

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

INTERIM DECISION OF THE DEPUTY COMMISSIONER

September 22, 2005

INTERIM DECISION OF THE DEPUTY COMMISSIONER<sup>1</sup>

By leave of the Deputy Commissioner,<sup>2</sup> applicant Erie Boulevard Hydropower L.P. ("applicant") filed an expedited appeal from an oral 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 August 3, 1981, through January 8, 1994, will be applied in its entirety to the present water quality certification application proceeding. Although the ALJ's ruling is a correct application of the regulations, for the reasons that follow, and in the exercise of discretion, I reverse the ALJ's ruling.

Facts and Procedural Background

In 1991, Niagara Mohawk Power Corporation ("Niagara Mohawk") applied to the Department of Environmental Conservation ("Department") for water quality certifications ("WQCs"), pursuant to section 401 of the federal Clean Water Act, for nine hydroelectric generating projects. Included in the nine projects was the subject School Street project located in the City of Cohoes, New York.

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

<sup>2</sup> See Ruling of the Deputy Commissioner on Motion for Leave to File an Expedited Appeal, June 17, 2005.

On November 19, 1992, Department staff denied the applications for all nine WQCs. On December 16, 1992, Niagara Mohawk formally requested an administrative adjudicatory hearing pursuant to section 621.7 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

An administrative permit hearing was noticed and ALJ Andrew S. Pearlstein convened a combined legislative hearing and issues conference on August 5, 1993, for all nine WQC applications. After the issues conference was adjourned, but prior to the ALJ's issues ruling, former Part 624, as amended, which had been in effect since August 3, 1981, was repealed, and the current version of Part 624 ("current Part 624") was adopted, effective January 9, 1994.

ALJ Pearlstein subsequently issued a ruling determining several threshold legal issues concerning the scope of New York State's authority to review, deny and condition Clean Water Act § 401 WQCs for hydroelectric projects whose relicensing was before the Federal Energy Regulatory Commission ("FERC") (see Matter of Niagara Mohawk Power Corp., Rulings of Administrative Law Judge, April 20, 1994, at 1, 29). ALJ Pearlstein also determined that several factual issues might require adjudication. However, because consideration of remaining factual issues had been deferred until resolution of the

threshold legal issues, ALJ Pearlstein provided the parties to the proceeding with a further opportunity to review the application materials and to raise any additional factual issues they believed might require adjudication (see id. at 1, 29-30).

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 Clean Water Action § 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 permits 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 settlement negotiations that extended over a lengthy period of time. During this extended period of negotiations, ALJ Casutto replaced ALJ Pearlstein on the matter. In addition, Erie Boulevard Hydropower, L.P., replaced Niagara Mohawk as the applicant for the WQC 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).

As a result of the extended negotiations, settlements were reached on all of the nine WQC applications except the

School Street WQC. In November 2004, the Town of Green Island and the Village of Green Island (collectively "Green Island") filed a joint petition for party status in the still pending School Street WQC permit hearing proceeding. ALJ Casutto denied the petition as untimely (see Ruling on Petition for Party Status, Dec. 27, 2004, at 4). The ALJ indicated, however, that party status in the permit hearing proceeding was not a prerequisite to participation in the School Street project negotiations, and he encouraged the settlement participants to consider including Green Island in those negotiations (see id. at 4-5). He also held that if further hearings were required for any new draft WQC that might be issued for the project, Green Island would be able to renew their application for party status at that time (see id. at 5). ALJ Casutto noted that, consistent with his prior rulings concerning the nine Niagara Mohawk WQC applications, permit hearing proceedings for the School Street project would be governed by former Part 624 (see id. at 1 footnote 1; see also Matter of Niagara Mohawk Power Corp., ALJ Ruling on Settlement Offer, Aug. 18, 1995, at 5-7).

Settlement discussions on the School Street project eventually concluded, and a new draft WQC was prepared. On March 7, 2005, a supplemental notice of public comment period, complete application and reconvening of public hearing was issued that scheduled a supplemental legislative hearing and issues

conference, and established filing deadlines for additional petitions for party status.<sup>3</sup>

Before the issues conference reconvened, applicant and Department staff separately moved ALJ Casutto for a determination of applicable regulations. Applicant and staff sought a determination that current Part 624 would be applied to all future proceedings concerning the School Street project, including the upcoming supplemental legislative hearing, issues conference and, if necessary, any subsequent adjudicatory proceedings. Applicant and staff argued, among other things, that because issues for adjudication have not been identified, no "determination to hold an adjudicatory hearing" has been made yet (6 NYCRR current 624.1[d]). Accordingly, argued applicant and staff, because the identification of adjudicable issues, if any, will occur after the effective date of the current regulation, current Part 624 applies to these proceedings.

ALJ Casutto orally denied applicant and staff's respective motions on the issues conference record (see Issues Conference Transcript, April 14, 2005, at 42-44). The ALJ held that the referral of the matter to the Office of Hearings and Mediation Services ("Office of Hearings") and the opening of the hearing record in August 1993 were the triggering events that

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<sup>3</sup> Timely petitions for party status had previously been filed by New York Rivers United, New York Power Authority, and the City of Cohoes.

determined which version of Part 624 applied. The ALJ concluded that because those events occurred prior to the effective date of current Part 624, former Part 624 applies to these proceedings.

Applicant filed an appeal as of right or, in the alternative, sought leave to appeal from, ALJ Casutto's oral ruling. Deputy Commissioner Johnson retained the appeal and authorized applicant to supplement its filing (see Ruling of the Deputy Commissioner, June 17, 2005). Applicant filed a supplement. Party-status petitioner Green Island Power Authority ("GIPA") filed a response in opposition to applicant's appeal, and Department staff filed a reply supporting applicant's appeal.

#### Discussion

The transition provision of current Part 624 provides that "[t]he provisions of this Part apply to those proceedings in which the determination to hold an adjudicatory hearing was made on or after the effective date of these regulations" (6 NYCRR current 624.1[d]). As noted above, the effective date of current Part 624 was January 9, 1994.

As a technical matter, ALJ Casutto's conclusion that former Part 624 applies to these proceedings is correct. When the applicability provisions of current Part 624 are read in their entirety, the term "determination to hold an adjudicatory hearing" must be understood to refer to determinations pursuant to 6 NYCRR part 621 to hold a hearing (see 6 NYCRR current

624.1[a]). Section 624.1(a) expressly provides that current Part 624 applies to hearings based upon a determination by Department staff, pursuant to section 621.7(b), to hold an adjudicatory hearing (see 6 NYCRR current 624.1[a][1]); a request by an applicant in conformance with the provisions of section 621.7(f) where Department staff has denied a permit application or attached significant conditions (see id. 624.1[a][2]); a determination by Department staff, pursuant to 621.11(f), to hold an adjudicatory hearing on an application for conceptual review (see id. 624.1[a][3]); a request made by applicant in conformance with the provisions of section 621.13(d), based upon the Department's denial or conditioning of a permit in response to an application to renew or modify (see id. 624.1[a][4]); and a request by a permittee in conformance with the provisions of section 621.14(d) where Department staff proposes to modify, suspend or revoke a permit in the absence of alleged violations of the Environmental Conservation Law (see id. 624.1[a][5]). Thus, the term "determination to hold an adjudicatory hearing" in section 624.1(d), fairly read, means the various determinations under Part 621 specified in 6 NYCRR 624.1(a).

Applicant and Department staff argue that the term "determination to hold an adjudicatory hearing" refers to a determination, presumably in an ALJ's issues ruling and a Commissioner's interim decision on any appeal from such an issues

ruling, that issues exist for adjudication. Such a reading, however, would lead to confusion and inefficiency if applied to permit hearing proceedings. The drafters of current Part 624 did not intend for participants in Departmental permit hearing proceedings to wait until the middle of the hearing process to learn which version of the regulations applied. This would have caused considerable problems, particularly during the immediate transition period around January 1994. Instead, the drafters clearly intended a bright-line triggering event that occurred before a matter was referred to the Office of Hearings and, certainly, before any permit hearing proceedings began. In this case, that triggering event was the December 1992 request by applicant's predecessor for a hearing on the denial of its application for a WQC for the School Street project (see 6 NYCRR current 624.1[a][2], 624.1[d]), an event that occurred well before the effective date of current Part 624.

Notwithstanding ALJ Casutto's correct application of section 624.1(d), however, I am exercising my discretion and directing that all further proceedings in this matter be conducted pursuant to the current Part 624 (see 6 NYCRR 624.6[g]). First, neither applicant nor proposed intervenors would be prejudiced by application of current Part 624. Applicant's arguments in favor of the application of current Part 624 primarily center around its mistaken belief that an

intervenor's burden for establishing party status under former Part 624 was less stringent than under the current regulations. Although current Part 624 did represent a refinement of procedural standards applicable to permit hearing proceedings, in all key respects, the current Part 624 standards governing the issues conference stage of proceedings are simply a codification of standards settled through administrative decisional law under former Part 624 (see Feller, DEC's New Hearing Rules, 5 Environmental Law in New York (Matthew Bender & Co., Inc.), April 1994, at 62-63). Under former Part 624, a prospective intervenor had the burden of establishing that issues it proposed for adjudication were "substantive and significant" (see 6 NYCRR former 624.6[c] [requiring that an adjudicable issue be "substantive and significant"]; Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2 [imposing the burden of persuasion at the issues conference on the intervening party]; compare 6 NYCRR current 624.4[c][1][iii], 624.4[c][4]). An issue was "substantive" if it raised sufficient doubt about an applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would require further inquiry (see Matter of Hydra-Co. Generations Inc., Interim Decision of the Commissioner, April 1, 1988, at 2-3; compare 6 NYCRR current 624.4[c][2]). Former Part 624 expressly provided that an issue

was "significant" if it had the potential to result in "permit denial, require major modification to the project or the imposition of significant permit conditions" (6 NYCRR former 624.6[c]; compare 6 NYCRR current 624.4[c][3]).

Because a proposed intervenor's burden of persuasion at the issues conference is essentially the same under both the former and current Part 624, GIPA's unsupported assertion that application of current Part 624 to these proceedings would be prejudicial to it and the general public is unpersuasive. Indeed, GIPA contends that the issues it proposes for adjudication would survive an issues conference under either version of the regulations.

Second, given that current Part 624 has been in effect for over ten years, very little purpose would be served by continuing to apply the prior version to this proceeding. The former regulations contained gaps that were clarified in the current version. No real benefit would be gained, and considerable inefficiency might result, if questions concerning interpretation of the former regulations have to be addressed throughout these proceeding. Indeed, ALJ Casutto, in an earlier ruling on one of the other eight projects, relied upon the current regulations for guidance in filling gaps left by former Part 624 (see Matter of Niagara Mohawk Power Corp., ALJ Ruling on Beaver River Settlement Offer, Aug. 18, 1995, at 7).

Moreover, the parties are familiar with the current regulations and, to the extent questions arise concerning the interpretation and application of current Part 624, resolution of those questions would potentially provide guidance in other matters beyond this proceeding. In contrast, resolution of questions arising under former Part 624 would have little utility beyond the immediate proceeding.

Third, the transition provisions of current Part 624 were intended to address those matters that were presently under Departmental review at the time the new regulations were adopted. Presumably, it was beyond the expectation of the regulation's drafters that former Part 624 would be applied over a decade later to a project that returned to the Office of Hearings after such a long hiatus.

Finally, the permit hearing process on the new draft WQC has not progressed so far that a determination to apply the current version of Part 624 will be disruptive to the proceedings. Accordingly, because the parties will not be prejudiced by application of the current version of Part 624 to these proceedings, and to avoid any confusion<sup>4</sup> and inefficiency

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<sup>4</sup> I note that prior decisions in these proceedings have not been entirely consistent in their application of former Part 624 (see Matter of Niagara Mohawk Power Corp., Interim Decision of the Commissioner, Sept. 25, 1996 [citing 6 NYCRR current 624.4(c), 624.5(b)]; id., Ruling of ALJ Pearlstein, April 20, 1994, at 28 [citing to 6 NYCRR current 624.4(c) and 624.5(b)(2)]).

that might result from the use of former Part 624, in the exercise of discretion, I reverse the ALJ's April 14, 2005 oral ruling, and direct that current Part 624 be applied to the remaining of these proceedings.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Carl Johnson  
Deputy Commissioner

Dated: Albany, New York  
September 22, 2005