



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
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WATER

IN THE MATTER OF THE APPLICATION BY UNITED)	ORDER
WATER NEW JERSEY INC. PURSUANT TO <u>N.J.S.A.</u>)	
40:55D-19, AS UNDER THE BOARD'S ORIGINAL)	
JURISDICTION FOR APPROVAL OF UNITED)	
WATER'S WOODCLIFF LAKE DAM IMPROVEMENTS)	
PROJECT; AND A DETERMINATION THAT THESE)	
IMPROVEMENTS ARE REASONABLY NECESSARY)	
FOR THE SERVICE, CONVENIENCE OR WELFARE)	
OF THE PUBLIC; AND THAT ZONING AND LAND USE)	
ORDINANCES OF WOODCLIFF LAKE AND)	
HILLSDALE HAVE NO APPLICATION THERETO)	DOCKET NO. WM12050358

Parties of Record:

Thomas J. Herten, Esq., Archer & Greiner, P.C., for United Water New Jersey Inc.
Stefanie A. Brand, Esq. Director, Division of Rate Counsel
Kathy Rizza, Planning Board of the Borough of Woodcliff Lake
Christie Wyssneski, Borough of Hillsdale
Donald S. MacLachlan, Esq., for Hillsdale & Westwood Flood Solution Group and,
individually, Antonio Xavier, Wendy Xavier, Thomas Kelley and Elizabeth Kelley
Lisa Almeida, Deputy Attorney General, on behalf of the Department of Environmental
Protection

BY THE BOARD:

On May 1, 2012, United Water New Jersey ("Petitioner," "United Water" or "UWNJ") filed a petition and exhibits with the New Jersey Board of Public Utilities ("BPU" or "Board") pursuant to N.J.S.A. 40:55D-19 of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"). By Order dated May 23, 2012, the Board retained jurisdiction of this matter and designated Commissioner Mary-Anna Holden as presiding Commissioner. The Hillsdale & Westwood Flood Solution Group, a New Jersey nonprofit corporation, and Antonio Xavier, Wendy Xavier, Thomas Kelley and Elizabeth Kelley, individually (collectively "Interveners") were granted intervener status in this matter. The parties consented to allow the Department of Environmental Protection, Bureau of Dam Safety ("NJDEP") to submit briefs and intervene in this case as appropriate.

In relevant part, N.J.S.A. 40:55D-19 provides that:

This act or any ordinance or regulation made under authority thereof, shall not apply to a development proposed by a public utility for installation in more than one municipality for the furnishing of service, if upon a petition of the public utility, the Board of Public Utilities shall after hearing, of which any municipalities affected shall have notice, decide the proposed installation of the development in question is reasonably necessary for the service, convenience or welfare of the public.

Among the reservoirs used by United Water to service 60 municipalities in New Jersey is the Woodcliff Lake Reservoir (the "Reservoir"). The Reservoir, and the related structures that are necessary for its existence and continued operation, are located in municipalities in Bergen County, including the Borough of Woodcliff Lake ("Woodcliff Lake")¹ and the Borough of Hillsdale ("Hillsdale").

The Reservoir's related structures include a dam that is located across the Pascack Brook. The Woodcliff Lake Dam (the "Dam"), was constructed in or around 1904 by United Water's predecessor, Hackensack Water Company ("Hackensack Water"). The Dam and Reservoir have been used to provide water to the public for almost 108 years. Traversing the Dam is Church Road, a private road – owned by United Water – with use easements to Hillsdale and Woodcliff Lake. Pursuant to a December 20, 2007 NJDEP letter, United Water has undertaken certain improvements. United Water seeks to construct an auxiliary spillway, embankment protection, rehabilitation of the low level outlet, and rehabilitation of the embankment of the existing structure of the Dam, as well as embankment stabilization in two other dike areas along the Reservoir's south east side (the "Dam Improvement Project" or the "Project"). The Project was ordered by the NJDEP, pursuant to a Dam Safety Permit (# 1386) issued by the NJDEP Bureau of Dam Safety, dated November 7, 2011, and a related November 7, 2011 NJDEP Order. The deadline for commencing construction on the Project was May 7, 2012.²

POSITIONS OF THE PARTIES AS TO BPU JURISDICTION

In its Petition, UWNJ outlines the Project and alleges that Hillsdale has taken steps to assert jurisdiction over the Project and to thwart the Project. Petitioner further alleges that NJDEP is the agency with expertise to oversee dam safety issues and that relevant statutes addressing dam safety - N.J.S.A. 58:4-1 to -14, the Safe Dam Act ("SDA"), and regulations promulgated thereunder, N.J.A.C. 7:20-1.1 et seq. - vest sole jurisdiction for dam permitting, construction, maintenance, inspection and enforcement with NJDEP. Petitioner further alleges that Hillsdale has no authority to enforce municipal ordinances regarding the construction of the Dam. Petitioner further alleges that because the Project spans multiple municipalities, pursuant to N.J.S.A. 40:55D-19, the Board has original jurisdiction to supersede any municipal ordinances enforced against the Project. Petitioner therefore seeks a finding, that the project is "reasonably necessary for the service, convenience or welfare of the public." N.J.S.A. 40:55D-19

¹ Woodcliff Lake has not submitted any briefs in this matter before the Board.

² The Board takes no position on NJDEP's right to enforce its permit.

Following the filing of the Petition, the Board instructed all parties to submit briefs on the limited question of the Board's jurisdiction, including issues relating to the NJDEP. The Board received briefs from Petitioner, NJDEP, Hillsdale and Interveners.³

Borough of Hillsdale

In its brief, Hillsdale asserts that it does not oppose renovation of the Dam, but says, however, that it has concerns with the proposed Project. Hillsdale makes two principal arguments. First, Hillsdale alleges that it has taken no action that constitutes a finding that United Water could appeal to the Board pursuant to N.J.S.A. 40:55D-19. Secondly, Hillsdale alleges that the exception in N.J.S.A. 40:55D-19, which grants the Board original jurisdiction over developments proposed by a public utility for installation in more than one municipality does not apply because any installation completely in Hillsdale is subject to local review. Hillsdale asserts that the principal structure of this Project lies wholly within the Borough of Hillsdale, and that the elements of the project lying in other municipalities are so physically remote that they should be considered separate projects. For this reason, Hillsdale asserts that the Project should be treated as if it is located solely within the Borough of Hillsdale. Finally, Hillsdale alleges that it has concurrent jurisdiction with NJDEP to review this matter.

Interveners

Interveners allege that the Project is not designed to directly service customers and is not an inter-municipal development. Interveners also adopt the arguments submitted by Hillsdale. Additionally, Interveners allege that because the "sheet pile wall" portion of the Project is physically separated from the spillway and no parties object to its installation, that portions of the Project do not present an issue for Board determination. As such, Interveners allege that the contested portion of the Project is entirely within Hillsdale. Finally, Interveners assert that the nature of the collection and use of raw water which flows through the Dam does not constitute a utility purpose. For these reasons, Interveners believe that N.J.S.A. 40:55D-19 does not confer jurisdiction on the Board.

UWNJ

On October 23, 2012, Petitioner submitted two briefs opposing the filings of Hillsdale and Interveners, respectively. United Water asserts that Dam and sheet pile wall improvements are both mandated by NJDEP to protect the Dam.⁴ Petitioner asserts that it is not seeking Board appellate jurisdiction, but seeking the Board's original jurisdiction, because the project is located within multiple municipalities. Petitioner further alleges that the Legislature intended for N.J.S.A. 40:55D-19 to supersede local authority when a project has components in multiple municipalities, to avoid one municipality from blocking a utility project. Regarding the Interveners, Petitioner argues that Interveners admit that an integral portion of the Project is in two municipalities. Further, Petitioner alleges that if only contested portions of a project were considered for jurisdictional purposes, a municipality could block a project by only objecting to portions of the project within its municipal borders. Finally, Petitioner asserts that the Dam is operated for its franchise purposes and as part of its utility operations.

³ On November 23, 2012, the Division of Rate Counsel submitted a letter deferring to the Board on the issue of jurisdiction.

⁴ Petitioner concedes that a separate portion of the project, a fishing pier, is not mandated and does not argue that it should be considered when determining jurisdiction.

NJDEP

NJDEP asserts that it has exclusive authority over the construction, operation, maintenance and repairs related to the Project under the SDA. NJDEP also asserts exclusive authority over the Woodcliff Lake Reservoir operations under the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq. ("WSMA:"). Therefore, NJDEP claims that assertion of jurisdiction by Hillsdale over these matters is preempted by the State. Specifically, NJDEP notes preemption of Hillsdale's Conditional Use Standards for Public Utilities Ordinance, Tree Removal Ordinance and Soil Movement Ordinance. NJDEP further states that the Legislature intended to give NJDEP exclusive and comprehensive authority as to the Dam, as a Class I high hazard dam. NJDEP further asserts that the Board's authority under N.J.S.A. 40:55D-19 is based upon the applicability of Hillsdale's ordinances to the Project, and therefore the scope of this hearing must be limited to matters that are not preempted by the NJDEP.

BRIEFS IN RESPONSE TO NJDEP's BRIEF

Hillsdale

Hillsdale disagrees that NJDEP pre-empts its role in projects that have a significant impact on Hillsdale. Hillsdale asserts that it has authority to conduct site plan review of the Project. Hillsdale acknowledges that it cannot overrule the NJDEP, but asserts that it has authority to impose conditions that do not conflict with NJDEP requirements.

Interveners⁵

In their reply brief, Interveners argue that local jurisdiction over local land use issues asserted by Hillsdale is concurrent with, and consistent with, the exercise of authority granted by the Legislature to the Board and NJDEP and that neither agency should prevent planning board review. Interveners argue that the Board should not assert jurisdiction in this matter because doing so would be an inappropriate use of N.J.S.A. 40:55D-19 and exceed the Legislature's intent. Interveners further argue that local and state authority under the MLUL is co-existent. Interveners note that NJDEP's permit recognizes concurrent jurisdiction of municipalities. Additionally, any argument by Petitioner that a review by Hillsdale will delay the project should not be considered, because Petitioner has controlled the timing of the Project. Finally, Interveners reiterate their prior arguments regarding the inapplicability of N.J.S.A. 40:55D-19 to the circumstances of this case.

UWNJ

Petitioner agrees that NJDEP pre-empts the field, by and through the SDA, the WSMA and the

⁵ On February 15, 2013, after this matter was listed on the Board's agenda and over two months after the filing the NJDEP's reply brief on its jurisdictional issues, the Interveners sought leave to file a supplemental brief. UWNJ objected to the filing of this supplemental brief. Intervener submitted a reply in support of its request. In its brief, Interveners argue that Hillsdale has independent statutory authority to review the Project as well as other issues relating to NJDEP's assertion of jurisdiction. Interveners further argue that if NJDEP preempts Hillsdale, it also preempts any authority of the Board pursuant to N.J.S.A. 40:55D-19. In light of the lateness of the filing and the Board's findings regarding its review of NJDEP's jurisdiction, the Board denies Intervener's request to file its supplemental brief.

regulations promulgated thereunder. It believes the articulated position of the NJDEP is entitled to deference by the Board as the position of a sister agency. Petitioner submits that the Board should adopt its sister agency's findings and conclusions as set forth in the NJDEP brief dated November 8, 2012 and as evidenced by the issuance of the Dam Safety Permit with all of the attendant obligations imposed on Petitioner.

Petitioner reasserts its claim that the Project as described gives the Board jurisdiction. Petitioner also asserts that the Project is "reasonably necessary for the service, convenience or welfare of the public" under N.J.S.A. 40:55D-19. Petitioner claims that the NJDEP, by issuing the Permit, has made the finding that the Project is reasonably necessary and that because of NJDEP's actions and its preemption over the Project, the Board does not need to make the broad range of specific and detailed findings of fact that it typically makes in a N.J.S.A. 40:55D-19 petition, but should merely defer to NJDEP.

NJDEP's REPLY BRIEF

NJDEP states that it has required Petitioner to repair the Dam to meet the safety standards under the SDA, and has determined that the Project is necessary and sufficient to make the required repairs. Were NJDEP required to allow Hillsdale's local board to propose changes to the Project, it would interfere with NJDEP's statutory authority and purpose under the SDA and WSMA, and delay the necessary repairs. Hillsdale's Conditional Use Ordinance, Tree Removal Ordinance and Soil Removal Ordinance purport to grant the local boards the power to approve and/or deny applications related to the Project. Because NJDEP has the authority and mandate to issue permits related to dam construction and repair under the SDA, it states that the ordinances are incompatible with the SDA and are thus preempted. Nonetheless, NJDEP asserts that it would not assert jurisdiction over traffic safety issues during the construction process.

DISCUSSION AND FINDINGS

The Board has reviewed the parties' submissions for the purpose of determining whether the Board has jurisdiction to hear Petitioner's complaint. NJDEP, the Board's sister agency, has asserted that its authority under the SDA and WSMA preempts the field of dam and reservoir oversight completely. NJDEP asserts that the SDA and WSMA preempt the municipal ordinances raised in this proceeding. NJDEP urges the Board to limit the scope of the hearing to issues not preempted by NJDEP.

There is no dispute among the parties that NJDEP has the authority to act, in appropriate circumstances, pursuant to the SDA and the WSMA. Additionally, the parties do not appear to dispute the Board's authority to act, where appropriate, pursuant to N.J.S.A. 40:55D-19. Instead, the parties contest whether NJDEP's authority preempts the field and whether it is appropriate for the Board to act in this case.

The Board will first address arguments relating to NJDEP's authority to act and assertion of preemption. NJDEP has indicated that pursuant to the SDA and WSMA, it preempts various municipal authority, specifically those issues identified by Petitioner. Similarly, United Water asserts that NJDEP preempts the field, but nonetheless, urges the Board to act pursuant to its authority under N.J.S.A. 40:55D-19. Hillsdale and Interveners challenge NJDEP's assertion of preemption and further assert that the Board does not have authority to proceed in the first

instance, in this case, because the Dam Improvement Project does not meet the statutory criteria which convey authority for the Board to act.

To the extent parties assert that the Board may review NJDEP's decision relating to its issuance of a permit, the Board is being asked to collaterally rule on the appropriateness of NJDEP's statutory authority and preemption. Although the issue of NJDEP's preemption authority arose during the course of a proceeding before the Board, the Board is not the appropriate forum to review NJDEP's authority and decisions made pursuant to that authority. The exclusive forum for review of an agency determination is the Appellate Division. R. 2:2-3(a)(2) vests in the Appellate Division "exclusive jurisdiction to review any action or inaction of a state administrative agency." Mutschler v. N.J.D.E.P., 337 N.J. Super. 1, 9 (App. Div.), cert. denied, 168 N.J. 292 (2001) (citing Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976)). The cases are so regardless of the "theory of the challenging party's claim or the nature of the relief sought." Mutschler, 337 N.J. Super. at 10.

Accordingly, any determination by the Board regarding the Woodcliff Lakes Dam project must be made pursuant to the Board's statutory authority. Assuming that the Board were to find that it has jurisdiction in this matter pursuant to N.J.S.A. 40:55D-19, the Board must then determine whether it should exercise such jurisdiction under the circumstances of this matter.

When two agencies have claim to jurisdiction over a single issue, the agency holding the predominant interest should be granted jurisdiction. Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 440 (1990). NJDEP's claim to jurisdiction arises from its powers under the SDA and WSMA. NJDEP has exercised this jurisdiction and issued a permit to proceed with the work on the Dam. Given that the claims raised in the petition focus on the safety and reliability of the Woodcliff Lake Dam, NJDEP has significant interest in this case. In addition, the Board is cognizant that courts give the actions of an administrative agency a strong presumption of reasonableness and are only overturned if found to be arbitrary, capricious or unreasonable. In re Carter, 191 N.J. 474, 482 (2007). See also, City of Newark v. Natural Res. Council, 82 N.J. 530, 539, (1980), cert. denied, 449 U.S. 983 (1980) (agency's exercise of its statutorily delegated responsibilities is granted a strong presumption of reasonableness). When an agency is interpreting the laws that empower it, "[a]n agency's interpretation of operative law is entitled to prevail so long as it is not plainly unreasonable," L.M. v. Div. of Ed. Assist and Health Serv., 140 N.J. 480, 489-90 (1995), quoting Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327 (1984).

The Board therefore takes notice of and accepts -- without ruling on -- NJDEP's assertion that the SDA and WSMA preempt local ordinances and grant jurisdiction to NJDEP. Moreover, because NJDEP has issued a permit for this Project and asserted that it has preemptive jurisdiction over it, under the precepts of administrative comity, the Board does not deem it appropriate to assert jurisdiction over the same issues at this time. See Balsley, supra, at 440. NJDEP acknowledges that the SDA and WSMA do not preempt every conceivable challenge to the Project, and that the Board may have jurisdiction over non-preempted questions. However, no issues are raised in the filings before the Board that appear to be outside of NJDEP's preemption. Petitioner seeks the Board's declaration that Hillsdale's Conditional Use Ordinance, Tree Removal Ordinance, and Soil Movement Ordinance do not apply to the Project because they conflict with permits issued by NJDEP. NJDEP has already determined that the SDA and WSMA preempt these ordinances, leaving no question for the Board to decide.

The parties were asked by the Board to submit briefs on all aspects of all jurisdictional issues in

this case. All of the arguments advanced by the parties are pertain to NJDEP's preemptive jurisdiction, dam safety or to the ordinances which NJDEP asserts it preempts. This preceded any determination by the Board pursuant to N.J.S.A. 40:55D-19. Specifically, the facts in this case do not require the Board to act on the Board's preemptive authority under N.J.S.A. 40:55D-19, because the predominant issue raised is dam safety. The issues raised by the parties are related to the appropriateness of proceeding with the Dam repairs as directed in NJDEP's Permit and Order, not the reasonableness of UWNJ's actions. United Water clearly asserts that NJDEP preempts the field on dam safety, but seeks a Board ruling because it is a public utility. Hillsdale and the Interveners seek a Board ruling that Hillsdale in fact has authority to regulate portions of this Project. The Board declines to rule on either issue.

The facts and issues in this matter surround the appropriateness of the Permit and NJDEP's action, not whether the Dam is "necessary ... for the public convenience." The parties are in effect, asking to Board to evaluate NJDEP's claim of preemption. The Board is not the appropriate body to rule on these issues, and if there is a challenge to NJDEP's jurisdiction, it should be brought elsewhere.

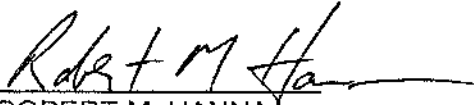
Based on the petition and other filings before the Board, there is no dispute requiring the Board to rule on whether the Woodcliff Lake Dam Project is reasonably necessary for the service or convenience of the public. The arguments raised do not question the necessity of the Project, but focus on the safety and reliability of the renovations required by the Permit. NJDEP has asserted jurisdiction over all issues of dam safety and reliability under the SDA, and the Board declines to consider issues on which NJDEP claims preemption. Therefore, the Board will reserve and elects not to exercise its jurisdiction pursuant to N.J.S.A. 40:55D-19. Furthermore, the Board need not decide whether the Project spans more than one municipality, giving the Board jurisdiction, because no arguments have been raised that fall outside of NJDEP's preemption.


Accordingly, the Board **HEREBY ORDERS** that this matter be and is **HEREBY DISMISSED** without prejudice. If a future issue arises in an area where the NJDEP does not preempt, any party may file a new petition with the Board, if appropriate.


This Order shall be effective on March 1, 2013

DATED: 2/20/13

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


MARYANNA HOLDEN
COMMISSIONER

ATTEST: 
KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



IN THE MATTER OF THE APPLICATION BY UNITED WATER NEW JERSEY INC.
PURSUANT TO N.J.S.A. UNDER THE BOARD'S ORIGINAL JURISDICTION FOR APPROVAL
OF UNITED WATER'S WOODCLIFF LAKE DAM IMPROVEMENTS PROJECT; AND A
DETERMINATION THAT THESE IMPROVEMENTS ARE REASONABLY NECESSARY FOR
THE SERVICE, CONVENIENCE OR WELFARE OF THE PUBLIC; AND THAT ZONING AND
LAND USE ORDINANCES OF WOODCLIFF LAKE AND HILLSDALE HAVE NO
APPLICATION THERETO. - DOCKET NO. WM12050358

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