

**Riverkeeper, Inc. v New York City Dept. of Env'tl.
Protection**

2020 NY Slip Op 35576(U)

May 28, 2020

Supreme Court, Queens County

Docket Number: Index No. 6106/2019

Judge: Joseph J. Esposito

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Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO

IA Part 6

Justice

X

RIVERKEEPER, INC., CONNECTICUT FUND
FOR THE ENVIRONMENT, INC., d/b/a SAVE
THE SOUND, BRONX COUNCIL FOR
ENVIRONMENTAL QUALITY, NEWTOWN CREEK
ALLIANCE, HUDSON RIVER WATERTRAIL
ASSOCIATION d/b/a NEW YORK CITY WATER
TRAIL ASSOCIATION, RARITAN BAYKEEPER
d/b/a NY/NJ BAYKEEPER, AND WATERKEEPER,
ALLIANCE, INC.,

Index No. 6106/2019

Mot. Date: 1/27/20

Motion Seq. No. 1

Petitioner,

-versus-

NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

X

The following numbered papers read on this hybrid Article 78 special proceeding and complaint for a declaratory judgment by petitioners, pursuant to CPLR Section 3001 to compel respondent, New York City Department of Environmental Protection, (DEP), to provide notification to the public for combined sewer overflow (CSO) discharges of untreated and partially untreated sewage under the Sewage Pollution Right to Know Act (SPRTKA), NY Environmental Conservation Law (ECL) Section 17-0826-a(2) and 6 NYCRR Section 750-2.7(b)(2). Cross motion by DEP for an order and judgment denying petitioner's application and dismissing the complaint.

Papers
Numbered

Notice of Petition - Petition - Exhibits..... 1-4
 Memorandum of Law in Support.....4a
 Notice of Cross Motion-Affidavits-Exhibits.....5-8
 Memorandum of Law in Support of Cross Motion.....8a
 Memorandum of Law in Opposition to Cross Motion.....9a
 Amended Memorandum of Law in Opposition to Cross Motion.....9b
 Reply Memorandum of Law in Further Support of Cross Motion.....10a

Upon the foregoing papers, and for the reasons stated herein, it is ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed and the cross motion is granted and the complaint is dismissed in its entirety.

In this Article 78 proceeding and complaint for a declaration, pursuant to CPLR Section 3001, petitioners seek to compel respondent, DEP, to provide notification to the public relative to CSO discharges of untreated sewage, pursuant to SPRTKA, NY Environmental Conservation Law (ECL) Section 17-0826-a(2) and 6 NYCRR Section 750-2.7(b)(2). Petitioners allege that DEP has violated its legal duty under SPRTKA by failing to notify the public after learning of sewage discharges. Petitioners allege that DEP has developed a pattern of failing to notify the public in each and every instance of a CSO discharge in violation of SPRTKA and such failure threatens the health and well-being of all people who live work or recreate on the City’s waters. Petitioners further argue that this court has jurisdiction, pursuant to CPLR Sections 504(3), 506(b) and 7804(b) to review administrative action or the failure of public officials or bodies to perform a mandated action. Petitioners maintain that a nondiscretionary duty may “derive from the Federal or State Constitutions, statutes or regulations” (*Klostermann v Cuomo*, 61 NY2d 525,541 [1984]). Petitioners contend that by DEP’s failure to perform its public duty notification under SPRTKA, it is subject to an Article 78 proceeding and a declaration, pursuant to CPLR Section 3001 that DEP’s alleged failure to notify the public of CSO discharges is unlawful.

Respondent, DEP cross moves for judgment dismissing the complaint,

pursuant to CPLR Section 3211(a)(2), (a)(3) and (7) on the grounds that this court does not have jurisdiction of the subject matter of the cause of action and that petitioners seek to compel a discretionary act and that petitioners fail to state a cause of action. CPLR 7803 provides that a mandamus is available solely when “a body or officer failed to perform a duty enjoined upon it by law.” Thus a mandamus “does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial” (*NY Civil Liberties Union v State of NY*, 4 NY3d 175, 178 [2005] *citations omitted*). A discretionary act “involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result” (*id citing Tango v Tulevech*, 61 NY2d 34,41 [1983]).

In support of its cross motion, DEP submits the affidavit of Pamela Elardo, Deputy Commissioner of DEP. Contrary to petitioners’ objections, this court finds her affidavit admissible. Ms. Elardo describes the DEP’s existing systems which enable DEP to utilize its water quality model for SPRTK reporting and uploads information relative to the water quality to DEP’s website so that is available to the public. In her affidavit, Ms. Elardo explains that DEP

provides public notification of water quality impacts that may pose a threat to public health, considering the potential for exposure and other relevant factors. The fact that a combined sewer outfall discharges or may discharge, alone, is less informative to determine a threat to public health. Instead, water quality is the relevant measure of whether discharges present a threat to public health on a waterbody basis.

Ms. Elardo further explains that DEP’s Waterbody Advisories system already provides the public with current water quality information through Notify NYC, DEP’s website mentioned above and also NY-Alert. Moreover, DEP’s Waterbody Advisories’ website automatically updates on an hourly basis. These Advisories are based on the New York State Department of Health standards for primary contact recreational uses involving direct contact with water, such as swimming. Finally Ms. Elardo notes that “reporting all potential discharges in New York City, rather than only those that may present a threat to public health,

would overwhelm the public.” The court notes that SPRTK explicitly provides that the public reporting requirement should be limited to discharges which may present “a threat to public health.”

Based upon the record submitted herein, in the first instance this court finds that petitioners have failed to meet the heavy burden of setting forth “a clear legal right” to a mandamus (*see Matter of City of NY v Bloomberg*, 6 NY3d 388 [2006]). The court finds that DEP is already performing its mandatory duties under SPRTK and if DEP were forced to comply with Petitioners’ additional demands it would involve new systems and models involving a “discretionary act [involving] the exercise of reasoned judgment” (*N.Y. Civil Liberties Union v State of NY supra* at 178).

The court further finds that Petitioners have also failed to establish their entitlement to a declaration; since they have failed to draw a nexus between DEP’s alleged inadequate notification practice and substantial legal interests, upon which a declaratory judgment would have a “direct and immediate effect” (*Enlarged City Sch. Dist. of Middletown v Middletown*, 96 AD3d 840[2nd Dept 2012]).

In accordance with the foregoing, the petition is denied, the proceeding is dismissed and the complaint is dismissed.

The foregoing constitutes the decision order and judgment of this court.

Dated: May 28, 2020



JOSEPH J. ESPOSITO, JSC