

In the Matter of the Application of

ERIE BOULEVARD HYDROPOWER, L.P.

**Ruling on Proposed
Issues and Party
Status**

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

(March 30, 2006)

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

(Albany County)

Summary of Rulings

In this application for hydro electric generation water quality certification (WQC) renewal, a lengthy, multi-year negotiation process resulted in a proposed settlement agreement. However, during the final stages of the settlement process, the Green Island Power Authority (GIPA) and the Town and Village of Green Island unsuccessfully sought to enter the negotiations. These three entities have sought party status in this proceeding to challenge various aspects of the project. (Other, earlier Intervenors have signed the proposed settlement agreement or indicated no opposition to it). GIPA has proposed its own hydroelectric generation project that would use the same riverine resources.

The proposed adjudicable issues asserted by GIPA and the Town and Village of Green Island, including purported defects or omissions in the WQC application materials, must be viewed in the context of the overarching Federal Energy Regulatory Commission (FERC) licensing proceeding. Because many final project details only will be determined as the result of the FERC licensing proceeding, proposed issues in this application for WQC must be evaluated by the standard of whether the WQC application

materials (and the issues conference record) provide reasonable assurance that the project will comply with New York State's water quality standards.

In view of the overarching FERC licensing proceeding, the record in this hydroelectric generation WQC proceeding, the application materials, including preliminary plans, are sufficient for review of this WQC application. No substantive and significant issues have been identified with respect to omission or defect in the WQC application materials. Furthermore, the record in this hydroelectric generation WQC proceeding provides reasonable assurance that the contemplated activities and project features will be conducted or implemented in a manner which will not violate applicable water quality standards. GIPA's contention that final plans for activities or project features identified in its petition for party status should be available as part of the application materials for this hydroelectric relicensing WQC application must be rejected. Preliminary plans available in this issues conference record, as conditioned by the Draft WQC (and the Settlement Agreement), do provide reasonable assurance that the contemplated activities and project features will be conducted or implemented in a manner which will not violate applicable water quality standards. No substantive and significant issues have been identified.

Background

In 1991, Niagara Mohawk Power Corporation (Niagara Mohawk) applied to the Department of Environmental Conservation (Department, NYSDEC or DEC) for nine water quality certifications, pursuant to section 401 of the federal Clean Water Act, for existing hydroelectric generating projects in New York. The WQCs are necessary for 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., (Acting through its general partner, Brascan Power-New York), is the successor in interest to Niagara Mohawk, with respect to the School Street hydroelectric generating project. In the project vicinity, the Mohawk River above the Cohoes Dam, and the power canal, are classified as Class A waters. The portion of the Mohawk River below the project tailrace is classified as Class C waters. For further background on this project, the reader is referred to the previous ruling in this matter, dated December 23, 2005.

The Public Hearing

Following conclusion of unfruitful settlement negotiations in this matter, DEC Staff prepared a draft WQC. 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 WQC application. That public notice advertised a supplemental legislative hearing and issues conference, and established filing deadlines for additional petitions for party status.¹

A legislative hearing was held as advertised on April 13, 2005 and an issues conference was held on April 14, 2005 and April 15, 2005, and was continued to an unspecified date. On February 6, 2006, the issues conference was reconvened.

Erie Boulevard, L.P., 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.

Staff of the New York State Department of Environmental Conservation (DEC Staff) was represented at both the legislative hearing and the issues conference, by William G. Little, Esq, Associate Attorney.

The Petitions for Party Status

In response to the supplemental public hearing notice, a petition for party status and amended petition were received from GIPA, 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).

Between the April 2005 issues conference and the February 6, 2006 issues conference, several events occurred:

First, by May 5, 2005, the Applicant provided additional

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

technical and other information regarding this WQC application.

Second, on September 22, 2005, Deputy Commissioner Johnson issued an Interim Decision holding that, although the bench ruling applying the former version of 6 NYCRR part 624 is technically correct, in the exercise of discretion the ruling is 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.)

Third, on December 23, 2005, I issued the ruling on applicability of SEQRA and federal preemption, above referenced. The ruling, in sum, stated that New York courts have explicitly held that for a federal Clean Water Act (CWA; 33 USCA 1251 *et seq.*) section 401 water quality certificate, a SEQRA review is preempted by the Federal Power Act, 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, and therefore is preempted in this instance.

Following the February 6, 2006 issues conference, participants' filings were received including GIPA's letter (dated February 9, 2006; Henner to Casutto), DEC Staff's letter (dated February 21, 2006; Little to Casutto) and Erie Boulevard's letter (dated February 21, 2006; Bifera to Casutto). The GIPA letter and the responses of DEC Staff and the Applicant primarily amplified or reiterated arguments made during the issues conference in this matter.

In addition, because NYRU's counsel was not able to attend the February 6, 2006 issues conference, NYRU was provided an opportunity to make a filing based upon its review of the February 6th transcript. Any such filings were to be made by February 23, 2006. No filing was received from NYRU, and the issues conference record closed on February 23, 2006.

Lastly, a GIPA letter (dated March 22, 2006; Henner to Casutto) and response letters from the Applicant (dated March 24, 2006; Bifera to Casutto) and from DEC Staff (dated March 28, 2006; Little to Casutto) were received after the close of the issues conference record. Even if these late filings were considered on their merits, they would not change the rulings made herein.

Proposed Adjudicable Issues

A. Alleged Defect or Omission in the Application Materials

During the April 2005 issues conference, GIPA and the Town and Village of Green Island asserted, and continue to assert, that Erie Boulevard's WQC application is defective or contains omissions. In sum, these Intervenor's contend that Erie Boulevard should be required to provide additional detailed technical information to support their application for a Departmental WQC.

1) The FERC Staff Letter

In support of this contention, GIPA submitted a letter dated February 1, 2006, with an attached letter from the FERC Staff to Erie Boulevard (FERC/Yearlick to Erie/Hirschey, dated 1/31/2006)². The FERC Staff letter seeks additional information regarding instream flows to be released seasonally to the project's bypassed reach. FERC Staff requested this information to obtain clarification of Erie Boulevard's basis for proposing three seasonal periods and differences in minimum flows.

However, both DEC Staff and the Applicant characterized this FERC Staff letter as nothing more than a typical inquiry requesting clarification. DEC Staff notably drew a distinction between a FERC Staff inquiry and a Commission inquiry or order. DEC Staff noted that such FERC Staff requests are not unusual in the course of FERC review of hydroelectric re-licensing proceedings.

Erie Boulevard made a motion to strike the letter because, following the April 2005 issues conference, GIPA was provided with an opportunity to amend its petition and declined to do so. The Applicant contends that GIPA did not identify the issue of Erie Boulevard's basis for seasonal differences in minimum flows in its petition for party status.

DEC Staff stated that FERC Staff's inquiry regarding proposed seasonal differences in minimal flow pertains to the water quality standards for dissolved oxygen ("DO"), 6 NYCRR

² GIPA's letter dated March 22, 2006 (Henner to Casutto) provides as an attachment, the Applicant's response to FERC Staff's request for additional information. The Applicant's response letter dated March 24, 2006 (Bifera to Casutto) objects to GIPA's untimely filing.

703.3³. However, DEC Staff notes that FERC Staff does not raise any issue that the DO standards have been, or will be, violated.

2) Other Alleged Defects or Omissions

GIPA contends in its April 2005 Amended Petition that four areas of information are omitted from the application materials. (Petition paragraphs 70[A] through [D]). GIPA contends that filings required after issuance of the FERC license should be available for review during this WQC proceeding. These filings include the following:

- a plan for comprehensive bedrock excavation and sediment removal (Draft WQC Condition 15);
- a final design of structures to be constructed and operated to provide permanent flows to the bypassed reach (Draft WQC Condition 9[c]);
- a final fish passage plan and schedule including functional design drawings for implementing fish passage conveyances (Draft WQC Condition 11);
- a stream flow and water level monitoring plan (Draft WQC Condition 10);
- a recreation plan (Settlement Agreement, Section 3.9[A]);
- an historic properties management plan (Settlement Agreement, Section 3.8;

Generally, the Department Staff and Erie Boulevard counter that to produce these detailed plans at this point in the FERC licensing proceeding is an impossibility, because final requirements for these plans only will be determined by issuance of a new license by FERC. The Department Staff and Erie Boulevard assert that discussion and review of these issues already has occurred and is ongoing, but that these are prospective filings in the FERC proceeding. In sum, these detailed plans are required to be filed, but only after issuance of the FERC license. The New York State WQC sought by the

³ For Class A and Class C non-trout waters, the minimum daily average of DO shall not be less than five milligrams per liter ("mg/l") and the DO concentration at no time shall be less than 4 mg/l. 6 NYCRR 703.3.

Applicant in this proceeding is a necessary prerequisite to issuance of a FERC license. 33 USCA 1341 (Clean Water Act § 401).

For example, with respect to a plan for comprehensive bedrock excavation and sediment removal (the first item identified above), the application materials (as supplemented by the Applicant's May 2005 filings) do contain a preliminary plan for comprehensive bedrock excavation and sediment removal.

In addition, Draft WQC Condition 18 sets forth threshold goals and performance standards for bedrock excavation and sediment removal activities. These goals and standards, which are set forth in eight sub-paragraphs, provide specific, enforceable narrative performance goals and standards that reasonably will avoid or minimize impacts of bedrock excavation and sediment removal activities upon water quality standards. See Exhibit 9, Draft WQC (dated March 10, 2005).

In view of the overarching FERC licensing proceeding, GIPA's contention that a final plan for comprehensive bedrock excavation and sediment removal should be available as part of the application materials for this hydroelectric relicensing WQC application must be rejected. The preliminary plan provides reasonable assurance that excavation and sediment removal activities will be conducted in a manner which will not violate applicable water quality standards.

Ruling 1: The proposed DO issue related to the FERC Staff letter is a new proposed issue, not identified in the GIPA petition or the Town and Village of Green Island Petition. Nonetheless, considering the proposed issue on its merits, this issue is neither substantive nor significant. As DEC Staff noted, the FERC Staff letter is not a directive or order of the Commission, but instead, a routine inquiry from FERC Staff requesting clarification.

Regarding other alleged defects or omissions in the WQC application materials, this application must be viewed in the context of the overarching FERC licensing proceeding. Because many final project details only will be specified as the result of the FERC licensing proceeding, proposed issues in this application for the WQC must be evaluated by the standard of whether the application materials (and the issues conference record) provide reasonable assurance that the project will comply with New York's water quality standards.

In view of the FERC licensing proceeding, I conclude that the application materials are sufficient for review of this WQC application. GIPA's contention that final plans for activities or project features identified above should be available as part of the application materials for this hydroelectric relicensing WQC application must be rejected. The preliminary plans available in this issues conference record, along with the Draft WQC and the Settlement Agreement, provide reasonable assurance that the contemplated activities and project features will be conducted or implemented in a manner which will not violate applicable water quality standards. No substantive or significant issues have been identified with respect to omissions or defects in the application materials for this WQC application.

B. Polychlorinated Biphenyl (PCB) Sediments and Proposed Blasting

PCB remediation is required at an inactive hazardous waste disposal site located approximately one mile upstream from the School Street project. The inactive hazardous waste disposal site is owned by Niagara Mohawk, and is the subject of an enforcement action by NYSDEC. Niagara Mohawk and DEC entered into a consent order for remediation of the site. *Matter of Remedial Program, Niagara Mohawk Power Corporation, Respondent*, Order On Consent No. A4-0416-0003 (March 31, 2000), Site No. 401502. Pursuant to the consent order, Niagara Mohawk is in charge of the remedial investigation feasibility study.

Separately, some low level PCB contamination has been identified in the School Street project power canal. The water supply intake for the City of Cohoes is located in the power canal. Both GIPA and the Town and Village of Green Island contend that proposed excavation and sediment removal of PCB sediments in the power canal will adversely affect water quality. However, DEC Staff and the Applicant explained that the general plan for work in the power canal requires first that the canal will be dewatered, then sediments will be excavated, and finally, blasting, if any, in the bedrock underlying the sediments will occur.

The low level PCB contamination in the power canal is below action levels promulgated by the Department. The Applicant notes that as part of the construction proposal, construction will occur in areas with low levels of PCB contamination. This issue is addressed in the Applicant's "Preliminary Power Canal Work

Plan (dated April 2005)," which was among the Applicant's additional filings in this WQC proceeding, made by May 2005. Moreover, the Applicant and DEC Staff confirm that blasting, if any, is planned to occur only after sediments have been removed.

However, because the power canal will be dewatered prior to commencement of sediment excavation - - and excavation is planned to precede any blasting - - the City of Cohoes' water supply intake necessarily must be relocated or an alternative supply must be identified prior to commencement of sediment excavation or any blasting activities. Negotiation of an agreement with the Latham Water District is being considered as one alternative. Failing that, the water supply intake would have to be relocated, either upriver or down river from its present location. In any event, the proposed alternate source of water supply for the City of Cohoes will be subject to a separate review in a proceeding pursuant to ECL Article 15.

Erie Boulevard contends that the environmental quality review applicable to this project is not a state environmental review, but instead, a federal environmental review pursuant to the National Environmental Policy Act (NEPA). DEC Staff contends that, in the FERC licensing proceeding, pursuant to NEPA the Applicant may be required to conduct additional studies or develop plans concerning any proposed blasting.

In sum, DEC Staff contends that this issue is most appropriately addressed in the FERC proceeding. Further, DEC Staff states that the Settlement Agreement and Draft WQC provide reasonable assurance that the project will proceed in a manner that will not violate state water quality standards. In conclusion, DEC Staff states that the Draft WQC contains water quality standards that are enforceable as written. DEC Staff uses the example of "minimizing soil disturbance", noting that compliance with this standard necessitates efforts by the Applicant that will result in the least amount of soil disturbance. Draft WQC, Condition 18(d).

Ruling 2: Remediation of the inactive hazardous waste disposal site (located approximately one mile upstream from the School Street project) is an enforcement matter separate from this WQC proceeding. That enforcement process includes a public participation component through which Intervenor may pursue their concerns. To the extent that blasting in the power canal may occur, the settlement agreement and the overarching FERC licensing process provide reasonable assurance that any blasting activity will be conducted

in a manner that will not violate applicable water quality standards. No adjudicable issue is presented.

The proposed alternate source of water supply for the City of Cohoes will be subject to a separate review in a proceeding pursuant to ECL Article 15. For purposes of this WQC review, the requirement of an ECL Article 15 review, conducted by NYSDEC in coordination with NYS Department of Health, provides reasonable assurance that the alternate supply will be of suitable quality as a water supply. No adjudicable issue is presented.

C. Supplemental Design Report

GIPA contends that the Applicant's Supplemental Design Report, prepared in 1991, is not adequate and may impact water quality. Specifically, GIPA asserts that the Supplemental Design Report does not contain any geotechnical analysis with respect to the canal and foundation geology. GIPA argues, for example, that the geology of the canal and foundation rock may have fractures or other features that could adversely affect water quality.

DEC Staff countered that the Supplemental Design Report is not a component of the WQC application, but is really a component of the FERC licensing proceeding; the Supplemental Design Report relates to the FERC licensee's ability to assure the structural integrity of the dam, the powerhouse, the gatehouse and the canal.

Applicant's counsel stated that FERC requires the Supplemental Design Report to review and assure that the facilities are safe and secure. In addition, counsel pointed to more recent filings providing additional geotechnical information and soil borings, describing the geology underlying the site. See Letter, April 25, 2005 (Madden to Salas), Exhibit 3, Section 9, Page 12.

Ruling 3: The preliminary plans available in this issues conference record, along with the Draft WQC and the Settlement Agreement, provide reasonable assurance that the contemplated activities and project features will be completed in a manner which will not violate applicable water quality standards, if any. No substantive or significant issues have been identified with respect to the Supplemental Design Report.

D. Fish Protection Measures/Fish Passageway

GIPA contends that a final fish passage plan and schedule are missing from the application materials, and are necessary for review of the project. As noted in the GIPA petition, Settlement Agreement Section 3.5 addresses fish protection and fish passageway features of the proposed project, including a conceptual layout of fish protection and downstream passage measures. Settlement Agreement Section 3.7 requires development of a plan and schedule for evaluating the effectiveness of downstream fish passage facilities described in Settlement Agreement Section 3.5.

Ruling 4: The preliminary plans available in this issues conference record, along with the Draft WQC and the Settlement Agreement, provide reasonable assurance that the contemplated activities and project features will be conducted in a manner which will not violate applicable water quality standards. No substantive or significant issues have been identified with respect to omissions or defects in the application materials regarding a final fish passage plan or schedule.

E. Stream Flow Rates and Water Level Monitoring

GIPA, joined by the Town and Village of Green Island contend that final stream flow and water level monitoring plans should be available in this WQC proceeding.

DEC Staff explained that minimum flow rates are a necessary water quality standard related to best use of the waters. In this instance, best use of the waters is use for secondary contact recreational uses and for fish propagation and survival. These are qualitative water quality standards; the regulations contain no quantitative water quality standards for flow rates. Draft WQC Condition 9 addresses interim flow rates, permanent flows and channel modifications. These WQC Conditions reference requirements, tables and drawings in the Settlement Agreement. Draft WQC Condition 10 addresses flow and water level monitoring, also referencing requirements set forth in the Settlement Agreement.

In the draft WQC, DEC Staff has prescribed provisions necessary to reasonably assure that stream flow rates and water levels will not violate applicable water quality standards. In addition, the WQC provides for a water level monitoring plan to assure that the prescribed minimum flow rates are maintained.

Ruling 5: The Draft WQC (and the Settlement Agreement) provide reasonable assurance that minimum stream flow rates and water level monitoring will be conducted in a manner which will not violate applicable water quality standards. No substantive or significant issues have been identified with respect to omissions or defects in the application materials regarding stream flow rates or water level monitoring.

F. Stormwater General Permit (State Pollutant Discharge Elimination System)

GIPA contends that the WQC application is incomplete because it does not contain an application for a construction stormwater general permit⁴ nor does it contain a proposed stormwater pollution prevention plan. The stormwater general permit contains standard provisions and conditions that would apply generically to construction activities.

However, DEC Staff explained that an applicant for such a general permit can apply for the permit only days prior to commencing the proposed construction activities. An applicant for such a permit would file a notice of intent to comply with the general permit conditions. An applicant may file this notice of intent anytime within 48 hours of the commencement of the proposed construction activities. These permits are routinely issued and do not require any public notice or public review of the general permit application.

A stormwater pollution prevention plan is required to be filed, pursuant to the draft WQC, but only after issuance of the FERC license. This is reasonable, so that the plan will address the specific work contemplated under the conditions of the FERC license.

Ruling 6: The Draft WQC provides reasonable assurance that Erie Boulevard will, at the appropriate time, file a stormwater pollution prevention plan and obtain a construction stormwater general permit for this project so that the proposed construction activities will be conducted in a manner which will not violate applicable water quality standards. No substantive or significant issues have been identified with respect to omissions

⁴ As part of DEC Staff's promulgation of the stormwater general permit, a threshold SEQRA review was conducted then for all uses of the general permit.

or defects in the application materials regarding stormwater pollution prevention plan or stormwater general permit.

G. Public Access and Recreation

GIPA argues that the development of a recreation plan is addressed in the Settlement Agreement (Section 3.9[A]), but is not referenced in the Draft WQC. GIPA contends that this is an omission or defect in the application materials.

However, DEC Staff and the Applicant explained that water quality standards for contact recreation are very limited, providing for primary and secondary contact and fishing. See 6 NYCRR 701.6(a) [Class A surface waters] and 701.8 [Class A surface waters]; see also 6 NYCRR 700.1(35) [definition of 'primary contact'] and 700.1(40) [definition of secondary contact]. DEC Staff and the Applicant explained that the public access and recreation plan described in the Settlement Agreement is an element of the FERC process, rather than the WQC review. Nonetheless, recreational access is addressed in some detail in the Settlement Agreement, albeit not by "final plans," as GIPA seeks.

Ruling 7: The preliminary public access and recreation plans available in this issues conference record, along with the Draft WQC and the Settlement Agreement, provide reasonable assurance that the contemplated activities and project features will be conducted in a manner which will not violate the limited applicable water quality standards. No substantive or significant issues have been identified with respect to omissions or defects in the application materials regarding public access and recreation.

H. American Indian Nations

GIPA contends that although the Settlement Agreement provides for development of an historic management properties plan in consultation with, *inter alia*, American Indian Nations, this plan is not mentioned in the Draft WQC.

Erie Boulevard counters, first, that GIPA lacks standing to raise this issue regarding American Indian Nations because GIPA does not represent any American Indian Nation. Moreover, the Applicant and DEC Staff state that the overarching FERC relicensing process requires consultation with recognized American Indian Nations. That process has occurred and is

ongoing in the overarching FERC proceeding.

Ruling 8: GIPA has not demonstrated that this proposed issue is within the purview of state WQC review for hydroelectric relicensing. Instead, in the present matter, the issue of consultation with recognized American Indian Nations is properly addressed in the FERC proceeding. No substantive or significant issues have been identified with respect to omissions or defects in the application materials regarding consultation with recognized American Indian Nations.

I. Coordination of Alternate Water Supply with Power Canal Excavation

The Town and Village of Green Island asserts that clarification of the Draft WQC is necessary to assure that excavation in the power canal will occur only after an alternate water supply has been identified and is providing potable water to the City of Cohoes water supply system. Specifically, the Intervenor contend that draft WQC condition #11 (Exhibit 9) requires that within 18 months of issuance of the FERC license, Erie Boulevard must complete the Phase I fish protection and downstream passage measures described in the Settlement Agreement (Exhibit 10). These Intervenor are concerned that construction of fish protection and downstream fish passage features of the project may commence before a suitable alternate water supply is in effect for the City of Cohoes water supply system.

The Applicant counters that the record is clear that no work will begin on these improvements until the City's water supply intake is closed and the power canal is dewatered. See April 25, 2005 letter, Exhibit 3. Nonetheless, upon further discussion during the issues conference, it was agreed that DEC Staff would propose revised language for draft WQC Condition 11 to clarify that the City of Cohoes' water supply intake will be closed and an alternate supply located prior to any dewatering or construction activity in the power canal.

By letter dated February 21, 2006, DEC Staff provided revised language to address the Intervenor's concerns. The revised additional language for draft WQC Condition 11 states that "all portions of the construction of the Phase I Fish Protection and Downstream Passage measures located in the power canal shall be completed in conjunction with and in compliance with the pertinent provisions of construction requirements of paragraph 15 below." The revised additional language for draft WQC Condition 15(c) inserts the phrase "prior to commencing

construction" in the following text: "details regarding the methods for dewatering the power canal prior to commencing construction, including, but not limited to the following; initial dewatering using the gatehouse, the management of water entering the canal after dewatering has taken place and work has commenced (i.e., storm water outfalls to the canal and direct precipitation). . . ."

Ruling 9: No issues conference participant has raised any objection to this proposed revised language. In view of the revisions to draft WQC Conditions 11 and 15(c), this proposed issue is resolved and does not require adjudication.

At the conclusion of the February 6, 2006 issues conference, GIPA clarified it continues to assert several proposed issues identified in its petition and discussed during the April 2005 issues conference. Many of these issues were asserted previously as SEQRA issues. In view of the December 23, 2005 ruling on SEQRA and preemption, GIPA has sought to base these proposed issues on water quality standards. To the extent that remaining proposed issues that GIPA continues to assert are not addressed in this ruling, the proposed adjudicable issues are rejected.

Appeals

The Commissioner has recused herself from this matter and has designated Deputy Commissioner Carl Johnson to make any agency determinations in this water quality certification application proceeding. A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis.⁵ Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.⁶ The following appeals schedule for this ruling also will apply to any appeals from the December 23, 2005 ruling on SEQRA and federal preemption.

Allowing additional time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6(g), any appeals must be received by Deputy Commissioner Johnson (Office of the Commissioner, N.Y.S. Department of Environmental Conservation,

⁵ 6 NYCRR 624.8(d)(2).

⁶ 6 NYCRR 624.6(e)(1).

625 Broadway, Albany, New York, 12233-1010), attention: Louis A. Alexander, Assistant Commissioner, before 3 p.m., on April 28, 2006. All replies to appeals must be received before 3 p.m., on May 19, 2006. One copy of each appeal or reply must be filed with the Deputy Commissioner. In addition, send one copy of any appeal and reply to the Chief Administrative Law Judge and two copies of any appeal and reply to the Administrative Law Judge. Participants who use word processing equipment to prepare their brief and/or reply must also submit a copy of their appeal and/or reply to the Administrative Law Judge in electronic form, by E-mail attachment formatted in either Adobe Acrobat, WordPerfect for Windows or Microsoft Word for Windows.

Alternatively, parties may file an electronic copy via E-mail at "kjcasutt@gw.dec.state.ny.us," to be followed by one paper copy to Deputy Commissioner Johnson, one copy to the Chief ALJ and two copies to the ALJ, each sent by first class mail and each postmarked by the date(s) specified above. This alternative service will satisfy service upon the Deputy Commissioner, Chief ALJ and the ALJ.

Also, send one copy of any appeal or reply to each person on the distribution list for this case. The participants shall ensure that transmittal of all filings is made to the ALJ and all others on the distribution list at the same time and in the same manner as transmittal is made to Deputy Commissioner Johnson. No submissions by facsimile/telecopier will be allowed or accepted.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.

_____/s/_____
Kevin J. Casutto
Administrative Law Judge

Dated: March 30, 2006
Albany, New York

To: Attached ERIE BOULEVARD HYDROPOWER, L.P., (School Street Project) Distribution List (dated February 8, 2006)

SCHOOL STREET PROJECT
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(Acting through its general partner,
BRASCAN POWER - NEW YORK)
(Formerly Niagara Mohawk Power Corporation)
NYSDEC No. 4-0103-00027/00001
(Formerly NYSDEC No. 4-6103-00027/00001-9)
[FERC Project No. 2539]
DISTRIBUTION LIST
[Revised 2/8/2006]

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