STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of ENTERGY NUCLEAR INDIAN POINT 2 LLC and ENTERGY NUCLEAR INDIAN POINT 3 LLC as respective owners of Indian Point 2 and Indian Point 3 and Joint Applicants for the Indian Point SPDES permit,

Petitioners-plaintiffs,

- against -

Decision & Judgment
Index No.: 6747-03
Index No.: 6749-03

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ERIN CROTTY, as Commissioner of New York State Department of Environmental Conservation,

Respondents-defendants,

MIRANT BOWLINE LLC, as owner of Bowline Point 1 and 2 and Applicant for the Bowline SPDES permit renewal; DYNEGY ROSETON LLC, as operator of GENERATION INC., as Applicant for the Roseton SPDES permit renewal,

Respondents-Defendants,

RIVERKEEPER INC.; SCENIC HUDSON INC., NATURAL RESOURCES DEFENSE COUNSEL INC., And RICHARD BRODSKY, in his individual capacity,

Respondents-Interveners.

Supreme Court, Albany County
RJI# 01-03-ST3971
Special Term

Present: E. Michael Kavanagh, JSC

Appearances:

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Kavanagh, J

Petitioners own and operate power plants located on or near the Hudson River and have been involved in protracted litigation as to the regulations and restrictions imposed upon their operation by the State Department of Environmental Conservation [hereinafter DEC]. Petitioners commenced this proceeding to challenge the content of the Final

Environmental Impact Statement issued by DEC as part of the permitting process for the continued operation of these facilities. Supreme Court (Keegan, JSC) issued a decision and Judgment dated March 3, 2004 which dismissed all of the challenges to the FEIS except that which seeks to invalidate the requirement contained within 6 NYCRR 704.5 mandating the use of the Best Technology Available ("BTA") in these power plants.

Power plants that employ cooling water intake structures are governed in part by a regulation (6 NYCRR 704.5) enacted in 1974 which states that "the location, design, construction and capacity of cooling water intake structures in connection with point source thermal discharges, shall reflect the best technology available for minimizing adverse environmental impact". Petitioners claim this requirement mandating the use of BTA is invalid because no public hearing was held on it prior to it being filed with the Secretary of State as required by the Environmental Conservation Law § 3-301(2)(a) and § 17-0301(4) and (6). Accordingly, the petition's third cause of action seeks a declaratory judgment that this regulation as it relates to the use of the BTA is constitutionally invalid and cannot be used by DEC as a condition for the issuance of valid operating permit for a power plant.

The Environmental Conservation Law requires that a regulation to be properly promulgated must first be published and public hearings must be conducted so that effected entities can be heard regarding their implementation and impact. Only after the hearings have been held can the regulation be filed with the Secretary of State and become legally enforceable. Petitioner claims that in 1974 when 6 NYCRR 704.5 was initially noticed for a public hearing it did not contain the provision regarding the use of BTA. Only after the hearings were conducted was this particular provision added and made part of the content of 6 NYCRR 704 which was then filed with the Secretary of State. Petitioners contend that

given no public hearing was held as to this part of the proposed regulation it was not properly promulgated and cannot now be used by DEC as part of the permitting process.

DEC does not concede that the BTA provision was not included in the wording of 6 NYCRR 704 when it was initially published and then made subject of the public hearings that were conducted in 1974. Instead it maintains that it is impossible to accurately reconstruct what took place at these hearings almost 30 years ago. What can be established from the records that are available is that there were at least five days of public hearings held on the specific provisions of 6 NYCRR 704.1-704.6 and that petitioners and their predecessors in interest were active participants. Respondent contends that any claim that this regulation was not properly promulgated could have, and should have, been made 30 years ago when the regulation with its provision for BTA was filed with the Secretary of State. No claim is made that petitioners did not know that BTA was part of the regulation when it was filed with the Secretary of State. Instead, petitioners chose to wait some 30 years to challenge it -- or well after the Statute of Limitations had expired for the period wherein such a claim could be made.

Petitioners argue that their challenge to the validly of this regulation did not become viable until June 25, 2003 when the FIES was issued by DEC and the BTA requirement was made a condition for the continued operation of its power plants. The Court disagrees. Petitioners and their predecessor in interest have been aware for almost 30 years that the BTA requirement existed in these regulations and would ultimately be applied to their operations. Given the highly litigious nature of these types of proceedings and the inevitable fiscal impact that the imposition of BTA would have on their power plants petitioners had to have known of the existence of this provision from the date it became part

of the public record. Everyone agrees that when filed with the Secretary of State in 1974 BTA was included in the wording of 6 NYCRR 704.5. Yet, petitioners waited more than 30 years to mount this challenge. As respondents point out, simply because the record of these proceedings cannot be completely reconstructed does not mean that the required public hearing on this provision was not held. And more importantly, the record cannot be reconstructed because the hearings took place 30 years ago. Petitioners waited years to bring this claim therefore they must shoulder the responsibility for whatever consequences resulted from such delay. Accordingly, it is the Court's finding that petitioners are not entitled to a judgment declaring 6 NYCRR Section 704.5 to be invalid and the third cause of action is hereby dismissed.

Petitioner also claims that DEC failed to make appropriate SEQRA findings in the administrative proceeding (2nd Cause of Action). In the related action (Brodsky v DEC), Justice Keegan issued a court order which adopted a schedule agreed to by the parties for any future administrative action including the issuance of the FEIS and a draft SPDES permit. This schedule did not include a time period wherein a statement of factual findings would be issued by DEC pursuant to SEQRA. Petitioners in this proceeding claim that DEC's failure to issue such a statement compromises any of the administrative actions it has taken to date. This claim appears to be a rather transparent attempt by petitioner to challenge the schedule for future administrative proceedings after it had agreed to it. Petitioner concedes that this statement of findings would have no real impact upon these proceedings and has given no explanation as to why this issue was not raised in the proceedings before Judge Keegan. Accordingly, this claim does not state a valid cause of action and must also be dismissed.

Accordingly, it is hereby

ORDERED AND ADJUDGED that petitioners' motion for summary judgment is denied; and it is further

ORDERED and ADJUDGED that respondents' cross motion are hereby granted and the second and third cause of action are hereby dismissed.

This constitutes the Decision and Judgment of this Court. All papers are being returned to the Attorney General. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notice of entry.

SO ORDERED!

8/18/04

E. Michael Kavanagh, JSC

Dated:

Papers Considered:

Notice of Amended Verified Petition and Declaratory Judgment Action; Amended Verified Petition and Declaratory Judgment Action; notice of motion for a determination of Entergy's Amended Verified petition; supplemental appendix and exhibits; Affirmation of Elise Zoli Esq date May 4, 2004 and appendix of exhibits

Notice of motion; Verified answer; affidavit of William Little and exhibits; Certified Return Volumes I, II and III

Notice of motion of Riverkeeper dated June 1, 2004; affirmation of David Gordon Esq; Entergy's Reply to the Departments Verified Answer dated June 23, 2004 Affidavit of Kathryn A Georgian Esq. sworn to June 23, 2004; appendix of relevant decisional authority; Affidavit of Kendrick Nguyen Esq. sworn to June 23, 2004 and exhibits; affidavit of Robert Brennan Jr. sworn to June 23, 2004 and exhibits; Affirmation of Elise Zoli Esq. Sworn to June 23, 2004 appendix of referenced in affirmation of Elise Zoli Esq.; Affidavit of Charlotte Bendar Esq. sworn to June 23, 2004 and exhibits; Affidavit of Sheryl Koval Esq. sworn to June 23, 2004; Affidavit of Nathan Broudeur Esq. Sworn to June 23, 2004 with exhibits; Affidavit of Randall Clark Esq. Sworn to June 23, 2004 and exhibits; Affidavit of Jeffrey Kapp Esq. Sworn to June 23, 2004 and exhibits; Affidavit of Alladine Joroff Esq. Sworn to June 23, 2004

Reply affidavit of Mark Sanza dated July 8, 2004

To commence the statutory time period for appeals as of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.