

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Section 401 Water  
Quality Certification for the School Street  
Project

- by -

**ERIE BOULEVARD HYDROPOWER L.P.,**

Applicant.

DEC Project No. 4-6103-00027/00001-9

DECISION OF THE DEPUTY COMMISSIONER

October 6, 2006

DECISION OF THE DEPUTY COMMISSIONER<sup>1</sup>

In this administrative permit hearing proceeding, applicant Erie Boulevard Hydropower L.P. ("applicant") seeks a Clean Water Act section 401 water quality certification for its School Street hydroelectric power plant located in the City of Cohoes, New York. Presently before me are appeals from petitioners Green Island Power Authority ("GIPA") and the Village and Town of Green Island (collectively, "Green Island"). Petitioners challenge two issues rulings of Administrative Law Judge ("ALJ") Kevin J. Casutto: (1) a December 23, 2005 Issues Ruling on SEQRA and Federal Preemption ("SEQRA Issues Ruling"), in which the ALJ rejected issues raised under the State Environmental Quality Review Act (ECL article 8 ["SEQRA"]); and (2) a March 30, 2006 Ruling on Proposed Issues and Party Status ("March 2006 Issues Ruling"), in which the ALJ rejected the remaining issues proposed by petitioners.

For the reasons that follow, the ALJ's issues rulings are affirmed, GIPA's and Green Island's respective petitions for party status are denied. The matter is remanded to staff of the Department of Environmental Conservation ("Department") for issuance of a Section 401 water quality certification to applicant.

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<sup>1</sup> Then-Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Deputy Commissioner Carl Johnson by memorandum dated February 25, 2005.

## FACTS AND PROCEDURAL BACKGROUND

Applicant's School Street project is a hydroelectric generating facility located at river mile 2.5 on the Mohawk River in the Counties of Albany and Saratoga, New York. The facility's powerhouse is located in the City of Cohoes at the junction of North Mohawk Street and School Street. The facility also consists of the School Street Dam (also referred to as the Cohoes Dam), which is a masonry gravity dam that crosses the Mohawk River upriver from the powerhouse and the Cohoes Falls. The dam creates an approximately 100-acre reservoir. Water is diverted by a gatehouse from the reservoir to a power canal, which runs parallel to and south of the river. The power canal conveys water to the powerhouse and its five turbines. After exiting the powerhouse, water is discharged to a tailrace and then back to the Mohawk River downriver of Cohoes Falls.

The Mohawk River above the dam and power canal is classified as Class A fresh surface waters (see 6 NYCRR 701.6). The portion of the Mohawk River below the tailrace is classified as Class C fresh surface waters (see 6 NYCRR 701.8).

In 1991, applicant's predecessor in interest, Niagara Mohawk Power Corporation ("Niagara Mohawk"), applied to the Department for Clean Water Act § 401 water quality certifications for nine existing hydroelectric generating projects (see 33 USC §

1341; see also 6 NYCRR 608.9[a]<sup>2</sup>). Included in the nine projects was the School Street project. The water quality certifications were sought in connection with Niagara Mohawk's applications before the Federal Energy Regulatory Commission ("FERC") to renew its federal licenses for the nine projects. In November 1992, Department staff denied the application for all nine water quality certifications, and administrative adjudicatory proceedings ensued in 1993.

Prior to filing the 1991 water quality certification applications, Niagara Mohawk sought and obtained a declaratory ruling from the Department's General Counsel concerning the Department's authority to apply SEQRA during review of water quality certification applications for projects subject to FERC's licensing jurisdiction. In that declaratory ruling, the General Counsel held that Clean Water Act § 401 authorized the Department to apply SEQRA, among other statutes, to water quality certifications for hydroelectric power projects (see DEC Declaratory Ruling No. 15-09, Aug. 27, 1990, at 6).

Niagara Mohawk commenced proceedings pursuant to CPLR article 78 challenging the declaratory ruling. Those proceedings culminated in the 1993 decision by the New York Court of Appeals in Matter of Niagara Mohawk Power Corp. v New York State Dept. of

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<sup>2</sup> Section 608.9 of 6 NYCRR was previously numbered section 608.7. Section 608.7 was renumbered section 608.9 effective December 18, 1994.

Envtl. Conservation (82 NY2d 191 [1993], cert denied 511 US 1141 [1994]). In that decision, the Court rejected the General Counsel's conclusions. The Court held that the Clean Water Act limited the Department's review to the EPA-approved water quality standards found in 6 NYCRR parts 701 to 704, and that nothing in the recent amendments to the Clean Water Act reversed settled New York law that the Federal Power Act (see 16 USC § 791a) otherwise preempted State review beyond those water quality standards (see 82 NY2d at 200-201). Thus, the Court rejected the application of SEQRA to section 401 water quality certifications for hydroelectric power facilities (see id.).

The following year, the United States Supreme Court issued its decision in PUD No. 1 of Jefferson County v Washington Dept. of Ecology (511 US 700 [1994] ["Jefferson County"]). In that decision, the Supreme Court held that the State of Washington's minimum stream flow requirement was a permissible condition of a section 401 water quality certification.

Administrative adjudicatory proceedings on the nine water quality certification proceedings were adjourned while Department staff revised the draft water quality certifications in light of Jefferson County. The parties then began settlement negotiations. During those negotiations, applicant replaced Niagara Mohawk as the applicant for the School Street project. Eventually, settlements were reached on all nine water quality

certifications, including for the School Street project, and a new draft section 401 water quality certification for the School Street project was prepared.

As part of the settlement agreement on the School Street project, applicant agreed to various operational modifications and environmental measures to improve fish protection and passage, and to augment recreational facilities at the project. The operational modifications incorporated into the draft water quality certification include, among other things, run-of-river operation, increased aquatic habitat flows, and the construction of fish passage and protection structures. Applicant also proposed to deepen and modify the power canal to increase its hydraulic capacity.

Administrative adjudicatory proceedings on the School Street project recommenced with the publication in March 2005 of a supplemental notice of public comment period, complete application and reconvening of public hearing. Timely petitions for party status were filed by GIPA and Green Island, respectively. Neither GIPA nor Green Island are parties to the settlement agreement.<sup>3</sup>

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<sup>3</sup> Two party status petitioners from the 1993 proceedings filed timely supplemental party status petitions: the New York Power Authority ("NYPA") and New York Rivers United ("NYRU"). The remaining 1993 party status petitioner, the City of Cohoes, is a party to the settlement agreement and did not pursue party status during the reconvened adjudicatory proceedings.

The ALJ reconvened a legislative hearing on April 13, 2005, and an issues conference on April 14 and 15, 2005 (see 6 NYCRR 624.4). After the issues conference, applicant provided additional technical and other information regarding the application. The ALJ subsequently issued the SEQRA Issues Ruling holding that SEQRA was not applicable to applicant's water quality certification application. The ALJ concluded that for hydroelectric power plant projects requiring a federal license from FERC, SEQRA review is pre-empted by federal law. The ALJ held appeals from his ruling in abeyance pending the reconvening of the issues conference to discuss all remaining proposed issues, and the issuance of a subsequent issues ruling on those issues.

The issues conference was reconvened on February 6, 2006. The ALJ subsequently issued the March 2006 Issues Ruling explicitly rejecting for adjudication the remaining issues proposed by GIPA and Green Island, and implicitly denying their petitions for party status.<sup>4</sup> The ALJ held that many final project details will only be determined during the subsequent FERC relicensing proceeding. Nevertheless, the ALJ concluded that applicant's section 401 water quality certification

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<sup>4</sup> The supplemental party status petitions by NYPA and NYRU, both of which did not pursue issues at the reconvened issues conference, were also implicitly denied by the ALJ. Neither party has appealed the denial of their party status.

application and the materials filed in support thereof provide a reasonable assurance that the project will comply with New York's water quality standards, and that GIPA and Green Island identified no substantive and significant omissions or defects in the water quality certification application materials that require adjudication.

GIPA filed an expedited appeal dated April 28, 2006, challenging both the SEQRA Issues Ruling and the March 2006 Issues Ruling (see 6 NYCRR 624.8[d][2]). Green Island also filed an expedited appeal dated April 28, 2006, challenging the March 2006 Issues Ruling. Responses to the appeals were filed by applicant and Department staff, respectively, both dated May 19, 2006.

GIPA subsequently filed a letter dated May 26, 2006, with an attached reply brief, seeking leave to file such brief in order to argue the applicability of the recent United States Supreme Court decision in S.D. Warren Co. v Maine Bd. of Env'tl. Protection (547 US \_\_, 126 S Ct 1843 [2006]) to this proceeding. By letter dated May 28, 2006, Green Island requested that the matter be remanded to the ALJ for consideration of S.D. Warren. By memorandum dated June 9, 2006, Assistant Commissioner Louis A. Alexander informed the parties that Green Island's request for a remand to the ALJ was denied, that GIPA's reply brief was accepted as filed, that all communications in response to GIPA's

and Green Island's requests were accepted, and that sur-replies were authorized. Assistant Commissioner Alexander also invited comments on the recent Appellate Division, Third Department, decision in Matter of Erie Blvd. Hydropower, L.P. v Stuyvesant Falls Hydro Corp. (30 AD3d 641 [3d Dept], appeal dismissed \_\_ NY3d \_\_ [2006]). Sur-replies were subsequently filed by GIPA, Green Island, Department staff, and applicant, respectively, all dated June 20, 2006.

### DISCUSSION

#### Applicability of SEQRA

The ALJ held in the SEQRA Issues Ruling that Department staff correctly declined to conduct SEQRA review on applicant's water quality certification application. After conducting a comprehensive review of the statutory and case law framework on the issue, the ALJ concluded that the Department's role in reviewing section 401 water quality certification applications for hydroelectric facilities subject to FERC's jurisdiction is limited to ensuring compliance with the State's EPA-approved water quality standards established at 6 NYCRR parts 701 to 704 (see SEQRA Issues Ruling, at 10). The ALJ also concluded that SEQRA is not a State water quality standard adopted and approved pursuant to Clean Water Act § 303, and that, under well-settled New York law, SEQRA's application to section 401 water quality certification applications is otherwise pre-empted by the Federal

Power Act (see id.).

GIPA argues that the ALJ erred in concluding that SEQRA does not apply to section 401 water quality certifications. GIPA contends that SEQRA is a procedural requirement applicable to water quality certifications through 6 NYCRR 608.9(a)(6) (“[s]tate statutes, regulations and criteria otherwise applicable to such activity”) and Clean Water Act § 401(d) (33 USC § 1341[d] [“appropriate requirements of State law”]). GIPA contends that Niagara Mohawk did not hold that SEQRA was preempted for water quality certifications and that Jefferson County overruled Niagara Mohawk’s holding of broad federal preemption. GIPA asserts that the Federal Power Act does not preempt SEQRA and the circumstance that FERC may conduct an environmental review under the National Environmental Policy Act (42 USC §§ 4321 to 4370f [“NEPA”]) should not be used as a basis for precluding review under SEQRA.

GIPA’s arguments and interpretation of case law are unpersuasive. As noted by the ALJ in his SEQRA Issues Ruling, it has long been settled New York law that the Federal Power Act vests broad federal regulatory and licensing jurisdiction in FERC over hydroelectric projects that preempts all State licensing and permitting functions (see Niagara Mohawk, 82 NY2d at 196-197; Matter of Power Auth. of State of New York v Williams, 60 NY2d 315, 324-325 [1983]; Matter of de Rham v Diamond, 32 NY2d 34, 44-

45 [1973])). It is also well settled that Clean Water Act § 401 provides the State with only a limited role in reviewing projects subject to FERC's exclusive permitting jurisdiction -- to certify whether a "reasonable assurance" exists that the project will not violate applicable water quality standards promulgated by the State and approved by the federal Environmental Protection Agency ("EPA") pursuant to Clean Water Act § 303 (see Niagara Mohawk, 82 NY2d at 196-197; see also 33 USC § 1341[a][1]; 40 CFR 121.2[a][3]; 6 NYCRR 608.9[a]). In this case, as was the case in Niagara Mohawk, the applicable, EPA-approved State water quality standards are those established at 6 NYCRR parts 701 to 704 ("Parts 701 to 704").

GIPA's contention that Niagara Mohawk did not hold that the Department is pre-empted from applying SEQRA during its review of a section 401 water quality certification must be rejected. At issue in Niagara Mohawk was the Department's determination in DEC Declaratory Ruling No. 15-09 that, pursuant to the "any appropriate requirement of State law" provision of section 401, it was authorized to apply SEQRA, among other State statutes, in addition to the Parts 701 to 704 water quality standards (see DEC Declaratory Ruling No. 15-09, at 5-6). The Court of Appeals expressly held that the Department's section 401 review was limited "only" to the Parts 701 to 704 water quality standards and, thus, rejected the Department's claimed authority,

pursuant to the "any appropriate requirement of State law" provision, to apply SEQRA in addition to those water quality standards (see 82 NY2d, at 199-201).

The Appellate Division, Third Department's decision in Matter of Erie Blvd. Hydropower, L.P v Stuyvesant Falls Hydro Corp. confirms the above reading of Niagara Mohawk. Citing Niagara Mohawk, the Appellate Division noted that the Court of Appeals specifically rejected the claim that SEQRA review of a FERC-governed license application was authorized (see 30 AD3d, at 645). The court also confirmed that the provisions of the Clean Water Act provide "the only exclusion from the otherwise comprehensive scheme of preemption authorized by the Federal Power Act" (see id. [emphasis in original]).

I also reject GIPA's contention that Jefferson County overruled Niagara Mohawk. At issue in Jefferson County was a condition Washington State sought to impose in a section 401 certification to ensure compliance with a state water quality standard adopted pursuant to Clean Water Act § 303 -- a seasonal minimum stream flow requirement to protect and enhance one of the designated uses of the Class AA waters, that is, its use for salmonid and other fish migration, rearing, spawning and harvesting (see 511 US at 714). Thus, Jefferson County concerned the scope of appropriate conditions a state could impose to ensure compliance with its water quality standards (see id. at

712-714). Jefferson County did not involve an attempt by Washington State to impose a condition pursuant to a SEQRA analog in addition to conditions based upon its water quality standards, or even to impose a condition derived from a SEQRA analogue in an effort to achieve its water quality standards. Nor did Jefferson County address the Federal Power Act's federal preemption of state regulation. Accordingly, Jefferson County's holding concerning the scope of a state's authority to impose conditions to ensure compliance with its EPA-approved water quality standards cannot be read as overruling the specific holding of Court of Appeals in Niagara Mohawk that the Department is federally preempted from conducting broad environmental review pursuant to SEQRA review in addition to reviewing compliance with the State's Part 701 to 704 water quality standards.<sup>5</sup>

Throughout this proceeding, GIPA has sought coordinated review of the certification application as a Type I action under SEQRA, the consideration of alternatives -- specifically, its proposal to construct its own hydroelectric facility at the Cohoes Falls -- and a substantive finding that any adverse

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<sup>5</sup> For similar reasons, S.D. Warren Co. v Maine Bd. of Env'tl. Protection (126 S Ct 1843 [2006]) cannot be read to overrule Niagara Mohawk or to suggest that Jefferson County had that effect. At issue in S.D. Warren was the scope of the term "discharge" as used in section 401. S.D. Warren did not involve a state's attempt to conduct broad environmental review of a section 401 certification application or impose conditions pursuant thereto. Nor did S.D. Warren discuss the scope of federal preemption under the Federal Power Act.

impacts have been minimized to the maximum extent practicable. SEQRA is not a water quality standard and, indeed, GIPA concedes this point. Thus, in light of the federal preemption of SEQRA review, the review GIPA seeks may only be conducted if required by the Clean Water Act or the State's EPA-approved water quality standards, and the conditions that would be imposed as a result of such review could only be imposed if they are necessary to ensure compliance with those water quality standards (see 511 US at 712-715; see also American Rivers, Inc. v Federal Energy Regulatory Commn., 129 F3d 99, 107 [2d Cir 1997] ["[s]ection 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another"]; Stuyvesant Falls, 30 AD3d, at 645).

Nothing in the Clean Water Act or the State's water quality standards, however, requires a broad environmental review or a finding that all environmental impacts have been mitigated to the maximum extent practicable.<sup>6</sup> Nor is such a review or such findings required for the Department to determine whether a section 401 project is reasonably assured to meet both the

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<sup>6</sup> It is telling that GIPA itself concedes that not all of the environmental impacts that would be reviewed under SEQRA are relevant to a section 401 certification and that the certification may not be conditioned based upon those impacts (see GIPA Expedited Appeal from Issues Rulings [4-28-06], at 17). Accordingly, even GIPA is seeking application of some form of abridged environmental review.

narrative and quantitative standards State water quality standards. The Part 701 to 704 water quality standards are sufficiently and appropriately comprehensive and stringent to ensure protection of the State's waters. Moreover, nothing in section 401 or the State's water quality standards would authorize denial of a section 401 certification to a project that otherwise meets water quality standards on the ground that an alternative project has been proposed by another party. Thus, the review GIPA seeks and any potential conditions it would wish to impose as a result of such review are neither authorized nor necessary to ensure that applicant's project will comply with the State's water quality standards.

In sum, settled New York law prevents the application of SEQRA to applicant's section 401 water quality certification application, and nothing in the Clean Water Act or the State's water quality standards authorizes or requires the SEQRA-like review GIPA urges.<sup>7</sup>

#### GIPA's Remaining Issues

GIPA also raises several other non-SEQRA issues. As an initial matter, GIPA argues that the ALJ erred in failing to

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<sup>7</sup> In light of this conclusion, I need not address and do not pass upon Department staff's and applicant's alternative argument that the present application is grandfathered under SEQRA. Nor do I pass upon ALJ Andrew Pearlstein's ruling to that effect (see Matter of Niagara Mohawk Power Corp., Rulings of the Administrative Law Judge, April 20, 1994, at 22).

require submission for review by the parties of applicant's final plans, which, according to the draft water quality certification and the settlement agreement, will be submitted after the FERC license has been issued. GIPA also contends that the ALJ incorrectly applied the "reasonable assurance" standard to reject otherwise substantive and significant issues requiring adjudication. I disagree.

Federal regulation establishes the substantive standard for issuance of section 401 water quality certification. A certification issued by a State must include a statement that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards" (40 CFR 121.2[a][3]).

The substantive standard for issuance of a section 401 certification should not be confused with the procedural burden of persuasion carried by a proposed intervenor at the issues conference stage of a 6 NYCRR part 624 ("Part 624") permit hearing proceeding. Where, as here, Department staff has reviewed the application materials and supporting plans, and concluded that the application meets substantive statutory and regulatory standards, the intervenor carries the burden at the issues conference of demonstrating that the issues it proposes are both substantive and significant (see 6 NYCRR 624.4[c][1][iii] and [4]). An issue is "substantive" if

sufficient doubt exists about the applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would require further inquiry (see 6 NYCRR 624.4[c][2]). An issue is significant if it has the potential to result in permit denial, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (see 6 NYCRR 624.4[c][3]).

The ALJ did not confuse the two standards when reviewing GIPA's petition for party status and the issues GIPA proposed for adjudication. In the circumstances here, where Department staff concluded that applicant's application for a section 401 water quality certification meets applicable standards, the presumption at the issue conference is that a "reasonable assurance" exists that the project meets the State's water quality standards. Thus, GIPA bears the burden of persuasion to demonstrate a substantive and significant issue concerning whether a reasonable assurance has been made.

In rejecting GIPA's argument that additional information and final plans are required before a section 401 water quality certification may be issued, the ALJ noted that many final project details will only be specified at the conclusion of the FERC licensing proceeding, which will proceed only after a water quality certification is issued by this

Department. The ALJ concluded, however, that the preliminary plans available at this stage, along with the draft water quality certification and the settlement agreement, provided a "reasonable assurance" that the project will not violate applicable water quality standards (March 2006 Issues Ruling, at 7-8).

I agree with the ALJ that final plans are not necessarily required before a section 401 water quality certification may be issued, particularly because an applicant's plans may be modified during the subsequent FERC licensing proceedings, so long as the preliminary plans provide the requisite "reasonable assurance" (40 CFR 121.2[a][3]). For the reasons that follow, I also conclude that GIPA failed to raise any substantive and significant issues sufficient to rebut the presumption that applicant's project is reasonably assured to meet applicable water quality standards, notwithstanding any further refinement of the project as a result of FERC's review.

#### Minimum Stream Flows and Dissolved Oxygen

GIPA contends that applicant's proposal to operate the hydroelectric power facility in a modified store and release mode will result in adverse impacts on fish and other aquatic species, and upon recreational uses downstream of the facility. GIPA also argues that operation of the facility will result in the depletion of dissolved oxygen in the Mohawk and Hudson Rivers.

GIPA contends that these facts raise substantive and significant issues for adjudication concerning the project's ability to meet standards for dissolved oxygen and minimum stream flows, and the flow and water level monitoring plan.

An intervenor's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2; see also 6 NYCRR 624.5[b][2][ii] [requirement that a petition for full party status present an offer of proof specifying the witnesses, the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to that issue]). Offers of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application (see Matter of Halfmoon Water Improvement Area, at 2; Matter of St. Lawrence Cement Co., LLC, Second Interim Decision of the Commissioner, Sept. 8, 2004, at 93-95 [discussing offers of expert testimony]). An intervenor need not present proof of its allegations sufficient to prevail on the merits (see Matter of Hydra-Co. Generations Inc., Interim Decision of the Commissioner, April 1, 1988, at 2-3). On the other hand, conclusory or speculative assertions unsupported by a sound factual or scientific foundation are insufficient to carry the intervenor's

burden (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2). Judgments about the strength of an intervenor's offer of proof are evaluated in light of the application and related documents, Department staff's analysis, the draft permit, the contents of any petitions filed for party status, the record of the issues conference, and any subsequent written arguments authorized by the ALJ (see 6 NYCRR 624.4[c][2]; Matter of Bonded Concrete, Inc., at 2).

Applying these standards, GIPA failed to make an offer of proof sufficient to raise any adjudicable issues concerning the project's ability to meet the applicable water quality standards. The State's water quality standard for dissolved oxygen in non-trout Class A and C waters provides, "the minimum daily average shall not be less than 5.0 mg/L, and at no time shall the [dissolved oxygen] concentration be less than 4.0 mg/L" (6 NYCRR 703.3). The historic data presented by GIPA at the issues conference failed to establish a violation of this standard in the waters in the vicinity of or influenced by the facility. GIPA made no other offer of data or expert testimony concerning the facility's impact on dissolved oxygen. Thus, GIPA failed to carry its burden of raising an adjudicable issue.

With respect to minimum stream flows and the flow and water level monitoring plan, the relevant standards are qualitative. For both Class A and C waters, the waters "shall be

suitable for fish propagation and survival" (6 NYCRR 701.6 and 701.8). The State's water quality standards do not provide a relevant quantitative standard establishing minimum flows to protect aquatic habitat. However, minimum interim and permanent flows to the bypassed reach of the Mohawk River are provided for in the draft water quality certification, and the settlement agreement (see Draft Permit [3-10-06], Issues Conference ["IC"] Exhibit 9, Condition 9; Settlement Agreement [3-7-05], IC Exhibit 8, section 3.2.2). These flows were established based upon minimum flow demonstrations into the bypassed reach conducted by a professional biologist employed by applicant. A biologist from Department staff participated in the demonstrations.

GIPA's offer of proof is insufficient to raise an adjudicable issue. GIPA's expert witness, an engineer who apparently lacks a biology background, is only minimally qualified to testify concerning the impact the flows provided for in the draft water quality certification and settlement agreement will have on aquatic habitat. Moreover, GIPA's expert relies exclusively upon a general guidance document, the Department's Fisheries Management Plan for the Lower Mohawk River (Oct. 1994), that predates the facility-specific demonstration conducted by applicant with staff's oversight, and does not take into account the results derived from that demonstration. Accordingly, GIPA's offer of proof does not raise sufficient doubt about the adequacy

of the flows provided for in the draft water quality certification and settlement agreement so as to reasonably require further inquiry. GIPA also fails to raise sufficient doubt that an effective and approvable monitoring plan can be developed that will meet the specifications of the draft water quality certification and the settlement agreement. Thus, the ALJ correctly held that GIPA failed to raise an adjudicable issue (see March 30, 2006 Ruling, at 7-8, 12).

#### Public Access and Recreation

GIPA contends that because the best usages of Class A and C waters are, among other uses, fishing and contact recreation, the water quality certification should require maximization of recreational uses (see 6 NYCRR 701.6[a] and 701.8). GIPA argues the draft water quality certification is inadequate because it fails to identify a recreation plan. Although the State's water quality standards require that Class A and C waters be suitable for recreation, they do not require the maximization of public access and recreational uses. The draft certification requirement that applicant develop recreational access and facilities at the project as provided for in the settlement agreement (see Draft Permit, condition 14) is sufficient to assure the State standards will be met, and GIPA fails to raise an adjudicable issue to the contrary. Moreover, the water quality standards do not require a recreation plan.

The recreation plan described in the settlement agreement is required by the FERC licensing process, not by the State's section 401 water quality certification. Thus, GIPA fails to raise a significant issue relevant to the section 401 certification, and the ALJ correctly so held (see March 30, 2006 Ruling, at 13).

#### Fish Protection Measures

GIPA maintains that the measures applicant proposes for minimizing the killing of fish are inadequate and will result in the mortality of millions, if not billions, of fish. Accordingly, GIPA argues that applicant's allegedly inadequate fish protection and passage measures will impair the best usage of Class A waters by making them unsuitable for fish propagation and survival (see 6 NYCRR 701.6). GIPA's arguments are speculative and unsupported by a qualified offer of proof. The draft water quality certification and the settlement agreement provide for screening of the bypass flow release mechanism in the project canal, the installation of new angled bar-racks to reduce entrainment while guiding fish to a downstream bypass, and the installation of fish conveyance structures, among other fish protection measures (see Draft Permit, Conditions 11 and 12; Settlement Agreement, Sections 3.5-3.7). GIPA offered no data or identified any expert testimony that would support its argument concerning the impacts of the proposed fish protection measures

or their effectiveness. Accordingly, the ALJ correctly concluded that GIPA failed to raise any adjudicatory issues concerning fish protection and passageway measures (see March 30, 2006 Ruling, at 11).

PCB Sediments, Proposed Blasting, and the City of Cohoes Water Supply

GIPA challenges the ALJ's ruling that GIPA failed to raise adjudicable issues concerning the remediation of hazardous wastes at the site, blasting in the power canal, and the impacts of activities on the water supply for the City of Cohoes (see March 30, 2006 Ruling, at 9-10). GIPA asserts, without support, that "[i]t is self-evident that blasting in a canal . . . is related to the possible contravention of a qualitative water quality standard" (GIPA Expedited Appeal, at 43).

As the ALJ correctly noted, the inactive hazardous waste site up-stream of the facility is the subject of a separate enforcement proceeding against Niagara Mohawk, and is not adjudicable in this proceeding. The low level of PCB contamination in the power canal is below the Department's action levels. Moreover, prior to any blasting, the power canal will be dewatered, and sediments will be removed and disposed of pursuant to Departmental guidance. In addition, as discussed further below, the City of Cohoes water supply will be moved out of the power canal prior to dewatering and sediment removal, thereby avoiding the risk of contamination to the City's water supply.

Given these precautions, GIPA's conclusory assertions unsupported by the identification of any evidence tending to cast doubt about their effectiveness fails to raise an adjudicable issue.

#### Geotechnical Analysis

GIPA challenges the ALJ's conclusion that no adjudicable issues are raised concerning the adequacy of applicant's geotechnical analysis (see March 30, 2006 Ruling, at 10). GIPA asserts that the geotechnical analysis is necessary to assure that the buildings and structures used in the facility are stable. Building and structural stability, however, do not implicate any Part 701 to 704 water quality standards, nor any "best use" provision of those regulations. Thus, GIPA fails to identify any significant issues relevant to issuance of the water quality certification. Instead, issues concerning building and structural stability are exclusively within FERC's relicensing jurisdiction.

#### Stormwater General Permit

GIPA contends that an application for a construction stormwater general permit should have been included in the application materials for the section 401 water quality certification. Applicant's filing of a notice of intent to apply for and adhere to the terms of the general permit satisfies its obligations under 6 NYCRR 750-1.21(d)(1). Having failed to raise any adjudicable issues concerning the project's compliance with

water quality standards, GIPA fails to raise an issue concerning applicant's ability to proceed pursuant to the general permit. Accordingly, the ALJ correctly ruled that no issue for adjudication is presented (see March 30, 2006 Ruling, at 12-13).

#### Aesthetic Flow Releases

Finally, GIPA contends that the project should be subject to requirements for aesthetic flow releases to improve the visual appearance of the Cohoes Falls. GIPA argues that although such requirements are typically included as a FERC license condition, they may also be imposed in a section 401 water quality certification.

Although requirements for aesthetic flow releases are included in the settlement agreement, the requirements are not included in the section 401 certification. The State's water quality standards address aesthetics for purposes of protecting potable water, and include consideration of, among other things, taste, odor, and discoloration (see 6 NYCRR 702.14[a] and [c]). They do not address the visual appearance of waterfalls. Thus, aesthetic flow releases are not the subject of a water quality certification and GIPA fails to raise an adjudicable issue.

#### Village and Town of Green Island's Appeal

Green Island argues that the draft water quality certification inadequately protects the water supply of the City of Cohoes, which it also uses. The present intake for the City's

raw water supply is located at the south end of the power canal. Green Island is concerned that if construction of the proposed Phase I fish protection and downstream river passage measures begins before the City's water supply intake is relocated, the water supply may become contaminated by PCB-contaminated sediments. Green Island contends that the draft certification contains contradictory requirements concerning the relocation of the water supply intake and demands that a condition be included expressly conditioning the commencement of construction upon issuance of a New York State Department of Health permit authorizing relocation of the intake. Green Island contends this issue is substantive and significant, requiring adjudication.

The ALJ concluded that this issue was resolved by the draft certification conditions, as revised by Department staff in its February 21, 2006 letter to the issues conference participants (see March 30, 2006 Issues Ruling, at 14-15). I agree.

As an initial matter, Green Island failed to raise any objection to the revised certification conditions to the ALJ, even though ample time to do so was available to Green Island. In any event, the relevant draft certification conditions provide, as revised:

"11. Fish Protection/Passage. Within 18 months of issuance of the FERC operating license the certificate holder shall complete the Phase I Fish Protection and Downstream

Passage measures described in the settlement, particularly Section 3.5. All portions of the construction of the Phase I Fish Protection and Downstream Passage measures located in the power canal shall be completed in conjunction with and in compliance with the pertinent provisions of construction requirements paragraph 15 below.

. . . .

"15. Power Canal Excavation/Sediment Removal. The Certificate Holder proposes to increase the hydraulic capacity of the power canal. Within 1 year of the issuance of the FERC operating license the Certificate Holder shall submit to the Department for review and approval a comprehensive bedrock excavation and sediment removal plan for the power canal that meets the goals and performance standards set forth in paragraph 18 below and that includes the following information;

"a) details regarding the temporary, or if appropriate, the permanent relocation of the City of Cohoes water intake during the period of time the power canal will be dewatered and excavated;

. . . .

"c) details regarding the methods for dewatering the power canal prior to commencing construction, including, but not limited to the following; initial dewatering using the gatehouse, the management of water entering the canal after dewatering has taken place and work has commenced (i.e., stormwater outfalls to the canal and direct precipitation)"

(Draft Permit, Conditions 11 and 15, as revised by Letter from William G. Little, Department Associate Attorney, to ALJ Casutto [2-21-06], at 4-5).

Thus, the express terms of the draft certification require that the City's water supply intake be relocated pursuant to a Department approved plan prior to dewatering the power canal, and that the canal dewatering will precede construction on the Phase I fish protection and downstream passage measures and any bedrock excavation and sediment removal. This is clearly the understanding of Department staff. It is also the understanding of applicant, as evidenced by its April 2005 Preliminary Power Canal Work Plan submitted to FERC (see Appendix to Erie Boulevard Hydropower L.P.'s Response in Opposition to Expedited Appeals, at 422-423 ["Erie understands the canal excavation portion of this Plan cannot proceed until a final option is selected and installed to ensure the City's water supply requirements are not interrupted."]).

Because the draft certification as revised requires that the dewatering of the power canal and any subsequent excavation and construction will occur only after the City's water supply is relocated, the certification provides adequate assurance that quality of the City's water supply will not be affected by the project. No further modification of the draft certification conditions is required and Green Island fails to raise any issues requiring adjudication.

CONCLUSION

In sum, GIPA and Green Island have failed to carry their respective burdens to demonstrate any substantive and significant issues requiring adjudication. Accordingly, the ALJ's SEQRA Issues Ruling and March 2006 Issues Ruling are affirmed, and GIPA and Green Island's respective petitions for party status are denied. Department staff is directed to complete the processing of the certification application and to issue the section 401 water quality certification to the applicant, consistent with this decision.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Carl Johnson  
Deputy Commissioner

Dated: Albany, New York  
October 6, 2006