

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

In the Matter

- of -

the Application for Permits pursuant to Articles 17 and 24 of the
Environmental Conservation Law (ECL), Section 401 of the Federal
Clean Water Act (CWA), and Parts 663 and 750 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

-by-

TOWN/VILLAGE OF HARRISON,

Applicant.

DEC Application Nos. 3-5528-00104/00001 and 3-5528-00104/00002

DECISION OF THE COMMISSIONER

June 16, 2015

DECISION OF THE COMMISSIONER

The Town and Village of Harrison (“Harrison” or “applicant”) proposes to develop a brownfield remediation site in Harrison (“Project Home Run” or “project”), and has applied for a consolidated permit pursuant to ECL articles 17 and 24, implementing regulations, and Clean Water Act § 401. The project has twice been reduced significantly in scope. The initial version of the project, according to the 2007 completed application, included a full baseball and softball stadium, youth soccer and multipurpose field, children’s playground, parking lots, and associated infrastructure (see <http://www.dec.ny.gov/enb/35816.html>, Notice of Legislative Public Hearing and Issues Conference, dated June 20, 2007). That version of the project would have involved filling and grading approximately 0.39 acre of a Class II freshwater wetland (“FWW J-3”) and 1.7 acres of the wetland’s 100-foot adjacent area (see Matter of Town/Village of Harrison, Rulings on Issues and Party Status, May 29, 2009 [“May 2009 Rulings”], at 2; see also Affidavit of Thomas J. Fucillo, Esq. dated January 13, 2015 [“Fucillo Aff.”], Exhibit [“Ex.”] 4, Document [“Doc.”] 4 [Amended Negative Declaration dated August 7, 2014], at 1).

In 2009 and 2010, Harrison revised and reduced the size of the project, resulting in plans for a “pick-up ball field, an open grass area, a walking trail that loops around the property and connects to the existing wood plank river walk and two gravel parking areas” (see Matter of Town/Village of Harrison, Supplemental Rulings on Issues for Adjudication, July 15, 2011 [“July 2011 Supplemental Rulings”]; see also Beaver Swamp Brook Project Home Run SEQRA Negative Declaration Update [Jan. 21, 2011]). That iteration of the project included filling and grading approximately 0.162 acre of FWW J-3 and 2.0 acres of the wetland’s adjacent area.

Following a legislative hearing and issues conference, Administrative Law Judge (“ALJ”) Daniel P. O’Connell issued three rulings regarding the second proposed project: (i) the May 2009 Rulings; (ii) an August 21, 2009 Ruling on SEQRA Compliance (“August 2009 SEQRA Ruling”); and (iii) the July 2011 Supplemental Rulings. In 2011, intervenors City of Rye (“Rye”) and Douglas Schaper appealed from the ALJ’s May 2009 Rulings and July 2011 Supplemental Rulings.

On June 12, 2013, I issued an Interim Decision (“Interim Decision”) affirming the ALJ’s rulings, and remanded the matter for adjudication of whether the project as it then existed satisfied the “weighing standards” set forth at 6 NYCRR 663.5(e)(2), applicable to projects involving placing fill in, and grading, a regulated wetland (see Interim Decision, at 9-10).¹ In November 2013, at the parties’ request, the matter was referred to mediation. Although the mediation efforts were productive in narrowing the issues, they did not result in a complete resolution or settlement of the matter.² In August 2014, the parties requested that the ALJ schedule the adjudicatory hearing.

¹ In the Interim Decision, I also: (i) affirmed the ALJ holding that Harrison’s SEQRA determination is beyond the scope of this proceeding (see Interim Decision, at 7); and (ii) held that Department staff’s SEQRA negative declaration was not irrational (see id. at 6-7).

² According to Harrison, during the mediation, Department staff and Harrison discussed ways to further reduce direct impacts to the wetland, and ultimately agreed to reposition the project so it would have no direct impacts on the wetland (see Fucillo Aff. ¶ 3). Although informed of the reduction in the scope of the project, Rye and Mr. Schaper declined to withdraw their opposition (see id.).

On or about August 19, 2014, Harrison filed a joint permit application and supporting documents relating to modification of the proposed freshwater wetlands permit, and reflecting a further modification and reduction of the project (“August 2014 Project”). The August 2014 Project no longer involves any filling or grading activities in FWW J-3. Filling and grading activities would be limited to 2.0 acres of the wetland’s adjacent area. In addition, the August 2014 Project includes a 1.07 acre wetland buffer enhancement plan to mitigate impacts on the adjacent area, comprised of removing all invasive plant species and replacing them with a combination of native plants and a seed mix to provide a vegetated buffer to the wetlands (see Matter of Town/Village of Harrison, Further Proceedings and Draft Scheduling Order, dated October 31, 2014 [“October 2014 Ruling”], at 2).

By email dated September 16, 2014, Department staff provided to the parties and to the ALJ copies of a Notice of Complete Application (“NOCA”), a SEQRA determination concerning the August 2014 Project, and a draft permit. Staff published the NOCA in the September 17, 2014 *Environmental Notice Bulletin*, and applicant published the NOCA in the *Journal News*. The NOCA provided a 15-day public comment period. No comments were received.

By letter dated October 3, 2014 (“Appl. Oct. 2014 Letter”), Harrison notified the ALJ that it did not object to any of the conditions in the draft permit and, based upon the reduction in scope of the project, requested that the adjudicatory hearing be canceled as moot. Following receipt and review of the comments provided by the parties, the ALJ ruled that an adjudicatory hearing was necessary to determine whether the August 2014 Project would meet the three compatibility tests set forth in 6 NYCRR 663.5(e)(1) (see October 2014 Ruling, at 7).³ The ALJ also ruled that, “[i]f Harrison cannot demonstrate compatibility, then the weighing standards outlined at 6 NYCRR 663.5(e)(2) must be adequately addressed in order to obtain a permit” (id.). The ALJ further held that “the parties will have the opportunity [at the hearing] to develop a record about whether the [August 2014 Project] would meet the weighing standards ... for a Class II wetland” (id.).

In his October 2014 Ruling, the ALJ also granted to staff and applicant an opportunity to respond to Rye’s and Mr. Schaper’s objections to Department staff’s September 2014 SEQRA amended negative declaration (see id. at 8-9). Following receipt of those responses, the ALJ ruled that staff’s September 2014 negative declaration “is rational and not otherwise affected by an error of law,” and that staff “took the required hard look at potential environmental impacts of the [August 2014 Project], and provided a reasoned elaboration for the negative declaration” (Issues Ruling on Department Staff’s September 15, 2014 Negative Declaration and Appeal’s Schedule, dated December 9, 2014 [“December 2014 Ruling”], at 5). The ALJ held that the environmental review of the August 2014 Project was complete (see id.).

³ Harrison and Department staff had also asserted to the ALJ that the activities associated with the August 2014 Project are “insignificant enough to be compatible” (see October 2014 Ruling at 7; see also 6 NYCRR 663.4[d] [in some cases, a proposed action that is otherwise characterized as “usually incompatible” with a wetland and its functions or benefits “may be insignificant enough to be compatible”]).

Applicant and Department staff appeal from the ALJ's October 2014 Ruling holding that an adjudicatory hearing is necessary (see Expedited Appeal, dated January 13, 2015 ["Harrison App."]; Appeal, undated ["Staff App."]). Rye appeals from the ALJ's December 2014 Ruling regarding SEQRA (see Rye Expedited Appeal, dated January 15, 2015 ["Rye App."]).⁴ Mr. Schaper has filed a "reply to the Appeals of Harrison and the DEC," but did not file his own appeal from either of the ALJ Rulings.

In this decision, I (i) reverse the ALJ's October 2014 Ruling, and direct staff to issue the permit for the August 2014 Project; and (ii) affirm the ALJ's December 2014 Ruling, subject to my comments below. As discussed below, the ALJ correctly held that staff took the requisite hard look at the August 2014 Project under SEQRA, and staff's negative declaration is rational and not affected by an error of law. I do not concur with the ALJ's ruling that an adjudicatory hearing is necessary to determine whether the August 2014 Project meets the compatibility tests set forth in 6 NYCRR 663.5(e)(1), and that the parties should have an opportunity to develop a record concerning whether the August 2014 Project would meet the weighing standards set forth at 6 NYCRR 663.5(e)(2).

DISCUSSION

A. Harrison's and Staff's Appeals

In its appeal, Harrison requests a determination that no issues for adjudication remain, and a direction that the adjudicatory hearing be canceled in accordance with 6 NYCRR 624.4(c)(5) (see Harrison App., at 2, 23). Harrison argues that the sole issue identified for adjudication in my June 2013 Interim Decision – whether the project satisfied the weighing standards – is no longer applicable because the August 2014 Project does not involve any direct impacts to the wetland (see id. at 12-13). Harrison also argues that it has demonstrated that the August 2014 Project meets each of the three compatibility tests set forth at 6 NYCRR 663.5(e)(1) (id. at 13-16). Finally, Harrison argues that intervenors Rye and Schaper have not satisfied their burden of establishing that any substantive and significant issues require adjudication, and that the ALJ erred in finding issues for adjudication (id. at 16-23). Staff has filed its own appeal, joining and agreeing with Harrison's position and requesting that I overturn the ALJ's October 2014 Ruling. I address the parties' arguments below.

1. The Compatibility and Weighing Standards

As set forth above, the earlier versions of the proposed project included filling and grading activities in both FWW J-3 and its adjacent area. Department regulations characterize filling and grading within a freshwater wetland as "P(X)," "P" denoting an activity requiring a permit, and "X" characterizing the activity as "incompatible," which means "incompatible with a wetland and its functions and benefits" (6 NYCRR 663.4[d]; see also id., Activities Chart, Items 20 [filling] and 25 [grading]). Proposed activities that the regulations characterize as

⁴ Although Rye states that it is also appealing from certain rulings contained in the October 2014 Ruling, it provides no argument on any issue specific to that Ruling, and expressly states that "the City is not appealing that portion of ALJ O'Connell's October 2014 Ruling finding that there were still issues that should proceed to the adjudicatory hearing stage" (Rye App. at 1).

“incompatible” must always meet the “weighing standards” in order to be permitted (see 6 NYCRR 663.5[e][2]; 6 NYCRR 663.5[d][2]).

Department regulations characterize filling and grading activities within a wetland adjacent area as “P(N),” “P” again denoting an activity requiring a permit, and “N” characterizing the activity as “usually incompatible,” which means “usually incompatible with a wetland and its functions or benefits, although in some cases the proposed action may be insignificant enough to be compatible” (6 NYCRR 663.4[d]; see also id., Activities Chart, Items 20 [filling] and 25 [grading]).

Filling and grading activities in a wetland adjacent area may be permitted if they meet the three tests for compatibility or, as set forth above, are “insignificant enough” to be considered compatible (see 6 NYCRR 663.5[d]; 6 NYCRR 663.5[e]). An activity satisfies the three tests for compatibility where it (i) would be compatible with the preservation, protection and conservation of the wetland and its benefits; (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland; and (iii) would be compatible with public health and welfare (see 6 NYCRR 663.5[e][1][i]-[iii]).

Where proposed activities in a wetlands adjacent area meet the three tests for compatibility, “no other weighing standards need apply, regardless of the wetland’s classification, and a permit, with or without conditions, may be issued for the proposed activity” (6 NYCRR 663.5[d][1]; see also 6 NYCRR 663.5[e][1] [if all three compatibility tests are met, “no other weighing standards need be met, regardless of the wetland class”). Thus, the “weighing standards” are not applicable where activities denoted “P(N)” meet the compatibility tests. If a proposed activity does not satisfy all three tests of compatibility, however, it must meet each of the “weighing standards” applicable to the particular class of wetland affected (see 6 NYCRR 663.5[d][2]; 6 NYCRR 663.5[e]).

An applicant bears the burden of demonstrating compliance with permit requirements and the regulations (see 6 NYCRR 663.5[a]). The discussion below addresses first Harrison’s and Department staff’s submissions regarding whether the August 2014 Project meets the compatibility tests. I will then address whether Rye or Mr. Schaper have raised any substantive and significant issues warranting an adjudicatory hearing.

2. The August 2014 Project and Applicable Standards

As set forth above, the August 2014 Project no longer involves any activities within a freshwater wetland, and involves only grading and filling activities within 2.0 acres of the wetland’s adjacent area (see Fucillo Aff. Ex. 4, Doc. 4, at 1). Under the regulations, these activities are considered “P(N)” (see discussion above). If the activities meet the three compatibility tests, or are “insignificant enough” to be considered compatible, the weighing standards need not be reached or applied, and a permit may be issued for the project (see 6 NYCRR 663.5[d][1]; 6 NYCRR 663.5[e][1]).

Both before the ALJ and on this appeal, Harrison has argued that the August 2014 Project meets each of the three compatibility tests. With respect to the first compatibility test,

Harrison states that the August 2014 Project is compatible with the preservation, protection and conservation of the wetland and its benefits for the following reasons: (i) the project has been redesigned to eliminate all regulated activities in the wetland; (ii) retention of the pond that is part of the mapped wetlands will promote the passive recreational enjoyment of the wetland by providing public open space and access to a restored wetland in an urbanized area; and (iii) the wetland and its adjacent area will benefit from the project's mitigation plan, which includes removing invasive plant species and planting native species on 1.07 acres (see Fucillo Aff. Ex. 4 [Application Document No. 7, Letter from Evans Associates dated July 31, 2014, attaching Project Narrative (“Evans Submission”)]; see id. Ex. 8 [Appl. Oct. 2014 Letter], at 3-4; see also Harrison App. at 13-16).

Department staff agrees with Harrison, stating that the wetland would be preserved because the August 2014 Project will involve no direct impact on the wetland. Department staff also describes the mitigation, referred to as a “buffer enhancement plan,” which involves the planting of native plants (primarily trees and shrubs) (see Affidavit of Heather Gierloff in Support of Expedited Appeal, dated January 15, 2015 [“Gierloff Aff.”], ¶ 9[i]; see also Staff App. at 6 [same]). According to Ms. Gierloff, these plantings will increase the complexity of the root systems on site, thereby enhancing habitat, and will provide filtration and soil stability “for both potential water level increases in the wetland and over-land flow of runoff to the wetland” (Gierloff Aff. ¶ 9[i]). Ms. Gierloff states further that the engineering plans submitted by Harrison reflect a post-project increase in flood storage volume (id. ¶ 9[ii]). Thus, the project would not only preserve, protect and conserve the wetland, but would actually increase one of its primary benefits.

With respect to the second compatibility test – whether the project will result in no more than insubstantial degradation to, or loss of, any part of the wetland – Harrison and Department staff state that, because the project no longer involves direct activities in the wetland, no loss of any part of the wetland will occur (see Appl. Oct. 2014 Letter, at 3-4 [no direct wetlands impact]; Evans Submission, at 3 [elimination of filling of on-site pond, which is part of the wetland, means that the second compatibility test has been met]; see also Gierloff Aff. ¶ 9[ii]). In addition, although the August 2014 Project involves grading and filling within the wetland adjacent area, Harrison and staff argue that the proposed mitigation plan “will more than off-set the minimal disturbance to the Adjacent Area” (Appl. Oct. 2014 Letter, at 3; see also Staff App., at 6-7 [although the project includes some impervious surface, run off is controlled with a Stormwater Pollution Prevention Plan and final grading will result in larger land area for flood attenuation]; Gierloff Aff. ¶ 9[ii] [project results in increase in flood storage volume]).

To meet the third compatibility test, the project must be compatible with the public health and welfare. Harrison argues that the project will provide “much needed athletic fields and recreational facilities,” and will promote recreational enjoyment of the wetland by providing public open space and walking paths providing access to the wetland (see Appl. Oct. 2014 Letter, at 4). Staff agrees with Harrison's argument, and states further that the August 2014 Project does not propose any actions that would be incompatible with public health and welfare, such as industrial activities, or storage or manufacturing of petroleum or other products that could impact the wetland (see Staff App., at 7).

3. Intervenors' Positions With Respect to the August 2014 Project

Following the receipt and review of materials relating to the August 2014 Project, and the revised draft permit, Rye and Mr. Schaper filed and served their opposition papers (see Fucillo Aff. Exs. 9 [Letter from Rye Corporation Counsel to ALJ dated October 10, 2014 (“Rye 2014 Letter”)] and 10 [Comment on Permit Application by Douglas B. Schaper dated September 17, 2014]). The ALJ thereafter held that an adjudicatory hearing would be required with respect to whether the August 2014 Project meets the compatibility tests, stating only that Rye and Schaper “disagree” with the positions of Harrison and Department staff (see October 2014 Ruling, at 7). The ALJ held that the parties “will have the opportunity [at the adjudicatory hearing] to develop a record about whether the [August 2014 Project] would meet the weighing standards outlined at 6 NYCRR 663.5(e)(2) for a Class II wetland (*id.*). The ALJ did not refer to any specific documents or other evidence submitted by either Rye or Mr. Schaper to support their “disagreement” with Harrison and staff.

In response to the current appeals by Harrison and Department staff, Rye argues that its wetlands consultant has raised “substantive and significant *concerns* regarding the ability of Harrison to meet these Compatibility Standards” (Opposition to Town/Village of Harrison and Department of Environmental Conservation Region III Staff’s [sic] Expedited Appeals [“Rye Opp.”], at 5) (*italics added*). Rye refers generally to two documents prepared by its consultant, but provides no specific page citations or quotes from these documents to support its argument (see Rye Opp. Ex. 2 [February 23, 2009 document entitled “Response to January 20, 2009 DEC Staff Statement” (“2009 Response”), and November 3, 2008 document entitled “Justification to Deny NYS DEC Freshwater Wetland Permit Application” (“2008 Justification Doc.”)]).

On their face, neither of the documents prepared by Rye’s consultant addresses the August 2014 Project. Both documents discuss the earlier remediation of the site and an earlier version of the project (see *e.g.* 2009 Response at 7-8 [discussing freshwater wetlands permit requirements concerning the “Remediation and Redevelopment projects,” and SEQRA issues]; 2008 Justification Doc. at 7-12 [discussion of wetlands permit requirements relating to the “Remediation and Redevelopment Projects” and the purported failure of the activities of the Remediation and Redevelopment projects to satisfy the weighing standards]).

The August 2014 Project reflects elimination of direct impacts to the wetland; this addresses concerns raised in Rye’s initial offer of proof, including the submissions by Rye’s consultant. Rye’s submissions are insufficient to establish that a substantive and significant issue exists requiring adjudication of whether the August 2014 Project meets the compatibility tests (see 6 NYCRR § 624.4[c][4] [potential party has burden of persuasion to provide an appropriate offer of proof that supports its proposed issues]; 6 NYCRR 624.5[b][2][ii] [offer of proof must “specify[] the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue”]; see also Matter of Akzo Nobel Salt Inc., Interim Decision of Commissioner, January 31, 1996, at 12 [no adjudicatory hearing necessary where revised permit conditions address intervenors’ offers of proof]).

In his submission responding to Harrison's and staff's appeals, Mr. Schaper argues that, absent an "independent" scientific analysis of the soils at the site, it is impossible to determine "the site's ability to mitigate flooding" (Letter to parties dated January 29, 2015 ["Schaper Letter"], at 1). Mr. Schaper also continues to argue that the earlier remediation of the site has "erased" the wetlands, and that the proposed project is not in the best interests of the people in the relevant communities (see id. at 1-2). As set forth in prior decisions and rulings, however, the earlier remediation of the site is not the subject of this proceeding (see Interim Decision at 3 n 5 [citing May 2009 Rulings at 52]). Mr. Schaper has not satisfied the burden to demonstrate that a substantive and significant issue exists requiring adjudication (see e.g. Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, March 3, 1982, at 2 [conclusory statements are not sufficient to raise an adjudicable issue, and a potential party's assertions "should arise from the opinions of the expert or other qualified witnesses"]; see also Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, October 26, 2012, at 4 [assertions by potential party "must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue."])).

The submissions of Harrison and staff demonstrate that the revised, much-reduced August 2014 Project meets each of the three compatibility tests set forth in the regulations. With respect to the first compatibility test, I agree with Harrison and staff that elimination of the filling and grading activities in the wetland preserves, protects and conserves the wetland and its benefits. Moreover, the mitigation plan to remove invasive plant species and to plant native trees and shrubs on 1.07 acres will enhance the wetland and its adjacent area by improving habitat, soil stability and flood storage capacity.

With respect to the second compatibility test, the August 2014 Project involves no loss of wetland, and the wetland buffer enhancement plan will serve to improve, rather than degrade, the wetland and its adjacent area. Finally, with respect to the third compatibility test, I find that the August 2014 Project will be compatible with the public health and welfare, by promoting recreational enjoyment of the wetland, and providing athletic fields and walking paths.

Neither Rye nor Mr. Schaper has raised a substantive and significant issue with respect to the August 2014 Project and any of the compatibility tests, and I do not concur with the ALJ's holding that the intervenors' "disagreement" with Harrison, or their "concerns," without more, are sufficient to warrant an adjudicatory hearing. Because the compatibility tests are satisfied, the weighing standards need not be reached.

B. Rye's Appeal

After reviewing Harrison's August 2014 Project which, as discussed above, modified Project Home Run to eliminate direct impacts on FWW J-3, Department staff issued an Amended Negative Declaration dated September 15, 2014 ("Amended Neg. Dec.") (see Rye App. Ex. 3). In the Amended Neg. Dec., staff stated that it had reviewed the project for potential impacts to land, surface water, groundwater, air, traffic, noise, visual and cultural resources (see id.). Staff determined that the August 2014 Project "is a lower impact alternative to a project

that has previously been determined not to have a significant adverse impact on the environment” (id.).

Following receipt and review of the Amended Neg. Dec., a Notice of Complete Application and a revised draft permit, Rye and Mr. Schaper filed letters with the ALJ, and Harrison and staff responded (see December 2014 Ruling at 1). The ALJ thereafter conducted a thorough review of the Amended Neg. Dec. and the parties’ filings, and concluded that the Amended Neg. Dec. was rational and not otherwise affected by an error of law, and that staff took the required hard look at potential environmental impacts of the August 2014 Projects and provided a reasoned elaboration for the negative declaration (see id. at 5).

In its appeal, Rye argues that, “simply because the [August 2014 Project] removes one component of the project, it does not mean that there are not remaining significant adverse environmental impacts necessitating a draft environmental impact statement” (Rye App. at 2-3). Rye then argues that the Amended Neg. Dec. is “conclusory,” and that the Amended Neg. Dec. relied improperly upon staff’s prior negative declaration in July 2011 and Harrison’s 2004 negative declaration (see id. at 4). Rye then argues that staff’s July 2011 negative declaration was inadequate with respect to flood storage capacity, and that the ALJ’s July 2011 Supplemental Rulings was in error (see id. at 6-7). Rye requests that I (i) consider *Harrison’s* August 2014 Amended Negative Declaration to be within the scope of these proceedings and find that it is arbitrary and capricious; and (ii) “annul” the ALJ’s December 2014 Ruling upholding staff’s Amended Neg. Dec. (see id. at 8).

In its response to Rye’s appeal, staff points out that, because the August 2014 Project reflects a change in a prior project that had been fully reviewed under SEQRA, staff could have limited its review to only the changes in the August 2014 Project (see Response to City of Rye’s Expedited Appeal, undated [“Staff Resp.”], at 2 [citing 6 NYCRR 617.7(e)(1)(iii)]).⁵ Rather than limit its review to the changes in the project, however, staff reviewed the entire project, and describes that review in detail (see Staff Resp. at 2-4).

Harrison agrees that staff’s review could have been limited to the changes in the project, but that staff went further and reviewed the entire project (see Response to City of Rye’s Expedited Appeal, dated January 27, 2015 [“Harrison Resp.”], at 4). Harrison also points out that many of Rye’s arguments were raised, and rejected, in the June 2013 Interim Decision affirming the negative declaration relating to the earlier version of the project (see id. at 6).

I agree with the ALJ’s thorough analysis of the parties’ arguments relating to staff’s SEQRA review of the August 2014 Project. Therefore, upon review of the record and giving due consideration to intervenors’ objections to Department staff’s amended negative declaration, I conclude that Department staff took the requisite “hard look,” and presented a reasoned

⁵ Section 617.7(e)(1)(iii) provides as follows:

At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, may amend a negative declaration when substantive ... changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

elaboration in support of its negative declaration (see Matter of Chemical Specialties Mfrs. Assoc. v Jorling, 85 NY2d 382, 396-397 [1995]). Accordingly, I affirm the ALJ's determination that Department staff's amended negative declaration was not irrational or affected by any error of law (see 6 NYCRR 624.4[c][6][i][a]).

In the "Conclusion" section of its appeal, Rye requests that I also review, and invalidate, Harrison's amended negative declaration (see Rye App. at 8). As I held in the Interim Decision, Harrison's SEQRA review is beyond the scope of this proceeding, and I affirm the ALJ's ruling in that regard (see Interim Decision, at 7 [citing May 2009 Rulings, at 43, further citing 6 NYCRR 624.4(c)(6)(ii)(a)]; see also December 2014 Ruling, at 5 [ALJ ruling that Harrison's August 2014 amended negative declaration is beyond the scope of this proceeding]).

To the extent that other issues have been raised, these have been considered and are lacking in merit.

CONCLUSION

I hereby reverse the ALJ's ruling that an adjudicatory hearing is necessary with respect to whether the August 2014 Project meets the compatibility tests set forth in 6 NYCRR 663.5(e)(1). Because the project satisfies all three of the compatibility tests, the weighing standards set forth at 6 NYCRR 663.5(e)(2) need not be addressed, and a permit may be issued (see 6 NYCRR 663.5[d][1], [e][1]).

I hereby affirm the ALJ's ruling that staff's September 15, 2014 amended negative declaration is not irrational or otherwise affected by an error of law, and that staff took the requisite "hard look" and presented a reasoned elaboration in support of its amended negative declaration.

This matter is hereby remanded to Department staff to issue the consolidated permit, a draft of which was provided to the ALJ on September 16, 2014.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: June 16, 2015
Albany, New York