STATE OF NEW YORK
SUPREME COURT: COUNTY OF GENESEE

TONAWANDA SENECA NATION,

Plaintiff-Petitioner,

V. Index No.: E69171

STEVEN HYDE, in his official capacity as President And Chief executive Officer of the Genesee County Economic Development Center, MARK MASSE, in his Official capacity as Senior Vice President of Operations Of the Genesee County Economic Development Center, PETER ZELIFF, in his official capacity as Chairman of The Genesee County Economic Development Center Board of Directors, MATTHEW GRAY, in his official Capacity as Vice Chair of the Genesee County Economic Development Center Board of Directors, GENESEE COUNTY ECONOMIC DEVELOPMENT CENTER, and PLUG POWER, INC.,

Defendants-Respondents.

EARTH JUSTICE
Attorney for Plaintiffs-Petitioner

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Plug Power, Inc.

DECISION AND ORDER

CHARLES N. ZAMBITO, J.

Petitioner Tonawanda Seneca Nation brings the above action pursuant to CPLR Article 78 for review of a determination by Respondent Genesee County Economic Development Center with respect to the utilization of land adjacent to their tribal territory for the development of a liquid hydrogen energy facility. The original petition was filed on June 4, 2021 and named only the Genesee County Economic Development Center (GCEDC) as a respondent. The relief sought in the original petition included voiding two determinations by the GCEDC, which would allow for the construction of the facility without further inquiry into the environmental impact upon the neighboring tribal land.

An amended petition was filed by the Tonawanda Seneca Nation on June 18, 2021, which added certain officers of GCEDC as respondents, as well as Plug Power, Inc., the business entity which was granted the lease to develop the property. The amended petition was filed without leave of the Court. Thereafter, the instant motion for permission to file an amended petition was filed on July 26, 2021. The Respondents have opposed the Petitioner's motion to amend and argue that the amended petition should be dismissed, claiming that it was filed without leave of the Court in violation of CPLR 401, and that in any event it was filed after the four-month limitation period established for such proceedings in CPLR 217(1). The motion to amend was argued before the Court on July 30, 2021 and the matter was deemed finally submitted.

Background

Respondent GCEDC is the agency which has owned and developed the Science, Technology and Advanced Manufacturing Park (STAMP) site, a 1,206-acre area located

in the Town of Alabama, Genesee County, since approximately 2010. It is also the lead agency responsible for making determinations regarding the environmental impact of the STAMP project and the facilities that would operate within it. During the course of its stewardship over the project, GCEDC has issued several determinations pursuant to the State Environmental Quality Review Act ("SEQRA"; Environmental Conservation Law Article 8; 6 NYCRR 617), including a Draft Generic Environmental Impact Study (DGEIS) in 2011, a Final Generic Environmental Impact Study (FGEIS) in 2012, a Findings Statement in 2012, an Amended Findings Statement in 2016 and a SEQRA update in 2020.

On February 4, 2021, Respondent GCEDC issued a resolution relative to the application of Respondent Plug Power, Inc, to develop a liquid hydrogen production plant in the Project Gateway area of the STAMP site. Among its findings, GCEDC determined, in light of the previously completed GEIS and STAMP Findings, along with submissions relating specifically to Plug Power's application ('Environmental Information'), that "all potential impacts associated with Project Gateway had been adequately addressed", and that "no further SEQRA compliance is required." The resolution goes on in Section 4 to make specific findings with respect to the impact that Project Gateway would have on the interests of the Tonawanda Seneca Nation regarding topics such as land use, wastewater, air emissions, health/safety, and noise, among others. The resolution concludes in Section 6 that "The requirements of 6 NYCRR Part 617 have been met" and states in Section 8 that its terms shall take effect immediately.

Further action on Project Gateway was taken by GCEDC on March 25, 2021, in the form of a Final Resolution relating to Plug Power, Inc and Project Gateway. The Final Resolution references the "SEQRA Resolution" of February 4, 2021 as having

concluded the SEQRA review process for the project and ratifies the "SEQRA Resolution previously adopted by the Agency, thus completing the SEQA review process for the Project." A copy of the February 4, 2021 SEQRA Resolution was attached to the Final Resolution.

Analysis

CPLR Article 78 provides a means by which a petitioner may challenge a determination made by a state agency. An action under Article 78 must be brought within four months of the date upon which the determination to be challenged becomes "final and binding" (CPLR §217(1)). A determination is considered final and binding when the "decisionmaker arrives at a definitive position on the issue which inflicts an actual concrete injury" (Matter of Essex Co. v. Zagata 91 NY^2 447), and when "the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (Walton v New York State Dept. of Correctional Services, 8 NY^3 183).

The language utilized by GCEDC in its February 4th SEQRA resolution has such binding and definitive import. Its terms, by any reasonable interpretation, set forth a final SEQRA determination which imposed an actual, concrete injury upon the Petitioner (Stop-the-Barge v. Cahill, 1 NY^3 218). Moreover, there is no indication in this record that there were any administrative steps available to the Petitioner to challenge the February 4th SEQRA determination (see Stop-the-Barge, ibid).[1] The fact that there was further action taken on Plug Power's application as reflected in GCEDC's March 25th Final Resolution, in which the February 4th SEQRA determination was referenced, does not alter this conclusion, because there is no evidence that there was a renewed consideration of the environmental impact of the project beyond the February 4th

resolution (Young v Board of Trustees of the Village of Blaisdell, 89 NY² 846; Matter of Lohman v Egan, 171 AD³ 1490).

The rationale for the brief time frame within which the final determination of an government agency may be challenged is to curtail the expense and delay brought on by litigation once a public project has been approved to go forward (see Solnick v Whalen, 49 NY² 224 ["The reason for the short statute is the strong policy, vital to conduct of certain kinds of governmental affairs, that the operations of government not be trammeled by stale litigation and stale determinations", quoting Mundy v Nassau Co. Civil Service Comm. 44 NY² 352, Breitel, Ch. J., dissenting]). To embrace the Petitioner's argument in this case would invite the result that the Legislature sought to avoid in enacting CPLR 217(1).

Based upon the foregoing, the four-month period within which the Petitioner should have commenced this action must be calculated from February 4, 2021. Therefore, the proposed amended petition is untimely as it relates to Plug Power, Inc. and the individual GCEDC respondents. The motion to amend is denied accordingly and the amended petition is dismissed (Matter of Assalone v Pawling Central School District, 36 AD³ 613).

The original petition, however, was timely filed against Respondent GCEDC, who also moves pursuant to CPLR 1001 to dismiss for the failure of the Petitioner to join a necessary party. Generally, a person who might be inequitably affected by a judgment in an action shall be made a plaintiff or a defendant in that action (CPLR 1001(a)). The failure to join such a necessary party can result in the dismissal of the action (Matter of Spence v Cahill, 300 AD² 992, lv denied 1 NY³ 508).

There has been no argument raised by the Petitioner in these proceedings which would convince the Court that Plug Power is not a necessary party, as their interests would be inequitably or adversely affected by the relief requested in the petition (Jim Ludka Sporting Goods, Inc v. City of Buffalo School District, 34 AD³ 1068). Further, Petitioner offers no excuse or explanation why Plug Power was not joined as a party prior to the expiration of the statute of limitations[2] (Best Payphones, Inc. v Public Service Com'n, 34 AD³ 1068; Bianchi v Town of Greece Planning Board, 300 AD² 1043). Considering these principles, the Court must also dismiss the original petition for the failure to join Plug Power, Inc. (Windy Ridge Farm v Assessor of Town of Shandaken, 11 NY³ 725).

In light of these determinations, the Court will not reach the Respondents' further claims.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 30, 2021
Batavia, New York

HON. CHARLES N. ZAMBITO
Acting Supreme Court Justice

1. The letter from Chief Roger Hill to Stephen Hyde dated March 23, 2021 asks that the SEQRA Resolution of February 4th be rescinded. The use of such language supports an inference that as of March 23rd, the Petitioners believed that the SEQRA determination reflected in the February 4th resolution was final and binding upon them and inflicted an actual injury. Nothing in GCEDC's letter in response, dated March 30th, suggests otherwise, or that there were administrative steps available to the Petitioner to challenge GCEDC's determination

2. The failure to join a necessary party within the period of limitation does not entirely remove the Court's discretion to allow the matter to continue pursuant to CPLR 1001 (b)(1)-(5). The Petitioner did not substantially argue this issue (with the exception of a claim of lack of prejudice to Plug Power), and under the circumstances of this matter, the Court declines to exercise its discretion to allow the case to continue despite the Petitioner's failure to join Plug Power, Inc. as a necessary party.