

In the Matter of the Application of
IT'S GREENER NOW, INC.
to modify a Mined Land Reclamation
Law permit pursuant to
Environmental Conservation Law ("ECL")
Article 23, Title 27 and Part 420
of Title 6 of the Official
Compilation of Codes, Rules
and Regulations of the
State of New York ("6 NYCRR"),
to expand the Padua Gravel Pit
in the Town of Dix, Schuyler County.

**RULING ON
MOTION**

Application No. 8-4424-00006/00001

BACKGROUND

By letter dated October 31, 2007, It's Greener Now, Inc. ("Applicant" or "IGN") moved for an order that a determination by staff of the Department of Environmental Conservation ("Department Staff") to hold a public hearing in this matter was untimely. The motion was brought pursuant to Section 624.6(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Department Staff opposed the motion in a submission dated November 21, 2007 ("Reply"). Applicant sought leave to respond to Department Staff's submission. The administrative law judge ("ALJ") granted leave and set a response date of November 30, 2007. Applicant submitted a response ("Applicant's Response") on that date.

On May 5, 2005, IGN applied to the Department for a permit modification. Specifically, IGN seeks to modify its Mined Land Reclamation Law ("MLRL") permit for a site in the Town of Dix, Schuyler County, to allow for an expansion of the approved life of mine from 14.33 acres to 106.27 acres. Department Staff issued several notices of incomplete application, and the Applicant made further submissions in response.

The Department is serving as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") Article 8. On May 14, 2007, Department Staff declared IGN's application complete, and issued a Notice of Complete Application and Negative Declaration (the "Notice") that

appeared in the Department's electronic *Environmental Notice Bulletin* and a local newspaper on May 23, 2007. The Notice set a deadline of June 25, 2007 for receipt of public comments.

The public comment period was subsequently extended to July 25, 2007, and by letter dated August 10, 2007, Department Staff notified Applicant of the determination to hold a public hearing. That letter also asked Applicant to provide additional information within thirty days.

On October 22, 2007, the matter was referred to the Office of Hearings and Mediation Services ("OHMS") to schedule a hearing. The hearing referral indicated that Department Staff was considering rescinding the negative declaration. In addition, the hearing referral stated that Department Staff had not yet taken a position with respect to permit issuance.

DISCUSSION

Positions of the Parties

Applicant's Motion

In its motion, Applicant contended that Department Staff failed to comply with the Uniform Procedures Act ("UPA"), ECL Section 70-0119(1) and former Section 621.7¹ of 6 NYCRR when the matter was referred to OHMS to schedule a public hearing. Section 70-0119(1) provides that

"[a]fter evaluating an application for a permit and any comments of department staff, other state agencies or units of government or members of the public, the department shall, on or before sixty calendar days after it mails notice to the applicant that the application is complete or on or before sixty days after the application is deemed complete pursuant to the provisions of this article, determine whether or not to conduct a public hearing on the application and mail written notice to the applicant of a determination to conduct a public hearing. Such determination shall be based on whether the evaluation or

¹ The Part 621 regulations were amended in 2006 with an effective date of September 6, 2006. As part of that amendment, Section 621.7, as it existed when this application was filed, was renumbered as 621.8. The language of the regulation is unchanged.

comments raise substantive and significant issues relating to any findings or determinations the department is required to make pursuant to this chapter, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project as proposed may not meet statutory or regulatory criteria or standards; provided, however, where any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue may result in denial of the permit or the imposition of significant conditions thereon, the department shall hold a public hearing on the application."

Former Section 621.7 of 6 NYCRR, which, as noted, has been renumbered as Section 621.8, states that

"[a]fter a permit application for a major project is complete . . . and notice in accordance with section 621.7 has been provided, the department must evaluate the application and any comments received to determine whether a public hearing will be held. If a public hearing must be held, the applicant and all persons who have filed comments must be notified by mail. This must be done within 60 calendar days of the date the application is complete. The uniform procedures time frames are suspended as of the date the department notifies the applicant of its decision to hold a hearing and the time frames of Part 624 of this Title, Permit Hearing Procedures, apply. A hearing may be either adjudicatory or legislative pursuant to Part 624 of this Title or legislative pursuant to this Part."

Applicant argued that Department Staff's August 10, 2007 notification that a public hearing would be held was untimely, because it should have been notified no later than July 14, 2007. Applicant noted that the public comment period closed on June 25, 2007, and was extended to July 25, 2007 without Applicant's

consent.² Applicant requested an order that Department Staff's request to conduct a public hearing was untimely, because of Department Staff's failure to provide notice within sixty days of the May 14, 2007 completeness determination, as required by ECL Section 70-0119(1) and Section 621.8 of 6 NYCRR.

In support of its motion, Applicant cited to Matter of Essex County, Interim Decision of the Commissioner, 1996 WL 172674 (March 20, 1996). In Matter of Essex, the applicant, Essex County, sought to modify its solid waste management facility permit to increase the daily tonnage of solid waste received at the Essex County Landfill. Id. at 2, * 1; Matter of Essex County, ALJ Rulings, at 1, 1996 WL 33140641, *1 (Feb. 29, 1996). Department Staff forwarded a copy of the application to the Adirondack Park Agency ("APA"), and on December 8, 1995, APA staff advised Department Staff that the proposal was not subject to APA jurisdiction. Matter of Essex, Interim Decision, at 2, 1996 WL 172674, * 2. A notice of complete application was sent via telefacsimile to the County on December 20, 1995, and mailed on December 21, 1995. Id. On February 8, 1996, the Members of the APA reversed APA staff's December 8 determination and concluded that an amendment of the existing APA permit for the landfill was required. Id. at 3, * 2.

On February 20, 1996, the last day of the sixty day period, Department Staff determined that a public hearing would be held, and advised the County of its decision via telefacsimile on that same date. Id. A hard copy was mailed on February 21, 1996, and the referral was forwarded to OHMS on February 22, 1996. Id. at 3, * 3.

That same day, the County sent a letter motion to the ALJ, seeking an order cancelling the public hearings because Department Staff's determination was not made within the time limits specified under the UPA, ECL Article 70. Id. The ALJ denied Essex County's motion, reasoning that although notification was not sent by mail within the sixty day period, service by telefacsimile on February 20, 1996 was sufficient. ALJ's Ruling, at 5-6, 1996 WL 33140641, * 4.

The Commissioner disagreed, holding that Department Staff's determination to hold a public hearing was not mailed within the sixty day time period mandated by ECL Section 70-0119(1).

² Section 621.14(a) provides that "[a]ny time period specified in this Part may be extended for good cause, by mutual written consent of the applicant and the department." This section, the former Section 621.15, was renumbered as part of the 2006 amendments.

Interim Decision, at 1, 1996 WL 172674, * 1. The Commissioner stated that the County's application was deemed complete, pursuant to ECL Section 70-0109(1)(b), on December 19, 1995, and Department Staff then had sixty days to determine whether to conduct a public hearing. Id. at 4-5, * 4. Because the sixtieth day fell on a Saturday (February 17, 1996), and Monday, February 19, 1996 was a legal holiday, the time was extended to February 20, 1996, consistent with the New York State General Construction Law Section 25-1(1). Id. at 5, *4. The Commissioner emphasized the importance of adhering to the requirements of the UPA, but concluded that nevertheless, any decision by the Department on the application should be coordinated with the APA's environmental review. Id. at 5-6, * 5. Concluding that APA's evaluation was the functional equivalent of review pursuant to SEQRA, the Commissioner suspended the time periods for a DEC decision until the Department received the functional equivalent of a draft environmental impact statement from APA, and remanded the matter to Department Staff. Id. at 6, * 5.

Department Staff's Reply

In its Reply, Department Staff countered that Matter of Essex was inapposite, arguing that the availability of alternative public process through the APA's involvement was "a significant factor" in the Commissioner's determination. Reply, at 5. Department Staff pointed out that the Interim Decision equated the APA's review with review pursuant to SEQRA, and that the Commissioner concluded that the Department's final decision must be held in abeyance until the APA review was completed. According to Department Staff,

"[t]his diminished the need to reconcile the concerns about the need for a public hearing with the time for communicating the need for the hearing to the applicant. Those facts differ from those currently before the department where there is no alternative, administrative avenue for review available to the public."

Id.

Department Staff argued that "the prevailing, overriding concern for meaningful public participation in the review of the application" should be balanced "against the lack of consequence to the applicant, if it is required to engage in the process designed to ensure a permit decision that results from a thorough review of the application." Reply, at 4. Department Staff went

on to point out that during the public comment period following publication of the Notice in this case, "the project garnered considerable public attention." Reply, at 2. Specifically, Department Staff stated that

"[a] public informational meeting was hosted by Schuyler County Legislature on June 18, 2007 as part of its regular meeting agenda. . . . At the session, several parties approached staff and requested an extension of the public comment period which was scheduled to expire on June 25, 2007. Subsequently, DMN [Division of Mineral Resources] staff contacted the applicant's consultant and obtained verbal consent for a 14 day extension of the public comment period from the consultant on behalf of the applicant. The extension was never confirmed in writing.

In the meantime, DEP [Division of Environmental Permits] staff received written requests for extension of the public comment period from the [V]illage of Watkins Glen, the [T]own of Dix, the New York State Office of Parks Recreation and Historic Preservation ("OPRHP") and [State] Senator George Winner. The parties requested various extension periods, ranging up to 30 days. In response, DEP staff extended the public comment period until July 25, 2007. The consent of the applicant was not sought before the comment period was so extended. After the extension was granted, staff made an attempt to obtain the applicant's consent to the extension. The applicant refused to consent."

Id.

The Reply included a list of thirty-eight comment letters that were received between June 21, 2007 and July 26, 2007.³ The letters, which were provided to the ALJ as part of the hearing referral, expressed concerns with respect to visual, noise, traffic, and fish and wildlife impacts, as well as impacts to hydrology and hydrogeology, and stormwater runoff. In addition, some comments discussed potential impacts to the Watkins Glen

³ The letters received after the close of the extended comment period were all dated prior to July 25, 2007.

State Park and the Village of Watkins Glen, as well as the Watkins Glen race course, which is listed on the National Registry of Historic Places, in light of the proximity of the Padua Gravel Pit and the proposed expansion. The New York State Department of Transportation ("DOT") observed that the potential increase in heavy vehicle traffic on State Route 409 "concerns us greatly because of the steep grades; the highway's winding nature, and the impact to the pavement's service life." June 29, 2007 letter from James E. Clements, DOT, to Roger McDonough, DEP.

In addition, Department Staff attached copies of two letters, including a March 20, 2006 letter from Ruth L. Pierpont, Director of OPRHP, to Rebecca and David Moyer, of Birchwood Archaeological Services. That letter stated that OPRHP had determined that the proposed expansion would have no impact upon cultural resources already listed, or eligible for inclusion in the State and National Registers of Historic Places. The second letter, dated August 13, 2007, was sent from OPRHP's coordinator of Historic Preservation Services, John A. Bonafide, to Rodger T. McDonough, an Environmental Analyst in the Department's Region 8 office.

In the August 13, 2007 letter, Mr. Bonafide stated that

"I am writing in an effort to rectify an error in our consultation process under Section 14.09 of New York State Parks and Recreation Law. A letter dated March 20, 2006 was inadvertently sent to you regarding our opinion on potential impacts to historic/cultural resources within the project area. Unfortunately, the comments were only intended to speak to the potential impact(s) the project might have on archaeological resources. The assessment of potential impacts to historic structures had not yet been undertaken when this letter was sent. As such, its findings are incomplete and we request that it be disregarded in the record and replaced with more complete findings and recommendations by this office with regard to all cultural and historic resources."

The letter indicated that while OPRHP continued to believe that the proposal would not impact archaeological resources, OPRHP was concerned that the proposed expansion would have an adverse impact on the Watkins Glen Grand Prix Road Course, which is listed on the National Register of Historic Places and includes

portions of Route 409, in the project area. The letter went on to request that review of the project be reopened to evaluate potential impacts to the Road Course, as well as the National Register eligible Watkins Glen State Park. According to the letter, OPRHP was seeking photo documentation for the adjacent St. Mary's Cemetery and Greenwood Cemetery to determine if those sites were eligible for inclusion in the Registers, and if so, OPRHP requested that the visual analysis be expanded to include potential impacts to these sites as well.

The letter concluded by stating that a July, 2004 letter that provided a No Adverse Impact finding for a then-proposed 6 foot by 7 foot culvert and conveyor to be placed under Route 409 was no longer valid. According to the letter, there was no discussion of an expanded mining operation as part of that proposal, which has now been reintroduced (expanded to a 10 foot by 12 foot culvert) as part of the instant application.

Department Staff maintained that the decision to extend the public comment period was rationally based, and appropriate given the significant public interest in the project, as expressed by private citizens, elected officials, and State agencies. In support of its arguments, Department Staff cited to Matter of Evergreen Recycling, LLC, Commissioner's Decision, at 13-14, 2005 WL 1840989, * 6 (July 28, 2005) (public participation in administrative review of permit applications is a central feature of the State's public policy; failure to afford all interested parties their appropriate role in the process and any adjudicatory hearing has served as basis for annulment of Departmental action on judicial review) (citations omitted).

Department Staff asserted that it was

"presented with a set of circumstances, including incongruent messages from OPRHP and public interest that developed well along the permit processing continuum, that was not anticipated by the UPA [Uniform Procedures Act] legislation and required a special approach. It is worth noting that staff acted promptly, upon the close of the extended comment period, to review the comments that were received and decide on an appropriate course of action. This was done within 90 days of completeness and, therefore, before the time that the application was subject to the default decision-making processes of the UPA."

Reply, at 5-6. Department Staff contended that Applicant had not demonstrated any prejudice as a result of these circumstances, and argued further that "[e]quity requires that an appropriate public forum be provided so that the concerns of the public can be vetted before this agency and its commissioner. The decision-making process of this agency should not be compromised because of the failure of staff to notify the applicant within 60 days of the completeness demonstration." Reply, at 6. Department Staff added that "[m]any interested parties have requested that the department rescind the negative declaration. Those requests are subject to a continuing review by department staff. A decision has yet to be made." Reply, at 1, fn. 1.

Applicant's Response

In its Response, Applicant contended that the level of public comment, and the bases for Department Staff's determination to conduct a public hearing, are irrelevant. According to Applicant, the sole question is whether Department Staff complied with the UPA and its implementing regulations when the decision was made to refer the application to OHMS. Applicant took issue with Department Staff's reliance upon the equities of the situation, and emphasized that the regulatory requirements are "written in a mandatory manner and allows [sic] for no such flexibility." Applicant's Response, at 3. Applicant went on to assert that it had been disadvantaged by the length of time that has passed, and maintained that "equity dictates in this case that the permit is issued for an application that has been pending since 2005 and has undergone significant regulatory review and critique." Id.

In further support of its arguments, Applicant cited to the Final Comment Responsiveness Document for the 1994 revisions to Part 624. In response to a comment with respect to public participation in the permit process, the Department stated:

"[u]nder UPA the total time allotted to DEC to perform its mandated functions is clearly set forth and extending the times is beyond DEC's statutory authority. Within 90 days of an application's completion (either by notice or by law), the Department must initiate a hearing if one is going to be held. Within this 90-day period DEC has 60 days to receive comments and decide on the basis of its own permit review or from the comments, whether or not a hearing is necessary."

December, 1993 Comments/Response Document, Part 622 (Uniform Enforcement Hearing Procedures) and Part 624 (Permit Hearing Procedures).

Applicant also argued that even if verbal consent to extend the public comment period by fourteen days were provided by IGN's consultant, the comment period would have expired on July 9, 2007. Applicant went on to state that it would not have authorized any further extension to the public comment period. With respect to the comment letters received, Applicant observed that only 12 of the 38 comment letters were received before the expiration of the original public comment period deadline. Finally, Applicant emphasized that

"[t]he fact is that the Applicant has submitted a response to Staff's August 10, 2007 letter and Staff is still (now more than 7 weeks after receiving such response) in the process of reviewing that response, including its coordination with its sister agencies. This technical review may occur without a public hearing, although it is clear at this point that Staff has gone beyond the ninety (90) days in which it has to make a final determination on the Application after a Notice of Complete Application has occurred without a public hearing. 6 NYCRR § 621.9(a)(2)."

Applicant's Response, at 2.

Ruling

In light of the mandatory nature of the UPA provisions, Applicant's arguments must prevail. See Matter of Seaboard Contracting and Material, Inc. v. Department of Env't'l Conservation, 132 A.D.2d 105, 109 (3rd Dept. 1987) (UPA default provisions are mandatory, not discretionary in nature); Matter of 628 Land Assocs., ALJ Ruling, at 3, 1993 WL 1465171, * 3 (Dec. 21, 1993). "The intent of the UPA is to compel agency decisionmaking within specified time frameworks and to ensure that applicants have a meaningful remedy when the agency exceeds those time limits." Matter of 628 Land Assocs., Interim Decision, at 3, 1994 WL 549641, * 3 (Sept. 12, 1994)⁴. The

⁴ Applicant in Matter of 628 Land Assocs. subsequently filed a petition pursuant to Article 78 of the New York Civil Practice Law and Rules (Matter of Zagata v. Freshwater Wetlands Appeals Bd., 244 A.D.2d 343 (2nd Dept. 1997), lv. granted, 91

statute requires the Department to decide within sixty days whether to hold a public hearing. That time period can only be extended, for good cause, with applicant's written consent. Section 621.14(a). Although the equities as articulated by Department Staff are compelling, those equities are not sufficient to overcome the statutory language. See Matter of Essex, Interim Decision, at 1, 1996 WL 172674, * 1.

Nevertheless, Department Staff has indicated that it is considering whether to rescind the negative declaration. See Section 617.7(f). If the negative declaration is rescinded, the SEQRA process has not been completed. Literal compliance with the provisions of SEQRA is required. Matter of Linus Realty, LLC, Issues Ruling, at 13-14, 2005 WL 2921250, *10 (Nov. 2, 2005); Matter of 628 Land Assocs., Interim Decision, at 4, 1994 WL 549641, * 3 (no valid final determination may issue absent compliance with SEQRA). Accordingly, a decision whether to rescind the negative declaration must be made, and if rescinded, the potentially significant environmental impacts of the proposed mine expansion must be evaluated.

On or before Friday, December 21, 2007, Department Staff shall advise the ALJ and the Applicant, in writing, of Department Staff's determination with respect to rescission of the negative declaration. Service via e-mail or telefacsimile, with hard copy to follow, is authorized.

/s/

Maria E. Villa
Administrative Law Judge

December 7, 2007
Albany, New York

TO: Service List

N.Y.2d 813 (1998), appeal withdrawn, 95 N.Y.2d 792 (2000).