Wildlife Preserv. Coalition of Long Is. v New York State Dept. of Envtl. Conservation
2014 NY Slip Op 33393(U)
December 30, 2014
Supreme Court, Suffolk County
Docket Number: 14-8023
Judge: W. Gerard Asher

[* 1]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 32

WILDLIFE PRESERVATION COALITION OF LONG ISLAND, by its president WENDY CHAMBERLIN, ANIMAL WELFARE INSTITUTE, HUNTERS FOR DEER, LLC, LONG ISLAND ORCHESTRATING FOR NATURE, THE EVELYN ALEXANDER WILDLIFE RESCUE CENTER, INC., ISABELLE KANZ, BARBARA McADAM, PATRICK McBRIDE and MICHAEL TESSITORE,

Petitioners-Plaintiffs,

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, JOE MARTENS, in his capacity as Commissioner of NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, THE LONG ISLAND FARM BUREAU, THE VILLAGE OF NORTH HAVEN and JOHN DOES,

Respondents-Defendants.

By: W. Gerard Asher, J.S.C.
Dated: December 30, 2014

Index No. 14-8023
Mot. Seq. # 001 - MD; CDISPSUBJ

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In this hybrid CPLR article 78 proceeding and action for declaratory relief and injunctive relief, the petitioners assert three causes of action in the "verified petition & complaint." The first cause of action seeks to have deer damage permits ("DDPs") previously issued by the New York State Department of Environmental Conservation ("DEC") in the towns of Shelter Island, Southampton, Southold, East Hampton, Riverhead, Brookhaven, and the Village of North Haven annulled, and otherwise declared invalid, and enjoining the DEC from issuing any additional DDPs for properties in eastern Suffolk County as a result of the DEC's violation of the New York State Environmental Quality Review Act ("SEQRA") in failing to prepare an Environmental Assessment Form ("EAF"), failing to make a Determination of Significance ("DOS") and by failing to prepare an Environmental Impact Statement ("EIS") prior to issuing the DDPs. The second cause of action seeks to have the DDPs issued to the aforementioned towns annulled on the ground that the DEC violated Articles 3 of the Environmental Conservation Law ("ECL") as well as ECL § 11-0521. The petitioners further assert in this cause of action that the DEC acted arbitrarily and capriciously in connection with the issuance of the DDPs. The third cause of action seeks a declaration that DEC may not issue DDPs without complying with SEQRA, preparing an EAF and preparing an EIS. In the wherefore clause of the petition, the petitioners also seek to enjoin the respondents-defendants from processing any applications and issuing any DDPs prior to complying with SEQRA and enjoining them from acting pursuant to or in accordance with the DDPs they issued.

In July 2013, respondent-defendant Long Island Farm Bureau ("LIFB") promoted, together with the U.S. Department of Agriculture, Animal and Plant Health Inspection Service and Wildlife Services Program ("USDA-WS"), a program to kill more than 5,000 deer in the towns and villages of eastern Long Island. According to the petitioners-plaintiffs, the DEC cooperated with the LIFB program but has not taken any public evaluation of the need for and scale of the program nor has it considered the environmental impacts of the culling program. On February 28, 2013, a DEC spokesperson announced that 12 DDPs had been issued for the LIFB program and that another 6 DDPs applications were pending. Petitioners-plaintiffs assert that the DEC issued the permits without complying with SEQRA, and further assert that it is their opinion that respondents-defendants have overestimated the current deer population and have overstated the amount of damage to agricultural resources to justify the program. Petitioners-plaintiff contend that the approval of the DDPs violates SEQRA, is arbitrary and capricious, and violates ECL § 11-0521.

By order to show cause dated March 5, 2014, the petitioners-plaintiffs moved for a preliminary injunction enjoining the DEC from processing any applications and issuing any DDPs for properties in Suffolk County until information on DEC's historic issuance of DDPs is furnished to petitioners-plaintiffs and until the DEC complies with SEQRA, and conducts an environmental assessment and an environmental impact statement on the effects of the proposed deer cull in Suffolk County.

On March 6, 2014, the Supreme Court in Albany County (Joseph Teresi, J.) granted a temporary restraining order enjoining the DEC from processing any additional applications for DDPs and issuing any additional DDPs.

Thereafter, respondent-defendant Village of North Haven cross-moved for an order changing the venue of the proceeding and/or for an order dismissing the petition for lack of standing and failure to state a cause of action. Respondent-defendant LIFB separately cross-moved for an order changing the venue of the proceeding. By order dated April 11, 2014, the Supreme Court in Albany County

(Christopher McCarthy, J.) granted the cross motion of the Village of North Haven to the extent of changing the venue of the proceeding from Supreme Court, Albany County to Supreme Court, Suffolk County. The Court noted in its decision that it did not consider the remainder of the Village of North Haven's cross motion. In addition, the Court denied LIFB's cross motion as moot.

After oral argument, by order dated September 15, 2014, this Court granted the DEC's request to vacate the temporary restraining order issued by the Supreme Court in Albany County (Joseph Teresi, J.) and denied the petitioner's application insofar as it sought a preliminary injunction enjoining the DEC from issuing any additional DDPs for properties in eastern Suffolk County.

This Court now addresses the remaining relief sought in the petition, to wit, the petitioner's request to have the DDPs previously issued to Shelter Island, Southampton, Southold, East Hampton, Riverhead, Brookhaven, and the Village of North Haven annulled on the grounds that the DEC violated Article 3 of the ECL and ECL § 11-0521 in issuing same, acted arbitrarily and capriciously in connection with the issuance of the DDPs, and the petitioner's request for a declaration that the DEC may not issue DDPs without complying with SEQRA, preparing an EAF, and preparing an EIS.

Article 3 of the Environmental Conservation Law provides in pertinent part that it is the responsibility of the DEC to carry out the environmental policy of the state, and that in doing so, the commissioner has the power to, *inter alia*, "[p]romote and coordinate management of . . . wildlife . . .to ensure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and [t]o take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion" (ECL 3-301 [1] [b]).

ECL 11-0521 (1) provides that "[t]he department [of environmental conservation] may direct any environmental conservation officer, or issue a permit to any person, to take any wildlife at any time whenever it becomes a nuisance, destructive to public or private property or a threat to public health or welfare."

Article 8 of the ECL, otherwise known as SEQRA, establishes a process for consideration of environmental factors in actions undertaken, funded or approved by government entities. ECL 8-0109 (2) specifically provides that "[a]ll agencies . . . shall prepare, or cause to be prepared . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." ECL 8-0109 (4) states that "the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action." The Court notes that once a final EIS has been filed "[n]o further SEQRA compliance is required if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement" (6 NYCRR 617.10 [d] [1]).

While 6 NYCRR 617.3 (a) provides that "[n]o agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA," pursuant to 6 NYCRR 617.3 (f), "[n]o SEQRA determination of significance, EIS or findings statement is required for actions which are Type II." In addition, while an EAF and DOS are required for Type I actions (6 NYCRR 617.6 [a] [2], [3]; 6 NYCRR 617.7), there is no such requirement for those actions classified as Type II actions. A Type II action has been defined as those actions which do "not. . . have a significant impact on the

environment or are otherwise precluded from environmental review under Environmental Conservation law, article 8" (6 NYCRR 617.5 [a]) and include "agricultural farm management practices, including . . . land use changes consistent with generally accepted principles of farming" (6 NYCRR 617.5 [c] [3]). In addition, a Class 4, Type II action has been defined pursuant to 6 NYCRR 618.2 (d) (5) as "wildlife activities . . . [that] . . . do not involve significant departures from established and accepted practices and if such actions are described in and are a part of a general . . .wildlife management program[] for which an EIS has been prepared [including] . . . harvesting or thinning of . . . wildlife surpluses . . . [and] weeding of competing or parasitic species and species incompatible with man's interests."

It is well settled that "[j]udicial review of an agency determination under SEQRA is limited to determining whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (***Matter of In Defense of Animals v Vassar Coll.***, 121 AD3d 991, 993, 994 NYS2d 412, 414 [2d Dept 2014] [internal quotation marks omitted]; *see also* ***Matter of Bronx Comm. for Toxic Free Schs. v New York City Sch. Constr. Auth.***, 20 NY3d 148, 958 NYS2d 65 [2012]; ***Village of Tarrytown v Planning Board of Vil. of Sleepy Hollow***, 292 AD2d 617, 619, 741 NYS2d 44 [2d Dept 2002]). "[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively . . . The agency decision should be annulled only if it is arbitrary and capricious, or unsupported by the evidence . . . [and] an agency's interpretation of its own regulation is entitled to deference unless it is unreasonable or irrational" (***Matter of In Defense of Animals v Vassar Coll.***, *supra* at 993, 994 NYS2d at 414 [internal citations and quotation marks omitted]).

Here, the record includes numerous documents from the DEC regarding the management and population control of deer including a Final Programmatic EIS on Wildlife Game Species Management Program of DEC's Division of Fish and Wildlife issued in 1980 as well as a Statement of Findings for the EIS by Commissioner Robert Flacke issued in 1981. Thereafter, in 1994, the DEC issued a Supplemental SEQRA Finding and Decision which covered the Final Programmatic EIS and addressed the issue of destructive wildlife and the issuance of nuisance permits. In its Finding and Decision, the DEC found that the activities described in the Final Programmatic EIS would require no further SEQRA action provided that they were described in the Final Programmatic EIS, did not involve significant departures from established and accepted practice, and did not include a substantial change in the authorized uses for land where such change may have a significant environmental impact. In April 1994, the DEC issued a Declaratory Ruling on the Issuance of Nuisance Deer Permits noting that ECL 11-0901 (14) provides that certain regulations set forth in ECL 11-0901 do not restrict the authority of any special permit or license issued by the DEC. In 2007, the DEC issued a Citizen's Guide to the Management of White-Tailed Deer in Urban and Suburban New York, and in 2008, the DEC issued Guidelines for Handling Deer Damage Complaints and Issuing Kill Permits. In 2011, the DEC issued the 2012-2016 Management Plan for White-Tailed Deer in New York State. After reviewing all of the aforementioned documentation, the Court finds that the DEC's issuance of nuisance deer permits to the aforementioned towns pursuant to ECL 11-0521 complied with the requirements of SEQRA and its regulations (*see* ***Matter of In Defense of Animals v Vassar Coll.***, *supra*), and that the Final Programmatic EIS– which was later updated with the supplemental findings statement–together with all of the aforementioned documents, assessing the impacts of the issuance of nuisance permits as a part of the DEC's wildlife management program, was proper (*see id.*).

Furthermore, the DEC's determination, that the permits requested in furtherance of the LIFB's deer cull program for eastern Long Island was consistent with the Final Programmatic EIS and that no further supplemental EIS was necessary since the activities were previously described in the Final Programmatic EIS, did not involve significant departures from established and accepted practice, did not include a substantial change in the authorized uses for land where such change may have a significant environmental impact, and was not arbitrary and capricious (*see id.*; *see also* 6 NYCRR 617.10 [c], [d] [4]; ***Matter of Eadie v Town Bd. of Town of N. Greenbush***, NY3d 306 [2006]).

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.

W. Gerard Asher

J.S.C.