

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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 750-758 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by

RULINGS ON
ISSUES AND
PARTY STATUS

DEC Application No.:
3-5528-00104/00001

TOWN/VILLAGE OF HARRISON, NEW YORK,
Applicant.

(Project Home Run)

May 29, 2009

Background and Project Description

In 1997, the Town and Village of Harrison, New York (Harrison) began a brownfield remediation project on a 14-acre site identified as the Beaver Swamp Brook site (B00109-3). The Beaver Swamp Brook site was a former commercial and industrial corridor that included environmentally degraded properties consisting of a junkyard, auto wrecking facility, and a construction equipment and material storage area in addition to vacant parcels where illegal dumping had occurred. The remedial action took place consistent with the Department's Brownfield Cleanup Program (see Environmental Conservation Law [ECL] 27-1401, *et seq.*) and was funded, in part, by a Department brownfield grant, a NRCS/USDA grant, and a Department Clean Water/Clean Air Bond Act grant.

After reviewing the site conditions and identifying potential remediation alternatives, Department staff issued a Proposed Remedial Action Plan (PRAP) on May 12, 2002, which was subsequently rescinded. Department staff issued a second PRAP in February 2003 for public review and comment. Staff issued a Record of Decision (ROD) on March 31, 2003. By letter dated July 3, 2008, Department staff approved the Final Engineering Report (FER) for the brownfield remediation project.

The Beaver Swamp Brook site is located on the southeast side of Oakland Avenue between Glen Oaks Drive and Osborn Road in Harrison. A portion of the remediated property includes State regulated Freshwater Wetland J-3 (Class II). To mitigate impacts to Freshwater Wetland J-3 that were associated with the

brownfield remediation, Harrison provided one acre of enhanced 100-foot adjacent area. The remediated property is also adjacent to Beaver Swamp Brook, which flows between Harrison and the City of Rye, then through the Village of Mamaroneck to Mamaroneck Harbor and, finally, to Long Island Sound.

Harrison proposes to redevelop approximately 5.7 acres of the Beaver Swamp Brook site with a recreational complex that includes a baseball/softball field, a soccer/multi-purpose athletic field, a children's playground, a nature walkway, an off-street parking area, site access, as well as infrastructure improvements to support these facilities. The redevelopment project is known as Project Home Run. At Department staff's direction, Project Home Run was not included in the original brownfield remediation.

Project Home Run (the redevelopment project) would involve filling and grading approximately 0.39 acre of Freshwater Wetland J-3 and 1.7 acres of the 100-foot adjacent area. The proposed filling and grading within Freshwater Wetland J-3 is subject to ECL Articles 17 (Water Pollution Control) and 24 (Freshwater Wetlands), and federal Clean Water Act (CWA) § 401 (Water Quality Certification) (see 33 U.S.C.A. § 1341). Project Home Run is also subject to the implementing provisions of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 663 (Freshwater Wetlands) and Parts 750-758 (State Pollutant Discharge System Elimination System [SPDES] general permit for stormwater discharges from construction activities). Consequently, in November 2006, Harrison filed an application with Staff from the Department's Region 3 Office (New Paltz, New York) for a consolidated permit, pursuant to ECL Articles 17 and 24, and CWA § 401, related to the construction of Project Home Run.

To mitigate the freshwater wetland impacts associated with Project Home Run, Harrison has agreed to maintain the remaining portions of Freshwater Wetland J-3 and the regulated adjacent area by managing *Phragmites australis* and other invasive plant species. Harrison would treat infested areas, which would not exceed nine acres, with the herbicide glyphosate (a/k/a Rodeo) and, as needed, replant these areas with native species.

Harrison, as lead agency, has characterized Project Home Run as an unlisted action. After determining that Project Home Run would not have a significant effect on the environment, and that a draft environmental impact statement (DEIS) would not be prepared, Harrison issued a negative declaration on June 23,

2004, pursuant to the State Environmental Quality Review Act ([SEQRA] ECL Article 8 and 6 NYCRR Part 617).

Proceedings

Department staff determined that the captioned permit application was complete on February 21, 2007. A notice of complete application was published in the Department's *Environmental Notice Bulletin (ENB)* on February 28, 2007, and in *The Journal News* (Central Area Zone) on March 2, 2007. Staff subsequently extended the public comment period set in the February 21, 2007 notice of complete application from March 16, 2007 to April 16, 2007. During the public comment period, Staff received 29 comment letters from members of the public. All public comments received by the April 16, 2007 deadline oppose the project.

In a letter dated April 23, 2007, Staff notified Harrison that the captioned matter would be referred to the Office of Hearings and Mediation Services (OHMS). OHMS received Staff's hearing request with a cover memorandum dated April 26, 2007. The matter was then assigned to Administrative Law Judges (ALJs) Mark D. Sanza and Daniel P. O'Connell. Thereafter, in accordance with the provisions of 6 NYCRR 624.3, a notice of legislative public hearing and issues conference (the Notice) was published in the Department's *ENB* on June 20, 2007, and by Harrison in *The Journal News* (Central Area edition) on the same date.

Due to the number of people expected to attend the legislative hearing session, a supplemental notice of public hearing (the Supplemental Notice) was published in the Department's *ENB* on July 18, 2007 to advise those interested in the project that the location of the legislative hearing session had been changed to the Harrison High School. Harrison also published the Supplemental Notice in *The Journal News* (Central Area edition) on July 18, 2007.

The June 20, 2007 Notice set a deadline of July 17, 2007 for the receipt of any written petitions for either full party or *amicus* status (see 6 NYCRR 624.5[b]). By letter dated June 29, 2007, Michael G. LaDore, a resident of Harrison, filed a petition on his behalf. The City of Rye filed a petition for full party status dated July 16, 2007. On July 23, 2007, the Office of Hearings and Mediation Services received a late petition for party status dated July 19, 2007 from Douglas B. Schaper, on his

behalf. Mr. Schaper is also a resident of Harrison. The petitions are more fully discussed below.

The June 20, 2007 Notice also set a deadline of July 27, 2007 for the submission of written comments on the project to ALJs Sanza and O'Connell. The ALJs received 16 written comments, some of which included photographs, from various residents of Harrison prior to the July 27, 2007 deadline. All of the written comments submitted to the ALJs oppose the project.¹

I. Legislative Public Hearing

As scheduled in the June 20, 2007 Notice and the July 18, 2007 Supplemental Notice, the legislative hearing session was held on July 23, 2007 at 7:00 p.m. in the cafeteria of the Harrison High School (Harrison, New York). Approximately 160 members of the public attended the hearing. Of those, 37 people, including local and State elected officials, made public statements.²

Department staff, represented by Assistant Regional Attorney Steve Goverman, Esq., advised those in attendance that no draft permits were available for review prior to the legislative hearing because Staff had not determined whether to issue or deny the requested permits.

Of the 37 people who spoke at the hearing, only three individuals who were not affiliated with Harrison, either as a local official or a retained consultant, spoke in favor of the project.³ These people talked of the need for Project Home Run,

¹ Many of the comments and photographs sent to the ALJS were submitted by the same individuals who had previously submitted written comments to the Department in March and April 2007 during the public comment period following publication of the notice of complete application in the *ENB* on February 28, 2007.

² Four additional individuals signed in with the ALJs to make a public statement at the legislative hearing but left the session prior to its conclusion.

³ Those who spoke on behalf of Harrison at the legislative hearing included then-Harrison Mayor/Supervisor Stephen Malfitano; Ron Belmont, Harrison Superintendent of Recreation; Robert Wasp, P.E., Harrison Commissioner of Public Works; Anthony Catalano, consultant from Woodard & Curran (White Plains, New York); and Leonard Jackson, P.E., from Leonard Jackson Associates (Pomona,

primarily due to the demand for additional recreational fields in Harrison by area youths engaged in organized sports such as Little League baseball, softball, lacrosse, and women's soccer.

All of the other speakers, including Hon. Steven Otis, Mayor of the City of Rye, and Hon. George S. Latimer, 91st Assembly District (which includes the City of Rye and Village of Mamaroneck, but not Harrison), oppose the project. In general, those speaking in opposition to Project Home Run consistently expressed three main points:

- (1) the brownfield remediation project, and particularly the placement of large quantities of fill, had adversely impacted Freshwater Wetland J-3, thereby causing increased stormwater runoff to, and flooding of, Beaver Swamp Brook in Harrison and in neighboring and downstream communities such as the City of Rye and Village of Mamaroneck in the spring of 2007;
- (2) the nature and extent of flooding of Harrison residences and surrounding areas from Beaver Swamp Brook in the spring of 2007 was substantially more severe than in previous years as a result of the brownfield remediation project and filling of Freshwater Wetland J-3 at the site; and
- (3) Harrison's current proposal to place additional fill in Freshwater Wetland J-3 to construct the recreational facilities at the site would increase the flooding from Beaver Swamp Brook more than what was experienced in the spring 2007.

Accordingly, the speakers critical of the project urged Department staff to deny the pending permit application, and to review the manner in which the original brownfield remediation and filling of Freshwater Wetland J-3 at the site was undertaken and/or approved. Many of the speakers challenging the project provided the ALJs with copies of news media accounts and color photographs of flooded conditions in the Harrison area during the spring of 2007.

Harrison's representatives disputed the contention that the remediation project previously undertaken at the site increased the potential for flooding from Beaver Swamp Brook in 2007, and

contended that Project Home Run would not further exacerbate the potential in the future.

II. Issues Conference (July 24, 2007)

The first session of the issues conference in this matter commenced at 10:00 a.m. on July 24, 2007 at the Harrison Public Library in Harrison, New York.⁴ Harrison was represented by Joe Latwin, Esq., Deputy Village Attorney for Harrison. In addition, then Mayor/Supervisor Stephen Malfitano, Harrison Public Works Commissioner Robert Wasp, and consultant Leonard Jackson appeared for Harrison.

Assistant Regional Attorney Steve Goverman appeared on behalf of Department staff. Other Department staff in attendance included Scott Sheeley (Environmental Analyst, Division of Environmental Permits), Heather Gierloff (Biologist, Division of Fish and Wildlife), James Candiloro (Environmental Engineer, Division of Environmental Remediation), and Patrick Ferracane (Water Program Specialist, Division of Water). Pursuant to 6 NYCRR 624.5(a), Harrison and Department staff are full parties in this permit proceeding.

As previously noted, the City of Rye, Michael LaDore, and Douglas Schaper separately filled petitions for party status with the ALJs in advance of the issues conference. The City of Rye was represented by its corporation counsel Kevin J. Plunkett, Esq. and Kristen Kelley Wilson, Esq., of Thatcher, Proffitt & Wood, LLP (White Plains, New York).⁵ Other individuals in attendance on behalf of the City of Rye were Mayor Steven Otis, and its consultant, Laura Tessier (Tessier Environmental Consulting). Michael LaDore and Douglas Schaper appeared, and represented themselves.

⁴ The location of the issues conference was changed to the Harrison Public Library from the Alfred F. Sulla, Jr. Municipal Building as set forth in the June 20, 2007 Notice due to a conflict with justice court proceedings. An announcement of this change was made by the ALJs at the July 23rd legislative hearing and, in addition, a notice of the change was posted at the Municipal Building on July 24th. The two locations are situated across the street from one another in Harrison.

⁵ Mr. Plunkett and Ms. Wilson are now with DelBello, Donnellan, Weingarten, Wise & Weiderkehr, LLP (White Plains, New York).

Prior to discussing the substance of the petitions with the parties, the ALJs advised the participants that certain documents relevant to the proceeding had been identified and pre-marked as exhibits (Tr. at 9-10). A preliminary exhibit list prepared by the ALJs was distributed to the parties during the issues conference and a revised copy of it, which includes additions made during the November 18, 2008 issues conference session, is attached as Appendix A to this ruling.

A. The City of Rye's Petition

The City of Rye (Rye) is located in Westchester County, immediately adjacent to Harrison and the Beaver Swamp Brook. The southern boundary of Freshwater Wetland J-3 serves as the municipal boundary between Rye and Harrison. Rye identified six potential issues for adjudication in its July 16, 2007 Petition for full party status.⁶

The first four issues proposed by Rye pertain to Harrison's analysis of the current proposal within the context of, and purportedly deviating from, the SEQRA analysis for the original remediation project (Rye's July 16, 2007 Petition, Issues I-IV). In that regard, the June 20, 2007 Notice provided as follows:

"The Town of Harrison Town Board was the lead agency for the State Environmental Quality Review (SEQR) of this project and issued a negative declaration on June 23, 2004 finding that there would not be any significant environmental impacts as a result of this project. Pursuant to 6 NYCRR 624.4(c)(6)(ii)(a), the Administrative Law Judges will not entertain any issues related to SEQRA because the Town of Harrison Town Board has determined that the proposed action does not require the preparation of a Draft Environmental Impact Statement (DEIS)" (Exhibit 1A).

Based on the foregoing, and because lead agency status was not re-established with the Department prior to the time of the issues conference (see 6 NYCRR 617.6[b][6]), both Harrison and

⁶ Rye also submitted lengthy and detailed written comments in opposition to the project to Department staff during the public comment period following publication of the notice of complete application in the *ENB* on February 28, 2007. Exhibit 2 to Rye's July 16, 2007 Petition for Full Party Status is a copy of those comments.

Department staff argued that Rye's attempt to raise any SEQRA-related issues about the project are barred by the provisions of 6 NYCRR 624.4(c)(6)(ii)(a) (Tr. at 20-23). In response, counsel for Rye conceded that its petition, including the proposed SEQRA-related issues, was prepared prior to the publication of the June 20, 2007 Notice (Tr. at 17). Department staff noted, however, that whether the March 31, 2003 ROD for the brownfield remediation project was exceeded or whether a change in baseline conditions at the site had resulted from the remediation would be a proper scope of inquiry for this permit proceeding (Tr. at 23).

Mr. LaDore did not take a position on the SEQRA topics proposed by Rye (Tr. at 30). Mr. Schaper did not offer any comments about Rye's proposed SEQRA issues. (Tr. at 31).

The two other potential issues raised by Rye in its July 16, 2007 petition for party status were that: (1) Harrison's proposal fails to meet the compatibility tests and weighing standards for a freshwater wetlands permit outlined at 6 NYCRR Part 663; and (2) Harrison did not consider other practicable alternatives as required by Part 663, such as using less fill and grading a smaller area than currently proposed (Rye's July 16, 2007 Petition, Issues V and VI). In particular, Rye contended that Harrison has inadequately considered stormwater impacts to Freshwater Wetland J-3 resulting from the proposal, as well as from the brownfield remediation project at the site, such that a freshwater wetlands permit for the project could not be issued (Tr. at 65-68).

In response, Harrison stated that all technical elements required by 6 NYCRR Part 663 in support of the pending permit application were presented to, and approved by, Department staff during the course of the brownfield remediation project. Harrison contended that it has complied with the wetland criteria found in Part 663 because Staff issued a ROD for the Beaver Swamp Brook site. Furthermore, Harrison maintained that the post-remediation engineering certification compliance documents submitted to Department staff for review and approval in mid-July 2007 establish compliance with the freshwater wetland permit issuance standards (Tr. at 40-42; 46; 50-51; 69-71).

Department staff responded that it has no basis to dispute the practicable alternatives analysis conducted by Harrison for the project as required by 6 NYCRR Part 663 (Tr. at 42-43). However, Department staff maintained that both the compatibility tests and weighing standards of Part 663 need to be reviewed within the context of this proceeding insofar as there may have

been changes to the redevelopment project due to the implementation of the brownfield remediation (Tr. at 42-43; 57-58).

Mr. LaDore had no comments on the remaining two topics proposed by Rye (Tr. at 53). Mr. Schaper offered some general comments concerning the nature of the fill that Harrison used for the remediation of the site and, which has been proposed for Project Home Run (Tr. at 53-57).

B. Michael LaDore's Petition

Mr. LaDore identified himself as a concerned Harrison resident and homeowner who would be directly affected by the project, and has been adversely affected by the brownfield remediation project at the site.⁷ Mr. LaDore proposed two issues for adjudication. According to Mr. LaDore, the substantial flooding that he and others in Harrison experienced in 2007 was caused by Harrison's poor maintenance of Beaver Swamp Brook, and an excess of fill used for the brownfield remediation project. Second, Mr. LaDore argued further that Harrison did not adhere to applicable Federal Emergency Management Agency (FEMA) and the National Flood Insurance Program (NFIP) standards or regulations for the remediation project which, thereby precludes issuance of a freshwater wetlands permit for Project Home Run. Mr. LaDore claimed that Harrison did not prepare and file a FEMA-required certification of no floodplain rise relative to the use of fill for Project Home Run (Tr. at 91).

Harrison responded that the U.S. Army Corps of Engineers issued a permit in June 2003 for the fill work in Freshwater Wetland J-3 associated with the brownfield remediation (Tr. at 91-92). Additionally, Harrison maintained that, as of March 17, 2006, it had a certification from a professional engineer that the activity proposed in the floodplain would not result in any increase in a 100-year flood (Tr. at 92-93). According to Harrison, this was done in conjunction with a program administered by Harrison as part of its own floodplain management

⁷ Mr. LaDore submitted three letters in opposition to the proposal to Department staff during the public comment period following publication of the notice of complete application in the February 28, 2007 *ENB*. His letters, submitted in March and April 2007, include one with photographs depicting Harrison properties flooded by an April 15, 2007 storm event. Mr. LaDore also spoke in opposition to the project at the July 23, 2007 legislative hearing session.

program (Tr. at 93). Harrison disputed Mr. LaDore's contention that FEMA required it to file a "no-rise" certification in connection with either the brownfield remediation or Project Home Run (Tr. at 92-94). Furthermore, Harrison contended that both the type and amount of fill used on the brownfield remediation had been supervised, inspected, and accepted by Department staff (Tr. at 104).

During the foregoing discussion of Mr. LaDore's petition, Department staff reported that, after further consideration, it had an issue for adjudication concerning an item proposed in Rye's petition. According to Staff, based upon its preliminary review of Harrison's post-remediation certification materials submitted in July 2007, Harrison's stormwater analysis for the project would require adjudication (Tr. at 95-96). Specifically, Department staff proposed the following issue for adjudication:

"The issue is whether the functions and benefit of the wetlands under [ECL] Article 24 in terms of the stormwater retention would be adversely affected by the project, as well as whether the baseline conditions of the site today are adequately addressed in the permit documents. A better term for that would be floodplain storage as opposed to stormwater retention" (Tr. at 96, 100; bracketed material supplied).

Rye supported Staff's request (Tr. at 97-98). Department staff did not take any position with respect to the two items proposed in Mr. LaDore's petition (Tr. at 100-101). Mr. Schaper commented on the drainage problems that would likely impact the playing fields proposed by Harrison as a result of the type of fill being used on the project site (Tr. at 103-104).

Mr. LaDore's petition did not identify whether he is seeking either full or *amicus* party status (6 NYCRR 624.5[b][1][iv]). Following his initial presentation on the issues proposed in his petition, Mr. LaDore indicated that, in light of Rye's participation and the items identified in its petition, he preferred to proceed as an *amicus* party (Tr. at 90).

C. Douglas Schaper's Petition

Mr. Schaper described himself as a concerned resident of Harrison. In his petition, Mr. Schaper acknowledged his

tardiness (see 6 NYCRR 624.5[c])⁸, and explained that his ability to prepare a timely petition was hampered because he encountered difficulties in accessing and reviewing documents associated with Project Home Run at the office of the Commissioner of Public Works as provided for in the June 20, 2007 Notice. This was confirmed by Mr. Schaper in greater detail at the issues conference (Tr. at 31-33).

Harrison acknowledged there was some confusion within the office of the Commissioner of Public Works over which documents comprised the application materials when Mr. Schaper appeared at the municipal offices to review the materials on July 16, 2007 (Tr. at 33-34; 36-37). During the issues conference, Mr. Schaper requested additional time to review the application materials and, if necessary, supplement his petition (Tr. at 34-35), and Harrison agreed (Tr. at 37-38). Due to the lack of draft permits for the project and Harrison's submission of additional information to the Department in July 2007, the other issues conference participants reserved their rights to supplement their respective petitions for party status as well (Tr. at 84-85).

In his petition, Mr. Schaper proposed two issues for adjudication. First, Mr. Schaper contended that Harrison's proposal to place more fill in Freshwater Wetland J-3 for Project Home Run would cause drainage problems for the proposed athletic fields and contribute to additional flooding of Beaver Swamp Brook. Second, Mr. Schaper asserted that the design of, and engineering for, Project Home Run are flawed, due to the types of fill proposed and the geology of the site. (Tr. at 107-110.)

At the July 24, 2007 issues conference, Mr. Schaper stated that he would offer testimony, but would not call any other witnesses (Tr. at 106). However, in his letter dated August 20, 2007, Mr. Schaper identified additional witnesses that he would call at the adjudicatory hearing. Generally, they are residents of the Town of Harrison.

Harrison responded that the fill used in conjunction with the brownfield remediation was not impermeable as alleged by Mr. Schaper (Tr. at 112). Additionally, according to Harrison, the freshwater wetlands application includes a grading plan that shows positive drainage from the proposed fields (Tr. at 112).

⁸ The filing deadline, as set forth in the June 20, 2007 Notice, was July 17, 2007. Mr. Schaper's petition was dated July 19, 2007 and was received by the ALJs on July 23, 2007.

Moreover, Harrison maintained that its geotechnical consultant has prepared a plan showing that the project site is feasible for drainage and soil consolidation (Tr. at 112-113).

According to Rye and Department staff, Harrison's geotechnical report was not submitted with the application materials and, therefore, they did not review it (Tr. at 113-114). Department staff was also concerned about the possibility of subsidence of the recreational fields over time following completion of the project, and the potential need for additional fill at the site in the future (Tr. at 115). Harrison stated that Department staff's concerns are fully addressed in the geotechnical report prepared by Harrison's consultant (Tr. at 115).

The other issues conference participants did not comment further about Mr. Schaper's petition for party status (Tr. at 116). Mr. Schaper's petition did not specifically identify whether he is seeking either full or *amicus* party status (see 6 NYCRR 624.5[b][1][iv]). Upon inquiry from the ALJs, Mr. Schaper said that he wants to be a full party (Tr. at 106; 110-112).

III. Additional Information

At the conclusion of the July 24, 2007 issues conference, the ALJs and participants discussed the need to exchange and review additional information. This information included, among other things, Harrison's geotechnical report concerning Project Home Run, and the draft engineering report and certification related to the brownfield remediation. Consequently, the ALJs reserved on the requests for party status. (Tr. at 116-121; 124-127.)

From July 2007 until October 2008, the issues conference participants exchanged numerous documents related to the brownfield remediation and Project Home Run. A list of documents is attached to this ruling as Appendix B.

In a letter dated April 9, 2008, ALJ Sanza advised the issues conference participants that he recused himself from this matter.

With a cover letter dated May 1, 2008, Department staff circulated a consolidated draft permit for Project Home Run to the issues conference participants. Subsequently, in a letter dated July 3, 2008, Michael J. Ryan, P.E., Remedial Bureau Section Chief, from the Department's Division of Environmental

Remediation, advised Commissioner Wasp that Department staff approved the revised draft final engineering report (FER) for the brownfield remediation. In a separate letter dated July 3, 2008 Staff directed Harrison to provide each issues conference participant with a copy of the FER. The issues conference participants and their respective consultants were provided the opportunity to review Staff's draft permit and the FER.

With a scheduling order dated September 19, 2008, I provided the issues conference participants with the opportunity to file a supplemental or modified petition by October 16, 2008. In addition, the September 19, 2008 order advised the participants that the issues conference related to Project Home Run would reconvene at 10:00 a.m. on November 18, 2008 in Harrison.

IV. Issues Conference (November 18, 2008)⁹

The prospective intervenors supplemented their respective petitions. Mr. Schaper filed a letter dated October 12, 2008. Mr. LaDore filed a letter dated October 15, 2008. Mr. Plunkett, on behalf of Rye, filed an Amended/Supplemented Petition for Full Party Status dated October 16, 2008.

As scheduled the issues conference reconvened at 10:00 a.m. on November 18, 2008 at the Harrison Public Library in Harrison, New York. Harrison was represented by Frank Allegretti, Esq., Town Attorney for Harrison. In addition, Mayor/Supervisor Joan Walsh, Harrison Public Works Commissioner Robert Wasp, and consultant, Bhavin Gandhi from Leonard Jackson Associates appeared for Harrison.

For the November 18, 2009 issues conference, there was a substitution of counsel for Staff. Assistant Regional Attorney Carol Blackmann Krebs, Esq. appeared on behalf of Department staff. Other Department staff in attendance included Scott Sheeley (Environmental Analyst, Division of Environmental Permits), Heather Gierloff (Biologist, Division of Fish and Wildlife), Kelli A. Higgins, P.E. (Environmental Engineer, Floodplain Management Section, Division of Water), and Michael J. Ryan, P.E. (Remedial Bureau Section Chief, Division of Environmental Remediation).

⁹ The transcript pages for the November 18, 2008 issues conference session are numbered 129 through 253, inclusive.

Rye appeared and was represented by its corporation counsel Kevin J. Plunkett, Esq. and Kristen Kelley Wilson, Esq. Other individuals in attendance on behalf of Rye were its consultant, Laura Tessier (Tessier Environmental Consulting). Michael LaDore and Douglas Schaper appeared and represented themselves.

A. Department Staff

1. Consolidated Draft Permit

During the November 18, 2008 issues conference, Department staff's draft permit was marked for identification as Exhibit 6 (Tr. at 137). The draft permit includes conditions related to the water quality certification (Section 401 of the federal Clean Water Act, 6 NYCRR 608.9), and the activities regulated pursuant to ECL Article 24 (Freshwater Wetlands Act). Special Condition No. 2 (Exhibit 6, p. 4 of 5), would require Harrison to comply with all applicable requirements related to the State Pollutant Discharge Elimination System (SPDES) General Permit for stormwater discharges from construction activities (GP-0-08-002). With respect to the use of pesticides, Ms. Gierloff, the Staff Biologist, explained that Harrison would develop a plan for Staff's review to control phragmites. After Staff approves the plan, Ms. Gierloff said that Harrison may apply an herbicide consistent with the approved plan. (Tr. at 137-139; Exhibit 6, Special Condition No. 7, p. 4 of 5.) According to Department staff, the draft permit is consistent with all applicable regulatory standards and requirements (Tr. at 140).

Harrison reviewed Staff's draft permit, and accepted the terms and conditions of the draft permit (Tr. at 143). Consequently, there are no disputes between Department staff and Harrison over a substantial term or condition of the draft permit (see 6 NYCRR 624.4[c][1][i]).

In its October 16, 2008 Amended/Supplemental Petition (at 24-25 [Issue IX]), Rye outlined its concerns about the draft permit (Tr. at 143-144). First, Rye noted that Harrison's June 23, 2004 negative declaration characterized Project Home Run as an unlisted action (see 6 NYCRR 617.2[ak]), but the draft permit characterizes it as a Type I action (see 6 NYCRR 617.2[ai], 617.4[b]). This discrepancy is discussed further below. Second, Rye observed that the draft permit does not identify a specific amount of fill that would be permitted in Freshwater Wetland J-3 and the adjacent area. Rye asserted that if Harrison needs more fill, then the Department should either modify the permit (if it

is subsequently issued), or require Harrison to file a new permit application.

Third, Rye asserted that Harrison has not submitted any freshwater wetland monitoring reports about the success of the wetland mitigation implemented over the past two years. Rye recommended that Staff require Harrison to provide a report about the success of the wetland mitigation plan as a prerequisite to receiving the requested permit because the outcome of the report may require Staff to modify the terms and conditions of the draft permit. Finally, Rye argued that Harrison should be required to verify the accuracy of the 2006 maps that have served as the base plans for the permit application.

In addition to the comments in the October 16, 2008 Amended/Supplemented Petition, Rye also offered a report at the November 18, 2008 issues conference that Ms. Tessier prepared entitled, *Justification to Deny NYS DEC Freshwater Wetland Permit Application No. 3-5528-00104/00001*. Ms. Tessier's comments about the draft permit are identified as Exhibit 7, and the issues conference participants were provided the opportunity to review and respond to these comments. (Tr. at 146-148, 246-248.)

Mr. LaDore opposed the issuance of the draft permit (Tr. at 170). Mr. Schaper expressed concern about the lack of attention to the fill that would be brought to the site, and echoed the concerns expressed by the other prospective intervenors (Tr. at 170-171).

2. Floodplain Review

During the July 24, 2007 issues conference session, Department staff had identified an issue for adjudication concerning stormwater retention and flood assessment that Harrison had undertaken up to that date (Tr. at 95-96). According to Staff, one of the benefits associated with Freshwater Wetland J-3 is flood protection and storage (Tr. at 218). At the November 18, 2008 issues conference session, Department staff stated that Harrison had adequately addressed these concerns in subsequent submissions (Tr. at 140-141). The relevant submissions are listed in Appendix B to this ruling, and include the Leonard Jackson Associates October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008. Prior to the November 18, 2008 issues conference, Ms. Krebs circulated a letter dated April 8, 2008 on behalf of Department staff (Tr. at 157). According to the April 8, 2008 letter, Department staff concluded

that the remediation project had no significant impact on flooding upon review of the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates January 29, 2008 letter (also see Tr. at 142, 156, 204, 218).

Rye, however, has concerns about the Leonard Jackson Associates October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008. The City's engineering consultant, Kevin Loyst, P.E. from the FMP Group (Ronkonkoma, New York), prepared a letter dated July 31, 2008, and requested additional information from Leonard Jackson Associates (Tr. at 149-151). During the issues conference, counsel for Rye agreed to provide copies of Mr. Loyst's July 31, 2008 letter to the issues conference participants. With an e-mail dated November 19, 2008, Ms. Wilson distributed an electronic copy of Mr. Loyst's July 31, 2008 letter. I stated during the issues conference that the two documents (*i.e.*, Mr. Loyst's July 31, 2008 letter and Rye's August 8, 2008 cover letter) would be marked collectively for identification as Exhibit 9 (Tr. pp. 246-247).

On behalf of Harrison, Mr. Wasp said that Leonard Jackson Associates had prepared a response to Mr. Loyst's July 31, 2008 letter, and offered copies at the issues conference (Tr. at 151-152, 155). I marked the Leonard Jackson Associates response for identification as Exhibit 8 (Tr. at 166, 246, 247). This document is described as the November 17, 2008 Leonard Jackson Associates report (Tr. at 184). Department staff, however, was not aware of the inquiry made by Rye (Tr. at 156). At the conclusion of the November 18, 2008 issues conference, the participants were provided the opportunity to review and comment about Exhibits 8 and 9 (Tr. at 246-248).

At the November 18, 2008 issues conference, Mr. Schaper asserted there are significant flaws in the computer models used to analyze the effects of storm events, and that the flaws and limitations of these models should be taken into account (Tr. at 163-164).

According to Mr. LaDore, Harrison has not complied with federal requirements concerning floodplain management. He argued that Harrison must obtain a "no-rise" certificate for development in a special flood hazard area (Tr. at 168). Staff contended, however, that Mr. LaDore's references to federal requirements are beyond the scope of this proceeding (Tr. at 171-173). Mr. LaDore asserted further that federal funds were used to finance the remediation, which would therefore require compliance with

federal requirements for floodplain development (Tr. at 172). Department staff stated that the "no-adverse impact" concept is part of a model local floodplain development permit law, and not a DEC regulation (Tr. at 172-173).

Rye contended that the authorization for the water quality certification stems from the federal Clean Water Act, which may require Staff to determine whether Project Home Run complies with federal requirements related to floodplain development (Tr. at 175-176). To support this contention, Mr. Plunkett noted that the Special Conditions outlined on pages 4 of 5 and 5 of 5 of the draft permit (Exhibit 6) refer to § 401 of the federal Clean Water Act (Tr. at 179). According to Department staff, the water quality certification is a State, rather than a federal, certification. Staff also noted that the SPDES program is a federally delegated program, and the Department implements the program pursuant to a State statute and regulations duly promulgated by the Department, but not the federal Clean Water Act. (Tr. at 176-177.)

At the November 18, 2008 issues conference, Ms. Krebs noted, on behalf of Department staff, that FEMA amended the flood insurance rate map in September 2007. Consequently, the analysis presented in the Leonard Jackson Report concerning the floodway and floodplain at the site would need to be revisited to reflect the September 2007 changes to the flood insurance rate map. (Tr. pp. 140-141.) Harrison agreed to provide revised information responsive to the change in an expedited manner (Tr. p. 142). With a cover letter dated December 17, 2008, Mr. Gandhi, on behalf of Leonard Jackson Associates, submitted the *Beaver Swamp Brook Floodway Analysis* dated December 16, 2008. In a scheduling memorandum, I advised the issues conference participants that the December 16, 2008 Floodway Analysis would be identified as Exhibit 10.

B. Michael LaDore's Supplemented Petition

In his October 15, 2008 letter, which supplements his original petition dated June 29, 2007, Mr. LaDore restated his request for amicus status. Mr. LaDore identified six issues in his October 15, 2008 supplemental petition. First, Mr. LaDore noted that Harrison filed a notice of intent on April 11, 2002 as the SEQRA lead agency. According to Mr. LaDore, Harrison made misrepresentations in that notice of intent, which consequently raised several critical issues associated with bringing additional fill on the site as proposed in the pending permit application.

Second, Mr. LaDore contended that Harrison did not notify FEMA that over 30,000 cubic yards of fill and top soil were brought to the site as part of the brownfield remediation. According to Mr. LaDore, the remediation was limited to removing two feet of contaminated material from the site, which would have totaled only 16,000 cubic yards. Mr. LaDore argued that placing additional fill on the site would require Harrison to file and obtain a "no-rise" certification, and Harrison has not yet done so. During the November 18, 2008 issues conference, Mr. LaDore stated that he had raised this issue in July 2007 (Tr. at 187).

Third, Mr. LaDore explained in his October 15, 2008 supplemental petition that he filed a request with Harrison pursuant to the Freedom of Information Law (FOIL) about whether Harrison prepared an EIS. According to Mr. LaDore, Harrison did not file an EIS, which he asserted is a violation of Executive Order 11988 (Floodplain Management [42 FR 26941; 3 CFR 1977]). Fourth, Mr. LaDore referred to Harrison's July 2003 SEQRA determination, which states, among other things, that the remediation project would not create any new flooding impacts, and that the post-remediation project elevations would not exceed the pre-remediation project evaluations. Mr. LaDore argued that because more than the expected amount of fill had been brought to the site during the remediation, the pre-remediation project elevations were exceeded.

As the fifth proposed issue, Mr. LaDore referred to Harrison's resolution dated June 23, 2004, which states, among other things, that a viable mitigation program was developed to avoid flooding impacts. According to Mr. LaDore, Harrison has not implemented the mitigation program, and the lack of any implemented mitigation program has contributed to flooding. Finally, Mr. LaDore argued in his October 15, 2008 supplemental petition that the Leonard Jackson Associates reports are internally inconsistent, and should be reviewed carefully.

Rye joined in asserting that the issues proposed in Mr. LaDore's October 15, 2008 petition are issues for adjudication (Tr. at 188). Harrison argued, however, that Mr. LaDore's October 15, 2008 petition does not propose any issues for adjudication (Tr. at 188).

In addressing Mr. LaDore's proposed issues for adjudication, Department staff made a distinction between the "floodway" and the "floodplain." According to Ms. Higgins, placing fill in the floodplain is "an allowable activity" (Tr. at 190). Ms. Higgins stated that prior to September 2007, the proposed location for

the fill associated with the brownfield remediation was in the floodplain, but outside the floodway. Under these circumstances, Ms. Higgins stated that fill could be placed in the 100-year floodplain that would displace (or elevate) the floodplain up to 12 inches. (Tr. at 190-191.)

Ms. Higgins noted, however, that in the vicinity of the site, FEMA amended the federal flood insurance rate map in September 2007. As a result, areas of the site that would be filled in conjunction with Project Home Run, and which are now located in the floodway, would require a certificate. (Tr. at 191-192.) Ms. Higgins explained that Harrison would need to comply with its local law concerning flood damage prevention (Tr. at 192). Ms. Higgins explained further that NFIP is a federal program that is administered by localities. To participate, localities must comply with FEMA guidelines, and in return, the localities may purchase flood insurance from the federal government. (Tr. at 192.) With reference to General Condition No. 3 on page 3 of 5 of the draft permit (Exhibit 6), Staff noted that Harrison would be required to obtain any other applicable approval from the US Army Corps of Engineers and the locality, for example (Tr. at 194).

C. Douglas Schaper's Supplemented Petition

In his October 12, 2008 letter, which supplements his July 19, 2007 petition for full party status (Tr. at 199), Mr. Schaper observed that adverse environmental impacts have resulted from the brownfield remediation, and contended that additional adverse impacts would result if the Commissioner approved a permit for Project Home Run. Given the adverse impacts associated with the brownfield remediation, Mr. Schaper is skeptical of the studies undertaken by Harrison's consulting engineer. Consequently, Mr. Schaper objected to the placement of any more fill on the site.

Mr. Schaper posited whether the scope and purpose of Project Home Run would be different if Department staff and Harrison officials owned property that was damaged during the April 2007 flooding. Mr. Schaper noted the inequities associated with those who will continue to be adversely impacted by the project, and those who would benefit from it. According to Mr. Schaper, the only way to serve the public interest would be to restore the wetlands to their original state, as best as possible.

Mr. LaDore and Rye did not comment about Mr. Schaper's October 12, 2008 letter (Tr. at 198). Harrison argued that Mr. Schaper did not identify any issues for adjudication (Tr. at

198). Department staff did not comment about Mr. Schaper's October 12, 2008 letter (Tr. at 198).

D. The City of Rye's Amended/Supplemented Petition

In the October 16, 2008 Amended/Supplemented Petition, Rye reiterated the issues initially proposed in its July 16, 2007 petition, and beginning on page 23 asserted additional issues for adjudication (Tr. at 200). At the November 18, 2008 issues conference, Mr. Plunkett explained that, with respect to the initial set of proposed issues, the brownfield remediation is fundamental to the redevelopment project (*i.e.*, Project Home Run). According to Mr. Plunkett, the remediation project that Harrison actually implemented has deviated drastically from the original scope, and from the approved ROD. Rye asserted that the change in the original scope of the remediation was substantial, and argued that the focus of the adjudicatory hearing should be to address the deviations from the original brownfield remediation in order to correct significant adverse environmental impacts that have resulted. (Tr. at 201-202.)

1. Proposed Issues I through VI, inclusive

With respect to the first set of proposed issues asserted by Rye (October 16, 2008 Amended/Supplemented Petition at 8-16), Department staff noted that the proposed issues relate to the environmental reviews undertaken by Harrison and the resulting negative declarations. In Staff's view, Harrison complied with all applicable SEQRA requirements. (Tr. at 205.) Nevertheless, there was a lengthy discussion at the November 18, 2008 issues conference about this topic and the issues proposed by Rye related to Harrison's SEQRA review of Project Home Run.

On behalf of Department staff, Mr. Ryan explained the steps associated with developing a ROD and implementing it. In general, a contaminated site is identified for remediation, and on-site sampling is undertaken to estimate the extent of the contamination. Based on the estimated extent of the contamination, the ROD is developed, which Mr. Ryan characterized as an outline. According to Mr. Ryan, the actual area of contamination is often underestimated. As a result, the scope of the excavation will change. The area of the excavation may increase, the depth of the excavation may increase, or both the area and the depth of the excavation may increase. Depending on the net increase, Mr. Ryan said that Department staff would evaluate whether to modify the ROD. (Tr. at 207.)

Mr. Ryan stated that Harrison complied with the central elements of the March 31, 2003 ROD with respect to the brownfield remediation. In addition, Mr. Ryan stated that the Department has developed guidelines to modify a ROD, and that, in Staff's view, a modification of the ROD for the Harrison site was not necessary. Mr. Ryan explained that additional backfill for the brownfield remediation was necessary because the excavation of the site expanded laterally. According to Mr. Ryan, the ROD contemplated a one-to-one replacement of excavated contaminated material with clean backfill material in addition to two feet of cover soil. As a result, more fill material was brought to the site than originally contemplated in the ROD because more than expected contaminated material had been removed. (Tr. at 208.)

Concerning Rye's second proposed issue, Department staff said that the draft permit would require the appropriate wetland mitigation sequencing pursuant to the requirement at 6 NYCRR 663.5(g)(3). Staff maintained there is no statutory or regulatory requirement for a one-to-one replacement of lost wetlands. Ms. Gierloff acknowledged that the Department's guidance recommends replacement. Ms. Gierloff noted further, however, that the guidance, which dates from 1997, is considered "old." Ms. Gierloff explained that Department staff has found that created wetlands do not succeed. Rather, the result is a disturbed area adjacent to wetlands that may have once been good upland habitat that, as a result of the mitigation, has become a poor quality wetland with invasive covertypes. The current focus, which is based on federal guidelines, is to remove invasive plants such as phragmites from existing wetlands, and reintroduce native plants, thereby diversifying the covertypes. Staff has found that this approach is more successful than creating wetlands from upland areas. (Tr. at 209-212.)

If Department staff is no longer going to rely on the 1997 guidance that recommends replacing lost wetlands, then Rye recommended that the guidance document should be removed from the Department's web site (Tr. at 233). Ms. Tessier noted, nonetheless, that the preferred order for wetlands mitigation is restoration, creation, and then enhancement, and asserted that wetlands mitigation should be linked to the established benefits and functions of the wetlands. But for flood protection, Ms. Tessier noted further that the other benefits and functions of Freshwater Wetlands J-3 are unknown. Based on her experience, Ms. Tessier stated that Freshwater Wetlands J-3 is unique due to its complex soil content, which has a capacity to improve water quality by removing contaminants. (Tr. at 233-234.)

With regard to the weighing standards (see 6 NYCRR 663.5[e][2]), Staff has considered the objective of Project Home Run, which would benefit the public in a number of ways. First, hazardous materials have been removed from the wetlands as part of the remediation. Staff also asserted that the public health of the community would benefit from the activities associated with using the sports fields on the site. (Tr. at 213-216.)

Rye acknowledged there is a significant benefit associated with removing the hazardous materials from the site (Tr. at 238). Ms. Tessier argued that the SEQRA documents related to Project Home Run do not include any alternatives analysis (Tr. at 237-238). Ms. Tessier noted further that the project includes the installation of vertical drains in the ballfields and asserted that these drains will essentially de-water portions of the site. Subsidence will result, and additional fill may be necessary. According to Ms. Tessier, these potential adverse impacts have not been considered. (Tr. at 238-239.)

The City of Rye's proposed third and fourth issues relate to the review required by SEQRA (October 16, 2008 Amended/Supplemented Petition at 12-13). When, as here, municipalities request remedial grant funding, Mr. Ryan, on behalf of Department staff, explained that they must comply with SEQRA.¹⁰ With respect to the brownfield remediation, Mr. Ryan stated that Harrison had complied with SEQRA and issued a negative declaration on July 15, 2003. Mr. Ryan noted that the July 15, 2003 negative declaration was limited to the brownfield remediation. (Tr. at 219-220.)

With respect to Project Home Run, Mr. Sheeley stated that Harrison issued a SEQRA negative declaration on June 23, 2004. According to Mr. Sheeley, the action considered in the June 23, 2004 negative declaration was the development of a new municipal park that would include a youth baseball/softball facility, a youth soccer field, a multipurpose playground, an interpretive nature walkway through open space near Beaver Swamp Brook, and off-street parking with related infrastructure improvements. Mr. Sheeley said that the Harrison Town Board was the SEQRA lead agency for this unlisted action. (Tr. at 223-224.)

Department staff noted that for various reasons, the lead agency either may amend a negative declaration (see 6 NYCRR

¹⁰ Effective September 14, 2006, compliance with SEQRA is no longer required pursuant to 6 NYCRR 375-4.11 (Tr. at 220-221).

617.7[e]), or must rescind it (see 6 NYCRR 617.7[f]). Staff noted further that where, as here, a coordinated review has taken place, the involved agencies, such as Department staff in this case, are bound by the lead agency's SEQRA determination (see 6 NYCRR 617.6[b][3][iii]). Department staff explained that, at Staff's request, Harrison provided additional information about stormwater management and potential flooding impacts. During the November 18, 2008 issues conference, Staff suggested or proposed (Tr. at 226-227) that Harrison may want to amend the existing negative declaration by incorporating the October 23, 2007 Hydrologic and Hydraulic Analysis and the January 29, 2008 Leonard Jackson Associates letter concerning stormwater management and potential flooding impacts into the negative declaration. Department staff stated that after reviewing the October 23, 2007 Hydrologic and Hydraulic Analysis and the January 29, 2008 Leonard Jackson Associates letter, Staff concluded there would be no adverse impacts. Under these circumstances, Staff contended that amending the June 23, 2004 negative declaration would be more appropriate than rescinding it as argued by Rye (October 16, 2008 Amended/Supplemented Petition at 12-13). (Tr. at 224-225.)

Rye contended that Harrison may not have conducted a coordinated review (Tr. at 227-228). Department staff understands, however, that Harrison did conduct a coordinated review (Tr. at 227). Mr. Sheeley acknowledged that if Harrison had not conducted a coordinated review when one was required, then the lack of coordination would be a procedural defect that could be corrected by subsequently undertaking a coordinated review (Tr. at 228).

Rye also observed that the draft permit (Exhibit 6) characterizes Project Home Run as a Type I action, but noted that the negative declaration characterizes Project Home Run as an unlisted action. Ms. Tessier inquired whether the discrepancy in how the action is characterized would impact the validity of the current SEQRA determination (Tr. at 228). Mr. Sheeley acknowledged the discrepancy (Tr. at 228), and offered the following explanation on behalf of Department staff. First, Mr. Sheeley said that the characterization could be a typographical error. He explained that Staff uses a template for developing draft permits, and the action that was the subject of the prior draft permit may have been a Type I action. When Staff subsequently prepared the draft permit for Project Home Run, Mr. Sheeley suggested that this portion of the draft permit template may not have been changed. Alternatively, Mr. Sheeley said that it may be appropriate to characterize Project Home Run as a Type

I action as provided by 6 NYCRR 617.4(b)(6)(i) and 617.4(b)(10). (Tr. at 229.)

Section 617.4(b)(6)(i) states that an action would be Type I when the project or action includes the physical alteration of 10 acres. Section 617.4(b)(10) states that an action may be Type I when any unlisted action exceeds 25% of any threshold in 6 NYCRR 617.4(b) that would occur wholly or partially within or substantially contiguous to any publically owned or operated parkland, recreation area, or designated open space. With respect to Project Home Run, Mr. Sheeley explained that the threshold for disturbance of the project site, which would be used as a park next to an open space area, would be 2.5 acres (*i.e.*, 25% of 10 acres is 2.5 acres). Mr. Sheeley noted that the environmental review for a Type I action must be coordinated, and a long-form environmental assessment form (EAF) must be prepared. (Tr. at 229.)

Referring to 6 NYCRR 624.4(c)(6)(ii), Harrison argued that the SEQRA-related issues proposed by Rye are beyond scope of this proceeding (Tr. at 23-240). Mr. LaDore did not offer any additional comments related to the first set of issues proposed by Rye, but he supported Rye's petition and all the issues proposed therein (Tr. at 240). Mr. Schaper also supports Rye's petition (Tr. at 240).

2. Proposed Issues VII, VIII and X¹¹

With reference to Staff's April 8, 2008 letter, Rye argued that Harrison must comply with Chapter 146 of the Code of the Town of Harrison entitled, *Flood Damage Prevention* (see Rye's October 16, 2008 Amended/Supplemented Petition at 23). With respect to Project Home Run, Rye asserted that compliance with this local ordinance is necessary, and would be required by Department staff's draft permit (Exhibit 6, see General Condition No. 3 on page 3 of 5). In Rye's October 16, 2008 Amended/Supplemented Petition (at 23), this is identified as proposed Issue VII.

Department staff did not have any comments with respect to the City's proposed Issue VII (Tr. at 243). Staff had previously

¹¹ In its October 16, 2008 Amended/Supplemental Petition (at 24-25), Rye provides comments about the draft permit (Exhibit 6) as proposed issue IX. Additional comments about the draft permit are discussed below in § V(A).

stated during the November 18, 2008 issues conference that Harrison would have to comply with the local ordinance (Tr. at 141, 156).

If Harrison obtains the requested permit and if the permit is conditioned similarly to the draft permit (Exhibit 6), Harrison stated that it would review Chapter 146 and, as appropriate, comply with it. Harrison argued that Rye's proposed Issue VII is neither a substantive and significant issue for adjudication, nor a bar to permit issuance (Tr. at 244).

As Issue VIII, Rye asserted that the Leonard Jackson Associates report may be inadequate (Rye's October 16, 2008 Amended/Supplemented Petition at 23). The Leonard Jackson Associates report referenced in Rye's petition are identified as the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates January 29, 2008 letter. According to Rye, it is not clear from the calculations that the post-ROD drainage projects were included in the analysis set forth in the October 23, 2007 Hydrologic and Hydraulic Analysis. Without this information, Rye contended that the accuracy and reliability of the October 23, 2007 Hydrologic and Hydraulic Analysis cannot be determined.

At the November 18, 2008 issues conference, Ms. Wilson, on behalf of the City of Rye, explained that Rye's engineering consultants had requested clarification from Leonard Jackson Associates in a letter dated July 31, 2008 (Tr. at 242). At the November 18, 2008 issues conference, I reserved Exhibit 9 for Rye's request for additional information from Leonard Jackson Associates (Tr. at 247). Depending on the response from Leonard Jackson Associates, Ms. Wilson stated that Rye may want to re-frame the issue (Tr. at 242). As previously mentioned, Mr. Wasp stated that he had a response from Leonard Jackson Associates, which he distributed at the November 18, 2008 issues conference (Tr. at 152). I marked that response as Exhibit 8 (Tr. at 166, 243, 246).

With respect to Rye's proposed Issue VIII, Department staff requested an opportunity to review and comment about what are identified in the previous paragraph as Exhibits 8 and 9 (Tr. at 243-244).

In its October 16, 2008 Amended/Supplemented Petition (at 25 [Issue X]), Rye asserted there is an issue for adjudication concerning the substantial and significant deviations from the March 31, 2003 ROD. To support this assertions, Rye referred to

the two reports attached to the October 16, 2006 Amended/Supplemented Petition, which are identified as Exhibits 1 and 2. Exhibit 1 to the October 16, 2008 Amended/Supplemented Petition is a report prepared by Tessier Environmental Consultants and is entitled, *Final Engineering Remediation Report (FER) Deviations from the March 2003 Environmental Restoration Record of Decision (ROD)*. The following topics are discussed in the report: (1) site excavation and fill; (2) addition of significant projects unrelated to the remediation; and (3) wetland and brook restoration. Exhibit 2 to the October 16, 2008 Amended/Supplemented Petition is a letter dated October 9, 2008 from the FMP Group, Rye's consulting engineers. The body of the October 9, 2008 letter compares and contrasts the brownfield remediation requirements outlined in the ROD and the actual work undertaken at the site, which is described in the FER. With respect to this proposed issue, Rye argued that deviations from the March 31, 2003 ROD should be considered and evaluated prior to the Commissioner making any determinations about the pending freshwater wetlands permit (Tr. at 242).

With respect to Rye's proposed Issue X, Department staff referred to the explanation provided by Mr. Ryan (Tr. at 244), which is summarized above.

Mr. LaDore and Mr. Schaper did not comment further about the City's proposed Issues VII, VIII and X or the discussion related to these proposed issues (Tr. at 245).

V. Post-Issues Conference Filings

At the November 18, 2008 issues conference, the participants distributed several documents, or were asked to provide them shortly after the issues conference. These documents were identified as follows. Rye filed a report by Ms. Tessier entitled, *Justification to Deny NYS Freshwater Wetland Permit Application No. 3-5528-00104/00001*, which comments about the draft permit. This report by Ms. Tessier is identified as Exhibit 7.

In a letter dated July 31, 2008, Rye's consulting engineer, Kevin F. Loyst, P.E. from the FPM Group, Ltd., requested clarification from Leonard Jackson Associates, Harrison's consulting engineers, concerning the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008. With an e-mail message dated November 19, 2008, Ms. Wilson circulated the July 31, 2008 FPM Group

letter to the issues conference participants. The July 31, 2008 FPM Group letter is identified as Exhibit 9.

On behalf of Harrison, Leonard Jackson Associates prepared a response to the July 31, 2008 FPM Group letter and provided the issues conference participants with copies during the November 18, 2008 issues conference. The Leonard Jackson Associates response is dated November 17, 2008, and is identified as Exhibit 8.

During the November 18, 2008 issues conference, Staff explained how FEMA had modified the flood insurance rate map in the vicinity of the project site effective September 2007, which necessitated a response and revision from Harrison. With a cover letter dated December 17, 2008 by Bhavin Gandhi from Leonard Jackson Associates, Harrison filed a report entitled, *Beaver Swamp Brook Floodway Analysis* dated December 16, 2008. This report is identified as Exhibit 10.

Consistent with the discussion at the November 18, 2008 issues conference, I issued a scheduling memorandum dated December 24, 2008, which provided the parties with an opportunity to comment about Exhibits 7 through 10, inclusive, and to respond to any comments related to these exhibits. Timely responses were received from the following issues conference participants. I received a letter dated January 19, 2009, sent certified mail, return receipt requested, from Mr. Schaper. Mr. Schaper's comments relate generally to Harrison's *Beaver Swamp Brook Floodway Analysis* dated December 16, 2008 (Exhibit 10). With a cover letter dated January 20, 2009, I received comments from Rye's consulting engineers (FPM Group) concerning Harrison's *Beaver Swamp Brook Floodway Analysis* dated December 16, 2008. With a cover letter also dated January 20, 2009, I received comments from Department staff. Staff responded to Ms. Tessier's report concerning the draft permit (Exhibit 7), and to Harrison's *Beaver Swamp Brook Floodway Analysis* dated December 16, 2008.

At Department staff's request, the time to file a response was extended. Mr. LaDore filed a letter dated February 16, 2009. Mr. Schaper filed a letter dated February 25, 2009. With a cover letter dated February 26, 2009, Ms. Krebs, on behalf of Department staff, filed a memorandum dated February 26, 2009 from Kelli Higgins-Roche (formerly Kelli Higgins), from the Department's Division of Water, Floodplain Management Section. With a cover letter dated February 26, 2009, Ms. Wilson, on behalf of Rye, filed a response prepared by Ms. Tessier entitled, *Response to January 20, 2009 DEC Staff Statement*. Because Mr.

LaDore filed his February 16, 2009 letter before the time to file responses was extended, Mr. LaDore supplemented his February 16, 2009 letter with additional comments in a letter dated February 27, 2009. With leave, Department staff filed a clarification letter dated March 3, 2009. Finally, Commissioner Wasp, on behalf of Harrison, filed a letter dated March 9, 2009 concerning compliance with Local Law Chapter 146. These filings are discussed below.

A. The Tessier Report entitled, *Justification to Deny NYS Freshwater Wetland Permit Application No. 3-5528-00104/00001* (Exhibit 7)

The Tessier Report (Exhibit 7) provides detailed comments about the brownfield remediation project and the redevelopment project. The report incorporates by reference Exhibit 1 to Rye's October 16, 2008 Amended/Supplemented Petition. The report is divided into seven sections and each is briefly summarized below.

In the first section, the report states that no baseline assessment of Freshwater Wetland J-3 was undertaken prior to the brownfield remediation. The report notes that an assessment was necessary for at least two reasons. First, the redevelopment of the site contemplated construction at the site. Second, State guidelines concerning compensatory mitigation require a functional assessment. The functional assessment should have included, among other things, a wetland delineation, a survey of all plant species, a plan to evaluate compensatory mitigation, vegetative cover maps for each growing season, surface and groundwater monitoring plans, and soil sampling. According to the report, much of this information would have been required by the US Army Corps of Engineers nationwide permit (2003-00171-YW). Without any of this information, the report concludes that it is impossible to verify in-kind wetland replacement and no-net-loss.

The report states, in the second section, that all impacts to the wetland from the remediation were not considered. The report asserts that unanticipated impacts resulted from the brownfield remediation, and references the FER to support this assertion. The scope of the original remediation was expanded to include additional projects such as the Glen Oaks and Oakland Avenue construction, as well as expanded site excavation and filling. According to the report, the FER does not document the status of the freshwater wetlands, the adjacent area, and mitigation areas subsequent to the completion of the remediation.

The third section of the report discusses how the environmental impacts associated with the redevelopment project (*i.e.*, Project Home Run) were considered. Based on the many changes related to the remediation, the report contends that all expected environmental impacts associated with Project Home Run were not identified. Consequently, all potential adverse impacts were not adequately considered during the SEQRA review. As a result, the report concludes that the permit application materials are not complete.

In the fourth section, the report argues that Harrison has not demonstrated that it complied with the special conditions of the federal nationwide permit. The report states that it is unknown whether Harrison advised the Corps of Engineers about the expansion, and if so, whether the Corps of Engineers authorized the changes. In addition, it is not known whether Harrison prepared the required annual reports on the status of the mitigation activities. According to the report, the Corps of Engineers permit requires a conservation easement or deed restriction on the wetland mitigation, such as the newly constructed wetland pond. Consequently, the report argues that the wetland pond should not be filled in as part of the redevelopment project. Finally, the report notes that the Corps of Engineers permit has expired and, therefore, does not cover any aspects of Project Home Run.

The fifth section of the report discusses the wetlands permit issuance standards outlined at 6 NYCRR Part 663. The report notes that Freshwater Wetland J-3 lies within two jurisdictions (*i.e.*, Harrison, and Rye), and argues that Department staff should have provided Rye with a copy of the permit application materials, pursuant to 6 NYCRR Part 663, as soon as Harrison filed the permit application, but did not. According to the report, the brownfield remediation was not subject to the wetland permitting process, but included regulated activities in the freshwater wetlands and the adjacent area, which by operation of the regulations (*see* 6 NYCRR 663.4[d][*Activities Chart*], Items 17, 19, 20, 21, 25, 28, 39 and 43), have been characterized as either incompatible or usually incompatible. Given these circumstances, the report argues that the compatibility and weighing standards outlined in 6 NYCRR 663.5(e) would apply to the redevelopment project, and that Harrison has not provided the required analysis. The report concludes that Harrison has not met the standards for permit issuance. The report concludes further that neither the remediation project nor the proposed redevelopment project would

be consistent with the guidelines concerning compensatory mitigation.

According to the sixth section of the report, the remediation project resulted in a net loss of freshwater wetlands, and additional wetlands would be subsequently lost as part of the redevelopment project. This section of the report also notes that a substantial portion of the regulated adjacent area would be filled as part of the redevelopment project.

The seventh section of the report outlines a number of deficiencies related to the environmental review required by SEQRA. According to the report, not all potential impacts have been considered. In addition, the brownfield remediation and the redevelopment project were inappropriately characterized as unlisted actions. The report argues that both actions should have been characterized as Type I. As a result, the report recommends that Harrison, as the lead agency, should rescind the negative declarations, as provided for by 6 NYCRR 617.7(f).

1. Department staff's Comments and Reply

As previously noted, Staff submitted detailed comments about the report (Exhibit 7) with a cover letter dated January 20, 2009. Department staff's comments are divided into two parts. The first is a statement, and the second part responds to each point of the Tessier report. According to the statement portion of Staff's comments, Staff delineated the freshwater wetland boundary in 2002 before the brownfield remediation project commenced, and again in 2006 after its completion. After comparing these two delineations, Staff concludes there is approximately 0.30 acres of additional wetland since the completion of the remediation. Of that amount, about 0.18 acres relates to changes in wetland delineation methodologies and the development of a small pond on the northwestern portion of the site. The remaining net gain (*i.e.*, 0.12 acres), is from the development of new wetlands in areas that were originally adjacent area.

With respect to the redevelopment project, Staff estimates that about 0.39 acres of freshwater wetland would be filled, based upon a review of the November 2006 regrading plan. A 0.18 acre portion of the filled area would be the recently created small pond. According to Staff, the pond does not have an inlet or outlet, and is not directly connected to the main portion of Freshwater Wetland J-3. Staff states further that although Harrison proposed creating new wetlands, Staff recommended that

Harrison develop a planting plan to improve the wetland adjacent area. Department staff explains that implementing the proposed planting plan would benefit the freshwater wetlands by filtering runoff from the athletic fields and roadway before entering the wetlands.

Department staff acknowledges that the weighing standards apply to the redevelopment project because Class II freshwater wetlands would be filled. Staff maintains that the proposed redevelopment would meet the weighing standards. For example, Project Home Run would be compatible with public health and welfare, according to Staff. Prior to the brownfield remediation, the site was contaminated with debris and hazardous materials, and contaminants have been removed. Staff notes that the proposed use would not reintroduce the contaminants that had been removed. Staff asserts that the use of a registered pesticide by a certified applicator in strict accordance with EPA and New York State pesticide label directions would be compatible with the public health and welfare.

Staff contends that Project Home Run, as presently designed, is the only practicable alternative to accomplish Harrison's objectives to provide additional athletic fields in the Town. According to Staff, there is no practicable alternative on a site that is not wetland or adjacent area. To support these determinations, Staff refers to the record of the July 23, 2007 legislative hearing. In addition, Department staff contends Project Home Run satisfies a pressing economic or social need that outweighs the loss of the wetlands.

According to Staff, the proposed redevelopment project would not have any adverse impacts to flooding. Staff notes that Harrison provided a full assessment of the floodplain impacts of the remediation project and the proposed redevelopment project. Staff has reviewed this assessment, and concurs with the findings.

With respect to SEQRA, Staff explains that it has re-evaluated the position that it took at the November 18, 2008 issues conference. Staff's current position is that it is not clear whether the site could be considered a public "recreation area" or "designated open space" at this time. Presently, the site is gated, and access to it is restricted pending completion of the proposed project. Department staff concludes, therefore, that the action may be considered an unlisted one, as originally characterized by Harrison. Staff will, consequently, defer to Harrison's classification of the action. Staff explains further

that Harrison mailed a SEQRA lead agency coordination letter dated April 11, 2002, and that Staff has a copy of the April 11, 2002 letter date-stamped received on December 20, 2006. According to Staff, this copy of Harrison's letter was sent to the Region 3 Staff in response to a notice of incomplete application concerning the freshwater wetlands application. It is likely that the original was sent to Staff who were reviewing the remediation proposal. Staff concludes there was no procedural flaw in the Town's SEQRA review of Project Home Run.

In addition to the statement summarized above, Staff provided a lengthy, detailed response to the Tessier Report. Generally in its response, Staff distinguishes the remediation project from the redevelopment project, and maintains that the remediation project was not subject to the permitting requirements of ECL Article 24, but the redevelopment project is. With respect to environmental review, Staff states that Harrison, as the lead agency, is responsible for complying with all applicable procedures, and notes that the regulations provide for the lead agency to either modify or rescind the initial determinations when new information becomes available. Finally, Staff maintains that Project Home Run would meet the permit issuance standards, and that the draft permit would preserve the values and benefits of the freshwater wetlands.

2. Replies from Mr. LaDore and the City of Rye

Upon review of Staff's response, Mr. LaDore and Rye provided additional comments. Mr. LaDore references Staff's acknowledgment in the statement concerning the variations among the plans and summary tables that has made it difficult to accurately account for the areas of wetland impacts and restoration that occurred during the brownfield remediation. Based on this acknowledgment, Mr. LaDore questions the basis for Staff's conclusion that the redevelopment project would not adversely impact the wetlands, and argues that Staff and Harrison have not adequately addressed the weighing standards for a freshwater wetlands permit. Mr. LaDore notes that Staff would require Harrison to file a permit modification if the redevelopment project changes. Mr. LaDore contends that Project Home Run has changed, but Harrison has not filed any permit modification. Finally, Mr. LaDore argues that Harrison has not met the permit issuance standards. For example, the remediation project contributed to extensive flooding damage, and the redevelopment project would not be compatible with public health, safety and welfare. Also, Mr. LaDore contends alternative

redevelopment projects and alternative locations for the proposed athletic fields have not been considered.

With a cover letter dated February 26, 2009, Rye provided additional comments. Rye disputes Staff's conclusion of a net gain of 0.12 acres of wetland between the pre- and post-remediation phases. In addition, Rye argues that the small pond created during the remediation has value because it is located within Freshwater Wetland J-3, and that a substantial portion of the regulated adjacent area would be filled, which could adversely impact the wetlands, among other things.

Rye continues to dispute whether Project Home Run would meet the weighing standards. For example, Rye contends that the athletic fields would be treated with chemicals, which would run off into the wetland, and that the Leonard Jackson Associates analysis has yet to demonstrate there would be no adverse impacts on flooding. In addition, Rye argues there are additional alternative redevelopment projects and alternative locations for the proposed athletic fields.

Rye maintains there are issues about whether a coordinated review occurred, and contends that it has not received any information, pursuant to FOIL, that would demonstrate that a coordinated review had occurred. Rye replied to each of the responses that Department staff had offered with respect to Exhibit 7.

B. Exhibits 8 and 9

During the November 18, 2008 issues conference (Tr. at 149-150), Rye explained that its consulting engineer, Mr. Loyst from the FMP Group, had prepared a letter dated July 31, 2008 that sought clarification of the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008. Ms. Wilson agreed to circulate the letter to the issues conference participants, which she provided as an attachment to an e-mail message dated November 19, 2008. I advised that I would mark Mr. Loyst's July 31, 2008 letter and Ms. Wilson's November 19, 2008 e-mail message collectively as Exhibit 9 (Tr. at 246-247).

In his July 31, 2008 letter (Exhibit 9), Mr. Loyst states that Rye is concerned about potential flooding and drainage impacts associated with the remediation and redevelopment. Mr. Loyst requests additional information about whether certain analyses were performed in the October 23, 2007 Hydrologic and

Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008; the nature of the data relied upon; whether the activities at Oakwood Avenue and Glenn Oaks Drive were considered in the analyses; and whether the April 15-16, 2007 storm event had been modeled, among other things.

On behalf of Harrison, Mr. Wasp said, during the November 18, 2008 issues conference, that Leonard Jackson Associates had prepared a response to Mr. Loyst's July 31, 2008 letter, and provided copies to the participants (Tr. at 151-152, 155). I marked the Leonard Jackson Associates response dated November 17, 2008 as Exhibit 8 (Tr. at 166, 246, 247).

According to the November 17, 2008 response from Leonard Jackson Associates (Exhibit 8), Mr. Jackson states that the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson Associates letter dated January 29, 2008 "defined the affects of Project Home Run on Beaver Swamp Brook 100-year discharge rates and flood elevations." The November 17, 2008 letter discusses the significance of understanding the interrelationship between filling, excavation and grading at the site, and how these activities could impact Beaver Swamp Brook flood discharges and elevations. Mr. Jackson explains that the area inundated during a flood event is referred to as the floodplain, which temporarily stores (or detains) flood waters that would otherwise flow downstream. He explains further that the storage or detention of flood waters reduces downstream discharge rates and, in turn, reduces flood elevations. He concludes that if flood storage is eliminated or displaced, then the downstream discharge rates and flood elevations would increase.

Mr. Jackson states that the issue of how Project Home Run would affect flooding is not directly related to the amount of fill brought to the site, but whether the fill would displace the flood storage capacity. Mr. Jackson notes that a site may be regraded either to increase or decrease the flood storage capacity without bringing additional fill to the site. According to Mr. Jackson, the prospective intervenors are inappropriately focusing on the amount of fill that was brought to the site as part of the remediation project, as well as the amount that would be brought to the site as part of the redevelopment project. Rather, the focus, according to Mr. Jackson, should be on the potential flood storage displacement that would occur.

With respect to other concerns raised in Mr. Loyst's July 31, 2008 letter, Mr. Jackson states that the activities

associated with Oakwood Avenue and Glenn Oaks Drive were considered in the analyses prepared for Harrison. Mr. Jackson states further that the Beaver Swamp Brook drainage basin is about 3,000 acres, and that the anticipated disturbance of 0.40 acres of freshwater wetland and 1.75 acres of adjacent area would have a *de minimus* impact. Therefore, the October 23, 2007 Hydrologic and Hydraulic Analysis did not separately quantify the potential impacts associated with the disturbance. Nevertheless, changes in grading in these areas are reflected in the October 23, 2007 Hydrologic and Hydraulic Analysis, according to Mr. Jackson.

The comments and replies associated with potential flood impacts related more to Exhibit 10 rather than to Mr. Loyst's July 31, 2008 letter and Mr. Jackson's November 17, 2008 letter. These comments and replies are discussed in the next section.

C. Leonard Jackson Associates report entitled, Beaver Swamp Brook Floodway Analysis (Exhibit 10)

With a cover letter dated December 17, 2008, Mr. Gandhi from Leonard Jackson Associates filed a report dated December 16, 2008 entitled, *Beaver Swamp Brook Floodway Analysis*. It is identified as Exhibit 10. At the November 18, 2008 issues conference, Department staff explained that FEMA modified the flood insurance rate map in the vicinity of the project site in September 2007, which necessitated a revision of the initial analysis provided by Harrison (Tr. at 140-141).

The issues conference participants were provided the opportunity to comment about Exhibit 10, and to reply. Mr. Schaper filed a letter dated January 19, 2009. With a cover letter dated January 20, 2009, Rye filed comments, and provided two copies of the September 2007 flood insurance rate map (Map No. 36119C0352F). With a cover letter dated January 20, 2009, Department staff filed a memorandum dated January 16, 2009 from Kelli Higgins-Roche.

Replies were received from the following issues conference participants. Mr. LaDore filed letters dated February 16, 2009 and February 27, 2009. Mr. Schaper filed a letter dated February 25, 2009. With a cover letter dated February 26, 2009, Department staff enclosed a second memorandum dated February 26, 2009 from Ms. Higgins-Roche that replied to Rye's January 20, 2009 comments. With leave, Staff also filed a letter dated March 3, 2009, which responded to Mr. LaDore's February 27, 2009 letter. Finally, Harrison filed a letter dated March 9, 2009.

With the December 16, 2008 analysis (Exhibit 10), Leonard Jackson Associates provided a plan showing the Project Home Run site, as well as the revised limits for the floodplain and floodway effective September 2007. The plan shows that the effective (or current) floodway would encumber portions of the parking lot, as well as portions of the baseball/softball diamond. Prior to September 2007, the floodway did not encumber any portion of the Project Home Run site. Based on the December 16, 2008 analysis, the encumbrance could be optimized or reduced. The analysis recommends that Harrison file a letter of map revision (LOMR) with FEMA to modify the limits of the floodway on the September 2007 flood insurance rate map.

1. Comments

In his January 19, 2009 letter, Mr. Schaper contends that Harrison has ignored those who were directly impacted by the flooding in this area. Mr. Schaper identifies projects that were supposed to prevent or mitigate flooding impacts but failed, among them, the levees in New Orleans, and the Missouri River Basin flood control program. Mr. Schaper states that he is not confident about the FEMA data, which serves as the basis for the December 16, 2008 analysis. Mr. Schaper maintains that the infrastructure of the area would not support the proposed redevelopment project.

With a cover letter dated January 20, 2009, Rye filed comments from its consulting engineers, the FPM Group, in the form of a letter dated January 16, 2009 from Kevin Loyst. Based on his review, Mr. Loyst observed that the December 16, 2008 analysis shows that the Project Home Run site presently lies within the floodway. Based on this showing, Mr. Loyst recommends that the Department not issue the requested freshwater wetlands permit. In the alternative, Mr. Loyst recommends that the Department hold the freshwater wetland permit application in abeyance until FEMA has completed the review of the forthcoming LOMR.

After comparing the original and the revised (September 2007) flood insurance rate maps, Mr. Loyst notes that the brownfield remediation was undertaken in what is now identified as the floodway, and a rise has resulted. Before proceeding with the redevelopment project, Mr. Loyst recommends that Harrison prepare an environmental impact statement that includes a complete analysis of the flood storage displacement and reduced conveyance that has resulted from the remediation project.

With a cover letter dated January 20, 2009, Department staff filed a memorandum prepared by Ms. Higgins-Roche, dated January 16, 2009. In question and answer format, the January 16, 2009 memorandum provides a brief history of the National Flood Insurance Program; outlines the requirements for local communities to participate in the NFIP; and describes how aspects of the program are administered and by whom. In addition, Staff's January 16, 2009 memorandum provides definitions of the terms "floodplain" and "floodway;" explains whether, and what kind of, development is authorized in these areas; and identifies the computer software that Staff uses to review floodplain modeling analyses. This information is similar to that provided by Ms. Higgins-Roche at the November 18, 2008 issues conference (Tr. at 159-161, 190-192).

Staff's January 16, 2009 memorandum also explains how the NFIP would apply to the Project Home Run site. With respect to the applicability of the NFIP, Staff distinguishes between the brownfield remediation project and the redevelopment project. Staff explains that the remediation project was developed prior to the issuance of the revised flood insurance rate map in September 2007. Staff states that the October 23, 2007 Hydrologic and Hydraulic Analysis was consistent with the flood insurance rate map in effect at the time of the analysis.

With the respect to the redevelopment project, however, Staff states further that Harrison must comply with the September 2007 flood insurance rate map. As a result of the revision, Staff observes that a portion of the project site is now located in the floodway limits, which would require "a no-rise analysis" for the placement of any fill in the floodway. In the January 16, 2009 memorandum (at page 5 of 7), Staff refers to its January 8, 2008 and March 11, 2008 memoranda, and explains that a rise between 0.08 and 0.10 feet (*i.e.*, 0.96 inches or less) would occur along the project reach, and estimates that about 0.60 inches of the rise would be due to the remediation project, and that the balance of the total anticipated rise (*i.e.*, 0.36 inches) would be associated with the redevelopment project. Staff notes that the rise associated with the brownfield remediation project (0.60 inches) was allowable based on the flood insurance rate map in effect prior to September 2007. Given the September 2007 map revision, Staff states that the anticipated rise of 0.36 inches, which would be associated with Project Home Run, must be mitigated to ensure that the rise along the project reach is precisely 0.00 feet.

Staff notes that when Harrison adopted the September 2007 flood insurance rate map, the Town also updated the local flood damage prevention law (Local Law No. 3 of 2007). Based on the current flood insurance rate map and revisions to the local law, Staff maintains that "the proposed redevelopment project would require mitigation of about 1 inch of rise above the base flood elevation and compensatory storage to mitigate any proposed fill brought into the floodplain" (January 16, 2009 memorandum, page 6 of 7). Depending on the design, Staff notes that the compensatory storage requirement for fill in the floodplain could also fulfill the mitigation requirement for an increase in the base flood elevation due to the placement of fill in the floodway.

In the January 16, 2009 memorandum, Staff states that only the fill placed inside the floodway boundary would need to meet the no-rise requirement, and notes that the December 16, 2008 Leonard Jackson Associates analysis (Exhibit 10) included a floodway optimization run. According to Staff, the floodway optimization run could refine the floodway boundary, and perhaps reduce the area of the redevelopment site that would be located in the floodway. Staff notes that the revision process would require Harrison to file a LOMR with FEMA.

Staff explains that the Department's role in the NFIP is limited, and that the program is administered at the local level, in this case by Harrison. Based on the review of the December 16, 2008 Leonard Jackson Associates analysis (Exhibit 10), Staff has identified two options with respect to the redevelopment project. First, Harrison may choose to accept the floodway boundary depicted on the September 2007 flood insurance rate map. This means that portions of the Project Home Run site would be located in the floodway. Consequently, in Staff's view, the redevelopment project, as currently proposed, would require mitigation and compensatory storage in order for Harrison to comply with the 2007 revisions to the local law, which implements the NFIP. With respect to the second option, Harrison may choose to seek an amendment of the September 2007 flood insurance rate map, based on the optimization run outlined in the December 16, 2008 Leonard Jackson Associates analysis, by filing a letter of map revision.

2. Replies

In his February 16, 2009 letter, Mr. LaDore refers to Staff's January 16, 2009 memorandum concerning the NFIP, and notes Staff's acknowledgment that the limits of the floodway and

floodplain have changed since the completion of the brownfield remediation project. Mr. LaDore argues that Harrison should prepare an environmental impact statement to address the change in the limits of the floodway and floodplain. Mr. LaDore argues further that the September 2007 changes to the flood insurance rate map demonstrate that the data that Leonard Jackson Associates relied upon for the October 23, 2007 Hydrologic and Hydraulic Analysis were not accurate. In addition, Mr. LaDore contends that the change to the flood insurance rate map would require Harrison to modify the permit application. Based on the foregoing, Mr. LaDore argues that the pending freshwater wetlands permit application should be denied.

In his February 25, 2009 letter, Mr. Schaper contends that Harrison's consulting engineers may have a conflict of interest with respect to the redevelopment project. Mr. Schaper contends further that the FEMA data, which is the basis for the various analyses undertaken by Leonard Jackson Associates could be interpreted differently and, thereby, produce different, conflicting results from those reported by Leonard Jackson Associates. According to Mr. Schaper, the analyses undertaken on behalf of Harrison are incomplete because they did not take into consideration the last volume of fill placed on the site before the 2006 flood event. Mr. Schaper questions the validity of the analyses, which concludes that flooding impacts are not likely, when recent experiences show otherwise. Mr. Schaper recommends that the scope of the redevelopment should focus on restoring the freshwater wetland, as much as possible, to its condition prior to contamination.

Enclosed with a cover letter dated February 26, 2009, Staff filed a second memorandum prepared by Ms. Higgins-Roche dated February 26, 2009 that replied to Rye's comments from its consulting engineers (Mr. Loyst's letter dated January 16, 2009). Staff notes that the Department has no authority to enforce local floodplain management laws. Rather, Department staff may provide technical assistance and guidance to local municipalities, and review local laws for compliance with federal and State requirements. According to Ms. Higgins-Roche's February 26, 2009 memorandum, Staff may report a community to FEMA if the local community fails to enforce its approved local floodplain management law.

According to Department staff, the LOMR process is iterative and time consuming. Staff states that FEMA reviews all map revisions thoroughly. Staff maintains that developers would have to comply with the current September 2007 flood insurance rate

map, until the LOMR process is completed and the local governments have accepted any revisions.

With respect to the floodway optimization analysis, Staff contends that moving stations on one side of the stream is an acceptable methodology. Therefore, the stations on Rye's side of the stream would not need to be moved to change the limit of the floodway on the Harrison side of Beaver Swamp Brook in the vicinity of the Project Home Run site. Staff acknowledges that if the floodway is optimized, the flow velocity would increase. Staff maintains, however, that the force associated with the anticipated increase in velocity would not be sufficient to displace or erode even fine sediments. In closing, Staff reiterates the two options outlined in the January 16, 2009 memorandum.

In his February 27, 2009 letter, Mr. LaDore notes that based on Department staff's January 16, 2009 and February 26, 2009 memoranda, Harrison has not complied with Local Law No. 3, and argues that Staff must advise FEMA that Harrison is not in compliance with Local Law No. 3. Mr. LaDore argues further that the September 2007 flood insurance rate map requires Harrison to modify its freshwater wetlands permit application, and that the redevelopment may not proceed until Harrison files a "no-rise certification." Given these circumstances, Mr. LaDore asserts that the freshwater wetlands permit application must be denied.

In its March 3, 2009 letter, Staff states it never asserted that Harrison is in violation of Local Law No. 3 with respect to compensatory storage. Rather, Department staff notes that in previous filings, it has outlined what the local requirements would be. Because the redevelopment project has not yet been built, Staff notes further that it would be premature to form any opinion about whether Harrison has complied with Local Law No. 3. Given these circumstances, Department staff concludes there has been no failure by Staff to notify FEMA about Harrison's lack of compliance with the local law.

In its March 3, 2009 letter, Department staff, nevertheless, requests that Harrison provide additional information about its "position on the applicability of the local law and if wetlands, adjacent area and flood analysis will be impacted at the project site." To the extent there would be any impacts at the project site, Department staff requests in the May 3, 2009 letter that Harrison file "a modification of the application materials."

In his March 9, 2009 letter, Commissioner Wasp provides clarification about Local Law Chapter 146, Flood Damage Prevention (September 20, 2007). Commissioner Wasp acknowledges that the local law requires compensatory storage for the placement of fill within the 100-year floodplain, and that the redevelopment project associated with the freshwater wetlands permit application pending before the Department would be subject to the local law because "fill above the existing grade will be placed" on the site. Harrison anticipates, however, that the current layout of the project and the final grade (*i.e.*, the elevation) would be modified to avoid any displacement of flood storage that could result from the redevelopment project. Finally, Commissioner Wasp states that Harrison will be filing a LOMR with FEMA to optimize the limits of the floodway. Harrison anticipated that it would file the necessary LOMR documents within 30 days from the date of Mr. Wasp's March 9, 2009 letter, which was April 8, 2009.

Discussion and Rulings

With a cover letter dated May 1, 2008, Department staff circulated a consolidated draft permit for Project Home Run to the issues conference participants. The terms and conditions of the consolidated draft permit are discussed above. During the November 18, 2008 issues conference, Commissioner Wasp stated that Harrison reviewed the draft permit, and accepted the terms and conditions of the draft permit (Tr. at 143). Consequently, there are no disputes that require adjudication between Department staff and Harrison over any substantial term or condition of the draft permit (*see* 6 NYCRR 624.4[c][1][i]).

The other issues conference participants, however, maintain there are issues for adjudication. Where, as here, Department staff has reviewed an application and finds that the proposal as conditioned by the draft permit would conform to all applicable statutory and regulatory requirements, the burden of persuasion is on the prospective intervenors to demonstrate that the proposed issues are substantive and significant (*see* 6 NYCRR 624.4[c][4]; 6 NYCRR 624.4[c][2] regarding *substantive*; 6 NYCRR 624.4[c][3] regarding *significant*). As discussed more fully below, Messrs. LaDore and Schaper, and Rye have met this burden with respect to some of the issues they proposed for adjudication.

I. SEQRA Review

In its October 16, 2008 Amended/Supplemented Petition (at 8-10, 12-16), Rye proposes three issues for adjudication related to Harrison's compliance with the requirements outlined in the State Environmental Quality Review Act (SEQRA [ECL Article 8]), and implementing regulations at 6 NYCRR Part 617. In general, Rye contends that Harrison did not take the required hard look (see *HOMES v New York State Urban Development Corporation*, 59 NY2d 220) at all potential environmental impacts associated with both the remediation and the redevelopment of the Beaver Swamp Brook site, and argues that this hard look should be undertaken now.

The first proposed issue (I at 8-10) is that modifications to the March 2003 ROD have resulted in adverse environmental impacts that were not considered. According to Rye, the amount of contaminated soil removed from the site increased by more than 1400% from what was originally anticipated. In addition, the scope of the brownfield remediation was expanded to include drainage improvement projects related to Glen Oaks Drive and Oakland Avenue. Rye asserts that Harrison did not consider the adverse impacts associated with these modifications as part of the initial environmental review.

The third proposed issue (III at 12-13) is that Harrison failed to consider the potential environmental impacts associated with changes to the original redevelopment project. To support this proposed issue, Rye references the additional amount of top soil brought to the site as part of the remediation project in preparation for the redevelopment project, as well as the drainage improvement projects related to Glen Oaks Drive and Oakland Avenue.

As the fourth proposed issue (IV at 14-16), Rye contends that Harrison illegally deferred analysis of environmental impacts and mitigation measures concerning potential flooding and stormwater runoff. According to Rye, Harrison ignored Rye's specific request to be treated as an interested agency as provided for by SEQRA (see 6 NYCRR 617.2[t]).

According to Department staff, Harrison conducted two separate SEQRA reviews: one for the brownfield remediation and a second for the proposed redevelopment project (*i.e.*, Project Home Run). Because Harrison sought and obtained grant funding for the remediation project, Staff stated at the November 18, 2007 issues conference session (Tr. at 219-220) that Harrison was required to

comply with SEQRA.¹² Harrison, as the lead agency, issued a negative declaration for the brownfield remediation on July 15, 2003. With respect to Project Home Run, Harrison issued a negative declaration on June 23, 2004. According to Staff, the unlisted action, which was the subject of the June 23, 2004 negative declaration, includes the development of a new municipal park that would include a youth baseball/softball facility, a youth soccer field, a multipurpose playground, an interpretive nature walkway, and off-street parking.

Department staff is an involved agency with respect to both SEQRA reviews because Staff has jurisdiction by law to fund, approve or directly undertake an action (see 6 NYCRR 617.2[s]). For the brownfield remediation, Staff awarded the grant money, and issued the March 31, 2003 ROD, which selected the appropriate remedy to achieve the stated goals and objectives of the remedial action. With respect to the redevelopment project, Staff has jurisdiction to review and approve the pending freshwater wetlands permit application for Project Home Run.

The hearing regulations clearly prescribe the circumstances when SEQRA issues may be addressed at the adjudicatory hearing. The ALJ will not entertain any issue related to SEQRA whenever an agency other than Department staff was the lead agency, and the lead agency determined that the proposed action does not require the preparation of a DEIS (see 6 NYCRR 624.4[c][6][ii][a]). These circumstances apply here. With respect to Project Home Run, Harrison, rather than Department staff, was the lead agency. Harrison, as the SEQRA lead agency, determined that Project Home Run was an unlisted action that did not require the preparation of a DEIS, and Harrison issued the June 23, 2004 negative declaration. Therefore, pursuant to 6 NYCRR 624.4(c)(6)(ii)(a), I am precluded from considering any issue related to SEQRA in this proceeding, which include Rye's proposed Issues I, III and IV.

However, 6 NYCRR 624.4(c)(6)(ii)(a) provides further that SEQRA issues may be considered during the adjudicatory hearing if lead agency status is re-established with Department staff

¹² As noted above, compliance with SEQRA is no longer required, effective September 14, 2006, pursuant to 6 NYCRR 375-4.11.

pursuant to the provisions outlined in 6 NYCRR 617.6(b)(6).¹³ To date, the involved agencies have not agreed, or attempted, to re-establish a different lead agency with respect to this matter.

As summarized above, the issues conference participants discussed the circumstances when the lead agency either may amend the negative declaration (see 6 NYCRR 617.7[e]), or must rescind the negative declaration (see 6 NYCRR 617.7[f]). For the reasons set forth in the October 16, 2008 Amended/Supplemented Petition as well as the arguments presented at the November 18, 2008 issues conference, Rye contends that Harrison should either amend or rescind the negative declaration due to the extensive changes made during the implementation of the March 31, 2003 ROD, the changes related to the scope of the redevelopment project, and the flooding that occurred along Beaver Swamp Brook in April 2007. At the November 18, 2008 issues conference, Department staff outlined a rationale for recharacterizing Project Home Run as a Type I action rather than as an unlisted action. The former type of action is more likely to require the preparation of a DEIS (see 6 NYCRR 617.4[a]). As noted above, Staff subsequently changed its position, and now maintains that Harrison properly characterized the action as unlisted.

The determination of significance issued by the lead agency following a coordinated review is binding on all other involved agencies (see 6 NYCRR 617.6[b][3][iii]). With reference to this regulatory provision, Department staff outlined, during the November 18, 2008 issues conference, the procedural requirements that the SEQRA lead agency must comply with in order to bind involved agencies into accepting the June 23, 2004 negative declaration. Among the procedures mentioned, the lead agency must undertake a coordinated review (6 NYCRR 617.6[b][3]). At the November 18, 2008 issues conference, Staff could not confirm that Harrison sent Department staff a lead agency coordination letter with respect to Project Home Run. Later, with the January 20, 2009 comments, Department staff said that Harrison had undertaken a coordinated review. Staff explained that on December 20, 2006, Staff received a copy of a lead agency coordination letter from Harrison dated April 11, 2002. Nevertheless, in its reply filed under cover of letter dated February 26, 2009, Rye maintains there are issues about whether a

¹³ 6 NYCRR 624.4(c)(6)(ii)(a) refers to 6 NYCRR 617.6(f) [sic]. This reference to the SEQR regulations is incorrect. The correct reference to the SEQR regulations concerning the re-establishment of the lead agency is 6 NYCRR 617.6(b)(6).

coordinated review occurred because Rye did not obtain a copy of the April 11, 2002 letter in response to its request made pursuant to FOIL.

Copies of the documents related to the environmental review of Project Home Run are not part of the issues conference record. These documents may include, among others, copies of the coordination letter(s) from Harrison and any response(s), correspondence from interested agencies and involved agencies, the environmental assessment form(s), and the June 23, 2004 negative declaration with supporting documents, such as an environmental assessment form. The issues conference participants dispute whether Harrison fully complied with the procedural requirements of ECL Article 8 and the implementing regulations at 6 NYCRR part 617.

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

The adjudication of whether Harrison complied with applicable SEQRA procedures is beyond the scope of this administrative proceeding because Harrison is the lead agency. However, a procedural defect related to how Harrison conducted its environmental review of Project Home Run, pursuant to ECL Article 8, could render the Commissioner's final determination about the pending permit application, or other approvals that may be necessary for Project Home Run, a nullity. Therefore, Harrison must provide copies of the relevant SEQRA documents for this hearing record. The other parties to this proceeding may also provide copies of any SEQRA related documents that they created (*i.e.*, Rye's request to be considered an interested agency) or obtained. The parties will have the opportunity to review these SEQRA documents and comment about them. The procedures for the collection and review of the SEQRA documents are outlined further below.

Finally, I note that when the review of an unlisted action is uncoordinated, each involved agency must undertake its own

environmental review (see 6 NYCRR 617.6[b][4]). Therefore, if Harrison does not provide documentation sufficient to demonstrate that it complied with all applicable SEQRA procedures related to the environmental review of Project Home Run, then Department staff, as an involved agency, would be required to undertake its own SEQRA review. Under these circumstances, Staff would be required to identify of the nature of the action (unlisted, Type I or Type II) and issue of a determination of significance, among other things. If required, and depending on what Staff's determination of significance is, Department staff may have to comply with a variety of additional SEQRA procedures.

II. Flooding

During the July 24, 2007 issues conference session, Department staff identified an issue for adjudication concerning Harrison's floodplain storage analysis (Tr. at 95-96). Staff withdrew this issue after Harrison provided the October 23, 2007 Hydrologic and Hydraulic Analysis and additional clarification in the Leonard Jackson Associates letter dated January 29, 2008. However, concerns about floodplain storage reemerged at the November 18, 2008 issues conference, when Staff explained that FEMA had finalized amendments to the relevant flood insurance rate map in September 2007. Staff requested that Harrison provide additional information concerning floodplain storage to reflect the September 2007 modifications to the flood insurance rate map. Harrison subsequently provided this analysis dated December 16, 2008 and entitled, *Beaver Swamp Brook Floodway Analysis*. This document is identified as Exhibit 10.

As explained above, the December 16, 2008 analysis and accompanying plan show that the floodway depicted on the September 2007 flood insurance rate map would encumber portions of the proposed locations for the parking lot and baseball/softball diamond. In a letter dated March 9, 2009, Commissioner Wasp stated, among other things, that Harrison would file a LOMR with FEMA, and request a modification of the floodway limits on the September 2007 flood insurance rate map.

In his initial and supplemental petitions, respectively dated June 29, 2007 and October 15, 2008, Mr. LaDore proposes several issues related to flooding. Mr. LaDore asserts that Harrison has not complied with various federal requirements concerning the preparation of an EIS as required by the National Environmental Policy Act (NEPA), and the filing of an application for a no-rise certificate, among other things. In addition, Mr. LaDore contends that Harrison did not consider potential flood

impacts when it undertook its environmental review pursuant to SEQRA. According to Mr. LaDore, his property and those of his neighbors, were flooded in March and April 2007. Mr. LaDore contends that the flooding, at least in part, was related to the brownfield remediation project, which required the importation of excessive amounts of fill to the Beaver Swamp Brook site. Mr. LaDore maintains that the fill brought to the site raised the elevation of the property and eliminated, or at least significantly limited, its flood-storage capacity.

Mr. Schaper raises similar issues concerning the potential adverse impacts associated with flooding in his initial petition dated July 19, 2007 and in his supplemental petition dated October 12, 2008.

In its October 16, 2008 Amended/Supplemented Petition (at 23), Rye proposes two issues for adjudication related to potential adverse flooding impacts. As its seventh proposed issue, Rye contends that Harrison had not demonstrated compliance with Chapter 146 of the Town Code. For the eighth proposed issue, Rye contends that the October 23, 2007 Hydrologic and Hydraulic Analysis and additional clarification in the Leonard Jackson Associates letter dated January 29, 2008 are inadequate.

Additional General Condition No. 3 of the draft permit (Exhibit 6, page 3 of 5; also see Exhibit 6, Item C, page 2 of 5) would require Harrison to obtain all other required permissions or approvals. During the issues conference and in subsequent filings, Department staff has provided a detailed outline of the NFIP, as well as the roles and responsibilities of the federal government, the New York State Department of Environmental Conservation, and local governments, in general, and Harrison, in particular.

With respect to Staff's responsibilities concerning the pending freshwater wetlands permit, Department staff's February 26, 2009 memorandum by Ms. Higgins-Roche, as noted above, identifies two options to address the revised location of the floodway limits on the Project Home Run site. First, Harrison may continue with its current proposal, and provide additional information to Staff with respect to compensatory storage. In the alternative, Harrison may file a LOMR with FEMA to revise the current (*i.e.*, September 2007) floodway limits on the Project Home Run site. With respect to the second option, Staff notes that Harrison would be still be required to provide additional information concerning compensatory storage for Staff's review.

Based on Commissioner Wasp's March 9, 2009 letter, Harrison intended to petition FEMA with a LOMR to amend the floodway limits on the September 2007 flood insurance rate map. Consequently, Harrison has yet to obtain the necessary approval that may be required by Local Law Chapter 146. Because Harrison, rather than the Department of Environmental Conservation, implements Local Law Chapter 146, proposed issues concerning whether Harrison would comply with Local Law Chapter 146 are beyond the scope of this hearing. Therefore, I deny the federal compliance issues proposed by Messrs. LaDore and Schaper, as well as Issues VII and VIII in Rye's October 16, 2008 Amended/Supplemented Petition.

Harrison's intention to file a LOMR to amend the floodway limits, however, presents a procedural issue with respect to this administrative hearing. In its March 3, 2009 letter, Staff requested additional information from Harrison about the applicability of Local Law Chapter 146 and whether wetlands, the adjacent area, and the current flood analysis would impact the project site. Depending on Harrison's response, Staff notes that Harrison may have to amend the pending freshwater wetlands permit application.

Given these circumstances, it is not clear to me whether the administrative hearing should continue at this time. Therefore, I request the following information from Harrison and Department staff. First, I request that Harrison advise the parties and me whether it filed its LOMR with FEMA in early April 2009. I request further that Harrison advise whether it obtained an estimate from FEMA about how long FEMA may take to consider Harrison's LOMR and subsequently, issue a determination. Second, after obtaining this status report from Harrison and with reference to Staff's March 3, 2009 letter, I request that Department staff identify what additional information it needs from Harrison to determine whether the pending freshwater wetlands permit application should be modified. A schedule for this submission of this information is provided below.

III. Standards for Issuance of a Freshwater Wetlands Permit

Among other things, Project Home Run would require placing and grading fill in Freshwater Wetland J-3 and its regulated adjacent area. By operation of the applicable regulation, these activities are considered incompatible when undertaken in a wetland, and usually incompatible when undertaken in the adjacent area (see 6 NYCRR 663.4[d][Items 20 and 25]).

Section 6 NYCRR 663.5(e) outlines the standards for permit issuance. For compatible and usually compatible activities, the regulated activities associated with a proposal must meet three tests in order to obtain a permit (see 6 NYCRR 663.5[e][1]). They are: (1) whether the proposed activities would be compatible with the preservation, protection and conservation of the wetland and its benefits; (2) whether the proposed activities would result in no more than insubstantial degradation to, or loss of, any part of the wetland; and (3) whether the proposed activities would be compatible with public health and welfare.

For incompatible activities, and those activities that do not meet all three of the foregoing tests, the weighing standards outlined in 6 NYCRR 663.5(e)(2) must be applied. For Class II wetlands, such as Freshwater Wetland J-3, the weighing standards are: (1) the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objective, and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; and (2) the proposed activity must minimize degradation to, or loss of, any part of the wetland and its adjacent area, and must minimize any adverse impacts on the functions and benefits that the wetland provides.

The regulations state further that Class II wetlands provide important wetland benefits, and their loss would be acceptable in very limited circumstances. Therefore, with respect to the captioned matter, the Commissioner would issue a permit only if he can determine that the proposed activity satisfies a pressing economic or social need that clearly outweighs the loss of, or detriment to, the benefits of the Class II wetland. (See 6 NYCRR 663.5[e][2].)

In its October 16, 2008 Amended/Supplemented Petition (at 10-11, 16-22), Rye proposes three issues for adjudication related to the standards for permit issuance. As the second issue (II at 10-11), Rye contends that Project Home Run fails to meet the "no-net-loss standard" and does not follow appropriate wetland mitigation sequencing. To support this contention, Rye refers to the responsiveness summary of the March 31, 2003 ROD, which states that Harrison agreed to "no-net-loss" in the acreage of freshwater wetlands. According to Rye, neither the FER concerning the brownfield remediation project nor the application materials for the redevelopment project show that a no-net-loss of wetlands would result from the proposed redevelopment. Rye contends further that Harrison has not demonstrated the proper

sequencing, which is first to avoid impacts, then to minimize impacts, and finally to compensate for any impacts.

With respect to the fifth issue (V at 16-21), Rye asserts that Harrison does not meet the standards for permit issuance. Rye splits this issue into two sub-issues concerning the compatibility tests (V-A) and the weighing standards (V-B). Rye argues that the application materials filed by Harrison do not demonstrate compliance with the compatibility tests and the weighing standards. In the absence of such a demonstration, Rye argues that the Commissioner should deny the requested freshwater wetlands permit.

As the sixth issue (VI at 21-22), Rye contends that Harrison has not considered alternatives that would require less fill and grading. According to Rye, Harrison must show that Project Home Run is the "only physical or economical alternative for accomplishing its objectives" (at 21, emphasis provided in original). Rye argues that Harrison currently uses the site for passive recreation, and that this use could be enhanced without impacting the wetlands further. Rye maintains that Harrison has not demonstrated any need for Project Home Run, and argues that the Commissioner should deny the requested permit.

Department staff addressed Rye's contentions about whether Project Home Run would comply with the standards for issuance of a freshwater wetlands permit at the November 18, 2008 issues conference, and in the comments and replies submitted after the November 18, 2008 issues conference. A summary of Staff's comments from the issues conference is provided above in Sections IV(A)(1) and IV(D)(1) of this ruling. A summary of Staff's comments and replies filed subsequent to the November 18, 2008 issues conference is provided above in Section V(A)(1) of this ruling.

For the following reasons, the prospective intervenors have raised substantive and significant issues about whether the pending permit application would meet the compatibility tests and the weighing standards applicable to a Class II freshwater wetland. Accordingly, I grant the issues proposed in Rye's October 16, 2008 Amended/Supplemented Petition, which are identified as Issues II, V (including V-A and V-B), and VI. Mr. Schaper's proposed issues related to potential adverse impacts to the freshwater wetlands essentially mirror Rye's proposed Issues II, V and VI, and are, therefore, granted.

Based on the proffered expert opinions of Rye's wetland consultant and engineer, the proposed issues are substantive because further inquiry is necessary to determine whether Project Home Run would: (1) be compatible with the public health and welfare; (2) be the only practicable alternative that could accomplish Harrison's objective; (3) have no practicable alternative on a site that is not a freshwater wetland or adjacent area; (4) minimize degradation to, or loss of, any part of the wetland and its adjacent area; and (5) minimize any adverse impacts on the functions and benefits that the wetland provides. With respect to the pending permit application, there is a question, based on Rye's offer of proof, whether Project Home Run would satisfy a pressing economic or social need that clearly outweighs the loss of, or detriment to, the benefits of the wetland.

With respect to the public health and welfare standard,¹⁴ further inquiry is necessary to determine whether Project Home Run would adversely impact the compensatory storage capacity of that portion of the floodway which would be filled as part of Project Home Run, and which is located within either Freshwater Wetland J-3 or its regulated adjacent area. In other words, I conclude that Harrison would comply with the public health and welfare standard for a freshwater wetlands permit if Harrison can demonstrate compliance with Local Law Chapter 146 and any other applicable FEMA requirements.

The proposed issues are significant because the potential result of the adjudicatory hearing could be permit denial, major modifications to Project Home Run, or the imposition of significant permit conditions in addition to those already proposed in the draft permit.

Rye's proposed Issue IX (October 16, 2008 Amended/Supplemented Petition at 24-25) enumerates various alleged deficiencies in the draft permit (Exhibit 6). These alleged deficiencies are summarized above with the other comments related to the draft permit including the Tessier Report (Exhibit 7) (see Section V[A] above).

¹⁴ With respect to the standards for permit issuance, compliance with the public health and welfare criterion is both a compatibility test (see 6 NYCRR 663.5[e][1][iii]), and a weighing standard (see 6 NYCRR 663.5[e][2]). Given the incompatible nature of placing fill in a regulated wetland, the applicable regulatory criteria that must be met for permit issuance are the weighing standards.

A result of the adjudication may be the development of additional permit conditions that may address the deficiencies asserted by Rye. The alleged deficiencies outlined in Rye's Amended/Supplemented Petition at 24-25, however, are not substantive and significant issues for adjudication. Therefore, I deny proposed Issue IX. At the conclusion of the adjudicatory hearing Rye, and the other parties to this proceeding, may propose additional permit conditions as part of their respective closing arguments.

IV. Other Proposed Issues

At the July 24, 2007 issues conference, Department staff's counsel said that issues related to whether the remediation project exceeded the scope of the remedy outlined in the March 31, 2003 ROD, and whether the baseline conditions at the site changed as a result of the remediation could be considered within the context of this administrative hearing (Tr. at 23). Staff, however, did not assert there were any adjudicable issues related to these topics.

As the tenth issue (October 16, 2008 Amended/Supplemented Petition, X at 25) and with reference to Exhibits 1 and 2 attached to the petition, Rye contends there are substantial and significant deviations from the March 31, 2003 ROD. Rye proposes that these significant deviations should be scrutinized carefully as part of the FER and prior to the final determination about the pending freshwater wetlands permit application. Rye argues that a detailed stormwater analysis as well as an evaluation of potential flooding impacts should be made available for public review. According to Rye the FER does not include an analysis of the deviations from the ROD.

I deny Rye's proposed Issue X. Rye did not cite, nor could I find, any authority that would require the Department to duplicate the review of Harrison's remediation project within the context of this administrative permit proceeding concerning the redevelopment project. This proceeding is separate and distinct from the oversight of the remediation project provided by Staff from the Department's Division of Environmental Remediation, even though the site of the remediation and redevelopment projects is the same, and the remediation project and Project Home Run are being implemented sequentially. (see *Besicorp-Empire Development*

Co., LLC, Commissioner's Interim Decision dated August 22, 2003.)¹⁵

In addition, I note that Staff has amended its position from the July 27, 2007 issues conference based on its review of the analyses presented in the October 23, 2007 Hydrologic and Hydraulic Analysis and the Leonard Jackson letter dated January 29, 2008. In a letter dated April 8, 2008, Staff stated that it accepted these analyses and withdrew the issue it had proposed at the July 27, 2007 issues conference concerning floodplain storage. Second, Staff has prepared a draft permit (Exhibit 6), and maintains that Project Home Run, as conditioned by the draft permit, would comply with applicable regulatory criteria.

I note that Harrison will be providing additional information given the September 2007 modifications to the flood insurance rate map. Also, I have determined there is a substantive and significant issue about whether Project Home Run would be compatible with the public health and welfare weighing standard. I have determined further that the scope of the issue related to the public health and welfare standard includes potential impacts associated with flooding and whether the redevelopment project would adversely impact the compensatory storage capacity of the floodway.

Finally, any other proposed issue not expressly discussed herein is denied.

Rulings on Party Status

Pursuant to 6 NYCRR 624.5, the parties to any adjudicatory hearing are Harrison, Department Staff and those who have been granted full party status. As explained above, I received separate petitions from Michael LaDore, Douglas Schaper, and the City of Rye. Mr. LaDore had requested amicus status. Mr. Schaper and Rye have each petitioned for full party status.

¹⁵ In *Besicorp*, the remedial action was undertaken pursuant to ECL Article 27, Title 13 (Inactive Hazardous Waste Disposal Sites). With respect to the captioned matter, Harrison undertook the remedial action pursuant to ECL Article 27, Title 14 (Brownfield Cleanup Program). Both programs provide for public review and comment before the Department identifies the remedial plan.

The criteria for determining whether the ALJ should grant petitions for full party status are provided in 6 NYCRR 624.5(d)(1), and the criteria concerning petitions for amicus status are provided in 6 NYCRR 624.5(d)(2). Upon review of these criteria, the petitions, the record of the issues conference sessions, and the supplemental materials filed subsequent to the issues conference, I conclude that Mr. LaDore, Mr. Schaper and the City of Rye have filed acceptable petitions as required by 6 NYCRR 624.5(b). As discussed above, Mr. Schaper and Rye have raised substantive and significant issues for adjudication concerning the standards for permit issuance outlined in 6 NYCRR 663.5. In addition, Mr. Schaper and the City of Rye have shown an adequate environmental interest (see 6 NYCRR 624.5[b][1][ii]). Therefore, I grant the petitions for full party status filed by Mr. Schaper and the City of Rye.

With respect to Mr. LaDore's petition, I conclude that his petition for amicus status complies with the requirements outlined at 6 NYCRR 624.5(d)(2). Accordingly, I grant Mr. LaDore's petition for amicus status.

Further Proceedings

As discussed above, I have requested additional information concerning: (1) the SEQRA review; (2) Harrison's LOMR; and (3) Department staff's request for information related to compensatory storage.

I consider the lead agency's compliance with SEQRA procedures to be a threshold question that should be resolved as expeditiously as possible. Of particular concern is whether a lead agency was properly established, and if so, whether all applicable procedures for a coordinated review were followed.

Therefore, Harrison should provide the parties and me with a copy of Harrison's April 11, 2002 lead agency coordination letter and any attachments, and copies of any other coordination letters it sent, as well as the other SEQRA documents identified above. Those parties who have copies of other documents related to the SEQRA review of Project Home Run are encouraged to provide copies to the other parties and me. I request that the parties exchange the SEQRA documents by June 15, 2009. After reviewing the SEQRA documents, the parties may file comments, which will be due on June 29, 2009. Subsequently, I will issue a ruling, which will be appealable as set forth below.

In addition, I request a report from Harrison about the status of its LOMR. I have also, requested additional information from Department staff. I request that Harrison provide the other parties and me with its status report by June 15, 2009. After reviewing Harrison's status report, I request that Department staff identify what additional information it needs from Harrison to determine whether the pending freshwater wetlands permit application should be modified. Staff should provide this information to the other parties and me by June 29, 2009.

I would like to schedule a telephone conference call with the parties during the week of July 6 or 13, 2009. The primary purpose of the conference call will be to hear from Harrison about whether it wants to proceed with the hearing at this time, or wait for a decision from FEMA about the LOMR. Also, the adjudicatory phase of the hearing may be postponed due to Department staff's review of a permit modification. The parties shall advise me of their availability for the July 2009 telephone conference call by June 15, 2009.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (see 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling (see 6 NYCRR 624.6[e][1]).

Because additional information from the parties will be forthcoming, appeals from these rulings will be held in abeyance pending the telephone conference call that will be scheduled for the week of July 6 or 13, 2009.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Appendix B Submissions filed between July 2007 and October
 2008.

Dated: May 29, 2009
 Albany, New York

Appendix B

Freshwater Wetlands Permit Application
DEC Application No. 3-5528-00104/00001
Town/Village of Harrison, New York
Project Home Run

Documents exchanged from July 2007 to October 2008

1. Cover letter dated July 30, 2007 from Robert Wasp, P.E., Commissioner, Harrison Department of Public Works, which in pertinent part included:
 - a. Hydrological report dated July 20, 2007 by Leonard Jackson Associates, Consulting Engineers (Pomona, New York);
 - b. Letter dated January 17, 2007 by GeoDesign, Inc., Geotechnical Engineers and Environmental Consultants (Middlebury, Connecticut) outlining preliminary recommendations and analyses;
 - c. Summary Report on Settlement Data - Phase II dated July 17, 2006 by GeoDesign, Inc.; and
 - d. Phase I Report dated January 5, 2006 by GeoDesign, Inc.
2. Letter dated August 1, 2007 from Scott Sheeley, Deputy Regional Permit Administrator, NYS DEC Region 3 Office to Commissioner Wasp requesting additional information from Harrison related to potential flood impacts from stormwater associated with Project Home Run that Staff had identified as an adjudicable issue at the July 24, 2007 issues conference (Tr. at 96, 100).
3. Letter dated August 15, 2007 from James E. Candiloro, P.E., Division of Environmental Remediation, NYS DEC to ALJ Sanza providing the issues conference participants with Department staff's status report of its review of Harrison's draft Final Engineering Report (FER) for the brownfield remediation project. Referencing a letter dated August 14, 2007 from Wayne D. Mizerak, Project Manager, Remedial Bureau C, Division of Environmental Remediation, NYS DEC to Commissioner Wasp, Department staff states that Staff has reviewed the draft Final Engineering Report, and based on

that review notes significant deficiencies. Mr. Candiloro's August 14, 2007 letter requests that Harrison respond to Staff's comments with a revised draft FER.

4. Letter dated August 20, 2007 from Mr. Schaper to the ALJs with copies to the issues conference participants supplementing his July 19, 2007 petition for party status. In his August 20, 2007 letter, Mr. Schaper states that during the adjudicatory hearing, he would call residents of Harrison as witnesses, but does not identify who these witnesses would be, the nature of their testimony, and how the proffered testimony relates to the issues proposed in his July 19, 2007 petition for party status. Mr. Schaper reiterates his opposition to Project Home Run, and asserts that then-Mayor Malfitano had pecuniary interests in the project due to his alleged ownership of real property near the project site.
5. Letter dated September 14, 2007 from Mr. Plunkett, counsel for the City of Rye, to the ALJs and issues conference participants concerning ALJ Sanza's memo dated September 6, 2007, which summarized the telephone conference call held on August 29, 2007. Mr. Plunkett explains that during the August 29, 2007 conference call, he requested the opportunity to participate, on behalf of his client, in meetings attended by Department staff and Harrison concerning revisions to the draft FER related to the brownfield remediation. Mr. Plunkett requests that the summary of the August 29, 2007 conference call reflects the facts that: (1) ALJ Sanza stated that he could not order Department staff and Harrison to include the City of Rye in any future meetings about the revised draft FER; and (2) Staff would not voluntarily allow the City of Rye to participate in these future meetings. Mr. Plunkett expresses concern that Staff is bifurcating the review related to the brownfield remediation from Project Home Run, and notes that Staff has requested additional information about potential adverse environmental impacts related to both the remediation and the redevelopment project. According to Mr. Plunkett, the requested information raises the question of whether Harrison's environmental review complied with SEQRA.

6. Letter dated October 26, 2007 from Leonard Jackson, P.E. of Leonard Jackson Associates to Mr. Sheeley responding to Department staff's August 1, 2007 request for additional information. Mr. Jackson's October 26, 2007 letter was part of a submission that included Harrison's response entitled, *Beaver Swamp Brook Hydrologic and Hydraulic Analysis for Town of Harrison, Westchester County, NY*, and dated October 23, 2007. The October 23, 2007 Hydrologic and Hydraulic Analysis includes hydrologic and hydraulic analyses that evaluate the effects of the brownfield remediation and Project Home Run on flood elevations of Beaver Swamp Brook. According to Harrison's consultant, the October 23, 2007 Hydrologic and Hydraulic Analysis demonstrates, among other things, that the brownfield remediation did not precipitate flooding along Beaver Swamp Brook, and that the proposed project related to the freshwater wetlands application would not precipitate flooding along Beaver Swamp Brook. The ALJs and all issues conference participants received copies of this submission.
7. Letter dated November 16, 2007 from Mr. LaDore to Mr. Sheeley with additional submissions responding to Harrison's October 26, 2007 Hydrologic and Hydraulic Analysis. The ALJs and all issues conference participants received copies of this submission.
8. Letter dated November 29, 2007 from Mr. Jackson to Mr. LaDore, which replied to Mr. LaDore's November 16, 2007 response. The ALJs and all issues conference participants received copies of this submission.
9. Letter dated December 13, 2007 from Mr. Plunkett, on behalf of the City of Rye, to the ALJs and issues conference participants, which responds to Harrison's October 26, 2007 Hydrologic and Hydraulic Analysis. The City of Rye's response included a report from its consultant, Laura Tessier (Tessier Environmental Consulting), dated December 2007.
10. Letter dated January 10, 2008 from Mr. Sheeley to Commissioner Wasp with copies provided to the ALJs and the issues conference participants. Mr. Sheeley's January 10, 2008 letter requests additional information from Harrison with respect to Staff's review of the October 26, 2007

Hydrologic and Hydraulic Analysis. Mr. Sheeley's January 10, 2008 letter requested additional information about the following three items: (1) a justification for changing the Manning's N-value on the right (western) over-bank where fill was placed; (2) an examination of whether the adopted FEMA model provides an accurate basis for comparison given the discrepancies in flow values; and (3) a full quantitative analysis of the April 2007 storm event.

11. Letter dated January 29, 2008 from Mr. Jackson to Mr. Sheeley with copies to the ALJs and issues conference participants responding to Staff's January 10, 2008 request for additional information related to the October 23, 2007 Hydrologic and Hydraulic Analysis.
12. Letter dated April 8, 2008 from Ms. Krebs to the ALJs with copies to the issues conference participants advising that Department staff had completed the review of the October 23, 2007 Hydrologic and Hydraulic Analysis, and Harrison's revised draft FER concerning the brownfield remediation. According to Ms. Krebs, Department staff accepts Harrison's analysis outlined in the October 23, 2007 Hydrologic and Hydraulic Analysis and supplemental materials. With reference to Town of Harrison Local Law No. 3 of 2007, § 146-5.1-2(3), Staff identifies an additional requirement concerning compensatory storage. In addition, Staff advises that the review of the revised draft FER for the brownfield remediation is complete, and notes that Harrison has addressed Staff's concerns. Consequently, Staff supports issuance of the requested permits.
13. With a cover letter dated May 1, 2008, Department staff circulates a draft permit for Project Home Run.
14. Letter dated July 3, 2008 from Michael J. Ryan, P.E., Section Chief, Remedial Bureau C, Division of Environmental Remediation, NYS DEC to Commissioner Wasp advising Harrison that Department staff approved the revised draft FER for the brownfield remediation. Mr. Ryan's July 3, 2008 letter directed Harrison to provide Department staff with an electronic copy of the FER.

15. Letter dated July 3, 2008 from Mr. Mizerak to Commissioner Wasp directing Harrison to provide each issues conference participant with a copy of the FER.
16. Scheduling order dated September 19, 2008 from ALJ O'Connell. The September 19, 2008 order provided the issues conference participants with the opportunity to file a supplemental or modified petition by October 16, 2008. In addition, the September 19, 2008 order advised the participants that the issues conference related to Project Home Run would reconvene at 10:00 a.m. on November 18, 2008 in Harrison.
17. Letter dated October 12, 2008 from Mr. Schaper to ALJ O'Connell with copies to the issues conference participants commenting about the project and the hearing process, as well as supplementing his initial petition dated July 19, 2007.
18. Letter dated October 15, 2008 from Mr. LaDore to ALJ O'Connell with copies to the issues conference participants supplementing his initial petition dated June 29, 2007.
19. Amended/Supplemented Petition for Full Party Status dated October 16, 2008 from Mr. Plunkett, on behalf of the City of Rye.

Preliminary Exhibit List (Revised April 6, 2009)

Freshwater Wetlands Permit Application
 DEC No. 3-5528-00104/00001
 Town/Village of Harrison
 (Project Home Run)

Exhibit Number	Description	ID	Rec'd	Offered By	Notes
1A	Notice of Legislative Public Hearing and Issues Conference Published in the <i>Environmental Notice Bulletin</i> on June 20, 2007	✓		N/A	
1B	Affidavit of Publication of Notice of Public Hearing Published in <i>The Journal News</i> (Central Area edition) on June 20, 2007	✓		N/A	
2A	Supplemental Notice of Public Hearing Published in the <i>Environmental Notice Bulletin</i> on July 18, 2007	✓		N/A	
2B	Affidavit of Publication of Supplemental Notice of Public Hearing Published in <i>The Journal News</i> (Central Area edition) on July 18, 2007	✓		N/A	
3	Joint Application for Permit (November 15, 2006)	✓		N/A	

Exhibit Number	Description	ID	Rec'd	Offered By	Notes
4	Letter from Marc Moran (DEC Region 3) dated December 21, 2004 to Anthony Catalano, P.E. (Malcolm Pirnie) Regarding Approval of Remediation Plan Revisions	✓		DEC Staff	
5	FEMA materials/documents	✓		Michael LaDore	
6	DEC Draft Permit	✓		DEC Staff	November 18, 2008 Issues Conference Session
7	Tessier Environmental Consulting: <i>Justification to Deny NYS DEC Freshwater Wetland Permit Application No. 3-5528-00104/00001</i>	✓		City of Rye	
8	Letter from Leonard Jackson, P.E. (Leonard Jackson Associates) dated November 17, 2008 to Robert G. Wasp, P.E., Commissioner of Public Works, Harrison Regarding Beaver Swamp Brook/Project Homerun	✓		Harrison	
9	E-mail message dated November 19, 2008 from Kristen K. Wilson; Letter from Kevin F. Loyst, P.E., Senior Environmental Engineer (FMP Group) dated July 31, 2008 to Leonard Jackson	✓		City of Rye	
10	Beaver Swamp Floodway Analysis for Town of Harrison, Westchester County (December 16, 2008)	✓		Harrison	

