the public with the opportunity to review and comment about not only the proposal but the environmental review of that proposal. In the absence of a SEQRA review, Staff contends that the pending consolidated permit applications are incomplete pursuant to 6 NYCRR 617.3(c).

In addition to the lack of a determination of significance pursuant to 6 NYCRR 617.7, Staff notes further that the New York State Department of State, Division of Coastal Resources closed its file with respect to Applicant's request for a federal consistency certification pursuant to 15 CFR Part 930, Subpart D. Staff enclosed a copy of the Department of State letter dated February 12, 2009 with the May 18, 2009 letter. Staff argues that to commence the public hearing without the benefit of a complete review concerning potential adverse environmental impacts, as well as consistency with the New York City waterfront revitalization plan may require additional hearings. According to Staff, to proceed with the public hearing under these circumstances would be an inefficient use of judicial resources.

In the event that the public hearing commences, Staff requests, in the alternative, that the public hearing be limited to the legislative hearing session, and that the issues conference and

adjudicatory phase of the public hearing not be convened until after the SEQRA and coastal consistency reviews are completed. In addition, Staff argues that the adjudicatory hearing should not go forward because potential issues related to the environmental review and coastal consistency could not be properly identified and considered at the adjudicatory hearing.

With respect to Mr. Drescher's May 27, 2009 letter, he provides a time line of Staff's review of the consolidated permit applications. In addition, Staff argues that the threshold question is whether a public hearing can, or should, commence on the denial of Applicant's consolidated permit applications prior to compliance with the requirements outlined in ECL Article 8, and its implementing regulations at 6 NYCRR Part 617. For the following reasons, Staff asserts that the hearing should not commence.

First, Staff notes that Applicant's proposal is subject to SEQRA, and that the proposed action is unlisted (*see* 6 NYCRR 617.2[ak]). Citing 6 NYCRR 617.3(c), Staff argues that an application for an unlisted action is not complete until the lead agency has issued either a negative declaration, which would complete the required SEQRA process, or a positive declaration, which would require the preparation of an EIS. With issuance of a positive declaration, Staff argues further that an application is not complete until the lead agency has determined that the scope and content of the EIS is adequate. With respect to the completeness of an application, Staff states that the requirements outlined at 6 NYCRR 617.3(c) are mirrored at 6 NYCRR 621.3(a)(7).

In addition to an approval from the Department, Staff contends that other approvals are needed from the US Army Corps of Engineers, the New York City Departments of City Planning and Small Business Services, and the New York State Department of State. The last approval concerns a federal coastal consistency approval.

Given these additional, required approvals, Staff contends further that, pursuant to 6 NYCRR 617.6(b)(2)(i), a lead agency must be established through the coordination process prior to the issuance of a determination of significance. In the event that a coordinated review does not take place, Staff refers to additional procedures at 6 NYCRR 617.6(b)(4). According to Staff, none of the procedures outlined at 6 NYCRR 617.6 have been followed because Applicant did not provide Department staff with a revised environmental assessment form (EAF) that reflected the most current version of its proposal.

Other than to request a hearing, Staff asserts that Applicant had additional remedies, of which it failed to avail itself. For example, Staff contends that Applicant could have asked the Commissioner to designate a SEQRA lead agency pursuant to 6 NYCRR 617.6(b)(5), but did not. As a result, Staff states that a SEQRA lead agency has yet to be established.

In Mr. Drescher's May 27, 2009 letter, Staff again refers to *Matter of 628 Land Associates*, Commissioner's Interim Decision, September 12, 1994; *Matter of Zagata v*

Freshwater Wetlands Appeals Board, 224 AD2d 343 (2d Dept. 1997), *appeal withdrawn* 95 NY2d 792 (2000), as well as the administrative precedents and case law referenced in the Commissioner's September 12, 1994 Interim Decision. Staff argues that the SEQRA review process must be substantially completed before any public hearing concerning the proposal can be scheduled. Department staff maintains that it is not attempting to abuse or harm Applicant by not undertaking the required SEQRA review sooner.

Finally, Staff contends there are two integrated elements to the decision making process. The first is the required SEQRA review, and the second relates to the applicable permit issuance standards. According to Staff, the Commissioner cannot come to any decision about Applicant's proposed project without considering both elements. Staff maintains that the case law cited by Applicant is distinguishable from the captioned matter. Department staff notes further, that Staff has not completed the required coastal zone consistency review, and requests the opportunity to complete that review before the public hearing commences.

II. Applicant's Cross-Motion

Reference is made to Mr. Zarin's letter dated May 21, 2009. As noted above, Applicant opposes Department staff's request to adjourn the public hearing pending compliance with SEQRA requirements. Applicant argues that the public hearing requested pursuant to 6 NYCRR 621.10(a) is an appeal from a denial and not a *de novo* review of Application's proposed project. Applicant argues further that Staff cannot manipulate the SEQRA review process to prevent Applicant from exercising its right to schedule the hearing it has requested.

According to Applicant, its permit applications have been pending before the Department for over two years, and that at no point during the review did Staff ever advise that it would issue a positive declaration, or otherwise state that a basis for the incomplete application was due to non-compliance with SEQRA.

As an alternative to Staff's motion to postpone the hearing, Applicant filed a cross-motion, and requests that the public hearing go forward to consider its appeal from Staff's permit denial. Applicant acknowledges that compliance with SEQRA cannot be waived if the Commissioner decides to grant a permit. Applicant argues that under such circumstances, it would support a remand to Department staff to complete the requirements of SEQRA. Applicant argues further, however, that compliance with SEQRA requirements would not be necessary if, after hearing, the Commissioner affirms Staff's denial of the requested consolidated permit and water quality certification.

Applicant references the following administrative precedents and case law. For the proposition that the hearing about a permit denial can go forward without a completed SEQRA review, Applicant cites *Matter of Owen Hynes*, Decision dated April 20, 1990 (1990 WL 154822). For the proposition that compliance with SEQRA is not necessary when a permit is

denied, Applicant cites *Loguidice v Southold Town Board of Trustees*, 50 AD3d 800 (2d Dept. 2008); *Retail Property Trust v Board of Zoning Appeals of Town of Hempstead*, 301 AD2d 530 (2d Dept. 2003); and *Wade v Kujawski*, 167 AD2d 409 (2d Dept. 1990).

Applicant argues that complying with SEQRA requirements after permit denial is unnecessary because it is futile. In support of the futility doctrine, Applicant refers to, among others, *Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136 (1995); *Good Samaritan Hosp. v Axelrod*, 150 AD2d 775 (2d Dept. 1989); *Community Housing Improvement Program, Inc. v New York State Div. of Housing and Community Renewal*, 230 AD2d 66 (3d Dept. 1997); and *Ziembra v City of Troy*, 37 AD3d 68.

Applicant cites *Mathews v Eldridge*, 424 US 319; *Jones v Berman*, 37 NY2d 42 (1975); and *Marsh v Hanley*, 50 AD2d 687 (3d Dept. 1975) for the proposition that its due process rights would be violated if the public hearing on Staff's denial is not held. According to Applicant, a holding, among others, in *Gordon v Rush*, 100 NY2d 236 (2003) is that the preparation of a draft EIS requires considerable time and expense.

With reference to Mr. Zarin's May 28, 2009 letter, Applicant restates that its request is limited to a hearing about whether its proposal would meet permit issuance standards. If Staff's denial is overturned after hearing, Applicant agrees that it will need to comply with all applicable SEQRA requirements. If Staff's denial is affirmed after hearing, Applicant argues that complying with SEQRA requirements would be futile and, therefore, unnecessary.

Applicant takes issue with some of the history outlined in Staff's May 27, 2009 letter. Applicant offered additional details about the submissions it filed with Staff, when Applicant made these submissions, and Staff's action (or lack thereof) with respect to these submissions. Applicant argues further that it is not seeking a *de novo* review of its consolidated permit applications, but a public hearing to challenge Staff's notice of permit denial.

Applicant objects to Staff's claim that Applicant impeded the SEQRA review process because it failed to file an EAF. Applicant argues that because it filed a consolidated permit application, it cannot exercise the responsibilities of either an interested agency or an involved agency, which include, among other things, issuing a determination of significance. According to Applicant, the absence of an EAF does not obviate the need for involved agencies to establish a SEQRA lead agency. Applicant notes that it filed an EAF on June 27, 2007, which referred to a pier and bulkhead, at least in general terms.

Applicant maintains that the case law to which it refers supports its argument that compliance with SEQRA would be futile if the final agency decision is to deny the requested consolidated permit application. Applicant argues that facts in this case and those in *Loguidice*, as well as the other referred case law, are similar and, that as a result, the legal principle outlined in *Loguidice* should be applied here.

III. Matter of 628 Land Associates

Both parties cite to *Matter of 628 Land Associates*, Commissioner's Interim Decision, September 12, 1994; *Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 (2d Dept. 1997), *appeal withdrawn* 95 NY2d 792 (2000). Given its significance in deciding the pending motions related to the captioned matter, the details of the case are summarized below.

A. Commissioner's September 12, 1994 Interim Decision

628 Land Associates submitted an application for a freshwater wetland permit (*see* ECL Article 24) to construct a retail shopping center in and adjacent to Freshwater Wetland AR-5, a Class I wetland, on Staten Island (Richmond County, New York). By certified letter dated June 2, 1993, Applicant requested a determination about the project as provided by ECL 70-0109(3)(b) and 6 NYCRR 621.9(b) (now codified as 6 NYCRR 621.10[b]). In a letter dated June 11, 1993, the Department's Chief Permit Administrator timely responded to June 2, 1993 five-day letter demand filed by 628 Land Associates, and denied the permit application. 628 Land Associates subsequently requested a hearing, and Staff from the Department's Region 2 Office (Department Staff) referred the matter to the then Office of Hearings to schedule the public hearing.

Upon review of the application materials filed by 628 Land Associates, the assigned ALJ determined that Staff had not made a determination of significance about the proposed project pursuant to ECL Article 8. The ALJ directed Staff to issue a SEQRA determination in order to prepare the notice of public hearing. Subsequently, Staff issued a positive declaration, which required 628 Land Associates to prepare a draft EIS.

628 Land Associates moved to dismiss the proceedings. Department Staff opposed the motion. 628 Land Associates filed a reply. The ALJ issued a ruling dated December 21, 1993, which denied 628 Land Associates' motion, which it appealed. The Commissioner issued an Interim Decision dated September 12, 1994.

In the September 12, 1994 Interim Decision, the Commissioner held that under the rules implementing the Uniform Procedures Act (*see* ECL Article 70 and implementing regulations at 6 NYCRR Part 621), there are two opportunities for an applicant to be afforded a public hearing. These opportunities are either before Department Staff has issued a determination, or afterwards. A determination to hold a hearing prior to Staff's decision on an application is made pursuant to the provisions of 6 NYCRR 621.7(b) (now codified as 6 NYCRR 621.8[a]). Such a determination belongs solely to Staff. This circumstance did not apply to the application filed by 628 Land Associates and it does not apply here to the captioned matter.

Where Staff does not determine to hold a hearing, the second opportunity for a hearing exists pursuant to 6 NYCRR 621.7(f) (now codified as 6 NYCRR 621.10[a][2]). In the

September 12, 1994 Interim Decision, the Commissioner explained further that the opportunity for a hearing pursuant to 6 NYCRR 621.7(f) (now codified as 6 NYCRR 621.10[a][2]) exists whenever Staff has either denied the application or imposed significant conditions that are unacceptable to the applicant. The former circumstance applied to the application filed by 628 Land Associates, and here to the captioned matter. Staff's letter dated February 12, 2009 denied the PC Group's consolidated permit applications in response to a five-day letter demand.

In the September 12, 1994 Interim Decision, the Commissioner held that the hearing provided by 6 NYCRR 621.7(f) (now codified as 6 NYCRR 621.10[a][2]) is not mandated by ECL Article 70 but exists in order to protect the due process rights of applicants, as well as to enhance the decision making process. According to the Commissioner, the administrative hearing provides an applicant with the opportunity to challenge Staff's decision at the administrative level and, as such, the Commissioner concluded in the September 12, 1994 Interim Decision that the opportunity must be exercised prior to seeking judicial review pursuant to Civil Practice Law and Rules (CPLR) Article 78 (*see* CPLR 7801[1]).

The Commissioner also addressed circumstances related to the absence of a determination of significance prior to Staff's denial in the September 12, 1994 Interim Decision. The Commissioner held that he could not issue a valid final decision about the permit application in the absence of a SEQRA determination. The basis, in part, for the Commissioner's holding was that SEQRA is intended to protect the public's opportunity to participate in the environmental decision making process. In addition, the Commissioner referenced the following case law for the proposition that a governmental action would be void and unauthorized without fulfilling the statutory requires of SEQRA (*see Matter of E.F.S. Ventures Corp. v Foster*, 71 N.Y.2d 359 [1988] and *Matter of Modern Landfill, Inc. v Jorling*, 161 A.D.2d 1112 [4th Dept. 1990]).

On the very limited occasions where an application has been referred to the Office of Hearing and Mediation Services without a determination of significance, the Commissioner, in the September 12, 1994 Interim Decision, outlined the procedures that should be followed. The Commissioner referred to *Matter of Quail Ridge Associates*, Interim Decision dated December 10, 1987 and *Matter of Peckham Materials Corp.*, Interim Decision dated November 1, 1985, and the then newly codified rule at 6 NYCRR 624.4(c)(6)(i)(a).

Pursuant to 6 NYCRR 624.4(c)(6)(i)(a), where the Department is the lead agency or there has been no coordinated review, the ALJ may review a determination by Staff to not require the preparation of a DEIS. Under such circumstances, the scope of the ALJ's review is limited to whether Staff's determination is irrational or otherwise affected by an error of law. Upon such a determination, the ALJ must remand the matter to Staff for a redetermination.

B. Appeals

1. Freshwater Wetlands Appeals Board

628 Land Associates appealed from the Commissioner's September 12, 1994 Interim Decision to the Freshwater Wetlands Appeals Board (FWAB Index No. 94-6), and asserted that the September 12, 1994 Interim Decision was erroneous as a matter of law, and arbitrary and capricious. The Commissioner responded, and moved to dismiss the appeal that 628 Land Associates filed with the FWAB.

The Commissioner asserted that the FWAB lacked jurisdiction to hear the matter because the Commissioner's September 12, 1994 Interim Decision was not a final agency determination and, therefore, was not ripe for review. The Commissioner contended that 628 Land Associates had not exhausted its administrative remedy of requesting a public hearing to consider Staff's permit denial. Subsequently, the Commissioner amended its motion, and argued that the FWAB lacked jurisdiction to hear the appeal because the September 12, 1994 Interim Decision addressed issues related to ECL Articles 8 and 70, and not to ECL Article 24.

628 Land Associates argued that the Commissioner's September 12, 1994 Interim Decision is a final agency determination. Also, 628 Land Associates argued that the FWAB has jurisdiction to review issues related to ECL Articles 8 and 70 in the context of an administrative proceeding concerning a freshwater wetlands permit application.

In an Order and Decision dated January 10, 1996 (1996 WL 159602), the FWAB held that, as a threshold matter, it had jurisdiction to review issues related to ECL Articles 8 and 70, when they arise in the context of an ECL Article 24 permit proceeding. The FWAB denied the Commissioner's motion to dismiss, and held further that a permit denial issued by the Chief Permit Administrator in response to a five-day letter (*see* 6 NYCRR 621.7[f], now codified as 6 NYCRR 621.10[a][2] and 621.10[c]), is final and, therefore, a reviewable determination. The FWAB's January 10, 1996 Order and Decision outlined a schedule for the parties to file additional papers related to the merits of the Commissioner's September 12, 1994 Interim Decision.

2. Judicial Review

Pursuant to CPLR Article 78, the Commissioner petitioned for review of the FWAB's January 10, 1996 Decision and Order in Supreme Court, Richmond County. In a judgment entered June 19, 1996, the court dismissed the Commissioner's petition.

The Commissioner filed an appeal with the Appellate Division, Second Department, which reversed the June 19 1996 judgment by Supreme Court, as well as the January 10, 1996

Decision and Order of the FWAB (*see Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 [1997]). With respect to the finality of a denial after the submission of a five-day letter demand, the court held that an applicant may not seek review of an agency determination from any appellate body until it has exhausted its administrative remedies. The court noted that the Commissioner did not have the opportunity to review the merits of the permit application filed by 628 Land Associates, and concluded that a denial by the Chief Permit Administrator in response to a five-day letter demand is a preliminary agency response that can only be challenged at an administrative public hearing. (*See Zagata*, 224 AD2d at 344.) The court concluded further that the Commissioner's September 12, 1994 Interim Decision is not a final agency determination that is ripe for review by the FWAB (*see Zagata*, 224 AD2d at 345).

The court noted further that:

“the public's right to participate in environmental decision-making is embodied in the SEQRA legislation, and cannot be waived or forfeited by any party, including the DEC, unless, as expressly provided in ECL 70-0109(3)(b) and 6 NYCRR 621.9(c) [now codified as 6 NYCRR 621.10(c)], the DEC defaults in responding to a five-day demand” (*Zagata*, 224 AD2d at 346). (Braced material supplied.)

In addition, the court observed that the exemption provided by ECL 70-0109(3)(b) did not apply in the 628 Land Associates matter because the Chief Permit Administrator issued a timely response. With reference to case law (*see Matter of E.F.S. Ventures Corp. v Foster*, 71 N.Y.2d 359 [1988] and *Matter of Modern Landfill, Inc. v Jorling*, 161 A.D.2d 1112 [4th Dept. 1990]), the court concluded further that the Chief Permit Administrator's June 11, 1993 response to 625 Land Associates' five-day demand was non-final because the June 11, 1993 response was made without the benefit of a SEQRA review. (*See Zagata* 224 AD2d at 346.)

Finally, with respect to the appellate history of the case, the Court of Appeals granted leave to 628 Land Associates to appeal, but 628 Land Associates subsequently withdrew its appeal (*see Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 [2d Dept. 1997], *lv granted* 91 NY2d 813 [1998], *appeal withdrawn* 95 NY2d 792 [2000]).

C. Conclusions

The Commissioner's September 12, 1994 Interim Decision establishes the following administrative precedents, which are applicable here. First, the administrative public hearing provided by what is now codified as 6 NYCRR 621.10(a)(2) is intended to protect the due process rights of applicants as well as to enhance the decision making process. Second, the Commissioner determined that applicants must exercise this opportunity prior to seeking judicial review pursuant to CPLR Article 78, and the Appellate Division affirmed this determination (*see Zagata*, 224 AD2d at 344-345).

Third, the Commissioner held that a valid final decision about a permit application could not be made in the absence of a SEQRA determination because SEQRA is intended, among other things, to protect the public's opportunity to participate in the environmental decision making process. The court recognized the significance role of the SEQRA review in the decision making process, but did not expressly rule on whether the required SEQRA review must proceed, rather than follow, a hearing to address the merits of Staff's permit denial (*see Zagata*, 224 AD2d at 345-346).

Finally, to address the quandary about how to proceed in the unusual circumstance where, as here, an application is referred to the Office of Hearing and Mediation Services without a determination of significance, the Commissioner determined that the rule at 6 NYCRR 624.4(c)(6)(i)(a) should be applied, which requires that the matter be remanded to Staff with instructions to make a determination of significance.

IV. Other Administrative Precedents

I am not persuaded by Applicant's reliance on *Matter of Owen Hynes* (Decision dated April 20, 1990 [1990 WL 154822]) for the proposition that the hearing about a permit denial can go forward without a completed SEQRA review for the following reasons. First, unlike the captioned matter, Department staff had made a determination of significance before referring Mr. Hynes' application to the then Office of Hearings to schedule the adjudicatory hearing. With respect to the captioned matter, however, Staff has not yet made a determination of significance. This distinction between the two cases is significant because the public hearing concerning Mr. Hynes' permit application addressed not only the permit issuance criteria, but also the potential adverse environmental impacts that Staff had identified as the basis for the positive declaration (*see Hynes*, at 1). As a result, the Commissioner relied on the hearing record in *Hynes* as the basis for concluding that Mr. Hynes' bulkhead would not have a significant impact on the environment with respect to SEQRA, and that the requested permit and water quality certification should be issued. With respect to the captioned matter, however, Applicant has requested a hearing limited to a review of Staff's permit denial. (*See Hynes*, at 1.)

Second, the Commissioner noted in the April 20 1990 Decision concerning Mr. Hynes' permit application that "a procedural irregularity occurred when the application was found complete without a draft environmental impact statement" (*Hynes*, at 1). The Commissioner noted further that the "irregularity was further compounded when the matter proceeded through the adjudicatory hearing process without benefit of a DEIS" (*Hynes*, at 1). The Commissioner directed that the "hearing forum should not be used to conduct fact finding on whether, in the absence of a DEIS, a positive determination of significance should be rescinded..." (*Hynes*, at 1).

Finally, I note that the Commissioner's April 20, 1990 decision in *Hynes* predates the Commissioner's September 12, 1994 Interim Decision in *628 Land Associates*. In the former case, the Commissioner noted the irregularity of conducting a public hearing in the absence of a

required DEIS, and discouraged using the public hearing to conduct fact finding on whether a positive determination of significance should be rescinded. (*See Hynes*, at 1.) In the latter case, the Commissioner referred to the hearing procedures at 6 NYCRR 624.4(c)(6)(i)(a), and directed a remand to Staff with instructions to make the required determination of significance pursuant to 6 NYCRR 617.

Rather than support Applicant's claim that the adjudicatory hearing could proceed in the absence of any determination of significance, I conclude that *Hynes (supra)* discourages the relief requested in Applicant's cross-motion.

To support its position, Staff cites *Matter of B. Manzo and Son, Inc.*, Hearing Report and Order of Disposition, May 2, 2000. In *B. Manzo*, the ALJ noted that both SEQRA and the Uniform Procedures Act require compliance with SEQRA prior to determining whether an application for a permit is complete (*see B. Manzo* at 4, and 6 NYCRR 617.3[c] and 621.3[a][6]). As a result, the ALJ concluded that the hearing request in the absence of a determination of significance was premature, and not ripe for review through the Department's public hearing process until the required SEQRA review was completed. The ALJ remanded the matter to Staff until such time that Applicant provided the information necessary for Staff to complete the required environmental review. (*See B. Manzo* at 5.)

In issuing the order of disposition in *B. Manzo*, the ALJ relied upon the Commissioner's September 12, 1994 Interim Decision concerning the application filed by 628 Land Associates, as well as the case law referenced in the September 12, 1994 Interim Decision (*see e.g. Matter of E.F.S. Ventures Corp. v Foster*, 71 N.Y.2d 359 [1988] and *Matter of Modern Landfill, Inc. v Jorling*, 161 A.D.2d 1112 [4th Dept. 1990]). (*See B. Manzo* at 5.)

Accordingly, I find that the administrative decisions concerning *Hynes*, *628 Land Associates*, and *B. Manzo* are applicable administrative authority in support of Staff's motion to postpone the public hearing pending the environmental review required by SEQRA.

V. Permit Denial and Compliance with SEQRA

The courts have reviewed issues related to compliance with SEQRA requirements, and the consequence of noncompliance has resulted in the annulment of the involved agency's approval. In *Matter of Rye Town/King Civic Association v Town of Rye* (82 AD2d 474 [1981], *appeals dismissed* 55 NY2d 747 [1981], *lv dismissed* 56 NY2d 508, 985 [1982]), the Appellate Division determined that literal compliance with SEQRA procedures is necessary. Subsequently, the Court of Appeals determined in *Webster Associates v. Town of Webster* (59 NY2d 220 [1983]), that literal compliance with SEQRA procedures may be moderated depending on the particular facts of the case.

Applicant refers to *Loguidice v Southold Town Board of Trustees*, 50 AD3d 800 (2d Dept. 2008), which cites to *Retail Property Trust v Board of Zoning Appeals of Town of Hempstead*, 301 AD2d 530 (2d Dept. 2003); and *Wade v Kujawski*, 167 AD2d 409 (2d Dept. 1990) for the proposition that compliance with SEQRA is not necessary when a permit is denied. Mr. Loguidice filed an application with the Board of Trustees for the Town of Southold (town board) for a permit to install a dock in Peconic Bay adjacent to his property. Subsequent to the public hearing concerning Mr. Loguidice's permit application, the town's local waterfront revitalization program was enacted, and the town board advised Mr. Loguidice that his project would be reviewed for compliance with the newly enacted revitalization program. Subsequently, the town board advised Mr. Loguidice that his proposal was not consistent with the revitalization program, and denied his application for a permit. After reviewing the town board's determination, the court ruled, among other things, that it was not necessary for the town board, as lead agency, to comply with the requirements of SEQRA. Due to the permit denial, the court reasoned that no action having a significant effect on the environment would be undertaken (*Loguidice*, 50 AD3d at 801).

Given the circumstance of permit denial, the court's holding in *Loguidice* is a practical approach about what to do with any remaining, uncompleted requirements associated with the SEQRA review process. It is significant to note, however, that the *Loguidice* decision states that the town board was the SEQRA lead agency (50 AD3d at 801). Though the court's decision is silent about whether the town board had issued any determination of significance or whether a DEIS had been prepared, it can be reasonably inferred that in order to be identified as the lead agency, the town board had, at least, commenced a review pursuant to SEQRA. Consequently, the significance of the holding articulated in *Loguidice*, and related cases, is that when there is permit denial, any remaining steps of an already commenced SEQRA review need not be completed. For example, an application of the *Loguidice* holding might be that the lead agency does not need to make the findings required by 6 NYCRR 617.11(d), and finalize a DEIS when the lead agency denies a permit application.

Consistent with the requirements outlined in ECL Article 70 (UPA), and its implementing regulations at 6 NYCRR Part 621, Staff is required to review and process applications for protection of waters and tidal wetlands permits, and water quality certifications. For UPA major projects (*see* 6 NYCRR 621.2[r], and 6 NYCRR 621.4[4][a][3][ii]; 621.4[e][4] and 6121.4[k][2] concerning the construction of piers), such as the one proposed by the PC Group here, the uniform procedure rules provide the public with the opportunity to review and comment about any complete application (*see* 6 NYCRR 621.6[g] and 621.7), including the status of the environmental review conducted under SEQRA (*see* 6 NYCRR 621.7[b][5]).

For permit applications subject to the uniform procedure rules (*see* 6 NYCRR 621.1), Department staff is responsible for initiating the SEQRA review by coordinating the review to determine the lead agency, when necessary and, when serving as the lead agency, issuing a determination of significance, among other things. When Staff, as the SEQRA lead agency,

issues a positive declaration, Staff also supervises the scope and preparation of the DEIS, and reviews it for completeness before making the DEIS and the application materials available for public review and comment (*see* 6 NYCRR 617.3[c][2] and 621.7).

In addition, the uniform procedure rules provide applicants with the opportunity for an interlocutory review of Staff's permit denial by the Commissioner after a public hearing (*see* 6 NYCRR 621.10[a][2]). In addition to the application materials, the other information that the Commissioner considers as part of the interlocutory appeal consists of the SEQRA-related documents, the public comments concerning the application materials and the SEQRA-related documents, as well as the evidentiary record from the adjudicatory hearing (*see* 6 NYCRR 624.12[b]). As a result, the scope of the Commissioner's interlocutory review may include SEQRA-related issues (*see* 6 NYCRR 624.4[c][6]).

Therefore, when a permit application is referred to the Office of Hearings and Mediation Services for a public hearing, its ultimate fate is unknown because the Commissioner will evaluate Staff's initial programmatic and SEQRA review, the public's comments, and the evidentiary hearing record, which encourages the participation of third parties, before making a final determination. Consequently, the Commissioner's final determination may be very different from Staff's preliminary determination. (*See Matter of Rochester Telephone v Ober*, 251 AD2d 1053, and *Matter of Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510.)

Given these circumstances, Applicant's attempt to apply the principal outlined in *Loguidice* to the captioned matter is premature at this phase in the review process. Based on the procedural rules applicable to the review of Applicant's consolidated permit applications, I conclude that Staff must commence a SEQRA review before the public hearing concerning this matter can be scheduled. Whether the holding in *Loguidice* should be applied to the captioned matter will have to wait until after the Commissioner makes a final determination about the pending consolidated permit applications.

VI. Doctrine of Futility

In addition to being unnecessary, Applicant argues further that compliance with SEQRA requirements after permit denial would be futile. In support of the futility doctrine, Applicant refers to, among others, *Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136 (1995); *Matter of Good Samaritan Hosp. v Axelrod*, 150 AD2d 775 (2d Dept. 1989); *Matter of Community Housing Improvement Program, Inc. v New York State Div. of Housing and Community Renewal*, 230 AD2d 66(3d Dept. 1997); and *Matter of Ziemba v City of Troy*, 37 AD3d 68 (3d Dept. 2006).

For the reasons set forth below, Applicant's reliance on the case law cited above is misplaced.

A. Lehigh Portland Cement Co.

Between August and November 1992, Lehigh Portland Cement Company submitted petitions to the New York State Department of Environmental Conservation pursuant to the Department's beneficial use determination (BUD) program. The petitions sought permission to use waste materials as substitutes for raw materials at Lehigh's cement manufacturing facility. Because the materials would have been beneficially used, the storage and use of what would normally be considered solid waste materials would not require a solid waste management facility permit from the Department pursuant to 6 NYCRR Part 360. (*See Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136, 138 [1995].)

When Lehigh did not receive a determination about its BUD petitions from Department staff, it filed a five-day letter demand. The Chief Permit Administrator timely responded, and advised that BUD determinations were not reviewed according to the procedures outlined in the uniform procedure rules (*see* 6 NYCRR Part 621.1). Lehigh sought judicial review and requested a declaratory judgment in Supreme Court, Albany County, about the applicability of the uniform procedure rules to BUD determinations. While the court action was pending, Department staff issued determinations concerning Lehigh's BUD petitions. In the meantime, the court, *sua sponte*, dismissed the CPLR Article 78 petition because Lehigh had failed to exhaust its administrative remedies. According to the court, a declaratory ruling from the Department's General Counsel pursuant to State Administrative Procedure Act (SAPA) and 6 NYCRR 619 (Applicability of Regulations and Statutes) was an administrative remedy not yet exhausted by Lehigh. (*See Lehigh*, 87 NY2d at 138-140.)

In *Lehigh*, the majority outlined its futility determination as follows. First, the Court determined that the Department had a well-established public policy that the review of BUD petitions was not subject to the uniform procedure rules. The basis for this determination was the letter from the Chief Permit Administrator which expressly stated the policy. (*See Lehigh*, 87 NY2d at 141.) Second, given the well-established public policy, the Court determined further that Lehigh could not rely on the time frames outlined in the uniform procedure rules to obtain a BUD determination from Department staff within a particular period, or have any pending BUD petitions deemed approved by default after a particular period tolled (*see Lehigh*, 87 NY2d at 141.) Although Lehigh could have requested a Declaratory Ruling concerning the applicability of the uniform procedure rules to the review of BUD petitions, the Court rejected this potential administrative remedy as futile. Given the futility of pursuing a Declaratory Ruling, the Court concluded that Lehigh had no other administrative remedies available to it. As a result, the Court modified the Appellate Division's order by reinstating the complaint. (*See Lehigh*, 87 NY2d at 138-140.)

The dissenting minority, however, agreed with the lower courts' determinations that Lehigh should have requested a declaratory ruling from the General Counsel at the Department of Environmental Conservation pursuant to 6 NYCRR 619 (*see Lehigh*, 87 NY2d at 144.) The

dissenting minority opined that a conclusion of “futility” should be applied sparingly after it is clear that a final administrative decision has been reached (*see Lehigh*, 87 NY2d at 145.)

The captioned matter is distinguishable from *Lehigh* on the facts. First, the captioned matter concerns consolidated applications for a protection of water and tidal wetland permit as well as a water quality certification, rather than BUD petitions. Therefore, unlike the BUD petitions in *Lehigh*, the review of Applicant’s consolidated permit applications is subject to the procedures outlined at 6 NYCRR Part 621. With respect to the captioned matter, Applicant has availed itself of the five-day letter demand provided by 6 NYCRR 621.10(b), and received a timely response from the Chief Permit Administrator. Pursuant to regulation (*see* 6 NYCRR 621.10[a][2]), the next step is an interlocutory review by the Commissioner after a public hearing. The Commissioner has determined, and the courts have affirmed, that the interlocutory review is an administrative remedy that must be exhausted before an applicant can seek judicial review pursuant to CPLR Article 78 (*see Matter of 628 Land Associates*, Commissioner’s Interim Decision, September 12, 1994; *Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 [2d Dept. 1997], *appeal withdrawn* 95 NY2d 792 [2000]).

B. Matter of Good Samaritan Hospital, and Matter of Community Housing Improvement Program, Inc.

In December 1979, the Community Hospital of Rockland County closed, leaving Good Samaritan Hospital and one other as the only hospitals to serve Rockland County. In November 1982, Samaritan Hospital undertook a major expansion and renovation project to accommodate its increasing patient load due to the closure of Community Hospital. Good Samaritan Hospital sought and obtained an approval from the Commissioner of the New York State Department of Health for the expansion project. In granting the approval, the Commissioner found there would be adequate financial resources to support the anticipated increase in operating costs associated with the expansion and renovation project. In 1983, however, after Good Samaritan Hospital commenced the expansion project, the Department of Health amended 10 NYCRR 86-1.17(a)(4), which was the rule that the Commissioner used to calculate per diem third-party reimbursement rates. The amended rule had the effect of capping Good Samaritan Hospital’s per diem reimbursement rate based on the average operating per diem costs of a peer group of hospitals identified by the Commissioner before the expansion project commenced. (*See Matter of Good Samaritan Hosp. v Axelrod*, 150 AD2d 775, 775-776 [2d Dept. 1989].)

Subsequently, Good Samaritan Hospital applied to the Department of Health for an increase in its certified per diem third-part reimbursement rates for the 1984 and 1985 rate years. The Commissioner denied the application in December 1985, and Good Samaritan Hospital commenced a CPLR Article 78 proceeding in Supreme Court (Rockland County). The Commissioner moved to dismiss Good Samaritan Hospital’s petition based on the failure to exhaust administrative remedies. (*See Good Samaritan*, 150 AD2d at 775.)

The Appellate Division determined that Good Samaritan Hospital had exhausted its administrative remedies because the appeal process would have been futile. The basis for the determination was that the amended rule would not afford Good Samaritan Hospital adequate relief from the reimbursement cap. In addition, the court also concluded that exhaustion of the available remedies would cause irreparable harm. The basis for this determination was that Good Samaritan Hospital had to scale back on services due to the inadequate reimbursement, but continued to bear the cost of maintaining the previously approved expansion. (*See Good Samaritan*, 150 AD2d at 776-777.)

In *Matter of Community Housing Improvement Program, Inc. v New York State Div. of Housing and Community Renewal* (230 AD2d 66, 68-70 [3d Dept. 1997]), the court found that the New York State Division of Housing and Community Renewal has a well-established policy of using Real Property Tax Law (RPTL) Article 12 rather than RPTL Article 12-A, as expressly prescribed by Administrative Code of the City of New York § 26-405(a)(3), to compute the capital value of property in New York City for the purpose of determining the maximum base rent that a landlord may collect for a rent-controlled residential property.

Citing *Lehigh (supra)*, the court rejected the claim that the proceeding should be dismissed for failure to exhaust administrative remedies because the Division of Housing and Community Renewal had a well-established policy implemented in 1986 to use a particular formula (*i.e.*, RPTL Article 12) to determine the annual increase in rent for rent-controlled housing in New York City. (*Community Housing*, 230 AD2d at 69-70.)

With respect to the captioned matter and for the reasons previously outlined above, Applicant has an administrative remedy available to it, in the form of an interlocutory review by the Commissioner after an adjudicatory hearing, which the courts have determined to be valid (*Matter of 628 Land Associates*, Commissioner's Interim Decision, September 12, 1994; *Matter of Zagata v Freshwater Wetlands Appeals Board*, 224 AD2d 343 [2d Dept. 1997], *lv granted* 91 NY2d 813 [1998], *appeal withdrawn* 95 NY2d 792 [2000]). In addition, Applicant has not claimed that complying with SEQRA at this point in the proceeding would cause an irreparable injury of the nature identified in *Good Samaritan Hospital*.

Though not expressly asserting an injury, Applicant cites *Matter of Gordon v Rush* (100 NY2d 236, 243) for the proposition that preparing a DEIS involves considerable time and expense. In *Gordon*, the court concluded that injury or harm had occurred when the Town of Southampton Coastal Erosion Hazard Board of Review (the board of review) issued a positive declaration. As a result, the board of review required the oceanfront property owners, who had applied to the town and other involved agencies for permits, to prepare a DEIS after the Department of Environmental Conservation, as the SEQRA lead agency, had already conducted a coordinated review and issued a negative declaration. (*Gordon*, 100 NY2d at 243.)

When involved agencies duly undertake a coordinated review, and the SEQRA lead agency has been established, the other involved agencies are bound by the lead agency's determination of significance (*see* 6 NYCRR 617.6[b][3][iii]). Under such circumstances, only the lead agency, rather than the other involved agencies, may either amend or rescind a negative declaration (*see* 6 NYCRR 617.7[e] and 617.7[f]).

Applicant cannot make a claim of injury or harm of the nature incurred by petitioners in *Gordon*. With respect to the captioned matter, the SEQRA involved agencies, among them, the Department and New York City agencies, have not established the lead agency through the coordinated review process. No determination of significance has been made. Therefore, at this point in the proceedings, the resources that may be associated with the preparation of a DEIS, if one is required, to address the potential adverse environmental impacts associated with Applicant's proposal are speculative. In addition, Applicant may benefit from a coordinated review given the other required approvals that Applicant must obtain before undertaking the proposed project.

C. Matter of Ziembra

The court considered the following questions in *Matter of Ziembra v City of Troy* (37 AD3d 68 [3d Dept. 2006]), in which the Historic Action Network commenced an action to enjoin the City of Troy Code Director from issuing a permit to demolish allegedly historic buildings. First, the court considered the threshold question of whether the petitioner, Mr. Ziembra, then President of the Historic Action Network, and other members of the group, had standing to commence the proceeding. The court determined the petitioners had standing. (*See Ziembra*, 37 AD3d at 70, 72).

The second question considered by the court was whether the Code Director was required to conduct an environmental review pursuant to SEQRA before he could issue a demolition permit. The court held that issuing a demolition permit was a ministerial act, rather than a discretionary one, given the limited set of criteria that the Code Director must consider before issuing the demolition permit. The court concluded that the issuance of the demolition permit was ministerial for SEQRA purposes. As a result, the court determined that the preparation of an EIS would be "futile" because the Troy Code Director lacked the discretion to deny the demolition permit on the basis of SEQRA's broader environmental concerns. (*See Ziembra*, 37 AD3d at 75; *also see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 327 [1993]).

Applicant's reliance on *Ziembra* is misplaced. Applicant's consolidated permit applications is an action as defined at 6 NYCRR 617.2(b). Consequently, Applicant's proposal is subject to review pursuant to SEQRA. The Commissioner and other involved agencies will base their respective decisions on technical and environmental-specific information. In contrast, the court determined in *Ziembra*, that issuing a demolition permit is a ministerial act that is not subject to SEQRA. The futility of preparing a DEIS in *Ziembra* arises from the ministerial nature

of issuing demolition permits, rather than the lack of additional administrative remedies (*see e.g. Good Samaritan Hospital [supra]*, and *Community Housing Improvement Program, Inc. [supra]*).

VII. Due Process

Applicant cites *Mathews v Eldridge*, 424 US 319; *Jones v Berman*, 37 NY2d 42 (1975); and *Marsh v Hanley*, 50 AD2d 687 (3d Dept. 1975) for the proposition that its due process rights would be violated if the public hearing on Staff's denial is not held at a meaningful time and in a meaningful manner.

The procedures for an administrative public hearing established by the Uniform Procedures Act (ECL Article 70) and implementing regulations at 6 NYCRR Part 621 (Uniform Procedures) and Part 624 (Permit Hearing Procedures) conform to the essential elements of due process as outlined in the above referenced case law. After the review required by SEQRA is commenced, Applicant will be afforded its right to an administrative hearing. In addition, the rights of other involved agencies and the public will be preserved by having a complete permit application and a SEQRA determination available for review and comment.

Rulings and Order of Disposition

During the May 22, 2009 telephone conference call, Applicant's counsel acknowledged that a SEQRA review would, nonetheless, be required if the Commissioner were to overturn Staff's permit denial. Applicant's counsel also recognized that additional proceedings would be necessary to provide for the review and comment of Staff's determination of significance and the resulting SEQRA review, among other things. I consider the bifurcated review process proposed by Applicant to be cumbersome and an inefficient use of judicial resources. Furthermore, the proposed bifurcated process would be confusing to the public, in general, and to potential intervenors, in particular.

Based on the reasons discussed in detail above, I, therefore, grant Department staff's motion to postpone the public hearing concerning the captioned matter, and deny Applicant's cross-motion to schedule the public hearing.

To date, no involved agency has commenced the review required by ECL Article 8. Accordingly, I remand this matter to Department staff to carry out the required review as expeditiously as possible (*see* 6 NYCRR 617.3[h]).

In its submissions, Staff stated that it would likely issue a positive determination, and require the preparation of a DEIS. In remanding this matter, I request that Staff consider the

appropriateness of issuing a conditioned negative declaration (*see* 6 NYCRR 617.2[h]), as contemplated by 6 NYCRR 617.7(d).

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
June 26, 2009