

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

In the Matter

- of -

the Application for a Freshwater Wetlands Permit pursuant to Environmental Conservation Law Article 24 (Freshwater Wetlands) and a Tidal Wetlands Permit pursuant to Environmental Conservation Law Article 25 (Tidal Wetlands) and Part 661 (Tidal Wetlands - Land Use Regulations) and Part 663 (Freshwater Wetlands Permit Requirements) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

- by -

**WILLIAM HALEY,**

Applicant.

DEC #1-4736-06627/00001

INTERIM DECISION OF THE COMMISSIONER

June 22, 2009

INTERIM DECISION OF THE COMMISSIONER

William Haley (the "Applicant") has applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for a freshwater wetlands permit and a tidal wetlands permit for the construction of a two-story single family dwelling, driveway, and sanitary system (the "project") in the hamlet of East Quogue, Town of Southampton, Suffolk County, New York (the "site").

Department staff, by notice of permit denial dated February 3, 2006, advised applicant that Department staff had determined that its "subject application fails to satisfy the standards for permit issuance contained in [the freshwater wetlands regulations]." On February 10, 2006, applicant requested a hearing on the denial. The matter was subsequently referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Kevin Casutto.

Under cover of a letter dated February 9, 2007, applicant submitted a project revision, including relocation of the proposed residence and septic system, in addition to mitigation measures, to address Department staff's concerns (the "2007 Revision"). The ALJ held the issues conference in abeyance pending Department staff's review of the 2007 Revision. By letter dated November 28, 2007, Department staff advised applicant that, after reviewing the proposed changes, the project "still fails to meet the standards for permit issuance" under the freshwater wetlands regulations.

The issues conference was subsequently held and on September 18, 2008, the ALJ issued his Issues Ruling in this proceeding (the "Issues Ruling"). In his Issues Ruling, ALJ Casutto identified the following two issues for adjudication:

- 1) whether the project "complies with the permitting standards . . . and procedural requirements for various activities" for a freshwater wetlands permit; and
- 2) whether the project "complies with the permitting provisions for a tidal wetlands permit." See Issues Ruling, at 9.

- Applicant's Appeal

Applicant, by letter dated October 8, 2008, appealed from the ruling ("Applicant's Appeal Letter") on two grounds. First, applicant argued that Department staff, in its notice of

permit denial, based its rejection of the application solely on the failure to satisfy the standards for permit issuance under the freshwater wetlands regulations. According to applicant, Department staff "did not raise any issues whatsoever" under the tidal wetlands regulations (see Applicant's Appeal Letter, at 2). Applicant contended that, as a result, the project's compliance with the tidal wetlands permitting standards should not be an issue for adjudication in this proceeding.

Second, applicant argued that the 2007 Revision that it submitted to Department staff "in hopes of mitigating some of the impacts raised by the [Department] in its rejection of [applicant's] initial application" should be considered in any adjudication (Applicant's Appeal Letter, at 1).

- Department Staff's Reply

By letter reply dated November 6, 2008, Department staff contended that the failure to itemize issues in a notice of denial of an application does not preclude their being identified for adjudication in a subsequent hearing on that application. In addition, Department staff maintained that the 2007 Revision failed to meet the applicable freshwater wetlands and tidal wetlands permit standards and, accordingly, should not be considered in the adjudicatory hearing on this project.

Department staff also contended that the 2007 Revision represented an "offer of settlement" and, therefore, was inadmissible at the hearing based on section 4547 of the New York Civil Practice Law and Rules ("CPLR").

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For the reasons discussed in this Interim Decision, the project's compliance with tidal wetlands permitting standards will not be an issue for adjudication. Furthermore, the 2007 Revision shall be considered as a modification to the original project for purposes of the adjudicatory proceeding on this matter.

DISCUSSION

- Compliance with Tidal Wetlands Regulations

Section 621.10(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") provides that the Department is to provide an

applicant "with a decision in the form of: a permit, a permit with conditions or a statement that the permit applied for has been denied, with an explanation for the denial" (emphasis added).

Department staff, in its notice of permit denial to applicant, noted that applicant's project site contained a "Class II freshwater wetland." The letter went on to delineate those freshwater wetlands standards that the application failed to satisfy. Although the letter noted that the site was within "300 linear feet of NYSDEC Regulated Tidal Wetlands which is protected under the Tidal Wetlands Act," it did not make any statement that the project did not comply with the tidal wetlands law nor did it identify any tidal wetlands standard that the application did not meet. Accordingly, it was reasonable for applicant to assume that Department staff had no objections to the issuance of a tidal wetlands permit for this project.

The notice of complete application and public hearing for the project, which was published in the Department's Environmental Notice Bulletin (see Hearing Exh 2) and the Southampton Press (Western Edition) (see Hearing Exh 3) detailed deficiencies in the permit application but only with respect to the freshwater wetlands regulations in 6 NYCRR part 663.

At the issues conference, although Department staff indicated that the project did not satisfy tidal wetlands requirements, it failed to identify those provisions of the applicable tidal wetlands law and regulations that were not met and provided no explanation of any specific deficiencies in the application in that regard (see, e.g., Hearing Transcript, at 42-43). Nor did Department staff identify its specific tidal wetlands concerns in its reply to applicant's appeal.

Department staff is correct that applicant has the burden of proof to demonstrate in a hearing on a permit application that applicant's proposal would be in compliance with all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b]). However, this does not relieve Department staff of the obligation to identify, in a timely fashion, those issues relating to a permit application upon which its denial is based. A reading of the notice of permit denial in this matter provided no indication that applicable tidal wetlands standards were not met. Furthermore, the notice of the project that was published in the Environmental Notice Bulletin and the local newspaper, which, in part, is intended to inform the public of environmental concerns with the project, referenced only freshwater wetland standards.

An applicant is entitled to know the grounds upon which its permit application is denied so that, if it seeks a hearing on the denial, it is able to prepare its case including the identification and development of witnesses, the organization of documentary evidence and the development of legal argument. In addition, Department staff needs to inform an applicant of the specific grounds for denial to afford an applicant the opportunity to consider revisions to a project or related mitigation measures (see Matter of Kelleher, Decision of the Assistant Commissioner, December 24, 2008 ["Kelleher"], at 3<sup>1</sup>).

In a notice of permit denial, Department staff is required to clearly state the substantive reasons for denial of the permit application, relate those reasons to the permitting standards, and, in situations such as this where more than one permit has been applied for, address each permit application that Department staff determines does not satisfy applicable standards.<sup>2</sup> A failure to state the basis for denying a permit application or the mere suggestion that there might be an issue that warrants denial is insufficient to satisfy the regulatory standard of 6 NYCRR 621.10(a).

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<sup>1</sup> In Kelleher, the applicant had been advised in the notice of permit denial letter that its application failed to meet various tidal wetlands regulatory standards. At the issues conference, Department staff raised an additional issue relating to tidal wetland development restrictions. In that proceeding, the applicant had at least been notified of a number of tidal wetlands deficiencies, and the ALJ determined that the additional issue could be adjudicated. Even in those circumstances, it would have been within the ALJ's discretion to exclude the late-raised issue from consideration (see Kelleher, at 3).

Here, Department staff's permit notice letter was silent regarding any tidal wetland standards that the project failed to meet (see, e.g., Hearing Transcript, at 42-43 [applicant noting that none of the bases for denying application were related to tidal wetland requirements]). In this circumstance where Department staff did not specify any concerns regarding the project's compliance with tidal wetland requirements, it was not unreasonable for applicant to assume that Department staff had no objections to issuance of the tidal wetlands permit.

<sup>2</sup> In this proceeding, Department staff determined that the project was a Type II action (see 6 NYCRR 617.5) and was not subject to review pursuant to the State Environmental Quality Review Act ("SEQRA"). For those permit applications, however, where a SEQRA positive declaration has been issued, Department staff should also identify any SEQRA-related matters that warrant denial of the permit application.

Unlike the situation presented here, there may be circumstances in the permit hearing process where a new ground for denial of a permit application is legitimately identified by Department staff following issuance of a notice of permit denial. For example, Department staff may identify an additional issue based, among other things, upon new information or other submissions from an applicant. In addition, Department staff may, based on its consideration of public comment or other public submissions, identify an issue for adjudication. Where Department staff identifies a new ground for denial of a permit application following issuance of a denial letter, staff must also provide a reasoned explanation regarding why the ground was not identified at an earlier date. Absent such an explanation by Department staff, it may be appropriate to exclude consideration of Department staff's newly raised ground in the permit hearing.

The record before me does not provide any reasoned explanation why issues relating to tidal wetland permitting standards were not set forth in the notice of permit denial or in the public notice. Even at the issues conference stage, when staff contended that compliance with tidal wetlands regulations would be an issue for adjudication, Department staff failed to identify any specific tidal wetland provisions that applicant's project would not satisfy.

To ensure fairness and the orderly consideration of issues, potential issues are to be raised by the time of the issues conference (see 6 NYCRR 624.4[b][2]). It is not sufficient at the issues conference to reference an issue in a general, non-specific manner such that it is unclear or uncertain what is being proposed for adjudication. This would not meet the standard for an adjudicable issue because it does not adequately specify the matter that staff is citing as a basis to deny the permit (see 6 NYCRR 624.4[c][1][ii]).

Accordingly, based on the record before me including the lack of any specific identification of tidal wetlands provisions that warrant permit denial, compliance of applicant's project with the tidal wetlands permitting standards is not subject to adjudication in this proceeding and shall not be a basis for denial of the project.

- Consideration of the 2007 Revision

As previously noted, subsequent to Department staff's issuance of the notice of permit denial, applicant submitted a modification to the project for Department staff's consideration in 2007. The terms of the 2007 Revision encompassed both project revisions (for example, relocation of the proposed dwelling to the west and north of the original footprint, reduction of the size of the dwelling, and relocation of the septic system) and specific mitigation measures (for example, revegetation and restoration of wetland areas on adjacent municipal property, and the donation of monies to the Southampton Community Preservation Fund for a local watershed). Based upon my review of applicant's submission, it is clear that it was offered to address concerns raised by Department staff in the notice of permit denial with respect to freshwater wetlands requirements.

This proceeding was held in abeyance to allow for discussions between Department staff and applicant on the project and possible revisions (see, e.g., letters dated November 3, 2006 and June 1, 2007 from ALJ Casutto to applicant and applicant's attorney, respectively). Following receipt of the 2007 Revision, Department staff concluded that it failed to meet the standards for issuance of a freshwater wetlands permit and so notified the applicant by letter dated November 28, 2007. In that letter, staff contended that, among other things, the relocation and downsizing of the proposed residence represented only a minimal increase in the setback from the freshwater wetland boundary, the relocation of the septic system and construction of a retaining wall would result in a decreased setback from that boundary as compared to the original proposal, and that the proposed mitigation measures would have little environmental benefit.

Applicant argues that, for purposes of the adjudicatory hearing, the proposed project is the initial application, as modified by the 2007 Revision. Department staff disagrees and argues that, in order for the 2007 Revision to be considered, applicant is required to withdraw its original application and file a new application (see Hearing Transcript, at 21).

A hearing on a permit application can elicit information that may lead to further modification of a proposed project. The hearing process is an iterative one where applicant may offer changes to a project that are meant to address environmental concerns or provide for further mitigation. The practice of offering project modifications in a good faith effort to mitigate environmental impacts or achieve compliance with permitting standards is one that I encourage.

A productive collaboration, where Department staff clearly explains why a permit denial is warranted, and applicant has the opportunity to respond with potential changes to the project design, is an administratively efficient and practical way to both protect the environment and enable project proponents to pursue their goals. It is accordingly appropriate to consider the 2007 Revision in the adjudicatory proceeding on this project.

Department staff also argues that the 2007 Revision was submitted to the Department "as an offer of settlement and as such [is] inadmissible at the hearing (CPLR 4547), precluding consideration of the plans as part of the permit application and from this adjudicatory hearing." This argument is rejected. This proceeding is not an enforcement hearing where settlement proposals may be excluded from consideration (see, e.g., Matter of Bath Petroleum Storage, Inc., Ruling of the ALJ, June 13, 2005, at 9). In permit application hearings, project redesign and modifications proposed to address environmental concerns or to satisfy applicable legal requirements may as appropriate be considered, and they are not excludable as "settlement offers."

Circumstances may exist where modifications to a proposed project so substantially change an application that a pending proceeding would need to be terminated, and the applicant would be required to file a new application, restarting the application review process from the beginning. Examples of such changes would be substantially increasing the footprint of a proposed residential dwelling or changing the project from residential to commercial. That is clearly not the case here.<sup>3</sup>

I concur with applicant that his project, as modified by the 2007 Revision, is a proper subject for adjudication in this proceeding (see Hearing Transcript, at 28-29). The Issues Ruling listed the specific freshwater wetlands standards to be addressed for purposes of the original application and related environmental items (see Issues Ruling, at 7-9). These standards, in conjunction with Department staff's evaluation of the 2007 Revision's compliance with freshwater wetland requirements (see letter dated November 28, 2007 from DEC Environmental Analyst I Susan Ackerman to applicant's consultant), are to be addressed in the adjudicatory hearing.

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<sup>3</sup> Circumstances may also exist where an applicant proposes a project that it knows is not permissible and then proceeds to submit a multitude of modification alternatives. In those situations, requiring the filing of a new application(s) may be appropriate. Again, that is not the situation here.

This Interim Decision does not preclude applicant from offering additional revisions to its project in the adjudicatory hearing in an effort to comply with the freshwater wetland permitting standards, subject to the discretion of the ALJ (see 6 NYCRR 624.8[b][1]).

CONCLUSION

Accordingly, the issue for adjudication in this proceeding is whether applicant's project, as modified by the 2007 Revision, complies with the permitting standards for a freshwater wetlands permit (see 6 NYCRR 663.4 and 663.5) as they relate to the items listed in the Issues Ruling at pages 7-8 ([a]-[h]).

This matter is remanded to the Chief Administrative Law Judge<sup>4</sup> for further proceedings consistent with this Interim Decision.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By: \_\_\_\_\_/S/\_\_\_\_\_  
Alexander B. Grannis  
Commissioner

June 22, 2009  
Albany, New York

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<sup>4</sup> ALJ Casutto has recently left the employ of the Department, and this matter has been transferred to Chief ALJ James T. McClymonds, pending reassignment.