

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NEW YORK PROPANE GAS ASSOCIATION, INC.,
PARACO GAS CORPORATION, MULHERN GAS
CO. INC., ATLANTIC BOTTLE GAS CO. INC.,
G.W. ERHART INC., and IDEAL BOTTLE GAS INC.,
Plaintiffs,

-against-

DECISION AND JUDGMENT

Index No. 4925-19

RJI No. 01-19-133277

NEW YORK STATE DEPARTMENT
OF HEALTH and HOWARD ZUCKER, M.D.,
COMMISSIONER,

Defendants.

APPEARANCES:

The West Firm
For Plaintiffs
677 Broadway, 8th Floor
Albany, New York 12207-2966

Letitia James, Esq.
Attorney General of the State of New York
Nicholas C. Buttino, Esq. and Susan L. Taylor, Esq.
(Assistant Attorneys General, of Counsel)
For Defendants
The Capitol
Albany, New York 12224-0341

RYBA, J.

Plaintiff, New York Propane and Gas Association Inc. (hereinafter NYPGA), is a trade organization comprised of businesses that sell propane and underground propane storage systems, whose chief purpose is to promote the regulatory interests of the propane industry to the government. The remaining plaintiffs are individual propane dealers that provide and install underground propane tanks which are used to provide fuel to residential and business customers. By letter dated June 29, 2018, defendants responded to a request from the Suffolk County Department of Health Services, Bureau of Drinking Water, for an interpretation of the New York State Sanitary Code, specifically

10 NYCRR Subpart 5-1, Appendix 5-B, Table 1, as it relates to the minimum separation distance between private potable water wells and underground propane tanks. As set forth in the June 29, 2018 letter, defendants advised that:

1. The Department [of Health] considers underground propane tanks to be potential sources of contamination. As such they are covered by the “*All known sources of contamination not shown above*” item in Appendix 5-B, Table 1, requiring a separation distance of 100’.

2. If the 100’ separation distance is not fully achievable, due to small lot size or other physical limitations, the maximum distance possible should be used when siting a new or replacement water well.

3. In accordance with Appendix 5-B.1 (a) (2) the separation distances indicated in Table 1 are only applicable during the installation of new and replacement water wells. While the installation of an underground propane tank on a site with an existing water well is not subject to Appendix 5-B, an effort should be made to maximize the separation distance to provide a safety buffer during maintenance of the water well or underground propane tank.

Pursuant to this interpretation, on July 31, 2018, the Suffolk County Department of Health issued a guidance statement that limited the distance between propane tanks and sources of water, including wells. Thereafter, by letter dated February 22, 2019, NYPGA requested that defendants reconsider its rule regarding setbacks of underground propane tanks and the distance from water wells. By letter dated April 9, 2019, defendants responded to NYPGA’s request in pertinent part as follows (emphasis added):

As discussed during our September 11, 2018 meeting on this subject, the New York State Department of Health (Department) pursuant to Title 10 of the New York State Codes, Rules and Regulations (NYCRR) 5-1.1 (dg) considers propane to be an unspecified organic contaminate (UOC).

Section 5-1.1 (dg) defines a UOC as any organic chemical not otherwise specified in 10 NYCRR Subpart 5-1. Propane is currently not specific in Subpart 5-1 but is an organic chemical and therefore is regulated as a UOC pursuant to 10 NYCRR 5-1.5, Table 3. Table 3 specifies a maximum contaminant level of 0.05 milligrams per liter (mg/l) for a UOC.

Based on propane’s classification as a UOC, the Department considers underground propane tanks to be potential sources of propane contamination. Accordingly, the installation of a new or replacement water wells must meet the requirements of 10 NYCRR Appendix 5-B, which includes the separation requirement of 100 feet from “**All known sources of contamination otherwise not listed above.**” **This requirement results in the installation of new or replacement water wells being required to be 100 feet away from an underground propane tank.**

In August of 2019, plaintiffs commenced this action for a judgment declaring that defendants’ April 9, 2019 letter interpreting 10 NYCRR Part 5-1, Appendix 5-B (c), Table 1, is a “rule” established in violation of the State Administrative Procedure Act (SAPA) and Article IV § 8 of the New York State Constitution, was made in excess of its statutory authority, and is arbitrary and irrational. Plaintiffs accordingly seek a judgment annulling and enjoining the enforcement of the April 9, 2019 “ruling” and an order awarding them costs and attorneys’ fees. In lieu of answering, defendants now move for an order dismissing the action pursuant to CPLR 3211 (a) for lack of standing and ripeness, and for failure to exhaust administrative remedies. Alternatively, defendants request that the action be converted to a proceeding pursuant to CPLR Article 78. Plaintiffs oppose the motion.

In support of the motion to dismiss, defendants contend that plaintiffs lack the necessary standing to maintain this action inasmuch as they have failed to establish that either the individual plaintiffs or the members of the organizational plaintiff NYPGA will suffer an injury in fact, or that any injuries that such members may suffer fall within the zone of interest sought to be promoted by the New York State Sanitary Code 10 NYCRR 5-1 et seq., or its enabling legislation, Public Health Law § 225. “Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria” (Society of Plastics Indus. v County of Suffolk, 77 NY2d

761, 769 [1991]). In order to establish standing to challenge an administrative action, the individual plaintiffs must establish an injury in fact as the result of the challenged agency action, and that its interests are within the zone of interests sought to be protected by the statutes and/or regulations governing the dispute (see, New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211[2004]; Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772 [1991]). As to the injury in fact requirement, the plaintiff must establish that it has suffered “special damage, different in kind and degree from the community generally” (Matter of City of New York v City Civ. Serv. Commn. 60 NY2d 436, 442-443 [1983]). Where an agency issues a policy which requires the promulgation of a rule that was directly applied to plaintiff, the plaintiff had standing to challenge the agency’s non-compliance with SAPA (see, Schwartzfigure v Hartnett, 83 NY2d 296 [1994]).

With regard to the standing of an organization such as NYPGA, as a general rule “associations have standing to challenge administrative acts which adversely affect their members” (Matter of Dental Socy. v Carey, 61 NY2d 330, 333 [1984]). Here, plaintiffs provide affidavits from David Latourell, an employee of Paraco Gas Corporation and Richard Brescia, an employee of New York Propane Gas Association, Inc, that set forth claims that its members have suffered concrete injuries relative to conducting business. Specifically, plaintiffs claim they have been denied permits for installation of propane tanks due to the inability to meet the 100-foot requirement and in some instances they have lost customers. Based on these circumstances, the Court finds that standing has been established. Next the Court will address plaintiffs’ claim that the State Administrative Procedure Act (“SAPA”) was violated.

The State Constitution, as well as the State Administrative Procedure Act (“SAPA”), mandates the procedures that must be followed for promulgation of rules and regulations. Excluded from these requirements are “interpretive statements and statements of general policy which in

themselves have no legal effect but are merely explanatory” (see, SAPA § 102 [2] [b] [iv]). A rule or regulation, by contrast, is “a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers” (Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]). SAPA sets forth in part that “prior to the adoption of a rule, an agency shall submit a notice of the proposed rule-making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule” (see, SAPA § 202 [1]).

Plaintiffs claim that defendants’ April 2019 letter expanded the list of “potential” and “known sources of contamination” set forth in the New York State Sanitary Code, 10 NYCRR 5-1. Petitioners claim that prior to the expansion, for more than 12 years the Department of Health maintained that Appendix 5-B and Table 1, which addresses separation distances for new water wells, did not apply to propane tanks. Plaintiffs assert that the defendants’ April 2019 letter took the position rendering propane tanks from being “potential sources of propane contamination” to “known sources of contamination.” In opposition, defendants argue, in part, that the Department of Health’s reasoning in its letter does not harm plaintiffs. They further assert that the “interpretive statements” impose no new obligation and therefore they are exempt from procedural requirements, such as those in SAPA. They also assert no harm based on the fact that plaintiffs may apply for a waiver.

Upon reviewing the various arguments and the relevant statutes, the Court finds that the expanded interpretation violates SAPA. While defendants argue that the regulations themselves, exclude propane tank installers, that reasoning does not mitigate the fact that the April letter expands the applicability of Section 5-B.7 Separability, Table 1 which governs “the required minimum

separation distances to Protect Water Wells from contamination.” The last entry in the table states specifically that “all known sources of contamination otherwise not shown above” must be 100 feet from a water well. This table does not state that “potential sources of contamination” must be 100 feet from a well. In the defendants’ April 9, 2019 letter, they do not state that propane tanks are a “known source of contamination,” it states that propane tanks are a “potential source”. Yet, the Department interprets the 100 feet separation requirement as applicable to potential sources. Clearly, the Department’s expanded interpretation of applying a rule applicable only to “known sources” to a “potential source,” required the defendants to go through SAPA procedures to change the rule. Therefore, since the rule was expanded without complying with SAPA, the Court finds it was illegally implemented.

Next, the Court must analyze if an exception to SAPA exists. Here, there is no dispute that the defendants’ interpretation is applicable statewide to all administrative agencies. Therefore the new interpretation appears to be a “fixed, general principle without regard to other facts and circumstances.” Therefore, no exception to SAPA applies. Defendants’ assertion that plaintiffs may apply for a waiver fails to mitigate the fact that the rule was improperly expanded without compliance with SAPA.

Since no exception to SAPA is applicable and defendants have admittedly issued the interpretation without complying with the rule making process, the rule change inherently made by the defendants’ interpretation is invalidated by the Court. Accordingly, the defendants are barred from interpreting and advising administrative agencies that “potential sources of UOCs” are covered by the 100 foot setback rule governing “known sources of UOCs” as currently set forth in the rule (see, 10 NYCRR Part 5, Subpart 5-1 Standards for Water Wells Appendix 5B Section 5-B.7, Table 1). In view of this finding, the Court need not address the alternative grounds for dismissal and

the requests for relief raised in defendants' motion.

In view of the foregoing, it is

ORDERED that the motion is denied, and it is further

ORDERED that the Department of Health is barred from interpreting 10 NYCRR Part 5, Subpart 5-1 Standards for Water Wells Appendix 5B Section 5-B.7, Table 1 such that "potential sources of UOCs", like propane tanks, are equated to "known sources of UOCs" and it is further

ORDERED that the Department of Health must immediately inform all administrative agencies that received the interpretation, which applied the 100 foot setback rule for "known sources of contamination" to propane tanks, that the interpretation is null and void; and it is further

ORDERED that plaintiffs are entitled to costs and attorneys' fees.

This constitutes the decision and judgment of the Court. The plaintiffs' counsel is directed to file a copy of the decision and order with the Albany County Clerk. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and 5016 and counsel are not relieved from the applicable rules respecting filing and service.

SO ORDERED.

ENTER.

Dated: April 20, 2020

A handwritten signature in blue ink, consisting of a large, stylized 'C' followed by a long horizontal line extending to the right.

HON. CHRISTINA L. RYBA
Supreme Court Justice