

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

In the Matter of the Application of

SIERRA CLUB, CONCERNED CITIZENS OF ALLEGANY
COUNTY, PEOPLE FOR A HEALTHY ENVIRONMENT, INC.,
JOHN E. CULVER, AND BRIAN AND MARYALICE LITTLE,

ORAL ARGUMENT
REQUESTED

Petitioners,

VERIFIED PETITION

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

Index No.

–against–

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, BASIL SEGGOS, COMMISSIONER, AND
HAKES C&D DISPOSAL INC.,

Respondents.

Petitioners Sierra Club, Concerned Citizens of Allegany County, People for a Healthy Environment, Inc., John Culver, and Brian and Maryalice Little (collectively “Petitioners”), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules, by their undersigned attorneys, allege as follows.

I. PRELIMINARY STATEMENT

1. This proceeding challenges the actions of Respondent New York State Department of Environmental Conservation (“DEC”) in issuing the Final Scoping Outline for the Draft Supplemental Environmental Impact Statement (“DSEIS”) for the Hakes C&D Landfill Expansion on August 2, 2017 (the “Final Scope”).

2. DEC’s issuance of the Final Scope is legally deficient because the Final Scope improperly excludes radioactivity issues from the analysis of environmental impacts of the Hakes

C&D Landfill Expansion in the DSEIS in violation of the requirements of the State Environmental Quality Review Act, ECL Article 8 (“SEQRA”) and the SEQRA regulations, 6 NYCRR Part 617.

3. Petitioners seek a judgment and order pursuant to Sections 7803 and 7806 of the Civil Practice Law and Rules (“CPLR”) invalidating the Final Scope on the basis that it was issued in violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and its issuance constituted an abuse of discretion.

II. PARTIES

4. Petitioner Sierra Club is a national grassroots conservation organization. It is organized as a nonprofit corporation under the laws of the State of California. Sierra Club was founded in 1892. Its purposes include practicing and promoting the responsible use of earth’s ecosystems and resources, and protecting and restoring the quality of the natural and human environment. The protection of air, soil and water resources is a key aspect of Sierra Club’s work. Sierra Club has approximately three million members and supporters nationwide. More than 50,000 Club members live in New York. A number of Sierra Club’s members live in the vicinity of the Hakes C&D Landfill (“Hakes Landfill”) or downriver from the Village of Bath Wastewater Treatment Plant (“Bath WWTP”) which accepts discharges from the leachate pre-treatment plant at the Steuben County landfill where all of the leachate from the Hakes landfill is sent. The Bath WWTP discharges into the Cohocton River. The Hakes Landfill is one of only three landfills in New York still accepting shale gas drilling wastes from Pennsylvania. The interests of the Club and its members are injured by allowing the expansion of the operations of the Hakes Landfill increasing the volumes of potentially radioactive leachate entering the Bath WWTP and being discharged into the Cohocton River and by operations at the Hakes landfill emitting radon and other harmful emissions into the atmosphere. Sierra Club and its members participated in the

DEC proceedings related to the Final Scope. Sierra Club Atlantic Chapter submitted comments on the draft scoping document urging that radioactivity issues be considered and many Sierra Club members did likewise. The Club and its members suffer informational injury as a result of the lack consideration of radioactivity issues in the environmental impact statement covering the Hakes landfill expansion project.

5. Petitioner Concerned Citizens of Allegany County (CCAC) is a New York State not-for-profit corporation formed in 1996. Its purposes include providing educational support to citizens of Allegany County and the Southern Tier region working to examine and mitigate environmental impacts. The protection of soil, air and water resources from radiological contamination is a key aspect of CCAC's work. CCAC formed in connection with the efforts to stop a proposed low-level radioactive waste disposal site in Allegany County in the early 1990's, as described in the documentary film, "My Name is Allegany County." More recently, CCAC has worked on radioactivity and other issues involved in the disposal of shale gas drilling wastes in the Hyland landfill in the Town of Anjelica. The Hyland Landfill is one of only three landfills in New York still accepting shale gas drilling wastes from Pennsylvania. CCAC has approximately 20 active members most of whom live in Allegany County. Some of CCAC's members live near the Hyland Landfill or near the Village of Wellsville Waste Water Treatment Plant which accepts leachate from the Hyland Landfill and discharges into the Genesee River. CCAC participated in the DEC proceedings related to the Final Scope. CCAC submitted comments on the draft scope urging that radioactivity issues be considered. CCAC and its members suffer informational injury as a result of the lack consideration of radioactivity issues in the environmental impact statement covering the Hakes landfill expansion project.

6. Petitioner People for a Healthy Environment, Inc. (“PHE”) is a New York State not-for-profit corporation formed in 2009. The members of PHE organized to advocate for the strengthening and effective enforcement of environmental and land use laws and regulations, and to assist communities, groups and individuals whose land, air, water, health, and quality of life may be subject to degradation by resource extraction activities. PHE’s first project was to bring a lawsuit challenging the siting of a regional gas field services facility for Schlumberger, Inc. over the primary aquifer in the Village of Horseheads. PHE was a co-petitioner with Sierra Club in the litigation challenging the failure of the Village of Painted Post to do an environmental impact review of its decision to sell water from its municipal water system to a subsidiary of Shell Oil for hydrofracking in Pennsylvania. PHE has worked extensively on the radioactivity issues presented by the acceptance of shale gas drilling wastes at the Chemung County Landfill. Aquifer protection is a key focus of PHE activities. The Chemung County Landfill is one of only three landfills in New York still accepting shale gas drilling wastes from Pennsylvania. The membership of PHE is centered in the Chemung River valley, and the drinking water of the Chemung River valley may be adversely affected by the actions complained of in this Petition. The interests of PHE and its members are injured by allowing the expansion of the operations of the Hakes Landfill increasing the volumes of potentially radioactive leachate entering the Bath WWTP and being discharged into the Cohocton River, which is upstream of Corning and Elmira, and a source of drinking water for both cities. The interests of PHE and its members are also injured by operations at the Hakes Landfill emitting radon and other radioactive emissions into the atmosphere of this region. PHE and its members suffer informational injury as a result of the lack consideration of radioactivity issues in the environmental impact statement covering the Hakes landfill expansion project.

7. Petitioner John Culver resides at 9938 Woodcock Road in the Town of Campbell, New York. His home is on one of two adjoining properties in which he has an ownership interest. These properties, totaling 72 acres, border two sides of the site of the proposed expansion of the Hakes Landfill. The Final Scope says that the proposed new landfill disposal cells can be built as close as 50 feet from property lines. He is one of the closest neighbors to the landfill on the northern side of the landfill. There are ongoing boundary disputes between Hakes and Mr. Culver. Mr. Culver regularly experiences horrible smells coming from the landfill that make him sick to his stomach. Because of the hazardous traffic conditions created by numerous large tractor-trailer trucks bringing waste to the landfill on the steep winding curves of Manning Ridge Road, he no longer travels that road even though it is the shortest route to major highways. Mr. Culver participated in the DEC proceedings related to the Final Scope. Mr. Culver made comments to DEC on HCDD's proposed expansion project regarding drainage pipes and previous tree-cutting that are discussed on pages 35-36 of the Final Scope. Mr. Culver suffers informational injury as a result of the lack consideration of radioactivity issues in the environmental impact statement covering the Hakes landfill expansion project.

8. Petitioners Brian and Maryalice Little reside at 9949 Woodcock Road in the Town of Campbell, New York. They are members of the Sierra Club. Their home is on one of two adjoining properties totaling 40 acres they own on Woodcock Road. The southern border of their properties is approximately 1,500 feet north of the northern boundary of the Hakes Landfill property. They are among the closest neighbors to the landfill on the north. The northern section of the Hakes Landfill property, which is currently undeveloped, is the section proposed for expansion of the landfill. The Littles experience disturbing noises and noxious air emissions from the landfill on their property on a regular basis. Because of the hazardous traffic conditions

created by numerous large tractor-trailer trucks bringing waste to the landfill on the steep winding curves of Manning Ridge Road, they no longer travel that road even though it is the shortest route to major highways. Mr. and Mrs. Little suffer informational injury as a result of the lack consideration of radioactivity issues in the environmental impact statement covering the Hakes landfill expansion project.

9. Respondent New York State Department of Environmental Conservation (“DEC”) is the administrative agency of the State of New York performing the actions at issue in this case. DEC is the governmental body responsible for environmental protection in the state of New York and for the protection of New York’s natural resources. DEC administers New York’s water pollution discharge and water withdrawal permitting programs. Basil Seggos is the Commissioner of DEC.

10. Respondent Hakes C&D Disposal Inc. (HCDD) is a New York business corporation with its principal executive office at Casella Waste Systems Inc., 25 Greens Hill Lane, Rutland, Vermont. HCDD operates the Hakes Landfill located at 4376 Manning Ridge Road, Painted Post, New York in the Town of Campbell. HCDD is a wholly-owned subsidiary of Casella Waste Systems.

III. FACTUAL BACKGROUND

11. On April 4, 2017, DEC published notice in its Environmental Notice Bulletin (the “ENB Notice”) that, as lead agency, it had determined that the application of HCDD to expand the Hakes Landfill may have a significant adverse impact on the environment and that a Draft Supplemental Environmental Impact Statement (“DSEIS”) must be prepared. The notice stated that written comments on the draft scope would be accepted until May 5, 2017.

12. As described in the draft scope, the present operations of the Hakes Landfill occupy approximately 109 acres of land east of Manning Ridge Road in the Town of Campbell. These operations include landfill cells and ancillary facilities. The expansion project would increase the land area affected by the landfill by approximately 52 acres: 22 acres of additional cells and approximately 30 acres of ancillary facilities including a proposed 24 acre soil borrow area. Soils would be excavated from the borrow area for landfill construction and operation.

13. The draft scope states that the proposed expansion would add more than 2.5 million cubic yards of disposal capacity, which would extend the life of the landfill by 5 to 10 years.

14. According to the draft scope, the permitted disposal rate would remain at 1,494 tons per day.

15. The draft scope states that, because the Hakes Landfill was the subject of a Final Environmental Impact Statement (“FEIS”) in 2006, a Supplemental Environmental Impact Statement (“SEIS”) will be prepared for the expansion project.

16. The 2006 FEIS did not address issues with radioactivity in wastes entering the landfill.

17. According to records posted online by the Pennsylvania Department of Environmental Protection (“PADEP”), the Hakes Landfill began accepting unconventional gas drilling wastes from gas drilling operations in Pennsylvania in 2010.

18. HCDD’s annual reports appear to confirm the PADEP reports.

19. HCDD’s 2011 Annual Report shows that total tonnage of wastes received at the Hakes landfill in 2011 was 376,485.60 tons. Of this amount, the report says 89,837.42 tons came from Bradford County Pennsylvania and 81,121.57 tons came from Tioga County, PA. The total tonnage from these two counties was 170,958.99 tons, or 45% of the total tonnage received in

2011. The types of wastes received from these counties are not broken down in the annual report, but it is likely that the bulk of these wastes were shale gas drilling wastes.

20. In 2012, HCDD's Part 360 solid waste management facility permit was modified to explicitly authorize the acceptance of certain types of Marcellus shale drilling wastes and to prohibit the disposal of other types of Marcellus shale drilling wastes. Drill cuttings generated from operations using air and water-based drilling fluids were authorized for acceptance for disposal. Bulk drilling fluids, liquids resulting from the hydrofracturing process, flowback water and related filter sludge, production brine and related filter sludge, and drill cuttings generated from operations using oil-based drilling fluids were prohibited from disposal.

21. The HCDD Part 360 permit was also modified in 2012 to permit the solidification of wastes onsite. The liquid solidification process shall be operated in accordance with the Operation and Maintenance Manual.

22. The PA DEP records posted online show that 332 barrels of liquid fracking waste were sent by gas companies drilling in Pennsylvania to the Hakes landfill between 2010 and 2017.

23. In 2012, Hakes Operations and Maintenance Manual ("Hakes OMM") was revised to include a radiation monitoring protocol. The protocol states that each inbound load entering the landfill shall be screened for radioactivity using a Ludlum Model 375 Waste Monitor, or equivalent, located at the scale/weigh station. The protocol sets procedures for what happens if the monitors are triggered by a load entering the landfill. The protocol requires that a log of daily background readings be maintained at the landfill, that the monitoring system be calibrated at least annually, and that field checks utilizing a source sample will be performed on a weekly basis.

24. Also in 2012, DEC began requiring that leachate from the Hakes Landfill be tested semi-annually for radioactivity.

25. At the present time, the Hakes Landfill appears to be one of only three landfills in New York that continue to accept shale gas drilling wastes from Pennsylvania according to the PADEP reports and HCDD's most recent annual report. As shown in the PADEP reports, the other two landfills that continue to accept shale gas drilling wastes from Pennsylvania are the Chemung County landfill in Chemung, New York and the Hyland Landfill in Anjelica, New York.

26. Because of widespread concerns that the shale gas drilling wastes being accepted by the Hakes landfill contain radioactive components, Sierra Club, CCAC and many others submitted comments on the draft scoping document for the proposed expansion of the Hakes landfill objecting to the failure of the draft scoping document to include radioactivity issues in the outline for the DSEIS for the Hakes expansion proposal.

27. The comments pointed out the levels of radioactivity reported in the 2013 leachate testing results for the landfill and expressed concern that the drive-through entrance monitors were not sufficient to detect radium and radon in wastes entering the landfill.

28. The comments also discussed data contained in the report commissioned by PADEP on Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) in shale gas drillings that indicates significant levels of radioactivity are associated with shale gas drilling wastes, citing *Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) Study Report*, PermaFix Environmental Services for PADEP, 2015.

29. The comments pointed out that without appropriate testing methods, radioactivity concentrations in both waste and landfill leachate—and in turn the potential risks posed to health and the environment—may be underestimated.

30. On August 2, 2017, DEC emailed copies of the Final Scope to those parties who had commented on the draft scope.

31. The Final Scope stated that the majority of the comments on the draft scope assert that drill cuttings and other authorized waste from drilling operations should not be permitted at the Hakes Landfill. The scope states that the majority of these comments assert that radioactivity will not be managed properly and that the wastes being received at the Hakes Landfill should be characterized as radioactive waste, not solid waste. In addition, claims are made that the drill cuttings present a health risk. The scope stated that many commenters suggested that drill cuttings should be treated as Technically Enhanced Naturally Occurring Radioactive Materials (TENORM) and that drill cuttings are not Naturally Occurring Radioactive Material (“NORM”). The Final Scope stated that other commenters speculated that accepting gas drilling wastes will lead to contaminated leachate and that some commenters questioned whether the leachate should be sent to the Steuben County WWTF in Bath, claiming that it was radioactive.

32. The Final Scope rejected these comments, stating that these questions have been raised previously and addressed in a statewide manner by the DEC program policy on drill cuttings entitled, “Program Policy Memorandum: Recommended Permit Modifications and Operating Procedures for Landfills relating to Wastes from Drilling in the Marcellus Shale Formation” dated September 18, 2015.

33. The program policy memorandum requires procedures similar to those contained in the Hakes Part 360 permit and the Hakes OMM, but does not address the questions raised by the commenters regarding the adequacy of the Ludlum monitors specified in the policy memorandum to detect the types of radiation present in shale gas drilling wastes. Nor does the policy memorandum provide adequate procedures for reviewing the sufficiency of the required semi-annual leachate testing results.

34. Furthermore, the policy memorandum was adopted without public input or comment and is not posted on the DEC website or otherwise made available to the public. Petitioners had to file FOIL requests to obtain the policy memorandum.

35. The Final Scope stated that all incoming waste and all outgoing leachate loads pass through the radiation detector at the scale. The scope stated that no leachate loads have set off the radiation detector alarms but did not address comments expressing concern with the adequacy of the landfill entrance monitors to detect harmful levels of the alpha and beta radiation present in Marellus shale drilling wastes.

36. The Final Scope also stated that leachate from the Hakes Landfill is analyzed semi-annually for radioactivity and sediment from the leachate storage tanks is analyzed annually. The scope stated that laboratory analysis has not revealed elevated levels of radioactivity in the leachate, but did not address the reporting of levels of Radium-226 as high as 180 pCi/L in Hakes leachate mentioned in Sierra Club's comment letter on the draft scope.

IV. CAUSE OF ACTION
VIOLATION OF SEQRA

37. Petitioners repeat and reallege the allegations in paragraphs 1 through 36 as though fully set forth herein.

38. DEC's issuance of the Final Scope is legally deficient because the Final Scope improperly excludes radioactivity issues from the analysis of environmental impacts of the Hakes C&D Landfill Expansion in the DSEIS in violation of the requirements of SEQRA, Article 8 of the Environmental Conservation Law ("ECL") and the SEQRA regulations, 6 NYCRR Part 617.

39. SEQRA provides that whenever an action *may* have a significant impact on the environment, an Environmental Impact Statement ("EIS") shall be prepared. ECL 8-0109(2). An EIS is required to contain all the information necessary to assure that the lead agency, can

ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. The EIS is made available to the public so that they are apprised of possible adverse environmental consequences and may comment and propose mitigating measures. *Id.*

40. In this matter, DEC, acting as lead agency, has determined that HCDD's application to expand the Hakes Landfill may have a significant adverse impact on the environment and that a Draft Supplemental Environmental Impact Statement ("DSEIS") must be prepared.

41. DEC determined to initiate scoping for the EIS pursuant to 6 NYCRR 617.8. Scoping is not required, but is undertaken to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or nonsignificant.

42. DEC's decision in the Final Scope to eliminate consideration of radioactivity issues in the DSEIS was based on errors of fact regarding the adequacy of the gamma detectors HCDD has installed at the entrance to the landfill to detect the types of radioactivity present in the shale gas drilling wastes being sent to the Hakes Landfill, and the proper interpretation of the landfill's semi-annual leachate testing results.

43. These errors deprive Petitioners of an opportunity for adequate "airing" of the radioactivity issues and the potentially significant adverse impacts of radioactive wastes deposited in the landfill. Cf. *Assn for a Better Long Island v. NYS DEC*, 23 NY 3d 1 (2014).

44. For these reasons, DEC's determination not to include radioactivity issues in the Final Scope was made in violation of lawful procedures, affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion.

V. RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter judgment against DEC pursuant to CPLR 7803 and 7806 as follows:

- A. Annuling the Hakes Final Scope issued on August 2, 2017 on the basis that it was issued in violation of lawful procedures, was affected by errors of fact and law, arbitrary and capricious, and an abuse of discretion;
- B. Granting Petitioners the costs and disbursements of this action; and
- C. Granting such other and further relief as the Court deems just and proper.

DATED: Hammondsport, New York
November 30, 2017

Respectfully submitted,



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VERIFICATION

I, Rachel Treichler, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-captioned proceeding, affirm the following to be true under the penalties of perjury pursuant to CPLR 2106, that I am an attorney for the Petitioners in this proceeding and that the foregoing petition is true to my own knowledge, and upon my review of the pertinent documents.

I am signing this verification pursuant to Rule 3020(d)(3) of the CPLR because Petitioner Sierra Club is a foreign corporation and because all the material allegations of the pleading are within my personal knowledge.

Dated: November 30, 2017
Hammondsport, New York



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