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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 21

Matter of
SILVERCUP STUDIOS, INC., et al.

Petitioners,

- against -

THE POWER AUTHORITY OF THE STATE OF
NEW YORK, et al.

Respondents,

CITY OF NEW YORK,

Intervenor.

x

INDEX NO. 2858/01

MOTION DATE: MARCH 21, 2001

MOTION CAL. NO.:

BY: GOLIA, J.

DATED: MARCH 29, 2001

x

In this Article 78 proceeding, petitioners seek: (1) a preliminary injunction enjoining respondents from any further construction and development in connection with two proposed power plants at a single site located on Vernon Boulevard, Long Island City, Queens, New York until respondents have complied with the requirements of the State Environmental Quality Review Act (hereinafter "SEQRA") and its implementing rules and regulations; (2) enjoining the issuance of any further approvals or permits in connection with the construction of the two power plants at the Vernon Boulevard site until respondents have complied with SEQRA; and (3) a judgment annulling and vacating the "Negative Declaration" issued by respondent New York Power Authority in connection with the construction of the proposed power plants, and

the Air Permit issued by the New York State Department of Environmental Conservation.

Pending the hearing of the application for a preliminary injunction, this court issued a temporary restraining order on February 1, 2001, enjoining respondents from taking any action in furtherance of the construction of the project or its physical preparation, conditioned upon the filing of a bond by petitioners in the amount of \$5 million dollars. Petitioners, however, did not file the bond and the temporary restraining order was not effectuated.

The parties appeared in court on February 9, 2001 for submission of additional papers on the request for a preliminary injunction and a discussion of the matter was held on that date. Petitioners' request for a preliminary injunction was granted in a memorandum decision, dated February 16, 2001. That order provided for a bond to be set by the court. The parties thereafter appeared for further discussions on the amount of the bond and the possible settlement of the action on February 22, March 7, March 8, and March 14, and March 21, 2001.

On March 8, 2001, the City of New York moved to intervene in the hearing on the bond and the within Article 78 proceeding and that application was submitted and granted without opposition. The respondent waived their rights to contest any final determination of this court on the grounds that the petitioner failed to pursue their rights to injunctive relief and thereupon all parties elected to not make any submissions on the amount of the bond, and oral

argument on the merits was heard on March 21, 2001. At that time the within Article 78 proceeding was fully submitted to the court. It is noted that counsel for the parties were engaged in extensive and serious settlement negotiations prior to submitting this matter to the court for a determination on the merits, and indeed are continuing such negotiations sub judice.

A brief history of the procedures and factual circumstances underlying this action are in order.

In late August 2000, the Public Service Commission advised the New York Power Authority (hereinafter "NYPA") that a shortfall in electrical generating capacity was expected to reach more than 300 megawatts by the following summer and that immediate action was required to prevent likely brownouts or blackouts in New York City during the peak demand period beginning June 1, 2001. On August 29, 2000, NYPA's Board of Trustees authorized the purchase and installation of eleven LM-6000 simple cycle natural gas turbine generator units, each capable of a net electrical output of 44MW, from the General Electric Company, as well as advanced pollution control devices. NYPA's Executive Vice-President, in a report that was included in background portion of the Trustees' resolution, stated that "The Authority staff has concluded that the contemplated actions may fall within the definition of 'Type II' actions under the Department of Environmental Conservation regulations implementing the State Environmental Quality Review Act ('SEQRA'). If so, such actions may be undertaken since they are, inter alia, 'immediately necessary for the protection or

preservation of life, health, property or natural resources' and qualify, for the same reasons, as 'exempt actions' under the Authority's SEQRA regulations. Further environmental review may, however, be required, including review in connection with any required permits to site or construct these units." NYPA thereafter selected six sites in the City of New York and one site on Long Island for its In-City Generation Project, including the subject site at Vernon Boulevard in Queens, New York. None of the sites are located in the Borough of Manhattan. In late November 2000, NYPA selected the 3.2 acre Vernon Boulevard site in Queens, and proposed that two turbine generators be installed on this site, with a total electrical output not exceeding 79.9MW, even though the turbines are capable of generating some 88MW of power. Each of the two generators would be separately housed, and each would have a 150 foot high stack. On November 16, 2000, the Chairman of the New York State Board of Electric Siting and the Environment, after public notice and comment, issued a declaratory ruling that the NYPA's two turbine facilities were not subject to Article X of the Public Service Law, which mandates comprehensive site review and public hearings, since NYPA had entered into a binding commitment to limit the operation of such facilities to no more than 79.9MW. The importance of committing to such limits is that facilities whose total electrical output are 80MW or greater are subject to the provisions of Article X of the Public Service Law. It should be noted that the mere increase of .1MW would mandate compliance with Article X.

On October 20, 2000, NYPA, in a coordination letter to the New York State Department of Environmental Conservation (hereinafter "DEC") requested that NYPA serve as the "lead agency" to conduct a coordinated environmental review. The DEC acceded to this request. On November 10, 2000, NYPA filed applications for an Air Permit with the DEC for each of the New York City sites. The DEC reviewed the permit applications, published notices of public hearings to be held on December 14, 2000, and provided that the public comment period would be open until December 22, 2000. The public hearings were attended by several hundred people, and approximately 130 people, including state and local elected officials, provided public comments at the hearings. In addition, the DEC received over 600 written comments. The DEC thereafter reviewed the public comments, and determined that none of the comments raised a significant or substantial issue requiring the DEC to deny NYPA's applications, or substantial changes in the project. The DEC therefore, determined that an adjudicatory hearing was not necessary, and on January 12, 2001, issued the air permits for the six facilities, including the Vernon Boulevard site.

Meanwhile, on November 20, 2000, NYPA, pursuant to its authority as the "lead agency," prepared an Environmental Assessment Form ("EAF") for the entire In-City Generation Project, including the Vernon Boulevard site. NYPA retained the services of Allee King Rosen & Fleming ("AKRF") to help conduct a thorough assessment of the potential environmental impacts of the proposed

turbines at each location in the City of New York and Long Island. Under NYPA's direction, AKRF prepared an Environmental Assessment Form (hereinafter "EAF"), dated November 20, 2000, which included a project description, a discussion of the project's purpose and need and a description of NYPA's site selection criteria. The EAF contained an evaluation of the potential impacts of the project on all areas of relevant potential environmental concern, including land use and neighborhood character, community facilities, historic and archaeological resources, visual impacts, natural resources, hazardous materials, waterfront revitalization, infrastructure (water supply, sanitary sewage, solid waste and energy), traffic, air quality and noise, as well as construction related impacts and cumulative impacts. Included was an attachment analyzing the impact of the project on coastal zone management and State and City policies for waterfront revitalization. The EAF also included comprehensive surveys of existing land use, zoning and community facilities within 400 feet and a half-mile radius study areas. Subsequently, AKRF prepared a supplement to the EAF in which it assessed a site in Staten Island. NYPA's EAF and the supplement to the EAF both concluded that the project would not have any significant impacts, either at individual sites or cumulatively. NYPA, thereupon, issued a Negative Declaration and Determination of Non-Significance for all sites, except for one site in Staten Island, on November 20, 2000. (NYPA issued a similar negative declaration for the Staten Island site on December 19, 2000.) As a

result of the Negative Declaration, an environmental impact statement was not required under SEQRA.

In November 2000 NYPA initiated consultations with the State Office of Parks, Recreation and Historical Preservation ("OPRHP"), pursuant to the State Historic Preservation Act to review the potential impact on cultural resources, including the Terra Cotta Building, a New York City Landmark adjacent to the Vernon Boulevard site, and potential pre-contact archaeological remains on and adjacent to the site. NYPA, AKRF and NYPA's archaeological consultant, Historical Perspectives, Inc. conferred with OPRHP in order to develop archaeological testing protocol for the archaeological study, and provided OPRHP with written reports during and upon completion of that investigation. After a second round of archaeological investigations, OPRHP, in January 2001, concluded that the project would have "no impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places."

NYPA and its consultants carried out detailed modeling for carbon monoxide, particulate matter sized 10 microns or less in diameter, and nitrogen oxides emissions from all of the proposed natural gas units. The results of that modeling showed that the maximum predicted concentrations from the facilities added to the existing background concentrations would be well below the federal and state national ambient air quality standards. The DEC reviewed NYPA's modeling results and air quality permits and held separate

public hearings on each of the proposed permits in the counties where the proposed facilities were to be located.

On December 14, 2000, public hearings were held in the Bronx, Brooklyn, Queens and Suffolk County. A fifth hearing was held in Staten Island on January 25, 2001. The DEC accepted and reviewed written comments from the public following the public hearings, including comments from the petitioners in this proceeding, and comments from the United States Environmental Protection Agency. On January 12, 2001, the DEC issued a response to the comments as well as the requested air quality permits. (The permit for the Staten Island site was issued on February 13, 2001.) These permits authorize the construction and operation of the natural gas turbine units, and require NYPA to comply with all applicable restrictions under New York State's Clean Air Implementation Plan, New York's air quality permitting regulations set forth in 6 NYCRR Part 201, the "new source performance standards" gas turbines set forth in 40 CFR Part 60, Subpart GG, and the "Acid Rain program" set forth 40 CFR Parts 72 and 75. The DEC requested that NYPA prepare an "environmental justice" analysis in connection with its application for air emissions permits for the project. This was prepared by AKRF at the request of NYPA, in an effort to determine whether the project would disproportionately affect the poor and minorities.

NYPA, using 1990 census data, the most current available at that time, found that while residential populations in the immediate area (400 feet) are limited, the larger study (½ mile),

in most cases contains a concentration of minority and low impact populations at each of the six sites that is greater than that for the City as a whole or the county in which the site is located. For the Vernon Boulevard site in the larger area the population was largely White, although there were significant minority concentrations in this area, including Black, Asian and Hispanic groups. Overall, the income level was in keeping with the borough-wide average, and the percent of persons living below the poverty level was just above the borough-wide percentage and was less than that for the City as a whole. NYPA submitted its Environmental Justice Report to the DEC on January 9, 2001.

NYPA's EAF, as well as the Environmental Assessment prepared by NYPA's consultant and the Coastal Assessment form, are all dated November 20, 2000. On that same date, November 20, 2000, NYPA filed a "negative declaration," in which it determined that any adverse environmental impacts associated with the project would not be significant and, therefore, an environmental impact statement would not be required. NYPA thereafter commenced construction at the Vernon Boulevard site. Once the site preparation commenced, excavated soils were tested and have been or are being disposed of in accordance with applicable regulatory requirements. NYPA anticipates that the installation of the two generators will be completed by mid-May, with a two week start-up and testing period, so that the generators will be operational by June 1, 2001.

Petitioner Silvercup Studios, Inc. is a film and television production studio located at 42-22 22nd Street, Long Island City, New York, adjacent to the Queens East River waterfront area and approximately six blocks from the Vernon Boulevard site. Petitioner Terra Cotta, LLC is a wholly-owned affiliate of Silvercup Studios, and has acquired a three-acre parcel across the street from Silvercup Studios' main facility, which is directly adjacent to and immediately north of the Vernon Boulevard site. The Terra Cotta parcel is now vacant except for the former New York Architectural Terra Cotta Company Office, which was constructed in 1892, listed on the New York State Register of Historic Places in December 1987 and thereafter designated a New York City Landmark in August 1992. Silvercup Studios asserts that it plans to restore the Terra Cotta building and to expand its studio space onto the Terra Cotta site and to construct residential or commercial high rise towers on this site. Petitioners, Congressman Joseph Crowley; New York City Councilman Walter McCaffrey; New York State Assemblyman Michael Gianaris; New York State Assemblywoman Catherine Nolan; and ,State Senator George Onorato are duly elected officials representing electoral districts in the affected area. Petitioner Citylights At Queens Landing, Inc. is a cooperative housing corporation consisting of a 42-story, 521-unit cooperative housing accommodation located in the Queens West development that overlooks the Vernon Boulevard site. Petitioner Coalition Helping Organize A Kleaner Environment ("C.H.O.K.E.") is an organization formed to combat the lack of community outreach by the New York

Power Authority in seeking to build power plants in Western Queens. Petitioner Plant Specialists, Inc. provides high-end gardening services to residential and commercial clients for interior spaces and outdoor gardens and is located at 42-25 Vernon Boulevard, directly across the street from the proposed power plant site. Petitioner Saiph Corporation operates a business at 8-03 43rd Avenue, Long Island City, which is directly around the corner from the proposed power plant site. Petitioner Nina Adams is the President of the Queensbridge Tenant's Association, which represents over 10,000 residents of the Queensbridge Housing Complex, the largest public housing complex in the country. The Housing Complex is several blocks north of the Vernon Boulevard site. Petitioner Pamfil Dornan is a Long Island City resident, who resides 1½ blocks, approximately 400 feet from the Vernon Boulevard site.

Respondents are the NYPA, a public corporation, created in 1931 pursuant to the Public Authorities Law; and John P. Cahill, the Commissioner of the New York State Department of Environmental Conservation; the DEC; and the intervenor, the City of New York, whose concern is self-evident.

Petitioners' Contentions

Petitioners assert that NYPA has engaged in regulatory shortcuts in order to avoid public oversight and circumvent the SEQRA process. Petitioners assert that they were not aware of NYPA's plans until they read about them in an article in the New

York Times on November 22, 2001. Claire Shulman, the Borough President of Queens County, states in her affidavit that her office first became aware of NYPA's plans in early November through rumors and press accounts and that NYPA's representatives did not visit her office or formally advise her of their plans until November 16, 2000, four days prior to the issuance of the Negative Declaration. Other elected officials who are petitioners herein have submitted affidavits stating, inter alia, that they too were not informed of NYPA's intentions until the process was nearly completed on November 22, 2000. Petitioners' main contentions are set out below.

(A). The June 1, 2000 deadline and the need for the generators

Petitioners assert that NYPA's deadline of June 1, 2001 is a self-imposed deadline and that there is no need to construct the Vernon Boulevard facility by that date. In support of this claim, petitioners have submitted the affidavit of Ashok Gupta, a senior energy economist with the Natural Resources Defense Counsel. Mr. Gupta's qualifications as an expert on energy issues is undisputed by the parties, and his analysis is based upon publically available documents from various state agencies and other organizations responsible for maintaining the reliability of New York's electricity system. Mr. Gupta, in his affidavit, asserts that the Public Service Commission ("PSC") and NYPA have failed to demonstrate that the subject project is needed to assure reliable electricity service in New York City for the summer

of 2001. Mr. Gupta concedes that forecasting electrical supply and demand is an inexact science and that it is impossible to predict future events with absolute certainty. Mr. Gupta further asserts that the PSC's analysis of the need for additional electricity generation is flawed. He believes that the DPS has seriously underestimated the amount of new generation capability that has been added to the City's resources since summer 2000, which according to his figures results in an overall total deficiency of 17.7MW. Inasmuch as, the Department of Public Service ("DPS") and the New York Independent System Operator ("NYISO") require that 80 percent of the City's forecasted peak demand be capable of being supplied by electricity generation in the City, that if the 80 percent in-city requirement was properly applied, instead of a deficiency there would be a small surplus of 13.3MW. It is further asserted that the DPS failed to take into account reductions in demand, based on a variety of programs that promote energy efficiency, which Mr. Gupta asserts will reduce the amount of electric generation capacity necessary to meet the 80 percent in-city capacity requirement by between 216MW and 280MW for summer 2001. Mr. Gupta also asserts that NYPA failed to consider energy efficiency as an alternative to the installation of gas turbines.

In a supplemental affidavit, Mr Gupta states that based upon the February 15, 2001 NYISO report, he agrees with the projected summer peak demand forecast for summer 2001 in the City and the capacity for importing electricity into the City.

Mr. Gupta, however, argues that whether one uses NYISO's, DPS' or his own estimate, the total supply of electricity for use in New York City in summer 2001, including both in-city generation and import capacity, will exceed estimated summer peak demand by at least 2,600MW, providing a cushion of at least 24.8 percent (NYISO's estimate) or 27.4 percent (Gupta's estimate). Mr. Gupta estimates that based upon the figures presented in the February 15, 2001 NYISO report, and assuming no reduction in peak demand this summer due to energy efficiency programs, that the in-city electric supply will fall below the 80 percent requirement by only 122MW. If the predicted reductions in peak demand fall by 271MW due to energy efficiency programs, then Mr. Gupta concludes the in-city electric supply will exceed the 80 percent requirement. Mr. Gupta, thus, objects to NYISO's conclusion that there is a 397MW gap between the amount of in-city generation available for summer 2001 and disagrees with respondent experts findings as to the amount of in-city generation necessary to meet the 80 percent in-city capacity requirement.

(B). The Purchase of the Generators

Petitioners assert that NYPA opted to purchase twin gas turbines with a capacity slightly more than the promised total capacity of 79.9MW, just .1MW short of 80MW, so as to avoid review under Article X of the Public Services Law. It is asserted that the NYPA's purchase of these generators in August 2000, prior to conducting any environmental review, violated 6 NYCRR § 617.3(a),

which provides that "[n]o agency involved in an action may undertake, fund or approve the action until it had complied with the provisions of SEQRA."

(C). Compliance with the substantive requirements of SEQRA

Petitioners assert that NYPA, as the lead agency, was required to thoroughly analyze and take a "hard look" at the following concerns (among others) in connection with the siting of the proposed power plant, as set forth in 6 NYCRR § 617.7(c): "(1) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; . . . (4) the creation of a material conflict with a community's current plans or goals as officially approved or adopted; (5) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources of an existing community or neighborhood character; . . . (8) a substantial change in the use, or intensity of use, of land . . . or in its capacity to support existing uses; (9) the creation of a material demand for other actions which would result in one of the above consequences; and (10) changes in two or more elements of the environment, no one of which has a significant effect on the environment, but when considered together result in a substantial adverse impact on the environment."

It is undisputed that the proposed power plant is a Type I action under SEQRA, and, therefore, it "carries with it the presumption that it is likely to have a significant adverse impact

on the environment and may require an EIS." (6 NYCRR § 617.4[a][1].) Petitioners assert that NYPA's EAF recognized that there are potential archeological sites, historic structures near the site, and possible substantial hazardous contamination on the site, which could potentially be adversely impacted by the construction of the proposed facility. Petitioners assert that these potential adverse impacts surpass the low threshold required to trigger comprehensive environmental review.

It is petitioners' contention that NYPA in its position, as the lead agency and in violation of SEQRA, improperly deferred a full analyses of, and potential mitigation measures for, numerous environmental impacts to a later indefinite date subsequent to its issuance of a Negative Declaration. In its EAF, NYPA recognized the site was probably highly contaminated, and conceded that it was unaware of the full extent of the contamination. NYPA, nonetheless, found that there would be no significant contamination at the site based upon "a soil and groundwater sampling program to be performed [after the issuance of the Negative Declaration] to identify contaminants and delineate their presence on the [Vernon Boulevard] site." NYPA asserted in its Responsive Summary that "[t]his testing provided additional confirmation that the measures proposed in the EAF are adequate to deal with any contamination at this site." Petitioners contend that respondents have not made these test results known, and that they are not part of the administrative record. It is asserted that NYPA also deferred its analysis with respect to the potential impacts on known

archeological conditions on the site. It is argued that while NYPA acknowledged that the site was in an area of "high sensitivity" for "precontact" (Native American) archeological resources, it only stated that "Stage 1B subsurface testing will be undertaken to determine if there are potential precontact and historic archeological resources that would be negatively impacted by the proposed facility." In the Responsiveness Summary, NYPA asserted that "[s]ubsequent to issuance of the EAF, Phase II testing was performed for [the Vernon Boulevard] site," confirming that there are no significant archaeological resources remaining on the Vernon Boulevard site. Petitioners further assert that NYPA failed to sufficiently analyze and propose specific mitigation measures with respect to the potential impact the construction of the power plant might have on the Terra Cotta Building, prior to its negative declaration. It is asserted that the public record does not contain any evidence of subsequent archaeological or hazardous testing undertaken by NYPA, or any evidence that any of the regulatory agencies received or reviewed the pertinent data, approved relevant mitigation plans, or concurred with NYPA's conclusions.

Petitioners argue that the issuance of a negative declaration, with assurances that any future problems will be addressed as they arise, violates SEQRA's entire framework.

Petitioners argue that NYPA, as a matter of law, is precluded from issuing a conditional negative declaration for a Type I action, and that its Negative Declaration was improperly

premised upon future actions or "conditions" cited in its EAF and the DEC's responsiveness summary. It is further asserted that respondents did not meet the standards set forth in Merson v McNaly (90 NY2d 742) for issuing a Negative Declaration, in that NYPA failed to engage in public participation in an open process, prior to the issuance of the Negative Declaration. Petitioners assert that NYPA failed to take a "hard look" at critical areas of environmental concern in connection with the proposed power plant. It is asserted that NYPA had failed to make public the basis for its claim that there is an urgent need for at least 450MW of new generating capacity within New York City by June 2001; that NYPA failed to consider other viable alternative sites with far less environmental impact; that NYPA's characterization of the proposed site as "industrial" is inaccurate and fails to recognize that the proposed power plant conflicts with and will have a significant adverse effect on the ongoing revitalization efforts for the Long Island City waterfront area, and fails to address the community's concerns pertaining to the power plant's visual appearance and image, safety concerns, air pollution, noise and vibration.

It is also asserted that NYPA failed to conduct soil testing and provide for the cleanup of known contaminants at the site; that NYPA failed to assess the project's potential impact on the relevant historic and archeological resources in the area; that NYPA failed to consider that the proposed power plant would make it unfeasible for Silvercup to proceed with its plans to build new studios on the adjoining property, which would result in a loss of

jobs in the area; that the DEC permit recognizes that the generator facility would be capable of operating above 80MW and, therefore, NYPA is attempting to improperly segment its environmental review and thereby avoid Article X siting requirements; that NYPA failed to consider the cumulative impact of the subject project and other current applications for power plants in Long Island City.

Petitioners assert that the DEC's issuance of an air permit to NYPA was in violation of lawful procedure in that it cut short mandatory public review, did not conduct an adjudicatory hearing on the permit, and failed to consider substantive air quality issues and potential impacts on the surrounding community. It is asserted that the permit issued by the DEC lacks a rational basis, does not have a substantial foundation in the record and is arbitrary and capricious. It is asserted that the DEC disregarded the fact that the proposed plant may cause hazardous conditions on the Queensboro Bridge; that the DEC inappropriately dismissed the potential for ammonia spills from the facility, and that the DEC failed to consider the facility's air impacts on Silvercup's planned development of its adjacent property.

Finally, it is asserted that NYPA ignored state law protecting landmark buildings and that the proposed construction is likely to cause irreparable harm to the Terra Cotta building.

Respondents' Contentions

Respondent NYPA, in opposition, asserts that in compliance with the procedural and substantive requirements of

SEQRA, it conducted a detailed, comprehensive examination of the potential environmental impacts of the project and reasonably determined that it would not have any significant adverse impacts on the environment. Respondents' experts from the Department of Public Service and NYISO assert in their affidavits that there is a critical need for additional electrical generating capacity in New York City by June 1, 2001, in order to meet the anticipated peak summer demand, and that unless these generators are added to the generation capacity, there will be a shortfall of 397MW in the City this summer. These experts take issue with Mr. Gupta's calculations and conclusions.

NYPA asserts that contrary to petitioners' claims, it had no obligation under SEQRA to seek public input prior to the issuance of its Negative Declaration; that its Negative Declaration was not impermissibly conditioned on future action; that it did not violate SEQRA by purchasing the generators prior to the completion of the SEQRA process; that it did not improperly segment its review of the project; and that it was not required by SEQRA to consider the impact of other proposed power plant projects.

NYPA asserts that it identified the relevant areas of environmental concern, took a "hard look" at these areas, and provided a "reasoned elaboration" of the basis for its determination that no significant environmental impacts would result from the project. It is asserted that SEQRA does not require NYPA to evaluate the need for this project as part of the environmental assessment. NYPA's EAF, however, contains a

discussion of the project's purpose and need. NYPA, in support of its claim that there is a real need for the project, cites to several expert studies released in January 2001, that examined in-City electrical generation and made projections for needed additional capacity in both the short and long term. These studies confirmed the Public Service Commission's conclusion that there is a substantial shortfall of available electrical supply for the summer of 2001. While several of these studies predict a shortfall of 400MW or more for 2001, respondents acknowledge that projecting electrical supply and demand into the future is an inexact science, open to various assumptions and interpretations. However, it is asserted that all of the technical experts agree on the need for substantial new capacity. Respondents assert that the projected shortfall of 397MW for 2001, means that every generator that is part of the in-City project, including the Vernon Boulevard generators, are urgently needed and must be completed in time for the summer peak demand season beginning June 1, 2001.

NYPA asserts that it carried out an extensive program to reach out in the communities where the facilities will be sited, although SEQRA imposed no legal obligation to do so. These efforts began in September and November 2000, when NYPA met with Mayor Rudolph Giuliani and advised him of the Public Service Commission's concerns for adequate electrical capacity for the summer 2001. NYPA informed the Mayor of its intention to provide additional in-City capacity in time for the June 2001 peak season demand. NYPA officials met with the Mayor again in November 2000,

once the proposed sites had been identified. In mid-November, before the issuance of the EAF on November 20, 2000, NYPA met with the Borough Presidents of Queens, Brooklyn and the Bronx. In late November and early December, NYPA attended Community Planning Board meetings in each of the affected Community Planning Boards in Queens, Brooklyn and the Bronx. In the end of November and in December, NYPA met with various local, state and federally elected officials, and community and environmental groups.

Respondents assert that pursuant to 6 NYCRR § 617.7[b], NYPA, as a lead agency, was not required to consider alternative sites prior to making a declaration of significance and it need not provide a written comparison of alternatives in its negative declaration. NYPA, however, asserts that it actually considered a wide array of alternative sites in New York City, and applied the following five site selection criteria in conducting its search: (1) whether environmental or technical difficulties associated with the site would make it infeasible to meet NYPA's June 1, 2001 deadline; (2) proximity to high-voltage electrical substation for power distribution; (3) proximity to high-pressure gas transmission lines; (4) the absence of significant adverse environmental impacts; and (5) dispersion of the generators among the City's boroughs so that no one community would host all or most of these facilities. NYPA asserts that it considered approximately 60 different sites, including 19 separate sites in Queens, before selecting the Vernon Boulevard location.

It is asserted that NYPA properly concluded that the project would be consistent with the land use patterns in the half-mile area, and the industrial character of the surrounding neighborhood. In addition, it is asserted that there is nothing in the City Planning Department's plans, studies or resolutions over the past decade that precludes the development of the NYPA facility at Vernon Boulevard. Rather, NYPA asserts that its project is entirely consistent with the City's officially adopted plans for the Queens waterfront. In addition, respondents argue that there have been no officially approved plan for re-zoning or developing NYPA's property or other near by waterfront parcels, which are all within a manufacturing zone. The Queens West development is located at least a half mile south of the NYPA parcel and is separated from the industrial northern portion of the waterfront by the Anable Basin inlet. It is asserted that the NYPA facility will not conflict with or detract from the Queens West or other developments at the southern portion of the Hunter's Point waterfront. Respondents argue that the fact that the Queens West project is adjacent to the former Westinghouse power plant, which has four blackened 275 foot stacks that rise out of the roof, which itself is about 100 feet high, has not precluded plans for new development in Queens West. NYPA asserts that its facility will be largely obscured from the view of Queens West residents, and that it will have a masonry screening wall and an attractive landscaped esplanade, and, therefore, will not have any impact on Queens West. It is further asserted that NYPA's facility at Vernon Boulevard is

consistent with local land uses and would not create any material conflict with officially approved development plans. In particular, it is asserted that the facility is consistent with the Waterfront Access Plan approved by the City Planning Commission in September 1997, and that it will be located 100 feet from the shoreline and the NYPA will install a screening wall which will obscure most of the facility, and there will be an esplanade to ensure continuous public access to the waterfront.

Respondents further argue that it was not required under SEQRA to evaluate any alleged impact that its facility might have on Silvercup's plans to develop its property in the future. Silvercup Studios' proposal to develop the "Silvercup Studios West" includes development on the parcel presently owned by NYPA, as well as the construction of film studios and a 40-story office tower or a 30-story residential tower. Respondents assert that this mixed-use development conflicts with the present zoning resolution and officially adopted plans for the Long Island City waterfront development. It is further asserted that Silvercup's alleged expansion plans are entirely speculative, as they consist of nothing more than a few architectural drawings and would be subject to an extensive series of governmental review and approval. In addition, respondents assert that Silvercup's claim that noise from the proposed facility would cause it to abandon its plans for mixed use development, is unsubstantiated. NYPA asserts that not only did it undertake an evaluation of the noise impact its facility

would have, but that the results of its study demonstrated that the increase in noise levels would be negligible.

NYPA, as a state agency, is not required to comply with all of the provisions of the New York City Zoning Resolutions. NYPA, nonetheless asserts that its proposed facility is compatible with the predominant uses in the area and in an M1-4 zone. Electric generating facilities, contained in Use Group 18, are permitted uses in an M1-4 zone, provided they meet certain performance standards. It is asserted that due to the industrial character of the surrounding neighborhood, and the absence of any significant air quality, noise, or traffic impacts, the EAF properly concluded that the proposed facility would not result in a "material conflict" with local zoning laws or other officially adopted plans, which is the only relevant standard under SEQRA.

NYPA asserts that prior to issuing the Negative Declaration, AKRF performed, on its behalf, an extensive evaluation of the Vernon Boulevard site's history of use and current characteristics to determine the potential for existing on-site contamination. The EAF disclosed that based on the historical use of the site as a large quantity oil storage facility for over 50 years, it was likely that near-surface and subsurface petroleum contamination was present, and that based on the site's use by the Terra Cotta Company prior to 1936, the soil might contain elevated levels of metals. In addition, the EAF stated that PCB's and illegally dumped construction debris containing asbestos might be present at the site. NYPA's Health and Safety Plan addressed these

issues, and included a soil and groundwater sampling program to identify contaminants and delineate their presence on the site. Groundwater monitoring wells were installed and soil samples were collected from soil borings across the site. These samples were analyzed for the presence of volatile and semi-volatile organic compounds, PCB's, pesticides, herbicides and metals. In the event that such sampling and monitoring reveals unacceptably high levels of contamination, NYPA, pursuant to its Health and Safety Plan, will halt its construction until appropriate corrective measures can be implemented, including removal and proper disposal of contaminated soil. NYPA is also conducting continuous perimeter community air monitoring, using a photoionization detector and particle monitor, and in the event that such monitoring reveals excessive airborne contaminants, it will halt construction and take remedial measures. It is asserted that in light of NYPA's protective measures which address a pre-existing condition, the EAF reasonably concluded that construction of the proposed facility would not have a significant adverse impact in the form of increased risks to human health or the environment from on-site hazardous contamination.

NYPA argues that its EAF discussed the potential for adverse impacts on archaeological resources, in full compliance with SEQRA's "hard look" requirement. The potential for "precontact remains" (materials pre-dating European contact with Native American culture) was considered and the EAF stated that the project is in an area of "known precontact activity" based upon the

existence of known precontact sites located across the East River and approximately 10 blocks east of the project. The EAF stated that Stage 1B subsurface testing would be conducted by NYPA prior to construction to determine whether there were any precontact remains or historical archaeological resources in the project area. NYPA also conducted a study of the Terra Cotta Building located on Silvercup's property, and concluded that the NYPA property was probably a storage or fitting yard for the company. In December 2000, a crew of five archaeologists conducted subsurface investigation of the site, prior to NYPA's site preparation. Further review by these archaeologists confirmed the absence of both Native American cultural artifacts and 19th century artifacts of historical significance. NYPA asserts that it also took a hard look at the potential impact of its facility on the Terra Cotta Building. It concluded that its facility would not have a significant visual impact on this structure, as it is located in an industrial area, near the supports of the Queensboro Bridge, and would remain visible from the street. It further concluded that the potential construction impact on the Terra Cotta Building would be insignificant. NYPA asserts that despite petitioners' claims, the heaviest construction, including pile driving, has already taken place at the Vernon Boulevard site and that there has been no apparent damage to the Terra Cotta Building. Respondents, therefore, assert that petitioners' arguments concerning the construction impact on the Terra Cotta Building are incorrect and moot.

NYPA contends that its project is consistent with city and state policies regarding waterfront revitalization and will not have a significant adverse impact on waterfront revitalization in the North Hunter's Point area. NYPA argues that as the project site and the surrounding waterfront areas are all industrial in character and not currently suited for public access, the proposed project will not have an adverse impact on public access or waterfront revitalization. It is noted that none of the area's private landowners, including Silvercup, provide public access to the waterfront. NYPA, however, has revised its site plan since the preparation of the EAF and the issuance of the Negative Declaration and is committed to constructing a 100 foot buffer between the plant, the waterfront and a landscaped esplanade for public access.

Respondent DEC asserts that it provided the public with adequate notice and an opportunity to comment on the subject project, and that no adjudicatory hearing was required. It is further asserted that as the issuance of the air quality permit for the Vernon Boulevard facility was not affected by an error of law, nor was it otherwise arbitrary or capricious or an abuse of discretion, it, therefore, must be upheld.

City of New York, Intervenor's Contentions

The City of New York has submitted an affidavit from Robert M. Harding, the Deputy Mayor for Economic Development and Finance, in support of NYPA's efforts to construct and operate two natural gas powered electric generators. The affidavit does little

more than cite to two recent newspaper articles pertaining to the City's need for an adequate supply of electricity during the coming summer and for the next several years until new larger scale power plants can be licensed and built.

Decision

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; Akpan v Koch, 75 NY2d 561; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 363; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 416.) 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; see also, Chinese Staff & Workers Assn. v City of New York, 68 NY2d, at 363-364, supra; Aldrich v Pattison, 107 AD2d 258, 265; H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232.)

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, 75 NY2d 561)

It is well settled that "[j]udicial review of the actions of an administrative determination is confined to the 'facts and record adduced before the agency'." (Yarbough v Franco, 95 NY2d 342.) Likewise in SEQRA proceedings, a Negative Declaration must be based upon the facts before the lead agency at

the time of the determination. The lead agency must have sufficient information to show that the impact will not be significant at the time that it makes a Negative Declaration. (See, SEQRA Handbook at 45; see also, Rochester Telephone Mobile Communications v Cole, 224 AD2d 918; Purchase Env'tl. Protective Assn. Strati, 163 AD2d 596.) The court, therefore, is constrained to consider only the evidence that was before NYPA at the time it issued its Negative Declaration. The voluminous documents, data, and affidavits that were submitted to this court constitutes evidence dehors the administrative record and cannot be considered by the court. In addition the post hoc measures taken by NYPA following the issuance of the Negative Declaration, which consist of archaeological and soil testing at the site, and plans for a landscaped esplanade and a screening wall similarly cannot be considered by the court. These post hoc measures cannot serve as a substitute for the required hard look which must be taken before the issuance of a Negative Declaration. Such "after the fact SEQRA compliance . . . has been held to be an empty exercise, which in effect, 'rubber stamps' a decision which has already been made." (Abate v City of Yonkers, 264 AD2d 517.)

Applying the above mentioned principals here, I find at the outset that petitioners' challenge to the August 2000 decision to purchase the generators is not subject to SEQRA review. The mere purchase of the generators was not an "action" within the meaning of SEQRA, and, consequently, the purchase, not subject to

the provisions of SEQRA, will not be reviewed here.
(6 NYCRR § 617.3[a].)

It is not the function of this court to make a determination as to the desirability of the project, to reconcile the opinions offered by the parties' experts as to whether there is or will be a shortfall of in-city electrical generation by summer 2001, or to determine whether there are viable alternatives to the proposed gas turbines engines. It was the importance of these extra-judicial issues that motivates this court in its intent to mediate the dispute between the parties. However, the parties have elected not to take full advantage of such offers. Therefore, the only issue to be determined here is whether NYPA "identified the relevant areas of environmental concern," took a "hard look" at them, and made a "reasoned elaboration" of the basis for the determination. To that end, I have examined the EAF and the supporting documents that existed prior to or contemporaneously with the issuance of the EAF.

In Matter of Merson v McNally (90 NY2d 742, 750), the Court of Appeals stated that "'SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making'." (Matter of Coca-Cola Bottling Co. v Board of Estimate, 72 NY2d 674, 679.) This policy is effectuated, in part, through strict compliance with the review procedures outlined in environmental laws and regulations. (See, Matter of King v Saratoga County Bd. of Supervisors, 89 NY2d 341, 347-348). "A SEQRA review process conducted through closed bilateral

negotiations between an agency and a developer would bypass, if not eliminate, the comprehensive, open weighing of environmentally compatible alternatives both to the proposed action and to any suggested mitigation measures." The Court therein further stated that "[t]he environmental review process was not meant to be a bilateral negotiation between a developer and a lead agency but, rather, an open process that also involves other interested agencies and the public." (Id. at 753). In the case at bar, NYPA acted in the dual role of developer and the lead agency for SEQRA review, and conducted its review with an eye towards approving the project and commencing construction no later than January 2001. It is clear that since August 2000 it has been NYPA's goal and steadfast intention to construct and operate the subject generator by June 1, 2001. To this end, NYPA selected twin engine turbines with a total capacity of 88MW, but committed itself to only utilizing 79.9MW in order to avoid and circumvent full and public environmental review under Article X of the Public Service Law.

The EAF identified several areas of environmental concern, which are at issue here. The first relevant area of concern is the project's impact on the existing community or neighborhood character. NYPA conducted a 400 foot area study and a ½ mile area study. NYPA stated that within 400 feet of the proposed facility, the area is primarily composed of industrial land uses, such as Consolidated Edison substations, a warehouse and shipping facilities. The Queensboro Bridge is within the 400 foot area. This area also included a hotel directly across the street

from the site and a commercial office building east of the hotel. North of the Queensboro Bridge supports is Queensboro Park, a large open space with athletic fields, playgrounds and a waterfront walkway. The Queensbridge Houses is also within the 400 foot area, as well as another cluster of 3-story multifamily residences, and the landmark Terra Cotta building. The ½ mile study contained a mix of uses, including undeveloped and residential parts of Roosevelt Island, including Goldwater Memorial Hospital; the Long Island City/Hunter's Point mixed-use district, which includes 2 to 5 story multifamily residential buildings, small offices with neighborhood retail uses, such as restaurants and hardware stores, religious facilities, schools, and learning centers, and Hunter's Point Park which has a playground and basketball courts. NYPA concluded that the proposed project, while altering the present land use of the site, would be consistent with the industrial nature of much of the surrounding area and would not have a significant impact on the area.

NYPA has consistently characterized the neighborhood surrounding the Vernon Boulevard neighborhood as industrial. It is undisputed that the project is located in an area zoned for light manufacturing, which would prohibit a private developer from constructing and operating a power plant in this area. NYPA's characterization of the surrounding neighborhood as industrial gave scant recognition to the residential, recreational and community uses that exist in the area. NYPA also failed to consider extensive redevelopment efforts, adopted land use plans and

residential construction underway in the area, as well as the fact that the prior industrial uses of the Long Island City waterfront are largely a thing of the past, and that the proposed site is located within an emerging mixed-use waterfront area undergoing major targeted revitalization and redevelopment. Plans to redevelop the area have existed for nearly 20 years, at every level of local, city and state government. In view of the on-going and planned redevelopment, the fact that NYPA intended to complete the project within six months after the EAF was written does not dispense with the duty to consider the project's future impact on the community and neighborhood. I, thus, find that NYPA failed to take a hard look at the proposed facility's impact on the existing neighborhood's character.

The second area of concern is the impact the proposed power plant would have on historic and archaeological resources. The EAF stated that the landmark Terra Cotta building was located on an adjacent property and stated that it would not impact views of the building, as it would still be visible from the street. Although NYPA acknowledged that the power facility would be visible from both the bridge and the Terra Cotta building, it concluded that this would not have a significant visual impact on these structures, notwithstanding the fact that the power facility would contain two 150 foot stacks. Furthermore, while it was not anticipated that construction vibrations would result in an impact to the building or to the nearby Queensboro Bridge, the EAF stated that special measures would be taken to protect these structures

from ground-borne vibrations. The EAF, however, did not state what these measures would consist of or how they would be carried out. There is no evidence that NYPA conducted any engineering surveys to determine whether the construction activities would have a physical impact on either the Terra Cotta Building or the Queensboro Bridge. NYPA's broad conclusory statement that the construction of the power plant would not have a significant adverse impact on these structures is not based on any documentary evidence in the administrative record. I, therefore, find that NYPA failed to take a hard look at the impact that the on-site construction would have on these structures and that its conclusions were not supported by substantial evidence in the record.

The EAF also stated that the proposed site was in an area of known precontact (Native American) activity. NYPA determined that based upon studies and inventories of nearby sites that "[t]he implication is that the project site is in proximity to known precontact sites of varying sizes and types, and, therefore, the general area has a high sensitivity for this type of resource." NYPA stated that Stage 1B subsurface testing would be undertaken to determine if there are any precontact and historic resources that would be negatively impacted upon by the project. "Stage 1A research and Stage 1B testing would then provide actual test data specific to the project site and delineate areas that need data recovery. Such areas would be avoided where possible or data recovery operations would be undertaken so that the project can proceed without significant impacts." (Emphasis added.) NYPA's

analysis apparently focused on the impact that archaeological testing would have on construction, rather than the impact that construction would have on potential archaeological resources, as required by SEQRA. The archaeological assessment relied upon by NYPA apparently was prepared on November 24, 2000, four days after the issuance of the Negative Declaration. Clearly, no archaeological testing had been performed at the site prior to the preparation of the EAF and the issuance of the Negative Declaration. NYPA's conclusion that there might not be any potential adverse impacts to archaeological resources, thus, was premature and was not based on substantial evidence in the administrative record.

The third area of concern is the potential visual impact the project would have on the surrounding community. The EAF describes the project site as approximately 3.2 acres of vacant waterfront land. The views from the project site and a ½ mile radius surrounding the site are principally an urban industrial landscape. The EAF states that the "most visible element of the proposed facility would be the stack that would extend to a height of approximately 150 feet above grade. The tallest of the generators' structures, aside from the stack, would reach a height of 40 feet." The facility would be most visible from the water and the Queensboro Bridge, and would remain mostly obscured from inland, due to the presence of other buildings in the area. NYPA, thus, concluded that the project would not have a visual impact on the surrounding neighborhood.

In reaching this conclusion, NYPA, did not consider the aesthetic visual impact the facility would have on residents who would utilize the waterfront area. In discussing waterfront revitalization, the EAF stated that "the project and the adjacent sites do not currently provide public access. The existing conditions at the site and the surrounding industrial land uses are not suitable for safe public access opportunities. Likewise, public access is not compatible with the proposed power facility. However, the proposed project would not impede or prohibit access to publicly accessible coastal lands or waters at other locations, such as Queensbridge Park." After this litigation commenced, NYPA asserted it would construct a screening wall and esplanade along the waterfront. NYPA's site plan, dated January 1, 2001, a month and a half after the SEQRA process closed, however, does not show a public esplanade, and, in fact, none of the designs, drawings or schematics included a public esplanade which would provide public access to the waterfront. Thus, while NYPA now seeks to mitigate the visual impact the power plant will have on the surrounding neighborhood, the EAF made no mention of any of these plans to minimize the visual impact of the power facility or to provide an esplanade with waterfront access.

The fourth area of concern is the potential impact that the project may have on known hazardous materials that existed on the site. The EAF recognized that the site was likely to contain petroleum from its prior usage as a large quantity oil storage facility and a spill that had not been cleaned up, toxic metals

that could have been used in the manufacture of terra cotta in 1936, PCB's from the prior oil facility, and asbestos and lead paint from illegal dumping on the site. It was also recognized that "[s]ince the potential for soil or groundwater contamination had been identified on the site, impacts related to the release of and exposure to subsurface contaminated materials are anticipated during construction and after the site is occupied." The EAF discussed the institution of a Health and Safety Plan, designed to protect workers during construction, conducting tests of the soil, and the proper disposal of contaminated soil. The EAF, however, did not include a specific remediation plan, and clearly no soil tests were conducted until after the issuance of the Negative Declaration. In view of the fact that the construction of the proposed project could cause a release of hazardous materials, the court finds that NYPA did not take a hard look at this area of concern.

Petitioners' assertion that NYPA failed to consider Silvercup's plans to develop its adjoining property prior to issuing the Negative Declaration is without merit. SEQRA only requires a lead agency to compare the impacts a proposed action where it creates a "material conflict with a community's current plans or goals as officially approved or adopted." (6 NYCRR § 617.7[c][1][iv].) (Emphasis added.) Silvercup has not established that its plans to develop the adjoining property have been officially approved or adopted. Moreover, the Silvercup site, pursuant to the City's long term waterfront planning objectives has

been slated as a public park, and there is no evidence that Silvercup has been given permission to construct a mixed-use commercial/residential tower. Inasmuch as Silvercup's development plans are in their infancy, NYPA was not required to consider such plans in its EAF.

It is noted that NYPA officials have now admitted that the use of these electrical generators may not be temporary, and that it may seek to sell the power plants to private developers in the future. The court notes that the Vernon Boulevard facility is in an area that prohibits power plants under the present zoning resolution, making it questionable whether this particular facility could be operated by anyone other than NYPA.

In view of the foregoing, I find that NYPA's issuance of the Negative Declaration was in violation of SEQRA. Petitioners' request to vacate the negative declaration, therefore, is granted. NYPA is directed to prepare an EIS and to conduct its environmental review process in an open and deliberate manner. Petitioners' request for a permanent injunction is granted to the extent that NYPA is directed to cease all construction and related activities at the Vernon Boulevard site until full SEQRA review has been completed. Inasmuch as NYPA's actions were in violation of SEQRA, the permit issued by the DEC is also vacated.

Lastly, I wish to acknowledge and commend counsel for the Petitioner and the Respondents for their professionalism and reasoned positions in this matter.

Settle order which shall provide for the safeguarding of any property already in place and to prevent waste to such property or land such as by erosion, etc.

J.S.C.