

**Clean Water Advocates of N.Y., Inc. v New York  
State Dept. of Env'tl. Conservation**

2011 NY Slip Op 32572(U)

October 4, 2011

Sup Ct, Albany County

Docket Number: 4523-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
 SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
 CLEAN WATER ADVOCATES OF NEW YORK, INC.,

Petitioner,

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

-against-

**DECISION and ORDER**  
**INDEX NO. 4523-11**  
**RJI NO. 01-11-ST2760**

NEW YORK STATE DEPARTMENT OF  
 ENVIRONMENTAL CONSERVATION;  
 WAL-MART REAL ESTATE BUSINESS TRUST;  
 and WAL-MART STORES, INC.,

Respondents.

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Supreme Court Albany County All Purpose Term, September 30, 2011  
 Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Petitioner commenced this CPLR Article 78 proceeding challenging the New York State Department of Environmental Conservation's (hereinafter "DEC") consideration of Wal-Mart's<sup>1</sup> Stormwater Pollution Prevention Plan (hereinafter "SPPP") for property it seeks to develop in Lockport, New York (hereinafter "the premises"). DEC answered the petition and set forth two objections in point of law. Wal-Mart also answered and raised two objections in point of law, one of which claimed Petitioner lacked standing. Petitioner submitted a reply. Because, on this record, Petitioner failed to sufficiently establish its standing to bring this proceeding, the petition is dismissed.

The standing challenge is considered first because "[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." (Society of Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 768 [1991]).

To establish its standing, the instant organizational Petitioner must demonstrate three distinct requirements.

First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members.

(Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 765 [1991]).

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<sup>1</sup> For this motion Respondents Wal-Mart Real Estate Business Trust and Wal-Mart Stores, Inc. will not be distinguished but rather will be referred to collectively as "Wal-Mart."

Here, Petitioner failed to demonstrate the first organizational standing requirement set forth above. Petitioner only alleged the existence of one member, its president Joanne Woodside (hereinafter “Woodside”). Woodside established, by her allegations of fact based upon her own knowledge, that she lives “within 900 feet of [the premises], 4 miles of the Tonawanda Creek, 1.5 miles of the Erie Canal, 14 miles of Lake Niagara and 22 miles of the Niagara River.” She allegedly uses the above water bodies for recreation and as her potable water source. While her “close physical proximity as a neighbor to [this] proposed project may give rise to an inference of direct harm... standing will not be recognized unless [she] can show that the close proximity exposes her to a harm different from the harm experienced by the public generally.” (Basha Kill Area Ass'n v. Planning Bd. of Town of Mamakating, 46 AD3d 1309, 1310 [3d Dept. 2007]; Matter of Oates v. Village of Watkins Glen, 290 AD2d 758 [3d Dept. 2002]; *see generally* Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406 [1987]; Save the Pine Bush, Inc. v. Planning Bd. of Town of Clifton Park, 50 AD3d 1296 [3d Dept. 2008]).

Woodside’s allegations, however, do not demonstrate her individual standing because they neither give rise to the inference of direct harm nor establish that her harm is different from that experienced by the public generally. Her proximity to the premises, 900 feet, without any further detail does not raise an inference of standing. (Matter of Oates v Village of Watkins Glen, 290 AD2d 758 [3d Dept 2002][no inference of standing for petitioner 530 feet away from project]; Matter of Buerger v Town of Grafton, 235 AD2d 984 [3d Dept 1997][no inference of standing for petitioner 600 feet away from project]). Nor has Woodside set forth sufficient allegations to establish that the DEC’s approval of the SPPP will cause her any harm, because

she did not allege that her property is down gradient from the premises and will be impacted by the premises' stormwater runoff that the SPPP is intended to ameliorate. Her vague allegation of economic harm is simply not an interest protected by the SPPP determination Petitioner is challenging. Moreover, Petitioner failed to proffer any allegations or evidentiary proof that the premises' stormwater runoff will affect the water bodies Woodside uses. The petition's bare allegation that "construction activity contribute[s] to the increase of pollutants in these water bodies" is insufficient to establish any connection between the specific SPPP challenged and an increase in pollutants in the Tonawanda Creek, Erie Canal, Lake Niagara or the Niagara River. Because Petitioner failed to establish that any of its members have standing to challenge the SPPP, Petitioner has no standing in this action and it must be dismissed. (New York State Ass'n of Small City School Districts, Inc. v. State of New York, 42 AD3d 648 [3d Dept. 2007]; Save the Pine Bush, Inc. v Planning Bd. of Town of Clifton Park, 50 AD3d 1296 [3d Dept. 2008]).

Although the above alone is dispositive, Petitioner similarly failed to establish that "neither the asserted claim nor the appropriate relief requires the participation of the individual members." (Society of Plastics Indus. v County of Suffolk, supra at 765). Petitioner proffers no proof in support of such requirement. Nor does Petitioner deny Wal-Mart's allegation and documentary showing that it was incorporated on the same day it filed this proceeding. This failure of proof further requires dismissal of this proceeding.

Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for DEC. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 4, 2011  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition, dated July 1, 2011, Verified Petition, dated July 1, 2011, with attached Exhibit A.
2. Objection in Point of Law, Answer and Return, dated September 9, 2011; Affidavit of David Gasper, dated September 8, 2011; Affidavit of Shohreh Karimipour, dated September 8, 2011; Affidavit of William Smythe, dated September 6, 2011; with Exhibits A-P.
3. Objection in Point of Law and Verified Answer, dated September 9, 2011; Affidavit of Todd Markevich, dated September 9, 2011; with attached Exhibits 1-16; Affirmation of Kenneth Friedman, dated September 9, 2011, with attached Exhibits 1-6.
4. Affidavit of Robert Harris, dated September 23, 2011; Affidavit of Joanne Woodside, dated September 15, 2011.