

**STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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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

RULING ON  
SEQRA  
COMPLIANCE

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

**TOWN/VILLAGE OF HARRISON, NEW YORK,**  
Applicant.

**(Project Home Run)**

August 21, 2009

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**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 remedial action took place consistent with the Department's Brownfield Cleanup Program (see Environmental Conservation Law [ECL] § 27-1401, *et seq.*). By letter dated July 3, 2008, Department staff approved the Final Engineering Report (FER) for the brownfield remediation project.

In addition to the remediation project, Harrison also proposed to redevelop approximately 5.7 acres of the remediated Beaver Swamp Brook site. The redevelopment project is known as Project Home Run. A portion of the Beaver Swamp Brook site includes State regulated Freshwater Wetland J-3. Therefore, in November 2006, Harrison filed applications with Staff from the Department's Region 3 Office (New Paltz, New York) for a consolidated permit, pursuant to ECL Articles 17 and 24, implementing regulations, and CWA § 401, related to the construction of Project Home Run.

**Proceedings**

In a ruling dated May 29, 2009 concerning the captioned matter, I identified the issues for adjudication and the parties to the adjudicatory hearing. The May 29, 2009 ruling discussed the SEQRA review that Harrison undertook concerning the proposed redevelopment project referred to as Project Home Run.

In its October 16, 2008 Amended/Supplemented Petition, the City of Rye (Rye) asserted that Harrison did not undertake a complete review of Project Home Run as required by SEQRA, and proposed a series of related issues. For the reasons outlined in the May 29, 2009 ruling (at 41), these proposed issues were excluded from the adjudicatory hearing.

However, I directed Harrison to provide copies of the SEQRA documents related to the redevelopment project for the record of this hearing (May 29, 2009 Ruling at 42-46). Harrison timely complied with the directive. With a cover letter dated June 15, 2009, Department of Public Works Commissioner Wasp, on behalf of Harrison, provided copies of the documentation related to Harrison's review of the brownfield remediation project and Project Home Run pursuant to ECL Article 8 and 6 NYCRR Part 617. Attached to this ruling as Appendix C is a list of the documents that Harrison provided.

The May 29, 2009 ruling provided the other parties with the opportunity to review the documents that Harrison provided, and to comment about the documents. I received a letter dated June 29, 2009 from Rye's legal counsel, Mr. Plunkett. Mr. Schaper filed a letter dated June 30, 2009. I did not receive any comments from Mr. LaDore.

Because no comments were received from Department staff, I inquired, during a telephone conference call held on July 16, 2009, whether Staff had filed a response to Harrison's June 15, 2009 letter. Ms. Krebs explained, on behalf of Department staff, that she did file a letter and had included some of the documents listed on Appendix C. Unfortunately, my office did not receive Staff's letter or enclosures.

In the May 29, 2009 Ruling (at 45, 54), I expressly requested that Harrison provide copies of the April 11, 2002, lead agency coordination letters. In addition, I encouraged the other parties to provide any SEQRA related documents in their possession. When I did not receive the lead agency coordination letters, I requested them during the July 16, 2002 telephone conference call.

Subsequently, with a cover letter dated July 23, 2009, Department staff provided copies of two lead agency designation resolutions by the Harrison Town Board, and a copy of the negative declaration. These documents correspond to Item Nos. 3, 3A, 8, and 9 on Appendix C attached to this ruling. Staff's version of the Harrison Town Board's June 23, 2004 resolution

concerning the SEQRA determination of significance for Project Home Run is similar to what is identified as Item No. 1 on Appendix C. Staff's version of the document is formatted slightly differently, and is signed by Stephen Malfitano, who was the Town Supervisor at the time.

In a letter dated August 3, 2009, Rye commented about the content of Staff's July 23, 2009 letter and the enclosures.

As explained in the May 29, 2009 Ruling (at 45), the adequacy of Harrison's SEQRA review is beyond the scope of this administrative proceeding. I noted, however, that a procedural defect concerning how Harrison coordinated 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. I explained (May 29, 2009 Ruling at 55), that I would review the papers submitted by the parties and issue a ruling about whether Harrison complied with the procedural requirements of SEQRA concerning the coordinated review process. The purpose for this review is to determine whether Department staff has any SEQRA-related obligations concerning the review of the pending permit application materials.

### **Discussion and Ruling**

As noted above, Appendix C to this ruling is a list of the documents that Harrison provided. In his June 15, 2009 cover letter, Commissioner Wasp identified Patrick Cleary, AICO, PP, as Harrison's Town Planner, and explained that Mr. Cleary provided him with the following information. On April 11, 2002, the Harrison Town Board (the Board) adopted Resolution No. 2002 B 182 (see Appendix C, Item Nos. 8 and 9) in which the Board outlined its intent to serve as the lead agency for the Beaver Swamp Brook Environmental Restoration Project and Project Home Run.

According to Harrison's June 15, 2009 letter, the Planning Office complied with the Board's resolution within one week of the Board's action by circulating a notice of intent with the full Environmental Assessment Form (EAF) to the involved agencies via first class mail. The Board received no objections from involved agencies about the Board serving as lead agency. Subsequently, the Board adopted Resolution No. 2003-362 on June 23, 2004 (see Appendix C, Item No. 1), and a determination of

significance and negative declaration for Project Home Run (see Appendix C, Item Nos. 2 and 3).

In its letter dated June 29, 2009, Rye contended that Harrison failed to conduct a proper SEQRA review. First, Rye argued that Harrison improperly segmented the review of Project Home Run into a review of the remediation project and a separate review of the redevelopment project. According to Rye, Harrison should have considered the remediation and redevelopment of the Beaver Swamp Brook site as a single action.

Second, Rye noted that the scope of the remediation and redevelopment projects has changed significantly since the projects were initially proposed. As a result, the related potential adverse environmental impacts have also changed. Rye contended that Harrison has not revisited or supplemented its original SEQRA determinations to address the significant changes associated with the remediation and redevelopment projects.

Finally, Rye questioned whether Harrison properly conducted a coordinated review. Although Rye is not an involved agency, by letter dated June 25, 2002, Rye identified itself as an interested agency, and stated, at the time, that it wanted to take an active role in the environmental review of the remediation and redevelopment projects. According to Rye, Harrison ignored the request. As a consequence, Rye argued that Harrison failed to comply with the intent of the coordinated review process, which includes, among other things, identifying all potential adverse impacts, and obtaining input from all involved and interested agencies, as well as the public.

Rye requested that I direct Department staff to undertake an independent review of the remediation and redevelopment projects to insure that all involved and interested agencies have the opportunity to review and comment about all potential adverse impacts associated with the Beaver Swamp Brook site and any proposed mitigation.

In his June 30, 2009 letter, Mr. Schaper outlined many concerns about Project Home Run. Among them, Mr. Schaper agreed with Rye's contention that the SEQRA review of the remediation and redevelopment projects was improperly segmented. Mr. Schaper argued that an EIS should have been prepared. Finally, Mr. Schaper recommended that the site should be allowed to revert to a natural state.

In the May 29, 2009 Ruling (at 31-32, 44), I summarized Department staff's current position with respect to the SEQRA review of Project Home Run. As noted in the Ruling, Staff provided this information as part of its January 20, 2009 submission. Staff explained that Harrison mailed a SEQRA lead agency coordination letter dated April 11, 2002, a copy of which Region 3 Staff received, perhaps for the second time, on December 20, 2006. According to Staff, the initial copy of Harrison's April 11, 2002 lead agency coordination letter may have been sent to members of Staff in the Division of Environmental Remediation. As outlined in the January 20, 2009 submission, it is Department staff's position that Harrison's SEQRA review of Project Home Run was not procedurally flawed and, therefore, complied with applicable requirements outlined in 6 NYCRR Part 617.

In the July 23, 2009 letter, Staff states, in pertinent part, that:

"[i]f the April 11, 2002 Notice of Intent/Designation was sent to all involved agencies along with the EAF and adequate project description, Department staff believe that the Notice of Intent/Designation would be sufficient for coordination purposes pursuant to 6 NYCRR §617.6(b)(3)(i)."

Staff's copy of the Board's April 11, 2002 notice of intent to serve as SEQRA lead agency (see Appendix C, Item No. 9) is stamped received on "DEC 20 2006." In the July 23, 2009 letter, Staff refers to the second paragraph on page 2 of this document, and notes that the resolution is the actual notice that should have been mailed to the involved agencies. Staff's copy of the Board's June 23, 2004 SEQRA determination of significance (see Appendix C, Item No. 1) is stamped received on "FEB 8 2007."

In its August 3, 2009 letter, Rye observed that the Region 3 Department staff received the Board's April 11, 2002 notice of intent to serve as SEQRA lead agency "4 years, 8 months and 9 days" after the Board adopted the April 11, 2002 notice. Rye argued that Department staff, therefore, could not have responded within the 30-day period set forth in the Board's April 11, 2002 notice. Rye also noted that the description of the remediation and redevelopment projects outlined in the Board's resolutions and the EAF do not accurately reflect the current proposal for Project Home Run. Before the administrative hearing continues, Rye argued that Department staff should undertake a *de novo* "SEQRA review on the entire Project Home Run."

In its August 3, 2009 letter, Rye characterizes Project Home Run as consisting of both the brownfield remediation project and the redevelopment project. However, in the May 29, 2009 Ruling (at 2) and in this ruling, I distinguish the brownfield remediation project from the redevelopment project, and use the term, "Project Home Run," to refer exclusively to the redevelopment project. The scope of the adjudicatory hearing is limited to the pending applications for a consolidated permit to construct Project Home Run - the redevelopment project.

As identified in Appendix C, Item Nos. 8 and 9 are copies of the Board's Resolution No. 2002 B 182, dated April 11, 2002, which state the Board's intent to serve as the SEQRA lead agency for the brownfield remediation project and the redevelopment project at the Beaver Swamp Brook site. Item No. 9 listed in Appendix C is a copy of the Board's resolution dated April 11, 2002 that Staff enclosed with the July 23, 2009 letter. Although Resolution No. 2002 B 182 directs the lead agency notice to be circulated to the involved agencies, and provides the involved agencies 30 days for review, neither version of the resolution (Item Nos. 8 and 9) identifies who the lead agencies are.

With the June 15, 2009 cover letter, Harrison also provided copies of Resolution Nos. 2003-387 (Appendix C, Item No. 4) and 2004-362 (Appendix C, Item No. 1). The former resolution adopts the negative declaration (Appendix C, Item No. 5) concerning the remediation project and references the Department's record of decision. The latter resolution adopts the negative declaration (Appendix C, Item No. 2) concerning the redevelopment project (i.e., Project Home Run). As noted in the May 29, 2009 ruling (at 42-43), the propriety of Harrison's SEQRA review concerning the remediation and the redevelopment projects is beyond the scope of this proceeding (see 6 NYCRR 624.4[c][6][ii][a]).

The issue, relevant to this proceeding, is whether Harrison conducted a coordinated review consistent with the requirements outlined at 6 NYCRR 617.6(b)(3). If Harrison complied with the coordination requirements, then Department staff, as an involve agency, is bound by Harrison's determination of significance concerning Project Home Run (see 6 NYCRR 617.6[b][3][iii]). If, however, Harrison did not comply with the coordination requirements, Staff would not be bound by Harrison's determination of significance, and would be required to undertake a SEQRA review as if the review were uncoordinated (see 6 NYCRR 617.6[b][4][i]).

No party has provided me with copies of Harrison's coordination letters or other documentation which demonstrates that Department staff and other involved agencies received the Board's April 11, 2002 notice of intent to serve as SEQRA lead agency for Project Home Run prior to the expiration of the 30-day comment period set forth in the resolution. Rather, the information that Staff enclosed with its July 23, 2009 letter shows that Staff received the Board's April 11, 2002 notice of intent to serve as SEQRA lead agency over four years later. Also, Staff did not provide any copy of an EAF. Therefore, I conclude that Harrison did not conduct a coordinated review consistent with the requirements outlined at 6 NYCRR 617.6(b)(3).

In the absence of a properly conducted coordinated review for Project Home Run, I conclude further that Department staff, as an involved agency, has committed errors of law by: (1) relying on the Board's June 23, 2004 SEQRA determination of non-significance pursuant to 6 NYCRR 617.6(b)(3)(iii), and (2) failing to make its own determination of significance pursuant to 6 NYCRR 617.6(a). Accordingly, I remand the captioned matter to Department staff, pursuant to 6 NYCRR 624.4(c)(6)(i)(a), issue a determination of significance consistent with the requirements outlined in 6 NYCRR part 617.

I fully appreciate that this remand may result in a redundancy of efforts already undertaken by Harrison. At this point in the proceedings, however, I find that it would be more efficient to remand the matter to Staff as provided by 6 NYCRR 624.4(c)(6)(i)(a) to ensure procedural compliance with SEQRA before devoting any more of the parties' resources to an adjudicatory hearing.

### **Appeals**

During the July 16, 2009 telephone conference call, Commissioner Wasp said that Harrison was in the process of finalizing plans related to Project Home Run. According to Commissioner Wasp, the forthcoming plans would: (1) avoid the floodway, as recently revised; (2) require less fill; and (3) create more compensatory storage. Harrison contends that the new plans would reduce potential adverse impacts to the freshwater wetlands. Commissioner Wasp anticipated that the new plans would be filed with Department staff by the first week of August.

Because Department staff and the parties will be reviewing additional materials related to Project Home Run, appeals from

the May 29, 2009 Ruling will continue to be held in abeyance to conserve administrative resources. After the parties review and comment about Harrison's forthcoming materials, I will advise the parties about the need to reconvene the issues conference and revise the May 29, 2009 Ruling.

Pursuant to 6 NYCRR 624.8(d)(2), the parties, however, may appeal this ruling concerning compliance with the procedures outlined in 6 NYCRR part 617. Appeals must be received no later than 4:00 p.m. on September 4, 2009, and replies must be received no later than 4:00 p.m. on September 11, 2009. A party's failure to appeal from this SEQRA compliance ruling at this time will constitute a waiver of the party's right to appeal.

The original and three copies of each appeal and reply thereto must be filed with Commissioner Alexander B. Grannis (attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14<sup>th</sup> Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief Administrative Law Judge James T. McClymonds and me. One copy of each submittal must be sent to all others listed below at the same time it is sent to the Commissioner. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

### **Further Proceedings**

My July 20, 2009 memorandum concerning the July 16, 2009 telephone conference call outlined further proceedings. Harrison may have filed, or will be filing, new plans with Department staff. Subsequently, I will schedule a telephone conference call to obtain an estimate from Staff about the amount of time needed to review Harrison's submission. Based on that estimate, a schedule for filing comments by the other parties will be developed.

/s/

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Daniel P. O'Connell  
Administrative Law Judge

Appendix C: Harrison's SEQRA Documentation.

Appendix C

**Harrison's SEQRA Documents**

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

SEQRA Documents enclosed with Harrison's June 15, 2009 cover letter:

1. Resolution No. 2004-362, dated June 23, 2004 entitled, "SEQR Determination of Significance for Project Home Run for property located between Oakland Avenue and the Beaver Swamp Brook, more specifically known as [sic] designated as Block 152, Lot 23; Block 154, Lot 3; Block 155, Lots 1&7; Block 163, Lots 1, 30 & 36; Block 162, Lots 1, 5, 13, 15, 21, 33, 43, 46, 57, 62, 69 & 71; and Block 161, Lot 49." [Department staff enclosed a version of this document with the July 23, 2009 letter. Staff's copy of this document is stamped received on FEB 8 2007.]
2. Attached to Resolution No. 2004-362 is a Negative Declaration, Notice of Determination of Non-Significance, dated July 23, 2004. Name of Action: Beaver Swamp Brook Environmental Restoration Project.
3. Negative Declaration, Notice of Determination of Non-Significance, dated July 23, 2004. Name of Action: Beaver Swamp Brook Environmental Restoration Project. [Department staff enclosed a copy of this document with the July 23, 2009 letter.]
  - A. Reasons Supporting this Determination (Paragraph Nos. 1-14). [Department staff enclosed a copy of this document with the July 23, 2009 letter.]
  - B. Traffic Impact Study dated July 10, 2002 by Adler Consulting: Transportation, Planning & Traffic Engineering, LLC (White Plains, New York) for Project Home Run, Oakland Avenue, Town/Village of Harrison, New York. Project No. 102222.
  - C. Flood Damage Protection. Insert for Harrison SEQR - Beaver Swamp Brook Projects.
4. Resolution No. 2003-387, dated July 15, 2003 entitled, "Adoption of SEQR Determination of Significance for the Beaver Swamp Brook

Environmental Restoration Project for property located between Oakland Avenue and the Beaver Swamp Brook, more specifically known and designated as Block 152, Lots 1-11; Block 163, Lots 1-39; Block 162, Lots 1-75; and Block 161, Lots 8-68."

5. Attached to Resolution No. 2003-387 is a Negative Declaration, Notice of Determination of Non-Significance, dated July 2003. Name of Action: Beaver Swamp Brook Environmental Restoration Project.
  - A. Reasons Supporting this Determination. (Paragraph Nos. 1-15)
  - B. Full Environmental Assessment Form, dated July 2003. Name of Action: Beaver Swamp Brook Environmental Restoration Project. Parts 1 and 2.
6. Affidavit of Publication from the *Journal News, Central Area*, dated July 29, 2003, concerning Bond Resolution dated June 26, 2003 for the replacement of sidewalks.
7. Affidavit of Publication from the *Journal News, Central Area*, dated July 30, 2003, concerning Bond Resolution dated June 26, 2003 for reconstruction and resurfacing of roads.
8. Resolution No. 2002 B 182, dated April 11, 2002 entitled, "Designation of the Town Board as Lead Agency, SEQR Notice of Intent to Serve as Lead Agency for Project Home Run - Athletic Field Complex for property located on the North side of Oakland Avenue in the Town/Village of Harrison, NY known and designated as Block 152, Lot 23; Block 154, Lot 3; Block 155, Lots 1&7; Block 163, Lots 1, 30 & 36; Block 162, Lots 1, 5, 13, 15, 21, 33, 43, 46, 57, 62, 69 & 71; and Block 161, Lot 49." [Department staff enclosed a copy of this document with the July 23, 2009 letter.]
9. Resolution No. 2002 B 182, dated April 11, 2002 entitled, "Designation of the Town Board as Lead Agency, SEQR Notice of Intent to Serve as Lead Agency for Project Home Run - Athletic Field Complex for property located on the North side of Oakland Avenue in the Town/Village of Harrison, NY known and designated as Block 152, Lot 23; Block 154, Lot 3; Block 155, Lots 1&7; Block 163, Lots 1, 30 & 36; Block 162, Lots 1, 5, 13, 15, 21, 33, 43, 46, 57, 62, 69 & 71; and Block 161, Lot 49" signed by Stephen

Malfitano, Mayor/Supervisor. [Department staff enclosed a copy of this document with the July 23, 2009 letter. Staff's copy of this document is stamped received on DEC 20 2006.]

10. Full Environmental Assessment Form dated April 2002. Name of Action: Project Home Run - Athletic Fields. Parts 1, 2, and 3.