Town of Brookhaven v New York State Dept. of Envtl. Conservation (Div. of Envtl. Remediation)
2018 NY Slip Op 31765(U)
July 24, 2018
Supreme Court, Suffolk County
Docket Number: 16-10678
Judge: Martha L. Luft
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

DECISION AND ORDER

TOWN OF BROOKHAVEN,

Petitioner,

COPY

- against -

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DIVISION OF ENVIRONMENTAL REMEDIATION), THE METROPOLITAN TRANSPORTATION AUTHORITY, AND LONG ISLAND RAILROAD (DIVISION/ SUBSIDIARY OF METROPOLITAN TRANSPORATION AUTHORITY),

Respondents.

By: HON. MARTHA L. LUFT
I.A.S. PART 50
Index No. 16-10678

Mot. Seq. # 001- MD
002- MD; CDISPSUBJ

Return Date: 1-9-17 (#001)
1-23-18 (#002)
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1-23-18 (#002)

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In this article 78 proceeding the petitioner Town of Brookhaven (the Town) seeks a judgment reversing, annulling, and setting aside the determination of the respondent New York State Department of Environmental Conservation, Division of Environmental Remediation, (DEC) dated September 30, 2016, which classified a dump site on a parcel of real property owned by the respondent Metropolitan Transportation Authority (MTA) and its subsidiary the respondent Long Island Railroad (LIRR) (collectively the Owners) as "Classification 3" pursuant to Environmental Conservation Law § 27-1305. Article 27 Title 13 of the Environmental Conservation Law (ECL) addresses the public health or the

environmental threats posed by inactive hazardous waste disposal sites (ECL 27-1301 [2]). The DEC may place contaminated sites on the New York State Registry of Inactive Hazardous Waste Disposal Sites (the registry) and classify them on a scale of one to five, from the most to the least hazardous (ECL 27-1305 [2] [b]).

This matter arises in the context of a lengthy environmental investigation into the Owners' property located in the Hamlet of Yaphank, Town of Brookhaven, New York (the dump site or the site). The site is more or less bounded on the north by the LIRR train tracks. It is bounded on the east by River Road, on the south by a parcel of undeveloped residential property and a parcel owned by nonparty Nicolia Ready Mix, Inc. (Nicolia), and on the west by a parcel owned by nonparty Asbestos Transfer Company, Inc. (ATC). It is undisputed that the LIRR used the site to dispose of solid waste and debris from its railroad operations from the 1950s to the 1970s. In 1992, the LIRR discovered buried solid waste and fill material while constructing a railroad siding at the site, and it informed the DEC that its initial tests of the soil at the site revealed the presence of lead and other contaminants exceeding New York State standards. In 2005, the LIRR discovered that the fill had also been placed on the properties owned by Nicolia and ATC.

In this special proceeding, the Town sets forth two claims for relief. In its first claim for relief, the Town alleges that the September 2016 determination must be vacated on the grounds that it is arbitrary and capricious, and that it contradicts and is inconsistent with certain prior findings of the DEC that the dump site poses a significant threat to the public health or the environment. In its second claim for relief, the Town alleges that the determination violates the prior order and judgment of the Court dated May 18, 2016 (Leis III, J.), which reversed a prior determination by the DEC dated May 27, 2014 (the 2014 determination) that removed the dump site from the registry.

As to the Town's claims for relief, it first must be determined if any of the objections in point of law asserted by the respondents require a dismissal as a matter of law. In its answer, the DEC sets forth a single affirmative defense (objection in point of law). In their answer, the Owners set forth five affirmative defenses (objections in point of law). The DEC's objection in point of law contends that the September 2016 determination must be upheld because its classification of the site was rational, lawful, and "not arbitrary and capricious or contrary to law." Said contentions go to the ultimate findings of the Court in this special proceeding, and do not establish the DEC's entitlement as a matter of law to a determination in its favor regarding any of the claims raised in the petition.

The Owners' first objection in point of law is that the Town lacks standing to bring this proceeding. "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (***Hoston v New York State Dept. of Health***, 203 AD2d 826, 611 NYS2d 61 [3d Dept 1994], *citing* ***Society of Plastics Indus., Inc. v County of Suffolk***, 77 NY2d 761, 570 NYS2d 778 [1991]; ***New York State Nurses Assn. v Axelrod***, 152 AD2d 888, 544 NYS2d 236 [3d Dept 1989]). A party challenging an administrative action, for standing purposes, must show (1) that the party would suffer direct harm, injury that is in some way different from that of the public at large, and (2) that the in-fact injury of which the party complains (its aggrievement, or the adverse effect upon it) falls within the

"zone of interests," or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted (*see* ***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*; *see also* ***Gernatt Asphalt Products, Inc. v Town of Sardinia***, 87 NY2d 668, 642 NYS2d 164 [1996]; ***Brown v County of Erie,*** 60 AD3d 1442, 876 NYS2d 801 [4th Dept 2009]).

Pursuant to ECL 27-1305 (1), "[u]pon identification of an inactive hazardous waste disposal site not included in the registry for the immediately preceding year, the [DEC] shall notify in writing the chief executive officer of each county, city, town and village and the public water supplier which services the area in which such site is located that such site has been so identified." Pursuant to ECL 27-1305 (2) (c) (6), the DEC "shall, within ten days of any determination notify the local governments of jurisdiction whenever a change is made in the registry pursuant to this subdivision." In its petition, the Town alleges, among other things, that it has successfully challenged the 2014 determination of the DEC regarding the site and its classification, and that the contaminants in the dump site pose an acute danger to public health and the environment, including "the nearby environmentally sensitive Carmans River Estuary" located within the Town. Thus, it is determined that the harm to the Town is direct and different from the public at large, and that its alleged injury falls within the zone of interest to be protected by the ECL.

In addition, a determination regarding standing rests, in part, on policy considerations, that a party should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (*see* ***Society of Plastics Indus., Inc. v County of Suffolk***, *supra*). Regarding the Town's claims for relief, the interests of justice require recognition of its standing to bring this proceeding. It is clear that the public interest would be subverted if no one were found to have standing to challenge the determination herein. Under the totality of the circumstances, even if the Town had not established direct harm different from that of the public at large, it has properly pled standing herein.

The Owners' second and third objections in point of law contend that the Town's allegation that the DEC has selected or intends to select an inappropriate remedy to resolve the environmental issues at the dump site is not ripe for review, and that a judicial determination as to the remedy to be implemented would "improperly displace the primary jurisdiction" of the DEC. To the extent that the petition alleges that a remedy or remediation plan has been or will be selected by the DEC in this matter, the undersigned declines to address the merits of the claim. Whether agency action is ripe for review depends upon several considerations (***Gordon v Rush***, 100 NY2d 236, 762 NYS2d 18 [2003]). First, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (***Matter of Essex County v Zagata***, 91 NY2d 447, 453, 672 NYS2d 281, 285[1998], quoting ***Chicago & S. Air Lines v Waterman S.S. Corp.***, 333 US 103, 113, 68 S Ct 431, 437 [1948]; *see* ***Gordon v Rush***, 100 NY2d at 242, 762 NYS2d at 21). In other words, " 'a pragmatic evaluation [must be made] of whether the "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" ' " (***Essex County v Zagata***, 91 NY2d at 453, 672 NYS2d at 284 [citations omitted]; *see* ***Gordon v Rush***, 100 NY2d at 242, 762 NYS2d at 22). Here, the record reveals that a final remedy or remediation plan for the site has not been selected.

In addition, based upon its second claim for relief, the petitioner seeks relief in the nature of mandamus to compel directing the DEC to adopt a remediation plan for the site in conformance with the order and judgment of the Court dated May 18, 2016. 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, 292 [1994]; *see* ***Yager v Massena Cent. School Dist.***, 119 AD3d 1066, 989 NYS2d 177 [3d Dept 2014]). It is determined, as discussed below, that the Town's contention that the order and judgment of the Court dated May 18, 2016 directs the DEC to adopt the remedy requested by the Town is without merit, and that the determination of any remedy is within the judgment or discretion of said agency subject to appropriate review by the courts. Thus, to the extent the petition contains prayers for relief regarding the choice of remedy or remediation plan regarding the site, said requests are dismissed as a matter of law.

The Owners' fourth objection in point of law contends that the petition must be dismissed because the Town has failed to join necessary parties Nicolia and ATC, whose business operations would be disrupted by the remedy or remediation plan sought by the Town. In light of the determination that the Town is not entitled to relief regarding this issue, it is determined that the subject objection in point of law is academic.

The Owners' fifth objection in point of law contends that the petition fails to state a cause of action. A respondent may raise an objection in point of law in its answer or by a motion to dismiss the petition (CPLR 7804 [f]). Generally, a party may only move to dismiss a pleading before service of the responsive pleading is required (*see* CPLR 3211 [e]). Here, the Owners did not move to dismiss the petitioner prior to the service of their answer. However, failure to state a cause of action is one of the permissible grounds for a post-answer motion to dismiss (*id.*), and such a motion, had the Owners so moved, would have been deemed to have been brought under CPLR 3212. This special proceeding is not a plenary action and, as such, a motion for summary judgment is an improper procedural vehicle herein (*see e.g.* ***City of New York v Long Is. Airports Limousine Serv. Corp.***, 110 Misc2d 338, 442 NYS2d 365 [1981], *affd as mod* 91 AD2d 1149, 458 NYS2d 751 [3d Dept 1983], *on reargument* 96 AD2d 998, 467 NYS2d 93 [3d Dept 1983], *affd* 62 NY2d 846, 477 NYS2d 613 [1984]; ***Hecht v Maness***, 23 Misc2d 889, 206 NYS2d 587 [App Term, 2d Dept 1960]). Nonetheless, a court is required to make a summary determination of a special proceeding using the same test that is applied to a summary judgment motion (see CPLR 409 [b]; ***Mega Personal Lines Inc. v Halton***, 297 AD2d 428, 746 NYS2d 204 [3d Dept 2002]; ***Lefkowitz v McMillen***, 57 AD2d 979, 394 NYS2d 107 [3d Dept 1977]). Thus, said contention goes to the ultimate findings of the Court in this special proceeding, and do not establish the Owner's entitlement as a matter of law to a determination in its favor dismissing the petition.

The Court now turns to the first claim for relief wherein the Town seeks to annul the DEC's classification of the site on the grounds that it is arbitrary and capricious, and that it contradicts and is

inconsistent with the DEC's prior findings that the dump site poses a significant threat to the public health or the environment. In considering this claim, it is appropriate to set forth some additional information which provides a background to the dispute.

As noted above, ECL 27-1305 provides for the creation of a registry of inactive hazardous waste disposal sites and requires that the DEC classify such sites on a scale of one to five, from the most to the least hazardous. Considering the three classifications relevant herein, ECL 27-1305 [2] [b] provides:

> In making its assessments, the department shall place every site in one of the following classifications:
>
> (1) Causing or presenting an imminent danger of causing irreversible or irreparable damage to the public health or environment--immediate action required;
>
> (2) Significant threat to the public health or environment--action required;
>
> (3) Does not present a significant threat to the public health or environment--action may be deferred;

It is undisputed that, upon discovering the contamination at the site, the LIRR undertook a lengthy process of investigation and intermittent remediation at the site with the oversight and direction of the DEC. In the process, the DEC made certain statements or findings which form the basis of the allegations in the petition that the DEC has failed to follow its own precedent in determining that the site is classified under ECL 27-1305 [2] [b] [3]). That issue will be addressed after the undersigned determines whether the DEC's 2016 determination and classification of the site as Classification 3 was arbitrary and capricious.

It is well settled that in a special proceeding seeking judicial review of administrative action, the court must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious (*see* ***Flacke v Onondaga Landfill Sys.***, 69 NY2d 355, 514 NYS2d 689 [1987]; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, 53 NY2d 186, 440 NYS2d 875 [1981]). In reviewing an administrative action a court may not substitute its judgment for that of the agency responsible for making the determination (*see* ***Flacke v Onondaga Landfill Sys.***, *supra*; ***Matter of Warder v Board of Regents of Univ. of State of N.Y.***, *supra*). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (***Matter of Pell v Board of Education,*** 34 NY2d 222, 356 NYS2d 833 [1974]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

A review of the certified record and return submitted by the DEC reveals that, afer discovering the contaminated fill at the site, the LIRR undertook an investigation which included soil sampling, groundwater well installations and sampling, ground penetrating radar investigation, air monitoring and

a site survey. On February 7, 1996, the DEC and the LIRR entered into an order on consent (the consent order) requiring the LIRR to prepare a preliminary site assessment report and to obtain data which would enable the DEC to determine whether the waste or fill at the site constituted a significant threat to public health or the environment. The consent order indicated that the site had been listed on the registry as Class 2(a), "a temporary classification which indicates that investigation is required" to determine whether the site poses such a threat. The LIRR forwarded the results of its earlier site investigation to the DEC by letter dated April 19, 1996. By letter dated October 15, 1997, the DEC approved the work plan for the preliminary site assessment report.

On October 26, 1998, the DEC issued comments and revisions to the draft of the preliminary site assessment report, which required the LIRR to conduct additional on-site and off-site surface and sub-surface soil and groundwater sampling and analysis. In January 1999, the LIRR submitted the revised preliminary site assessment report to the DEC, which confirmed the presence of lead, arsenic, copper, zinc, mercury and nickel in the on-site soil and groundwater in amounts that exceeded the DEC's environmental standards. The preliminary site assessment report included a fish and wildlife impact analysis, which noted that the Carmans River lay within a two-mile radius of the site, that the site is not within the Carmans River corridor and does not encroach on the river's wetlands, and that the site does not encroach on the Suffolk County Pine Barrens.

After additional on-site and off-site surface and sub-surface soil and groundwater sampling and analysis, air monitoring and site surveys, the LIRR submitted a draft supplemental site assessment report to the DEC in April 2000. By letter dated October 16, 2000, the LIRR responded to the technical comments made and revisions requested by the DEC regarding the draft supplemental site assessment report and submitted its final supplemental site assessment report. The supplemental site assessment report confirmed the presence in the surface and sub-surface soil of contaminants in amounts that exceeded the DEC's standards, identified areas of environmental concern, including a drainage swale within the dump site, and noted that on-site and off-site groundwater had not been found to be adversely impacted by the site conditions. The supplemental site assessment report recommended further investigation into the areas of environmental concern, the evacuation and proper off-site disposal of the impacted soil in any "hot spot" as an interim remedial measure, and a feasibility study to evaluate appropriate engineering alternatives to close the site and prevent the migration of contaminants.

On October 15, 2002, the DEC and the LIRR entered into a voluntary cleanup program agreement (VCP) which required the LIRR, under the DEC's oversight, to submit work plans for the investigation into the nature and extent of the contaminants on the site, any interim remedial measures required, any final remedial action required, and any post-remedial construction, monitoring or maintenance required. After the LIRR submitted a draft investigative work plan, the DEC made technical comments and requested certain revisions to the draft in correspondence dated July 23, 2003. By letter dated October 27, 2002, the DEC, in consultation with the New York State Department of Health, approved the investigative work plan as submitted and revised by the LIRR. It also approved an associated site-specific health and safety plan revised prepared by the LIRR in September 2003.

In June 2004, the LIRR submitted a draft site investigative report detailing the results of its study of the nature and extent of the contamination on-site and off-site. After receiving technical comments and revisions regarding the draft from the DEC in letters dated October 4, 2004 and December 7, 2004, the LIRR submitted its revised site investigative report in January 2005. Said report recommended a number of interim remedial measures to reduce any potential exposure of the contaminates at the site to humans or wildlife, the development of a report to identify and evaluate a final remedy to the contamination at the site, additional investigation of the nature and extent of the contamination of certain limited areas of concern, and securing the existing perimeter fencing around the site.

After investigation by the LIRR, and multiple instances of technical comment and suggested revisions by the DEC, the DEC approved the LIRR's September 2005 interim remedial measure work plan on November 23, 2005. The interim remedial measures contained in the work plan were implemented by the LIRR, with a modification approved by the DEC, including the evacuation of approximately 1,013 cubic yards of soil from the dump site swale, which was then backfilled with clean fill and re-planted with trees.

After additional investigation by the LIRR, and multiple instances of technical comment and suggested revisions by the DEC, the DEC approved the LIRR's November 2006 supplemental investigation and remedial selection work plan in a letter dated February 23, 2007. The LIRR then implemented said work plan and reported its findings to the DEC in its supplemental site investigative report dated June 2008. Based upon the results of said investigations, the DEC notified the LIRR that the department had determined that remediation of the site was necessary, and directed the LIRR to prepare a remedial action work plan in its letter dated July 16, 2008.

By letter dated June 22, 2012, the DEC disapproved the draft remedial action work plan submitted by the LIRR, and requested 16 modifications to the document. After multiple telephone calls and emails exchanged between the parties, and submissions by the LIRR regarding an appropriate landfill capping system, the LIRR submitted a revised remedial action work plan on December 20, 2012 (the RAWP). The RAWP noted the presence of contaminated fill material ranging from two and one-half feet to 24 feet in thickness in areas of the site and the Nicolia and ATC properties, which lay immediately above a layer of soil consisting of glacial outwash sand. In analyzing 175 subsurface soil samples, said work plan noted that a number of metals and polycyclic aromatic hydrocarbons (PAHs) were present in the subject fill material in concentrations in excess of DEC standards, and that the distribution of said metals and PAHs "are restricted to the fill material and are not impacting the underlying glacial outwash sand."

The RAWP also reported that the results of groundwater samples revealed that the metals of concern herein were, with one exception, generally within DEC groundwater standards, and that the metals detected in on-site and downgradient groundwater were at concentrations comparable to those in

upgradient groundwater samples.[1] While the RAWP noted that some off-site downgradient groundwater samples exhibited concentrations of metals above DEC groundwater standards, it concluded that, because these concentrations exceed said standards by an amount less than the amount of on-site samples and due to the relative insolubility of these metals, "groundwater was not considered a potential exposure pathway for site-related contaminants."

Section 2.2 of the RAWP, entitled Description of Remedial Alternatives, analyzed three remedial actions regarding the dump site. In Section 2.2.1, entitled "Alternative 1: "No Further Action with Institutional Control," the LIRR notes that, because the fill material would not be removed or consolidated and placed under a soil or asphalt cover certain institutional controls would be required. Alternative 1 provides for the filing of a restrictive deed to restrict the use and control of the LIRR property and all of the affected adjacent properties, the maintenance of the fencing around the site, the implementation of a long-term groundwater monitoring program, and the establishment of agreements between the LIRR and Nicolia and ATC providing for access to their properties.

In Section 2.2.2, entitled "Alternative 2: Partial Fill Consolidation, Placement of a Geomembrane Cap, Semi-Permeable Soil Cover/Asphalt Cover and Institutional Controls," the RAWP provides for remedial action at the site including, among other things, the placement of a one-foot semi-permeable soil or aggregate cover on portions of the LIRR property and the Nicolia property, the excavation of all contaminated fill material from an undeveloped residential property which abuts the site, the consolidation of excavated contaminated fill of approximately 7,000 cubic yards on a portion of the LIRR Property, and the installation of an impervious geomembrane cap to effectively encapsulate the consolidated fill. Alternative 2 also proposes the placement of a 12-inch thick asphalt cover over the entire ATC property after the removal of the existing degraded asphalt and some fill material, which would also be consolidated on the LIRR Property prior to placement of the geomembrane cap; the construction of several recharge basins to manage post-construction storm water runoff from the site; and the excavation of surficial soil before placement of the soil or aggregate cover. In addition, Alternative 2 provides for the implementation of the institutional controls contained in Alternative 1.

Section 2.2.3 of the RAWP, entitled "Alternative 3: Complete Excavation and Off-site Disposal of All Fill Exceeding NYSDEC SCOs[2] and Placement of Asphalt Cover," provides for remedial action at the site, including the removal, to the extent practical, of all contaminated fill material located on the LIRR and Nicolia properties and the undeveloped residential property, the transportation of the contaminated fill off-site, and the substantial backfilling and site restoration required once the fill material has been removed. Alternative 3 also includes the placement of a 12-inch asphalt cover on the ATC property, noting that it is not technically or practically feasible to remove the contaminated

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[1] Upgradient monitoring wells provide samples of groundwater which is flowing towards the site in question, while downgradient wells sample groundwater which has flowed through or underneath the site and has or will continue to flow away from the site. It is undisputed that the comparison of such samples is a standard technique used to determine whether a site has contributed to off-site groundwater contamination.

[2] The acronym stands for the DEC's standards and "soil cleanup objectives."

fill at that location without the demolition of the entire ATC facility, and the implementation of the institutional controls contained in Alternative 1.

After considering a number of factors in a comparative analysis of the three remedial alternatives, the RAWP recommended Alternative 2 as the remedial action to be implemented regarding the dump site. Alternative 1 was not recommended because it would not address the potential threats to public health or the environment. Alternative 3 was not recommended because, among other things, it would significantly disrupt the business operations of Nicolia and ATC, it would create the potential for on-site and off-site migration of contaminated dust, and it would have the greatest impact on the surrounding properties and the environment due to the large amount of excavation and handling of contaminated fill materials.

By letter dated May 27, 2014, the DEC approved the RAWP and issued a declaration statement and decision document (collectively, the 2014 determination) for the site under the VCP. In its declaration statement, the DEC sets forth the elements of the remedy for the site, which essentially tracks the elements of Alternative 2 under the RAWP, with elements of appropriate DEC oversight. In its decision document, the DEC indicates that it considered all public comments regarding the proposed remedy for the site in selecting a remedy, and it sets forth, among other things, summaries of the environmental assessment of the site and the objectives for the remedial program selected. The decision document also sets forth the elements of the selected remedy included in the declaration statement, and it states that the selected remedy will be referred to as the consolidation/capping and storing remedy (herein, cap and store remedy).

In September 2014, at the request of the Town, the LIRR agreed to install two additional groundwater monitoring wells in off-site locations to the west-southwest of the site. By letter dated November 19, 2014, the LIRR submitted the results of its supplemental investigation, conducted according to the Town-approved work plan for the groundwater study. Based on the results of the groundwater sampling, the letter report noted that, with the exception of iron, the metals detected did not exceed DEC standards, that the filtered sample of iron did not exceed such standards, and that, under the circumstances, iron was not a contaminant of concern.

As noted above, the Town challenged the 2014 determination in an earlier special proceeding pursuant to CPLR article 78 which resulted in that determination being annulled and set aside by the order and judgment of the Court dated May 18, 2016 (Leis III, J.). For reasons that will become obvious, the undersigned will not address the issues raised by the Town regarding Justice Leis' order and judgment before completing this summary of the subject administrative record.

After the 2014 determination was annulled, the DEC, by letter dated September 30, 2016, notified the LIRR of its determination to include the site in the registry of inactive hazardous waste disposal sites effective in 20 days (the 2016 determination). The letter further advised the LIRR that the site would be listed as classification 3 and, once the listing became effective, the site would become subject to certain restrictions as set forth in 6 NYCRR Part 375, and enclosed a copy of the inactive

hazardous waste disposal report which would appear in the registry. Said copy includes the relevant language set forth in the DEC's site classification report finalized on October 21, 2016. The site classification report, indicating its review and approval by officials of the DEC and New York State Department of Health between June 14, 2016 and August 24, 2016, summarizes the findings of the investigations as of the date of the report, and concludes, among other things, that off-site groundwater, including groundwater in the direction of the Carmans River has not been impacted by the on-site contaminants. The report states that the site is not within the Carmans River Corridor and is not within a regulated wetland area, that the on-site contaminates are not affecting the public water supply, and that the site is completely fenced.

The Town now challenges the 2016 determination on the grounds that it is arbitrary and capricious. In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (***Matter of Pell v Board of Education***, 34 NY2d 222, 356 NYS2d 833 [1974]; ***Matter of Galaxy Bar & Grill Corp. v New York State Liq. Auth.***, 154 AD3d 476, 61 NYS3d 539 [1st Dept 2017]). In addition, the determination of an administrative body is generally entitled to great deference from the Court (*see* ***Matter of Levitt v Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining***, 79 NY2d 120, 580 NYS2d 917 [1992]; ***Matter of Niagara Falls Power Co. v Water Power and Control Comm.***, 267 NY 265, 196 NE 51 [1935]; ***County of Nassau v New York State Pub. Empl. Relations Bd.***, 151 AD2d 168, 547 NYS2d 339 [2d Dept 1989]; *affd sub nom.* ***Matter of County of Nassau (Nassau Community Coll.) v New York State Pub. Empl. Relations Bd.***, 76 NY2d 579, 561 NYS2d 895 [1990]). The presumption is that an administrative agency charged with implementing the policies of a statute has developed an expertise that requires a court to accept its construction of the statute if not unreasonable (***Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.***, 48 NY2d 398, 423 NYS2d 466 [1979]), and its interpretation of its regulations unless "irrational and unreasonable" (***Matter of Marzec v DeBuono***, 95 NY2d 262, 716 NYS2d 376 [2000]).

In arguing that the 2016 determination is arbitrary and capricious, the Town did not initially submit any evidence to call the factual and scientific findings of the DEC into question, let alone to permit the Court to find said determination irrational and unreasonable. Instead, after commencing this special proceeding, the Town moved by order to show cause for leave to amend its petition. In its application, the Town submits the affidavit of Stephanie O. Davis (Davis), a certified professional geologist, and the vice president of FPM Group Ltd., the consulting firm retained by the Town to assist in this proceeding. In her affidavit, Davis swears that it is her professional opinion that there are multiple environmental deficiencies in the cap and store remediation plan, and that the affidavits submitted by the DEC and the LIRR "fail to justify the adoption of the 'cap and store' plan (Alternative 2)."

Davis indicates that the affidavit submitted by the DEC in opposition to the petition states that the DEC, in selecting a remedy for the site, did not take into consideration the proximity of the Carmans River, and that the remediation plan adopted in the 2014 determination is not in accordance with the conservation and management plan adopted by the Town regarding the river. A review of the DEC's

affidavit, and the paragraph cited by Davis, reveals that the affiant does not indicate that the DEC failed to consider the proximity of the site to the Carmans River, and the administrative record belies that claim. In addition, Davis fails to establish that the DEC is obligated to meet the Town's plan to protect the Carmans River rather than the ECL and its implementing regulations. More importantly, Davis does not address the critical issue of whether the DEC's current classification of the site is arbitrary and capricious. Instead, she states in conclusory fashion that the prior remediation plan "is not protective of the environment and not consistent with the [conservation and management plan adopted by the Town], and that Alternative 2 fails to restore the site to pre-disposal conditions," although that remedy is feasible. Davis further indicates that the affidavit submitted by the LIRR in opposition to the petition acknowledges the presence of contaminants which in some cases exceed DEC standards, and she states in conclusory fashion that "[t]hese conditions support the selection of a more protective remedy for the landfill materials" and their removal from the Carmans River watershed.

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 725, 480 NYS2d 195, 197 [1984], quoting ***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1, 3 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). Here, to the extent that Davis' affidavit attempts to render an expert opinion, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Moreover, Davis fails to address the issue before the Court, focusing instead on alleged deficiencies in the prior remedy approved by the DEC without acknowledging that the DEC will be considering whether to approve that remedy, a modified remedy, or an entirely new remediation plan for the site.

Thus, the Town's contention that the 2016 determination of the classification of the subject hazardous waste disposal site is arbitrary and capricious based upon the administrative record is rejected. The Town next contends that the DEC has failed to follow its previous determinations that the site presents a significant threat to the public health or the environment, requiring its listing on the registry as Classification 2. A decision of an administrative agency is arbitrary and capricious if it neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts (***Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington***, 97 NY2d 86, 735 NYS2d 873 [2001]; ***Matter of Benali, LLC v New York State Dept. of Envtl. Conservation***, 150 AD3d 986, 55 NYS3d 118 [2d Dept 2017]).[3]

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[3] As discussed below, the Town also contends that a correct classification of the site would preclude the LIRR from entering into the DEC's brownfield cleanup program to implement Alternative 2 as the remedial plan for the site.

The Town's contention that the DEC failed to adhere to its own precedents is without merit. In support of its contention on this issue, the Town highlights language in the 2014 determination wherein the DEC states that "[t]he disposal of contaminants at the site has resulted in threats to public health and the environment ... The disposal or release of contaminants at this site ... has contaminated various environmental media." The Town also points out that, in an action by the DEC against the LIRR regarding the site, the DEC stated that "the contaminants at the Site have the potential to migrate from the Site, and people on the Site may come into contact with contaminants. The Site therefore may present an imminent and substantial endangerment to public health or the environment," and that "[u]nless properly remediated, the Site may present an imminent and substantial endangerment to health or the environment." In addition, the Town insists that the DEC's 2009-2010 State Agency Environmental Audit Report indicates that the site "poses a potential substantial threat to the public health or the environment," which parallels the definition of "a significant threat to the environment" contained in 6 NYCRR §375-2.7 (a) (1) and (2). Finally, the Town argues that the RAWP's rejection of Alternative 1, because it is "not protective of public health or the environment since there is the potential for direct exposure to metal contamination present in on-site surface soil," indicates that the DEC has failed to adhere to its own determinations regarding the site. The quoted language does not indicate, nor does the administrative record support a conclusion, that the DEC had made a finding that the threats to the public health or the environment were "significant," as required under the statute. In fact, the administrative record indicates that the DEC did not fail to adhere to its prior determinations herein, and that it carefully considered whether the contaminants on the site were having a significant impact on the public health or the environment, or posed such a threat in the future.

The Court now turns to the second claim for relief wherein the Town alleges that the 2016 determination is ultra vires as it violates the prior order and judgment of the Court dated May 18, 2016 (Leis III, J.). Said order and judgment states, in pertinent part:

> ADJUDGED that ... [the 2014 determination] ... is annulled upon the ground that the DEC Determination does not comply with the requirements of ECL §27-1301, et seq., for failure of the NYSDEC to place the LIRR Yaphank Site in the "Registry" of "Inactive Hazardous Waste Sites" pursuant to ECL §27-1305(1), and for failure to classify the LIRR Yaphank Site as one of the five categories enumerated in ECL§27-1305(2) ... and it is further
>
> ADJUDGED AND DECLARED, ... that [the 2014 determination] is ultra vires because the Voluntary Cleanup Program of the NYSDEC ... is ultra vires and beyond the authority of the NYSDEC as not having been authorized by the New York State Legislature and having been eliminated upon the enactment of the Brownfield Cleanup Program in ECL §27-1401 et seq., and it is further

* * *

> ORDERED AND ADJUDGED that [the 2014 determination] is remanded to the NYSDEC with the direction that the DEC comply with Title 13 of the ECL including by, among other things, placing the LIRR Yaphank Site on the "Registry" of Inactive Hazardous Waste Sites for classification of the inactive hazardous waste site as either Class 1 or 2 or other appropriate classification pursuant to ECL §27-1305, and for the NYSDEC to impose an appropriate remediation plan upon the MTA-LIRR respecting the LIRR Yaphank Site and to take all appropriate steps required by Title 13 of the ECL and its implementing Regulations in respect of the LIRR Yaphank Site or, if after classification, place the site into the Brownfield Cleanup Program as permitted by law...

Again, in considering the Town ultra vires claim, it is appropriate to set forth additional information providing a background to the subject issue. It is undisputed that, upon the signing of the voluntary cleanup agreement under the VCP, the DEC gave the site an "N" classification, which was outside the five classifications contained in ECL 27-1305 (2), and the site was removed from the registry. It is also undisputed that the DEC has now classified the site pursuant to ECL 27-1305 [2] [b], albeit as a Classification 3, and properly implemented the brownfield cleanup program (BCP), which allows the type of remediation plan set forth in Alternative 2, as set forth above. In addition, the DEC mandated that the LIRR implement a remediation plan for the site based upon the VCP in conformance with Alternative 2, and it is currently considering an application by the LIRR to enter the BCP which will lead to a review of the appropriate remediation plan for the site.

Regardless of the import of this additional information, the plain language of the subject order and judgment is contrary to the Town's contention that the DEC must place the site in a Classification 1 or Classification 2. Thus, it is determined that the Town's second claim for relief is without merit. Accordingly, the petition is denied in its entirety.

As mentioned above, afer the commencement of this special proceeding, the Town moved for leave to amend its petition to assert claims for a preliminary injunction enjoining the DEC from granting the LIRR's application to enter the site into the BCP, and for a judgment declaring said application invalid. The sole basis for the amendment to the petition is the alleged arbitrary and capricious nature of the DEC's classification of the site in the 2016 determination, and the alleged impropriety of acceptance of the site into the BCP when the 2016 determination is annulled and set aside, and the DEC is directed by the Court to place the site on the registry in Classification 1 or Classification 2. In light of the determination that the DEC's the 2016 determination was not arbitrary and capricious, the motion to amend the petition is deemed academic.

Accordingly, it is

ORDERED that the motion by the petitioner for an order pursuant to CPLR 402 for leave amend the petition and to file and serve the proposed verified amended petition is denied.

Submit judgment.

Dated: July 24, 2018

Martha L. Luft
A.J.S.C.

HON. MARTHA L. LUFT