

In the Matter of the Application of

MONICA SUE JAMES

for a Tidal Wetlands Permit pursuant to Article 25 of the Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

RULING
ON
MOTION FOR
PROTECTIVE ORDER

DEC #1-4728-01350/00003

INTRODUCTION/PROCEEDINGS

In this tidal wetland permit application, prior to issuance of a public hearing notice, the Applicant filed a discovery request. By E-mail dated August 12, 2005, attorney for the Applicant filed a discovery request seeking disclosure of the entire permit file, permits and all studies and reports for fifteen properties near the site, as identified in the request. Applicant seeks to compare site conditions at other nearby permitted properties to the Applicant's site in furtherance of the permit application.

In response, DEC Staff filed a Notice of Motion for Protective Order (the Motion), with a supporting affirmation of Kari E. Wilkinson, Assistant Regional Attorney and a supporting affidavit (all dated November 4, 2005). Attached as Exhibit B to the Motion is the supporting affidavit of Matthew Richards, NYSDEC Marine Biologist I (also dated November 4, 2005).

DISCUSSION

Pursuant to 6 NYCRR 624.7, discovery prior to an issues conference is limited to what is afforded under 6 NYCRR 616, the Freedom of Information Law (FOIL; Public Officers Law §84 et seq.). However, by permission of the ALJ, a party may obtain discovery prior to the issues conference. Here, the Applicant has chosen not to make a FOIL request, but instead has filed a discovery request. Although not specifically sought, I treat the Applicant's discovery request, additionally, as seeking permission for pre-issues conference discovery pursuant to 6 NYCRR 624.7(c).

Ultimately, a determination whether to grant or deny this

wetland permit application necessarily focuses on whether this Applicant has demonstrated compliance with the statutory and regulatory requirements of ECL Article 25 and 6 NYCRR part 663, which is the proper subject of this permit hearing. This is a site specific analysis. Evidence of issuance of permits for other properties will be of secondary importance (at best), and likely not relevant to determining compliance with the statutory and regulatory requirements. Following is a discussion of DEC Staff's opposition to the discovery request and the Applicant's response.

Relevance

DEC Staff contends that compliance with the discovery request would be extremely burdensome and that the request is not relevant to the above captioned permit proceeding and further is overbroad and vague. Instead, DEC Staff contends, wetlands permit issuance determinations are site specific, made according to the specific, unique factors existing at the time the permit application is received. In support of its position, DEC Staff cites *Matter of Leibner v NYSDEC*, 291 AD2d 558 (2nd Dept., *lv denied* 98 NY2d 606 (2002) and *Matter of Stephan Kroft*, Decision of the Commissioner, July 8, 2002, 2002 WL 1586198.

"Permit issuance determinations are fact-specific decisions and the facts and bases for permit issuance in these other instances are not articulated in this record - nor should they necessarily be required to, given that each are based on fact specific evaluations applicable to their site." *Leibner supra*.

The Applicant counters that pursuant to Civil Practice Law and Rules (CPLR) §3101, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action; regardless of the burden of proof." Discovery in this administrative hearing generally conforms with CPLR practice; see 6 NYCRR 624.7(b) and (c)(2). The Applicant purports to have photographs of over 150 docks located on the south shore of Long Island. The Applicant asserts that each of the 15 properties identified in her request represents a location with an existing dock, and further that each of these docks share a large number of characteristics with her proposed dock. These existing docks, the Applicant contends, can be observed on aerial photographs, satellite photographs, by boat and often, from land.

In addition, the Applicant argues that the language of the Department's tidal wetland regulations is not specific; that information contained in the requested permit files will likely enable the Applicant's technical and scientific consultants to characterize the Department's permitting standards and infer how

Staff interpreted the permitting standards as applied to these other existing docks on the Great South Bay. Nonetheless, the Applicant concedes that without the production and review of the requested 15 permit applications, it is impossible to predict the degree of relevance those materials may have to the current permit application proceeding. The Applicant concludes that taken as a whole, the 15 files may serve to provide a "roadmap" that can be used by the parties and the Commissioner to clarify standards, facts and framework surrounding the issues presented by this permit application.

Regarding *Kroft, supra*, the Applicant notes that did not address the issue of discovery presented here, and in any event, the Commissioner's comments are not precedent setting with respect to the CPLR. In the Applicant's view, the Commissioner's conclusion in *Kroft* is not based upon the ALJ's discussion regarding the proliferation of other dock structures or upon a principle of law, but instead is based upon the hearing record in that matter. Therefore, the Applicant contends that the Commissioner's conclusion in *Kroft* does not relate to the issue whether the permit applicant in that matter should have had access to DEC files or whether the information contained in any one or more permit files might be relevant.

DEC Staff cites the affidavit of Marine Biologist I, Matthew Richards, that, "[e]nvironmental conditions and site conditions are for all practicality different than those of another area in a different section of the bay. For sites to be considered the same, one would have to show the same exact conditions exist in all aspects..." See also, *Matter of Brian Zazulka*¹, Commissioner Decision, December 27, 2004, 2004 WL 3048988 (N.Y.Dept.Env.Conserv.), *affirmed on judicial review*, 807 N.Y.S.2d 311, 2006 N.Y. Slip Op. 00528, N.Y.A.D. 2 Dept., Jan 24, 2006. Therefore, only if the Applicant can show that another site is the same in all respects, would such comparison be relevant.

In sum, wetland permit determinations are case-by-case decisions based upon compliance with the statutory and regulatory requirements of ECL Article 25 and 6 NYCRR part 661. The determination whether to grant this permit necessarily focuses on whether this Applicant has demonstrated compliance with the statutory and regulatory requirements of ECL Article 25 and 6 NYCRR part 661, which is the proper subject of the anticipated hearing.

¹ *Zazulka* was a freshwater wetland case, but the principle regarding comparison of an applicant's site to other sites applies as well to tidal wetlands permit review.

In a previous wetlands case, I noted that rather than supporting that applicant's position, the comparison to other properties shows that the Department's wetlands permitting decisions necessarily are case-by-case, site specific determinations, and that, where appropriate, DEC Staff has responded to unique site specific conditions to work with a permit applicant. *Zazulka supra*. In *Zazulka*, that applicant proposed to show that four other wetland permit cases in the vicinity of the site were not any different than the Applicant's; and because permits were granted in these other instances, *Zazulka* contended that his permit application also should be granted. But instead, *Zazulka* analogized that an aspect or feature of each of the other sites was similar to his site, and, if these similar features were taken together, they comprise a hypothetical property similar to the *Zazulka* site. That argument was not what that applicant initially proposed to show and the argument was rejected. *Zazulka supra*.

Overbroad and Vague

Regarding Staff's contention that the Applicant's request is overbroad and vague, Staff states that the request describes the locations of the permit applications/properties sought, by address, tax lot number and/or current owner of the property. However, the Department's data base, *Department Application Review and Tracking* (DART), locates applications made after 1992 by permit number and rarely can locate applications by address or owner. Applications made prior to 1992 are cataloged at Region 1 Headquarters by the name of the applicant (*i.e.*, the name of the applicant at the time the application was made; not necessarily the current owner of the property). Therefore, Staff contends, the Applicant would have to provide names of current and prior owners before Staff could possibly comply with the request. In addition, Staff contends that Applicant's request to review "the entire permit file including the application, correspondence, permits, as well as all studies and reports," is extremely overbroad, because included in the request are materials that consist of privileged documents. For these reasons, DEC Staff asserts that the discovery request is overbroad and vague and the order of protection should be granted.

Nonetheless, while DEC Staff asserts that a protective order should be granted with respect to the Applicant's discovery request, Staff acknowledges that the Applicant may seek the information through FOIL.

Lastly, I reject DEC Staff's contention that the discovery request must be denied because to do otherwise would unduly prolong the permit hearing. This permit hearing is conducted at the request of the Applicant. It is the Applicant, not Staff,

who may be aggrieved by delay in processing this permit application.

RULING

The issue of whether materials are subject to discovery, is separate and distinct from whether any of the material is admissible as evidence at hearing. Standards for scope of discovery necessarily are broader than standards for admission into evidence. Nonetheless, DEC Staff has identified legitimate concerns about the great scope of this discovery request and the Staff resources necessary to comply with such a request.

In balancing these concerns, I grant limited discovery to the Applicant, for as many as four sites that were permitted after 1992 from the 15 identified in the discovery request. The Applicant must identify the permit number for each of the four properties, so that DEC Staff may identify responsive records through the Department's DART data base. Once responsive documents are identified, DEC Staff may assert privileges for particular documents.



Kevin J. Casutto
Administrative Law Judge

Albany, New York
DATE: March 8, 2006

To: James Distribution List