

Matter of Sane Energy Project; NYH20 LLC v Hudson River Park Trust
2013 NY Slip Op 30166(U)
January 16, 2013
Supreme Court, New York County
Docket Number: 103707/12
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

Justice

PART 36

Home Energy Project

INDEX NO.

103707/12

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The Hudson River Park Trust

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 1/16/13

HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
In the Matter of the Application of
SANE ENERGY PROJECT; NYH20 LLC;
FOOD AND WATER WATCH; UNITED FOR ACTION;
NEW YORK CITY FRIENDS OF CLEARWATER;
VILLAGE INDEPENDENT DEMOCRATS;
YNestra KING; NATHANIEL JOHNSON;
ANNE HEANEY; JOAN BEARD; JOHN MIMIKOS;
SHERRY LANE; AND WILLIAM "BUCK" MOORHEAD,

Petitioners,

Index No.103707-2012

- against -

**DECISION and
ORDER**
Mot. Seq.: 001

THE HUDSON RIVER PARK TRUST; TEXAS
EASTERN TRANSMISSION LP; ALGONQUIN
GAS TRANSMISSION LLC; AND SPECTRA
ENERGY CORPORATION,

Respondents.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Petitioners bring this Article 78 proceeding to prevent Respondents from constructing a natural gas pipeline and related facilities on the Gansevoort Peninsula portion of the Hudson River Park in New York. Respondents cross move to dismiss the Article 78 Petition.

On December 20, 2010, Spectra Energy Corporation ("Spectra"), Texas Eastern Transmission LP ("Texas Eastern") and Algonquin Gas Transmission LLC ("Algonquin") filed applications under Sections 7(b) and 7(c) of the Natural Gas Act, with the Federal Energy Regulatory Commission ("FERC"), seeking Certificates of

Public Convenience and Necessity to construct, abandon, install, own, operate, and maintain expansions of the existing Texas Eastern and Algonquin interstate natural gas pipeline systems in New York, New Jersey, and Connecticut.

The project involves the construction of approximately 15.5 miles of new 30-inch diameter gas pipeline, replacement of approximately 5 miles of existing pipeline with 42-inch diameter pipeline, and installation of associated pipeline support facilities and six new metering and regulating stations, located in New York, New Jersey and Connecticut. The pipeline will extend from Linden, New Jersey, underneath the Arthur Kill Complex, Staten Island, underneath the Kill van Kull to Bayonne and Jersey City, New Jersey, and underneath the Hudson River into Manhattan. The portion to be constructed in Manhattan is 650 feet and, while designed for a maximum allowable pressure of 1,200 pounds per square inch ("psi"), will only operate at 350 psi or less in Manhattan, consistent with the operating pressures of existing large diameter pipelines in Manhattan. The end of the new pipeline on the Gansevoort Peninsula would connect with a 1,500 foot pipeline to be constructed by Consolidated Edison ("Con Edison"), to transport the gas to an interconnection with Con Edison's existing gas distribution system.

On March 16, 2012 a Final Environmental Impact Statement ("FEIS") was issued by FERC, which examined the environmental impacts of the pipeline. FERC found that the Trust has no authority over Con Edison's distribution system or the Con Edison pipeline because it does not connect to property owned by the Trust but rather will be constructed along 10th Avenue. The FEIS concluded that the NJ-NY project would result in limited adverse environmental impact. Areas examined include geology and soils; wetlands and water bodies; vegetation, wildlife and habitat, and aquatic resources; land use, recreation, special interest areas, and visual resources; socioeconomic; cultural resources; air quality and noise; climate change; and reliability and safety. FERC concluded that the "majority of cumulative impacts would be temporary and minor... [and] that the Project would contribute to cumulative improvement in regional air quality if a portion of the natural gas associated with the NY-NJ Project displaces the use of other more polluting fossil fuels." Although Con Edison's pipeline was determined to be out of the Trust's jurisdiction, Respondent states at oral argument that "there was environmental consideration given [by FERC] to the Con Edison extension and its interconnect with the Texas pipeline."

On May 31, 2012, FERC issued Certificates of Public Convenience and Necessity, approving the NJ-NY Project. On June 18, 2012, the Hudson River Park Trust ("the Trust") approved a proposed thirty-year lease agreement between the Trust and Texas Eastern. As a landowner, the Trust recognized that Texas Eastern could have obtained a permanent easement through an eminent domain proceeding provided under the Natural Gas Act; however, according to Respondents, the Trust determined that negotiating a right-of-way agreement would ensure that all park-related concerns were addressed.

Texas Eastern agreed to pay the Trust \$2,775,000 to construct, operate, and maintain a portion of the Pipeline within the Hudson River Park at the Gansevoort Peninsula. The interest leased by the Trust is a right of way twenty feet wide across the land portion of the premises and a ten foot wide right of way under the submerged lands portion of the Premises. The lease right granted to Texas Eastern includes public or private roadways or pedestrian ways to allow Texas Eastern ingress and egress from the right of way.

By letter dated June 29, 2012, FERC issued a Notice to Proceed, authorizing Respondents to commence construction of portions of the project, including the portion presently being constructed on the Gansevoort Peninsula. Respondents have blocked off access across the eastern end of the Gansevoort Peninsula portion of Hudson River Park, preventing use of the pedestrian pathway along the west side of Route 9A. They have also begun cutting the pavement of the access road, preventing access to the Peninsula via this roadway.

Petitioners now bring this Article 78 Petition to prevent Respondents from proceeding with the pipeline construction activities on the Gansevoort Peninsula. Petitioner's causes of action challenge the Trust's compliance with SEQRA, as well as the siting of the pipeline within the Hudson River Park under the Hudson River Park Act and the Public Trust Doctrine.

Under the Federal Natural Gas Act, the licensing of interstate natural gas pipelines falls exclusively within the jurisdiction of FERC. (*See, 15 U.S.C. 717; Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145 [1988] [the

federal government has occupied the field with regard to natural gas pipelines]). The Natural Gas Act vests exclusive jurisdiction with the U.S. Court of Appeals to hear challenges involving the licensing of interstate natural gas pipelines even if challenges are framed in state-law terms. Thus, FERC has exclusive jurisdiction to determine the location of interstate natural gas pipelines (*See, Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 [1988]), and any challenges to the right of way approval by the Trust must be brought in the federal court of appeals.

Furthermore, federal law preempts state and local agency environmental review requirements for proposed interstate pipelines. (*See, Nat'l Fuel Gas Supply Corp., v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571 [2nd Cir 1990] [holding that the Natural Gas Act preempted a New York State law that required site-specific environmental review of interstate pipeline construction]). Accordingly, the Trust could not conduct an environmental review of an interstate natural gas pipeline under SEQRA as it is preempted by federal law. The proper channel to challenge the FEIS, including the scope of environmental review provided by FERC for the Con Edison Extension, is with FERC and the Federal Court of Appeals.

Wherefore, it is hereby,

ORDERED and ADJUDGED that the Article 78 Petition is denied; and it is further,

ORDERED that the cross-motion to dismiss is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: January 16, 2013



EILEEN A. RAKOWER, J.S.C.