Department of Environmental Conservation
Legislative Hearing Concerning
Patrick Farm, US Rte 202 - Rte 306 Suffern, New York 10901:
NYSDEC Application Nos. 3-3926-00570/00002, 0004 & 0006
January 7, 2013

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- Good Afternoon. My name is Daniel Richmond, and I am a Partner at the Law Firm Zarin & Steinmetz.

- Our Firm represents a group of residents of the Town of Ramapo ("Town"), organized under the name Ramapo Organized for Sustainability and a Safe Aquifer ("ROSA"), who reside in immediate proximity to the site ("Site") of the above-referenced application ("Application"). Some of ROSA's members live immediately adjacent to the Site, while many others live in the surrounding community.

- Respectfully, there are multiple substantive and significant issues warranting further analysis in connection with the permits requested in connection with the Patrick Farm Project.

SEQRA

- As an initial matter, the Department does not have an adequate basis for its independent review of the environmental impacts of the requested permits under the State Environmental Quality Review Act ("SEQRA"). It cannot issue its requisite Involved Agency SEQRA Findings on the present administrative record.

- As the Department is aware, as an Involved Agency, it must issue its own SEQRA Findings before taking any action on the Project. See 6 N.Y.C.R.R. § 617.11(c).

- The intent of this requirement is to ensure that each agency applies its "different perspectives on the information in an EIS based on their particular jurisdiction."

- That is to say, the Department, as an Involved Agency in this Project's review, is obligated to ensure that its permitting decisions incorporate environmental considerations, as SEQRA requires.

- Respectfully, the Department lacks an adequate empirical basis upon which it can review the requested permits in conformance with SEQRA, much less issue SEQRA Findings.

- The Department needs to ensure that it has the necessary factual, empirical information before it can issue the requested permits.

- Under CPLR Section 7803(3), "[a] determination will [only] be deemed rational if it has some *objective factual basis*."

- This means that agencies must have sufficient objective factual evidence before they can undertake permitting decisions.

- It has become increasingly apparent that the SEQRA Findings issued for the Project by the Town Board, as Lead Agency, are flawed, and cannot be relied upon by the Department in undertaking its independent SEQRA review responsibilities or to issue its own Findings.

- The Town's SEQRA Findings do not fully address, and not responsive to, the environmental issues that the Department must consider in connection with its permitting decisions here.

- The Town Board's SEQRA Findings, for example, fail to account for, much less mitigate, the Project's impacts on navigable waters.

- As I will explain, the Department is obligated to consider the Project's impacts on navigable waters of the United States pursuant to its Water Quality Certification responsibilities under the Clean Water Act.

- The Department cannot fulfill its responsibilities under SEQRA and its Water Quality Certification responsibilities on the present record in significant part because the Findings, and the Applicant's analysis, are predicated on the erroneous notion that the U.S. Army Corps of Engineers ("ACOE") has provided a "Jurisdictional Determination" for the waters and wetlands on the Site.

- That is to say, the actual limits of navigable waters on the Site have not been defined.

- As such, the Department is essentially flying blind with respect to its consideration of how the Project would affect navigable waters.

- The Project's lack of an ACOE Jurisdictional Determination is set forth in detail in detail in our letter of November 26, 2012, and the attachments thereto, and is explained in further detail by ROSA's consultant Andrew Willingham and Kim Copenhaver.

- The reality is that ACOE has never issued a Jurisdictional Determination for the Patrick Farm Project.

- ACOE Guidance indicates that in the absence of a definitive, official determination identifying the limits of navigable waters of the United States on a project site, *all* waters and wetlands that would be affected in any way by the Project must be treated as if they are jurisdictional waters of the U.S.

- That is to say, if the Department will not require a Jurisdictional Determination, it must, in undertaking the instant permitting decisions, consider all waters on the wetlands on the Site to be jurisdictional waters of the United States, which the Department must consider in both its SEQRA analysis as well as its Water Quality Certification determination.

- The mandatory ACOE presumption in the absence of a Jurisdictional Determination establishes that the Project will have extreme impacts on waters the Department must consider, which have not been mitigated and which, at a minimum, must be deemed substantive and significant issues warranting further analysis by the Department.

- Even in the absence of the ACOE presumption, it is still apparent that the Project will adversely affect waters of the United States, which the Department must consider.

- As will explained by Andrew Willingham, PE, a consultant for ROSA, will explain, for example, that the Project would place a condominium building on a federally protected wetland, as evidence by the fact that this location that has NWI mapped wetlands, and which hydric soils.

- This impact was not considered in the Town's SEQRA Findings. Again, however, the Department must assess this impact in connection with its SEQRA responsibilities.

- This, in itself, is clearly a substantive and significant issue warranting adjudication.

- The Project will adversely affect protected navigable waters in other ways, which were also not considered in the Town SEQRA analysis.

- As Mr. Willingham will explain, for example, the Town's SEQRA analysis was premised on the assumption that its stormwater management system would have significant recharge function.

- The Project's stormwater management system has, however, since been substantially revised so that it will not provide any recharge to protected navigable waters.

- Again, the Department needs to develop a Record before it can issue Findings on this impact.

- Respectfully, if the Department, as an Involved Agency, were to issue its own SEQRA Findings on the present Record, such Findings would lack an adequate empirical basis and would not be deemed rational.

- In addition, under SEQRA, the Department is, respectfully, obligated to review Project alternatives that would better mitigate the Project's adverse impacts.

- As the Department is aware, the search for possible alternatives to a proposed action has "been characterized as the 'heart of the SEQRA process." Shawangunk Mountain Envtl. Ass'n v. Planning Bd. of Town of Gardiner, 157 A.D.2d 273, 557 N.Y.S.2d 495, 497 (3d Dept. 1990) (citation omitted). .

- As a Department Administrative Law Judge held in another matter:

> If the New York State Department of Environmental Conservation, in its SEQRA capacity as an involved agency, identified some overriding environmental impact associated with the [proposed project] which could not be mitigated, it would have the opportunity to look further at other alternatives which might better mitigate adverse impacts.

- In re SES Brooklyn Co., LP & the City of N.Y., 1989 WL 163659, *21 (N.Y. D.E.C. Nov 14, 1989) (Fourth Interim Decision)

- In particular, the Department should consider less dense alternatives, which would truly avoid impacts to waters in the Department's jurisdiction, including waters the Department has jurisdiction over through its Water Quality Certification responsibilities.

- On the present record, however, it is impossible for the Department at this juncture to review the Project's alternatives because the scope of the Project's impacts are still currently unknown.

Water Certification

- The facts evidencing the inadequate SEQRA record also show that there are substantive and significant issues that must be addressed in connection with the Department's Water Quality Certification for the Project.

- New York State environmental law clearly requires all applicants for federal permits that would result in a discharge to "navigable" waters to "apply for and obtain a water quality

certification from" the New York State Department of Environmental Conservation ("DEC"). 6 N.Y.C.R.R. § 608.9.

- As discussed above, ROSA believes that the ACOE wetlands that will be impacted by the Project are more extensive than the Applicant acknowledges.

- In any event, even the minimal Nationwide Permit that the Applicant concedes it requires, which concerns only a very limited Project component, triggers the Department's 401 Water Quality Certification requirement, which cannot be waived. See Park Ridge Neighborhood Ass'n, 832 N.Y.S.2d at 655; see also 33 C.F.R. §§ 325.1(d)(4), 336.1(a)(1) & 336.1(b)(8).

- Under the Clean Water Act, States are intended to be the "prime bulwark" against water pollution:

> The states remain, under the Clean Water Act, the "prime bulwark in the effort to abate water pollution," and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law.

Keating v. F.E.R.C., 927 F.2d 616, 622 (D.C. Cir. 1991) (citations omitted) (emphasis added).

- Indeed, in enacting the Clean Water Act, Congress expressly declared its intention that States have the "primary" responsibility for preventing water pollution within their jurisdictions:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (emphasis added);

- When certifying water quality, the Department's purview is not limited to the waters that fall within its jurisdiction under other statutory provisions.

- This was precisely the issue at hand in a matter that this Firm handled, Park Ridge Neighborhood Ass'n v. Crotty, in which the Appellate Division, Second Department held that

> The Department's argument that its regulations require water quality certification only where the waters in issue fall within its jurisdiction under the Freshwater Wetlands Act (ECL art. 24) is inconsistent with the terms of the

> regulation, pursuant to which the certification requirement applies to any permit 'that may result in any discharge into navigable waters as defined in section 502 of the Federal Water Pollution Control Act.'

38 A.D.3d 903, 832 N.Y.S.2d 653, 655 (2d Dept. 2007) (quoting 6 N.Y.C.R.R. § 608.9 [a]).)

- As such, under its Water Quality Review responsibilities, the Department must consider *all* wetlands and water courses on the Site that would be impacted by the Project which would ultimately affect protected navigable waters.

- In addition to the wetlands on the Site, the Department must consider the various impacted streams and other waters that discharge into navigable waters.

- Notably, the Applicant has not even requested Water Quality Certification, much less demonstrated compliance with the various provisions of the Clean Water Act, as required by 6 N.Y.C.R.R. Section 608.9.

- The Applicant's failure to demonstrate compliance with the criteria set forth in Section 608.9 is, standing alone, sufficient basis to deny Water Quality Certification.

- For these reasons, there are, at a minimum, substantive and significant issues that need to be addressed in connection with the Department's Water quality Certification responsibilities.

- Again, for example, the Project presents unstudied impacts to navigable water, including locating a condominium therein.

- Ultimately the Department simply does not have an adequate empirical foundation to consider the Project's impacts to navigable waters because there has been not Jurisdictional Determination.

Stream Disturbance

- Similarly, in connection with the Applicant's request for a Stream Disturbance Permit, the Department must evaluate the probable effect of the permit on the health, safety and welfare of the people and the permit's effect on natural resources likely to result from the proposed project/work.

- Based on the plans submitted by the Applicant there appears to be more stream disturbances on the Site than the Applicant claims.

- These disturbances may include proposed walkways around and over tributaries leading to and from the Pond on the Site, road crossings, proposed playgrounds.

- Likewise, the Applicant in its Disturbance Summary Table, does not even include the Pond as a regulated stream, even though prior submissions made on behalf of the Applicant include the Pond. Based on these prior submissions it appears that there may be disturbances to the banks of the pond.

- The Applicant's omission of the Pond as a regulated stream while concurrently proposing disturbances to the Pond must be evaluated by the Department before a permit is issued.

Conclusion

- In sum, we respectfully submit that an Adjudicatory Hearing is warranted to fully vet the substantive and significant issues at stake. See 6 N.Y.C.C.R. § 621.8(b).

- We thank the Department for its time and attention, and look forward to working with it in its continuing review of the Project.

- Please let us know if you have any questions, or would like for us to expand upon any matters discussed today or set forth in our written submission.