

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

In the Matter of the Application of ^x
BRONX ENVIRONMENTAL HEALTH AND
JUSTICE, INC.,
Petitioner,

INDEX NO. 25754/04

BY: GRAYS, J.

DATED:

For a Judgment pursuant to CPLR
Article 78 And for Declaratory
Relief pursuant to CPLR § 3001

-against-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

x

In this Article 78 proceeding petitioner Bronx Environmental Health and Justice, Inc. (Bronx Environmental) seeks judgment vacating the findings of respondent New York City Department of Environmental Protection (DEP) dated July 16, 2004, which selected the Mosholu golf course located in Van Cortlandt Park, Bronx, New York as the preferred site for a water treatment chemical plant (WTP), and ordering the DEP to commence additional SEQRA and CEQR proceedings and awarding it attorney's fees, costs and disbursements. Petitioner separately moves for an order permitting it to file a late expert's affidavit.

Petitioner Bronx Environmental is a non-profit community organization dedicated to working for the interests of the Mosholu neighborhood in Bronx County, New York.

Bronx Environmental's members live, work, and/or attend school and engage in recreational activities near Van Cortlandt Park.

Respondent DEP is the lead agency pursuant to SEQRA. The DEP is the applicant as well as the entity that approves the application for permission to construct and operate the WTP.

The Croton Watershed--a series of interconnected reservoirs and lakes located primarily in Westchester, Dutchess and Putnam counties--is one of New York City's three principal drinking water sources, supplying between 10% and 30% of the City's requirements. In 1992, after preparing a report concluding that filtration would be necessary to ensure the safety of water from the Croton Watershed, the City entered into a stipulation with the New York State Department of Health acknowledging that State and Federal law required it to build a filtration plant. The City agreed to complete the design of a water treatment plant by July 1995, and complete construction by July 1999. In 1993, the United States Environmental Protection Agency determined that the Surface Water Treatment Rule (40 CFR 141.70-141.75) required the City to filter and disinfect its Croton water supply. Without challenging the EPA's determination, the City began designing a water treatment plant. In 1997, the City's lack of progress resulted in an action by the Federal government in the District Court for the Eastern District of New York against the City and the DEP for violation of Federal law. The State

intervened as a plaintiff, alleging noncompliance with the State Sanitary Code. Recognizing that the public interest would be best served by resolving the litigation, the parties, in 1998, executed a consent decree requiring filtration and disinfection of the Croton water. The decree establishes 26 "milestones," or deadlines, for stages of the water treatment plant, including a final Environmental Impact Statement and approvals under the City's Uniform Land Use and Review Procedure by July 31, 1999; construction completion by September 1, 2006; and operation by March 1, 2007. Milestone 14 provides that by July 31, 1999 "in the event that use of the selected site for the [plant] requires state legislation, the City shall request state legislation and home rule message from the City Council." Milestone 15 further specifies that any such legislation must be obtained by February 1, 2000. Failure to comply, under the consent decree, subjects the City to substantial penalties (United States of America v City of New York, 30 F Supp 2d 325 [1998]). In 2002, a supplement to the Consent Decree extended the milestones for the completion of construction. A second supplement to extend the milestones for the design, construction and operation of the water filtration plant was recently executed by the parties and was submitted to the federal court.

As designed, the water treatment plant is to be a 473,000 square foot industrial facility covering 23 acres, with a

raw water pumping station, finished water pumping station and tunnel linking the plant to a distribution system near another reservoir. It will operate around the clock, seven days a week, filtering 290 million gallons of water and producing up to 61 tons of "dewatered sludge cake" daily. Once the plant is operational, the Croton water will be transported there for treatment, fluoridation, chlorination and distribution. After considering several locations, in December 1998, the City announced that its preferred site was the Mosholu Golf Course in Van Cortlandt Park, the City's third largest park, dedicated as parkland by an act of the Legislature in 1884 (see L 1884, ch 522). The Court of Appeals in Friends of Van Cortlandt Park v City of New York (95 NY2d 623 [2001]), determined that the use of parkland for this purpose required the prior approval of the State Legislature. In 2003, after the City Council adopted a home rule message requesting the legislation, the State Legislature authorized the City to alienate the proposed site in Van Cortlandt Park for the purpose of building and operating a water filtration plant. The State legislation required the City to obtain the City Council's concurrence for locating the plant in Van Cortlandt Park. After a public hearing, the City Council adopted the required resolution on September 28, 2004. The State legislation also required the DEP to prepare a supplemental environmental impact statement.

The DEP issued an Environmental Impact Statement (EIS) in 1999, which reviewed eight alternative sites, including the Mosholu golf course, pursuant to SEQRA and CEQR. The 1999 EIS included a description of the proposed project at all eight sites; the need for the project; engineering analyses leading to and alternatives to the proposed project; methods of analysis; descriptions of existing conditions and future conditions without the project; identification and evaluation of potential impacts of the project and its alternatives; mitigation measures; and a discussion of nonfiltration/watershed protection. In August 2003, the DEP issued a draft scope of work which evaluated the potential significant environmental impacts on the three sites then under consideration, including the Van Cortlandt Park site. In September 2003, the DEP held public hearings in the Bronx and Westchester County. In December 2003, the DEP published a Draft Supplemental EIS (DSEIS) and held additional public hearings in February and March 2004 in the Bronx and Westchester County. On June 30, 2004, the DEP issued the Final Supplemental EIS (FSEIS) in which it reviewed and compared the potential environmental impact of constructing and operating the water treatment plant at the three remaining sites under consideration, and identified the Mosholu golf course in Van Cortlandt Park as the preferred site for the water treatment plant. On July 16, 2004, the DEP Commissioner, Christopher Ward, issued a Statement of Findings, pursuant to

SEQRA/CEQR, in which he determined that the Mosholu site in Van Cortlandt Park was the most suitable location for the Croton water treatment facility.

Petitioner's motion for a preliminary injunction enjoining construction activities at Van Cortlandt Park was granted by this court in an order dated January 12, 2005. The Appellate Division, in an order dated February 4, 2005, granted the DEP leave to appeal and stayed enforcement of the order of January 12, 2005, pending the hearing and determination of the appeal (Matter of Bronx Environmental Health and Justice, Inc. v New York City Department of Environmental Protection, ___ AD3d ___, [February 4, 2005]).

Petitioner commenced the within Article 78 proceeding on November 15, 2004, and alleges that the DEP's selection of Van Cortlandt Park as the preferred site is in violation of law, is arbitrary and capricious and an abuse of discretion. Petitioner in essence asserts that the DEP should have selected the Eastview site rather than the Van Cortlandt Park site for the construction of the WTP. Petitioner, in its first cause of action, alleges that the DEP failed to make available all of the underlying reports and data that formed the basis of the DEIS and FSEIS.

In the second cause of action, petitioner alleges that the DEP, in violation of Environmental Conservation Law § 8-0109(2)(b), failed to include particulate matter air quality modeling data in

the DSEIS to identify project-related air quality impacts from diesel engines and other mobile sources, which would have allowed the public to have commented on the data. It is asserted that the absence of this data is arbitrary and capricious, contrary to law and an abuse of discretion. In the third cause of action, petitioner asserts that the FSEIS failed to set forth mitigation measures as regards an increase in particulate matter and adverse health impacts during construction of the facility. In the fourth cause of action it is alleged that the DEP failed to minimize the potential adverse impact of vehicular exhaust resulting from increased truck traffic during construction on asthma related health issues in the community. The fifth cause of action alleges that the DEP has evinced a complete unwillingness to involve the public in the SEQRA process, in violation of 6 NYCRR § 617.3(d). The sixth cause of action alleges that the DSEIS and FSEIS, in violation of 6 NYCRR § 617.9(b)(5)(v), are factually inaccurate and do not contain accurate evaluations of range of reasonable alternatives and are subject to systemic biases, such that a comparative assessment of the sites cannot be properly made. The seventh cause of action alleges that the decision to construct the WTP in a section of Van Cortlandt Park that is adjacent to a poor minority neighborhood discriminates against petitioner's basic right to health and environment, in violation of Article I, Section 11 of the State Constitution. In

the eighth cause of action it is asserted that the DEP, as the governmental steward and provider of air quality, park space and neighborhood character, violated section 8-107 of the Administrative Code, in that it denied the minority community surrounding the Van Cortlandt Park site the advantages of cleaner air and open park space, by choosing to build the WTP in Van Cortlandt Park.

Respondent DEP, in opposition, asserts that in compliance with the procedural and substantive requirements of SEQRA and CEQR, it conducted a detailed, comprehensive examination of the potential environmental impacts of the project. Respondent asserts that petitioner's claim that it did not make available to the public certain documents referenced in the DSEIS and FSEIS is inaccurate and lacks merit. It is asserted that the documents identified by petitioner were not used by the DEP to assess the potential environmental impact of the WTP, and were not relied upon by the DEP in reaching its conclusions contained in the DSEIS and FSEIS. In addition, it is asserted that the subject documents were not incorporated by reference and were cited by the DEP only to provide background information to help the public understand the historical context within which the decision to site and construct a WTP was reached. It is asserted that all of the information and data that the DEP relied and based its conclusions upon in the SEIS were included in the body of the FSEIS. As regards the second and

fourth causes of action, respondent asserts that contrary to petitioner's assertions the DSEIS and FEIS included a comprehensive analysis of the WTP's potential impact on air quality and concluded that the plant would not result in any significant air quality impacts. It is also asserted that the DEP performed a thorough analysis of vehicle exhaust emissions and that contrary to petitioner's assertions, the DEP examined the available health data, and concluded that the project posed no significant adverse impacts from traffic. As regards the third cause of action, it is asserted that the revised information pertaining to vehicle emissions and air quality was incorporated into FSEIS in order to present the most recent information available on the project and to respond to community comments on the DSEIS and these revisions had no material effect on the conclusions previously stated in the DSEIS. As regards the fifth cause of action, the DEP asserts that it extensively involved the public in the environmental review process, and it complied with all requirements under SEQRA and CEQR. As regards the sixth cause of action, the DEP asserts that it performed a thorough analysis of alternative sites that fully complied with the requirements of SEQRA/CEQR. It is also asserted that the DEP was not required to conduct an "environmental justice" analysis as part of its environmental review under SEQRA and CEQR. Finally, as to the eighth and ninth causes of action, it is

asserted that petitioner's claims under the Administrative Code of the City of New York and the State constitution are without merit.

The within Article 78 motion was adjourned on December 15, 2004 and December 21, 2005 and was marked fully submitted on January 25, 2005. On February 22, 2005, petitioner moved for an order permitting it leave to file a late affidavit from an expert on the health consequences of air pollutants. Petitioner asserts that the expert's affidavit was prepared and signed on January 25, 2005, but could not be submitted along with its reply papers, as it only contained a signed facsimile, and, therefore, did not comply with the requirements of CPLR 2105. Petitioner also submitted an unsigned reply memorandum of law in support of the verified petition, preliminary injunction and temporary restraining order, dated February 1, 2005. Since petitioner timely submitted a signed reply memorandum of law dated January 25, 2005, it appears that this is a second reply memorandum of law. Petitioner, however, does not state any reason for the delay in seeking to submit either the properly executed expert's affidavit or the second reply memorandum of law. Furthermore, it is noted that although petitioner contends that the expert's affidavit was intended to be part of its reply papers, the affidavit supports arguments raised in the petition and is not a response to the DEP's opposing papers. Under these circumstances, the motion for leave to submit a late affidavit is denied. The

court will not consider the second reply memorandum of law, dated February 1, 2005, as it was also submitted after the motion was marked fully submitted.

Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 688 [1996]; Akpan v Koch, 75 NY2d 561 [1990]; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 363 [1996]; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 416 [1986]). In assessing an agency's compliance with the substantive mandates of the statute, the courts must "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d, at 417 [1986]; see also Chinese Staff & Workers Assn. v City of New York, 68 NY2d, at 363-364, supra; Aldrich v Pattison, 107 AD2d 258, 265 [1985]; H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232 [1979]). An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the

circumstances and nature of particular proposals (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d, at 417, supra).

Similarly, agencies have considerable latitude evaluating environmental effects and choosing between alternative measures. (Id.) While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to "weigh the desirability of any action or [to] choose among alternatives" (id., at 416). Nevertheless, an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern (see H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d, at 231, supra). Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors. This determination is best made on a case-by-case basis (Akpan v Koch, supra).

Petitioner acknowledges that the City of New York is required to construct a water filtration plant for the Croton water supply system. Since the DEP made its determination to build the plant in Van Cortlandt Park, four different groups of petitioners have commenced Article 78 proceedings challenging that determination. A proceeding entitled Croton Watershed Clean Water

Coalition, Inc. v New York City Department of Environmental Protection, index number 21923/04, was commenced in Queens County, and the Honorable James P. Dollard, in a decision dated January 24, 2005 and judgment dated March 1, 2005, dismissed the petition. The petitioners therein did not take issue with the site selection process. Here, petitioner takes issue with the site selected and advocates the selection of the Eastview site in Westchester County. In an effort to forestall the DEP from proceeding with the construction of the water filtration plant in Van Cortlandt Park, petitioner seeks the recommencement of SEQRA and CEQR proceedings and the preparation of a new SEIS.

The DEP asserts that the July 16, 2004 Statement of Findings fully set forth its reasons for siting the WTP in Van Cortlandt Park, and includes water system dependability, water quality, security, the complexity of engineering and construction, costs, environmental impacts, economic development and community benefits. The DEP asserts that the Mosholu site will best ensure the delivery of safe drinking water to millions of New York City consumers. In addition, the DEP asserts that the site selected has resulted in a commitment by the City of New York of \$200 million for the benefit of parks and recreation in the Bronx, which inures to the benefit of all Bronx residents.

Petitioner's first, second, third and fourth causes of action are essentially identical to several causes of action raised

by the petitioners in the proceeding decided by Justice Dollard. This court, although not bound by Justice Dollard's determination, finds that it is in agreement with his determination as to these issues.

In the first cause of action, Bronx Environmental alleges that the DEP failed to make available all of the underlying reports and data that formed the basis of the DEIS and FSEIS. SEQRA does not directly address the extent to which the agency must make raw data available, but guideposts to a determination of this issue may be found in the regulations and statutory purposes. On the one hand, the plain intention is that an EIS be comprehensible, not overly, or overwhelmingly, technical. The regulations direct that an EIS is to be analytical, not encyclopedic, that it should not contain more detail than is appropriate to the proposed action, and that highly technical material should be summarized (6 NYCRR 617.14[b], [c]; see also 21 NYCRR 4200.10[a]). Nothing in the statute or regulations requires an agency to make raw data available to the public. However, the primary purpose of a DEIS is "to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action" (ECL 8-0109 [4]) -- a purpose arguably best served by broad disclosure. Applying

these principles here, the court finds that the DEIS and FSEIS contained all of the information necessary for the public to understand the potential environmental impact of locating the treatment plant at each of the three potential sites. Many of the documents identified in the petition pertain to the Croton watershed and are not related to the siting of the proposed water treatment plant in Van Cortlandt Park. The court finds that the DEP was not required to make available to the public documents that it did not rely upon in making its determination and which are broader in scope than the data relating to the specific site chosen by the DEP. Therefore, the failure to make such documents public does not give rise to a violation of SEQRA or CEQR. To the extent that petitioner claims that the appendices to the DSEIS were not included in the copies placed in the repositories, it is noted that a CD-ROM containing the appendices was included with each multi-volume set of the DSEIS that the DEP provided to the repositories. Finally, petitioner's assertion that the DSEIS and FSEIS are inadequate because they failed to consider certain information about the proposed cost of the project lacks merit. Cost analysis is not an environmental consideration and, therefore, is not required under SEQRA or CEQR and need not be included in the DSEIS and FSEIS.

Petitioner's second, third and fourth causes of action all concern the potential impact constructing and operating the WTP

in Van Cortlandt Park may have on air quality. Essentially, petitioner takes issue with the DEP's conclusions as regards the project's potential impact on air quality and asserts that the DEP failed to identify respiratory death rates occurring in the specific area surrounding the project; that the DEP's air quality analysis relied upon background PM10 levels collected from a location five miles away from the project site; and that rather than using worst case scenario air quality levels, the DEP used the second highest concentrations. It is also asserted that the DEP failed to mitigate increases in the death rate in the community from asthma and other respiratory illness which may occur due to the proposed construction. The court finds that the DSEIS contained a comprehensive and thorough analysis of the potential impacts of PM10 (particulate matter of 10 microns per cubic meter) concentrations on air quality, utilizing the National Ambient Air Quality Standards (NAAQS) promulgated by the Federal Environmental Protection Agency (EPA) pursuant to the Federal Clean Air Act (42 USC § 7409). The methodology employed by the DEP is the same methodology employed by all government agencies. In determining the PM2.5 background levels for the Van Cortlandt Park site, the DEP used data from an air monitor located in the Bronx Botanical Gardens. This air monitor is 1.5 miles from Van Cortlandt Park, and not 5 miles away, as asserted by petitioner. It is noted that monitoring stations are maintained by the State Department of

Environmental Conservation and are located at a limited number of fixed points within the City of New York. The court, therefore, finds that the use of the monitoring site at the Botanical Gardens was proper, as it is the closest station to Van Cortlandt Park. The DSEIS contained an analysis of the potential impact of PM10 on all receptors, which included sensitive populations, such as children and the elderly. Data pertaining to death rates was also analyzed. As regards vehicular emissions and the need for mitigation, the DEP concluded that the PM10 levels for the project fell below the NAAQS threshold of significance, and, therefore, based on this data and the methodologies it used to calculate these pollutant concentrations, the DEP determined that there was no need for mitigation to reduce the small increase in anticipated PM10 emissions. The DEP used conservative data and assumed that the construction equipment would be in operation around-the-clock and assessed potential impacts for the peak, rather than average, concentrations over a five year period. Based on this analysis, and after comparing predicted emissions to the NAAQS threshold for PM10, the DEP concluded that the construction and operation of the water treatment plant at the Mosholu golf course would not create significant adverse impacts on air quality. The court finds that contrary to petitioner's assertions the DEP did not admit that it had not fully examined the relationship between vehicular exhaust from construction trucks and increased asthma related death rates

in surrounding community. Rather, the FSEIS only stated that the health data surrounding this issue requires further study. Such studies are typically made by the scientific community, and not the DEP. The DEP's calculations were revised between the publication of the DSEIS and FSEIS, due to the release of updated EPA models for mobile and construction sources, as well as revisions in the construction schedules, equipment lists and usage factors. The construction emissions calculations were also revised to reflect the benefit of using ultra-low sulfur diesel fuel in on-road and off-road construction vehicles, in order to reduce emissions. The court finds that absent a showing by petitioner that the revisions contained in the DSEIS and FEIS have a material effect on the conclusions reached by the DEP in its analysis, these revisions do not require the annulment of the DEP's determination (see generally Merson v McNally, 90 NY2d 742 [1997]; Waste Mgt. v Doherty, 267 AD2d 464, 465 [1999]).

Petitioner, in its fifth cause of action, alleges that the DEP failed to involve the public in the SEQRA process, in that it only held one public meeting in the Bronx on March 3, 2004, which was marked by disruptive behavior by some individuals and did not allow for a question and answer session. It is also asserted that after issuing the FSEIS, the DEP only allowed a 10 day period for consideration by the public. The court finds that these claims are unpersuasive. The DEP initially held public hearings in

September 2003, and thereafter prepared and issued the DSEIS in December 2003. Public hearings were held in the Bronx and Westchester counties in February and March 2004. At these hearings, several hours of comment were heard and recorded by a stenographer. Sign-in sheets were provided at both the Bronx and Westchester hearings in order to provide the public with an opportunity to orally comment at the hearing and to document their presence. A written comment period was established and several hundred comments were received by the DEP. On June 30, 2004, after considering the comments received during the public comment period, the DEP issued the FSEIS, in which it identified the Mosholu Golf course in Van Cortlandt Park as the preferred site for the Croton WTP. On July 16, 2004, then DEP Commissioner Christopher Ward issued a Statement of Findings in which he determined that the Mosholu golf course in Van Cortlandt Park was the most suitable location for the WTP. On September 15, 2004, a committee of the City Council held a public hearing on the siting of the WTP in Van Cortlandt Park, and on September 28, 2004, the City Council approved this site. The court finds that the DEP involved the public in the environmental review process, as it held hearings at each stage, and solicited and responded to hundreds of written comments. Neither SEQRA nor CEQR requires the DEP to conduct a question and answer session at a public hearing. Furthermore, the DEP's alleged failure to control disruptive

members of the public at the March 2004 meeting in the Bronx, does not establish that public participation was inadequate. The DEP received several hundred public comments on the DSEIS, including 46 oral comments at the Bronx meeting. Members of the public were also afforded an additional 10 days after the public hearing to submit written comments, and the DEP in compliance with SEQRA and CEQR responded to all of the public comments in the FSEIS. The regulations governing SEQRA require that the lead agency permit the public no less than 10 days to consider a final EIS before issuing a written findings statement (6 NYCRR § 617.11). The DEP provided adequate time for public consideration of the FSEIS, prior to issuing the Statement of Findings, and it was not required to take any action or respond to additional public comments that were submitted during this period.

Petitioner in its sixth cause of action objects to the environmental justice analysis and cost analysis set forth in the FSEIS. An environmental justice analysis is required solely when an applicant is seeking a permit from the State Department of Environmental Conservation, pursuant to DEC policy guidelines CP-29. Neither SEQRA nor CEQR require an agency to perform an environmental justice analysis as part of the environmental review of an action. The DEP included an environmental justice analysis in its FSEIS, in response to comments it received and in anticipation of its filing an application for a permit with the

DEC. The DEP acknowledged that it may have to perform a further analysis, if required by the DEC. In view of the fact that the DEP was not required to perform an environmental justice analysis under SEQRA, and as it has not filed a permit application with the DEC, the request for judicial review of the environmental justice analysis is premature.

Petitioner asserts that the DEP improperly manipulated the relative costs of the Eastview and Mosholu projects, and claims that the capital costs of the Eastview plant are lower than that of the Mosholu site. Cost analysis, however, is not required under SEQRA and CEQR, as it is not an environmental consideration, it is not subject to review here.

However, the potential socioeconomic effect of the project is an environmental consideration and was extensively analyzed in the DSEIS and FSEIS. The court finds that the DEP properly considered the combined impacts of other projects in the area around Van Cortlandt Park, as well as other projects planned for the Eastview site. In the case of the Eastview site, the DEP is proposing two large capital projects, including the Ultraviolet Disinfection Facility. These two projects are to be built adjacent to one another at the same site, during the same construction period as the Croton WTP. The DEP assessed the potential environmental impact of the construction of these proposed projects at the Eastview site. Petitioner does not

identify any other major project to be built adjacent to Van Cortlandt Park, and the DEP is not required to speculate as to other potential projects that may be undertaken by other City agencies.

Petitioner's claim that the DEP failed to consider the combined impact of the proposed work at the Jerome Park Reservoir on the Bronx site, therefore, is without merit. The DEP in response to comments stated in the DSEIS that the possibility of cumulative impacts was considered in conjunction with either Bronx sites and that as the construction traffic patterns for the Mosholu and the Jerome Park Reservoir did not overlap, it was determined that these sites were far enough apart so that there would not be substantial cumulative impacts to receptors during construction.

The DEP's comparative analysis of the traffic patterns for the Eastview and Van Cortlandt Park sites also complied with SEQRA and CEQR. The DEP was not required to consider an equal number of intersections for all potential sites, but rather looked at where potential traffic impacts are likely to occur. Both the DSEIS and FSEIS analyzed neighborhood character impacts within a half-mile study area that might result from the project, including traffic impacts, and concluded that the project would not have adverse impacts on the Van Cortlandt Park site's neighborhood character.

Petitioner's claim regarding the analysis of potential impact of the project on zoning is rejected. Van Cortlandt Park is zoned as parkland, and as the proposed facility would be built within the park, no zoning changes are necessary. Petitioner's assertion that the WTP would appear as an industrial use on the City's land use maps and that this may provide a basis for granting variances for other industrial uses in the area is purely speculative. The DEP is not required to engage in such speculation in its FSEIS.

Petitioner's seventh cause of action, which asserts a denial of equal protection based upon the selection of the Van Cortlandt Park, rather than the Eastview site, is without merit. Section 11 of Article I of the State Constitution does not create any legal rights (Brown v State of New York, 89 NY2d 172 [1996]). Petitioner's allegation that the civil rights referenced in this section "include a basic right to health and environment" and that "[t]he plain language of Section 11 protects against disparate impact discrimination, including environmental and health impacts" fails to support a claim for discrimination. In addition, petitioner has failed to allege and cannot demonstrate that the DEP intentionally discriminated against minority communities in its siting decision, a required element of an equal protection claim (see 303 West 42nd Street Corp. v Klein, 46 NY2d 686 [1979]; People v Goodman, 31 NY2d 262, 268 [1972]).

Petitioner's eighth cause of action, which alleges a violation of section 8-107(4)(a) of the Administrative Code of the City of New York, is without merit. This section of the Administrative Code pertains to discrimination in accommodations. Petitioner's claim concerning the site selection of Van Cortlandt Park, and the environmental impact on clean air quality is not within the scope of this section. The court explicitly declines to extend the definition of a public accommodation to the air quality of any particular borough or neighborhood within the City of New York. To the extent that petitioner asserts that the DEP is the provider of the "advantages or privileges" of air quality and park space, this claim is rejected, as the DEP does not "provide" air quality or park space. Finally, petitioner's discrimination claim cannot be raised within the context of an Article 78 proceeding (CPLR 7803).

In view of the foregoing, petitioner's motion for leave to file a late affidavit is denied.

Petitioner's request to vacate the DEP's findings of July 16, 2004 and to remit the matter to the agency for further proceedings is denied, and the petition is dismissed.

Settle one judgment and order.

J.S.C.