

In the Matter of the Application of

**ANTHONY SANTO**

**RULING**

for a freshwater wetlands permit pursuant to article 24 (Freshwater Wetlands) of the New York Environmental Conservation Law and part 663 (Freshwater Wetlands Permit Requirements) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York to construct three single-family dwellings in Freshwater Wetland AR-3, Richmond County Tax Block 2259, Lot 9, Staten Island, New York.

(January 21, 2005)

DEC No. 2-6404-00981/00001

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**Proceedings**

On February 24, 2004, Anthony Santo, Applicant, filed a freshwater wetland permit application in the above referenced matter with the New York State Department of Environmental Conservation ("DEC"), Region 2 Headquarters. The project application proposes subdivision of the 0.47 acre site into three lots, and construction of a single family residence on each lot. The project site is located on Mace Street in the Richmondtown section of Staten Island, New York. The site extends along the northwest side of Mace Street; Call Street borders the site to the west; Hitchcock Avenue is the nearest open cross-street, approximately 154 feet to the east of the site. Richmond Road is approximately 280 feet to the south of the site.

On May 14, 2004, Staff of the New York State Department of Environmental Conservation ("DEC Staff") issued a Notice of Incomplete Application for this project, stating that Staff did not agree with the wetland boundary proposed by Applicant's consultant, and that Staff would re-inspect the site and prepare a wetland boundary line to be used for this permit application.

On June 10, 2004, Applicant filed a letter with DEC Staff contending that the permit application was deemed complete on March 10, 2004, pursuant to Environmental Conservation Law ("ECL") §70-0109(3)(b) (the "purported 5-day letter"). Applicant asserted that more than 90 days had elapsed since the permit application was filed. Therefore, in Applicant's view, the

permit application was deemed complete and the permit was deemed issued unless the Department had issued a decision within five days. Applicant cites ECL 70-0109(3)(b) and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") 621.9(b) in support of these arguments, which are addressed further, below.

In response to Applicant's purported 5-day letter, DEC Staff issued a letter on June 21, 2004 denying the permit application. Staff denied the permit application because Staff disagreed with Applicant's wetland boundary and because the project did not comply with the compatibility factors and weighing standards of 6 NYCRR 663.5(e). Applicant requested a hearing on the permit denial, and DEC Staff referred the case for hearing to the DEC Office of Hearings and Mediation Services ("OHMS"). The hearings file was received by OHMS on July 21, 2004.

A public hearing in this matter was scheduled to commence with a legislative hearing on November 30, 2004. However, during a telephone conference on November 29, 2004, the hearing was cancelled due to a procedural defect regarding public notice. During the November 29 telephone conference, DEC Staff for the first time raised objection to going forward with this permit hearing in the absence of compliance with the State Environmental Quality Review Act ("SEQRA") process. See ECL article 8; 6 NYCRR part 617. During this telephone conference, with the parties' consent, I cancelled the hearing and set a schedule for filing a written motion and reply on the SEQRA issue. Rescheduling of the public hearing was held in abeyance.

In accord with this schedule, on December 6, 2004, Staff filed a written motion to suspend the proceedings pending compliance with SEQRA. Later that day, Applicant filed its objection to the motion.

### **The Motion to Suspend**

#### SEQRA Compliance

By letter dated December 6, 2004, DEC Staff moved to suspend the permit hearing, pending review of the application pursuant to SEQRA. DEC Staff contends that the proposed project is subject to SEQRA and is not a Type I or Type II action, and consequently is an Unlisted Action. See 6 NYCRR 617.4 (Type I Actions), 617.5 (Type II Actions) and 617.2(ak) (Unlisted Actions).

Applicant contends that pursuant to 6 NYCRR 617.5(c)(9), the construction of a single family residence on an approved lot is a

Type II action. But, as Staff has explained, the use of the singular article (*i.e.*, a...residence [emphasis supplied]) in 6 NYCRR 617.5(c)(9) shows that projects involving multiple buildings are not Type II actions. In addition, this action requires subdivision of the site, and therefore, is not an action "on an approved lot." 6 NYCRR 617.5(c)(9). This project is not for construction of a single residence on the site, but is for subdivision of the site into three lots and the construction of three residences, one residence on each subdivided lot. In sum, this proposed activity - - *i.e.*, subdivision and construction - - does not meet the requirements of 6 NYCRR 617.5(c)(9) for classification as a Type II SEQRA action.

Regarding the required SEQRA review, DEC Staff contends that more than one agency involved in the approval process has a discretionary approval. Applicant's application documents indicate that, in addition to the DEC approval, approvals from the following City of New York agencies are required:

- \* City of New York, Department of Planning: For approval under the City Zoning Resolution, because the project is located in a Special Natural Area District. See N.Y.C. Zoning Resolution, Section 105-02 (see <http://nyc.gov/html/dcp/pdf/zone/art10c05.pdf>).

- \* City of New York, Department of Buildings: For construction.

- \* City of New York, Department of Environmental Protection: For storm drains.

- \* City of New York, Department of Transportation: For paving.

At a minimum, the City of New York, Department of Planning, represented by the City Planning Commission, will be required to issue a non-ministerial approval, because the project site is located in a N.Y.C. Special Natural Area District. Therefore, at a minimum, DEC and the City Planning Commission are involved agencies in the SEQRA review. See 6 NYCRR 617.2(s).

Furthermore, Staff notes that the project site is situated within the coastal zone as identified in the Waterfront Revitalization Plan of the City of New York, Map 26 (See <http://www.nyc.gov/html/dcp/html/wrp/wrpcoastalmaps.html>). Mace Street is located within the shaded area demarking the coastal zone that requires a consistency review with the Waterfront Revitalization Plan, pursuant to Executive Law

article 42. This process inter-relates with the SEQRA process.<sup>1</sup>

Staff contends that pursuant to 6 NYCRR 617.6(b)(2)(i), because more than one agency is involved, a lead agency must be established prior to the determination of significance. Staff further asserts that even if no coordinated review was required, the agency conducting an uncoordinated review must establish whether or not the project may have a significant adverse impact on the environment (and each involved agency also must make this determination). In the present case, Staff contends, this review was never done. DEC Staff contends that the sequence of events including Applicant's purported five-day letter request, Staff's denial and Applicant's subsequent request for hearing, shifted the parties' focus - - and more particularly, shifted Staff's focus - - away from SEQRA compliance requirements.

Citing ECL 70-0109(4), Staff asserts that the Department was not required to respond to the five-day letter request. Instead, Staff argues, ECL 70-0109(4) requires compliance with SEQRA, as specified therein, in order for an application to be complete. Both SEQRA and the New York Uniform Procedures Act ("UPA"; ECL article 70) require issuance of a negative declaration or Staff's acceptance of a draft environmental impact statement ("DEIS"), among other things, prior to a determination that an application for a permit is complete. See 6 NYCRR 617.3(c) and 621.3(a)(6); see also 6 NYCRR 621.5(f).

Moreover, DEC Staff cites judicial and administrative case law in support of its position that strict compliance with SEQRA is required, including the associated involvement of the public in the environmental permit decision making process. See *Matter of Coalition for Future of Stony Brook Village v Reilly*, 299 AD2d 481 (2nd Dept. 2002); *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415 (1986); and *Matter of B. Manzo & Sons, Inc.*, Hearing Report and Order of Disposition, May 2, 2000.<sup>2</sup> The courts and the DEC Commissioner have held that if a governmental agency acts without fulfilling the statutory requirements of SEQRA, the governmental action is null and void. See *Matter of 628 Land Associates*, Interim Decision of the

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<sup>1</sup> See, for example, 19 NYCRR Ch. 13, Waterfront Revitalization of Coastal Areas and Inland Waterways, Subpart 600.5 (Coastal Policies) and 6 NYCRR 617.11(e); see also 6 NYCRR 621.3(a)(9).

<sup>2</sup> Available at "<http://www.dec.state.ny.us/website/ohms/decis/manzohr.htm>".

Commissioner, September 12, 1994; *Matter of Modern Landfill, Inc. v Jorling*, 161 AD2d 1112 (4th Dept.), lv denied 76 NY2d 715 (1990); *Matter of E.F.S. Ventures Corp. v Foster*, 71 NY2d 359 (1988). The public's right to participate in environmental decision-making is embodied in the SEQRA legislation, and cannot be waived or forfeited by any party including the DEC, unless, as expressly provided in ECL 70-0109(3)(b) and 6 NYCRR 621.5(f), the DEC as lead agency defaults in responding to a five-day demand.<sup>3</sup> See *Matter of Zagata v Freshwater Wetlands Appeals Bd.*, 244 AD2d 343 (2<sup>nd</sup> Dept. 1997), *appl withdrawn* 95 NY2d 792 (2000). Where governmental action is taken without any SEQRA compliance, as Applicant seeks here, the courts have held that this failure constitutes a matter of foremost State policy concern and that it is within the Commissioner's authority to correct the failure by nullifying the action. See *Zagata v FWAB*, *supra*, and *Modern Landfill*, *supra*, both citing *E.F.S. Ventures Corp.*, *supra*. Nonetheless, DEC Staff notes that Applicant is not defenseless against unwanted delays. Pursuant to 6 NYCRR 617.6(b)(5)(i), after 30 days, an applicant can request that the DEC Commissioner designate a lead agency.<sup>4</sup>

DEC Staff also asserts that the permit application is not complete. Pursuant to 6 NYCRR 617.3(c), an application for approval of an unlisted action is not complete until either a (SEQRA) negative declaration has been issued or a DEIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. Neither of these requirements, DEC Staff contends, has been met in this case.

Applicant's view is that whether the permit application was deemed complete is irrelevant and Staff's raising the issue of completeness at this time is merely a stalling tactic. Applicant notes that DEC Staff received the permit application on February 24, 2004, and more than 15 days elapsed without any notice to Applicant from DEC Staff, as required by ECL 70-0109(1)(b). Therefore, in Applicant's view, the application was deemed complete by operation of law on March 10, 2004. This argument is inconsistent with Applicant's argument that completeness is

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<sup>3</sup> As noted above, pursuant to 6 NYCRR 621.3(a)(6), an application is not complete until certain requirements of SEQRA have been accomplished, as specified therein. See 6 NYCRR 621.3(a)(6).

<sup>4</sup> No such request has been made by Applicant and the lead agency has yet to be determined.

irrelevant. Furthermore, Applicant notes that on May 14, 2004 (almost two months after March 10), DEC Staff issued a Notice of Incomplete Application that did not request any further information from Applicant, did not mention incompleteness due to SEQRA, and did not object that Applicant's name is different than the name on the real property deed for the site (discussed further below). Applicant contends that this Notice of Incomplete Application is untimely and, therefore, a nullity.

Applicant does not contest the case law cited by DEC Staff in support of its position that SEQRA compliance can not be waived. But, Applicant does contend that Staff should have raised these issues earlier in the proceeding, not for the first time on the eve of hearing. Staff does not contest Applicant's assertion. As noted above, Staff asserts that the sequence of events shifted Staff's focus away from the SEQRA requirements, such that Staff did not raise these issues earlier in the permit review. Staff does not dispute that Staff should have addressed the SEQRA compliance issues earlier in this permit review process.

In sum, I conclude that compliance with SEQRA cannot be waived. The proposed project is an unlisted action. Compliance with the SEQRA process has not yet occurred, including at a minimum, determination of coordinated or uncoordinated review, designation of a lead agency (if coordinated review) and determination of significance. Even assuming, *arguendo*, applicant's contention is correct that the permit application is deemed complete by default pursuant to the Uniform Procedures Act, this does not waive compliance with SEQRA. See 6 NYCRR 621.5(f). In the absence of compliance with SEQRA, the Part 624 public hearing cannot be scheduled, because SEQRA issues may be reviewed in the public hearing process, and SEQRA compliance has not yet occurred. See 6 NYCRR 624.4(c)(6).

#### The Owner of the Site

Lastly, DEC Staff asserts that Applicant, Anthony Santo, is not the owner of the property. Instead, Staff asserts, the property is owned by a company in which Mr. Santo appears to have some interest. Applicant's response is that at the time the application was submitted, Anthony Santo was the sole member of the limited liability company, Block 2259 Construction, L.L.C. ("Block 2259"), which holds title to the site. Applicant points to the signature page of the proposed Declaration (restrictive covenant) in the application materials, which indicates that Mr. Santo would sign in his capacity as a member of Block 2259. I recommend that Representatives of Block 2259 conform the permit

application materials to reflect the actual site owner of record as "Applicant," with Mr. Santo acting as a member and representative for Block 2259 (or whatever language best represents the actual relationships and circumstances of the owner of record and a member sponsoring the application).

### **Ruling**

As DEC Staff has stated, compliance with SEQRA is mandatory (but for the one exception set forth in ECL 70-0109(3), not applicable here). Both SEQRA and the New York Uniform Procedures Act ("UPA"; ECL Article 70) require issuance of a negative declaration or Staff's acceptance of a DEIS, among other things, prior to a determination that an application for a permit is complete. See 6 NYCRR 617.3(c) and 621.3(a)(6); see also 6 NYCRR 621.5(f). DEC Staff timely denied the permit application in response to Applicant's five-day letter request. No lead agency determination has yet been made in this case.

SEQRA compliance cannot be waived. Where governmental action is taken without any SEQRA compliance, as Applicant seeks here, the courts have held that this failure constitutes a matter of foremost State policy concern and that it is within the Commissioner's authority to correct the failure by nullifying the action. See *Zagata v FWAB*, *supra*, and *Modern Landfill*, *supra*, both citing *E.F.S. Ventures Corp.*, *supra*. Therefore, DEC Staff must commence review under SEQRA before the public hearing process proceeds further. This proceeding is suspended, pending compliance with the SEQRA requirements detailed above. Potential SEQRA issues may be adjudicated in the permit hearing. Moreover, the scope of the project will be defined - - and may change from the current proposal - - in the process of compliance with SEQRA.

The proposed activity - - *i.e.*, subdivision and construction - - does not meet the requirements of 6 NYCRR 617.5(c)(9) for classification as a Type II SEQRA action. At a minimum, the DEC and the City of New York, Department of Planning, represented by the City Planning Commission, are involved agencies in the SEQRA review. See 6 NYCRR 617.2(s). In addition, the consistency review with the Waterfront Revitalization Plan, required pursuant to Executive Law article 42, inter-relates with the SEQRA process.

Because Staff already has referred this case to the Office of Hearings and Mediation Services, DEC Staff should promptly conduct a SEQRA review. I direct that by February 4, 2005 Staff must provide a SEQRA status report addressing at a minimum, (1) the determination whether this project will be subject to a

coordinated or uncoordinated review; (2) if coordinated review, what agency will be designated lead agency; (3) whether preparation of an environmental impact statement is required in this matter.

January 21, 2005  
Albany, New York

                    /s/                      
Kevin J. Casutto  
Administrative Law Judge

TO: Santo Distribution List



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**NYSDEC Case No. 2-6406-00981/00001**  
**September 9, 2004**

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