

**STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS**

**In the Matter of Compelling Compliance with the
provisions of Agriculture and Markets Law
§305-a (1) by**

**Town of Southeast
1360 Route 22
Brewster, NY 10509**

**DETERMINATION
AND
ORDER**

PRELIMINARY STATEMENT

On February 19, 2010, Christine Meister, owner of River Run Farm, requested that the Department of Agriculture and Markets ("Department") review the Town of Southeast's Freshwater Wetlands Law and associated permit fee as it pertains to her commercial horse boarding operation and the stabilization of a streambank on her property. The Department investigated to determine whether the Town of Southeast administered the Town's Freshwater Wetlands Law in a manner consistent with the provisions of Agriculture and Markets Law (AML) §305-a. AML §305-a(1)(a) mandates that when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, local governments do so in a manner as may realize the policy and goals set forth in Agriculture and Markets Law Article 25-AA. The policy and goals include conserving, protecting and encouraging the development and improvement of agricultural land for the production of food and other agricultural products; conserving and protecting agricultural lands as valued natural and ecological resources; and protecting and enhancing agricultural land as a viable segment of the local and State economies and as an economic and environmental resource of major importance. The statute further provides that local governments "shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

The Department reviewed correspondence and documentation submitted by Christine Meister; Carrie Davis, Agricultural Program Coordinator, Watershed Agricultural Council, East of Hudson Program; Adam Peterson, Division of Environmental Permits, Region 3, NYS Department of Environmental Conservation; Lauri Taylor, District Manager, Putnam County Soil and Water Conservation District; historical aerial imagery of the farm as acquired through the National Aerial Photography Program and the NYS Digital Orthoimagery Program; photography examined through Putnam County's GIS website as acquired by Pictometry International Corporation; and the Town of Southeast's Freshwater Wetlands Zoning Ordinance, Chapter 78 and its associated Fee Schedule for 2009. Based upon the relevant facts and information gathered, I hereby make the following

findings and conclusions which support a Determination that the Town of Southeast has violated AML §305-a (1) and an Order compelling compliance with such law.

FINDINGS

1. By letter dated March 5, 2010, William Kimball, Director, Division of Agricultural Protection and Development Services, New York State Department of Agriculture and Markets, notified Town Supervisor Michael Rights that the Department received a request from Ms. Christine Meister for a formal review of the Town's Freshwater Wetlands Law and associated permit fee for compliance with AML §305-a.
2. Ms. Meister operates a "commercial horse boarding operation" on 30 acres of land located within Putnam County Agricultural District No. 1, a county adopted, State certified agricultural district. On June 2, 2010, Ms. Meister stated that she had 13 horses boarded and owned on the farm. Ms. Meister informed Department staff on December 2, 2010 that she currently has 15 horses on the farm. Ms. Meister stated that the subject property receives an agricultural assessment. The Department has determined that Ms. Meister's horse boarding activity constitutes a "farm operation" and a "commercial horse boarding operation" as defined in AML §301(11) and (13).
3. According to Ms. Meister and Carrie Davis, Agricultural Program Coordinator, Watershed Advisory Council's (WAC) East of Hudson Program, WAC and the USDA Natural Resources Conservation Service (NRCS) staff designed and engineered a conservation practice to construct sheet piling and rock rip rap along the toe of the piling to halt stream bank erosion along a 140 foot section of the East Branch of the Croton River. The river is presently cutting into the riverbank and may compromise the stability of an existing agricultural structure if not corrected.
4. On April 27, 2010, Adam Peterson, an Environmental Analyst with the NYS Department of Environmental Conservation (NYS DEC), indicated to Dr. Robert Somers, Manager, Agricultural Protection Unit, Department of Agriculture and Markets, that a coordinated review of the proposed action on River Run Farm was conducted with the New York City Department of Environmental Protection (DEP). On July 22, 2009 three permits were issued to River Run Farm by the NYS DEC, including a Stream Disturbance Permit (ECL Article 15, Title 5, ID No. 3-3730-00268/00002), Freshwater Wetlands Permit (ECL Article 24, ID No. 3-3730-00268/00003) and Water Quality Certification Permit (Section 401, Clean Water Act, ID No. 3-3730-00268/00004). The NYS DEC requires that all of the approved stream stabilization work be performed in conformance with permit conditions as provided in the permits. The permit prohibits in-stream work during trout spawning and incubation, which occurs from October 1st to April 30th.
5. On April 28, 2010, Dr. Robert Somers, Manager of the Department's Farmland Protection Program, contacted Ms. Davis to discuss WAC's involvement with the proposed action (installation of steel sheet piling, rock rip rap to armor stream bank, and vegetative plantings for bank stabilization) on River Run Farm. Ms. Davis indicated that the proposed stabilization work was designed by Sam Ly, Project Engineer, United States Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) to meet NRCS standards and specifications. Ms. Davis

stated that WAC will bid the project out; execute a contract, which will be signed by the selected contractor and landowner; and perform inspections during construction. At the conclusion of construction activities, WAC's Project Engineer, Andy Cheung, P.E., will certify that the project is complete and meets project plans, design and specifications.

6. In addition to permits received from the NYS DEC, Ms. Meister indicated that the Town of Southeast is requiring her to obtain a local freshwater wetlands permit and pay an initial fee of \$1,100. Ms. Meister indicated that the Town's wetlands permit fee and lengthy review process is costly and delays associated with municipal review, especially when the activity has been permitted by the NYS DEC, jeopardizes the project's implementation and completion. The project has been delayed and the DEC permits expire on September 30, 2011.
7. Ms. Davis indicated to Dr. Somers that she contacted several Town representatives, including Steve Coleman, Town Wetlands Inspector, Thomas Fenton, Town Engineer, and Laurie Friccione, Town Planning Department Secretary, regarding the Town fees. Ms. Davis indicated that on or about January 20, 2010 Ms. Friccione informed her that the fee would be \$1,100 since the project falls outside the definition of an "Activity of Minor Significance," will occur within a floodplain, and will involve the modification of greater than 25 feet of stream bank/watercourse.
8. Mr. Kimball detailed the results of the Department's review of the Town's Freshwater Wetlands Law in a June 21, 2010 letter to Supervisor Rights. Mr. Kimball stated that a permit fee of \$1,100, as provided in the 2009 Town of Southeast Fee Schedule, appears to be excessive and unreasonably restricts River Run Farm in possible violation of AML Section 305-a(1). The Fee Schedule requires \$1,100 for the first 100 linear feet of road, pipeline or utility construction within a wetland and an additional \$1,100 for each 100 linear feet thereafter. In addition, the fee schedule description does not appear to fit the type of work that will be performed on River Run Farm. Furthermore, the fee appears to be excessive in light of the significant level of permitting and review conducted by the NYS DEC, in cooperation with the NYC DEP; the design work performed by the USDA NRCS; and the WAC-EOH project review, inspections and close-out examination.
9. On August 16, 2010, Mr. Kimball informed Supervisor Rights that the Department had completed its review of the Town of Southeast's Zoning Code as it pertains to River Run Farm for compliance with AML §305-a(1). Based upon its review in this matter, the Department concluded that the application of the Town's Freshwater Wetlands Law to River Run Farm, including the \$1,100 permit fee, unreasonably restricts River Run Farm in violation of AML §305-a(1). The Department concluded that the Town has not demonstrated that the public health or safety is threatened by the activities proposed by River Run Farm.
10. The Department informed Supervisor Rights, by letter dated August 16th, that the Town must not subject River Run Farm to the Town of Southeast's Freshwater Wetlands permitting requirements, including the \$1,100 permit fee. The Department requested that the Town confirm within 20 days that it will not continue to impose such requirements and will allow the farm operation to begin constructing the improvements

pursuant to the three permits issued by the NYS Department of Environmental Conservation, with overview and inspection performed by the Watershed Agricultural Council, East of Hudson Program. The Department informed Supervisor Rights that if steps to comply are not taken, the Department may take appropriate action to enforce the provisions of AML §305-a (1).

11. In the Department's June 21, 2010 and August 16, 2010 letters to Supervisor Rights, the Town was requested to provide the Department with any documentation or other evidence that it may have that public health or safety is threatened by the farm operation. The Department did not receive any response from the Town.
12. On December 10, 2010, Danielle Cordier, Department Senior Attorney, spoke with Willis H. Stephens, Esq., Town Attorney for the Town of Southeast. Ms. Cordier indicated to Mr. Stephens that the Department had corresponded with the Town regarding River Run Farm's proposed streambank stabilization project. Mr. Stephens requested, both over the phone and pursuant to an e-mail, copies of the Department's correspondence and indicated that he would submit a response to the Department. Copies of the Department's correspondence were sent to Mr. Stephens on December 10, 2010.
13. On January 5, 2011, Ms. Cordier e-mailed Mr. Stephens inquiring whether the Town was going to submit any comments or respond to the Department's AML §305-a review. The Department has not received any response from the Town or Mr. Stephens.

CONCLUSION

Based upon the above findings, I conclude the following:

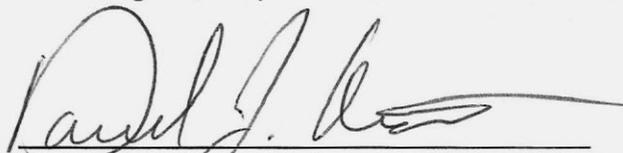
1. The Town of Southeast's Freshwater Wetlands Law is duplicative, costly and time consuming to the farm operator with no apparent benefit to the protection of public health or safety. The Town's administration of its Freshwater Wetlands Law with respect to River Run Farm, including the \$1,100 permit fee, for the construction of steel sheet piling along approximately 140 feet of stream bank along a portion of the East Branch of the Croton River, rock rip rap to armor the bank and protect the pilings, and vegetative plantings along the bank for stabilization purposes unreasonably restricts River Run Farm in violation of AML §305-a (1).
2. Although given the opportunity to do so, the Town has not shown that a duplicative freshwater wetlands permitting process is needed to protect against any threat to public health or safety due to the activities proposed by River Run Farm.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Southeast has violated AML §305-a (1), and it is hereby

ORDERED, pursuant to the provisions of AML §36 that the Town of Southeast comply with the provisions of AML §305-a(1) by not administering any provisions of its Freshwater Wetlands Law with respect to River Run Farm's stream bank stabilization project, including the \$1,100 permit fee.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Southeast, by mail to Hon. Michael Rights, Supervisor, 1360 Route 22, Brewster, New York, 10509.



Darrel J. Aubertine, Acting Commissioner
of Agriculture and Markets of the State of
New York

Dated and Sealed this 23rd
day of February, 2011
at Colonie, New York