SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY

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FRIENDS OF THE GREAT SWAMP (PUTNAM & DUTCHESS COUNTIES), INC, THE OBLONG LAND CONSERVANCY, INC, CONCERNED CITIZENS OF DOVER, INC., CHARLES A. QUIMBY,

Petitioners,

-against-

TOWN OF DOVER, NY, NEW YORK TRANSCO LLC, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondents.

FOR AN ORDER AND JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR

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DECISION AND ORDER
(Motion Seq. # 1)

Index No.: 2023-50796

This is a CPLR Article 78 proceeding to annul a negative declaration issued by the Town of Dover Planning Board ("Planning Board") on February 6, 2023 regarding New York Transco, LLC's ("Transco") proposed electric Phase Angle Regulator substation located at 2238 Route 22, Dover Plains, New York (the "Transco project site"). The following papers were read and considered in determining the petition:

Petitioners' petition and supporting papers identified as NYSCEF document numbers 1-10;

Respondent, Consolidated Edison Company of New York, Inc.'s amended answer identified as NYSCEF document number 79;

Respondent, Town of Dover's, answering/opposition papers and certified return identified as NYSCEF document numbers 46-68, and 80-86;

Respondent, Transco's, answer and opposition papers identified as NYSCEF document numbers 87-90;

Petitioners' reply papers identified as NYSCEF document numbers 94-96.

RELEVANT FACTUAL BACKGROUND

On or about April 6, 2021, counsel for Transco submitted an e-mail to the Planning Board requesting a preliminary meeting for a site plan Transco intended to submit for construction of an electric Phase Angle Regulator substation to be located in the Town of Dover ("the Project"). (NYSCEF Doc. No. 47, pg. 1.) The property on which Transco proposes to construct the Project is located at the corner of Cricket Hill Road and Route 22 ("the Project Site"). At the time of its application, Transco was leasing the property and in contract to purchase it. The Project Site is located adjacent and to the north of the Cricket Hill Preserve, (also locally known as "the Great Swamp"), which is a National Historic Landmark, a New York State-designated Critical Environmental Area, and a Class I wetland.

Transco's formal application was submitted on or about October 1, 2021 after representatives from Transco had engaged in at least one meeting, and various correspondence, with the Planning Board. (NYSCEF Doc. No. 47, pgs. 1-52.)

On October 18, 2021, the Planning Board passed a resolution declaring its intent to act as Lead Agency over the coordinated review of the Project. (NYSCEF Doc. No. 53, pgs. 154-156.)

Between October 4, 2021 and September 18, 2022, Transco appeared at several Planning Board meetings to discuss the Project. Also during that timeframe, Transco submitted numerous documents to the Planning Board, including correspondence from Transco's retained experts to provide responses to questions and comments that had been made both during Planning Board meetings from members of the Board and its own experts (an engineer, a planner and an attorney) and through correspondence from the Planning Board's experts.

In or around early December 2021, Transco engaged with members of the board for the owners the Great Swamp parcel, Friends of the Great Swamp, Inc. ("FROGS"), to explain the Project. In December 2021, FROGS corresponded with the Planning Board to express concerns about potential negative environmental impacts of the Project on the Great Swamp, and, in particular, on the flora, fauna and wildlife species that live and/or are believed to live in the Great Swamp.[1] (NYSCEF Doc. No. 55, pgs. 48-49.) FROGS noted that the Transco parcel had

[1] Some of the species known or believed to live in the Great Swamp are endangered (e.g., the Bog Turtle, the Indiana Bat, the Timber Rattlesnake).

historically been used as an automotive junkyard and that there was still visible debris left on the site, including tires and vehicle parts. It noted that a vernal pool which starts on the Transco site but exists mostly on the FROGS parcel is, "almost devoid of our area's typical vernal pool biota. Wood frogs, the only characteristic vertebrate species that we have found, sing briefly in the spring, but no egg masses or tadpoles have been detected. This lack of reproduction suggests toxic or other inhibitory contamination is present and warrants a serious evaluation." It also noted concerns over proposed blasting associated with the Project, which it asserted could cause fractures in the bedrock and negatively affect surface and groundwaters feeding the Great Swamp.

Numerous emails and letters from members of the public expressing concern about various aspects of the Project—including its environmental impact on the FROGS parcel and in general—were submitted to the Planning Board beginning in or around the same time as the December 2021 letter from FROGS and continued up until the close of public comments after the public hearings in February 2023.

A draft of a Negative Declaration under SEQRA was prepared in February 2022. (NYSCEF Doc. No. 56, pg. 22.)

At the May 23, 2022 Planning Board meeting, members of the Planning Board (and the Board's planner and attorney) brought up the FROGS December 2021 letter and the issues contained therein. The Planning Board's planner acknowledged that Transco had previously indicated to the Board that it had undertaken some due diligence in connection with its leasing of the property, including some limited subsurface work, but noted that Transco had never shared its results of that due diligence with the Board. He asked whether Transco was prepared to share that information with the Board and, "just give a summary of what they did test for if they tested soil, groundwater, whatever they – they did as part of that would be helpful to understand."

Transco's attorney stated that, "No contamination that warranted further investigation was was [sic] identified," and that he would provide more information in writing. Upon being asked by the Planning Board's attorney for the Phase I results, and receiving a "headshake back in return", counsel stated that, "we'll just keep asking for it." (NYSCEF Doc. No. 58, pgs. 100-101.) Transco's attorney then responded that, "Those documents are typically confidential between the – the seller and buyer or whoever is working on it, so it's not unique." This prompted some additional back-and-forth, with the Board's experts evidently pressing Transco's

attorney to reveal its subsurface testing results which emanated from its intended purchase of the property.

At the same Planning Board meeting in May 2022, a discussion transpired between members of the Planning Board and Transco's attorney regarding the discarded tires and other debris on the site. Transco's attorney reported that NYSDEC was allowing Transco to remove "certain" debris in limited, particular manners. When asked by the Planning Board whether that meant that certain debris would not be removed, additional back-and-forth occurred in which Transco explained that NYSDEC would allow it to remove visible debris so long as the soil was not being disturbed (or was being minimally disturbed). In practice, that meant Transco could remove visible debris with a Bobcat machine so long as that debris was outside the delineated wetland area and only incidentally disturbing the soil, while visible debris within the delineated wetland area could only be removed by hand. No excavation to remove debris was permitted. (NYSCEF Doc. No. 58, pgs. 71, 75-77, 84-87.)

NYSDEC correspondence on this topic dated March 2, 2022 confirmed that the soil was only to be incidentally disturbed in debris removal. (NYSCEF Doc. No. 56, pg. 75.)

On or about July 28, 2022, Transco, through one of its retained experts, submitted a letter to the Planning Board in which it asserted, as a response to the Planning Board's Planner's comments in his most recent memo, the following:

> "Applicant Response to Comment 5-1: Reference to a "junkyard" addresses limited areas on the Site where there are discarded materials such as used tires and scrap metal from automobiles and some construction debris. This is discussed in prior submittals to the Board.
>
> As indicated in the Full Environmental Assessment Form (FEAF), there are no reported spills at the Site and no portion of the Site is listed on the NYSDEC Spills Incidents database or Environmental Site Remediation database. The Site has also not been the subject of corrective activities. The planned area of disturbance on the Site is small, relative to the scale of the overall system which feeds water into the Great Swamp. Terracon hydrogeologists and engineers evaluated the conditions of the Site and surrounding area, considering blasting associated with Project construction. Accordingly, it is confirmed that completion of the Dover Station Project is not expected to have an adverse or measurable impact on aquifers or the quantity and quality of water which enters the system for the Great Swamp.
>
> The Project complies with all applicable local, state and federal regulations and standards, as well as industry guidelines and best practices for this type of

> construction. During construction activities, soil erosion and sediment control measures will be implemented in accordance with federal, state, and local regulations to avoid construction-related erosion and sedimentation to ensure no impacts to any regulated wetlands or streams on or off-Site occur as part of the Project.
>
> Nonetheless, Site investigations and testing further confirm that the Dover Station Project will not negatively affect existing subsurface site conditions or result in disturbance of any existing environmental contamination since there is no such contamination warranting further investigation. This is confirmed by environmental scientists in TRC Correspondence included as Attachment B. Subsurface testing is evaluated based on compliance with applicable State guidance and applicable regulatory site assessment standards. Investigations performed at the Site demonstrate that Site testing does not surpass any applicable thresholds, and that the Project will not negatively affect the environmental Site or off-site conditions." (NYSCEF Doc. No. 59, pg. 2.)

Attachment B referenced in the aforesaid July 28, 2022 Transco response contained graphs of the results from the testing Transco had done in relation to its purchase of the property. There were five soil samples taken, and a sample from one monitoring well on the Transco property. The graphs each contain three columns, the first of which identifies all the particular analytes/substances found in each sample, the second of which states what is asserted to be the "Applicable Use Standard" against which each analyte was measured, and the third of which states "exceedance of applicable use standard?" For every analyte on every graph, the third column reads "no." Footnote 2 at the end of Attachment B reads, "Applicable Use Standards are the respective New York State Department of Environmental Conservation (NYSDEC) Part 375 Commercial Use Soil Cleanup Objective/ Industrial Use Soil Cleanup Objective." None of the underlying data (i.e., the numerical concentration) for each analyte found in each sample was provided in the graph. Thus, it did not reveal how close the testing came to exceeding the limits.

The public hearing on the Project was opened on September 19, 2022. It continued at the Planning Board's October 17, 2022 meeting, its November 21, 2022 meeting and its January 23, 2023 meeting. The public was allowed to continue submitting written comments through February 1, 2023 at which the time the public hearings were deemed closed.

From the first public hearing through the last, and in many of the written comments submitted throughout that timeframe, members of the public voiced their concerns about, and

opposition to, the Project.[2] A substantial portion of those opposed to the Project raised as a concern the potential contamination of the Transco property and its danger, as a result of construction, to the Great Swamp (its surface waters, its flora and fauna, the species of wildlife with habitats there).

James Utter, a member of FROGS, in both written submissions and during the public hearings, asserted that Transco's soil and groundwater testing was inadequate and unclear, in that only very few samples were taken, the locations of the samples were not in areas where many of the junkyard vehicles had historically been stored and, though dozens of contaminants (some known carcinogens) were listed as having been detected in the samples, none of the actual data from the testing results was supplied by Transco. Dr. Utter repeatedly requested that the Planning Board require Transco to provide the underlying data from their testing and consider undertaking independent testing of the Transco site before making any determination on whether to issue a positive or negative declaration under SEQRA.

Other members of the community, as well as various non-profit organizations, made similar comments at the public hearings regarding potential contamination on the Transco site as a result of it being a former junkyard, and the effects of same on the Great Swamp if construction of the Project were to continue as proposed. Some requested that Transco provide the actual data from its testing, some requested the Planning Board to undertake its own testing. (NYSCEF doc. No. 61, pgs. 64-85, comments by, e.g., Quimby, Utter, Hersey, Kish; NYSCEF Doc. No. 63, pgs. 58-101, comments by, e.g., Quimby, Schultz, Apuzzo, Pereira, VanBuren, Utter; NYSCEF Doc. No. 64, pgs., 111-125, comments by, e.g., Quimby, Chipkin, Pereira; Marotta; NYSCEF Doc. No. 85, pgs. 63- 87, comments by, e.g., Quimby, Fieldstein, Wade, Shindell, Lazarow, Schwartz, Utter.)

The Housatonic Valley Association submitted a letter to the Planning Board dated January 23, 2023, accompanied by a report authored by Eric Kiviat, PhD with the Hudsonia Institute. The letter and report asserted, among other things, that the testing undertaken and reported by Transco was inadequate to provide a full picture of the contamination on its site, and that, "[t]esting down-gradient of the proposed site commissioned by Friends of the Great Swamp indicates that leaching of contamination into surface runoff and/or groundwater may already be negatively impacting water quality at this location." It further asserted that the Transco testing

[2] Only a small number, approximately two to three people, voiced support for the project.

and reporting did not account for the contamination from a former dump site, across the street from the Transco site.[3] The FROGS parcel is asserted to be "downflow" of the Transco [and former dump] site. (NYSCEF Doc. No. 65, pg. 91.)

Mr. Utter submitted another letter (dated March 1, 2023 but noted in the Town's Certified Return to have been received on February 1, 2023). He asserted that he had repeatedly asked Transco to share the data from its test results with him but was met with silence. He asserts that on the morning of the last public hearing, he was told that, "Transco was not going to provide their data because DEC and the Dover Planning Board had already accepted their conclusion."

Mr. Utter also discussed the surface water and soil samples that he had taken on FROGS' property in December 2022 and the test results thereof. He stated that as of that date, he had still not received the results of the soil test results from the laboratory. As for the water samples, he asserted that they revealed the presence of, "phalates, a group of plasticizers that are known carcinogens." (NYSCEF Doc. No. 67, pg. 88.) FROGS' laboratory test results are in the Town's Certified Return. (NYSCEF Doc. No. 66, pgs. 101-109.)

John Sullivan, an Ecologist who had been performing contract work for FROGS for several years, submitted a letter to the Planning Board dated February 1, 2023. Among other things, Mr. Sullivan asserted that it was critical to obtain the actual data related to Transco's soil and groundwater testing because, among other reasons, if the measured concentration of one or more of the chemicals found in the soil fell just below the Commercial / Industrial SCOs (Soil Cleanup Objectives[4]), those concentrations might still be high enough to pose a threat to down-gradient aquatic ecosystems and public health, especially if the contaminant had a relatively high degree of toxicity.

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[3] The report asserted that the EAF at E.1.h.iii incorrectly stated that Transco site is not within 2000 feet of any site in the DEC Environmental Site Remediation database. It asserted that the former dump site north of Cricket Hill Road (opposite the Transco site) is within 2000 feet thereof and is in the DEC database at https://www.dec.ny.gov/cfmx/extapps/derexternal/haz/details.cfrn?pageid=3.

[4] Soil Cleanup Objectives, or SCOs, are customarily applied in the context of soil remediation work undertaken after, for example, a spill involving a toxic chemical(s). The regulations under 6 NYCRR Part 375 discuss various levels or categories of SCOs and include the SCO tables developed pursuant to ECL 27-1415(6). The practical impact of selecting a particular SCO is that it acts as the standard against which the concentrations of chemicals found in a soil sample are measured. Generally stated, if an SCO with a higher threshold was selected (such as the Commercial/Industrial SCO), then a soil sample with a relatively high concentration of a chemical would still be considered acceptable, while that same soil sample might be deemed unacceptable under an SCO with a lower threshold (such as the Groundwater Protection SCO). As discussed later in this order, the parties agree that selection of the proper SCO should be done in consultation with NYSDEC officials.

Mr. Sullivan also raised an issue not previously raised nor apparently discussed or considered by the Planning Board or its experts up to that point: That the Commercial/Industrial SCO used by Transco as the guideline against which it measured its soil and water samples probably should not be the SCO utilized. He asserted that under 6 NYCRR Part 375, it was premature to even select an SCO given several preliminary steps that had not yet been undertaken by Transco. He asserted that the more stringent standards of either "Protection of Groundwater" or the "Protection of Ecological Resources" SCO should be used under the guidance offered in the regulations.

Mr. Sullivan also noted that the single groundwater sample taken by Transco was apparently only tested for VOCs and not for all of the other chemicals and compounds for which the soil was tested. He asserted that this was inexplicable and "troubling" because, "subsurface flow tends to be an important pathway for contaminant migration."

Mr. Sullivan also discussed the results of the soil and water tests undertaken by FROGS in December 2022. He noted that it was significant that some of the very same chemicals reported by Transco to have been found in its soil samples, including phalates, were the same ones found in the downgradient surface water samples taken by FROGS on its property in December 2022. He asserted that this suggested that the,"groundwater (at least the local or "shallow" flow path) has been contaminated," and that, therefore, contaminants from the Transco site may already be migrating to the FROGS parcel by the local groundwater system and/or the surface runoff from the Transco site. (NYSCEF Doc. No. 67, pgs. 61-69.)

Dr. Gail L. Batchelder, a Hydrogeologist, submitted a letter to the Planning Board dated February 1, 2023. Dr. Batchelder asserted, among other things:

> "a typical investigation of a property of similar size that had been used as a junkyard for many years would include at least 15 to 20 soil borings specifically located where junk yard activities and storage of junk had occurred, as well as locations where evidence of disposal is still visible. The investigation would also include at least 5 to 6 monitoring wells installed in areas where junk yard activities likely to release contaminants to the subsurface had occurred, as well as in areas where vehicles had occurred, as well as in areas downgradient of the majority of junk yard operations and storage. Such areas of junk yard storage are readily visible on aerial photographs.
>
> To summarize, based on a review of the documents publicly available and my understanding of the environmental aspects of the site, I do not believe that sufficient information is available to evaluate the quality of soil and groundwater

> at the site and to determine whether redevelopment of the property, including blasting of bedrock, will not affect migration of potential contaminants. I respectfully concur with the statement by HVA that the Planning Board does not currently have adequate information to render a decision on the New York Transco application." (NYSCEF Doc. No. 67, pg. 1.)

Additional, extensive written comments in opposition to the Transco Project were submitted to the Planning Board from members of the public and other non-profit groups after the last public hearing in January 2023.

Transco responded in writing to many of the aforesaid comments submitted by the public, though its response made no mention of Mr. Sullivan's or Dr. Batchelders' comments. (NYSCEF Doc. No. 67, pg. 120.) With respect to the contamination issues, it largely repeated the content of its experts' previous reports. As to the FROGS testing on its own parcel, Transco asserted that there was insufficient demonstration of the method of testing and propriety of laboratory techniques, including proper "chain of custody".

On February 6, 2023, after the public comment period had closed, US Fish and Wildlife Service sent an email to the Planning Board which read:

> "It has been brought to the U.S. Fish and Wildlife Service's attention that there may potentially be concerns for contaminants present on the Transco Dover Station property on Cricket Hill Rd., that if disturbed, may impact a significant ecologically sensitive wetland directly adjacent to the property. We understand that the contaminants are likely present from tires and other debris currently located on the Transco property. The data we received will be reviewed by our contaminants biologists, but we will need some time to respond to the project sponsor and their consultants on whether a change in our position on the project is warranted. As such, we recommend that the Town Planning Board delay any project approvals until the contaminants issue is discussed by the regulatory agencies and there is a recommended path forward. We also understand that the New York State Department of Environmental Conservation may be reaching out to you about this new information as well." (NYSCEF Doc. No. 67, pg. 125.)

On February 6, 2023, the Planning Board held a meeting at which it passed a resolution adopting a negative declaration for the Transco Project. (NYSCEF Doc. No. 86.) Prior to adopting the resolution, the Board continued its discussion of some of the issues raised during the public hearings. It also discussed, rather extensively, the US Fish and Wildlife ("USFW") email that had been received. The Planning Board's attorney specifically stated that since the

email had been submitted, it should be identified as having been considered in the negative declaration:

> "If the Board intends to move forward tonight, we need to address the letter received from Fish and Wildlife in the documents and add a sentence at least explaining that why, you know, why you want to move forward despite the issue – potential issue raised in that letter." (NYSCEF Doc. No. 86, pg. 15.)

In response to the Planning Board Chairman's comment that the USFW email was submitted after the public comment period was closed and that no Federal permit was required by Transco, the Planning Board attorney further stated:

> "Well, I mean it raised a question and so I think the Board has to address it." (NYSCEF Doc. No. 86, pg. 15.)

No such statement was made with regard to Mr. Sullivan's or Dr. Batchelder's letters, nor were those letters acknowledged or addressed by the Board or identified as having been considered before issuing the negative declaration.

This proceeding was commenced on March 8, 2023 by the filing of a notice of petition, petition and supporting papers.[5]

Upon motion, a TRO was issued on March 17, 2023. After a hearing, the TRO was modified by order dated March 20, 2023. An order granting a preliminary injunction was issued on April 13, 2023.

All respondents have answered the petition, and the respondent, Town of Dover ("the Town"), has filed its certified return. Respondents Transco and the Town have also submitted memoranda of law and related opposition papers to the petition.

THE PARTIES' ARGUMENTS

In their petition, the petitioners assert that the issuance of the negative declaration was arbitrary and capricious because the Planning Board failed to take a "hard look" at the site conditions on the Transco Property. Among other things, they argue that the Planning Board ignored the submissions made by John Sullivan and Dr. Batchelder with respect to contamination at the site (the inadequate soil and water testing, the use of the incorrect SCO, etc.) and relied

[5] Petitioners' standing in this proceeding has already been determined in this Court's April 13, 2023 decision and order.

solely on the studies submitted by Transco's experts, failing to consider the others. They assert that the Planning Board arbitrarily and capriciously selected "little to no impact" on the long form EAF, "in many areas where the evidence before it supported the contrary conclusion." They assert that the Planning Board failed to adequately consider the negative aesthetic impact the Transco Project will have on the town and its residents, and that the Board should not have approved the project because the town of Dover is in a "draft Disadvantaged Community [DAC] as designated by the New York Department of Environmental Conservation [DEC] and a Potential Environmental Justice Area [PEJA]" and the CLCPA (Climate Leadership and Community Protection Act) disallows approval of projects which disproportionately burden disadvantaged communities.

Petitioners assert that a positive declaration should have been issued and that Transco should have been required to proceed with a full Environmental Impact Statement (EIS).

In issuing its decision and order granting a preliminary injunction, this Court held that, "the petitioners have demonstrated a likelihood of success on the merits that the Planning Board failed to take a 'hard look' at relevant areas of environmental concern before issuing the negative declaration including, but not necessarily limited to, effects of the proposed project on surface and groundwater." In making that determination, this Court noted, among other things, that there was no indication that the Planning Board had considered Mr. Sullivan's and Dr. Batchelder's letters, nor taken a hard look at the matters raised therein.

In opposition, the Town asserts, among other things, that the Planning Board did take a hard look at the issues of potential contamination of the soil and surface/groundwaters on the Transco Property. With respect to Mr. Sullivan's and Dr. Batchelder's February 1, 2023 letters, the Planning Board Chairman, Ryan Courtien, is a bit circumspect. He does not affirmatively state that he (or other board members) reviewed and considered those letters prior to issuing the negative declaration. Rather, he states that, "the Planning Board reviewed and considered all input received from interested stakeholders, including all written submissions made during the public hearing and extended written public comment period," and that, while those two letters were not enumerated in the list of items considered in the negative declaration, the Board

considered, "the substantive issues raised in those February 1, 2023 submissions." He asserts that the Board could not list all the letters it receives from the public as they are too numerous.[6]

Mr. Courtien further states that Mr. Sullivan and Dr. Batchelder took issue with, "the conclusion and the sufficiency of TRC's [Transco's expert] testing methodologies," and that with respect to those issues,

> "Ultimately, the Planning Board relied on the Town Planner and Town Engineer to evaluate the technical sufficiency of the information and found the TRC studies to be on-point and methodologically credible, and the Batchelder and Sullivan criticisms of those studies unfounded."

The Town also argues that Mr. Sullivan's and Dr. Batchelder's letters, "offered no new information." (NYSCEF Doc. No. 81, pg. 11.)

However, the Town offers no argument as to why the SCOs that Mr. Sullivan asserted in his letter should have been used in determining the presence and/or level of contamination on the Transco Site (Protection of Groundwater SCO and/or Protection of Ecological Resources SCO) were inapplicable, nor does the Town identify anything in the Certified Return which demonstrates that the Planning Board or its experts considered and rejected the use of those SCOs or offered any advice to the Board as to why those SCOs did not apply to the circumstances present here.

In its opposition papers, Transco, like the Town, recites the history of the Planning Board review relative to its project and asserts that the Planning Board took the requisite "hard look" at each of the issues before it.

With respect to the contamination issues on the site, Transco cites its experts' reports and offers several pages of argument discussing the import and impact of its testing results and explaining, in its view, how this evidences that its site is not contaminated

With respect to the SCO used by its experts in analyzing its testing data, Transco asserts that, "Commercial/Industrial SCO selected for the Project Site was the correct classification given the proposed use as an electric utility substation," and that, "while [Sullivan] argues that a

[6] Mr. Courtien also asserted that, generally, only agency review documents and applicant submissions are listed in the negative declaration as documents that were reviewed, not public comment letters. However, the negative declaration here did list some public comment letters—the FROGS December 19, 2021 letter and the Hudsonia report dated January 18, 2023.

different SCO should have been applied (R. 2510, 2513), there is no basis to do so." Transco offers no rationale or argument why this is so.

Notably, both the Town and Transco admit that part of the process in determining the proper SCO is to, "consult with regulatory officials at NYSDEC to ensure that the correct SCO is selected." (Werner Affidavit, NYSCEF Doc. No. 83, ¶19; Transco Memo. of Law, NYSCEF Doc. No. 90, pg. 13.) Neither the Town nor Transco identify where in the Certified Return there is evidence that such consultation with NYSDEC to determine the correct SCO occurred, and the Court was unable to locate any.

In reply, the petitioners assert, among other things, that the Planning Board's determination largely ignored the issue of contamination at the Transco Site and its potential effects on the Great Swamp (as evidenced by, among other things, FROGS testing results on its own property). They assert that the Board failed to take a hard look at the contamination by ignoring repeated pleas and recommendations (from experts such as Sullivan, Batchelder and Hudsonia) to require further, independent testing of the site and by simply adopting/repeating Transco's experts' representations and conclusions without the Board's own experts conducting any analysis of Tansco's experts' methodology, standards used or major conclusions.

Mr. Sullivan gives an affidavit in which he explains, in great detail, why the SCO used by Transco was not the appropriate one and why, under 6 NYCRR Part 375, one of the other two SCOs he identified in his February 1, 2023 letter should have been utilized. He further explains why the SCO used by Transco and adopted by the Planning Board was arbitrary and capricious and notes that even Transco's witness admitted in his submission to this Court that the applicable SCO was highly relevant for the Planning Board to consider in making its determination as to there being no contamination at the site. In short, the Industrial/Commercial SCO selected by Transco allows for a higher concentration of any particular chemical/contaminant to be present and not be considered to pose a danger, while both the Protection of Groundwater and Protection of Ecological Resources SCOs have lower threshold values.

Counsel for the petitioners also presents, in his reply, copies of email exchanges between USFW, Transco's expert and NYSDEC that he obtained via a FOIA after the adoption of the negative declaration. After February 6, 2023, USFW continued to follow up regarding the sufficiency/validity of Transco's soil testing and, based on Transco's expert's response, believed there to be "red flags" over the testing possibly not complying with NYSDEC regulations and/or

the results being barely below even the Industrial/Commercial SCO. (NYSCEF Doc. No. 96, pgs. 124-129.) Counsel avers that such inquiries are what constitute a "hard look", and that the Planning Board undertook no such similar effort.

Petitioners argue that it was the *potential* for significant environmental impact which required a positive declaration and that issuance of the negative declaration was arbitrary and capricious. They note that the Town's counsel's argument that the petitioners and members of the public did not provide "hard evidence" of contamination to the Board misses the point: That it was the Planning Board's job to take a "hard look" and that it had ample information in front of it to do so, but failed in its responsibility.

STANDARD OF COURT REVIEW AND TAKING A "HARD LOOK" UNDER SEQRA

The Court's limited role in reviewing SEQRA determinations is well-settled:

> "'[I]n reviewing ... SEQRA determinations ... we are limited to considering 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " *(Chinese Staff & Workers Assn. v City of New York,* 68 NY2d 359, 363 [quoting CPLR 7803 (3)]). Thus, we may not question the 'desirability of any action or choose among alternatives, but [we must] assure that the agency itself has satisfied SEQRA, procedurally and substantively' *(Matter of Jackson v New York Urban Dev. Corp.,* 67 NY2d 400, 416). The relevant question before us, then, is whether the respondents 'identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination' *(Chinese Staff & Workers Assn. v City of New York, supra,* at 363-364)." *Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 396 [1995]

In reviewing an agency's SEQRA determination, the court in *Munash v. Town Board of Town of East Hampton*, 297 A.D.2d 345 [2d Dep't 2002] discussed that,

> "'The basic purpose of SEQR[A] is to incorporate the consideration of environmental factors into the existing planning, review and decision making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR[A] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact

> statement' (6 NYCRR 617.1[c])…. *Since SEQRA mandates the preparation of an EIS when the proposed action may include the potential for at least one significant environmental effect, 'there is a relatively low threshold for the preparation of an EIS'* (*Matter of UPROSE v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 608, 729 N.Y.S.2d 42; *see Matter of Silvercup Studios v. Power Auth. of State of N.Y.*, 285 A.D.2d 598, 729 N.Y.S.2d 47; *Matter of Omni Partners v. County of Nassau,* 237 A.D.2d 440, 442, 654 N.Y.S.2d 824). [Emphasis added.]
>
> ***347** Pursuant to SEQRA, [the reviewing agency] may issue a negative declaration, obviating the need for an EIS, only after it has identified the relevant areas of environmental concern, taken a 'hard look' at them, and made a 'reasoned elaboration of the basis for its determination' (*Matter of Jackson v. New York State Urban Dev. Corp., supra* at 417, 503 N.Y.S.2d 298, 494 N.E.2d 429; *see Chinese Staff & Workers Assn. v. City of New York,* 68 N.Y.2d 359, 363–364, 509 N.Y.S.2d 499, 502 N.E.2d 176; *Matter of Vil. of Tarrytown v. Planning Bd. of Vil. of Sleepy Hollow,* 292 A.D.2d 617, 741 N.Y.S.2d 44, *lv. denied* 98 N.Y.2d 609, 746 N.Y.S.2d 693, 774 N.E.2d 758; *Matter of Hubbard v. Town of Sand Lake,* 211 A.D.2d 1005, 1006, 622 N.Y.S.2d 126)."

In vacating the negative declaration issued by the trial court in *Munash*, the Appellate Division noted that the board had issued the declaration without first receiving independent testing from privately-retained consultants who had indicated the need for downgradient water testing because of the potential significant impact on the ecosystem of the neighboring Pine Barrens area:

> "In early January 2001, the Town Board received a report from privately-retained consultants indicating that the proposed development may have a significant impact on the ecosystem of the Pine Barrens area, which encompasses rare, endangered, and threatened animal and plant species. The Town Board also received a report from a hydrogeologist, who expressed concern that the project might have a harmful impact on the quality of groundwater in wells downgradient of the site, and stressed the need for on-site study. Although the hydrogeologist retained on behalf of the Town Board stated in her January 18, 2001, report that it was unlikely that there would be a significant impact on downgradient water quality, she did not perform an on-site study, and indicated that she would further evaluate this issue upon receipt of additional groundwater quality information from the Suffolk County Department of Health Services. However, the Town Board issued its negative declaration on the same day it received its hydrogeologist's report and the final EAF, without waiting for its hydrogeologist to complete her evaluation.
>
> Under these circumstances, it cannot be said that the Town Board took the required hard look at the relevant areas of environmental concern before issuing

> its negative declaration (*see Matter of Kahn v. Pasnik*, 90 N.Y.2d 569, 664 N.Y.S.2d 584, 687 N.E.2d 402; *Matter of New York Archaeological Council v. Town Bd. of Town of Coxsackie*, 177 A.D.2d 923, 576 N.Y.S.2d 680)."

Further, the "hard look" doctrine is not satisfied by simply imposing mitigating conditions in connection with the issuance of a negative declaration. In fact, including numerous mitigating techniques may be an inherent acknowledgement that the project may cause significant environmental impacts. In *West Branch Conservation Association, Inv. V. Planning Board of the Town of Clarkstown*, 207 A.D.2d 837 [2d Dep't 1994] the Court discussed this issue:

> "The report essentially discussed various methods by which the environmental impacts of the project could be mitigated. We note that the report contained the types of discussions of mitigation techniques that one would find in an EIS. However, the report could not legitimately serve as a substitute for an EIS and the attendant analysis and public discussion entailed in a proper SEQRA review.
>
> ...
>
> In issuing its negative declaration the Planning Board listed some 13 reasons supporting its determination. As to potential impacts on the ecology, it noted that 'the development will generally be kept out of the forest and off the slopes, and every effort will be made to retain as much of the natural features as is possible'. In discussing mitigation techniques ***841** and manners in which to protect the environment, the Planning Board inherently acknowledged that the project may cause significant environmental impacts. Furthermore, significantly missing from the Planning Board's determination was any discussion of the impact of removing some 21 acres of vegetation from the site, despite the fact that the removal or destruction of large quantities of vegetation or fauna is an indicator of a significant effect on the environment (*see*, 6 NYCRR 617.11).
>
> The Planning Board further acknowledged that a variety of wildlife lived and foraged in the subject area. It suggested that although the subdivision would cause interference with wildlife habitats, the wildlife would be able to seek refuge elsewhere and could 'make cautious use of open-space mixed in with the residential areas'. Inherent in the Planning Board's determination was a finding that the subdivision might cause 'substantial interference with the movement of any resident or migratory fish or wildlife species'—another indicator of a significant effect on the environment (6 NYCRR 617.11[a] [2]).
>
> Additionally, the Planning Board found that surface runoff would be 'controlled and drained positively to prevent erosion, thereby protecting the pond water quality from the potential impacts associated with subdivision runoff', and

> '[e]rosion will be prevented by minimizing cut and fill and road or access drive grades'. Again, inherent in the Planning Board's discussion of these issues was an underlying acknowledgement that there existed a potential for a substantial increase in potential for erosion—yet another indicator of a significant effect on the environment (*see,* 6 NYCRR 617.11 [a] [1])."

Additionally, and as relevant here, "'a lead agency without environmental expertise to evaluate a project may rely on outside sources and the advice of others in performing its function' (*Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 350 [4th Dept 1999]), so long as the lead agency 'exercise[s] its own judgment in determining whether a particular circumstance adversely impacts the environment' (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 234)." *Boise et al. v. City of Plattsburgh, et al.*, 2023 WL 5279461 [3d Dep't 2023].

DISCUSSION

Sub-Surface Contamination

Initially, the Court recognizes that the Transco Project was under review for approximately fifteen months[7] and that the applicant made many appearances before the Planning Board during that time. The Court also recognizes the apparent import of the Transco Project on New York State's climate and energy goals. However, the length of time one spends before the Planning Board does not necessarily mean a "hard look" was taken at the relevant areas of environmental concern, and the importance of the project does not obviate the statutory and regulatory requirement that the Planning Board take a hard look and make a reasoned elaboration of the basis for its determination.

As applied here, the fundamental question is whether the Planning Board took a hard look at the issue of sub-surface contamination at the Transco Site and of its potential impacts to the local groundwater *and* to the surface and groundwater of the Great Swamp as well as its ecological resources.

[7] Not including the informal period of discussion which began several months earlier than submission of the formal application.

Based on the totality of the record before it, the Court concludes that the Planning Board did not take the requisite hard look at these issues.

The FROGS parcel is, indisputably, a Critical Environmental Area (Negative Declaration, pg. 4; NYSCEF Doc. No.68, pg. 5). If the Transco site contains harmful contaminants which exceed whatever guidelines are appropriate to apply, that circumstance would certainly impact, and could alter, the responses to several of the sections on the Environmental Assessment Form (EAF) completed by the Planning Board (e.g., section 3, "Impact on Surface Water", section 4, "Impact on Groundwater", section 7, "Impact on Plants and Animals", section 12, "Impact on Critical Environmental Area", section 16, "Impact on Human Health"). A finding by the Board that, "the action *may* include the *potential* for *at least one* significant adverse environmental impact" would result in the requirements for a full Environmental Impact Statement (EIS) to be undertaken. (6 NYCRR §617.7(a)(1); Emphasis added.)

What is striking when reviewing the totality of the record before the Planning Board is that when the public hearing was opened in September 2022 (almost a full year after the applicant had been making its own presentations to the board), one of the most oft-repeated concerns raised by members of the public, the owners of the FROGS property and concerned non-profit organizations and experts (e.g., Hudsonia, Mr. Sullivan, Dr. Batchelder) was the potential contamination of the applicant's property given its historical use as an automotive junkyard and the need to evaluate and confirm the levels of contaminants at the site because the construction proposed on the Transco site will necessarily disturb the soils, and the surface waters from the Transco site runoff onto sections of the FROGS property.

Yet, the Planning Board never discussed or addressed this issue in any meaningful manner, and there is no indication in the Certified Return that the Board's planning firm analyzed any of the information or data provided to it by Transco with respect to soil and/or groundwater testing to determine whether it was of concern. Rather, it appears the Planning Board simply accepted Transco's representations as to both the standards to be used and unspecified testing data it gathered. This Court cannot find that under the circumstances presented, this constituted taking a "hard look" at the issue of contamination on the site and its potential effect on the FROGS parcel.

The Planning Board's failure to take a "hard look" at the potential contamination issues raised by the public, including in Mr. Sullivan's and Dr. Batchelder's letters, is rendered plain when one considers the issues at which the Planning Board *did* take a "hard look". Throughout the public hearing process, and even prior thereto, the Planning Board repeatedly and quite thoroughly questioned the applicant, and examined its reports, with respect to a number of issues, including: noise levels that the site would produce (not only during construction, but also once it was completed)[8]; the environmental justice implications of the project; and the possibility of constructing much of the proposed infrastructure underground rather than aboveground (i.e., to have "buried" lines) to address the aesthetic impacts of the project. Indeed, Planning Board members pressed the applicant on each of these topics during public hearings, and even repeatedly asked the Board's own experts (its attorney, its planner, its engineer) to weigh in on each of these topics during the proceedings. The Board even went so far as to try and retain an outside expert to examine the feasibility of having Transco use buried lines in its project.[9]

Inexplicably, however, no such "hard look" was taken by the Board on the question of potential soil and groundwater contamination on the Transco site. For example, neither the Planning Board nor its planning firm insisted on seeing the soil and groundwater testing data gathered by Transco, despite repeated requests from the public to do so and a sound rationale for doing so having been offered by, among others, Mr. Sullivan.

Further, there is no evidence in the record that either the Planning Board or its planning firm pressed Transco on whether the SCO it selected was proper nor whether Transco had consulted with NYSDEC on which SCO to use, despite specific request by John Sullivan to do so and explicit reasoning as to why. Indeed, in the present submissions to the Court, all parties agree that selection of the proper SCO is critical because, without it, there is no way to properly analyze and determine whether existent contaminants are within acceptable levels under the applicable circumstances. All parties also agree that selection of the proper SCO requires proper application of the provisions of 6 NYCRR Part 375 *and* consultation with NYSDEC. Yet there is no indication in the voluminous materials which comprise the Certified Return that Transco,

[8] Interestingly, Transco provided the underlying data from each of its noise tests (decibel levels, etc.), but would not provide the raw data from its soil and groundwater testing.
[9] Though specific details are scarce in the Return, the Board and the proposed expert apparently could not reach an agreement for performing that review work and the expert was not retained.

the Planning Board or the Planning Board's consultants ever consulted with NYSDEC on which SCO would be the proper one to apply to the circumstances here, nor that the Planning Board or its consultants ever made an independent determination under the applicable guidelines as to the proper SCO to use.

Additionally, neither the Planning Board nor its planning firm apparently pressed Transco on its methodology in gathering soil and groundwater samples. This is particularly notable because at the May 23, 2022 Planning Board meeting, the Board's planner specifically stated that his firm would look into these very things. (NYSCEF Doc. No. 58, pg. 100.) However, in each of the memos he generated after that date, there is no indication that he or his firm actually did review and/or analyze any of those matters (the testing data, the selection of the SCO, the testing methodology, etc.). Instead, each memo from the planning firm repeats, almost verbatim, the language from Transco's experts' reports, particularly TRC's July 28, 2022 report regarding its soil and groundwater testing. (E.g., NYSCEF Doc. No. 58, pg. 127; Doc. No. 59, pgs. 1-6; and Doc. No. 60, pgs. 109-115.)

Simply parroting the applicant's own expert's reports, without more, does not amount to taking the requisite "hard look" required under SEQRA.

Additional evidence that no "hard look" was taken into the issue of soil and groundwater contamination is found in the Planning Board's adoption of Transco's representation as to NYSDEC's findings.

In reviewing the documents contained in the Certified Return, it is evident that NYSDEC had not been asked to comment about contamination on the Transco Site nor about the soil and water testing Transco had done. NYSDEC had been asked to provide input on two things: Transco's request to remove certain debris from the site, and its proposed Stormwater Pollution Prevention Plan ("SWPPP").

With respect to debris removal, NYSDEC allowed Transco to remove debris in certain areas so long as it only "inconsequential[ly]" disturbed the soil in that process and if any more extensive work was to be done, additional input and/or permitting from NYSDEC would be required. (NYSCEF Doc. No. 56, pg. 75.)

With respect to the SWPPP, review of the multiple communications between Transco and NYSDEC makes clear that NYSDEC's ultimate comments/conclusions had nothing to do with

contaminants in the soil or groundwater on Transco's site, but only with the PH of the surface waters that flow onto the FROGS property and the effect of same on the bog turtle population. In particular, NYSDEC's final comments/conclusions were that,

> "based on the incorporation and implementation of measures to avoid and/or minimize any direct impacts to individual bog turtles and the steps you are taking to avoid potential changes to the chemistry, quality, and quantity of surface and groundwater entering the adjacent wetland, we can reasonably conclude that the project is not expected to result in a take of bog turtles," (NYSCEF Doc. No. 59, pg. 31)

This conclusion was reached after NYSDEC expressed concern over Transco's proposed use of the rock it intended to blast as part of its project and Transco's response to those concerns. In particular, Transco had initially proposed to re-use rock on its property that it intended to blast during its project as crushed rock in its SWPPP. NYSDEC expressed concern that doing so could negatively affect the PH of the water and potentially harm the bog turtle population/habitat. Transco modified its SWPPP to bring in other types of rock (basalt, diorite) for use in the SWPPP so as not to negatively affect the water quality flowing onto the FROGS parcel—i.e., the PH of the water. (NYSCEF Doc. No. 59, pgs. 118-123, 136-140.) Based on those modifications, NYSDEC concluded that Transco's plan would avoid changes to the quality/chemistry of the water and that no "take permit" was required.

In short, while NYSDEC certainly expressed approval of Transco's Project as it impacted the wetland insofar as the PH of the water runoff was concerned, its comments did not express any opinion on the existing contamination of the Transco site. In fact, NYSDEC's comments were all provided *prior to* Transco disclosing to the Planning Board the results of its soil and water testing, and there is no indication that Transco ever revealed those findings to NYSDEC.

Nonetheless, at the August 15, 2022 Planning Board meeting, Transco's attorney stated to the Planning Board,

> "Some key updates are we received a DEC determination as to confirming both there's no impacts to surface water, groundwater or wetlands now. Those are also from the prior decisions we've got from them or I should say findings. And no adverse impacts on any regulated species and no take permit is required." (NYSCEF Doc. No. 60, pg. 123.) [Emphasis added.]

Transco's attorney's statement that DEC determined that the Project will have, "no impacts to surface water, groundwater or wetlands now," was at best, a gross oversimplification of NYSDEC's determinations and at worst, a misrepresentation. Transco's experts' letters to the Planning Board which referenced and incorporated NYSDEC's comments did little to clarify this oversimplification. Whatever its intent, the attorney's comment and/or Transco's experts' letters to the Board which preceded it were followed by the Planning Board's planner misconstruing NYSDEC's findings which apparently only served to compound the Planning Board's failure to take a hard look at the underlying information coming from NYSDEC.

Evidence that the Board's planner confused NYSDEC's limited input as to water quality/chemistry with a wholesale approval of the Transco Project or a finding of there being no contamination on the Transco site is found in his comments at two Planning Board meetings and his memo to the Planning Board dated August 12, 2022.

At the August 15, 2022 Planning Board meeting, in response to Transco's attorney's presentation described above, the Board's planner stated:

> "Yeah. We looked at that too and, you know, it's pretty standard. The -- the referenced standards that they have and the chemicals that they looked at. And, you know, we didn't see any issues with the conclusions here. We also have the DEC in writing saying that what they're proposing to do for the wetlands and their site plan in general it's going to avoid impacts to the swamp next door. So for that reason, I don't really think there's an issue with contamination to worry about with this project." [Emphasis added.] (NYSCEF Doc. No. 60, pgs. 133-135)

During the January 23, 2023 Planning Board meeting, when advising Planning Board members on how they could find there to be "no" or a "small" impact with respect to the impact of the project on wetlands—and specifically in the context of answering one Board member's question with respect to how they could find "no" or "small" impact with respect to section 3 of the EAF (Impacts on Surface Water), the planner similarly stated:

> "MR. WERNER: And had they -- had we reached this point and they've done nothing to address the wetlands, they've done no consultation with DEC, they've done -- you know, they didn't delineate it, you know, we could put moderate to large, you need to study this more. But they have to an extent -- a large extent -- studied this. And we've determined that it's a small impact *based on the fact that DEC is comfortable with what they're doing to their wetlands*." (NYSCEF Doc. No. 85, pgs. 17-19.)

And, in his memo to the Planning Board dated August 12, 2022 (page 4 thereof, NYSCEF Doc. No. 60, pg. 112), the Board's planner offered his conclusion that the site is not contaminated based on the materials submitted by Transco and by NYSDEC's comments as to water quality and chemistry.

Notably, the Planning Board Chairman, in his Affidavit to this Court, stated that, "ultimately, the Planning Board relied on the Town Planner and Town Engineer to evaluate the technical sufficiency of the information…" (NYSCEF Doc. No. 82, ¶18.)

In practical effect, this series of events depicts that the Planning Board relied on input from its planner, who relied on Transco's representation/characterization of another agency's (DEC's) findings, without the Board actually exercising its own judgment in determining whether a particular circumstance adversely impacts the environment. (See *Boise et al. v. City of Plattsburgh, et al., supra.*)

Had the Board (or its planner) taken a hard look at NYSDEC's comments as to water chemistry and quality, it would have recognized that they were not related to soil and groundwater contamination nor the proper SCO for contaminant testing. They were related to the issue of the PH of the surface waters running onto the FROGS parcel and the potential effect of same on bog turtles if blasted rock was re-used at the Site. There appears to be no discernment of that point by the Planning Board or its planning firm, which certainly raises the question of whether either of them ever reviewed the communications between Transco's experts and NYSDEC or simply relied on Transco's characterization of them and/or the Board planner's mischaracterization of them.

Therefore, the Planning Board's reliance on NYSDEC's findings as a basis for its own conclusion that the Transco site was not contaminated was irrational. The Planning Board apparently failed to take a hard look and scrutinize the information provided to it from Transco and simply adopted Transco's conclusions and representations. That included adopting Transco's representations about NYSDEC's input on the project, which was limited in scope and did not involve input on whether the Transco site contained contaminants beyond acceptable levels nor what the proper SCO should be.

The Planning Board also, without explanation, seems to have ignored the water testing that FROGS undertook on its own parcel. In letters from Mr. Utter and Mr. Sullivan as well as

in the Hudsonia report, FROGS reported that it had taken samples of surface water from vernal pools located on its property, located downgradient of the Transco property, and taken them to a lab for evaluation. Mr. Utter and Mr. Sullivan noted the presence of phalates in the samples taken, and Mr. Sullivan noted that several of the chemicals found in the samples are the same ones found in the Transco soil testing, raising the question of whether chemicals from Transco's property are already migrating, through surface and/or groundwaters, onto the FROGS parcel.

One would expect that this information would have at least merited a discussion by the Planning Board into whether more investigation was warranted to determine if contamination on the Transco site was, potentially, impacting the FROGS parcel. As discussed above, the standard under SEQRA is whether the proposed action *may* include *the potential* for at least one significant environmental effect, not whether there is a definitive impact. It is a relatively low threshold, not a high bar of proof. (See, e.g., *Munash v. Town Board of Town of East Hampton* , *supra*.)

Dismissing, out of hand, the test results from FROGS as not good enough to prove an impact does not amount to taking a hard look. If the Planning Board or Transco believed that the test samples taken by FROGS did not follow proper protocols, a simple fix would have been for the Board to request its own experts to commission a test, with FROGS' permission.

To the extent that the Planning Board found that there would be no little to no impact on groundwater as a result of the blasting proposed as part of Transco's construction due to the depth of the blasting as compared to the estimated depth of the groundwater, that finding, alone, was not enough to support the negative declaration. Separate from the issue of potential contamination to groundwater serving residents in the immediate vicinity is the potential impact of the existent contamination on Transco's site to the surface waters which flow from it onto the FROGS parcel—an issue that had repeatedly been raised and ignored by the Planning Board for all the reasons discussed above.

Additionally, there appears to have been no discussion or analysis by the Planning Board of a point pertaining to groundwater raised in Mr. Sullivan's letter: The one groundwater sample taken by Transco on its site was apparently not tested for the same chemicals tested in its soil samples. It was only tested for VOCs. This raises the additional question of whether a hard look was ever taken at the groundwater test results offered by Transco in the first instance, which

informed the Board's conclusion in the negative declaration that the, "Site is not contaminated currently." (NYSCEF Doc. No. 3, 3rd page of Neg. Dec.)

To the extent that the Planning Board relied on numerous mitigation efforts to be undertaken by Transco as a basis for issuing the negative declaration (silt fencing, etc.), such conditions do not salvage an otherwise irrationally-issued negative declaration. To the contrary, they act as a tacit acknowledgement of the potential for significant environmental impact such that a negative declaration was inappropriate. (See, e.g., *West Branch Conservation Association, Inv. V. Planning Board of the Town of Clarkstown*, 207 A.D.2d 837 [2d Dep't 1994].)

The parties' respective submissions on the underlying petition highlight a salient point: The detailed discussion that is now playing out before the Court through the affidavits of Heather Vaillant, Aaron Werner, John Sullivan and others is one that should have been initiated, welcomed and investigated by the Planning Board and evidently was not. What is the proper SCO guideline to use, in conjunction with NYSDEC's input, is an issue at which the Planning Board should have taken a hard look. Whether there were enough testing locations, and proper testing locations, for both soil and groundwater on the Transco site are matters at which the Planning Board should have taken a hard look. Whether or not to undertake independent testing of soil and groundwater on the Transco site is a matter at which the Planning Board should have taken a hard look. Whether the testing done by FROGS on its own property was valid and whether it implicates the need for a full EIS is a matter at which the Planning Board should have taken a hard look.

Instead, however, each time, when faced with requests and rationales for the Board to take a closer look at the underlying data collected by Transco, the methodologies it employed in its testing, the proper SCO to utilize and the contamination existent in surface waters on the FROGS parcel, the Planning Board ignored it or refused to look into it.

Having failed to take a hard look at the contamination on the Transco Site, the proper SCO to utilize in evaluating that contamination, and the potential that contamination from the Transco site was already migrating onto the FROGS parcel, it was arbitrary and capricious for the Board to determine that there would be "no" or "little" with respect to areas of concern on the EAF, including but not limited to sections 3, 4, 7, 12 and 16, and to issue a negative declaration to Transco.

Climate Leadership and Community Protection Act (CLCPA)

There is sufficient evidence in the Certified Return that the Planning Board took a hard look at whether the Transco Project would violate the CLCPA. Among other things, the Board's planner provided a memo to the Board explaining his firm's review of the data and conclusions offered by the applicant on the issue and had concurred with its conclusions (NYSCEF Doc. No. 64, pgs. 55-58) the Board's attorney researched the issue and advised the Board of the inapplicability of the Act to the Board and the Board discussed it at meetings (NYSCEF Doc. No. 55, pgs. 55-56; NYSCEF Doc. No. 60, pgs. 125-132). Petitioners do not offer any additional argument on this point in their reply.

There is no evidence that the Planning Board failed to take a hard look at this issue.

Habitat Issues

Petitioners assert that the Planning Board failed to take a hard look at the issue of whether the Transco Project may affect rare, threatened and endangered species and significant ecological communities. They rely on *Kittredge et al. v. Planning Board of the Town of Liberty et al.*, 57 A.D.3d 1336 [2d Dep't 2009] and the Hudsonia report's assertion that the Transco site has potential to support additional species and natural communities of conservation concern.

Respondents assert that a hard look was taken at these issues, including consideration of input from NYSDEC and USFWS with respect to, among other things, bog turtles and timber rattlesnakes.

Other than with respect to the sub-surface contamination issue discussed at length above, the Certified Return contains sufficient evidence that the Planning Board took a hard look at habitat issues. Among other things, NYSDEC approved of Transco's plan to protect bog turtle habitats and to respond to any encounters with bog turtles and timber rattlesnakes.

Kittredge, supra., is inapposite. In that case, the responding agencies had merely indicated that they had no information about the existence of threatened or endangered species on the property at issue. Here, there was extensive communication about the species known or expected on the Transco Site and the neighboring FROGS parcel, and the Transco Project was reviewed with those species (and others) in mind.

With the exception of sub-surface contamination on the Transco Site and any related potential to impact the habitats of threatened or endangered species, the Planning Board did otherwise take a hard look at habitat issues.

Based on the foregoing, it is hereby

ORDERED that the petition is granted to the extent that the negative declaration issued by the Town of Dover Planning Board on February 6, 2023 which is the subject of this proceeding is vacated and nullified and the matter is remanded to the Town of Dover Planning Board for it to take a "hard look" at the areas of environmental concern as more particularly discussed herein and, after so doing, reconsidering whether to issue a positive or negative declaration on the Transco Project; and it is further

ORDERED that the petition, insofar as it seeks the directive for a scoping session as required by SEQRA and the subsequent preparation of a DEIS and/or issuance of a positive declaration, is denied; and it is further

ORDERED that any other relief requested but not granted herein is denied.

Dated: August 24, 2023
Poughkeepsie, NY

ENTER:

Hon. Thomas R. Davis, J.S.C.

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.