

STATE OF NEW YORK
FRESHWATER WETLANDS APPEALS BOARD

SCENIC HUDSON, INC.,

Appellant,

vs.

DECISION & ORDER

FWAB No. 09-03

Columbia County Wetlands, HS-2

ALEXANDER B. GRANNIS, Commissioner,
New York State Department of Environmental Conservation,

Respondent.

Introduction

In this appeal, appellant Scenic Hudson, Inc. challenges two permits issued by respondent New York State Department of Environmental Conservation (DEC) to O & G Industries, Inc. The first permit is a Freshwater Wetlands Permit issued pursuant to Article 24 of the State Environmental Conservation Law (ECL). The second is a Water Quality Certification issued pursuant to Section 401 of the federal Clean Water Act and 6 New York Code, Rules and Regulations (NYCRR) Part 608.¹ DEC issued the permits on October 30, 2009.

In its notice of appeal, filed December 24, 2009, Scenic Hudson alleges that the permits should be vacated on a number of grounds, including that DEC staff failed to consider a

¹ The Board questions whether it has jurisdiction to hear a challenge to the Water Quality Certification since it appears that the certification was not made pursuant to ECL Article 24. See ECL § 24-1103(1)©. The Water Quality Certification may be a legally separate from the Freshwater Wetlands Permit. The Board requests that Scenic Hudson address this jurisdiction question regarding the certification in its appeal brief, if Scenic Hudson wishes to challenge the legality of the certification.

biological survey report from October 2008 provided to DEC's Hudson River Estuary Program, and to O & G Industries, on or about November 26, 2008.

Pursuant to a scheduling order entered in this matter on January 19, 2010, following a status conference with the parties, DEC moved to dismiss the appeal on January 19, 2009, on the grounds that Scenic Hudson filed its notice of appeal after the period of time to challenge the permits provided by law had expired. Scenic Hudson timely filed its opposition to the motion on January 25, 2010. For the reasons set forth in the discussion below, the DEC's motion to dismiss the appeal is denied.

The parties have also submitted to the Board a number of e-mails concerning the appropriate content of the record on this appeal. In an e-mail from counsel for Scenic Hudson dated January 27, 2010, Scenic Hudson requests the inclusion of 7 documents in the record beyond those which DEC compiled and filed with the Board. DEC opposes, arguing that only those documents actually considered by DEC staff in granting the challenged permits appropriately are part of the record.

The Board need not decide that question at this time. Scenic Hudson is directed to provide to the Board (and to DEC to the extent it has not done so already), a copy of the first 5 documents listed in counsel's e-mail, and the link to the "Map of the Coastal Zone Boundary under the CZMA." In its appeal brief, Scenic Hudson may provide factual and legal arguments regarding why the Board should consider particular information in each one or all of those documents on this appeal. In its brief, DEC may provide factual and legal arguments why the Board should not. Both parties are granted an additional 7 pages in brief length to cover those arguments.

With respect to the “Hudson River National Estuarine Research Reserve Draft Significant Coastal Fish and Wildlife Area Report,” which Scenic Hudson states is an internal DEC document that Scenic Hudson does not have in its possession, Scenic Hudson should provide the Board (with a copy to DEC) with an e-mail or letter, not exceeding 2 pages, explaining why that document it does not possess is relevant to the Board’s review of this appeal. Such communication shall be transmitted to the Board on or before February 8, 2010. If DEC opposes the consideration of that document by the Board on this appeal, it should provide the Board (with a copy to Scenic Hudson) with an e-mail or letter, not exceeding 2 pages, explaining its position on or before February 12, 2010.

Discussion

DEC argues that this appeal should be dismissed because Scenic Hudson did not file its notice of appeal with the Board until December 24, 2009, more than 30 days after October 30, 2009, the day DEC issued the permits, and presumably mailed them to O & G Industries. (DEC Notice of Appearance and Motion to Dismiss (DEC Motion)). DEC states that no public notice of the application for the permits, of the DEC’s negative declaration pursuant to the State Environmental Quality Review Act, or of DEC’s issuance of the permits was legally required or in fact provided. DEC does not contest Scenic Hudson’s assertion that Scenic Hudson had no knowledge of the permits having been issued until one of Scenic Hudson’s staff was informed at a Town of Greenport Planning Board meeting on November 24, 2009, that DEC had “blessed the project” which is the subject matter of the permits, and the next day November 25, 2009, a reporter told Scenic Hudson staff that State and federal permits had been issued to the project.

Scenic Hudson's further assertion that it did not receive confirmation from DEC that the permits had been issued until December 2, 2009, in response to a Scenic Hudson request pursuant to the State Freedom of Information Law (FOIL), also is not contested by DEC.

In this matter, Scenic Hudson seeks review of a final decision by DEC allegedly affecting Scenic Hudson, *i.e.*, the decision to grant the permits to O & G Industries. The statutory provision applicable here regarding the time to seek review by the Board is ECL § 24-1103(1)(d), which provides in relevant part that the affected party must file its notice of appeal with the Board "within thirty days after ... notice of such decision given"² The Board's implementing regulation regarding the time to file an appeal with the Board provides that a notice of appeal must be filed "within 30 days after the service or notice, whichever occurs later in time, of any decision, determination or order of the [DEC]." 6 NYCRR § 647.3(a).

DEC argues the time frame for filing begins to run when the Department issues a decision (*i.e.*, mails the permits), but because a timely appeal must be filed "within 30 days after the service or notice, whichever occurs later in time . . ." depending on the facts, a simple mailing might not even start the clock ticking with regard to the permittee (O&G in this case), let alone an unrelated third-party like Scenic Hudson where there is no evidence that they too were served AND there was no public notice. If we agree with the DEC interpretation as to when the clock begins to run with regard to a third-party like Scenic Hudson, it would make it very difficult (if not completely shut the door) for any interested third-parties to ever have the

² In its motion to dismiss, DEC invokes ECL § 24-1103(1)© (DEC Motion, at 4-5), but that provision applies to appeals *by any party* to any proceeding before the DEC. To the extent that O & G Industries' application for the permits, and DEC's consideration and issuance of them was a proceeding before the DEC, an issue we need not decide here, Scenic Hudson was not a party to that proceeding. Thus, that provision is not applicable here.

opportunity to appeal. In the interest of fairness and due process (and common sense), actual notice must be applied.

DEC also argues that “notice” under the law means only *public* notice, which here never was provided with respect to the challenged permits. (DEC Motion at 8). Under that meaning of “notice,” the time period for an affected party such as Scenic Hudson to challenge permits where no public notice is provided might never legally close, which would be anathema to finality. Scenic Hudson, on the other hand, argues that “notice” means actual, subjective notice to a party. (Answer to Motion to Dismiss, at 4.)

Notice under ECL § 24-1103(1)(d) and 6 NYCRR § 647.3(a), however, may be *either* appropriate public notice *or* actual notice to an appellant. For example, in *Murtaugh v. Krupski*, No. 00-06, 2001 N.Y. Env. LEXIS (FWAB 2001), the Board determined that the appellant’s appeal challenging the accuracy of the wetlands map for Suffolk County was filed too late when the map was publicly filed in February 1993, and publicly noticed in May 1993, but the appellant’s notice of appeal was not filed until August of 2000. On the other hand, actual notice of a DEC decision a party seeks to challenge also starts the 30 day time limitations period. See, for example, *Aldous v. Town of Lake Luzerne*, 281 A.D.2d 807, 808 (3d Dept. 2001) (the limitations period to commence an Article 78 proceeding to compel a government official to act begins to run when the official’s refusal to act is communicated to the petitioner).

Here it is uncontested that public notice was never provided on the challenged permits, so actual notice is the operative notice to start the 30 day limitations period. Scenic Hudson moved promptly and filed its notice of appeal with the Board within 30 days after first learning that

DEC had “blessed the project,” and less than 30 days after learning that State permits had been issued to the project. Accordingly, Scenic Hudson’s appeal was timely filed.³

Conclusion

Based on the uncontested facts and the discussion above, DEC’s motion to dismiss this appeal is denied.

So Ordered, this 2nd day of February, 2010,

By,

/s/ Melissa D. Boglioli, Member

/s/ Allison Duncan, Member

/s/ Michael J. McEachern, Member

/s/ Lemuel M. Srolovic, Chair

³ We need not and do not decide where in the sequence of information regarding the permits Scenic Hudson acquired sufficient notice to start the 30 day limitations period.