

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13
Justice

THE TOWN OF EASTCHESTER, et al.	x	Index Number <u>27956</u> 2004
- against -		Motion Date <u>January 26,</u> 2005
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.		Motion Cal. Number <u>26</u>

x

The following papers numbered 1 to 34 read on this Article 78 proceeding by petitioners The Town of Eastchester, Yasmin Pacia, Nicola Pacia, Theresa Gaffney and Eileen Curran for a preliminary injunction and a judgment vacating the findings of respondent New York City Department of Environmental Protection (DEP) dated July 16, 2004, which selected the Mosholu golf course located in Van Cortlandt Park, Bronx, New York as the preferred site for a water treatment plant (WTP), and enjoining the DEP from commencing any construction or site preparation activities for the Croton WTP until they have complied with the requirements of SEQRA and CEQR. Respondents The New York City Department of Environmental Protection (DEP) and Commissioner of the New York City Department of Environmental Protection (Commissioner) cross-move for an order dismissing the petition, and in the alternative seek an order granting summary judgment in their favor. Respondent United Water New Rochelle, Inc. cross-moves for an order dismissing the petition, pursuant to CPLR 3211(a)(7).

	<u>Papers Numbered</u>
Order to Show Cause - Petition - Affidavits	
- Exhibits (1-33)	1-11
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Petitioners' Memorandum of Law
 Defendants' Memorandum of Law
 Defendants' Memorandum of Law
 Petitioners' Reply Memorandum of Law
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 Defendants' Reply Memorandum of Law

Upon the foregoing papers it is ordered that petitioners' request for a preliminary injunction and respondents' cross motions to dismiss the petition are decided as follows:

The Croton Watershed consists of a series of interconnected reservoirs and lakes located primarily in Westchester, Dutchess and Putnam counties and is one of New York City's three principal drinking water sources, supplying between 10% and 30% of the City's requirements. In 1992, after preparing a report concluding that filtration would be necessary to ensure the safety of water from the Croton Watershed, the City entered into a stipulation with the New York State Department of Health, acknowledging that State and Federal law required it to build a filtration plant. The City agreed to complete design of a water treatment plant by July 1995, and complete construction by July 1999. In 1993, the United States Environmental Protection Agency determined that the Surface Water Treatment Rule (40 CFR 141.70-141.75) required the City to filter and disinfect its Croton water supply. Without challenging the EPA's determination, the City began designing a water treatment plant. The City's lack of progress resulted in the Federal government brought suit in 1997 in the District Court for the Eastern District of New York against the City and its Department of Environmental Protection for violation of Federal law. The State intervened as a plaintiff, alleging noncompliance with the State Sanitary Code. Recognizing that the public interest would be best served by resolving the litigation, the parties, in 1998, executed a consent decree requiring filtration and disinfection of the Croton water. The decree establishes 26 "milestones," or deadlines, for stages of the water treatment plant, including a final Environmental Impact Statement and approvals under the City's Uniform Land Use and Review Procedure by July 31, 1999; construction completion by September 1, 2006; and operation by March 1, 2007. Milestone 14 provides that by July 31, 1999, "in the event that use of the selected site for the [plant] requires state legislation, the City shall request state legislation and home rule message from the City Council." Milestone 15 further specifies that any such legislation must be obtained by February 1, 2000. Failure to comply, under the consent decree, subjects the City to substantial penalties (United States of America v City of New York, 30 F Supp 2d 325 [1998]). In 2002, a supplement to the Consent Decree extended the milestones for the completion of

construction. A second supplement to extend the milestones for the design, construction and place the water filtration plant in operation was recently executed by the parties and submitted to the federal court.

After considering several locations, in December 1998 the City announced that its preferred site was the Mosholu golf course in Van Cortlandt Park, the City's third largest park, dedicated as parkland by an act of the Legislature in 1884 (see L 1884, ch 522). The Court of Appeals in Friends of Van Cortlandt Park v City of New York (95 NY2d 623 [2001]), determined that the use of parkland for this purpose required the prior approval of the State Legislature. In 2003, after the City Council adopted a home rule message requesting the legislation, the State Legislature authorized the City to alienate the proposed site in Van Cortlandt Park for the purpose of building and operating a water filtration plant. The State legislation required the City to obtain the City Council's concurrence for locating the plant in Van Cortlandt Park. After a public hearing, the City Council adopted the required resolution on September 28, 2004. The State legislation also required the DEP to prepare a supplemental environmental impact statement.

The DEP issued an environmental impact statement (EIS) in 1999, which reviewed eight alternative sites, including the Mosholu golf course, pursuant to SEQRA and CEQR. The 1999 EIS included a description of the proposed project at all eight sites; the need for the project; engineering analyses leading to and alternatives to the proposed project; methods of analysis; descriptions of existing conditions and future conditions without the project; identification and evaluation of potential impacts of the project and its alternatives; mitigation measures; and a discussion of nonfiltration/watershed protection.

In August 2003, the DEP issued a draft scope of work which evaluated the potential significant environmental impacts on the three sites then under consideration, including the Van Cortlandt Park site. In September 2003, the DEP held public hearings in the Bronx and Westchester County. In December 2003, the DEP published a Draft Supplemental EIS (DSEIS) and held additional public hearings in February and March 2004 in the Bronx and Westchester County. On June 30, 2004, the DEP issued the final Supplemental EIS (FSEIS) in which it reviewed and compared the potential environmental impact of constructing and operating the water treatment plant at the three remaining sites under consideration, and identified the Mosholu golf course in Van Cortlandt Park as the preferred site for the water treatment plant. On July 16, 2004, the DEP Commissioner, Christopher Ward, issued a Statement of Findings, pursuant to

SEQRA/CEQR, in which he determined that the Mosholu site in Van Cortlandt Park was the most suitable location for the Croton water treatment facility.

The Town of Eastchester, a municipal corporation, is located in Westchester County. Water is supplied to the Town of Eastchester indirectly through connections with the water supply and distribution systems of the Village of Scarsdale and a privately owned water utility, United Water New Rochelle (UWNR), formerly the New Rochelle Water Company. The Village of Scarsdale supplies water to Eastchester Water District No. 1, utilizing Catskill and Delaware water taken from the Bronx River Pipe Line, which runs from the Kensico Reservoir to the Bronx County/Westchester County line. UWNR supplies water to the remainder of the Town of Eastchester using direct connections to the New Croton Aqueduct and the Catskill Aqueduct, and interconnections to the Delaware Aqueduct via the Westchester joint Water Works. UWNR obtains approximately 5% of its water supply from the Croton Aqueduct which requires filtration and obtains 95% of the remaining water supply from the Catskill and Delaware sources, which do not require filtration. UWNR is required to meet federal and state mandates by either filtering water from its backup source of supply, the Croton Aqueduct, or finding an alternative source of supply that meets the federal requirements.

Beginning in 1992, UWNR performed an analysis of various alternatives and concluded that connecting to the Delaware Aqueduct, which meets current federal filtration avoidance requirements, was the most reasonable and cost-effective alternative. UWNR entered into a stipulation agreement with the DOH, which requires it to eliminate the Croton supply and replace it with an improved source. The UWNR project consists of three components to be located in Yonkers and Eastchester, New York: (1) a connection to shaft #22 on the Delaware Aqueduct; (2) a new transmission main through Yonkers that will connect the Delaware Aqueduct to UWNR's existing distribution system; and (3) the Delaware Pump Station, an 8,000 square foot facility on California Road, in the Town of Eastchester, that will treat and pump water received from the Delaware Aqueduct for distribution to UWNR's customers. In a letter dated June 30, 1993, the New York State Department of Health (DOH) informed UWNR that it was required to complete its proposed connection to the Delaware Aqueduct by June 1999. In a letter dated April 26, 1995 and addressed to the then DEP Commissioner, UWNR sought assistance in connecting to Shaft #22 of the Delaware Aqueduct so that it could continue to meet all of its water supply demands and meet the requirements of the SWDA Surface Water Treatment Rule.

The Delaware Pump Station project was the subject of SEQRA review by the Town of Eastchester's Planning Board, which served as the lead agency. The Planning Board coordinated its review of the project with other permitting authorities, including the DEP, an "involved agency." On November 20, 1995, the Planning Board determined that this project would not have any significant adverse impacts on the environment and issued a "negative declaration," which meant that an environmental impact statement for the Delaware Pump Station was not necessary. Six years later, the Planning Board, in a declaration issued on May 30, 2001, purported to rescind the negative declaration. In an Article 78 proceeding commenced by UWNR, the Appellate Division affirmed the Supreme Court's determination that the site plan application of UWNR dated March 7, 1994, was deemed approved by operation of the Zoning Law of the Town of Eastchester, and that the attempt to annul the negative declaration was improper (see United Water New Rochelle, Inc. v Planning Bd., 2 AD3d 627, 628 [2003], motion for leave to appeal denied 2 NY3d 703 [2004]).

The Delaware Pump Station has been the subject of a series of stipulations between the DOH and UWNR, and the completion date of the project has been extended as construction has been delayed due to litigation and other actions taken by the Town of Eastchester. The latest stipulation dated May 31, 2002, requires UWNR to monitor the water from the Croton Water system and ensure disinfection capacity, and provides in pertinent part that:

"5(a) If the Croton Filtration Plant to be constructed by New York City is to be located north of UWNR's connection to the Croton Aqueduct and the existing Croton Aqueduct be used to deliver treated water, UWNR will not be required to construct the Delaware Aqueduct connection and pump station, but shall, within 30 days of the date that the Department informs UWNR of the site of the Croton Filtration Plant, submit a written plan to the Department to minimize UWNR's use of its Croton Source until the Croton Filtration Plant is operational and treated water is delivered via the existing Croton Aqueduct. The Department will promptly review the plan submitted by UWNR and inform UWNR if the plan, as submitted, is acceptable, or if revisions to the plan are required for the plan to be acceptable. In the event that the Department notifies UWNR that revisions to the plan are required to be acceptable, within 30 days of such notice, UWNR will submit, to the Department, an amended plan that incorporates the revisions required by the Department.

(b) If the Croton Filtration Plant is to be constructed by New York City is to be located south of UWNR's connection to the Croton Aqueduct, or if use of the Croton Aqueduct is to be eliminated, UWNR within 90 days of the date the Department informs UWNR of the site of the Croton Filtration Plant or elimination of the use of the Croton Aqueduct, submit to the Department a written schedule setting forth deadlines for completion of construction of the new pump station and connection to the Delaware Aqueduct."

In April 2004, UWNR informed the DEP that it sought its assistance with the creation of a connection at Shaft 22 to the Delaware Aqueduct, as the proposed filtration plant for New York City was south of the UWNR's connection to the Croton Aqueduct, and, therefore, would not provide filtered water to UWNR. UWNR stated that it is under a DOH order to eliminate its reliance on the Croton water, and to instead connect to the Delaware Aqueduct. UNWR further stated that a connection at Shaft 22 of the Delaware Aqueduct would provide UWNR with the necessary redundancy to provide adequate supply, when as anticipated, the DEP takes the Catskill Aqueduct out of service for an extended period of time in 2007 in order to prepare for its UV project. The DEP, in a letter dated January 3, 2005, informed UWNR that it has planned extensive shutdowns of the Catskill Aqueduct between Kensico and Hillview Reservoirs for inspection and rehabilitation, from September through May 2007 and ending by year 2011. During this time, UWNR and all other water systems supplied by this portion of the Catskill Aqueduct should ensure that an alternative water supply is available before the shutdowns. The DEP also stated that it was also planning to shut down the Croton Aqueduct in order to complete rehabilitation work and modifications necessary for filtration of the Croton Supply. The shutdowns will be coordinated so that at least two aqueducts that convey water to Westchester County and New York City remain in service at all times. Westchester County water suppliers affected by these shutdowns were encouraged to conduct a comprehensive evaluation of existing and future planned water supply facilities to ensure a continuous water supply, "including but not limited to (1) connections to other NYC DEP aqueducts and reservoirs, (2) source water connections to supplies other than NYC aqueducts and reservoirs, and (3) distribution interconnections, pump stations, pressure reducing stations, etc., necessary to receive water from other suppliers that are not relying on the Catskill Aqueduct as a source of supply."

Petitioners the Town of Eastchester, and Nicola Pacia, Yasmin Pacia and Theresa Gaffney, residents of the Town of

Eastchester who live adjacent to the site of the Eastchester Pump/Treatment Plant, commenced this Article 78 proceeding in the Supreme Court, Westchester County. The proceeding was transferred to this court, pursuant to an order dated November 19, 2004, which granted a motion for a change of venue. Petitioners assert that the DEP was required to assess the impacts of locating the WTP in Van Cortlandt Park on Eastchester's water supply, and that the failure to do so was a per se violation of SEQRA and CEQR. Petitioners' first cause of action alleges that the DEP acted arbitrarily and capriciously by failing to identify the potential significant impacts of the siting of the Croton WTP in the Bronx would have on the Town of Eastchester. It is asserted that the "potential significant impacts resulting from construction and siting of the Eastchester Pump/Treatment Plant on Eastchester Site are direct and cumulative and associated impacts related to the DEP's action of siting the Croton WTP on the Bronx Site." It is asserted that the DEP failed to identify indirect secondary and cumulative impacts on the Town of Eastchester in violation of SEQRA and CEQR. The second cause of action asserts that the DEP failed to take a "hard look" at the broader cumulative impacts of its siting decision, and asserts that the need for the Delaware project was ultimately contingent on the location of the Croton WTP. It is asserted that the DEP should be required to conduct an analysis of the "known and irreparable impacts that the future development of the UWNR Delaware Project and Eastchester Pump/Treatment Plant will have on residents of Eastchester, particularly with regard to neighborhood character, visual quality and aesthetics, water rates, water availability and traffic." Petitioners, in their complaint, assert that there is a direct causal link between the DEP's siting of the WTP in the Bronx and the UWNR's need to build a new pumping station in the Town of Eastchester.

This court, after hearing oral argument, denied petitioners' request for a temporary restraining order on January 19, 2005.

Petitioners' request for a preliminary injunction is denied. It is well settled that in order "to obtain the drastic remedy of a preliminary injunction, a movant must demonstrate (1) a likelihood or probability of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of granting the injunction" (Peterson v Corbin, 275 AD2d 35, 37 [2000], lv dismissed 95 NY2d 919 [2000], citing Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v Srogi, 52 NY2d 496 [1981]). "Preliminary injunctive relief is a drastic remedy which will not be granted "unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right

rests upon the movant"" (Peterson, 275 AD2d at 37, quoting Nalitt v City of New York, 138 AD2d 580, 581 [1988], quoting First Natl. Bank v Highland Hardwoods, 98 AD2d 924, 926 [1983]). Thus, "[a] movant's burden of proof on a motion for a preliminary injunction is particularly high" (Council of City of New York v Giuliani, 248 AD2d 1, 4 [1998], lv to appeal dismissed in part, denied in part 92 NY2d 938 [1998]).

Petitioners herein have not demonstrated a likelihood of success on the merits of any of their claims. Contrary to petitioners' assertions, the provisions of SEQRA and CEQR do not require the DEP to determine the impact of its site selection on communities outside of New York City, which take water from the City's drinking water system, but were not considered as sites for the WTP. The City of New York is required to allow certain municipal corporations or water districts to take water from the City system, upon application to the DEP Commissioner, up to a specified maximum, and subject to the payment of water charges, and reasonable rules and regulations of the DEP. The City is not required to supply water of any particular character or quality, and is not required to provide any form of disinfection, chemical addition, filtration or other treatment (see Title 24, Section 260 of the Administrative Code of the City of New York). Rather, in this instance, it is UWNR's responsibility to provide its customers with drinking water that meets federal and state health standards (see 42 USC § 200f; 40 CFR § 141.70-141.75; 10 NYCRR Part 5). The 1937 Permit, which allows UWNR to take water from the Croton Aqueduct, and the May 29, 1967 agreement between the City of New York and New Rochelle, which governs the taking of water by New Rochelle from Shaft 22 of the Delaware Aqueduct for the Town of Eastchester and several villages, specifically state that the City of New York is not obligated to treat or filter water and requires the City of New Rochelle or Service Area Communities or its authorized agent to install, maintain and operate at its own expense any additional plant or equipment for chemical treatment, sedimentation or filtration of the water. The 1967 agreement specifically identifies the Town of Eastchester as a Service Area Community.

In order meet the federal and state requirements for safe drinking water, UWNR proposed a connection to the Delaware Aqueduct and constructing the Delaware Pump Station. These proposals were made some ten years before the DEP selected the Van Cortlandt Park site for the WTP. The Town of Eastchester was well aware of UWNR's proposals, as the construction of the Delaware Pump was the subject of an independent SEQRA review, and the Town's Planning Board issued a negative declaration on November 20, 1995, which was

subsequently upheld by the Supreme Court and the Appellate Division.

SEQRA requires the preparation of an Environmental Impact Statement for any government-sponsored or government-approved "action" that may have "a significant effect" on the environment (see ECL 8-0109[2]). One criterion for the "significant effect" determination is the existence of "two or more related actions ... none of which has ... a significant effect ... but when considered cumulatively would meet one or more of the [other regulatory significant effect] criteria" (6 NYCRR 617.11[a][11]). For purposes of determining whether an action meets any of those regulatory criteria, "the lead agency must consider reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon" (6 NYCRR 617.11[b]). In all other circumstances, consideration of the cumulative effects of projects other than the one immediately proposed is permissible but not mandatory (see Matter of Save the Pine Bush v City of Albany, 70 NY2d 193 [1987]; see also 6 NYCRR 617.15[a][1]).

Petitioners contend that the Croton WTP and the Delaware Pumping Station are "related" because they both involve the treatment of drinking water from the same source, the Croton Aqueduct, which is owned by the City of New York. It is asserted that if the Croton WTP was located upstream from UWNR's connection to the Croton Aqueduct, there would be no need to construct the pumping station in Eastchester, as the town would receive filtered water from the Croton WTP. It is, therefore, asserted that the DEP's site selection process should have considered the cumulative impacts of the construction of the Delaware Pumping Station on the Town of Eastchester and the individual petitioners. However, the fact that UWNR could be a potential beneficiary of the Croton WTP, if it was to be built above its connection to the Croton Aqueduct, does not make these projects "related" to or "dependent" upon one another, so as to require a cumulative environmental analysis. These are discrete projects and are not located in a specially created geographic district. The court is not persuaded that these two projects are indeed related actions, as there is no showing that these projects involve a single discrete common plan, are integrated, dependent upon each other, and devoid of independent utility (see Akpan v Koch, 75 NY2d 561 [1990]; North Fork Env't'l Council v Janoski, 196 AD2d 590, 591 [1993]; Concerned Citizens for the Env't v Zagata, 243 AD2d 20, 22 [1998]; cf. Matter of Village of Westbury v Department of Transp., 75 NY2d 62, 69 [1989]; Matter of Save the

Pine Bush v City of Albany, 70 NY2d 193, 205-206 [1987]; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 367 [1986]). The only element they share—the need to provide their respective customers with safe drinking water that meets state and federal health standards—is insufficient to mandate a cumulative impact analyses as part of the DEP’s SEQRA review (see Long Island Pine Barrens Soc., Inc. v Planning Bd. of Brookhaven, 80 NY2d 500, 512-516 [1992]; Village of Tarrytown v Planning Bd., 292 AD2d 617, 621 [2002]; North Fork Env’tl. Council v Janoski, 196 AD2d 590, 591 [1993]). Petitioners’ claim that the DEP was required to consider the cumulative impacts of UNWR’s Delaware Pumping Station in the Town of Eastchester when it conducted its environmental review of the Croton WTP, therefore, is without merit.

Moreover, there exists an even more fundamental reason why requiring a cumulative impact study would not be appropriate here. The Delaware Pumping Station was already the subject of environmental review and the Planning Board of the Town of Eastchester issued a negative determination in 1995. Inasmuch as the negative determination was upheld by the Supreme Court and the Appellate Division, the Town of Eastchester may not, in the guise of this proceeding, collaterally attack those determinations.

In view of the foregoing, the court finds that the within petition fails to state a claim for judicial review of the DEP’s determination to site the Croton WTP in Van Cortlandt Park. Petitioners’ request for a preliminary injunction, therefore, is denied, and respondents’ cross motions to dismiss the petition are granted.

Dated: May 4, 2005

J.S.C.