

APPENDIX K

Spring Creek Ecosystem Restoration Draft Integrated Feasibility Report and Environmental Assessment

Appendix K

Public Comments

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

ELISABETH HAUB SCHOOL OF LAW

78 NORTH BROADWAY

WHITE PLAINS, NEW YORK 10603

PHONE: 914.422.4343

FAX: 914.422.4437

SUPERVISING ATTORNEYS

KARL S. COPLAN

TODD D. OMMEN

ADMINISTRATOR

JENNIFER RUHLE

October 6, 2017

By Email

Attn: Diana M. Kohtio

The U.S. Army Corps of Engineers, New York District

Planning Division-Environmental Branch

26 Federal Plaza, New York, New York 10278-0090

Re: Comments regarding *Integrated Ecosystem Restoration Feasibility Report and Environmental Assessment for the Spring Creek North Ecosystem Restoration Project*

Dear Ms. Kohtio,

We represent NY/NJ Baykeeper and certain community members near Spring Creek Park and submit on their behalf the following comments regarding the Integrated Ecosystem Restoration Feasibility Report and Environmental Assessment (“Report”) for the Spring Creek North Ecosystem Restoration Project (the “Project”).

Background

For years, the Northwestern portion of Spring Creek Park was used for passive recreation by the community. Despite that fact, and despite that the area was designated as parkland, NYC did not maintain or upkeep the park. Indeed, in 2001, the city illegally fenced off the park and excluded the public in order to construct a composting facility. After construction began on the Spring Creek composting facility, this clinic brought an action against New York City (“NYC”) asserting that the city illegally alienated Spring Creek Park by converting it to a composting facility. In 2013, after years of litigation before DEC and in the court, the Supreme Court of Kings County ultimately agreed. The court granted our motion for summary judgment, finding that NYC had violated the public trust doctrine and enjoining the city to cease all operations associated with the composting facility until and unless NYC obtained legislative approval to

alienate the parkland. NYC elected not to seek such approval, but since that time the City has taken no steps toward restoring Spring Creek Park for public use and recreation. Indeed, the park remains fenced off and unuseable to this day.

Comments

The below comments address two specific aspects of the Report: (1) the nature of and enforceability of deadlines for components of the Project related to the portion of Spring Creek Park for which NYC is responsible, and (2) environmental justice concerns related to the restoration project. These comments specifically address the Northwest portion of Spring Creek Park that will be restored for passive recreation under the Report (the “Park Area”), which is referred to as “Areas F + G” throughout the Report (*see, e.g.*, Report, pp. iv, 56, 74).

Passive Recreation Requirements and Associated Deadlines

NYC is under multiple legal obligations to restore the Park Area for public use and enjoyment. Initially, as set forth above, the court has already determined that NYC’s fencing off of the Park Area for the composting facility was illegal alienation of parkland. Moreover, NYC is obligated under its permit and under a memorandum of understanding (“MOU”) to restore the Park Area. Specifically, the permit required, upon cessation of the composting operations, that the City “remove all or any portion of the uncompleted structure or fill and restore the site to its former condition.” Likewise, the MOU required that, as of August 2016, the city Department of Sanitation “shall fully restore the site, including, as requested by Parks, the removal of all structures, roads, and/or other infrastructure constructed by Sanitation for its composting operation. Sanitation shall additionally install new landscaping, including trees, grasses and shrubs, as reasonably requested by Parks.”¹

These obligations to restore the Park Area for recreational use are reflected in the Report, but nothing in the Report expressly obligates NYC to perform any of the actions listed in the Report. Rather, the Report contemplates an agreement between the U.S. Army Corps of Engineers (“USACE”) and NYC to address the restoration of the Park Area (*see* Report, page 103 (discussing the Project Partner Agreement and its requirements)). Given that NYC is under multiple legal obligations to restore the Park Area, and given that the court has already found that NYC illegally alienated the Park Area for the composting facility, the Report should include language that requires the contemplated Project Partner Agreement to have binding deadlines for NYC and USACE to comply with for the restoration project. Further, entry into such a binding agreement should be a required condition of the Report. This language is necessary to ensure NYC’s compliance with the Project. NYC has been, at best, complacent in restoring and redeveloping Spring Creek Park; the court decided that NYC must cease construction of the

¹ The City of New York Department of Parks and Recreation entered into the MOU on August 27, 2017.

Spring Creek Park Composting Facility in 2013 (see *Raritan Baykeeper, Inc. v. City of New York*, 984 N.Y.S.2d 634 (N.Y. Sup. Ct. 2013)), but in the four years since that court decision, NYC has taken no action to restore Spring Creek Park to a usable public park despite the obligations contained in the permit and the MOU. Therefore, without any express language requiring NYC to restore the park, NYC could potentially delay, or even entirely remove itself from, the restoration project without any legally enforceable consequences.

NYC is pledging \$8,429,630 to restore Spring Creek Park (see Report, Table 26: Cost Apportionment of TSP (Fully Funded Costs), pp. 103-04), and based on the current language of the Report, if NYC ultimately decides to withdraw from the plan, restoration of Spring Creek Park will suffer. Should NYC fail to restore the recreational area for public use, it would violate NYC's legal obligations to restore the Park Area and harm the people in the neighborhoods surrounding Spring Creek Park, thus prolonging the time frame where people cannot access the park without any certainty as to when, if at all, the restoration project would be resumed and completed.

For these reasons, we request that the Report be amended to: (1) make the Project Partnership Agreement a required condition of the Report; (2) include date certain deadlines for NYC to commence and complete restoration of the Park Area; and (3) expressly require that this restoration be for "passive recreation" and include a walking path, as contemplated by the Report (see Report, pp. 9, 42, 76, 82, 99, 103).

Environmental Justice

The foregoing binding agreement is also warranted given that the community bordering the Park Area is an environmental justice community with no other access to a park in the area. The Report mistakenly identifies the relevant neighborhood in the discussion of Environmental Justice concerns. According to the Report, "the NYSDEC identifies 'Potential Environmental Justice Areas (PEJAs)' as census block groups meeting one or more of the following NYSDEC criteria in the 2000 U.S. Census...51.1% or more of the population are members of minority groups in an urban area." (Report, p. 40).² In numerous sections of the Report, the USACE refers to the Howard Beach neighborhood as the community adjacent to Spring Creek Park (see, e.g., pp. 6, 7, 9, 39, 87, 89), ultimately finding that Howard Beach is not a PEJA. However, the

² As per NYSDEC standards, USACE is relying on census data from 2000. It is important to note that the federal government has updated data from the 2010 U.S. Census, which would provide more recent, and therefore relevant, information. However, regardless of whether USACE uses the 2000 or 2010 data, the conclusion is the same. In 2000, 98 percent of the population of East New York was minority, and in 2010, that number increased to 98.7 percent. Therefore, the neighborhood of East New York is a PEJA, and should therefore be mentioned, discussed, and considered as such in the USACE Report.

Report makes no mention of whether other communities that are actually closer to the Park Area than Howard Beach are PEJAs.

While Howard Beach is likely not a PEJA (with 14.6 percent of the population being minority), the nearby neighborhood of East New York is almost certainly a PEJA because 98 percent of the population is minority. East New York is directly adjacent to the Park Area proposed for passive recreation (*see* Figure 1: Map of Neighborhoods Surrounding Spring Creek Park) (the area of Spring Creek Park that will be restored to passive recreation is almost entirely contained in East New York, and Howard Beach is separated from Spring Creek Park by the Shore Parkway, which would hinder its use by residents of Howard Beach). Thus, the relevant community, at least as far as the city's obligations to restore the Park Area, is a PEJA.

Figure 1: Map of Neighborhoods Surrounding Spring Creek Park



Map taken from the NYC Department of City Planning (red arrow added to indicate Spring Creek Park Composting Facility location), available at <http://maps.nyc.gov/census/>.

Conclusion

Language should be added requiring that the contemplated Project Partnership Agreement have binding deadlines for NYC for all of the steps in the restoration project and requiring that the Park Area be restored for passive recreation with the associated walking path.

Entry into such an agreement should be a condition of the Report. Additionally, as shown by the demographic data from the 2000 U.S. Census, East New York is clearly a PEJA neighborhood near Spring Creek Park, and the Report should accurately reflect that fact.

Thank you for your consideration of these comments. Should you have any further questions or concerns, please do not hesitate to call or write to the undersigned.

Respectfully Submitted,



Todd D. Ommen
Managing Attorney
tommen@law.pace.edu



James J. Creech
Legal intern
jcreech@law.pace.edu

Draft Feasibility Report/Environmental Assessment Public Comments and Responses

The Draft Integrated Feasibility Report/Environmental Assessment for the Spring Creek North Ecosystem Restoration Project - Section 1135 was circulated for a 30-day public and agency review on September 6, 2017. During the comment period, one public comment letter was received from:

Pace Environmental Litigation Clinic, Inc.:

- 1) Through representatives of NY/NJ Baykeeper and certain community members near Spring Creek, it has been brought to the District's attention that the Community of East New York, a Potential Environmental Justice Area (PEJA), was not given proper consideration in the FR/EA.

Response: The District has addressed these concerns in the Report by revising *3.8.4 Environmental Justice* and will continue to coordinate with the community as the project moves into construction phase.