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November 15, 2012

Richard Tomer
Chief, Regulatory Branch
Department of the Army
NY District, Corps of Engineers
Jacob K. Javits Federal Building
New York, New York 10278-009

Re: Patrick Farm Development Site, Town of Ramapo, Rockland County, New York,
Subject of Prior Cease & Desist Order,
Enforcement Case No. 2004-047 (NAN-2004-505)

Dear Chief Tomer:

We understand how busy your office must be in light of the recent devastation by Hurricane Sandy, and would not bother you but for the time sensitivity of what we believe is a very straightforward request. The State Court reviewing the Patrick Farm Development Project simply needs to understand whether or not the Army Corps of Engineers (ACOE) ever issued a jurisdictional determination for the Patrick Farm Project, which is located in the Town of Ramapo, New York (Town). Final papers must be submitted to the Rockland County Supreme Court in the first week of December.

We respectfully submit that ACOE has a responsibility to set the record straight on this very narrow issue. In order to aid the ACOE in responding to this specific request, we have summarized the background information and the record; while this letter, its attachment and the exhibits to the letter and its attachment contain extensive background information, ultimately, we are asking ACOE to confirm a very basic fact, which should take little time to address.

In sum, the Applicant sponsoring the Project, Scenic Development, LLC, has consistently represented to the Town and the Court that ACOE has issued a Jurisdictional Determination for the current Proposed Project of 497 homes on the entirety of the 200+ acre property. The Applicant has argued that its purported ACOE jurisdictional determination establishes that the Project has been planned in accordance with the New York State Environmental Quality Review Act (SEQRA).

The Village of Pomona, Dr. Sonya Shapiro and Milton Shapiro (adjacent landowners), and ROSA 4 Rockland, Inc. (Ramapo Organized for a Sustainable and Safe Aquifer - an organization formed to protect water and other environmental resources in Rockland County), believe that the Record shows that ACOE never issued a Jurisdictional Determination.

Recent Appellate Court decisions require the lower Court to determine whether the Project was approved in conformance with SEQRA's requirements. Based on the Applicant's representations, the resolution of this issue will in large part turn on whether ACOE ever issued a Jurisdictional Determination. As such, again, the Court simply needs to understand whether or not ACOE issued a Jurisdictional Determination for the Project.

The Issues

One of the critical issues in the judicial SEQRA review will be whether ACOE actually confirmed the Applicant's delineation of all federally regulated wetlands (ACOE jurisdictional wetlands) and other waters of the United States on the Patrick Farm site during SEQRA review, as required by the June 25, 2008 SEQRA Final Scoping Document (See Exhibit 1, p. 1 & p. 5-Section III (c) (3)). Confirmation of the location and boundaries of all on-site wetlands was considered particularly important because the site is located within the headwaters of the Mahwah River watershed and includes vital wetlands that filter pollution, help recharge the underlying federally designated sole-source aquifer and also prevent downstream flooding.

The scope of ACOE review is an integral issue in the SEQRA challenge because several experts, including a former ACOE Project Manager whose responsibilities included jurisdictional determinations, concluded that:

- The Applicant failed to identify all on-site ACOE jurisdictional wetlands in its SEQRA submissions;
- The Applicant failed to provide any ACOE documentation confirming on-site ACOE wetland locations and boundaries, as required by the SEQRA Final Scoping Document, or that ACOE had otherwise authorized this Proposed Project;
- The failure to identify ACOE jurisdictional wetlands was not a mere technicality, as the Proposed Project shows plans to disturb and build in some of the unidentified ACOE wetland areas. See Exhibit 2 - Aquatic Resource Review maps prepared by Ms. K. Copenhaver – former ACOE wetland delineator, which identify potential impacts within the wetland areas that were undisclosed; Exhibit 3 – Wetland Disturbance Map prepared by David Clouser & Associates, which identifies proposed construction in areas previously documented – but not identified by the applicant – to contain ACOE wetlands); and Exhibit 4 – see pink hatched area next to pond which shows a large wetland area identified by ROSA's experts which has not yet been reviewed or delineated by ACOE.¹

Moreover, as ACOE documents show, the Applicant actually withdrew an October 2008 request for ACOE review of the Proposed Project when Dr. Christopher Mallery of ACOE notified

¹ Complete affidavits of these experts which were prepared in connection with the judicial proceedings are included as Exhibits 14 & 15 to this letter. We have summarized the finding so you do not have to read these detailed affidavits; however, they are provided here for your reference if desired.

Applicant that further information concerning jurisdictional issues would be required for the requested authorization. (See Exhibit 5 – Dr. Mallery’s administrative Memorandum for Record, April 18, 2011).

Finally, and most disturbing, is that, despite this April 18, 2011 ACOE Memorandum for Record (Exhibit 5), which shows there was no ACOE review of this Proposed Project, the Applicant claims in its December 22, 2009 Final Environmental Impact Statement (FEIS) that “Communication with the Corps of Engineers on October 2, 2009 confirmed that the Corps of Engineers, New York District office has approved the delineation of the federally regulated wetlands and other waters of the United States on the Patrick farm development and verified that the activities associated with the project are authorized under Nationwide Permit (NWP) 29.” (See Exhibit 6 – Comment and Response 3.3-8 of the FEIS)

At no time did the Developer disclose to the Town, the public or to Rockland County agencies, which had expressed concerns over possible impacts to ACOE jurisdictional wetlands, that ACOE was requiring additional review. Instead, **the Developer, in our opinion, misled the Town, the public and the Rockland County agencies into believing that it had obtained approval of the wetland delineation and authorization from the Corps for the proposed 497-unit Proposed Project.**

The Town relied on the Developer’s misrepresentation of ACOE approval of federal wetland delineation and project authorization in its SEQRA findings.

Now that this issue is before the Court, the ACOE should settle this issue by simply stating whether or not it issued a Jurisdictional Determination.

We respectfully submit that it would be in the public interest for ACOE to provide a Jurisdictional Determination of the locations and boundaries of all federal jurisdictional wetlands on the Patrick farm site (as the New York State Department of Environmental Conservation has done with respect to on-site NYS wetlands). **Our current request to you is to clarify the precise review made by ACOE in connection with this 497-unit Proposed Project during the SEQRA review which occurred between June 2008 and January 25, 2010.**

The attachment to this letter contains further details related to this matter in the form of a “summary of findings” and we have included considerable documentation for your reference in the form of relevant exhibits to this letter and attachment.

Conclusion

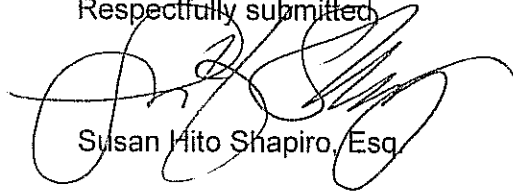
For all of the above reasons, we are requesting that ACOE confirm that during the time period of the SEQRA review:

- 1) That ACOE did not verify the delineations and boundaries of ALL on-site federal jurisdictional wetlands; and,
- 2) That ACOE advised Applicant that further review was warranted in order for ACOE to determine that the expanded project (i.e., the 497 housing unit project) was in fact authorized under a nationwide permit and that the Applicant declined this further review of the expanded project.

As stated above this issue will soon be the subject of a judicial SEQRA review. We are only requesting a short letter confirming the above two points for the period covering the SEQRA review which ended on January 25, 2010.

Note: Please do not confuse these matters with other more recent communications and permits related to a small limited portion of the site related to the expansion of a culvert crossing Rte. 202 that was requested later by the NYS DOT and is not a subject of this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Susan Hito Shapiro', is written over the typed name below.

Susan Hito Shapiro, Esq.

On behalf of Dr. Sonya and Milton B. Shapiro;
The Village of Pomona; and ROSA 4 Rockland, Inc.
(Ramapo Organized for a Sustainable and Safe Aquifer)

cc: William Janeway, NYS DEC
Judith Enck, EPA Regional Administrator
Town of Ramapo Town Board
Town of Ramapo Planning Board
New York State Senator David Carlucci
New York State Assemblywoman Ellen Jaffee
New York State Assemblyman Kenneth Zebrowski
Rockland County Department of Planning

Attachment A – Summary of Findings

The Applicant Omitted Certain ACOE Jurisdictional Wetlands from the Wetland Map Submitted to the Town

The Applicant purports to identify all Patrick Farm wetlands in the DEIS (Exhibit 7, pp. 3.3-16 through 19) and the 2009 Patrick Farms Wetland Map (Exhibit 8 - Figure 3.3-4 of the DEIS). While the Applicant's Wetland Map correctly identifies on-site federal "Waters of the U.S." (WOUS) such as on-site tributaries and in-stream ponds that feed into the Mahwah River (marked in blue on the Map), this Wetland Map does not identify all of the wetlands abutting, adjacent to and with direct hydrological connections to the identified WOUS and the Mahwah River, and/or which have a significant nexus to the Mahwah River, all of which would be considered ACOE jurisdictional wetlands.²

For example, a 5+ acre in-stream pond and its tributaries that all flow into the Mahwah River are correctly identified as WOUS in the DEIS Wetland Map; however, the Applicant failed to identify many acres of adjacent critical wetlands that have a continuous surface connection to these identified waters (See pink cross hatched areas around pond in Exhibit 4 and photographs of this wetland area in Exhibit 9).

The Applicant Provided No Written ACOE Confirmation of the Location and Boundaries of the On-site ACOE Jurisdictional Wetlands

The inaccurate identification of all ACOE jurisdictional wetlands would have been discovered had the Applicant obtained confirmation of the boundaries of the federal jurisdictional wetlands as explicitly required by the SEQRA Final Scoping Document: Specifically, Section III.C.3.b of the Scoping Document (Exhibit 1 p.5) required the Applicant to "**Delineate and flag the boundary of all State and Federal Jurisdictional Wetlands...; boundaries to be confirmed by the permit agencies**" (emphasis supplied).

While the Applicant requested, obtained and submitted a written jurisdictional determination from the New York State Department of Environmental Conservation (DEC) confirming the boundaries of on-site NYS jurisdictional wetlands³, no such confirmation was provided by the

² It should be noted that ACOE, along with the Environmental Protection Agency (EPA), issued guidance on December 2, 2008, relating to federal jurisdictional wetlands entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States." This 2008 Guidance was issued after the Applicant's 2005 wetland survey but before the 2009 SEQRA submissions. The use of an outdated (pre-Guidance) 2005 wetland survey (see Exhibit 7, p 3.3-16 ¶6) as the basis for federal wetland identification in 2009 (post Guidance) SEQRA proceedings was improper. We are aware there is the 2011 EPA/ACOE draft guidance for determining federal jurisdiction over wetlands and other waters. Although not in effect now or at the time of the SEQRA review, the wetlands at issue would still be considered ACOE jurisdictional wetlands under the draft guidance.

³ By letter dated April 3, 2009, the Applicant requested a "jurisdictional determination" from DEC regarding resources on the site, including wetlands (see Exhibit 10). Applicant received and submitted Wetland

Applicant showing any ACOE confirmation of the boundaries of the on-site federal jurisdictional wetlands.

Although there is a procedure to obtain ACOE's confirmation of the existence and boundaries of ACOE jurisdictional wetlands, it is our understanding that the Applicant did not provide any documentation that it applied for or obtained an ACOE jurisdictional determination to confirm ACOE wetlands, as it had done with the DEC to confirm NYS jurisdictional wetlands.

There is No Document Showing Any ACOE Review for the 497 Dwelling Proposed Project

As discussed more fully below, the only apparent review that Applicant sought from ACOE during the SEQRA process was for a determination that the 497 dwelling Proposed Project was authorized under a nationwide permit. See Exhibit 7 - DEIS, p. 3.3-19 (stating that the "most recent site plan, the subject of the DEIS, has been resubmitted to the ACOE for confirmation that the development is eligible under a nationwide permit"). Ultimately, this very request was withdrawn when ACOE made clear that considerably more review would be necessary for such a determination. (See Exhibit 5 – ACOE Memorandum for Record)

Interestingly, the other references to ACOE review in the DEIS/FEIS are in connection with a 2004 ACOE Cease & Desist Order for fill being placed unlawfully into ACOE regulated wetlands, measures taken by Applicant to remediate the impacted areas, and a 2007 Cease & Desist Closure letter from Dr. Christopher Mallery of ACOE closing the Remedial Action on February 1, 2007 (Exhibit 12, ACOE Cease & Desist Closure Letter).

In connection with the closure of ACOE's Remedial Action, the Applicant provided ACOE with a Preliminary Layout Study showing plans to build "139 single-family homes" on the Patrick Farm Site. The specifically referenced drawing in the letter showed the addition of a limited number of single family homes (highlighted in yellow) bringing the total number of homes to the 139 residences. The addition of some single family homes was considered by Dr. Mallery to be "minor in scope" and Dr. Mallery opined that the plans could proceed under a Nationwide Permit (NWP).

On May 5, 2008, the project changed and greatly expanded. On that date, the Applicant filed plans with the Town for 497 housing units (including over 300 multi-family units), instead of the 139 single-family homes that had been reviewed by ACOE.

On or about October 2, 2008, Applicant's then attorneys wrote a letter (Exhibit 13) to your attention stating that in light Dr. Mallery's "caution about project modifications" (Exhibit 13 p3); Applicant was requesting confirmation that the revised plan would still be authorized under a NWP.

Location Map with a 11/13/09 validation stamp entitled "NYSDEC FRESHWATER WETLAND BOUNDARY VALIDATION" confirming that the map "accurately depicts" the limits of the NYS wetlands. (See Exhibit 11)

The ACOE administrative "Memorandum for Record" prepared by Dr. Mallery (Exhibit 5) documents the receipt of this 10/02/08 letter (Exhibit 13) and related submittals and treats it as "a request for a regulatory determination" with respect to the revised plans

The Memorandum for Record discloses that Dr. Mallery informed Applicant's attorney that "review of these submittals for such **authorization would involve the necessity for further information concerning jurisdictional and cultural resources issues** that was not required for the authorization of the previously proposed project [i.e., the 139-single family homes]" (emphasis supplied). It also documents that **Applicant's attorney "stated that it would not be necessary to proceed with the additional processing of these requests"** [emphasis supplied].

Moreover, the Memorandum for Record confirms a 09/28/09 letter from Applicant's consultant, which "contained a similar request for a determination," but states that the Applicant's consultant was not aware that the Applicant's attorney "had declined further review of the matter." The Memorandum for Record concludes that accordingly "no further action" was taken by ACOE "for these requests and submittals."

It seems clear from these ACOE documents that as a result of the Applicant's affirmative decision not to pursue the review that ACOE would require for the expanded project, ACOE did not review the impact of the expanded plans nor did ACOE issue any opinion with respect to the expanded plan, much less authorize them. Further, ACOE did not delineate in any way the existence and boundaries of the ACOE jurisdictional wetlands on the Patrick Farm property, as required by the scoping documents for the SEQRA review.

The Applicant Failed to Disclose ACOE's Requirement of Additional Review and Its Withdrawal of the Request for Such ACOE Review

The Applicant did not disclose to the reviewing agency - the Town - the fact that ACOE was requiring additional review and that the Applicant turned down that review.

At no time during the SEQRA process did the Applicant disclose ACOE's response to the October 2008 request for authorization--that further review and information was necessary for such authorization. Further, the Applicant did not disclose that its attorneys had withdrawn the request for authorization when it learned of the additional required review, and that its environmental consultant followed the same path with respect to its September 2009 request, resulting in no further action or review by ACOE.

Despite ACOE's Requirement of Additional Review, the Applicant Provided Misleading Statements in the FEIS That It Had Obtained ACOE Approval

During SEQRA proceedings, the Applicant provided misleading statements that ACOE had approved the delineation of the wetlands and authorized this Proposed Project, when, in fact, it had not.

Most egregiously, in response to federal wetland concerns raised during the DEIS review, the Applicant inexplicably and misleadingly states in the FEIS, "Communication with the Corps of Engineers on October 2, 2009 confirmed that the Corps of Engineers, New York State District office has approved the delineation of the federally regulated wetlands and other waters of the United States on the Patrick Farm development and verified that the activities associated with

the project are authorized under Nationwide Permit (NWP) 29." (Exhibit 6 – Comment and Response 3.3-8)

The specific correspondence cited by the Applicant in the FEIS to support its statement above is **not a correspondence with ACOE**, as the Applicant would have us believe, but **rather a 10/2/09 letter from the Applicant's attorneys to the Applicant's consultants** (Exhibit 13 – Sive Paget letter). This letter fails to disclose ACOE's clear response reflected in the ACOE Memorandum for Record that further review is required for the proposed expanded project in order to obtain ACOE authorization. Indeed, this Letter from counsel does not refer to any communications with ACOE at any time during 2008 or 2009; rather, the Applicant's attorney refers only to the Cease & Desist Closure Letter of 2007 (Exhibit 12) that authorized the 139 single family home development under a NWP.

Instead, ignoring ACOE's comments and request, Applicant's attorney opines that the ACOE's New York District Office "has approved the delineation of federally-regulated wetlands and other waters of the United States on the Patrick Farm development site and verified that the activities associated with the project are authorized under Nationwide Permit (NWP) 29." (Exhibit 6) To support this "opinion", Applicant's attorney cites to the 2007 Cease & Desist Closure Letter (Exhibit 12), claims that the change from 139 homes to close to 500 is a "slight" change and, without providing one shred of any documentation from ACOE relating to this Proposed Project, states that since the proposed development would not impact delineated wetlands, the project is thus covered under a NWP.

This Catch-22 misrepresentation is fatally flawed (as Applicant failed to delineate all federal jurisdictional wetlands) and it flies in the face of ACOE's administrative record.

In sum, at no time did the Applicant disclose to the Town that ACOE would not render an opinion on the expanded project without further review and that the Applicant had declined the review. Further, the Applicant then misrepresented that ACOE had approved the wetland delineation and verified that the expanded project was covered under a NWP, when ACOE had not. Thus, the Applicant provided false and misleading statements concerning ACOE's actions, upon which the Town relied in connection with its SEQRA review.

Exhibits

- Exhibit 1 – June 25, 2008 SEQRA Final Scoping Document
- Exhibit 2 – Aquatic Resource Review maps prepared by K. Copenhaver
- Exhibit 3 – Clouser Wetland Disturbance map (W-2)
- Exhibit 4 – Clouser Nominated Wetlands map
- Exhibit 5 – ACOE Memorandum for Record, Mallery - April 18, 2011
- Exhibit 6 – Comment and Response 3.3-8 of the FEIS
- Exhibit 7 – DEIS pp. 3.3-16 through 19
- Exhibit 8 – DEIS Figure 3.3-4 Wetland Map Patrick Farms
- Exhibit 9 – Photos of undisclosed federal wetland areas.
- Exhibit 10 – Applicant to NYS DEC JD Request 04/03/09
- Exhibit 11 – The DEC Validation Map, stamped 11/13/09
- Exhibit 12 – ACOE Letter to Applicant 02/1/2007
- Exhibit 13 – Sive Paget to ACOE, 10/02/09
- Exhibit 14 – Affidavit from Copenhaver
- Exhibit 15 – Affidavit from Clouser