

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Section 401 Water
Quality Certification for the School Street
Project

- by -

ERIE BOULEVARD HYDROPOWER L.P. ,

Applicant.

DEC Project No. 4-6103-0027/00001-9

RULING OF THE DEPUTY COMMISSIONER
ON MOTION FOR LEAVE TO FILE AN EXPEDITED APPEAL

June 17, 2005

RULING OF THE DEPUTY COMMISSIONER¹
ON MOTION FOR LEAVE TO FILE AN EXPEDITED APPEAL

Applicant Erie Boulevard Hydropower L.P. ("applicant") filed a motion with the Deputy Commissioner claiming an appeal as of right or, in the alternative, seeking leave to file an expedited appeal, from a bench ruling of Administrative Law Judge ("ALJ") Kevin J. Casutto rendered during an issues conference on April 14, 2005. In that ruling, ALJ Casutto held that the former version of 6 NYCRR part 624 ("former Part 624"), which was in effect from July 14, 1985 through January 8, 1994, will be applied in its entirety to the present water quality certification application proceeding.

Applicant premises its appeal as of right and its motion for leave to appeal upon the Part 624 regulations in effect since January 9, 1994 ("current Part 624"). Applicant argues that because the ALJ's ruling was a ruling on the merits of a legal issue made as part of an issues ruling, it has an appeal as of right pursuant to current 6 NYCRR 624.8(d)(2)(ii). In the alternative, applicant seeks leave to appeal pursuant to current 6 NYCRR 624.8(d)(2)(v), arguing that it will be unfairly and significantly prejudiced if the ALJ's ruling is not reviewed at this time.

¹ Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Deputy Commissioner Carl Johnson by memorandum dated February 25, 2005.

Staff of the Department of Environmental Conservation ("Department") filed a response and supplemental response to applicant's motion supporting applicant's positions.

Green Island Power Authority ("GIPA") filed a response to applicant's motion opposing applicant's petition and a reply to Department staff's supplemental response. GIPA argues, among other things, that former Part 624 should be used to determine whether applicant has an appeal as of right or, in the alternative, whether applicant's motion for leave to appeal is authorized. GIPA contends that no appeal as of right lies from the ALJ's ruling because the only rulings appealable as of right under the former regulations were ALJ rulings denying or limiting party status (see 6 NYCRR former 624.4[f]). GIPA also argues that former Part 624 did not otherwise authorize motions for leave to file expedited appeals.

The Village and Town of Green Island (collectively "Green Island") submitted a joint response to applicant's motion, also opposing applicant's petition. Citing the current Part 624, Green Island argues that the ALJ's ruling is not an issues ruling and, thus, no appeal lies as of right pursuant to 6 NYCRR 624.8(d)(2)(ii). In addition, Green Island urges that the Deputy Commissioner deny applicant's alternative motion for leave to appeal on the ground that applicant is not prejudiced by the ALJ's determination to apply former Part 624 to these

proceedings.

After considering all the submissions concerning the threshold question whether applicant has an appeal as of right or, in the alternative, whether its motion for leave to appeal should be granted, I conclude that it is unnecessary at this time to determine whether the current or former versions of Part 624 apply. Both the current and former versions of Part 624 authorize appeals as of right from issues rulings (see 6 NYCRR current 624.8[d][2][ii]; 6 NYCRR former 624.6[d]). Thus, assuming without deciding that the ALJ's bench ruling is viewed as an issues ruling, applicant's appeal as of right would lie under either version of Part 624.

With respect to motions for leave to appeal, GIPA is correct that, although the current version of Part 624 expressly authorizes such motions (see 6 NYCRR 624.8[d][2][v]), former Part 624 is silent concerning such motions. Nevertheless, prior Commissioners recognized their inherent authority under the former hearing regulations to consider and grant motion for leave to file interlocutory appeals, even where no explicit authority existed (see, e.g., Matter of Universal Waste, Inc., Interim Decision [of the Commissioner] on Motion for Reconsideration, Aug. 5, 1987; see also Feller, DEC's New Hearing Rules, 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 60). Thus, applicant is authorized to seek leave to

file an expedited appeal under either version of Part 624.

I also conclude that I need not decide whether the ALJ's bench ruling in this proceeding is an issues ruling. Even assuming it is not, I conclude that applicant has satisfied the standards for the discretionary grant of a motion for leave to file an expedited appeal, whether under the former Part 624 (see Matter of Universal Waste, Inc. [motion for interlocutory appeal granted "in the public interest"]), or under the current Part 624 (see 6 NYCRR 624.8[d][2][v] [leave to file an expedited appeal granted where movant demonstrates that the failure to decide such an appeal would be "unduly prejudicial" or "result in significant inefficiency in the hearing process"])). Thus, applicant's appeal is retained, whether because it lies as of right, or by virtue of a discretionary grant of leave by the Deputy Commissioner.

Having determined to retain applicant's appeal, the parties to the appeal are hereby authorized to supplement their submissions to address the merits of the appeal. Although I note that applicant has indicated the papers constituting its arguments on the merits of its appeal have already been submitted, applicant should nonetheless be given a brief period to make any additional submissions it deems appropriate. The remaining participants should also be given sufficient time to thereafter file their responses on the merits.

Accordingly, this matter is remanded to the Chief

Administrative Law Judge for the establishment of an appropriate briefing schedule for the appeal.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Carl Johnson
Deputy Commissioner

Dated: Albany, New York
June 17, 2005