At a motion term of the Supreme Court, Tompkins County, on the 26th day of November, 2018

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TOMPKINS

In the Matter of the Application of THE CITY OF ITHACA, THE TOWN OF ITHACA, THE TOWN OF ULYSSES, THE VILLAGE OF UNION SPRINGS, JOHN V. DENNIS, individually and as President of CAYUGA LAKE ENVIRONMENTAL ACTION NOW (CLEAN), an unincorporated association, ALFRED THOMAS VAWTER, JOSHUA J. and JENNIFER L. LAPENNA, RODNEY and CYNTHIA HOWELL, KENT and HEATHER STRUCK, JUDITH R. SCOTT, and WILLIAM HECHT,

Petitioners,

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

vs.

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and CARGILL, INCORPORATED,

Respondents.

DECISION AND ORDER

Index No.: EF2017-0285
RJI No.: 2017-0566-M

Rowley, John C., A.J.S.C.

INTRODUCTION

Petitioners commenced this action seeking to vacate the August 16, 2017 modified mining permit issued by respondent New York State Department of Environmental Conservation (DEC) to respondent Cargill. This permit allows Cargill to construct a 2500' deep elevator shaft (Shaft No. Four) into its existing salt mine under Cayuga Lake and adjacent lands. Petitioners assert that DEC violated state law and its own regulations by failing to require Cargill to complete an Environmental Impact Statement (EIS) before issuing the permit.

Petitioners' assert that DEC's environmental review of Shaft No. Four was deficient for ignoring the overall impact of the project. They claim that the addition of this shaft will facilitate expansion of Cargill's mining into an additional 150 acres (the northern reserves). Therefore, DEC was required to consider the long-term effects of this expansion within their review of the Shaft No. Four project. Petitioners argued that the 2015 DEC decision to separate the environmental review of these projects (northern reserve and Shaft No. Four) was an illegal use of permissible segmentation.

On motion for summary judgment, decided in June of 2018, respondents successfully argued that challenges to prior permits issued by DEC to Cargill including their 2015 approval of mining in the northern reserves and their determination of permissible segmentation of the two projects, are time barred. Therefore, petitioners' claims are limited to defects in the 2017 permit only. Two issues remain. First, petitioners contend that a close reading of DEC regulations mandates the inclusion of the northern reserves in the environmental review without reliance on their illegal segmentation claim. Second, DEC failed to take a "hard look" at the impact of this project as required under the State Environmental Quality Review Act (SEQRA).

History

Cargill and its predecessor have mined salt from under Cayuga Lake since 1919. Regulatory oversight of this activity increased significantly with the advent of the Mined Land Reclamation Law (1974) and SEQRA (1975). Since then, DEC has approved a series of mining renewals and modifications for Cargill.

In 2000, Cargill sought approval from DEC to add 5,056 acres to the previously approved 8,361 acres. This application was granted in 2003 following environmental review (not an EIS). No legal challenge was brought to the decision to issue the permit nor the SEQRA determination.

In 2015, Cargill sought approval to mine an additional 150 acres of underground reserves ("northern reserves") contiguous to the previously permitted lands. An environmental review was completed by Cargill through its technical consultant, Spectra Environmental Group. DEC's review of these submissions were conducted by both in-house staff and outside consultant, the John T. Boyd Company. By permit dated June 2, 2015, DEC approved the 2015 Expansion Permit and issued a Negative Declaration (no EIS required) under SEQRA. Significantly, this 2015 Negative Declaration

included the DEC determination of "permissible segmentation"[1] of the 150 acre northern reserves from a potential new air shaft project (ultimately Shaft No. Four). No legal challenge was brought to the decision to issue the permit nor the SEQRA determination.

ARTICLE 78 PETITION

Petitioners commenced this action on December 13, 2017 by filing a Notice of Petition and Petition seeking review under Article 78 of the Civil Practice Law and Procedures of the August 16, 2017 modified mining permit issued to Cargill by DEC. By motion filed April 11, 2018, Cargill sought an order of dismissal on jurisdictional grounds and summary judgment. By Decision and Order dated June 13, 2018, Cargill's motion to dismiss on jurisdictional grounds was denied but Cargill's motion for summary judgment was granted, in part. As noted, petitioners' challenges to the environmental review process regarding permits issued to Cargill in 2003 and 2015 for the same mine were dismissed as time barred.

In reaching its decision the court has reviewed the Article 78 Petition; plaintiff's Memorandum of Law filed March 10, 2018 and supporting affidavits; defendant Cargill's Memorandum of Law in Opposition to the Article 78 Petition filed July 13, 2018 and supporting affidavits; plaintiff's Reply Memorandum of Law filed October 26, 2018 and supporting affidavits; defendant Cargill's Sur-Reply Memorandum of Law filed November 9, 2018; and defendant New York State's Sur-Reply Memorandum of Law filed November 9, 2018 and the 2118 page Administrative Record

Oral argument was held November 26, 2018, with Lippes & Lippes, Richard J. Lippes, Esq. of counsel appearing for the Petitioners, Barclay Damon, LLP, Patricia Naughton, Esq. and Kevin Roe, Esq. of counsel appearing for defendant Cargill, Incorporated, and the New York State Attorney General Letitia James, Loretta Simon, Esq. and Susan Taylor, Esq. of counsel appearing for the New York State Department of Environmental Conservation ("DEC").

[1] SEQRA defines "segmentation" as "the division of the environmental review of an action such that various activities or stages are addressed under this part as though they were independent, unrelated activities, needing determination of significance." 6NYCRR S617.2(A & G). DEC asserts that it lawfully exercised its discretion and determined that it would be no less protective of the environment to examine the anticipated shaft proposal separately from the 2015 addition of the northern reserves.

ISSUES PRESENTED

1. Do DEC regulations require a hard look at the impact of mining in the northern reserves?

2. Did the DEC take a hard look

1. WAS DEC REQUIRED TO INCLUDE THE NORTHERN RESERVES IN THEIR ENVIRONMENTAL REVIEW OF THE SHAFT NO. FOUR PROJECT?

Analysis

Petitioners' claim DEC violated SEQRA by not taking a "hard look" at the long term, indirect, and cumulative effects of mining in the northern reserves. Respondents argue this claim was dismissed by the court's decision on summary judgment barring petitioners' challenge to the 2015 segmentation decision. In response, petitioners have clarified that they "are not pursuing any claim that DEC improperly segmented the consideration of granting the Shaft No. Four permit from either the grant to build the tunnel, or that DEC segmented review of Shaft No. Four from mining the northern reserves under Cayuga Lake" (Lippes Memorandum of Law p.3 10/26/18). In addition, petitioners are "not asking the Court to look at what already has been done in granting the mining permits in 2003 and 2015". [2]

Petitioners rely on the follow DEC regulation to support their claim:

> For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:
>
> (i) Included in any long-range plan of which the action under consideration is part;
> (ii) Likely to be undertaken as a result thereof; or
> (iii) Dependent thereon.
>
> 6 N.Y.C.R.R. 617.7(c)(2)

[2] Despite these representations, petitioners' final papers include numerous references to inadequacies in the environmental review of prior permits (e.g., 10/23/18 Vaughan Aff, PP 24-48).

Petitioners interpret this regulation as requiring inclusion of previously permitted underground mining in the SEQRA review. In effect, their argument is that DEC's failure to do so would constitute impermissible segmentation as the two projects would have been evaluated in isolation from each other.

Upon review, the court cannot support this interpretation of the regulation as it would render permissible segmentation meaningless. The DEC decision to separate their environmental review of the northern reserves from Shaft No. Four cannot be challenged here. It could have been challenged in 2015 but it was not. To now require review of the two projects together defies logic and a reasonable interpretation of the law.

2. ENVIRONMENTAL REVIEW OF SHAFT NO. FOUR

Hard Look Required

In evaluating Cargill's application for Shaft No. Four, DEC was required to take a "hard look" at the project's potential environmental impacts. Per SEQRA, the "hard-look" standard requires:

1. DEC, as lead agency, to identify all areas of environmental concerns;
2. DEC to take a "hard-look" at the environmental issues identified; and
3. Present a reasoned elaboration of why these identified environmental impacts will not adversely affect the environment if there is a determination that no environmental impact need be drafted.

Petitioners' Allegations

Petitioners allege multiple flaws in DEC's "hard look" at the impact of constructing Shaft No.

Four including the failure to identify relevant areas of environmental concern and DEC's failure to provide a reasoned elaboration for their determination that an EIS was not necessary. Specific concerns about the structural stability within the bedrock at the Shaft No. 4 location were cited, along with the potential risks from unrecognized water flow pathways within the bedrock, the possible intersection of an inactive fault with the proposed shaft, and the potential risk to drinking water.

DEC Review Process

In defending their review of Cargill's permit application, DEC highlighted portions of their evaluation process that preceded their Negative Declaration and Notice of Completed Application (NOCA):

-Cargill initially submitted its application for Shaft No. Four on October 21, 2015. Cargill's permit application was prepared by SPECTRA Environmental Group and included a Stormwater Pollution Prevention Plan and SEQRA supporting documentation in the form of a Full Environmental Assessment Form.

-On December 15, 2015, DEC notified Cargill of 11 items that needed to be addressed in the pending application following initial review by the Division of Environmental Permits and Division of Mineral Resources. A 12th item, addressing potential groundwater well impacts, was added later.

-By letter received February 1, 2016, Cargill responded to all 12 items.

- On March 2, 2016, DEC notified Cargill that specific information related to disposal in the mine of water, brine, and muck was required.

-By letters dated March 7, 2016 and March 23, 2016, Cargill responded to the March 2 inquiry.

-Additional letters were exchanged regarding related issues including public release of responses initially marked as confidential and/or proprietary by Cargill.

After issuance, the Negative Declaration and NOCA were published as required to allow public comment. The initial 30 day public comment period ended October 2, 2016. When objections were raised

about the public comment period, DEC had the material published again and received comments for a 2nd 30 day period. DEC reported that approximately 88 comments were received in total. Those comments included the concerns raised by petitioners and a variety of others such as light pollution, noise impacts, and archeological impacts. On May 17, 2017, DEC hosted a meeting at the request of Dr. John Dennis (a petitioner herein) where he and his associates presented a PowerPoint entitled "Continued Concerns Surround DEC Application…).

DEC ultimately issued a Written Response to Comments which is part of the record here (R2090-R2100). That section begins with the observation that

> … a lead agency [must] rescind a negative declaration when substantive new information is discovered or changes in circumstances related to the project arise that were not previously considered and the lead agency determines that a significant environmental impact may result… The issues raised during the public comments period have not identified any new information or changes in circumstance which could reasonably be expected to cause significant adverse impacts; therefore the negative declaration shall not be rescinded. (R2090-2091).

This observation is followed by four pages of responses to the comments[3]. Although petitioners assert that the failure to address a specific concern means that it was ignored, DEC vigorously disputes this claim. For example, the affidavit of Christopher Lucidi (attached to the 11/9/18 DEC Sur-Reply) details the DEC analysis regarding the claims made in the affidavit of Dr. John Dennis. The affidavit of Steven Army (attached to the DEC Sur-Reply) includes responses to the affidavits of Dr. John Warren, Dr. Raymond Vaughan, Dr. Andrew Michalski, and Dr. John Mason.

The record reveals that DEC focused on water intrusion into the mine and potential impacts on local groundwater resources throughout the review process. By five separate requests for information, DEC required Cargill to provide detailed responses about water-related impacts of the Shaft No. Four project. DEC then closely monitored the drilling of Corehole 18 and conducted 29 inspections of the test corehole drilling. Most of the first 1,000 pages of the Record are devoted to site -specific study of the environmental impacts of this project including the analysis of Corehole 18 by RESPEC, the Cargill consultants. DEC conducted both an internal evaluation of the RESPEC report and had its geotechnical consultant J.T. Boyd do the same. Finally, DEC's Negative Declaration included two mitigating permit conditions – implementation of a well monitoring plan and a guarantee to provide potable water source in

[3] DEC notes that their regulations do not require a written response to comments under these circumstances, "Shaft No. 4 permit is not a delegated permit", citing 6 NYCRR 621.10(e). Lucidi Affidavit P 5.

the event of an "unanticipated reduction in groundwater quality or quantity".

Analysis

Article 78 challenges to SEQRA determinations generally fall into two categories, procedural and substantive. Procedural requirements such as timelines for completion of forms or rules regarding publication must be strictly complied with (*see*, e.g., *Matter of Wir Associates, LLC v Town of Mamakating*, 157 AD3d 1040 [3d Dept 2018]). Substantive challenges, like that of petitioners, are evaluated under a different standard. "[J]udicial review of a lead agency's SEQRA determination is limited to whether… substantively, the determination was affected by error of law or was arbitrary and capricious or an abuse of discretion (*Matter of Chinese Staff & Workers v Burden*, 19 NY3d 922, 923 [2012]).

Petitioners' objection to DEC's approval of Shaft No. Four (leaving aside the northern reserves) requires the court to assess whether the potential environmental impacts of the shaft were adequately evaluated. A "negative declaration" (no EIS) "is properly issued when the (lead) agency has made a thorough investigation of the problems involved and reasonably exercised its discretion" (*id*. at 924). If an agency is given due consideration to the relevant potential environmental impacts of a project, has reached its determination in a reasonable fashion, and made a reasoned elaboration, of the basis for its decision, a court is not permitted to second guess the agency's choice (*Hallenbeck v. Onondaga County Resource Recovery Agency,* 225 A.D.2d 1036, 1036, 639 N.Y.S.2d 627 [4th Dept.1996]*).*

Upon review of the extensive record, the Court finds that DEC identified all areas of environmental concerns. Their internal review generated many substantive demands that Cargill was required to meet. DEC sought and accepted public comment for two 30 day periods and included relevant comments in their analysis.

DEC took a "hard-look" at the environmental issues identified. They utilized their in-house experts and employed an outside consultant to review their conclusions. They exceeded their regulatory requirements in accepting, reviewing, and commenting on expert submissions that raised a host of potential problems, ranging from the mundane to the catastrophic.

DEC provided a reasoned elaboration for why the identified environmental impacts for the Shaft No. Four project only will not adversely affect the environment. Under these facts, the court will not

second guess their conclusions.

Conclusion

Petitioner's Article 78 petition is denied.

Dated: April 22, 2019

John C. Rowley

Digitally signed by John C. Rowley
DN: C=US, OU=Tompkins County Court, O=NY State Unified Courts, CN=John C. Rowley, E=tpkrowley_chambers@nycourts.gov
Date: 2019-04-22 11:09:20

HON. JOHN C. ROWLEY

Acting Supreme Court Justice