STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a Tidal Wetlands Permit Pursuant to Article 25 of the Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

BENALI, LLC,

Applicant.

Ruling on Issues and Party Status and Order of Disposition

DEC Application No. 1-4738-02841/00003

Background

Benali, LLC (Benali or applicant), owns property (site) located at 1275 Cedar Point Drive West, Southold, Suffolk County, New York (SCTM# 1000-090-01-002). By application dated February 15, 2010, Benali applied to the Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit pursuant to the provisions of article 25 of the Environmental Conservation Law (ECL) and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Applicant proposes to construct a single-family dwelling, driveway, and sanitary system at the site.

By letter dated January 6, 2011, Department staff denied the application. By letter dated February 4, 2011, applicant requested an adjudicatory hearing on its application.

Proceedings

The Office of Hearings and Mediation Services (OHMS) received the hearing referral for the captioned matter from Department staff on March 10, 2011, and the matter was assigned to me. A Notice of Legislative Public Hearing, Issues Conference, and Adjudicatory Hearing (hearing notice) was published in the Department's Environmental Notice Bulletin (ENB) on May 25, 2011, and applicant published the hearing notice in the Suffolk Times on May 26, 2011.

The hearing notice advised that the legislative hearing, issues conference, and adjudicatory hearing were to be held at the Sound View Restaurant, Greenport, New York, on June 21, 2011, and on successive days, as necessary. The hearing notice further advised that written comments on the application would be accepted if received by OHMS on or before June 21, 2011.

-- Legislative Hearing

As provided in the hearing notice, I convened the legislative hearing on June 21, 2011, at 10 a.m. at the Sound View Restaurant in Greenport. There were approximately a dozen people in attendance, including representatives of the applicant and the Department.

Mark Terry, Principal Planner, Town of Southold, was the only member of the public who spoke at the legislative hearing. Mr. Terry stated that there is a discrepancy relating to the location of the tidal wetland boundary at the site. He also submitted two documents for inclusion in the legislative hearing record. The documents are memoranda from Mr. Terry to the Chair of the Southold Zoning Board of Appeals noting that the tidal wetland boundary delineation shown on an earlier survey of the site differs substantially from, and is landward of, the delineation shown on the site plan submitted by the applicant. These memoranda recommend that the earlier, seaward, delineation should be used.

Leslie Weisman, Chair, Zoning Board of Appeals, Town of Southold, did not offer oral comments at the legislative hearing, but did submit a letter from the Suffolk County Soil and Water Conservation District (SWCD), dated December 28, 2010, for inclusion in the legislative hearing record. The letter notes that SWCD conducted a site visit and sets forth SWCD's concerns regarding the proposed development of the site. These concerns include inadequate separation between groundwater and the proposed cesspools and insufficient set-back of the proposed structure from the tidal wetland.

-- Issues Conference

Immediately following the legislative hearing, at approximately 10:30 a.m., I convened the issues conference. Pursuant to the hearing notice, the deadline for petitions for party status was June 14, 2011. No petitions were received by OHMS. Accordingly, only the applicant and Department staff participated in the issues conference (see 6 NYCRR 624.4[b][3]). Applicant was represented by Anthony R. Filosa, Esq., Rosenberg Fortuna & Laitman, LLP, and Department staff was represented by Kari E. Wilkinson, Esq., Assistant Regional Attorney, Region 1.

Discussion

To meet the standards for adjudication, an issue must (i) relate to a dispute between the Department and the applicant over a substantial term of the draft permit, (ii) relate to a matter cited by staff as a basis to deny the permit, or (iii) be proposed by a potential party and be both "substantive and significant" (see 6 NYCRR 624.4[c][1]).

The hearing notice identified three issues for adjudication, each of which was an issue that was cited by Department staff as a basis to deny the permit. The issues identified for adjudication were: (1) whether the proposed septic system is compatible with the public health and welfare (see 6 NYCRR 661.9[c][1]); (2) whether the proposed project fails to comply with

the tidal wetlands development restrictions (see 6 NYCRR 661.9[c][2]); and (3) whether the proposed project is incompatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands (see 6 NYCRR 661.9[b][1][i]).

At the outset of the issues conference, applicant stated that it had determined not to contest any of the bases cited by Department staff for denying the permit and would forgo the adjudicatory phase of these proceedings. Rather than contest the bases for the denial, applicant argues that the Department must grant the permit pursuant to the provisions of 6 NYCRR 621.10, which sets forth certain time periods for action by the Department on pending permit applications. This argument does not present an adjudicable issue (see 6 NYCRR 624.4[c][1]) and applicant has withdrawn its objection to the bases cited by staff for denying the permit (see issues conference transcript at 14-15, 27-28). Accordingly, there are no issues for adjudication.

-- Timeliness of the Department's Denial Letter

Pursuant to the provisions of 6 NYCRR 621.10, if the Department fails to make a decision on a permit application within prescribed time periods, an applicant may make notice of that failure and mail a request (often referred to as a "five-day letter") to the Department for a decision. If the Department fails to mail a decision on the permit within five working days of its receipt of the five-day letter, the permit will be deemed granted (see also ECL 70-0109[3][b]).

Subdivision 621.10(b) provides, in part:

> "[i]f the department or its agent fails to mail a decision [on a permit application] within the time periods specified [under 6 NYCRR 621.10(a)], the applicant may make notice of that failure, by means of certified mail, return receipt requested, addressed to the Commissioner of the Department of Environmental Conservation, Attention: Chief Permit Administrator, New York State Department of Environmental Conservation, Division of Environmental Permits, 625 Broadway, Albany, NY 12233-1750 . . . Such notice must contain the applicant's name, location of the proposed project, the office in which the application was filed, the identification number(s) assigned to the application in any notice from the department and a statement that a decision is sought according to this subdivision or ECL 70-0109(3)(b). Any notice failing to provide this information will not invoke this provision."

Subdivision 621.10(c) provides, in part, "[i]f the department or its agent fails to mail the decision to the applicant within five working days of the receipt of such notice, the application will be deemed approved and the permit deemed granted, subject to the standard terms or conditions applicable to such a permit."

Although Department staff was prepared to proceed to hearing on the issues that were identified for adjudication in the hearing notice, staff stated at the issues conference that it was not prepared at that time to argue the issue of the timeliness of the Department's denial letter (see

issues conference transcript at 16). In light of this, I directed the parties to briefly state their respective positions on the timeliness of the denial letter on the issues conference record and further directed the parties to file post-issues conference briefs detailing their positions on or before July 12, 2011. At the request of Department staff, and with the agreement of applicant, the date for submittal of briefs was extended to August 9, 2011. Both parties timely submitted their respective briefs. Applicant's brief refers to, and quotes from, a letter dated December 29, 2006, from the Department to another applicant concerning use of the proper mailing address for five-day letters. On August 29, 2011, at my request, applicant supplied this office with a copy of the December 29, 2006, letter.

Applicant's brief provides the following timeline with respect to applicant's December 28, 2010, five-day letter.

December 28, 2010:	Date of applicant's five-day letter and date it was mailed
December 29, 2010:	Date five-day letter was received by Department
January 5, 2011:	Last date for timely response to be mailed by Department
January 6, 2011:	Date of Department's denial letter
January 7, 2011:	Date Department's denial letter was mailed

By its brief, Department staff provides the following timeline with respect to the five-day letter.

December 28, 2010:	Date of applicant's five-day letter
December 30, 2010:	Date five-day letter was received by Department
December 31, 2010:	Date five-day letter was received by Division of Environmental Permits
January 6, 2011:	Date of Department's denial letter and date it was deposited in the Department's mail room

The critical dates for determining the timeliness of the Department's January 6, 2011, denial letter are the date that applicant's December 28, 2010, five-day letter is deemed as having been received by the Department and the date the denial letter is deemed as having been mailed by the Department. Starting with the latter date first, I conclude that the Department's denial letter was mailed on January 7, 2011, the date it was postmarked (see issues conference exhibit 3 at 3; see also id. at 4 [the "shipment request form" dated January 7, 2011]). Although Department staff's papers indicate that the denial letter was signed, dated, and deposited in the Department's mail room on January 6, 2011 (see staff brief, exhibit G ¶¶ 12-13, exhibit E), the record does not establish that the letter was placed in the exclusive control of the U.S. Postal Service prior to the date it was postmarked (see CPLR 2103 [defining "mailing" as "the deposit of a paper enclosed in a first class postpaid wrapper . . . in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state"]). Absent evidence to support an earlier date, I deem the date of the postmark, January 7, 2011, to be the date the denial letter was mailed.

With regard to the date that the five-day letter was received, applicant asserts that the letter was received at the Department's offices in Albany on December 29, 2010, and argues that this date is controlling. I disagree. For the reasons discussed below, I conclude that the date the five-day letter was received by the Chief Permit Administrator, December 31, 2010, is controlling under the facts and circumstances of this case.

Pursuant to ECL 70-0109(3)(b), a five-day letter must be sent "to the department by means of certified mail return receipt requested addressed to the commissioner." The ECL does not specify the mailing address to be used for, or the information to be included in, five-day letters sent to the Commissioner. As is appropriate, these specifics are provided by the implementing regulations (see Mercy Hospital of Watertown v New York State Dep't of Social Services, 79 NY2d 197, 203-204 [1992] [upholding a challenged regulation and holding that "an agency's powers include not only those expressly conferred [by statute], but also those required by necessary implication. This is especially true where, as here, the Legislature has delegated administrative duties in broad terms, leaving the agency to determine what specific standards and procedures are most suitable to accomplish the legislative goals" (internal quotation marks and citations omitted)]; see also ECL 3-0301[2][m] [conferring on the Commissioner the authority to "[a]dopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter"]).

Pursuant to the procedures set forth under 6 NYCRR 621.10(b), five-day letters must be "addressed to the commissioner of the Department of Environmental Conservation, attention: Chief Permit Administrator, New York State Department of Environmental Conservation, Division of Environmental Permits, 625 Broadway, Albany, NY 12233-1750."

Applicant's five-day letter was not addressed as mandated by 6 NYCRR 621.10(b). Rather, applicant's letter was addressed:

New York State
Department of Environmental Conservation
625 Broadway
Albany, New York 12233-0001
Attention: Peter Iwanowicz, Acting Commissioner

While the record does not indicate where applicant obtained the address it used for mailing the five-day letter,[1] it is clear that the address used by applicant does not conform with the dictates of the regulation. Applicant's failure to use the mailing address set forth under 6 NYCRR 621.10(b) is puzzling given that applicant's five-day letter expressly references 6 NYCRR 621.10(b) and includes all of the other information required pursuant to that

[1]The zip code used by applicant corresponds to the zip code provided on Department's website "For general information, or if you are not sure which program or office you need to contact" (see http://www.dec.ny.gov/about/259.html). The zip code provided on the Department's website for mailings to the Commissioner is 12233-1010 (see http://www.dec.ny.gov/about/556.html).

subdivision, such as the name of the DEC office where the application was originally filed and the application number assigned by the Department. Clearly, applicant was familiar with the provisions of 6 NYCRR 621.10(b).

By definition, five-day letters are highly time sensitive. The implementing regulations require applicants to mail these letters to a specific address and to provide specific information that ensures the application is properly identified. These regulatory requirements increase the likelihood that five-day letters will be processed in a timely manner and decrease the likelihood that a potentially environmentally harmful permit will be "deemed granted" merely because a five-day letter is misrouted or fails to fully identify the application.

The mailing address set forth by the regulation contains two components intended to ensure delivery of five-day letters to the Division of Environmental Permits in Albany, the address must state (i) "attention: Chief Permit Administrator," and (ii) "Division of Environmental Permits." Applicant's five-day letter omits both of these components. Additionally, there is no mention of 6 NYCRR 621.10 or its provisions in the subject line or elsewhere on the first page of applicant's five-day letter. Given that applicant failed to include the required references to the Division of Environmental Permits in the address used to mail the five-day letter and did not cite 6 NYCRR 621.10 anywhere on the first page of the letter, it is not surprising that applicant's five-day letter did not reach the Division of Environmental Permits until December 31, 2010.

Where, as here, an applicant fails to follow the mailing requirements set forth under 6 NYCRR 621.10(b), the question becomes, what is the appropriate disposition of the letter?[2] On one extreme, such a letter could be deemed not to invoke the provisions of ECL 70-0109(3)(b), thereby rendering it a nullity and leaving the Department free to ignore it. On the other extreme, such a letter could be deemed to be received on the first date that it is delivered to any office of the Department, anywhere in the State. In my view, both of these approaches are untenable. The first approach would have the unjust result of foreclosing consideration of an otherwise compliant letter even after it is received by the Division of Environmental Permits in Albany. The second approach would have the unjust result of increasing the likelihood that the Department will issue environmentally harmful permits merely because of the logistical delays associated with forwarding five-day letters to the appropriate Department office for action.

Using the date of receipt by the Division of Environmental Permits in Albany, the office specified by regulation, avoids both extremes. An applicant's failure to properly address a five-day letter will be cured by the actual receipt of the letter by the Division of Environmental Permits. This approach also eliminates the possibility that an environmentally harmful permit will be deemed granted by operation of law solely because a misaddressed five-day letter is

[2]This, of course, is a different question than that presented where a five-day letter bearing the address set forth under 6 NYCRR 621.10(b) is misrouted within the Department through no fault of the applicant. That question is not before me.

received by the Division of Environmental Permits in Albany more than five working days after it is received somewhere within the Department.

The Department's denial letter states that the applicant's "[five-day] letter was received here on December 31, 2010" and, therefore, "[t]his decision [to deny the permit] is made within five working days, as required" (staff brief, exhibit D at 1). December 31, 2010, is the date that applicant's five-day letter was received by the Division of Environmental Permits.[3] Under the facts and circumstances presented here, I conclude that December 31, 2010, is appropriately deemed as the date that applicant's five-day letter was received.

Applicant cites to a December 29, 2006, letter (2006 DEP letter) from the Division of Environmental Permits in which the Division advised other applicants (2006 applicants) that their application was deemed approved because the Department failed to timely mail a response to their five-day letter. Although the 2006 applicants' five-day letter was also misaddressed, I reject the current applicant's argument that the outcome of the 2006 matter is controlling here.

First, the 2006 DEP letter does not purport to be a statement of Department policy. Although the 2006 DEP letter advised that the subject application was deemed approved in that instance, the letter also advised that "failing to follow the requirements of the regulation with regard to a letter's address and content can result in the Department determining that [ECL 70-0109(3)(b)] has not been invoked" (2006 DEP letter at 2). Accordingly, the 2006 DEP letter cannot be read to stand for the proposition that the Department is foreclosed from denying a permit where a misaddressed five-day letter is not responded to within five working days of its receipt by any office of the Department. Second, the 2006 matter was not before this office for consideration. Rather, the 2006 matter was handled within the Division of Environmental Permits and the specific facts and circumstances relating to the underlying application and the processing of the 2006 applicants' five-day letter are not before me. Third, the 2006 DEP letter does not indicate the date on which the 2006 applicants' five-day letter was received by the Division of Environmental Permits in Albany. The 2006 applicants' five-day letter is dated December 4, 2006, and the 2006 DEP letter in response is dated December 29, 2006. Therefore, despite the fact that the 2006 applicants' five-day letter was misaddressed, the Division of Environmental Permits may have received the letter weeks before the Department's response was mailed. Here, by contrast, the five-day letter was received by the Division of Environmental Permits on December 31, 2010, and responded to five working days later.

To the extent that applicant has raised other arguments in support of issuance of the requested permit, I have considered and rejected those arguments.

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[3]Applicant contests staff's assertion that the five-day letter was received by the Division of Environmental Permits on December 31, 2010. This date, however, is clearly stamped as the date of receipt on the front of the five-day letter and is also the date entered on the date line of the "process sheet" used by the Division of Environmental Permits to track five-day letters (see staff brief, exhibits A, C).

Issues Ruling and Conclusions

Applicant waived its right to contest any of the bases cited by Department staff for denying the permit and no potential party proposed an issue for adjudication. Accordingly, there are no issues for adjudication.

For the purposes of 6 NYCRR 621.10, I conclude that applicant's five-day letter was received on December 31, 2010, the date that the letter was received by the Division of Environmental Permits in Albany. I further conclude that the Department's denial letter was mailed on January 7, 2011, within five working days of the date of receipt of applicant's five-day letter, as required by 6 NYCRR 621.10(c). Accordingly, applicant is not entitled to a permit under the provisions of 6 NYCRR 621.10.

No further proceedings before this office are required. The matter is remanded to Department staff for any additional action deemed appropriate on the application. The hearing record in this matter is closed.

Appeals

Pursuant to 6 NYCRR 624.8(d)(2), a ruling (i) to include or exclude any issue for adjudication, (ii) on the merits of any legal issue made as part of an issues ruling, or (iii) affecting party status may be appealed to the Commissioner on an expedited basis. Pursuant to 6 NYCRR 624.6(e)(1), appeals must be filed to the Commissioner in writing within five days of the disputed ruling. Because this ruling is being mailed by regular first class mail, appeals may be filed within ten days of the date of this ruling. Pursuant to 6 NYCRR 624.6(e)(2), replies are due within five days of service of any appeal.

All appeals or replies must be filed in triplicate and sent to Commissioner Joe Martens, Attn: Louis A. Alexander, Assistant Commissioner, NYSDEC, Office of Hearings and Mediation Services, 625 Broadway, Albany, New York 12233-1010. No submissions by facsimile or other electronic means will be accepted. Copies of appeals or replies must also be sent to me and to the adverse party at the same time they are sent to the Commissioner. Appeals should address the rulings herein directly, rather than merely restate a party's contention. To the extent practicable, appeals should include citations to the issues conference transcript and to documents submitted by the parties to OHMS during these proceedings.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
September 28, 2011