Matter of Peconic Baykeeper, Inc. v New York State Dept. of Envtl. Conservation

2014 NY Slip Op 32436(U)

September 17, 2014

Sup Ct, Suffolk County

Docket Number: 13-14425

Judge: Arthur G. Pitts

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This opinion is uncorrected and not selected for official publication.

[* 1]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY	I.A.S. PART 43
In the Matter of the Application of PECONIC BAYKEEPER, INC., Petitioner, For a Judgment Pursuant to Article 78 of Section 3001 of the Civil Practice Law and Rules - against - THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Respondent.	By: Pitts, J.S.C. Dated: September 17, 2014 Index No. 13-14425 Mot. Seq. # 005 - MD # 006 - MG; CDISPSUBJ Return Date: 9/12/13 (#005) 10/17/13 (#006) Adjourned: 3/20/14

COPY

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In this article 78 proceeding, petitioner Peconic Baykeeper ("Baykeeper") seeks a judgment on its first cause of action determining that respondent New York State Department of Environmental Conservation ("DEC") abused its discretion and acted arbitrarily, capriciously and contrary to law in denying Baykeeper's petition to modify certain State Pollution Discharge Elimination System permits (SPDES). Petitioner seeks a determination that the SPDES permit modifications requested by Baykeeper are justified and a direction to the DEC to begin the permit modification process for the identified permits. On its second cause of action, petitioner seeks a determination that the DEC abused its discretion, acted arbitrarily, capriciously and contrary to law in determining that Baykeeper's petition did not meet the statutory and regulatory requirements for a petition for modification and remittur of Baykeeper's September 2012 modification petition to the DEC for a determination. With respect to the third cause of action, petitioner seeks a further determination that the DEC abused its discretion, acted arbitrarily, capriciously, and contrary to law in denying Baykeeper's petition to modify the SPDES permit for the South Country Assisted Living Facility, and directing the DEC to begin the permit modification process for the South Country Assisted Living Facility's SPDES permit. On its fourth cause of action, petitioner seeks a judgment declaring that SPDES permits must meet all applicable requirements of the Federal Clean Water Act.

Respondent moves pursuant to CPLR 3211 for an order dismissing this proceeding in its entirety.

On or about September 17, 2012, petitioner wrote to the DEC pursuant to Environmental Conservation Law ("ECL") §17-0817(5) and 6 NYCRR 621.13(b) requesting that respondent initiate 1,338 permit modification proceedings for water pollution control permits issued to various sewage treatment facilities and septic systems throughout Suffolk County. The DEC responded to this request by letter, dated April 1, 2013, from John J. Ferguson, Chief Permit Administrator, informing petitioner that its letter failed to meet the statutory and regulatory requirements for a petition for modification. The DEC noted that petitioner's letter lacked facts, data, or other relevant information specific to each of the referenced 1,338 discharges. Further, the DEC advised that requesting the modification of more than one permit is procedurally impermissible, that it did not concede any of the factual allegations, and that it made no determination as to whether the requests were justified. The DEC agreed to review any resubmissions by Baykeeper. Petitioner made no further submissions to respondent, and thereafter, initiated this proceeding.

ECL 17-0817(5) states:

> Any interested party may request at any time that a permit be modified, suspended or revoked on the grounds that newly discovered, material information has been discovered; that a material change in environmental conditions has occurred; that relevant technology or applicable law or regulations have changed since the issuance of the existing permit; or on other grounds established by the department by regulation. All such requests shall be in writing and contain facts or reasons supporting the request. If the department determines that the request is not justified, it shall send the party a brief written response giving the reasons for the decision. A copy of such request and the department's response shall be sent to the permittee. If the department determines that the request is justified, it shall take action pursuant to article seventy of this chapter.

6 NYCRR 621.13 is entitled Permit Modifications, Suspensions or Revocations by the Department. Subsection (b) states:

> The department may consider requests from any interested party for modification, suspension or revocation of permits based on reasons given in paragraphs 621.13(a) (1) through (6) of this section. Requests must be in writing, contain facts or reasons supporting the request and be sent to the regional permit administrator as listed in section 621.19 of this Part. The department must decide whether the request is justified and the action to be taken in response to the request. A brief response giving the reason(s) for the department's decision must be sent to the party making the request. Rejection of interested party requests for modification, suspension or revocation are not subject to public notice, comment or hearings.

Although petitioner attempts to graft declaratory judgment language onto its three causes of action pursuant to article 78, the gravamen of the relief sought is mandamus to compel respondent DEC to act on its modification request.

Mandamus to compel lies "to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (***New York Civ. Liberties Union v State of New York***, 4 NY3d 175, 791

NYS2d 507 [2005]; *see* ***Matter of Schmitt v Skovira***, 53 AD3d 918, 862 NYS2d 167 [3d Dept 2008]). The remedy, however, is available only "to compel a governmental entity or officer to perform a ministerial duty, [and] does not lie to compel an act which involves an exercise of judgment or discretion" (***Matter of Brusco v Braun***, 84 NY2d 674, 679, 621 NYS2d 291 [1994]; *see* ***Yager v Massena Cent. School Dist.***, 119 AD3d 1066, 989 NYS2d 177 [3d Dept 2014]). "A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result' " (***New York Civ. Liberties Union v State of New York***, *supra*, quoting ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]; *see also* ***Alltow, Inc. v Village of Wappingers Falls***, 94 AD3d 879, 942 NYS2d 147 [2d Dept 2012]). In other words, a party seeking mandamus to compel must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the court to grant that relief (***Doorley v DeMarco***, 106 AD3d 27, 962 NYS2d 546 [4th Dept 2013]).

A reading of ECL 17-0817(5) and 6 NYCRR 621.13(b) reveals that the granting or denial of a request for a modification of a permit is a purely discretionary act and is not subject to mandamus to compel (*see* ***Town of Riverhead v New York State Dept. of Environmental Conservation***, 50 AD3d 811, 858 NYS2d 183 [2d Dept 2008] [The determination to initiate proceedings leading to the revocation of a permit is a discretionary function with respect to which mandamus will not lie]; ***Haydock v Passidom***, 121 AD2d 540, 503 NYS2d 599 [2d Dept 1986] [A state agency has no mandatory duty to revoke or suspend a dealer's used vehicle registration for alleged misuse of dealer number plates]). Petitioner's citation of ***Natural Resources Defense Council v New York City Depart. of Sanitation***, 83 NY2d 215, 208 NYS2d 957 [1994], in support of its argument is distinguishable, since in that case the court compelled the implementation of a New York City law that required the Department of Sanitation to establish a recycling program. ECL 17-0817(5) and 6 NYCRR 621.13(b) clearly state the respondent *may* consider requests for modification and, therefore, such decision is purely discretionary. Thus, petitioner has failed to establish that respondent can be compelled to act in this matter.

Petitioner next argues that respondent's actions are subject to mandamus to review. In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity "to be heard" and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law (***Matter of Scherbyn v Wayne–Finger Lakes Bd. of Coop. Educ. Servs.***, 77 NY2d 753, 570 NYS2d 474 [1991]; *see* ***Matter of Ward v City of Long Beach***, 20 NY3d 1042, 962 NYS2d 587 [2d Dept 2013]; ***Bylicki v Board of Fire Commrs. of S. Farmingdale Fire Dist.***,103 AD3d 799, 962 NYS2d 180 [2d Dept 2013]). It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion (***Arrocha v Board of Educ. of City of New York***, 93 NY2d 361, 690 NYS2d 503 [1999]; *see* ***Matter of Pell v Board of Educ.***, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

Enforcement of environmental permit regulations involves "questions of judgment, discretion and the allocation of the resources and priorities which are inappropriate for resolution in the judicial arena" (***Matter of Kerness v Berle***, 85 AD2d 695, 445 NYS2d 48 [1981], *affd* 57 NY2d 1042, 457 NYS2d 786

[1982]; *see* ***Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]; ***Matter of Kroll v Village of E. Hampton***, 293 AD2d 614, 741 NYS2d 98 [2d Dept 2002]; ***Matter of Dyno v Village of Johnson City***, 261 AD2d 783, 690 NYS2d 325 [3d Dept 1999]).

The respondent herein was faced with a modification request for 1,338 SPDES permits, which would require notices to be sent to each of the permitees (*see* 6 NYCRR 621.13(d)) and would potentially require 1,338 hearings (*see* ECL 70-0119). The respondent reviewed the application letter and rejected it, stating that the letter lacked facts, data, or other relevant information specific to each of the referenced 1,338 discharges. The letter also informed petitioner that respondent made no determination as to whether the requests were justified and stated that it would review any resubmissions that the petitioner wished to make. Based upon the facts submitted, the respondent DEC declined a request that would require a massive undertaking in time and resources because it felt that the petitioner failed to supply individual information for 1,337 of the permits in question. As to the single site application for the South Country Assisted Living Facility, respondent alleges that the application contains scientifically unproven factual conclusions. Under these circumstances, the Court finds the respondent's actions to be a reasonable response to the application and, consequently, that the respondent's action was not arbitrary or capricious, an abuse of discretion or capricious or affected by an error of law (*see* ***Matter of Ward v City of Long Beach***, *supra;* ***Matter of Scherbyn v Wayne–Finger Lakes Bd. of Coop. Educ. Servs***, *supra*).

In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a) (7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference (*see* ***Matter of Eastern Oaks Dev., LLC v Town of Clinton***, 76 AD3d 676, 906 NYS2d 611 [2d Dept 2010]; ***Matter of Bloodgood v Town of Huntington***, 58 AD3d 619, 871 NYS2d 644 [2d Dept 2009]). The motion must be determined solely on the allegations contained in the petition (*see* ***Matter of East End Resources, LLC v Town of Southold Planning Bd.***, 81 AD3d 947, 917 NYS2d 315 [2d Dept 2011]; ***Matter of McComb v Reasoner***, 29 AD3d 795, 815 NYS2d 665 [2d Dept 2006]; ***Matter of Long Is. Contrs. Assn. v Town of Riverhead***, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (*see* ***Wohlgemuth v Lang Constr., LLC***, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]). Based upon the facts and law set forth above, petitioner has failed to establish its entitlement to article 78 relief and the respondent has established that the petitioner failed to state a cause of action that would entitle it to relief. The defense of failure to exhaust administrative remedies, discussed in detail below, is a further grounds for dismissal of this proceeding. Therefore, the petition herein is denied and the respondent's motion to dismiss the petition is granted.

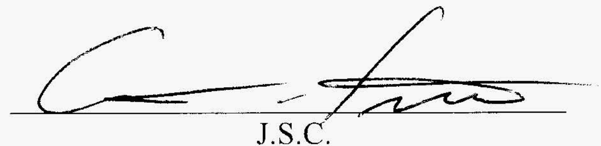
Turning to the petitioner's request for declaratory relief, in general, "[t]he doctrine of exhaustion of administrative remedies applies to actions for declaratory judgments" (***Slater v Gallman***, 38 NY2d 1, 377 NYS2d 448 [1975]***; Town of Oyster Bay v Kirkland***, 81 AD3d 812, 917 NYS2d 236 [2d Dept 2011], *affd* 19 NY3d 1035, 954 NYS2d 769; ***Matter of Shepherd v Maddaloni***, 103 AD3d 901, 960 NYS2d 171 [2d Dept 2013]). It is further noted that, generally, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (***Watergate II Apts. v Buffalo Sewer Auth.***, 46 NY2d 52, 57, 412 NYS2d 821 [1978]). "[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings

until final resolution of those proceedings before the agency" (***Matter of Tahmisyan v Stony Brook Univ.***, 74 AD3d 829, 902 NYS2d 617 [2d Dept 2010], quoting ***Galin v Chassin***, 217 AD2d 446, 447, 629 NYS2d 247 [1st Dept 1995]; *see* ***17 Fortune Corp. v Town of Babylon***, 96 AD3d 929, 946 NYS2d 259 [2d Dept 2012]).

"The doctrine of exhaustion of administrative remedies requires 'litigants to address their complaints initially to administrative tribunals, rather than to the courts, and ...to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts' (citation omitted). It is bottomed on the principle that '[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action" (***Young Men's Christian Ass'n v Rochester Pure Waters Dist.***, 37 NY2d 371, 375, 372 NYS2d 633,636 [1975]. The requirement that administrative remedies be exhausted "furthers the salutory [sic] goals of relieving the courts of the burden of deciding questions entrusted to an agency ... and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment' " (***Watergate II Apts. v Buffalo Sewer Auth.***, *supra*, at 57; *see* ***Coleman v Daines***, 79 AD3d 554, 913 NYS2d 83 [1st Dept 2010]).

There are exceptions to the applicability of the exhaustion doctrine where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to administrative remedies would be futile or would cause irreparable injury (*see* ***Watergate II Apts. v Buffalo Sewer Auth.***, *supra*; ***Town of Oyster Bay v Kirkland***, *supra*; ***Pitts v City of New York Off. of Comptroller***, 76 AD3d 633, 906 NYS2d 337 [2d Dept 2010]). The record establishes that this matter does not fit into any of the exceptions to the doctrine of exhaustion of administrative remedies. Respondent DEC made it clear that it had not made any decision as to the validity of petitioner's claims, that it needed further information and that petitioner could resubmit further individual permit modification requests and the agency would review such submissions. Nor did petitioner establish that any of the other exceptions would apply. Instead of pursuing the matter, petitioner initiated this litigation. In light of these facts and the relevant law, the Court finds that petitioner failed to exhaust its administrative remedies. In light of the multiple factual scientific issues set forth herein, this matter should have been pursued with the respondent DEC so that the agency could "prepare a record reflective of its 'expertise and judgment' " (*see* ***Watergate II Apts. v Buffalo Sewer Auth.***, *supra*, at 57). Petitioner, having failed to exhaust its administrative remedies, each of respondent's causes of action, including that for declaratory relief must be dismissed.

Settle judgment.



J.S.C.

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