SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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,

ORAL ARGUMENT REQUESTED

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

Index No.

–against–

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

Respondents.

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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PRELIMINARY STATEMENT

This proceeding challenges the actions of Respondent New York State Department of Environmental Conservation ("Respondent DEC") in issuing a Final Supplemental Environmental Impact Statement on December 5, 2018 (the "FSEIS") for a proposed landfill expansion project by Respondent Hakes C&D Disposal Inc. ("Respondent HCDD") and the actions of and Respondent Town of Campbell ("Respondent Town") in issuing two findings statements on a proposed zoning law amendment, one by the Town Planning Board on January 16, 2019 and one by the Town Board on March 11, 2019 (the "Findings Statements"), and in approving a zoning law amendment for the benefit of HCDD in reliance on the FSEIS and the Findings Statements on March 11, 2019 (the "Zoning Change") without taking a "hard look" at the scientific evidence presented by Petitioners of high levels of radium and radon in the Hakes landfill or at the scientific evidence presented by Petitioners that the landfill's entrance monitors are ineffective, and without mitigating the risks of radium and radon in the landfill in accordance with the requirements of the State Environmental Quality Review Act, ECL Article 8 ("SEQRA") and the SEQRA regulations, 6 NYCRR Part 617.

STATEMENT OF FACTS

The facts are set forth in the verified petition.

STATUTORY AND REGULATORY FRAMEWORK

SEQRA was enacted by the New York State Legislature in 1976. The purpose of SEQRA is to:

> Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the

> understanding of the ecological systems, natural, human and community resources important to the people of the State.

ECL § 8-0101.

While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act ("NEPA"), 42 USCA 4332 *et seq*., the Legislature recognized that NEPA was merely a procedural statute that assures that environmental issues are considered by a decision maker prior to taking any action. NEPA does not require substantive decisions by the decision maker. See *City of Buffalo v New York State Department of Environmental Conservation*, 184 Misc.2d 243 (Erie Cty 2000). The Legislature wished to provide greater protection to the environment when it passed SEQRA, and therefore, made significant changes from NEPA, including the requirement that environmental impact statements must be prepared in a much broader category of actions, and the requirement of substantive duties on the part of the decision maker to assure that environmental consequences that are identified will be avoided or mitigated. *Id.* As pointed out in the *City of Buffalo* case:

> The substantive mandate of SEQRA is much broader than that NEPA. 42 USCA Section 4332 requires federal agencies to prepare an EIS [Environmental Impact Statement] for 'any major federal action significantly affecting the quality of the human environment.' This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for 'any action which is proposed or approved which *may* have a significant effect on the environment.' Only a 'low threshold' is required to trigger SEQRA review."

Id. at 249 [citations omitted, emphasis added].

The heart of SEQRA lies in its provision regarding Environmental Impact Statements. *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996). As previously indicated, the law provides that whenever an action *may* have a significant impact on the environment, an Environmental Impact Statement ("EIS") shall be prepared. ECL 8-

0109(2). The agency having principle responsibility for carrying out or approving the project or activity, in this case Respondent DEC, is charged with the responsibility of determining whether the project under consideration may have significant adverse environmental effects, and if so, must prepare an EIS. *Id*. The "lead agency" is the entity charged with carrying out the procedures mandated by SEQRA. An EIS is required to contain all the information necessary to assure that the decision-making bodies relying on the EIS can ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. Therefore, the lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects." ECL § 8-0109(1). SEQRA requires that the EIS is made available to the public so that they are apprised of possible adverse environmental consequences and may comment and propose mitigating measures. *Id*.

In the present case DEC, the lead agency for the Hakes landfill expansion project, determined that HCDD's application to expand the Hakes Landfill might have a significant adverse impact on the environment and required the preparation of a Draft Supplemental Environmental Impact Statement ("DSEIS").

Since the early landmark cases of *Town of Henrietta v Department of Environmental Conservation*, 76 A.D.2d 215 (4th Dep't 1980), and *H.O.M.E.S. v New York State Urban Development Corporation*, 69 A.D.2d 222 (4th Dep't 1979), New York courts have addressed the requirements and responsibilities of agencies pursuant to SEQRA on numerous occasions. Early on in these cases, courts recognized that because of the importance placed upon SEQRA responsibilities by the Legislature, substantial compliance with SEQRA will not suffice; rather the statute must be strictly and literally construed, and compliance with the procedural

requirements must be enforced. *Matter of Rye Town/King Civic Association v Town of Rye*, 82 A.D.2d 474 (2nd Dep't 1981), *lv. app. dism*. 56 N.Y.2d 985 (1982); *Schenectady Chemicals v Flack*, 83 A.D.2d 460 (3rd Dep't 1991); *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996). In a frequently-cited quotation, the court in *Schenectady Chemicals* stated:

> By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell.' It is our view that the substance of SEQRA cannot be achieved without its procedure, and that *any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found that it has discharged its responsibility thereunder.*

83 A.D.2d at 478 [ciitations omitted, emphasis added]. New York courts continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent" practicable. ECL 8-0103(6). In addition, the courts have recognized that to assure that both the spirit and letter of SEQRA are followed, courts cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental goals of the Act. See, *e.g., Stony Brook Village v Reilly*, 299 A.D.2d 481 (2d Dep't 2002), *Matter of Rye Town*, 82 A.D.2d 474.

Moreover, if a lead agency is allowed to rectify a SEQRA procedural violation without voiding the actions taken after the violation occurred and requiring it to be done properly, the lead agency could treat the renewed work as a mere post-hoc rationalization of what had gone on before. The Court of Appeals decision in *Tri-County Taxpayers Association v Town of Queensbury*, 55 N.Y.2d 41 (1982) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that

took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished . . . ." 79 A.D.2d 337 (3d Dep't 1981) at 342. However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, the vote had to be nullified. The Court stated:

> It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption.

55 N.Y.2d at 64. Therefore, where a procedural violation of SEQRA is found, in order to assure that the goals of SEQRA are met, the decision must be annulled.

While SEQRA requires a strict standard of compliance, the lead agency is allowed to fulfill substantive duties in making its final decision and choosing from appropriate alternatives is within their discretion. However, the broader discretion that resides with an agency concerning its substantive duties does not insulate the agency from judicial review. Indeed, in the case of *Akpan v Koch*, 75 N.Y.2d 561 (1990), the court elucidated the standard of review concerning substantive matters:

> Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the affect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors.

75 N.Y.2d at 571 [citations omitted].

The universally applied standard in determining whether or not a lead agency has fulfilled its SEQRA obligations was first espoused in the *H.O.M.E.S.* case, *supra*, and eventually

incorporated in the SEQRA regulations at 6 NYCRR 617.7(b). The standard is commonly called the "hard look standard." It requires that the agency:

> (1) Identify all areas of relevant environmental concern;
>
> (2) Thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
>
> (3) Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an EIS need not be drafted.

6 NYCRR 617.7(b). This standard was elucidated by the Court of Appeals in *Akpan v. Koch*, 75 N.Y.2d 561 (1990):

> [A]n agency, acting as a rational decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern (see, H.O.M.E.S. v New York State Urban Dev. Corp., 69 A.D.2d, at 231, supra). Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors.

75 N.Y.2d at 571.

ARGUMENT

The legal issues presented by this case are whether or not Respondent DEC, acting as "lead agency," and Respondent Town, acting as an "involved agency," met the "hard look standard" when Respondent DEC issued the FSEIS and the Town of Campbell issued its two findings statements without giving due consideration to the scientific evidence presented by Petitioners of high levels of radium and radon in the Hakes landfill or to the evidence that the

landfill's entrance monitors are ineffective and taking any steps to mitigate the risks of radioactivity in the landfill.

A. Respondent 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 and that the Landfill's Entrance Monitors Are Ineffective

Respondent DEC and Respondent Town have not met the "hard look standard" standard. The facts of the present case are similar to the facts of *Matter of Wellsville Citizens for Responsible Dev. v. Wal-Mart Stores,* 140 A.D.3d 1767 (4th Dept. 2016), in which the court annulled a negative declaration for the construction of a Wal-Mart because the lead agency failed to investigate the veracity of information received from the public that state-listed threatened species might be present on the project site the court concluded that the lead agency failed to take a hard look at the impact of the project on wildlife, and the negative declaration with respect thereto was therefore arbitrary and capricious. The *Wellsville* court also concluded that annulment was required because the lead agency erred in failing to consider the surface water impact of the entire project. Similarly, in *Matter of Brander v. Town of Warren Town Board*, 18 Misc.3d 477 (Onondaga County 2007), the lead agency was provided "with credible scientific information" about problems with a noise study upon which it had relied and the agency did not give due consideration to this information.

The affidavits submitted by Petitioners' experts Dr. Vaughan and Dr. May demonstrate that in relying on the adequacy of the radiation detector alarms at the landfill and in ignoring the laboratory analysis of the landfill leachate in determining to exclude radioactivity issues from the Final Scope for the DSEIS, Respondent DEC ignored strong scientific evidence regarding the presence of high levels of radium and radon in the landfill.

Respondent DEC's action in issuing the FSEIS without taking a hard look at the scientific evidence presented by Petitioners or providing a reasoned elaboration as to why allowing the landfill to expand its operations despite having high levels of radium and radon in the landfill will not have an adverse effect on the environment and the health and safety of the people, animals and plants living near the landfill was a violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion.

B. Respondent DEC Violated SEQRA in Issuing an FSEIS that Failed to Mitigate the Risks of Radioactivity in the Landfill

In addition to its procedural requirements, SEQRA imposes substantive requirements that include implementing mitigation measures to minimize the environmental impact of the proposed project. ECL 8-0109(2)(f). *Matter of WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd*, 79 N.Y.2d 373, 381 (1992). In the present case, Respondent DEC proposed no mitigation measures to deal with the evidence regarding radium and radon in the landfill and the ineffectiveness of the landfill's entrance monitors submitted by Petitioners. Respondent DEC did not even conduct tests for Radon-222 in the landfill's gas collection system and leachate samples or consider the ways in which the testing methodologies used by the labs testing Hakes leachate for radionuclides may have failed to detect radium or allowed radon to escape from the samples.

For these reasons, Respondent DEC's action in issuing the FSEIS without mitigating the risks identified by Petitioners was a violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion.

C. Respondent Town Violated SEQRA In Issuing Two Findings Statements that Failed to Take a Hard Look at Scientific Evidence of High Levels of Radium and Radon in the Landfill and that the Landfill's Entrance Monitors Are Ineffective

Although certain specific duties apply to the lead agency under SEQRA, as an involved agency, Respondent Town also has obligations under SEQRA. ECL 8-0109 (8) provides that "[w]hen an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided. Accord 6 NYCRR 617.11(c) and (d). These requirements are summarized in the *WEOK case* cited above and characterized as requiring that an agency "must take a sufficiently 'hard look' at the proposal before making its final determination and must set forth a reasoned elaboration for its determination."

> If an agency proposes to approve a project, it must consider the FEIS and prepare written findings that the requirements of SEQRA have been met (ECL 8-0109 [8]). It must also prepare a written statement of the facts and conclusions in the FEIS and comments relied upon and the social, economic and other factors and standards which form the basis of its decision (6 NYCRR 617.9 [c]). Put differently, the agency must take a sufficiently "hard look" at the proposal before making its final determination and must set forth a reasoned elaboration for its determination (see, *Akpan v Koch*, 75 N.Y.2d 561, 570, supra; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415-416, supra).

79 N.Y.2d at 382.

In this case, Respondent Town violated its responsibilities as an "involved agency" under SEQRA and the SEQRA regulations in issuing findings statements and certifying that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes landfill expansion project without taking a hard look at the scientific evidence presented by Petitioners

that high levels radium and radon are present in the landfill and that the landfill's entrance monitors are ineffective, or providing a reasoned elaboration for why allowing the landfill to expand its operations despite having high levels of radium and radon and ineffective entrance monitors will not have an adverse effect on the environment and the health and safety of the people, animals and plants living near the landfill.

For this reason, Respondent Town's findings statements were made in violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion.

D. Respondent Town Violated SEQRA in Issuing Two Findings Statements that Failed to Mitigate the Risks of Radioactivity in the Landfill

Similarly, Respondent Town violated its responsibilities as an "involved agency" under SEQRA and the SEQRA regulations in certifying that the requirements of 6 NYCRR Part 617 for the Hakes landfill expansion project had been met without mitigating the effects of high levels of radium and radon in the landfill or the ineffectiveness of the landfill's entrance monitors in detecting radium and radon in wastes entering the landfill.

Petitioners identified a number of risks from having high levels of radium and radon in the landfill in their March 19, 2018, comment letter on the DSEIS. Respondent Town certified the expansion project without mitigating any of these risks.

For this reason, Respondent Town's findings statements were made in violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion.

CONCLUSION

For the reasons stated above, Respondent DEC and Respondent Town have failed to comply with the requirements of the State Environmental Quality Review Act, ECL Article 8 ("SEQRA") and the SEQRA regulations, 6 NYCRR Part 617.

DATED: Hammondsport, New York
April 9, 2018

Respectfully submitted,

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