SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of :

TIOGA ENERGY PARTNERS, LLC,

Petitioner,

-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and BASIL SEGGOS as COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

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

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DECISION and ORDER

Index No.: 6536-18

APPEARANCES:

COUCH WHITE, LLP
(by Adam J. Schultz and Alita J. Giuda, Esqs.)
Attorneys for Petitioner

LETITIA A. JAMES
Attorney General of the State of New York
(by Assistant Attorneys General Meredith G. Lee-Clark and Susan L. Taylor)
Attorneys for Respondents

Cholakis, AJSC

Petitioner commenced this CPLR Article 78 proceeding to compel respondents to schedule and hold an administrative hearing pursuant to ECL § 23-0305(6) on its application for two well-drilling permits. Petitioner also seeks an order compelling respondents to process its application as expeditiously as possible, as required under ECL § 23-0501(3). Respondents have

moved to dismiss the petition. For the reasons that follow, the motion is denied.

Background:

Petitioner is an energy development company that wishes to embark on a project whose goal is to extract natural gas from the Marcellus Shale formation in Western New York. Petitioner proposes to drill two wells in the Town of Barton in Tioga County. The first of these wells would be drilled vertically into the Utica Shale formation; the second would be drilled horizontally into the Marcellus Shale formation. The proposed method for drilling these wells is hydraulic fracturing, commonly known as "fracking." What sets petitioner's project apart from others is that it would employ gelled propane in lieu of water as the agent used for drilling the wells. Fracking with gelled propane has never been done in New York, though the technique is in use elsewhere.

Petitioner filed its formal applications in the spring of 2015. At respondents' request, petitioner provided additional information on its applications in July and October 2015. On April 15, 2016 respondents issued a "Notice of Incomplete Application" (NOIA) which indicated that certain necessary information was lacking from the applications. Petitioner responded with additional information on August 3, 2017.

On October 13, 2017 respondents issued another NOIA. This document stated that, while petitioner's responses to the first NOIA "satisfied all of [respondents'] questions and comments on the [vertical] well drilling permit application," there were additional questions and comments regarding the horizontal well permit application (Verified Petition at para 24 & 25). Petitioner provided its responses to the second NOIA on October 30, 2017. Respondents subsequently requested some additional information. Petitioner submitted responses to these requests on November 10, 2017; February 8, 2018; and February 15, 2018.

Since this latter date, respondents have made no additional requests for information. They have issued no other NOIA. Petitioner has made numerous inquiries on the status of its applications. Some of these generated no response; others were met with terse answers which can be paraphrased, in sum and substance, as "We're working on it." Respondents ultimately told petitioner to address its questions to their counsel. Upon doing so, petitioner was told by

respondents' counsel that "'all aspects of the referenced applications remain under Department review. We are still evaluating what additional information/materials may be required from the applicant. We have no additional information at this time, and will notify you as soon as we do'" (*Id.* at para 49).

On August 20, 2018 petitioner filed with respondents a "Petition for Hearing." This document recited a brief history of the permit applications and requested a hearing pursuant to ECL § 23-0305(6). According to petitioner, respondents neither scheduled the requested hearing nor responded substantively to a followup letter dated September 25, 2018. This lawsuit followed.

The present proceeding, in the nature of a mandamus to compel, seeks an order directing respondents to schedule a hearing; to provide notice of the hearing; to conduct the hearing; and to direct respondents to process the well drilling permit applications as expeditiously as possible.

The Motion to Dismiss:

Respondents advance three separate arguments in support of their motion to dismiss the petition. They allege that petitioner's claims are not ripe for judicial review; that ECL § 23-0305(6) does not create a right to a hearing; and that mandamus does not lie to compel respondents to issue a determination on petitioner's applications. These points will be analyzed *seriatim*.

Respondents contend that the issues raised by petitioner are not ripe for judicial review because there has been no final action on the part of the administrative agency involved. Respondents, however, are missing the point: petitioner does not seek review of respondents' actions; petitioner seeks an order compelling respondents to act. It is settled law that Article 78 relief does not lie when a petitioner seeks review of an agency's actions prior to that agency's issuance of a final determination (*see e.g. Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Comm'n*, 71 AD3d 679, 681 [2d Dept 2010]). However, when an agency refuses to act in an area where action is mandated, Article 78 relief is available in the absence of a final determination (*Matter of Hamptons Hospital & Medical Center, Inc. v Moore*, 52 NY2d 88, 96 [1981]). The present petition is predicated on the allegation that respondents are

failing to move forward on petitioner's pending applications for well drilling permits. As respondents are responsible for processing and reviewing such applications, a petition alleging respondents' failure to act on such applications states a cause of action. It is therefore not subject to dismissal on this ground.

Respondents also claim that the present petition is not ripe because the requisite review under New York's State Environmental Quality Review Act (SEQRA) has not been completed. Yet throughout their papers, respondents concede that the burden of going forward with SEQRA review in this case rests on their shoulders. For example, their supporting affirmation states (at para 8), "Department staff evaluates all well drilling permit applications to determine whether they are in conformance with the 1992 [Generic Environmental Impact Statement]." It continues, "[T]he Department must determine the environmental significance of the applications under SEQRA" (*Id.*). Respondents concede that petitioner has fulfilled its initial requirements: "Tioga Energy provided a full environmental assessment form (EAF) Part 1 . . ." (*Id.*). Finally, the supporting affirmation adds, "The Department . . . is responsible for completing parts 2 and 3 of the EAF" (*Id.*). Far from proving that the petition is not ripe for review, these assertions by respondents shore up petitioner's case by providing implicit evidence that respondents have not yet shouldered their statutorily mandated burden of SEQRA investigation.

Respondents also contend that ECL § 23-0305(6) does not create a right to a hearing. The provision in question states:

> The department may act upon its own motion or upon the application of any interested person. *On the filing of an application concerning any matter within the jurisdiction of the department*, pursuant to this article, the department shall promptly fix a date for a hearing thereon, and shall cause notice of the hearing to be given. The hearings shall be held without undue delay after the filing of the petition. The department shall make its order within sixty days after the conclusion of the hearing (emphasis added).

The plain language of this section seems to suggest that a "hearing" on any application within respondents' jurisdiction may be had for the asking by "any interested person." While it should be noted that ECL § 23-0305(1) limits the applicability of the section to matters "conducted in

the administration of [ECL Article 23]," there is no dispute that the issues in controversy here arise under Article 23. Thus, the right to request a hearing appears to be conferred on petitioner as an "interested party" to this ECL Article 23 controversy.

The only decisional authority provided by respondents in support of their position is an unpublished decision by an administrative law judge (ALJ) (*Matter of Advocates for Cherry Valley*, DEC Case No. OHMS-66175 [June 13, 2011]). In *Matter of Cherry Valley*, the ALJ denied an adjudicatory hearing on a well drilling permit application where that hearing was requested by a public interest group. The ALJ's decision was based upon the language of ECL § 23-0305(2), which states, "No rule, regulation, order or amendment thereof . . . shall be made . . . without a public hearing." The ALJ reasoned that, since a well drilling permit application is not a "rule, regulation, order or amendment thereof," no hearing was required.

The reasoning of *Matter of Cherry Valley* is clearly flawed. The mere fact that a hearing is a necessary prerequisite to the issuance of rules, regulations and orders does not allow the inference that *only* rules, regulations and orders require a hearing. Under the ALJ's line of reasoning, since no person can become a lawyer without a bachelor's degree, anyone with a bachelor's degree must be a lawyer. This is palpably absurd.

Moreover, respondents are mistaken when they assert that they are entitled to deference in their interpretation of the ECL. The cases on which they rely, (*Matter of Aponte v Olatoye*, 30 NY3d 693, 698 [2018], quoting *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]), hold that administrative agencies are entitled to deference in the interpretation *of their own regulations*. Those cases do not stand for the proposition that such deference is due when it is a statute, not a regulation, that is subject to interpretation. "Deference to administrative agencies charged with enforcing a statute is not required when an issue is one of pure statutory analysis" (*Matter of Suffolk Regional OTB Corp v NYS Racing & Wagering* Bd, 11 NY3d 559, 567 [2008], citing *Matter of Astoria Gas Turbine Power, LLC v. Tax Commn. of City of NY*, 7 NY3d 451, 455 [2006]). Thus, based on the plain language of ECL § 23-0305(6), respondent's motion to dismiss must be denied.

This is not, of course, to say that the ECL – or any other statute or regulation – prescribes a particular sort of hearing on an application for a well drilling permit. As petitioner points out,

it is not seeking a full-blown, adversarial, adjudicatory proceeding; nor does the statute require one. What appears minimally required by the statute is notice and an opportunity to be heard in some forum, whether formal or informal, on or off the record. In short, the right to a hearing in this particular context may reduce to nothing more nor less than the right to transparency, the right to require an agency involved in a complex process to allow interested parties some assurance that their matter is being handled with appropriate care and diligence.

Finally, respondents argue that mandamus to compel does not lie in this case. They contend that the Court lacks jurisdiction to order a discretionary administrative determination. As with their analysis of ripeness, however, respondents miss the point of petitioner's argument. Petitioner is not asking the Court to order respondents to grant their well drilling applications; instead, petitioner is asking the Court to order respondents to move forward with the process of reviewing their applications. Petitioner understands that the granting or denial of the applications is a discretionary determination outside the ambit of CPLR Article 78. The jurisdictional foundation of the petition is built on the proposition that, while respondents have the discretion to grant the well drilling permit applications or to deny them, respondents do not have the discretion to ignore them.

Well drilling permits are covered by ECL § 23-0501. Subsection (3) of that statute provides, "[T]he department shall take all actions required by it under this title . . . as expeditiously as possible." Petitioner alleges that respondents' apparent inaction for nearly a year constitutes a violation of this statutory mandate. If proven, such an allegation would entitle petitioner to relief pursuant to CPLR 7803(1), which empowers judicial review of the question of "whether [respondents] failed to perform a duty enjoined upon it by law."

For these reasons, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that respondents shall have 30 days from the date of this Decision and Order to serve and file an answer to the petition; and it is further

ORDERED that petitioner shall have 10 days from the date of service of the answer to file papers in reply.

This shall constitute the Decision and Order of the Court. All papers,including this Decision and Order, are being returned to the attorneys for petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED.
ENTER.

Dated: January 3, 2019
Albany, New York

C. Cholakis

Catherine Cholakis
Acting Supreme Court Justice

Papers Considered:

Order to Show Cause dated October 23, 2018; Verified Petition dated October 23, 2018; annexed Exhibits A and B;

Notice of Motion dated October 31, 2018; Affirmation of David H. Keehn, Esq. dated October 31, 2018; Memorandum of Law dated October 31, 2018;

Affirmation in Opposition of Adam J. Schultz, Esq. dated November 7, 2018; annexed Exhibits A-C; Memorandum of Law dated November 7, 2018;

Respondents' Reply Memorandum of Law dated November 9, 2018.