

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE  
ENVIRONMENTAL CLAIMS PART

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In the Matter of the Application of

VILLAGE OF KIRYAS JOEL and MAYOR ABRAHAM WIEDER; VILLAGE TRUSTEE JACOB MITTELMAN; VILLAGE TRUSTEE BARUCH MARKOWITZ; VILLAGE TRUSTEE SAMUEL LANDAU; VILLAGE TRUSTEE JACOB FREUND; and VILLAGE ADMINISTRATOR GEDALYE SZEGEDIN, each individually and in his official capacity,

Plaintiffs/Petitioners,

**DECISION AND ORDER**

For a Judgment Pursuant to Article 78 of the CPLR and a Declaratory Judgment Pursuant to Section 3001 of the CPLR

Orange County  
Index Nos. 1892/07  
3958/07  
Motion Date: Jan. 21, 2008

- against -

COUNTY OF ORANGE, ORANGE COUNTY SEWER DISTRICT # 1, TOWN OF WOODBURY, TOWN OF CHESTER, TOWN OF MONROE, TOWN OF BLOOMING GROVE, VILLAGE OF CHESTER, (Moodna Defendants/Respondents) VILLAGE OF WOODBURY, and VILLAGE OF SOUTH BLOOMING GROVE (Non-Contract Defendants/Respondents),

Defendants/Respondents.

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NICOLAI, J.

The following papers numbered 1 to 141 were read on this combined declaratory judgment action and CPLR Article 78 proceeding on plaintiffs'/petitioners' application pursuant to CPLR §6301 and §6311 for an order granting a preliminary

injunction and upon the defendants'/respondents' motions, pursuant to CPLR §3211(a) and §7804 for an order dismissing the complaint/petition.

<u>Papers</u>	<u>Numbered</u>
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits (OC Index No. 07/1892) .....	1-5
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits - Reply Memorandum of Law (OC Index No. 07/3958) .....	6-11
Respondents/Defendants County of Orange and Orange County Sewer District #1 Reply Memorandum of Law (OC Index Nos. 07/1892 and 07/3958) .....	12
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits - Affidavit of David Lindsey - Exhibits - Affidavit of Robert Jeroloman - Exhibits - Memorandum of Law - Reply Memorandum of Law (Previously Adjourned by the Court [Owen, J.]) (OC Index No. 07/1892) .....	13-43
Respondent/Defendant Town of Woodbury Notice of Motion - Attorney Affirmation - Reply Affirmation (OC Index No. 07/1892) .....	44-46
Respondent/Defendant Town of Woodbury Notice of Motion - Attorney Affirmation - Exhibits - Reply Affirmation (OC Index No. 07/3958) .....	47-60
Respondents/Defendants Town and Village of Chester Notice of Motion - Attorney Affirmation – Memorandum of Law - Reply Affirmation - Exhibit - Reply Memorandum of Law (OC Index No. 07/1892) .....	61-66
Respondents/Defendants Town and Village of Chester Notice of Motion - Attorney Affirmation – Memorandum of Law - Reply Affirmation - Exhibit - Reply Memorandum of Law (OC Index No. 07/3958) .....	67-72
Respondent/Defendant Town of Blooming Grove - Notice of Motion - Attorney Affirmation - Bohan Affidavit Memorandum of Law (OC Index No. 07/1892) .....	73-76

Respondent/Defendant Town of Blooming Grove - Notice of Motion - Attorney Affirmation - Bohan Affidavit Memorandum of Law (OC Index No. 07/3958) . . . . .	77-80
Respondent/Defendant Village of Woodbury Notice of Motion - Attorney Affirmation - Exhibits - Memorandum of Law (OC Index No. 07/1892) . . . . .	81-86
Respondent/Defendant Village of South Blooming Grove Notice of Motion - Attorney Affirmation - Supplementary Attorney Affirmation - Exhibits - Memorandum of Law (OC Index No. 07/1892) . . . . .	87-103
Respondent/Defendant Village of South Blooming Grove Notice of Motion - Attorney Affirmation - Supplementary Attorney Affirmation - Exhibits - Memorandum of Law (OC Index No. 07/3958) . . . . .	104-120
Respondent/Defendant Village of South Blooming Grove Reply Memorandum of Law (OC Index Nos. 07/1892 and 07/3958). . . . .	121
Plaintiffs/Petitioners Village of Kiryas Joel, et. al. Attorney Affirmation in Opposition - Exhibits - Memorandum of Law (OC Index Nos. 07/1892 and 07/3958) . . . . .	122-126
Plaintiffs/Petitioners Village of Kiryas Joel, et. al. Attorney Affirmation in Opposition - Exhibits - Affidavit of Gedalye Szegedin - Exhibits - Memorandum of Law - Exhibit (Previously Adjourned by the Court [Owen, J.]) (OC Index No. 07/1892) . . . . .	127-141

Upon the foregoing papers, it is ordered that this application is resolved as follows.

***Facts and Procedural History***

Plaintiff/petitioner, Village of Kiryas Joel (Kiryas Joel) is one among a number of municipalities within the defendant/respondent County of Orange and defendant/respondent County of Orange Sewer District #1 (OCSD) (collectively, the County). The individual plaintiffs/petitioners are Village Trustees and other officials of Kiryas Joel who have brought this action/proceeding individually and in their official capacity. They have brought a combined declaratory judgment action and CPLR Article

78 proceeding seeking to preliminarily or permanently enjoin the County from entering into a contract for sale or otherwise undertaking any further action towards the sale of wastewater treatment capacity from the County's Harriman Wastewater Treatment Plant to communities outside the OCSD. Petitioners contend that the County's efforts to allocate some of the OCSD's newly-acquired wastewater treatment capacity to non-OCSD municipalities violate County Law, General Municipal Law and SEQRA.

The OCSD has one water treatment facility, the Harriman Wastewater Treatment Plant, which serves Kiryas Joel, the Village of Harriman, the Village of Monroe and part of the Town of Monroe, all of which are located within the OCSD. The portion of the Town of Monroe that is outside the OCSD as well as the Town and Village of Woodbury, the Town of Blooming Grove, the Village of South Blooming Grove and the Town and Village of Chester, which have been joined in this action/proceeding as necessary parties, pursuant to the order of the Court dated July 2, 2007 (Owen, J.), are the municipalities outside the OCSD to which the County seeks to allocate some of the OCSD's wastewater treatment capacity. These out-of-OCSD municipalities that have been joined to this action/petition may be grouped into two categories for the purposes of this determination. The first group of these defendant/respondent municipalities are denominated as "the Moodna communities" and are comprised of the Town and Village of Chester, the Town of Monroe, the Town of Woodbury and the Town of Blooming Grove. They are so named because all are members of the Moodna Basin Joint Regional Sewerage Board and, along with the OCSD, were signatories to the 1978 Moodna Basin Inter-municipal Agreement (and its 1988 amendment), by which the OCSD agreed to enhance its wastewater treatment capacity by 2 million gallons per day and to allocate both the

expense and the expanded wastewater treatment capacity to these Moodna communities. The Villages of Woodbury and South Blooming Grove are the “non-contracting municipalities” which form the second group of out-of-OCSD municipal defendants/respondents. They are parties to this petition/action but were not signatories to the 1978 Inter-municipal Agreement (nor to the subsequent amendment).<sup>1</sup> Collectively, these two groups of defendants/respondents are referred to in this decision as the out-of-OCSD municipalities.

Pursuant to the terms of a Consent Decree and Order of the United States District Court for the Southern District of New York, the County was given until August 1, 2006 to expand the wastewater treatment capacity at the Harriman Wastewater Treatment Plant from 4.0 million gallons per day (the capacity which resulted from the expansion that followed the 1988 amendment to the 1978 Inter-municipal Agreement) to 6.0 million gallons per day. In 2001, Environmental Impact Statements were prepared as was the Statement of Findings. Notably, the Statement of Findings, as adopted by the Orange County Legislature, expressly states that the “purpose of the proposed enhancements [was] to meet the wastewater treatment needs of [the OCSD] and the Moodna Basin Southern Region Joint Sewerage Board sewer service areas.” The Orange County

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<sup>1</sup>It is useful to note that the non-contracting municipality of the Village of South Blooming Grove, which was incorporated on July 14, 2006, is located wholly within the Town of South Blooming Grove which is itself a Moodna Community. Moreover, the Village of South Blooming Grove is part of the Town of Blooming Grove's sewer district which discharges to the Harriman Sewer Treatment Plant pursuant to the inter-municipal agreement of 1978. As for the Village of Woodbury, it is subject to an inter-municipal agreement of its own with the Town of Woodbury. According to this agreement, the Village of Woodbury has undertaken the responsibilities, rights and obligations of the sewer district of the Town of Woodbury (a Moodna community) as of January 1, 2008.

Legislature then petitioned the New York State Comptroller for its consent to make the expenditures necessary to complete the expansion project. During the petition process, it was the County's position that the then-current capacity of the Harriman Wastewater Treatment Plant was inadequate to serve the needs of the communities within the OCSD, that the Moodna Communities were allocated 2.0 million gallons of wastewater treatment per day and that it was the County's intention to provide the non-contracting municipalities a limited (maximum 189,000 gallons per day) portion of the expanded capacity of the Harriman Wastewater Treatment Plant. The County's petition also reflected that more than 1.0 million gallons per day of the yet-to-be-expanded wastewater treatment capacity was already accounted for with various pending in-OCSD development projects and existing in-OCSD properties which had not been able to receive OCSD services because of a lack of capacity. Following the approval of its petition and the adoption of the resolution by the Orange County Legislature, the Harriman Wastewater Treatment Plant was improved and expanded such that it now has a wastewater treatment capacity of 6.0 million gallons per day.

In 2006, after the OCSD completed the expansion project, the County initiated a plan to allocate more than 1.0 million gallons per day of the OCSD's newly-enhanced wastewater treatment capacity, and the associated costs, to the out-of-OCSD municipalities. Petitioners objected on the grounds that the County had not quantified the excess treatment capacity, had not determined that there was adequate capacity within the OCSD and had not conducted a SEQRA review. By letter dated January 8, 2007, the County informed the out-of-OCSD municipalities that the Harriman Wastewater Treatment Plant was on line and fully operational at a 6.0 million gallon per day capacity.

The letter stated that its purpose was to “inquire as to your interest in a) purchasing capacity; and b) consolidation of your sewer district into the [OCSD].” The letter specifically referenced the provision in the 1978 Inter-Municipal Agreement for allocating expanded wastewater treatment capacity and the associated costs among the participating Moodna communities.

Petitioners commenced the first proceeding/action (Orange County Index Number 07/1892) on March 1, 2007 by Order to Show Cause and Verified Petition and Complaint. Thereafter, the County moved to dismiss this petition/action inter alia, on the ground that petitioners had failed to join the Moodna communities as necessary parties pursuant to CPLR 1003 and 3211(a)(10). While that application was pending before the Court, petitioners commenced a second petition/action (Orange County Index Number 07/3958) on May 7, 2007 by Summons and Verified Petition and Complaint. This second proceeding/action is virtually identical to the first save that in addition to the County, it names the Moodna communities and the non-contracting municipalities as defendants/respondents. By Decision and Order of this Court dated July 2, 2007 (Owen, J.), the Moodna communities and the non-contracting municipalities were joined in the first action as necessary parties. The substantive aspects of the motion to dismiss were deferred until joinder was fully affected. On July 17, 2007, petitioners filed a Supplemental Summons and Notice of Petition and Amended Verified Petition and Complaint seeking injunctive relief, a judgment under CPLR Article 78 and a declaratory judgment against the County, the Moodna communities and the non-contracting municipalities. The County's original motion to dismiss has been deemed submitted as to petitioners amended petition/action. In addition to the County's motion to dismiss, similar

motions have been filed by the Village of South Blooming Grove, the Town of South Blooming Grove, the Town and Village of Chester, the Town of Woodbury and the Village of Woodbury. The Town of Monroe, which initially made a motion to dismiss, has withdrawn that application and submitted its Verified Answer. This matter has been transferred to the Environmental Claims Part and is resolved as follows.

### ***Analysis***

With respect to any Article 78 proceeding, it must be determined, as a preliminary matter, whether petitioners' proceeding is timely. An Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). *Save the Pine Bush v. City of Albany*, 70 NY2d 193, 203 (1987). Petitioners contend that the County's letter of January 8, 2007 to the out-of-OCSD municipalities offering the sale of wastewater treatment capacity derived from the completed expansion project built and financed by the OCSD property owners was the trigger to their right to commence this action.

Petitioners argue that the January 8, 2007 letter constituted "the County's first formal offer to convey to the Moodna Communities more than 1.0 million gallons per day (mgd) of the new capacity built and financed by the District property owners". Respondents contend that the Statement of Findings, adopted by the Orange County Legislature on August 10, 2001 for the first expansion of the wastewater treatment facility, which states that the "purpose of the proposed enhancements [was] to meet the wastewater treatment needs of [the OCSD] and the Moodna Basin Southern Region Joint Sewerage Board sewer service areas" was the event that should have triggered the injury and therefore the commencement of the Statute of Limitations.



Inasmuch as the apportionment of future wastewater treatment capacity between the County and the Moodna communities was undertaken in the 1978 Inter-municipal Agreement (IMA), a reasonable argument cannot be made that any concrete injury resulting from wastewater capacity allocation would have been incurred some thirty (30) years ago. Respondents cannot claim that the Statute of Limitations commenced in 1978 with the execution of the IMA. The County's contention that the January 8, 2007 letter merely effectuated a long standing provision in the IMA is not plausible.

The terms of the 1978 IMA may have anticipated the necessity of an elastic mechanism for constructing additional wastewater treatment capacity to serve OCSD municipalities as well as the Moodna communities, however, the County cannot act contrary to the applicable laws. The County must comply with the SEQRA process and a determination of excess must be made prior to the sale or offer to sell any excess wastewater treatment capacity. Although the County's January 8, 2007 letter seeks to allocate the additional wastewater treatment capacity in a manner that is consistent with the historical operation of the Harriman Sewer Treatment Facility and with the 1978 IMA, the County has failed to make the required determination for its actions under SEQRA, General Municipal Law §119 and County Law §253-a(1) and §266. The County never made a determination that the existing sewage treatment capacity at the Harriman Plant was adequate to meet the needs of the in-OCSD municipalities.

Extending the use of 1.0 mgd of wastewater treatment to out-of-OCSD municipalities requires a review of the circumstances surrounding the capacity. Circumstances have undoubtedly changed for the OCSD members with regard to many instances including population and housing markets. At a bare minimum, the County

should have undertaken to prepare a Supplemental Environmental Impact Statement (SEIS) to evaluate relevant environmental concerns to the OCSD members and their proposed increased needs. See *Doremus v. Town of Oyster Bay*, 274 AD2d 390, 393 (2d Dep't. 2000). The County has made a determination to sell capacity at its wastewater treatment facility without consulting the members of the OCSD to see what, if any, projects are proposed that will add to the in-OCSD municipalities wastewater. There has been a history where in-OCSD municipalities have had moratoriums on construction due to a lack of capacity at the Harriman Wastewater Treatment Facility. The petitioners herein were subject to such limits on their development and therefore, the County must take all necessary steps to insure that the in-OCSD municipalities are adequately allocated with regard to their wastewater treatment needs and that is precisely an issue to be studied pursuant to the SEQRA process.

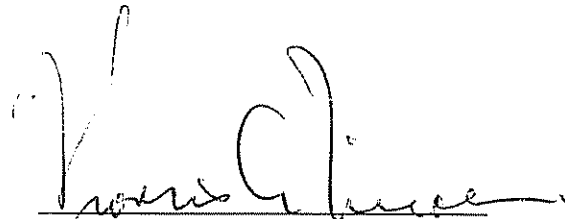
In addition to the environmental concerns that have to be addressed by the County, the sale of wastewater treatment capacity requires a determination from the County that the capacity to be sold is actually beyond the needs of the members of the sewer district. County Law § § 253-a and 266 and General Municipal Law § 119 require a determination be made by the OCSD that the treatment capacity actually be "in excess of its own needs". The County has an obligation to assess the treatment capacity needs of the district members and to make a reasoned determination of excess capacity on the record.

There is no indication in the record that the County undertook such a study or even discussed future needs of in-OCSD municipalities. Members of the OCSD financed and constructed the expanded capacity at the Harriman Plant for its own use and gain.

Without an inquiry into proposed development plans for in-OCSD properties and a determination of that the existing sewage treatment capacity at the Harriman Plant is adequate for the needs of the OCSD members, the County cannot offer 1.0 mgd of wastewater treatment to out-of-OCSD municipalities.

Accordingly, the defendants'/respondents' motions to dismiss are DENIED and the defendants/respondents are hereby enjoined from selling any wastewater treatment capacity to any entity outside the OCSD without first complying with the provisions of SEQRA, the County Law and the General Municipal Law.

Dated: White Plains, New York  
August 7, 2008



FRANCIS A. NICOLAI, J.S.C.

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