

In the Matter of the Application of

ERIE BOULEVARD HYDROPOWER, L.P.

**Issues Ruling
on SEQRA and
Federal Preemption**

(Acting through its general partner,
BRASCAN POWER - NEW YORK)
for federal Clean Water Act Section
401 Water Quality Certification
for its **School Street Project**.

DEC Project No.
4-0103-00027/00001
(formerly DEC No.
4-6103-00027/00001-9)
(FERC No. 2539)

(Albany County)

Background

In 1991, Niagara Mohawk Power Corporation ("Niagara Mohawk") applied to the Department of Environmental Conservation ("Department" or "DEC") for nine water quality certifications, pursuant to section 401 of the federal Clean Water Act (33 United States Code ["USC"] § 1341; "CWA"), for existing hydroelectric generating projects in New York. The CWA, enacted in 1948, was totally revised by amendments in 1972 that gave the Act its current shape. The water quality certifications are necessary for Federal Energy Regulatory Commission ("FERC") relicensing of the hydroelectric generating projects. The School Street project (the "project") located in the City of Cohoes, New York, is one of these nine projects. Erie Boulevard Hydropower, L.P., (the "Applicant" or "Erie Boulevard"), acting through its general partner, Brascan Power-New York, is the successor in interest to Niagara Mohawk, with respect to this project.

The project is located at river mile 2.5 on the Mohawk River in Albany and Saratoga Counties. The Powerhouse is located in the City of Cohoes at the junction of North Mohawk Street and School Street. The project is a hydroelectric facility that consists of five vertical Francis turbines with a generating capacity of 38.8 MW and is located on the Mohawk River. The project consists of the School Street Dam, which is a gravity dam that creates an approximately 100 acre reservoir. Water is diverted from the reservoir to the power canal, which conveys

water to the Powerhouse. At the School Street Dam is a gatehouse that is used to control the diversion of water to the power canal. The Powerhouse is at the end of the power canal and houses the five turbines. After exiting the Powerhouse, water is discharged to the tailrace and then back to the Mohawk River. Historically, the project has been operated as a storage-and-release pulsing facility. Applicant typically fluctuates the reservoir between 156.1 feet mean sea level ("msl") to 153.1 feet msl. Applicant is also proposing to excavate and dredge approximately 65,000 cubic yards of bedrock and sediment from the power canal, which is located within the project boundary.

On November 19, 1992, Staff of the New York State Department of Environmental Conservation ("DEC Staff") denied the applications for all nine water quality certifications. On December 16, 1992, Niagara Mohawk formally requested an administrative adjudicatory hearing regarding the water quality certification denials.

In 1993, an administrative permit hearing was noticed. ALJ Andrew S. Pearlstein convened a combined legislative hearing and issues conference on August 5, 1993, for all nine water quality certification applications.

In April 1994, ALJ Pearlstein issued a ruling determining several threshold legal issues concerning the scope of New York State's authority to review, deny and condition CWA § 401 water quality certifications for hydroelectric projects whose relicensing was before FERC. (See *Matter of Niagara Mohawk Corporation*, 1994 WL 1720233 [N.Y.Dept.Env.Conserv.]

Administrative appeals were filed challenging ALJ Pearlstein's ruling. While those appeals were pending, the United States Supreme Court issued a decision relevant to the scope of CWA § 401 review (see *PUD No. 1 of Jefferson County v Washington Dept. of Ecology*, 511 US 700 [1994]). Former Commissioner Langdon Marsh subsequently remanded the matter back to ALJ Pearlstein and directed Department Staff to revise the draft water quality certifications in light of the Supreme Court's decision (see Memorandum from Robert Feller, Assistant Commissioner for Hearings, to Parties [8-5-94]).

The parties then began sequential settlement negotiations that extended over a lengthy period of time. The settlement negotiations included the participants in the Departmental water quality certification hearing and other interested stakeholders. During this extended period of negotiations, ALJ Kevin J. Casutto replaced ALJ Pearlstein on these matters. In addition, Erie

Boulevard became the successor in interest to Niagara Mohawk as the applicant for the water quality certification for the School Street project (see *Matter of Erie Boulevard Hydropower, L.P.*, ALJ Ruling on Motion for Denial of Substitution of Applicants, Oct. 26, 2000).

The Public Hearing

As a result of the extended sequential negotiations, settlements were reached on all of the nine water quality certification applications except the School Street water quality certification. Settlement discussions on the School Street project eventually concluded, and DEC Staff prepared a new draft water quality certification. On March 7, 2005, a supplemental notice of public comment period, complete application and reconvening of public hearing was issued (the supplemental notice) regarding the School Street water quality certification application, that scheduled a supplemental legislative hearing and issues conference, and established filing deadlines for additional petitions for party status.¹

Erie Boulevard appeared at both the legislative hearing and the issues conference, by Hiscock & Barclay, LLP, Frank V. Bifera, Esq., member, and Winston & Strawn, LLP, William J. Madden, Jr., Esq., member.

DEC Staff was represented at both the legislative hearing and the issues conference, by William G. Little, Esq., an Associate Attorney with the Department.

- The April 2005 Legislative Hearing

The reconvened legislative hearing was held on April 13, 2005. Twenty-five public comments were received, including comments from federal and local elected officials and representatives of intervenors. Most comments were in opposition to the project. Those in opposition to the project argued that with increased river flows, Cohoes Falls should be redeveloped as a tourist attraction and that the canal intake is not suitable for recreational uses due to strong currents. In addition, opponents raised concerns that the power generated by the School Street facility would not be sold locally and also questioned the safety of proposed blasting in the canal and the proposed PCB

¹ Timely petitions for party status had previously been filed by New York Rivers United, New York Power Authority, and the City of Cohoes.

remediation. In sum, opponents argued that this project should be rejected because it is not the best use of riverine resources. Several opponents contended that the competing Green Island Power Authority proposal is superior.

The Petitions for Party Status

In response to the supplemental notice, a petition for party status and amended petition were received from the Green Island Power Authority, represented by Peter Henner, Esq. A joint petition for party status was received from the Town of Green Island and the Village of Green Island, represented by Towne Law Offices, P.C., Joshua A. Sabo, Esq., of counsel. In addition, two 1993 petitioners filed supplemental party status petitions. Supplemental petitions for party status were received from New York Power Authority ("NYPA"), appearing by Gerald Goldstein, Esq., Assistant General Counsel, and New York Rivers United ("NYRU"), appearing by Bruce Carpenter, Executive Director (NYRU's counsel, based in California, was unable to attend).

Deputy Commissioner's Interim Decision on Applicability of Permit Hearing Regulations

During the April 14, 2005 issues conference, the Applicant moved for a ruling that the former version of 6 NYCRR part 624 (applicable when this proceeding began), effective through January 8, 1994, will not be applied going forward in this proceeding. I ruled from the bench that because this proceeding commenced under the former 6 NYCRR part 624, the former regulation governed this water quality certification review. By leave of Deputy Commissioner Carl Johnson, the Applicant filed an expedited appeal of the bench ruling.

On September 22, 2005, Deputy Commissioner Johnson issued an Interim Decision holding that, although the bench ruling is technically correct, in the exercise of discretion, the ruling was reversed. *Matter of Erie Boulevard Hydropower, L.P.*, NYSDEC Case No. 4-6103-0027/00001-9, Interim Decision of the Deputy Commissioner, September 22, 2005, 2005 WL 1492857 (N.Y.Dept.Env. Conserv.). Therefore, going forward in this matter, the Department's current hearing regulations are applicable, 6 NYCRR part 624, effective January 9, 1994.

Applicant's Additional Filings

During the April 14 and 15, 2005 issues conference, the Applicant offered to provide additional information regarding the subject water quality certification application, and the

Applicant provided (or identified) the additional information by May 5, 2005. Other issues conference participants were afforded an opportunity to make responsive filings. These filings shall be addressed further at a future reconvened issues conference.

The FERC Licensing Proceeding and State Water Quality Review

In furtherance of its explanation of the role of state water quality certification in the context of FERC relicensing of hydroelectric power facilities, the Applicant has cited three federal cases: *Escondido Mutual Water Co. v LaJolla Band of Mission Indians*, 466 US 765 (1984), *Wisconsin Public Service Corporation v. FERC*, 32 F3d 1165 (7th Cir. 1994) and *Bangor Hydro-Electric Company v. FERC*, 78 F3d 659 (D.C. Cir. 1996). In addition, the Applicant has cited an earlier ruling by ALJ Pearlstein in this proceeding, *Matter of Niagara Mohawk Corporation*, 1994 WL 1720233 at 8, (N.Y.Dept.Env.Conserv.) (The standard to be applied is that of "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.").

Proposed Adjudicable Legal Issue: New York State Environmental Quality Review and Federal Preemption

The Green Island Power Authority (hereinafter, "GIPA") contends that the New York State Environmental Quality Review Act ("SEQRA") is applicable to the issuance of CWA § 401 water quality certificates, and that full compliance with SEQRA is necessary before the Department can issue such a certificate. Department and the Applicant, Erie Boulevard disagree, instead contending that a CWA § 401 certificate will be granted if the Department finds that the project will operate and be maintained in compliance with New York State's water quality standards that are comprised of numerical and narrative standards that are codified at 6 NYCRR parts 701-704. These standards have been approved by the U.S. Environmental Protection Agency ("U.S. EPA") pursuant to CWA § 303. DEC Staff and the Applicant contend that the Federal Power Act (hereinafter, "FPA") (16 USC § 791) preempts New York SEQRA review in this matter. Although preemption has been addressed previously in the 1994 ruling (see, *Matter of Niagara Mohawk Corporation*, 1994 WL 1720233 at 8, [N.Y.Dept.Env.Conserv.]), Intervenors argue that subsequent case law requires a determination that SEQRA is not preempted by the FPA. Therefore, this is a threshold legal issue.

The FPA governs applications for hydroelectric power projects on the navigable waters of the United States. The general power of FERC to grant licenses for such projects is

found in 16 USC § 797(e). CWA § 401 provides that before a Federal Agency (e.g., FERC) may issue a license or permit for a project that may have adverse effects on water quality, the State where the project is located must certify that the project will adhere to State water quality standards. See also 6 NYCRR 608.9. An applicant for a section 401 certificate must demonstrate that the point source complies with CWA sections 301, 302, 303, 306, and 307 (33 USC §§ 1311, 1312, 1313, 1316, 1317). Section 303 authorizes the states to adopt water quality standards and implementation plans that shall be submitted to the U.S. EPA for approval (see 33 USC § 1313). FERC's implementing regulations and re-licensing procedures are found in 18 Code of Federal Regulations ("CFR") 4 and 16.

Pursuant to the National Environmental Policy Act (hereinafter, "NEPA"), FERC conducts environmental impact assessments for all aspects of a federal license application (see 42 USC § 4321). The FPA also contains internal provisions for review of the environmental impacts of the project, which include assurances that the project will adequately protect, mitigate, and enhance fish, wildlife, and recreation (see 16 USC §§ 797[e], 803[a], 803[j]). The FPA has given FERC exclusive authority over hydropower projects, and limits a state's control to the issuance of the section 401 water quality certificate to ensure the projects meet the applicable water quality standards (16 USC § 791 *et seq.*).

The New York Courts have consistently held a broad view of federal authority under FPA (see *Matter of Niagara Mohawk Power Corporation*, 1994 WL 1720233 [NY Dept. Env't. Conservation]). Prior to enactment of the CWA, the Court of Appeals stated in *Matter of de Rham v. Diamond* (32 NY2d 34, 44 [1973]) that the Federal Power Commission (now FERC) had broad, sweeping power and planning responsibility when licensing and regulating hydroelectric facilities along the navigable waters of the United States.

"The Commission's jurisdiction with respect to such projects pre-empts all State licensing and permit functions. Section 21 of the Federal Water Pollution Control Act relinquishes only one element of the otherwise exclusive jurisdiction granted the Power Commission by the Federal Power Act. It authorizes States to determine and certify only the narrow question where there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable quality standards' of the State " (*id.*).

After the CWA was substantially revised in 1972, the Court of Appeals followed the reasoning of *Matter of de Rham v. Diamond* in *Matter of Power Authority of the State of New York v. Williams* (60 NY2d 315 [1983]). In *Matter of Power Authority*, which concerned the proposed Prattsville pumped storage power station, the Court held that the State had a "very limited" authority in reviewing a section 401 certification application (*id.* at 326). The Court expressly stated that "[t]he certification referred to in the Federal Clean Water Act, insofar as relevant to the Prattsville Project, is simply of compliance with section 303 of the Federal statute (US Code, tit 33, §1313), which provides for either State-adopted, Federally approved water quality standards or the promulgation of standards by the Federal Environmental Protection Agency" (*id.*).

Supreme Court, Albany County, determined in *Matter of Fourth Branch Associates v. Department of Environmental Conservation* (146 Misc 2d 334 [1989]), that the Department had no authority to incorporate SEQRA review during its CWA section 401 certification process for projects subject to FERC's jurisdiction.

"[I]t is well settled that the Federal Government's preemption of this area cannot be overcome by the enactment of State law. . . . (citation omitted). Moreover, there can be no doubt that the state cannot impose SEQRA review upon a section 401 water quality certification, for to do so would allow the State of New York to duplicate and possibly contravene the decision-making authority of the Federal government with respect to these projects, when exclusive authority has been entrusted to FERC by the Federal Power Act. . . ." (*id.* at 346) (citation omitted).

The opinion further noted that "[w]ere SEQRA permitted to operate in the field exclusively entrusted to the Federal Energy Regulatory Commission by the Federal Power Act, it would clearly tend to inhibit the operation of the Federal Power Act and would thereby thwart the operation of the Federal Government's overriding policy concerns regarding the comprehensive development of national hydropower resources " (*id.* at 346-347).

The Appellate Division in *Matter of Long Lake Energy Corporation v. New York State Department of Environmental Conservation* (164 AD2d 396 [1990]), followed reasoning similar to that used in the previous line of cases when it restated the principle that CWA section 401 authorizes states to determine and certify only the narrow issue whether a proposed project is reasonably assured to meet applicable state water quality standards (see *id.* at 401, 402). The court held that individual

standards governing turbidity and temperature change contained in 6 NYCRR parts 701 and 704, were such federally approved water quality standards (see *id.* at 402, 403). Accordingly, the court concluded that the Department acted within its authority when it denied a water quality certification application on the grounds that the applicant failed to provide requested information concerning turbidity and temperature change.

CWA section 401(d) was amended in 1972 to contain the following language: "[a]ny certifications provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply . . . with any other appropriate requirement of State law" (33 USC § 1341[d]). The Court of Appeals in *Matter of Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation* (82 NY2d 191, 199 [1993]) held that the "any other appropriate requirement of State law" phrase did not broaden the Department's authority to make sure applications for water quality certificates comply with provisions of State law other than the water quality standards adopted by the State in 6 NYCRR parts 701 and 704, and approved by the U.S. EPA pursuant to CWA section 303 (see *id.* at 199, 200).

"We agree with the Appellate Division that the Federal Power Act establishes a comprehensive scheme of federal regulation of hydroelectric projects that essentially preempts state regulation of hydroelectric facilities within the Federal Energy Regulatory Commission's jurisdiction. Settled law in New York has consistently supported the view that section 401 gives the State regulatory entity only a limited role of review, based on requirements affecting water quality, not on all state water quality provisions. Review by State agencies that would overlap or duplicate the federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of the law dominated by the nationally uniform Federal statutory scheme" (*id.* at 196).

Accordingly, the Court held that the Department lacked authority to deny a water quality certification on the basis of broader environmental provisions of New York law and regulation, including SEQRA, but instead was limited to the standards found in 6 NYCRR parts 701 through 704 (see *id.* at 195, 200).

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (511 US 700, 723 [1994]), the United States Supreme Court concluded that the Washington Department of Ecology's

minimum stream flow requirements can be imposed in a CWA section 401 water quality certificate for a federally licensed hydropower plant. Justice Sandra Day O'Connor recognized that the question before the Court in *Jefferson County* was specifically whether the Washington Department of Ecology could include minimum stream flow requirements in their section 401 water quality certificate. The State of Washington asserted that the minimum flow requirement was required to assure compliance with state water quality standards adopted pursuant to section 303 of the CWA (see *id.* at 712).

The Court held that, "[s]tates may condition certification upon any limitation necessary to ensure compliance with state water quality standards or any other appropriate requirement of state law." *Id.* However, the Court did not define the limits of the phrase "Any other appropriate requirement of state law". Nonetheless, the Court went on to state that "at a minimum, limitations imposed pursuant to state water quality standards and adopted pursuant to § 303 are appropriate requirements of state law (*id.* at 713)." Therefore, in *PUD No. 1*, the Supreme Court did address the scope of a state's authority under CWA section 401 and which criteria are appropriately included in federally approved state water quality certification standards. More importantly, the Court did not address the issue of whether states, in conducting CWA water quality certification review, can apply state statutes and regulations beyond the federally approved CWA water quality standards.

The New York Court of Appeals, as summarized above, has determined that the Department cannot apply SEQRA to review of an application for a CWA section 401 water quality certificate (see *Niagara Mohawk*, 82 NY2d at 196). The Court of Appeals stated that SEQRA review was outside the scope of the State's water quality standards adopted pursuant to CWA section 303, and therefore not a requirement of state law under the CWA (see *id.* at 195). Therefore, the New York Court of Appeals ruling in *Niagara Mohawk* that SEQRA review was not within the meaning of "any other appropriate requirement of State law" in CWA § 401 (d), was not overruled by the Supreme Court's subsequent "any other appropriate requirement of State law" ruling in *Jefferson County*.

In sum, applicants for state water quality certification may challenge any state-imposed conditions in state court to determine whether the condition exceeds the state's authority under CWA § 401. Certification conditions have been challenged in New York and the New York courts have consistently held that the State has a limited role in reviewing the effect that a

proposed project will have on water quality. The state's role is limited to assuring a proposed hydroelectric facility will adhere to state water quality standards (see *Niagara Mohawk*, 82 NY2d at 196).

Ruling #1: New York courts have narrowly construed the State's power when issuing a CWA section 401 water quality certificate to encompass only water quality standards codified pursuant to CWA section 303. See *Matter of de Rham v. Diamond* through *Matter of Niagara Mohawk Power Corporation v. New York State Department of Environmental Conservation*. Although the Supreme Court of the United States, in *PUD No. 1 of Jefferson County v Washington Dept. of Ecology*, 511 US 700 (1994), addressed the scope of standards that could be imposed under CWA section 401, the Court did not examine whether broad State statutes, such as SEQRA, could be imposed by a State in addition to its CWA section 401 water quality standards review.

The New York State Court of Appeals has explicitly stated that for a CWA section 401 water quality certificate, a SEQRA review is preempted by the FPA, which only allows a State to impose water quality standards adopted by the State and approved by the EPA pursuant to CWA § 303. SEQRA is not a State water quality standard adopted pursuant to the CWA. Therefore, this issue is neither substantive nor significant. No adjudicable issue is presented.

Appeals and Further Scheduling

Because it remains to reconvene the issues conference to discuss other proposed adjudicable issues, any appeals of this ruling are to be held in abeyance and may be filed on the schedule to be announced for appeals from the subsequent issues ruling in this matter.

A telephone conference will be arranged to discuss scheduling of the reconvened issues conference. During the issues conference, all remaining proposed adjudicable issues will be discussed in view of this ruling, and in light of the Applicant's additional filings. In addition, the proceeding is governed by the department's current 6 NYCRR part 624, effective January 9, 1994. Intervenors must present argument asserting substantive and significant issues concerning whether the settlement agreement and application materials do not provide reasonable assurance that the activity will be conducted in a

manner which will not violate applicable water quality standards. The Applicant and DEC Staff should be prepared to show, with reference to the settlement agreement and application materials, that reasonable assurance does exist that the challenged activity will be conducted in a manner which will not violate applicable water quality standards.

/s/

Kevin J. Casutto
Administrative Law Judge

Dated: December 23, 2005
Albany, New York

To: Attached ERIE BOULEVARD HYDROPOWER, L.P., (School Street Project) Distribution List (dated May 13, 2005)