STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

TOWN OF MARILLA,

Petitioner,

v. **Index No. I-2014-000101**

BARBARA TRAVIS, et al,

Respondents.

AND

TIMOTHY J. SCOTT,

Petitioner,

v. **Index No. I-2014-000102**

SUSTAINABLE BIOPOWER, et al,

Respondents.

DECISION & ORDER

Michalski, J.

Petitioners brought these Article 78 special proceedings seeking an Order: 1) declaring Respondent New York State Department of Environmental Conservation's "Negative Declaration", and its issuance of a 6 NYCRR Part 360 Permit, under – collectively – the Environmental Conservation Law and the New York State Environmental Quality Review Act, to be null and void *ab initio*, and 2) awarding various forms of injunctive relief against all Respondents. For the reasons set forth below, that application is ***denied***.

PROCEDURAL HISTORY

On October 31, 2012 Quasar Energy Group (QEG), a subsidiary of Respondent Sustainable Biopower (SB), submitted a Part 360 Permit application under 6 NYCRR § 360 to Respondent Department of Environmental Conservation (DEC), seeking approval to use an existing storage tank located on Respondent Trav-Co Farms' property, in the Town of Marilla, to house a digestate which SB refers to as Equate. That property consists of approximately three hundred eighty acres whereon wheat, corn, hay, and soybeans are grown. The application was stamped by a professional engineer, and attached thereto were topographical and flood plain maps of the area, a pump detail, and an Endangered and Threatened Species list. On November 6, 2012 the application was forwarded to DEC's Division of Materials Management in order to begin its technical review under 6 NYCRR § 360 and 6 NYCRR § 617 (the State Environmental Quality Review Act, or SEQRA). Upon initial comparison to the Part 360 regulations, DEC found that the application was incomplete. By way of a Notice of Incomplete Application (NOIA) dated November 26, 2012, DEC informed SB that it required further information before it could begin its review. Specifically, DEC requested SB to forward a completed Part I of a Full Environmental Assessment Form (EAF), and to more fully comply with other portions of Part 360. On December 3, 2012 SB forwarded the completed Part I of the EAF.

On December 11, 2012 DEC sent the Town of Marilla a SEQRA "Lead Agency" letter in connection with SB's application in which they: 1) indicated they had made an initial no "potential significant adverse environmental impact" determination, 2) anticipated that a "Negative Declaration" would ensue, 3) requested the Town to note any objections or concerns the project may present, and 4) inquired as to the Town's desire to assume lead agency status in conducting the

SEQRA review. Attached to that letter was a copy of SB's application and the Part I of the Full EAF. By correspondence dated December 19, 2012, the Town declined the offer to participate in the review process, nor did they voice any objections or concerns with, or claim any jurisdiction over, the tank's intended use.

On January 11, 2013 SB forwarded additional information to DEC including, *inter alia*, a second copy of the Part I of the Full EAF and various plans, drawings, and maps. Upon review of the second submission, DEC sent another NOIA to SB, asking, *inter alia*, that the maps originally provided be stamped and signed by a certified engineer, and an engineer's certification that the tank will comply with National Resources Conservation Service Code § 313. On April 12, 2012 DEC received SB's third submission. Included therein was information regarding on-site monitoring, closure plans, project drawings, spill contingency plans, sludge management plans, and procedures by which SB would address public complaints concerning odor, noise, and spills. Upon receipt of those documents, DEC made several subsequent requests, either by e-mail or letter, for further information or clarification as to their contents. SB responded to all such requests in like manner. On June 7, 2013, upon review of all the submitted materials, DEC determined that the project presented no "potential significant adverse environmental impact", and, therefore, issued its formal Negative Declaration under 6 NYCRR 617.7.

On June 20, 2013 DEC issued a Notice of Complete Application for the project, and directed SB to publish that Notice in the Alden Advertiser newspaper to announce the public comment period. Between early July and September 5, 2013, DEC received over one hundred comments raising a multitude of concerns with the project, which it promptly shared with SB. On August 14, 2013 DEC staff also made a site inspection of Trav-Co Farms property and the tank.

Upon completion of the comment period, and after further consultation with SB, DEC prepared a Responsiveness Summary to collectively address the concerns expressed during that time. A copy of the Summary was sent to each commentor, and was posted on the DEC website. On February 28, 2014 DEC staff met with the Town of Marilla supervisor, and members of the Town Board, the Town Planning Board, a member of the Conservation Advisory Board, and members of the Citizen's Committee to further discuss the project. Finally, on March 7, 2014, DEC issued the Part 360 Permit.

Petitioner Town of Marilla subsequently commenced a Civil Practice Law and Rules (CPLR) Article 78 special proceeding by filing a Verified Petition on July 3, 2014. Petitioner Scott commenced his action in the same manner on July 7, 2014. Collectively, Petitioners seek an Order declaring, *inter alia*, that DEC acted arbitrarily, capriciously, unlawfully, and failed to perform a duty enjoined upon it by law in: 1) determining that Town of Marilla zoning laws did not proscribe the tank's intended use, 2) making its "Unlisted Action" and "Negative Declaration" determinations, and 3) issuing the Part 360 Permit. Petitioners also seek various forms of injunctive relief, and costs.

Respondent DEC filed a Verified Answer with Objections on August 27, 2014. Respondents Sustainable Biopower, Stanley E. Travis, Barbara Travis, and Trav-Co Farms did likewise on August 22, 2014. The non-governmental Respondents also sought dismissal under CPLR § 3211(a)(3) and CPLR § 3211(a)(7).

STATUTE OF LIMITATIONS

Under CPLR § 217(1), an Article 78 special proceeding must be commenced within four months after the determination at issue becomes final and binding. A determination becomes "final and binding" once a particular agency takes a "definitive position on the issue that inflicts an actual,

concrete injury," *Stop-the-Barge v. Cahill* (1 N.Y.23d 218) quoting *Matter of Essex County v. Zagata* (91 N.Y.2d 447). In *Stop-the-Barge*, Respondent New York City Energy (NYCE) had submitted an application to Respondent New York City Department of Environmental Protection (DEP) to obtain a permit allowing them to install a power generator on a barge which was to be moored in the East River. Part of that application included an Environmental Assessment Statement. Upon receipt of the application, DEP assumed lead agency status and proceeded to conduct its coordinated SEQRA review. DEP subsequently issued three conditional Negative Declarations, the last of which was dated January 10, 2000. On January 19, 2000 the Declaration was published for the mandatory thirty day comment period (see 6 NYCRR 617.7(d)(l)(iv)). None of the Petitioners sought to be heard during that time. Subsequent to the issuance of the conditional Negative Declaration, NYCE applied for, and was later awarded, an air permit from DEC.

On February 20, 2001 Petitioners brought an Article 78 action seeking various forms of injunctive relief and vacatur of the Negative Declaration. Respondents then sought dismissal on statute of limitations grounds, alleging, *inter alia*, that the four month term began to run – at the latest – upon the conclusion of the thirty day comment period on February 20, 2000. Petitioners answered that such period commenced when DEC issued the air permit on December 18, 2000; reasoning that Respondents could not advance the project until that time. In granting Respondents' motion, the Court held that the issuance of the final conditional Negative Declaration "was a final agency action for purposes of judicial review," *Id.* Specifically, the Court held that notwithstanding that NYCE obtained the air permit from DEC after the Negative Declaration was made – it was the Negative Declaration, in fact, which "resulted in actual concrete injury to Petitioners because [it] essentially gave the developer the ability to proceed with the project without the need to prepare an

environmental impact statement," *Id.*

Here, Respondents claim that the scenario before us is sufficiently similar so as to warrant a like result; i.e., that the CPLR § 217(7) time began to run with the issuance of the Negative Declaration on June 7, 2013. Petitioners contend that the facts, and the law, are distinguishable from *Stop the Barge*, and ask us to adopt the findings reached in *Eadie v. Town Board of Town of N. Greenbush* (7 N.Y.3d 306). In *Eadie*, the Respondent municipality sought to re-zone certain parcels of land to permit Respondent developers to construct a shopping plaza. To that end, the Town prepared a draft generic Environmental Impact Statement (EIS). Public hearings were held and written comments received. The Town subsequently executed a final generic EIS on March 25, 2004. On April 28, 2004 the Town adopted a Findings Statement approving the project, including the anticipated zoning changes. The Town Board approved those changes on May 13, 2004.

Petitioners then brought an Article 78 action challenging the propriety of the Findings Statement and zoning changes. Respondent then moved for dismissal under CPLR § 217(1), claiming that the statute of limitations began to run when the findings statement was issued. Petitioners countered that the period commenced with the vote approving the zoning changes. In denying Respondents' motion, the Court held that though the "SEQRA process culminated in the issuing of a findings statement . . . no concrete injury was inflicted until the re-zoning was enacted," *Id.* In so holding, the Court particularly distinguished their decision in *Stop-the-Barge* by finding that it – *Stop-the-Barge* – "did not depend on future passage of legislation".

Here, despite Petitioners' protestations to the contrary, Respondents did not seek – nor do they require – any zoning changes in furtherance of the project. However, it can not be said that the Negative Declaration was the "last action taken by the Agency whose determination petitioners

challenge", *Eadie* (*supra*). Unlike, *Stop-the-Barge*, where Respondents obtained an air permit from *another* (our emphasis) agency, Respondents here were required to obtain the Part 360 Permit from the same agency which made the Negative Declaration. More significantly, as Petitioners correctly point out, had DEC declined to issue the Part 360 Permit, no harm would have accrued to Petitioners as the project could not have gone forward, *Eadie* (*supra*), *Stop-the-Barge* (*supra*). Accordingly, we find that the statute of limitations did not begin to run until the Part 360 Permit was issued on March 7, 2014, and, therefore, both actions were commenced timely.

STANDING

I. TOWN OF MARILLA

A municipality has standing to challenge a SEQRA determination where it demonstrates "how its personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from the public at large," *Town of Amsterdam v. Amsterdam Industrial Development Agency* (95 A.D.3d 1539) citing *Saratoga Lake Protection & Improvement District v. Department of Public Works of City of Saratoga Springs* (46 A.D.3d 979, *lv den* 10 N.Y.3d 706). Respondents aver that Petitioner Town of Marilla's mere assertion of its general police powers, its acting as stewards of its environment, of enforcing its zoning laws, or acting in a representative capacity for its affected citizens is insufficient under that standard. Though we agree with Respondents that the Petition is, perhaps, light on specifics, we can not say it is totally devoid thereof. And mindful of the admonition that standing rules "should not be heavy handed" (*Matter of Association for a Better Long Island, Inc. v. N.Y. State Department of Environmental Conservation*, 23 N.Y.3d 1), we can not say – as a matter of law – that Petitioner's pleadings are so wanting as to warrant a dismissal on standing grounds.

II. SCOTT

An individual has standing to challenge a SEQRA determination where he establishes:

> "1) that they will suffer an environmental injury in fact, i.e., an environmental injury that is in some way different from that of the public at large, and 2) that the alleged injury falls within the zone of interest sought to be promoted or protected by the statute under which the governmental action was taken," *Matter of Long Island Pine Barrens Soc'y, Inc. v. Planning Board of the Town of Brookhaven* (213 A.D.2d 484); *Soc'y of the Plastics Indus., Inc. v. County of Suffolk* (77 N.Y.2d 761, 773).

Respondents claim that Scott "has not alleged that his close proximity to the storage tank gives rise to a "direct injury" or that "such injury is in some way different from that suffered by the general public." We disagree.

Petitioner Scott's property lies within one hundred fifty feet of the storage tank. Moreover, the property is both downgrade and downstream therefrom. This geographical disposition, coupled with the fact that any fumes emanating from the tank will be significantly more bothersome to its abutting neighbors, lead us to conclude that Petitioner would endure an environmental harm which "is different from that suffered by the public at large," *Matter of Long Island Contractors' Association v. Town of Riverhead* (17 A.D.3d 590).

TOWN ZONING LAWS, SEQRA CLAIMS, AND PART 360 PERMIT

I. STANDARD OF REVIEW

CPLR § 7803 reads:

> "The only questions that may be raised in a proceeding under this article are: 1) whether the body or officer failed to perform a duty enjoined upon it by law; or 2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of

> jurisdiction; or 3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

It is well settled that in a proceeding seeking judicial review of administrative action, the hearing Court may "not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision," *Flacke v. Onondaga Landfill Systems, Inc.* (69 N.Y.2d 355), see also *Warder v. Board of Regents* (53 N.Y.2d 186). "Where the judgment of the agency involves factual evaluations in an area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference," *Flacke* (*supra*); see also *Warder* (*supra*); *Eastern Milk Producers Cooperative v. Association of State Department of Agricultural & Markets* (53 N.Y.2d 186). So long as the determination is "rational and supported by substantial evidence . . . a reviewing Court may not substitute its judgment" for that of the agency's "even if an opposite conclusion might be logically drawn," *Matter of Village of Honeoye Falls v. Town of Mendon Zoning Board of Appeals* (237 A.D.2d 959); see also *Welsh v. Town of Amherst Zoning Board* (270 A.D.2d 844).

II. ZONING LAWS

Petitioners contend that the EAF failed to note the restrictions which the Town of Marilla Zoning Code (MZC) places upon the use of the Trav-Co Farms property. Specifically, they maintain that the third sentence of MZC § 700-11(A)(7) prohibits the storage of liquids manure within one hundred fifty feet of any property line. Insofar as the tank sits within such distance of Petitioner Scott's property line, and the Town had not granted a variance for the tank's intended use, that section would be breached. Therefore, by relying on a faulty EAF and by failing to assess

"consistency with all duly adopted . . . zoning codes," DEC acted arbitrarily and capriciously, and failed to perform a duty enjoined on them by law in issuing the Part 360 Permit.

Respondents do not contest the restrictions which MZC imposes. However, they contend that equate is not a liquid manure under that section, but rather a digestate; and is to be classified as "manure, odor, or dust producing substances," *Id.* Under that same section of the MZC, a structure containing these substances is required to be set back only seventy five feet from a property line. Thus, because Petitioner Scott's property is one hundred twenty five feet from the storage tank, there is no code violation.

Respondents further contend that Agricultural and Markets Law (AML) Article 25-AA in general, and § 305-a(2)(a) in particular, preempt the MZC. AML § 305-a(2)(a), in pertinent part, reads:

> "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."

This section specifically authorizes county legislatures to create "agricultural districts". Land falling within those "districts may be entitled to various statutory protections and benefits," *Town of Lysander v. Hafner* (96 N.Y.2d 558). "Where a municipality seeks to administer a zoning ordinance that is in conflict with the policy objectives of [AML] article 25-AA . . . the zoning ordinance is superceded by the Agricultural and Markets Law," (*Inter Lakes Health, supra*). There is no dispute that the Trav-Co Farms property lies within an Agricultural district. Additionally, the Commissioner of the Department of Agriculture and Markets has determined, contrary to Petitioner's

position, that Respondents intended use of the tank constitutes an "Agricultural Activity" under AML § 301. That determination is entitled to great deference (*Id*).

Accordingly, we agree with both of Respondent's arguments, and find that Petitioners have failed to establish that DEC did not adequately consider the MZC in making its Part 360 determination.

III. PART 360 PERMIT AND SEQRA CLAIMS

There is no merit to Petitioners' contention that DEC acted unlawfully, irrationally, arbitrarily or capriciously, or failed to perform a duty enjoined upon them by law, or acted beyond the bounds of their jurisdiction in making their "Unlisted Action" or "Negative Declaration" determinations, or in issuing the Part 360 Permit.

DEC's decision to characterize the project as an "Unlisted Action" was rational and supported by substantial evidence (6 NYCRR 617.2[ak]). They thoroughly reviewed Part I of the Full EAF and the accompanying documentation. They also properly concluded, as noted above, that the tank was located within an agricultural district, and that its intended use was best classified as an agricultural activity. Petitioners' contentions that the Town of Marilla was necessarily an "involved agency", and that a "coordinated review" was required, are misplaced. The "Unlisted Action" designation allowed DEC to "proceed as if it was the only involved agency" (see 6 NYCRR § 617.6(b)(4)). Moreover, the Town's correspondence of December 19, 2012 indicating they had no approval authority over the tank, or any interest in assuming lead agency status, only underscores these findings.

We also find that DEC "identified the relevant areas of environmental concern, took a 'hard

look' at them, and made a reasoned elaboration of the basis for their [Negative Declaration] determination," *Matter of Jackson v. New York State Urban Development Corporation* (67 N.Y.2d 400). The Negative Declaration set out eight areas of potential environmental concern. The record, most particularly the affidavit of DEC analyst Lisa Czechowicz, clearly demonstrates that these concerns received the requisite "hard look" through a detailed and comprehensive review of the twice supplemented Full EAF, the completed Parts II and III of the EAF, and various other information SB submitted over several months. After comparing that information to the criteria set out in 6 NYCRR 617.7(c), DEC properly concluded that the project did not pose a "potential significant adverse environmental impact," *Id.*

In reaching its determination, as Respondents' note, DEC relied upon several factors, including that:

> 1) the Storage Tank is an existing tank located at the Trav-Co Farms; 2) the total acreage of the project site area only comprises 2 acres; 3) no new construction or land clearing is required; 4) no regulated wetlands or streams are located on Trav-Co Farms; 5) the depth to ground water table is 2 feet; 6) based upon DEC's review of its Natural Heritage Program maps, no threatened or endangered species or significant or unique habitat are identified on the project area; 7) Trav-Co Farms is accessible from several main transportation routes in Erie County which can handle the associated traffic levels, the project site can accommodate several vehicles waiting in queue, and there are only 3-to-6 inbound trips anticipated per day (on a 250-day basis); and 8) based on the implementation of the mandated Operational Requirements Plan, Standard Operating Procedure, and Contingency Plan for Spill Prevention and Response for the Storage Tank, potential impacts to air, odor, noise, dust and water will be avoided to the maximum extent practicable.

We are satisfied that this recitation certainly manifests the requisite "reasoned elaboration" as to how DEC arrived at its determination (see 6 NYCRR 617(b)[4]).

Lastly, Petitioners' assertion that DEC's determination to issue the Part 360 Permit lacks a rational basis is without merit. DEC undertook a lengthy and thorough review of the application, including multiple requests for – and receipt of – supplemental information, a site inspection, an extended public comment period, and meetings with various town officials and civic groups over a nearly eighteen month period. Additionally, they incorporated various terms and conditions into the Permit to further assure Petitioners, and the public at large, that all environmental concerns would be closely monitored. Thus, the record before us establishes that DEC's decision to issue the permit was lawful and not unreasonable.

CONCLUSION

Accordingly, we conclude that all of the Respondents have satisfied their collective statutory and regulatory obligations, and that DEC's determinations were rational and supported by substantial evidence.

WHEREFORE, it is hereby ORDERED that the requests for Article 78 and injunctive relief are ***denied***, and the Petitions are ***dismissed***.

Hon. John L. Michalski

Dated: Buffalo, New York
August 24, 2015

GRANTED

AUG 24 2015

BY _____
ROBERT ADAMSKI
COURT CLERK