

At a Regular Motion Term of the Supreme Court held in and for the County of Steuben in the Village of Bath, New York on the 24th day of July 2020

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2019-0441CV

In the Matter of the Application of
SIERRA CLUB, CONCERNED CITIZENS OF
ALLEGANY COUNTY, INC., PEOPLE FOR A
HEALTHY ENVIRONMENT, INC., JOHN
CULVER and BRIAN and MARYALICE LITTLE,

Petitioners,

for a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

DECISION and ORDER

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
BASIL SEGGOS, COMMISSIONER, TOWN
OF CAMPBELL, and HAKES C & D DISPOSAL
INC.,

Respondents.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Petitioners are represented by Rachel Treichler, Esq. and Richard Lippes, Esq. The Respondent, New York State Department of Environmental Conservation and the Commissioner Basil Seggos is represented by Marrie Chery-Sekhobo, Esq.; the Town of Campbell and the Town of Campbell Planning Board are represented by Ronald Hull, Esq.; and Thomas West, Esq. represented Hakes C & D Disposal Inc. The court heard oral argument on July 24, 2020 on the application by New York State Department of Environmental Conservation to dismiss the petition. The court reserved decision.

In support of the Petitioners Article 78 proceeding the court received and reviewed the following submissions:

Verified Petition dated April 9, 2019;
Petitioners' memorandum of Law in Support of the Verified Petition;
Petitioners' Memorandum of Law in Opposition to Respondent DEC's Motion to Dismiss and in Reply to Respondent Town of Campbell and Respondent Hakes C & D Disposal Inc.;
Affirmation in Opposition to Respondent DEC's Motion to Dismiss by Rachel Treichler affirmed June 15, 2020
[attachments: Final Supplemental Generic Environmental Impact Statement dated June 2015,
news article dated December 17, 2014 about fracking health risks]; and
Affirmation in Response to Respondent HCDD's Supplemental Affirmation by Rachel Treichler affirmed July 1, 2020.

In opposition to the Article 78 proceeding and in support of Respondent's motion to dismiss the court received and reviewed the following submissions:

Verified Answer to Amended Verified Petition;
Affidavit of Dr. Theodore Rahon in Opposition to Amended Verified Petition;
Affirmation of Thomas S. West in Opposition to Amended Verified Petition;
Memorandum of Law;
Affirmation of Lisa P. Schwartz affirmed May 21, 2020
[attachments: e-mails,
Part 360 Permit (Chemung County August 4, 2011),
Permit,
letter from Marc Gerstman dated September 28, 2011,
e-mails with Rachel Treichler, and
Sierra Club comments September 15, 2016];
Affidavit of Mark Amann sworn to May 21, 2020
[attachments: Permit Modification July 10, 1989,
Permit February 4, 1994,
Permit modification May 12, 1994,
Permit modification November 19, 2001,
Permit modification June 24, 2002,
Permit renewal and modification November 10, 2003,
Permit modification September 21, 2006,
Permit modification September 22, 2007,
Permit modification September 30, 2011,
Permit modification April 5, 2012,
Permit modification December 12, 2012,
Permit modification June 26, 2014,
Permit modification December 19, 2019,
Part 360 in effect in 1989,

Part 360 in effect from 1993,
Letter from DEC dated October 26, 2010,
Part 360 in effect from 2003,
Part 360 in effect from 1996, and
Letter from Yasmin Guevara dated September 11, 2018];
Affirmation of Thomas S. West, Esq. in Reply to Petitioner's Opposition to DEC's
Motion to Dismiss affirmed June 23, 2020; and
Reply Memorandum of Law in Support of State Respondent's Motion to Dismiss.

The court also reviewed the sixteen volumes (nearly 8,000 pages) of the record including all the comments submitted both in favor of and in opposition to the proposed landfill and the Respondents responses to those comments.

Background:

The Petitioners are objecting to the proposed expansion of a landfill in the Town of Campbell by Hakes C & D Disposal. On December 5, 2018 NYSDEC issued a Final Supplemental Environment Impact Statement giving approval to the proposed landfill expansion. At a town board meeting on January 26th and March 11, 2019 the Town of Campbell approved zoning changes to permit the project. The Petitioners alleged that the DEC and Town of Campbell failed to take a "hard look" at the project and in particular the possibility of high levels of radium and radon entering the landfill because the entrance monitors are ineffective in screening for this. Petitioners claim the actions by DEC and Town of Campbell violate SEQRA (State Environment Quality Review Act (1976)).

Initially DEC determined the project might have a significant adverse impact and they ordered the Supplemental Impact Statement. The Petitioner alleges that the SEQRA procedures must be strictly complied with and that substantial compliance is not enough. The alleged violation is the failure by DEC and Town of Campbell to take a "hard look" at the scientific evidence the Petitioners submitted with regard to potential radioactivity in the landfill. The Petitioners allege DEC never conducted any test for Radon-222 in the gas collection system and leachate samples.

Petitioners' claim that before any further debris is accepted at the landfill the DEC should require the existing landfill be dug up and tested to see why the leachate registers high at times. The Petitioners have an expert that has a theory that somehow massive amounts of uranium and other materials must have been dumped at the landfill even though the approved monitors are supposed to protect against this type of thing.

In seeking to have the petition dismissed the Respondents allege that this is nothing new, that everything the Petitioners allege has been argued before in other courts and/or that the time for alleging violations has long since run. DEC argues that what the Petitioners really wants is new laws and new regulations that impose higher standards of testing, etc. The DEC

alleges this is a simple application to expand an existing landfill. This is not the place to promote new regulatory requirements. DEC has reviewed and approved everything based on the current standards.

The time bar argument is based on prior DEC permit modifications involving Hakes that were issued in 2012, 2014 and 2017. It was those decisions which set the maximum for radioactivity levels and for the required testing of leachate and radiation detection. There is nothing in the current application that changes those standards. It is just that the Petitioners don't think the current standards are safe and that higher standards should be set.

DEC also argues the Petitioners did not exhaust their administrative remedies which need to be exhausted before proceeding with this suit. This has to do with the 2019 Air State Facility Permit and a Clean Water Act Section 401 Water Quality Certification. Sierra Club is trying to undo those permits but never filed alleged violations. Nor have they alleged facts to support such claims.

Discussion:

The petition enumerates eight specific deficiencies in the approval process that demonstrate the Respondents failed to take the necessary hard look. They are as follows:

1. DEC violated SEQRA in issuing an FSEIS that failed to take a hard look at scientific evidence of high levels of radium and radon in the landfill;
2. DEC failed to take a hard look at scientific evidence that the landfill's entrance monitors are ineffective;
3. DEC issued an FSEIS that fails to mitigate the risk of radioactivity in the landfill;
4. DEC failed to take a hard look at the scientific evidence of high levels of radium and radon in the landfill;
5. the Town failed to take a hard look at the scientific evidence that the landfill's entrance monitors are ineffective; and
6. the Town failed to mitigate the risks of radioactivity in the landfill.

Basically all the allegations are based upon the Petitioners' belief that the DEC and the Town of Campbell failed to address the scientific evidence concerning the Petitioners' belief that there are high levels of radioactive materials already in the landfill. That scientific evidence claims that current monitoring efforts have failed to protect against dangerously high levels of radioactive materials from being deposited in the landfill. Thus, if the DEC and Town were to have taken the required hard look they would have disallowed the expansion or at least imposed new more stringent testing standards.

The Petitioners at oral argument further distilled their argument to the simple question of whether or not the reports of Dr. Vaughan, Dr. Carpenter and Dustin May provided sufficient credible evidence (using data from the leachate and gas collection systems) to require the DEC

to take further action to ascertain what caused these periodic spikes in radioactive materials found sometimes in the current testing. Dr. Vaughan in particular extrapolates the data found from a handful of the leachate tests to hypothesize that significantly higher levels of radioactive materials have apparently been deposited in the Hakes landfill. The monitors currently used at the Hakes Landfill have been in place since 2010 and 2012. Dr. Vaughan does not think these monitors are adequate.

Despite the fact that Hakes was not asking for anything different as far as the type of material to be accepted or the daily volume of material, etc. from what had previously been accepted and approved by the DEC, the court finds the Respondents did not ignore but in fact considered the reports/opinions of Petitioners' experts. However, the Respondents did not find those reports to be scientifically reliable. They noted that Dr. Vaughan's research was not peer reviewed. The Respondents chose rather to believe the report of Dr. Rahon who explained how there could be variations in the collection samples without that being an indication that higher amounts of radioactive materials were present in the landfill. The DEC decided to continue the same testing methods and the same standards for admitting loads into the landfill as had been present when the 2012 permits were issued and when the Part 360 regulations were amended and approved in 2017. The DEC is confident that the current monitors would be triggered in the event someone attempted to dump a load that contained rock from horizontal drilling shafts.

The court has reviewed the scientific evidence presented by both the Petitioners and the Respondents. If there is a hearing in this case the court will need to determine whether or not the scientific evidence is sufficiently reliable so as to be admissible in court. However, at this point in time the court merely has to check to see if the Respondents looked at the scientific evidence and then determined that they had a sound rational basis in accepting or rejecting that evidence. Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 NY3d 219 (2007). Petitioners' challenge must be resolved by applying the very limited deferential standard which governs judicial review of substantive SEQRA determinations. Sun Co., Inc. (R & M) v. City of Syracuse Inds. Dev. Agency, 209 AD2d 34 (Fourth Dept. 1995). This court is limited to deciding whether or not the SEQRA determination was made in accordance with lawful procedure or was arbitrary and capricious. Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 NY3d 416 (2017).

Conclusions:

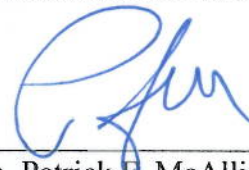
The court finds the Respondents took the necessary hard look when reviewing the scientific evidence. The Respondents came to a reasoned decision that had a rational basis. The record shows that all procedural requirements were met. The opinion of Dr. Vaughan may be of relevantly recent vintage, but the basic issues of what is being accepted at the Hakes landfill, how the loads are monitored, and how the landfill itself is monitored have been around for years. The court will grant the Respondents motion to dismiss this action.

NOW, therefore, upon consideration of all papers and proceedings heretofore had

herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED that Respondents motion to dismiss this petition be, and hereby is granted.

Dated: July 31, 2020



Hon. Patrick P. McAllister
Acting Supreme Court Justice

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