

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

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 (6 NYCRR),

-by-

BENALI, LLC,

Applicant.

DEC Permit Application No.
1-4738-02841/00003

DECISION OF THE COMMISSIONER

March 19, 2013

DECISION OF THE COMMISSIONER

This administrative proceeding concerns an application for a tidal wetlands permit pursuant to the provisions of article 25 of the Environmental Conservation Law (ECL) and 6 NYCRR part 661, submitted by Benali, LLC (applicant or Benali), dated February 15, 2010, for property located at 1275 Cedar Point Drive West, Southold, New York (SCTM# 1000-090-01-002). By letter dated January 6, 2011, staff of the New York State Department of Environmental Conservation (Department or DEC) denied the application.

By letter dated February 4, 2011, applicant requested an adjudicatory hearing on its application. The matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman, who held a legislative hearing and issues conference on June 21, 2011. Pending before me is an appeal from the ALJ's September 28, 2011 Ruling on Issues and Party Status and Order of Disposition (ALJ Ruling and Order) in which he determined that applicant is not entitled to a permit pursuant to the five-day letter provisions of 6 NYCRR 621.10. Subject to my comments below, I affirm the ALJ Ruling and Order that Benali is not entitled to a permit pursuant to 6 NYCRR 621.10, but I reach that conclusion based on an analysis that differs from that of the ALJ.

Background

The hearing notice for this application identified three issues for adjudication:

(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 immediately following the legislative hearing, applicant requested leave to add the following issue to be decided by ALJ Sherman: Whether the Department failed to timely respond to applicant's December

28, 2010 letter seeking a decision on the permit application under 6 NYCRR 621.10 (see Hearing Transcript, at 11:19-12:8).

Counsel for applicant stated on the record that applicant was not contesting any of the substantive bases cited by Department staff for denying the permit application, would forego the adjudicatory phase of the proceeding, and was limiting the issues before ALJ Sherman to the timeliness of the Department's letter denying the permit application.

At the issues conference, Department staff and applicant provided brief oral argument on the issue of timeliness of the Department's denial letter, and thereafter filed post-issues conference briefs detailing their positions regarding the timeliness issue.

On September 28, 2011, ALJ Sherman issued the Ruling and Order that is the subject of this appeal, ruling that no issues for adjudication were raised because applicant had waived its right to contest any of the bases for denying the permit and no potential party proposed an issue for adjudication. On the issue of the timeliness of the Department's letter denying applicant's permit application, the ALJ held that the Department received applicant's letter on December 31, 2010 (the date it was received by the Department's Division of Environmental Permits) and mailed its denial letter on January 7, 2011, the date the letter was postmarked. The ALJ concluded that, because the Department mailed its denial letter within five working days of the date of receipt of applicant's letter, applicant is not entitled to a permit under the "demand" provisions of 6 NYCRR 621.10.

By notice of appeal dated October 6, 2011, applicant appealed from the ALJ Ruling and Order. Department staff submitted its brief in opposition to applicant's appeal, dated October 28, 2011 and included, with the consent of applicant, a copy of a February 28, 2008 memorandum entitled "Five-Day Demand Letter Guidance," prepared by a former Chief Permit Administrator (2008 CPA Memo). Applicant submitted its reply brief dated November 15, 2011. Department staff thereafter submitted a letter and affirmation dated November 23, 2011 seeking to strike Point II in applicant's reply, which related to applicant's argument that certain documents were hearsay and therefore not admissible. Applicant submitted a letter dated November 29, 2011 responding to Department staff's November 23, 2011 submissions.

Applicant identifies four "Questions Presented" on this appeal:

"(1) Did the [ALJ] err in determining that the applicant's five (5) day permit demand letter was received by the Department on December 31, 2010, where the United States Postal Service certified mail return receipt postcard indicated that the same was signed for and received by the Department on December 29, 2010?;

"(2) Did the [ALJ] err in determining that the five (5) day demand letter was received on December 31, 2010, where the only "evidence" supporting this conclusion constituted the hearsay affidavit and other hearsay documents of the Department?;

"(3) Did the [ALJ] err in concluding that the applicant's five (5) day permit demand letter was timely responded to by the Department within five (5) working days of the date of receipt of said letter, on January 7, 2011, where the record evidence indicates that the demand was received by the Department on December 29, 2011 and, hence, was not responded to until seven (7) working days after the receipt of the demand?;

"(4) Was the Order arbitrary and capricious in determining that the Department was not precluded from relying upon the omission of the line 'Attention: Chief Permit Administrator' from the applicant's five (5) day demand letter on the basis of the Department having deemed approved a prior five (5) day demand letter which was both improperly addressed and omitted a label to the 'Attention: Chief Permit Administrator'?"

Standard of Review

This appeal is from the ALJ Ruling and Order issued following the issues conference and subsequent briefing. The purposes of an issues conference include narrowing or resolving disputed issues of fact without taking testimony, hearing argument on whether disputed issues of fact should be adjudicated, and determining whether legal issues exist whose resolution is not dependent on facts that are in substantial

dispute and, if so, to hear argument on the merits of those issues (see 6 NYCRR 624.4[b][2]).

At the issues conference in this matter, applicant expressly waived its right to adjudicate the substantive permit application issues identified in the hearing notice. Rather, the applicant sought only to address the issue whether the Department's denial letter was sent timely under the statutory and regulatory five-day demand letter provisions.¹ Although the "questions presented" on this appeal relate in part to factual issues including the dates that applicant's letter was received and the Department's denial letter was sent, this appeal presents a threshold legal question: What do the statute and regulations require of an applicant in order to invoke the five-day demand letter provisions? On this legal question, it is appropriate to review the ALJ Ruling and Order de novo (see, e.g., Matter of Sil-Tone Collision, Inc. v Foschio, 63 NY2d 406, 411 [1984]; Matter of Owl Energy Resources, Inc., Interim Decision of the Commissioner, Feb. 26, 1993, at 1-2).

Discussion

If the Department fails to mail a decision on a permit application within the prescribed period of time, a permit applicant may notify the Department of its failure "by means of certified mail return receipt requested addressed to the commissioner" (ECL 70-0109[3][b]). Such notification letters are referred to as "five-day demand letters" because a decision by the Department responding to such a letter must be mailed "within five working days of the receipt of such notice" (ECL 70-0109[3][b]). Absent a timely response to an applicant's "five-day demand letter," "the application shall be deemed approved and a permit deemed granted, subject to any standard terms or conditions applicable to such a permit" (ECL 70-0109[3][b]).

¹ Counsel for Benali stated that "we are not proceeding with an objection with respect to I guess what we would term the substance of the denial of the permit. Again, we're confining our objection to the timeliness issue" (Hearing Transcript, at 14:10-15). ALJ Sherman responded as follows: "[I]f the applicant is not prepared to go forward to challenge any of the bases for denial, we don't have a basis to go forward on the adjudication." Counsel for Benali responded: "Yes. That is understood, your Honor" (Hearing Transcript, at 14:21-15:3). As the ALJ correctly held, applicant has withdrawn its objection to the bases cited by staff for denying the permit, and no issues exist for adjudication concerning the bases of staff's denial (see ALJ Ruling and Order, at 3).

Department regulations specify the means by which an applicant may invoke the five-day demand process. A five-day demand letter 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" (6 NYCRR 621.10[b]). The letter must also contain the applicant's name, location of the proposed project, the office in which the application was filed, the identification numbers assigned to the application and a statement that a decision is sought according to the regulation or ECL 70-0109(3)(b) (see id.). If the letter fails to provide the information required in section 621.10(b), the five-day letter provision is not invoked (see id.).

In this case, applicant did not address its letter as required by the regulation. Rather, applicant addressed its letter as follows:

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

(Dec. 28, 2010 letter from David I. Rosenberg, Esq., to Peter Iwanowicz, Acting Commissioner, Dec. 28, 2010 [Applicant's letter]). Applicant's letter omitted "Attention: Chief Permit Administrator" as well as "Division of Environmental Permits," and provided an inaccurate zip code: 12233-0001 instead of 12233-1750.

Applicant argues that the Department (i) received applicant's letter on December 29, 2010 (the date that applicant contends its letter was received at the Department's offices in Albany), and (ii) mailed its denial letter on January 7, 2011 (the date the denial letter was postmarked). Applicant further argues that a December 29, 2006 letter (2006 Letter) sent by the Department in response to a five-day demand letter in an unrelated case is determinative of the Department's position regarding five-day demand letters. In that case, a five-day demand letter sent by consultant Suffolk Environmental Consulting, Inc. (Suffolk Environmental) was not properly addressed to the attention of the Chief Permit Administrator and was misrouted within the Department, resulting in the failure of

the Department to timely respond.² Although the former Chief Permit Administrator "deemed" the application approved in that case, he informed Suffolk Environmental 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 the demand provision of [the] Uniform Procedures [Act] has not been invoked," and directed Suffolk Environmental to share this information with its entire firm (see 2006 Letter, at 2 [emphasis supplied]).³

Department staff argues that the Department (i) received applicant's letter on December 31, 2010 (the date that DEC's Division of Environmental Permits stamped applicant's letter as received), and (ii) mailed its denial letter on January 6, 2011 (the date the denial letter was deposited in the Department's mailroom). Department staff further contends that applicant's letter did not invoke the five-day demand provisions in 6 NYCRR 621.10(b) because it was misaddressed. As support, Department staff cites to the 2008 CPA Memo, which discusses how an applicant invokes the five-day demand provision pursuant to 6 NYCRR 621.10(b), and describes what constitutes an "inappropriate or unacceptable" five-day demand letter. The 2008 CPA Memo states that an "inappropriate or unacceptable" five-day demand letter is one that "has not been transmitted in accordance with mailing procedures; or [t]he letter does not contain the required information" (Staff Brief, at 9 [quoting the 2008 CPA Memo, at 5]). The 2008 CPA Memo also states that "[d]irecting the letter to another individual or a different DEC facility will result in the letter not being treated as a five-day demand letter" (2008 CPA Memo, at 4 [emphasis supplied]).

Although I agree with ALJ Sherman's determination that applicant is not entitled to a permit under the provisions of 6 NYCRR 621.10, I base my decision on applicant's failure to comply with the explicit regulatory requirement with respect to addressing its letter. Because applicant failed to properly address its letter, the provisions of 6 NYCRR 621.10(b) and (c) and, thus, ECL 70-0109(3)(b), were never invoked.

The five-day demand letter provisions are intended to provide a permit applicant with a procedural vehicle by which it

² Suffolk Environmental is also the consultant for applicant in this case (see Hearing Exhibits 1a-1h).

³ I agree with ALJ Sherman's conclusion that the 2006 Letter does not purport to be a statement of Department policy, and is not controlling (see ALJ Ruling and Order, at 7).

may demand and receive a final decision within a specified period of time. Once the five-day period has commenced, failure by the Department to issue a final decision within the period will result in an automatic "approval" of the permit (with standard permit terms or conditions) by operation of law (see 6 NYCRR 621.10[c]).

Because the Chief Permit Administrator must address five-day letters in a timely manner, it is critical that he or she receive such letters at the earliest possible time after they have been received in the Department's Albany headquarters. Requiring that such letters be addressed to the attention of the Chief Permit Administrator and the Division of Environmental Permits is reasonable in that it ensures to the extent practicable that the Chief Permit Administrator will receive such letters promptly and in a timely manner. It is this critical element of the regulation - which can have a dispositive effect on the Department's ability to render a timely decision - with which applicant here failed to comply.

As the ALJ correctly stated (see ALJ Ruling and Order, at 5), the relevant statute, ECL 70-0109(3)(b), does not specify the mailing address to be used for, or the information to be contained in, five-day letters sent to the Commissioner. The Legislature has expressly granted the authority to the Department to establish such specifics by regulation (see ECL 70-0107[1] [directing the Department to "adopt rules and regulations to assure the efficient and expeditious administration of [ECL Article 70]" and ECL 3-0301[2][m] [granting the Department the power to "(a)dopt rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter"]; see also, Matter of City of New York v State of New York Commn. on Cable Tel., 47 NY2d 89, 92 [1979] ["An administrative agency, as a creature of the Legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication"]; Matter of Consolidated Edison Co. of New York, Inc. v Department of Envntl. Conservation, 71 NY2d 186, 191 [1988] [agency has the power "to promulgate the necessary regulatory details" when Legislature confers broad power on the agency to fulfill policy goals in statute]).⁴

⁴ Rather than being "out of harmony" with or otherwise limiting the relevant statutory right (see, e.g., Matter of Jones v Berman, 37 NY2d 42, 53 [1975]), the regulation at issue here provides specifics intended to "further the implementation of the law as it exists" (id.), and "assure the efficient and

Requiring strict adherence to the specific regulatory requirements with respect to five-day demand letters, including to whom such letters must be addressed (i.e., to the Chief Permit Administrator and the Division of Environmental Permits), serves at least two salutary purposes: the regulated community knows exactly what it must do to commence the five-day period, and the Chief Permit Administrator will know exactly when the five-day clock has commenced running.

Moreover, requiring strict compliance with the existing regulation does not prejudice any party. Following the rejection of an improperly addressed five-day demand letter, even in cases in which the contents of the letter are otherwise sufficient, the sender is free to send another letter that comports with the regulatory requirement, assuming that the Department has not finally acted on the permit application in the interim.⁵ It is only when a properly addressed and otherwise compliant letter is received, however, that the five-day demand provision has been invoked.

Finally, requiring strict compliance with the regulation increases the likelihood that all permit applications will be decided based on their merit, and decreases the likelihood that a project that does not meet the applicable statutory and regulatory standards could be permitted simply because a five-day letter was mis-directed due to an incomplete or inaccurate address.

A properly addressed and otherwise compliant five-day letter is considered "received" when it is actually received and signed for in the mailroom at the Department's headquarters at 625 Broadway in Albany. A Department denial letter is considered "mailed" when it has been deposited "in a post office or official depository under the exclusive care and custody of

expeditious administration" of the five-day letter statute, ECL 70-0109(3)(b) (ECL 70-0107[1]).

⁵ As ALJ Sherman stated (see ALJ Ruling and Order, at 5), it is puzzling that applicant included on the first page of its December 28, 2010 letter all substantive information required by 6 NYCRR 621.10(b) (i.e., applicant's name; location of proposed project; office in which application was filed; and proposed project's identification number), but failed to identify the Chief Permit Administrator or the Division of Environmental Permits at the Department's Albany headquarters anywhere in its letter or on the envelope, even though that information is clearly set forth in the regulation. Moreover, applicant failed to identify or refer to the five-day letter regulation in the "RE:" line or anywhere else on the first page of its letter.

the United States Postal Service within the state" (CPLR 2103[b][2], [f][1] [emphasis supplied]; see ALJ Ruling and Order, at 4). A letter is not considered "mailed" simply by depositing it in the Department's mailroom.

The ALJ considered two possible outcomes when a five-day letter does not comply with the regulatory mailing requirements in 6 NYCRR 621.10(b), and found both to be "untenable" (see ALJ Ruling and Order, at 6). At one end of the spectrum, an "otherwise compliant" letter could be considered a nullity simply because it was misaddressed. At the other, a misaddressed letter could trigger the five-day "clock" on the first date it was delivered to any office of the Department, anywhere in the State (see id.). While I agree with the ALJ's conclusion that the latter could lead to an unjust result, I disagree with his conclusion that it is "untenable" to reject "otherwise compliant" letters because they were not addressed to the attention of the Chief Permit Administrator within the Division of Environmental Permits. As discussed herein, requiring an applicant to address such letters to the Chief Permit Administrator protects the decision-making process and does not prejudice an applicant.⁶

Neither the 2008 CPA Memo referred to by Department staff nor the 2006 Letter referred to by applicant supersede the clear language of the regulation. In any event, both documents expressly state that failure to properly address the five-day letter can result in the Department determination that the five-day provision has not been invoked.⁷

⁶ In this case, applicant's failure to properly address its letter as required by the regulation was the cause of the delay in the letter reaching the Chief Permit Administrator. Even assuming without deciding that a misaddressed five-day letter could invoke the provisions of 6 NYCRR 621.10 - which it does not - I would agree with the ALJ's calculation of the five-day period in this case as beginning on the date the letter was received by the Chief Permit Administrator, and ending on the date the Department's denial letter was postmarked. Thus, in any event, Department staff's denial letter would have been timely.

⁷ In its reply brief, applicant refers to a footnote in the 2008 CPA Memo which states that five-day letters addressed only to the Commissioner, but not to the attention of the Chief Permit Administrator, are "routinely accepted as adequate" if they are "otherwise sufficient" (see applicant's reply brief, at 6-7; 2008 CPA Memo, at 5 n.2). To the extent the 2008 CPA Memo or any past practice conflicts with this decision, this decision controls.

To the extent applicant has raised additional arguments, they have been considered and are rejected.⁸

Accordingly, applicant Benali, LLC's application for a tidal wetlands permit pursuant to ECL article 25 and 6 NYCRR 661 is denied.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: March 19, 2013
Albany, New York

⁸ In addition, because this appeal is decided based upon the statutory and regulatory language, Department staff's request to strike Point II in applicant's reply is denied as unnecessary.