

<b>Matter of Wythe Berry LLC v New York State Dept. of Envtl. Conservation</b>
2015 NY Slip Op 31985(U)
October 26, 2015
Supreme Court, Kings County
Docket Number: 505803/2014
Judge: Wavny Toussaint
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16<sup>th</sup> day of October, 2015.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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In the Matter of the Application of  
WYTHE BERRY LLC,  
Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR,  
and for a Declaratory Judgment  
Pursuant to Section 3001 of the CPLR

DECISION AND  
JUDGMENT

--against--

Index No. 505803/14

NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION,  
JOSEPH MARTENS, in his capacity as  
Commissioner of the New York State Department  
of Environmental Conservation, and ROBERT W.  
SCHICK, in his capacity as Director of the Division of  
Environmental Remediation of the New York State  
Department of Environmental Conservation,

Respondents.

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The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Petition and Affidavits (Affirmations) Annexed \_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Memoranda of Law \_\_\_\_\_

1-13  
22, 24-34  
15, 23, 36

Upon the foregoing papers in this article 78 proceeding, petitioner, Wythe Berry LLC (Wythe) seeks review of a February 19, 2014 determination by respondent, New York State Department of Environmental Conservation (DEC) which denied Wythe's application to participate in the Brownfield Cleanup Program (BCP), authorized under Environmental Conservation Law (ECL) § 27-1401 et seq.

More specifically, Wythe seeks an order (1) annulling and/or vacating DEC's denial of Wythe's application to the BCP; (2) commanding DEC to approve petitioner's application, nunc pro tunc as of March 7, 2014 (the date the public comment period on the application was scheduled to expire); (3) commanding DEC to enter into a Brownfield Cleanup Agreement with petitioner, nunc pro tunc as of March 7, 2014, for the property identified on the City of New York Tax Map as Block 2283, Lots 1 and 10, and known as 94 N. 13th Street and 121 N. 12th Street, Brooklyn, New York 11249 (Site); (4) commanding DEC to accept, nunc pro tunc as of March 7, 2014, the Additional Investigation Work Plan, submitted by National Grid (Grid) and already approved by DEC, in lieu of the Remedial Investigation Work Plan submitted by petitioner with its application to the BCP; (5) commanding DEC to accept, nunc pro tunc as of March 7, 2014, the Excavation Work Plan, submitted by Grid as part of the Interim Site Management Plan (ISMP) and already approved by DEC, in lieu of a Interim Remedial Measures Work Plan permitted under the BCP; and (6) declaring DEC liable for any and all damages suffered and costs incurred, including attorneys' fees, arising from or related to the denial of petitioner's application to the BCP. DEC opposes the application.

### *Background Facts and Procedural History*

This Article 78 proceeding concerns two real property parcels located in the Williamsburg section of Brooklyn (Site). The Site, from approximately 1905 until approximately 1965, was a part of a larger parcel, consisting of approximately 10 contiguous parcels owned and/or operated by Brooklyn Union Gas as a manufactured gas plant (MGP) holder station (Wythe Holder Station). That station housed two gas holders, each with capacities of 5 million cubic feet, until approximately 1965. The gas holders and all the related equipment was dismantled in or about 1965. The Wythe Holder Station was sold off, in pieces, from approximately 1965 until approximately 2014 and developed with one- and two-story brick or concrete warehouses and a paved parking lot.

Brooklyn Union Gas merged with Long Island Lighting Company at some point after 1965 and thereafter became KeySpan Corporation, which National Grid (collectively, Grid) later acquired. DEC and Grid's predecessor entered into a "global" Order on Consent and Administrative Settlement (Consent Order) in February 2007. That order outlined a procedure requiring Grid to investigate the multitude of former MGP and holder sites located throughout New York State for contamination, to the extent that there were no prior findings of contamination. The Consent Order also outlined a remediation procedure for sites that were already known to be contaminated and sites that were found to be contaminated after an initial site investigation. DEC and Grid in August of 2007 entered into a Modification of the Order on Consent and Administrative Settlement (Modification). Such modification

amended some of the original provisions of the Consent Order and subjected the Wythe Holder Station property to the terms and conditions of the Consent Order and the Modification.

Grid was required, pursuant to the Consent Order, to prepare a Site Characterization work plan (SC) for the Wythe Holder Station with the objective of confirming or denying the presence of hazardous waste and determining whether the site poses a significant threat to public health or the environment. The Consent Order also outlined Grid's responsibilities following the approval of the SC. Grid had the option to keep the Wythe Holder Station subject to the Consent Order and continue forward with additional investigatory and/or remedial work plans, or it could elect to terminate the agreement provided that the activities on the property in question had not progressed to the remediation stage.

Grid submitted its SC work plan to DEC in or about July 2011 and carried out the plan over the course of the next two years. DEC approved the SC in or about August of 2013.<sup>1</sup> Wythe became interested, in or around the same time, in purchasing and developing the Site as a hotel, retail space, community facility space and office space and had apparently advised Grid of its desire and intention to apply to the BCP.

Wythe, Grid and DEC had entered into discussions, by December 2013, about the interplay between Grid's obligations under the Consent Order and Wythe's intention to apply to the BCP and develop the Site. Grid and DEC, pursuant to the provisions of the Consent

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<sup>1</sup>The record before the court does not provide any details as to why it took Grid nearly four years to submit the SC despite the Consent Order's expressly shorter time frames.

Order, agreed to move forward with an Interim Site Management Plan (ISMP) in anticipation of imminent redevelopment. DEC and Wythe held a BCP “pre-application meeting” in or about January 10, 2014, and DEC informed Wythe that the Site was ineligible for participation in the BCP because the Site was already subject to the Consent Order’s provisions.

Wythe submitted its written application for acceptance into the BCP on or about January 16, 2014 despite DEC's indication to Wythe that its application would be denied. DEC advised Wythe, by letter dated January 24, 2014, that its application to the BCP was complete and that Wythe was required to publish public notice of its application by February 5, 2014. DEC received a draft ISMP from Grid on or about February 11, 2014. The ISMP included a “Matrix of Responsibility” that expressly made clear that Wythe was taking responsibility for the bulk of the investigation and remediation of the Site. The ISMP also stated that Grid was going to reimburse Wythe for the costs it incurred based on the obligations pursued under the ISMP.

DEC issued a letter, on or about February 19, 2014, denying Wythe’s application to the BCP. The letter pertinently states that:

“The Department has determined, based upon the application and the representations and certifications contained therein, that the proposed site is not eligible for the BCP and so, pursuant to ECL Section 27-1405(2)(e) and 1407(9), the Department must

deny your request.<sup>2</sup>

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<sup>2</sup>ECL Section 27-1405(2)(e), which was amended after DEC's denial, had stated, before the amendment, in pertinent part that:

"2. 'Brownfield site' or 'site' shall mean any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant. Such term shall not include real property. . .

(e) subject to any other on-going state or federal environmental enforcement action related to the contamination which is at or emanating from the site subject to the present application.

ECL Section 27-1407(9) states in relevant part that:

9. The department may reject such request for participation if the department determines that the public interest would not be served by granting such request. The department shall consider factors, including but not limited to, the following:

(a) The person has been determined in an administrative, civil or criminal proceeding to have violated any provision of this article, any related order or determination of the commissioner, any regulation promulgated pursuant to this article, or any similar statute, regulation, order of the federal or other state government.

(b) The person has been denied entry into this program based upon one or more of the provisions of this subdivision, or a similar provision of federal or other state law.

(c) The person has been found in a civil proceeding to have committed a negligent or intentionally tortious act, or has been convicted in a criminal proceeding of a criminal act involving the handling, storing, treating, disposing or transporting of contaminants.

(d) The person has been convicted of a criminal offense under the laws of any state or of the United States which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration as that term is used in article one hundred ninety-five of the penal law.

(e) The person has in any matter within the jurisdiction of the department knowingly falsified or concealed a material fact or knowingly submitted a false statement or made use of or made a false statement on or in connection with any document or application submitted to the department."

“The proposed BCP site is part of a larger former manufactured gas plant (MGP) site, currently under an Order on Consent... This Order obligates National Grid to develop and implement a remedial program for the site. In accordance with ECL § 27-1405(2)(e) the site is subject to an ongoing enforcement action related to the contamination at the site. In addition, the Department has been notified by National Grid that they stand ready to cooperate and complete the remediation in accordance with the Order on Consent in conjunction with any proposed redevelopment of the site. Therefore, pursuant to ECL § 27-1409, the public interest would not be served by granting the application.”

Wythe commenced the instant Article 78 proceeding on or about June 24, 2014 by filing a notice of petition, petition with supporting exhibits and a memorandum of law. Wythe contends that this matter presents a pure statutory construction issue that can be determined as a matter of law without deference to DEC’s determination. Wythe argues that the Consent Order is not an “on-going state or federal environmental enforcement action” as contemplated by ECL § 27-1405(2)(e) and that DEC’s invocation of the “public interest” exclusion under ECL § 27-1409 overbroadly applies the statute.

DEC argues, among other points, that (1) Wythe’s remediation of the Site moots its application to compel DEC to admit it to the BCP; (2) DEC has rationally and reasonably denied Wythe’s BCP application because the Consent Order is an “on-going enforcement,” pursuant to ECL § 27-1405(2)(e); and (3) DEC’s denial of Wythe’s BCP application pursuant to the ECL § 27-1409 “public interest” exclusion is not arbitrary and capricious because Grid was actively cooperating with DEC to investigate and remediate contamination on the site.

Wythe's time to serve and file a reply was enlarged until December 1, 2014, pursuant to the October 27, 2014 stipulation of the parties, and no further adjournments were to be requested or granted to either party. However, the matter was once again adjourned from January 28, 2015, until March 4, 2015, despite the prohibition against further delay. Wythe's request at the March 4, 2015 return date to further enlarge its time to serve and file a reply was denied as a matter of discretion, and, after oral argument, the application was marked fully submitted.

### *Discussion*

Reviewing an agency's determination pursuant to a CPLR article 78 proceeding requires deciding if the determination was arbitrary, capricious or an abuse of discretion (*see Abiele Contr. v. New York City School Constr. Auth.*, 91 NY2d 1 [1997]). "An agency's interpretation of a statute it is charged with implementing is entitled to deference if not irrational or unreasonable" (*Matter of Hamil Stratten Props., LLC v New York State Dept. of Env'tl. Conservation*, 79 AD3d 747, 748 [2d Dept 2010], citing *Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]). A court must defer to the determination where the administrative record reflects that factual evaluations in the area of the agency's expertise were involved in the decision-making process (*see Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Env'tl. Conservation*, 14 NY3d 161, 176 [2010]).

DEC's denial of Wythe's BCP application pursuant to the ECL § 27-1409 "public interest" exclusion is not arbitrary, capricious or an abuse of discretion and should be given judicial deference. An agency charged with applying a statute in a manner consistent with the "public interest" must interpret the "public interest" at issue in a manner "directly related to and limited by the general purpose of the legislation itself" (*Matter of Occidental Chem. Corp. v New York State Env'tl. Facilities Corp.*, 113 AD2d 4, 6 [3d Dept 1985] citing *Matter of Intl. Ry. Co. v Public Serv. Commn. of State of N.Y.*, 264 App Div 506, 510 [3d Dept 1942], *aff'd* 289 NY 830 [1943]). ECL § 27-1403 states that the BCP was enacted to "advance the policy of the state of New York to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being...."

Here, DEC and Grid had already entered into an agreement that created a regimen to investigate and clean up the property at issue and had negotiated provisions making Grid financially responsible for all remediation without providing any additional financial benefits to Grid for its efforts. Thus, the public interest, as DEC reasonably determined, would not have been served by permitting Wythe Berry to enter the BCP program inasmuch as it would have triggered unnecessary financial obligations that would not have served the economic well being of the people of the state. Therefore, the denial of Wythe Berry's BCP application

was proper based on the "public interest" issue alone, which moots addressing the remaining arguments. Accordingly, it is

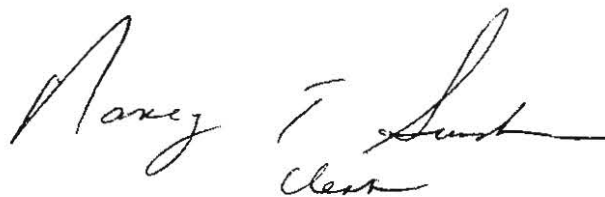
ORDERED that the petition is hereby denied and the instant matter is dismissed in its entirety.

This constitutes the decision and judgment of the court.

E N T E R,



J. S. C.  
Hon. Wavny Toussaint  
J.S.C.



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