

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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IN THE MATTER OF THE APPLICATION OF THE
COUNTY OF ORANGE,

Petitioner,

Index No. 7547/2004

IN A PROCEEDING UNDER ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES

-against-

DECISION AND ORDER

VILLAGE OF KIRYAS JOEL and BOARD OF
TRUSTEES OF THE VILLAGE OF KIRYAS JOEL,

Respondents.

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ROSENWASSER, STEWART A., A.J.S.C.

In this Article 78 proceeding, the petitioner seeks to annul the SEQRA Findings Statement of the Village of Kiryas Joel (Village) relating to the construction of a pipeline and related facilities to enable the Village to connect to the Catskill Aqueduct (the "project") and to annul the \$22,150,000 bond resolution which authorizes and funds a pipeline connecting the Village to the aqueduct.

The Court decides this application having considered:

- 1.) the verified petition and exhibits A through F;
- 2.) the petitioner's memorandum of law;
- 3.) the verified answer;
- 4.) the memorandum of law in opposition;
- 5.) the affidavit of Henry Boucher with Exhibits 1-2;
- 6.) the affirmation of Daniel A. Ruzow with Exhibits 1-3;
- 7.) the affirmation of Gedalye Szegedin with Exhibits 1-55;
- 8.) the certified transcript of the Record of Proceedings, Volumes 1-7;
- 9.) the supplement to transcript of the Record of Proceedings; and
- 10.) oral argument of June 29, 2005.

BACKGROUND

The proposed project consists of the construction of a pipeline between the Village's public water supply system and the Catskill Aqueduct which is part of the water supply for the City of New York. The project also includes the construction of a vacuum priming station and pump station and a filtration system. The connection to the Catskill Aqueduct is proposed to be on New York City owned land in the Town of New Windsor, New York and would extend approximately thirteen miles to a water treatment plant to be located in or near the Village.

The project was classified as a Type I Action under SEQRA by the Village which required the preparation of an Environmental Impact Statement (EIS). The Village declared itself as the lead agency on July 2, 2002, and issued a positive determination of environmental significance on August 6, 2002. The Village accepted the Draft Environmental Impact Statement (DEIS) on October 7, 2003. On May 4, 2004, the Village accepted the Final Environmental Impact Statement (FEIS) and thereafter adopted the Statement of Findings on July 8, 2004.

Orange County filed this verified petition on November 4, 2004, in which the approval by the respondents is challenged on the grounds that the Village failed to take the required "hard look" at the project's impact upon wastewater generation and treatment, archaeological resources and wetlands and failed to adequately assess alternatives and the growth inducing aspects of the project.

Statute of Limitations

The first issues presented to the court involve which statute of limitations applies to this action and whether the statute of limitations has already run, thereby making the petition untimely. The respondent argues that the 20-day period of limitations set forth in Local Finance Law §82 governs because, as a result of the adoption of the SEQRA findings, the Village enacted and published notice of bonding of the project. The petitioner argues that a four-month statute of limitations applies to this action because the action relates to the respondents' noncompliance with SEQRA [*Matter of Young v. Bd. of Trustees of Vil. Of Blasdell*, 89 NY2d 846 (1996); *Matter of Save the Pine Bush v. City of Albany*, 70 NY2d 193 (1987); CPLR §217(1)]. The Village also cites other statutes of limitations which they argue apply to the factual background of this action. For the reasons set forth before, Town Law §274-a and Village Law §7-725 which establish statutes

of limitations for challenges to site plan approvals, do not apply to this action and they do not act as a bar to the relief sought in the petition.

In this instance, the four-month statute of limitations governs [CPL §217(1)]. This action was brought to challenge the adoption of the Findings Statement by the Village in which the FEIS is formally approved and adopted. Until this point, the Village could have rejected the FEIS or modified the project. Accordingly, it is the approval of the Findings Statement which resulted in the harm to the petitioner and it is also that approval that is the triggering event for the running of the statute of limitations.

The court must now determine the date when this four-month statute of limitations began. The approval of the project occurred on July 8, 2004, when the board passed the Findings Statement which is the event which triggered this article 78 proceeding and which was when the Village arrived at a “definitive position on the issue” which inflicted an “actual concrete injury” [*Stop-The-Barge v. Cahill*, 1 NY3d 218 (2003); *Matter of Essex County v. Zagata*, 91 NY2d 447 (1998)]. Here, until the Village adopted the Findings Statement, the conclusions found in the FEIS could not be considered the last word on the project. “Finally before approving an action that has been the subject of a FEIS, an agency must consider the FEIS, make written findings that the requirements of SEQRA have been met, and prepare a written statement of the facts and conclusions relied on in the FEIS or comments (6 NYCRR 617.9(c), (d))” [*Jackson v. NY Urban Dev. Corp.*, 67 NY2d 400 (1986)]. The Findings Statement was the last word of the Village and it was this act of approval of the Findings Statement which commenced the four month statute of limitations.

The respondents’ argue that the time period began with the filing of the FEIS rather than its acceptance by the Village Board. This act of filing the FEIS was not a definitive position on the FEIS. The Finding Statement is the definitive statement of the intent of the board to adopt the FEIS and it was this act that caused actual concrete injury [*Stop-The-Barge v. Cahill*, *supra.*].

This action does not challenge any aspect of the proposed financing of this project nor does the board’s action have anything to do with site plan approvals. The application to stay the issuance of the bonds which were approved as a financing mechanism for the pipeline does not act to modify the statute of limitations for the challenged action.

Standing

The County of Orange does have standing to bring and maintain this action. The Village conferred standing upon the County of Orange by designating Orange County as an “Involved Agency” throughout the SEQRA process. The designation of the County as an “Involved Agency” by the Village acts to confer standing to bring this action on the County. In addition, the County owns and operates the Harriman sewage treatment plant into which waste water flows from the Village. Any increase in waste water from the Village as a result of the proposed project will necessarily result in the need for additional wastewater treatment capacity.

The wastewater treatment issue is within the zone of interest contemplated by SEQRA and the County of Orange is uniquely affected by the potential for increased usage of the wastewater treatment facility it operates. Accordingly, the County of Orange is an aggrieved party and has standing to bring this action.

Substantive Issues Relating to SEQRA Compliance

It is not appropriate for the Court to substitute its judgment for that of the Village in adopting and conducting the FEIS. The Court’s review is limited to determining whether or not the Village adequately considered the relevant issues in the SEQRA review. “Judicial review of a lead agency’s SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination ‘was affected by an error of law or was arbitrary and capricious or an abuse of discretion [CPLR 7803(3); *Chinese Staff & Workers Assn. V. City of New York*, 68 NY2d 359, 363 (1986); *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 (1986)]. In assessing an agency’s compliance with the substantive mandates of the statute, the courts must review the record to determine whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination.’ While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to ‘weigh the desirability of any action or [to] choose among alternatives’ [*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d, at 363- 364, *supra*; *Aldrich v Pattison*, 107 AD2d 258, 265 (2nd Dept 1985); *H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 AD2d 222, 232 (4th Dept 1979).]” [*Akpan v Koch*, 75 NY2d 561 (1990); *Neville v. Koch*, 79 NY2d 416 (1992)].

Areas of relevant environmental concern are not necessarily every conceivable environmental impact but rather are those areas which have significant environmental impact. The following areas, all of which were raised in one form or another during the review process are not just significant but are rather critical areas of concern, given the magnitude of the proposed project.

1. Wastewater Issues

The petitioner claims that the FEIS is deficient in its analysis of the impact of the project upon wastewater issues and that the Village failed to take the required "hard look" at the wastewater issue in the FEIS. The Court's review in this action is limited to a review of the sufficiency of the analysis of the lead agency and a review of the documents actually reviewed by the lead agency which lead to the conclusions contained in the DEIS and FEIS and in the Findings Statement.

It was raised by the parties that some of the information used in the arguments in this Article 78 proceeding was not presented to the lead agency when formulating the FEIS and the Findings Statement. The Court's review is limited to the record as it existed as of the date of adoption of the Findings Statement. All reports not considered by the lead agency during the review of the DEIS, FEIS or the Findings Statement are not relevant for the purposes of this article 78 review and will not be considered in this decision since they did not form a basis for the Findings Statement.

The New York State Department of Environmental Conservation (DEC) advised the Village in its comments to the DEIS that the impact of the project on sewage facilities and the discharge of treated effluent is a "primary concern" and further found that "the DEIS does not provide sufficient information in order to evaluate the potential for this impact." The petitioner also warned that over time the project will result in the creation of wastewater in excess of the treatment capacity of the treatment facilities operated by the County and by the Village by itself without considering other growth in wastewater generation in the region. The Village's response to the concerns raised consisted of its observation that the Village will grow at its current rate and the assumption that wastewater treatment capacity will expand to cover any increase generated by the project (*see*, R. 476). This assumption does not appear to be based on any specific data or analysis.

Once connected to the aqueduct, the amount of water permitted to be taken is an entitlement based upon a per capita formula which is tied to census data. Whether or not reliance upon wells is a factor which

would limit population growth is an open question, however there is no question that the Village is growing, that it will continue to grow with or without the pipeline (*see*, R. 450) and that a tap into the New York City aqueduct can result in sustained growth which will affect wastewater treatment capacity. The Village currently suffers shortages of water on days of peak demand. If the Village is permitted to connect to the aqueduct, these shortages will not occur and as a result, there will be an immediate increase in wastewater treatment demand (*see*, R. 379). This increase requires a hard look, involving population projections, to ensure that there will be treatment capacity and even if there exists enough capacity, to protect the watersheds into which the treated water flows.

The New York State Department of Environmental Conservation in its response to the DEIS stated “[w]ithout establishing a specific, verifiable water supply need, it is not possible to compare these needs with the potential adverse environmental impacts caused by the construction and operation of the new water supply system” [*see*, R. 701]. Further, there is no analysis of the potential expansion of the wastewater needs of surrounding communities or how the expanding needs of the Village will be addressed in light of the general expansion of population in the region.

An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals [*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986)]. Although it is postulated that the wastewater treatment facilities are equipped to handle the output of the Village after connection to the New York City aqueduct, there is no analysis of the effects of growth within the Village and outside the Village which will necessarily increase the burden on the wastewater treatment capacity of both the Village's treatment facility and the facility operated by the County of Orange. The unexplained position of the Village that a connection to a large, consistent source of water will not affect growth does not sufficiently establish that growth is not a factor to be considered in the environmental review process. The review must establish population projections and the associated projected water need and wastewater production so that an adequate review of the wastewater impact can occur. It is not the Village's finding that is in issue but rather the fact that the finding is not premised on an analysis to satisfy the law's requirement that a “hard look” be taken at areas of environmental concern.

2. Wetland and Archeological Issues

The Village has deferred identification and evaluation of effects of the project on wetlands and archeological sites until the final design phase of the project. Deferral does not constitute the required "hard look" based upon "reasoned elaboration." Moreover, there has not been an adequate explanation why a review was not conducted or is unnecessary. The failure to assess the effect of the project upon wetlands, the failure to delineate the location of wetlands and the decision to defer these analyses until the design phase defeats the meaningful review required by SEQRA.

The Village must conduct Stage 1-B archeological testing as required by the New York State Department of Environmental Conservation and as specified in the Archeological Assessment of January 2004 and it must be made part of a DEIS. Including this assessment as part of the DEIS will ensure that the final determination of the route of the of the pipeline and the associated facilities will minimally effect archaeological resources and will be considered as part of the final plan. Making the assessment after the final route of the project is chosen does not ensure that the purpose of SEQRA is fulfilled because archaeological issues will be relegated to a deficient analysis. This is because the option of choosing another route for the project will have been foreclosed.

In the same manner, the Village has deferred the wetlands assessment. Again, any action the Village takes to assess and ameliorate problems encountered after the final route is established may not be the best choice compared to actions that can be taken if the assessment is made prior to choosing the route. In fact, the delineation of known wetlands was not performed and the Village has found that in some instances, wetland delineation will be required [R. 1009]. The protection of wetlands must be a consideration made as part of the planning of the route of the pipeline and the site of the associated facilities. The wetlands assessment, an important part of the SEQRA process, would only be given secondary consideration and the SEQRA process would become inconsequential to a great degree. Such treatment to both the issues of archaeological resources and to wetlands does not constitute the required hard look anticipated by SEQRA and must be included in the review process.

3. Growth Inducement

Rather than analyze the project in terms of growth inducement, the Village maintains that the project merely replaces an insufficient water source with a reliable one. Therefore, they argue that the project has little, if any growth inducement. At the same time, the Village acknowledges that it is growing

and clearly the original plan for a pipeline diameter of twenty-four inches was based upon "future entitlements due to future growth" [*see*, R. 780]. The question at issue is whether the creation of this new source of water will act as a further impetus to growth. Unfortunately, it is a question that is not possible to answer after a review of the DEIS, the FEIS or the Findings.

The right to water from the aqueduct is based upon a per capita formula that applies to any municipality that taps into the aqueduct. Under this formula, a larger population entitles the municipality to a larger draw of water. The fact that current growth rates cannot be maintained with the current water supply and that a tap into the aqueduct will remove the supply of water as a limiting factor on the growth of the Village does, in fact, constitute a growth inducement and it must be addressed in the Environmental Impact Statement. The argument of the respondents that the introduction of the new water source will not act as a growth inducement must be supported in some fashion by facts and the reasons for the conclusion must be included in the DEIS.

4. Alternatives

By virtue of its status as a county through which a New York City water aqueduct passes, communities within the county are permitted to tap into the aqueduct with certain restrictions. The opportunity to connect to the aqueduct does not eliminate the need to address all the terms and requirements of SEQRA. It is not enough to argue that there is some entitlement to the connection to the aqueduct because even if an entitlement exists, the municipality desiring to connect to the aqueduct must nonetheless address alternatives under SEQRA.

The petitioners contend that in this instance the respondents failed to take a "hard look" at the available alternatives or explain that there are no alternatives. In section 2 of the FEIS (R. 782) and during the public hearing (R. 874-875), an issue is raised about why it is not a reasonable alternative to obtain a connection through the New Windsor water tap on the aqueduct. The same issue was raised by the New York State Department of Environmental Conservation (*see*, R. 702). Neither the DEIS or the FEIS address the issue.

Ultimately, the court will not substitute its judgment for the judgment of the lead agency. However, the court must ensure that the lead agency and the Village, when it approves the final report, have taken the

proper steps and sufficiently considered the topics set forth in SEQRA. In this respect, the court agrees that the respondents have failed to explain what alternatives were considered and why they were eliminated.

Conclusion

The DEIS fails to indicate that a "hard look" was taken at several issues necessary to support the determination to tap the aqueduct. This court is mindful that "it is not the role of the courts to weigh the desirability of any action or choose among alternative, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" [*Matter of Jackson v. New York State Urban Development Corp.*, 67 NY2d 400, 416 (1986)]. In reviewing an agency decision the court must "first, review the agency procedures to determine whether they were lawful. Second, [the court] may review the record to determine whether the agency identified the relevant areas of environmental concern, took a "hard look" at them and made a "reasoned elaboration" of the basis for its determination" [*Matter of Jackson, supra., citing Aldrich v. Pattison*, 107 AD2d 258 (2nd Dept 1985)]. One cannot presume that the requisite "hard look" was taken based on the thickness of the DEIS or because the consultants were highly regarded in their fields.

The Village's procedures in this matter were proper. There is no indication that the Village failed to follow proper procedure when it adopted the FEIS and issued its Statement of Findings on July 8, 2004. However, in certain substantive areas enumerated herein, the FEIS does not take a hard look at specific aspects of the project.

Based on the foregoing, the Statement of Findings adopted by the Village on July 8, 2004, are hereby vacated. The Village is directed to file a supplemental draft environmental impact statement (SDEIS) addressing those issues herein above set forth in accordance with the requirements of 6 NYCRR §617.9 and thereafter issue findings giving due consideration to the information contained in the SDEIS.

The foregoing constitutes the decision and order of the Court.

Dated: Goshen, New York
October 20, 2005

ENTER:


HON. STEWART A. ROSENWASSER
Acting Supreme Court Justice

TO:

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