

ENVIRONMENTAL LAW

Expert Analysis

Recent Developments Under State Environmental Quality Review Act

When a litigant brings a lawsuit under New York's State Environmental Quality Review Act (SEQRA), the odds of success have never been high. However, the cases decided in 2011 exhibited a stark exception to this general rule: Project applicants who were frustrated by governmental delays or obstacles won six of the seven cases they brought under SEQRA.

The volume of SEQRA litigation continues to decline. In 2011 the courts decided 35 cases under SEQRA, the lowest number since this column began its annual survey in 1990. The second lowest was 37 in 2010; the third lowest was 45 in 2009. (Previously the historical average was around 60.)

The Court of Appeals decided no SEQRA cases in 2011 (though as noted below, it decided one just two weeks ago).

Twelve of the 35 cases followed the preparation of an environmental impact statement (EIS). Plaintiffs won six of these, an uncommonly high percentage. However, only one concerned a new EIS that was found inadequate (and that finding was reversed on appeal).¹ Three were old EISs that required supplementation, and two cases involved applicants' challenges.

Twenty-two cases arose where no EIS had been prepared. Plaintiffs won five of those.

This column discusses the most important of the 2011 SEQRA cases and also summarizes other regulatory developments relevant to SEQRA.

Applicants' Challenges

As noted above, 2011 was an excellent year for applicants who went to court out of frustration with agencies' delays or denials of their permits.

Two decisions rejected municipal actions to subject actions to EISs. In *Center of Deposit v. Village of Deposit*,² the village required an EIS for the subdivision of one parcel into two; the Appellate Division, Third Department, found this premature since there were no plans for what to do with the

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property after the subdivision. In *East Hampton Library v. Zoning Board of Appeals of the Village of East Hampton*,³ the village required an EIS for expansion of a library, but this was found improper because educational facilities may expand up to 10,000 feet without invoking SEQRA (i.e., they are on the Type II list), and this project was reduced to below that threshold.

The Appellate Division, Second Department, issued a mandamus against one town, and allowed a mandamus action to proceed against another town that had unreasonably delayed action on proposed projects.⁴

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The City of Gloversville issued a negative declaration (a determination that no EIS is required) for an affordable housing project, but then it rejected the project application; the Appellate Division, Third Department, found there was no basis for the denial in the record other than the conclusory statements of some neighbors, and it affirmed the lower court's annulment of the city's decision.⁵ The Third Department also ruled in favor of a sand and gravel company and found that before the Town of Nassau banned commercial excavation, it needed to prepare an EIS on the ban.⁶

In the only case where a suing applicant lost, the suit was brought after the expiration of the statute of limitations.⁷

Supplemental EISs Required

Plaintiffs arguing that events since the issuance of the original EIS compelled a supplemental EIS

(or the consideration of one) were four for four in 2011.

Bronx Committee for Toxic Free Schools v. New York City School Construction Authority involved a new school whose EIS was completed in 2006. Subsequently a long-term monitoring plan was developed to ensure that the school's presence on a brownfield site did not pose hazards. The Supreme Court held, and the Appellate Division affirmed, that this plan was of sufficient importance and relevance to warrant the preparation of a supplemental EIS.⁸ The fact that the procedures of the state's Brownfield Cleanup Program were being followed was no shield. The Court of Appeals has agreed to review this case.

Develop Don't Destroy (Brooklyn) v. Empire State Development Corp. involved the much-litigated Atlantic Yards project in Brooklyn. The EIS had assumed the full project would take 10 years to build. It later appeared that it might take 25 years. The Supreme Court held, and again the Appellate Division affirmed, that this was such a significant change that a supplemental EIS was needed.⁹

Likewise, in *Long Island Pine Barrens Society v. Town of Brookhaven Town Board*, conditions imposed on a project after its initial approval and EIS were found to require a supplemental EIS.¹⁰

Finally, *Ardizzone v. Bloomberg* concerned the proposed Willets Point development in Queens. The 2008 EIS stated that the project would be built in one phase; that, in view of the large amount of traffic it would generate, it required the construction of new access ramps to and from the Van Wyck Expressway; and that no properties would be taken by eminent domain until the necessary state and federal approvals for the ramps were granted. In 2010 the Supreme Court upheld the EIS. In 2011 the city decided it was taking so long to obtain the ramp approvals that the project would be split into two phases, and the first phase could proceed without the ramp approvals. The Supreme Court, New York County, agreed to reopen the case to determine whether a supplemental EIS was needed. (The author of this column represents plaintiffs in this action.)¹¹

Socioeconomic Impacts

The City of New York issued a negative declaration for the rezoning of a 128-block area in Sunset Park, Brooklyn. The environmental assessment

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had concluded that there would be an incremental increase of only 75 dwelling units, and that this was too small to require a further study of socio-economic conditions. In *Chinese Staff and Workers Association v. Burden*, three justices of the Appellate Division, First Department, agreed. However, two justices dissented, finding that the rezoning might lead to a considerably larger change in the community, and that a socioeconomic analysis was warranted. They also objected that certain key information had been submitted as expert affidavits during the litigation and not as part of the environmental review.¹²

Because of the 3-2 split, an automatic appeal to the Court of Appeals was available, and it was taken. On June 27, 2012, the Court of Appeals unanimously upheld the majority opinion below. It clearly did not think much of the appeal. After reciting some standard law about SEQRA procedures, the court merely stated that in its environmental assessment the Department of City Planning "identified the relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis for its determination." The court did not engage at all with the substance of the arguments that had been made by the appellants or by the dissenters below.

Timing Issues

Several cases were dismissed because they were brought or litigated too late. Two cases were found barred (in whole or in part) by the statute of limitations.¹³ Others were moot because the project had already been built by the time a decision was rendered.¹⁴

Environmental Justice

As this column has previously discussed in detail,¹⁵ in 2011 the Legislature enacted the Power NY Act. It revived the long-expired Article X of the Public Service Law, which provides a consolidated approval process for electric generating facilities, and it expanded its coverage so that it applies to plants as small as 25 megawatts; the previous version had an 80-megawatt threshold. Plants proceeding under Article X do not have to go through the SEQRA process, as Article X requires roughly equivalent studies.

On June 28, 2012, the New York State Department of Environmental Conservation (DEC) adopted regulations under the Power NY Act. One of them is a new Part 487 to the DEC rules, establishing a regulatory framework to analyze environmental justice issues when new or expanded power plants are being reviewed under Article X.

The regulations require applicants to:

- Evaluate the cumulative impact on air quality;
- Evaluate the demographic, economic and physical description of the community where the facility will be located, compared to the county and adjacent communities;
- Evaluate the significant and adverse disproportionate environmental impacts of a proposed facility, if any, resulting from its construction or operation; and
- Avoid, minimize or offset any significant adverse disproportionate environmental impacts to the maximum extent practicable.

DEC had not previously adopted environmental justice regulations. In 2003 it issued Commissioner Policy 29, Environmental Justice and Permitting, to guide DEC permitting issues. The new Part 487 goes beyond the 2003 policy in certain respects, and it remains to be seen whether its methodologies will be applied to the SEQRA review of projects not covered by Article X.

The principal regulations to implement the revived Article X are to be issued by the Board on Electric Generation Siting and the Environment. This board issued draft regulations for public comment on March 27, 2012. These regulations have become the subject of some controversy; numerous proponents of new generating facilities have argued that the filings the proposed regulations would require are so detailed, and the authorities they leave with municipalities are so extensive, that the objective of encouraging the development of new generating capacity would be frustrated.

Also on June 28, 2012, DEC issued a new Part 251, which establishes emission limits for carbon dioxide from new power plants. These standards cannot be met by coal-fired power plants that do not have carbon capture and sequestration (CCS). CCS is not yet commercially available, but all this is somewhat academic because there are no pending proposals for new coal-fired power plants in New York.

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E-Designations

On June 18, 2012, amendments took effect to the E-Designation process. This is a method, linked to the City Environmental Quality Review (CEQR) process, by which environmental requirements related to potential hazardous materials, air quality and noise impacts are applied during the rezoning process in New York City. Many contaminated sites receive this designation, which may subject them to testing and remediation requirements when construction occurs there.

The new amendments relieve property owners and developers who seek certain zoning changes from having to execute restrictive declarations. Instead, studies performed during the CEQR process may determine whether special construction techniques are needed in order to deal with preexisting contamination, and designated city agencies will oversee the remediation process. The applicability of the E-Designation process was extended beyond zoning map amendments to special permits and variances. Compliance with E-Designations for air quality and noise have now been linked to the building permit process.

DEC Regulations

DEC has been meeting with stakeholders to discuss possible changes to its regulations under SEQRA. Among the changes that are being considered are imposing costs on lead agencies that fail to make certain SEQRA determinations on a timely basis; strengthening the scoping process; modifying the timeline for the completion of EISs; changing the Type I list (actions more likely to require an EIS) and the Type II list (actions that never require EISs); and increasing the availability of SEQRA documents on the web.

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1. *Town of Amsterdam v. Amsterdam Industrial Development Agency*, Index No. 2007-0815 (Sup. Ct. Montgomery Co., Jan. 14, 2011), rev'd in part 95 AD3d 1539 (3d Dept. 2012).

2. 90 AD3d 1450, 936 NYS2d 709 (3d Dept. 2011).

3. 31 Misc3d 1231(A), 932 NYS2d 760 (Sup. Ct. Suffolk Co. 2011).

4. *East End Resources v. Town of Southold Planning Board*, 81 AD3d 947, 917 NYS2d 315 (2d Dept. 2011); *Costco Wholesale v. Town Board of Town of Oyster Bay*, 90 AD3d 657, 934 NYS2d 430 (2d Dept. 2011).

5. *Kinderhook Development v. City of Gloversville Planning Board*, 88 AD3d 1207, 931 NYS2d 447 (3d Dept.), motion for leave denied, 18 NY3d 805, 940 NYS2d 214 (2012).

6. *Troy Sand & Gravel v. Town of Nassau*, 82 AD3d 1377, 918 NYS2d 667 (3d Dept. 2011).

7. *92 MM Motel v. Zoning Board of Appeals of the Town of Newburgh*, 90 AD3d 663, 933 NYS2d 881 (2d Dept. 2011).

8. *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, 86 AD3d 401, 927 NYS2d 45 (1st Dept. 2011), leave to appeal granted, 17 NY3d 717, 935 NYS2d 287 (2011).

9. *Develop Don't Destroy (Brooklyn) v. Empire State Development Corp.*, 33 Misc.3d 330, 927 NYS2d 571 (Sup. Ct. N.Y. Co. 2011), aff'd 94 AD3d 508, 942 NYS2d 477 (1st Dept. 2012), leave to appeal denied, ___NE2d___, 2012 WL 2378316 (June 26, 2012).

10. *Long Island Pine Barrens Society v. Town of Brookhaven Town Board*, 31 Misc3d 1213(A), 927 NY2d 817 (Sup. Ct. Suffolk Co. 2011).

11. *Ardizzone v. Bloomberg*, Index No. 103406/09 (Sup. Ct. N.Y. Co., Dec. 6, 2011).

12. *Chinese Staff and Workers Association v. Burden*, 88 AD3d 425, 932 NYS2d 1 (1st Dept.), aff'd ___NE2d___, 2012 WL 2399597 (June 27, 2012).

13. *Dandomar v. Town of Pleasant Valley Town Board*, 86 AD3d 83, 924 NYS2d 499 (2d Dept. 2011); *Dugan v. Liggan*, 90 AD3d 1445, 935 NYS2d 730 (3d Dept. 2011).

14. *Mitskouski v. Buffalo and Fort Erie Public Bridge Authority*, 415 Fed.Appx. 264, 2011 WL 285240 (2d Cir. 2011); *Sherman v. Planning Board of Village of Scarsdale*, 82 AD3d 899, 918 NYS2d 878 (2d Dept. 2011); *Papert v. Zoning Board of Appeals of Inc. Village of Quogue*, Index No. 10-12459, 2011 NY Slip Op 31501(U) (Sup. Ct. Suffolk Co., April 20, 2011).

15. Michael B. Gerrard, "New York's Revived Power Plant Siting Law Preempts Local Control," NYLJ, Sept. 8, 2011.