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Expert Analysis

Survey of 2015 Cases Under State Environmental Quality Review Act

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The courts issued 41 decisions under the New York State Environmental Quality Review Act (SEQRA) in 2015. In the most important of these, the Court of Appeals corrected a longstanding flaw in some lower courts' application of the standing doctrine to restrict access to the courts by environmental plaintiffs. The Court of Appeals has also issued a major decision on the ripeness of SEQRA suits.

Meanwhile, the State Department of Environmental Conservation (DEC) missed a statutory deadline of Jan. 1, 2016 under the Community Risk and Resiliency Act (which Governor Andrew Cuomo signed in September 2014) to issue official sea level rise projections,[1] though the agency proposed the projections in November 2015.[2] DEC has also failed to move forward with revisions to its SEQRA regulations that it launched with much fanfare in July 2012 with the announced intent "to streamline the regulatory process without sacrificing meaningful environmental review." Though DEC held several public meetings, issued a formal notice of intent in July 2012, and started work on a generic environmental impact statement (EIS), for more than a year there has been radio silence on the issue.

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But things remain active on the judicial front. Of 24 cases where the courts ruled on plaintiffs' challenges to an agency's failure to prepare an EIS, the government defendants prevailed in 20. Of the four cases involving challenges to EISs, the government defendants won three.

Standing

This annual review of SEQRA litigation begins with the Court of Appeals' decision *Sierra Club v. Village of Painted Post*.[3] To explain its significance, we need to go back to 1991, when the Court of Appeals issued its 4-3 decision in *Society of Plastics Industries v. County of Suffolk*.[4] That became the most controversial decision in the history of SEQRA because it was interpreted by the lower courts as severely limiting the ability of citizens to sue. In particular, in order to have standing, a plaintiff needed to demonstrate

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harm that was different from that suffered by the public at large. So if many people were equally affected by dirty air or a contaminated public water supply, no one could sue. And if many people enjoyed visiting a natural but uninhabited area—such as parts of the Adirondacks—none of them could sue about a threat to that area because no one was distinctively harmed. This was in many ways like a codification of the tragedy of the commons.

The Court of Appeals dialed back the part of that doctrine that applied to natural areas in 2009 in *Save the Pine Bush v. Common Council of the City of Albany*.[5] That decision found that people who do not live near a natural area but frequently visit it for recreation or study do have standing if the area is threatened. But it did not help those who are affected by a common problem like widespread pollution.

Then came *Sierra Club v. Village of Painted Post*. The Village of Painted Post is in Steuben County not far from the Pennsylvania border. Though hydraulic fracturing is now banned in New York, there is a lot of it in Pennsylvania, and it requires a great deal of water. Painted Post sits on top of a large aquifer, and the village Board of Trustees entered into an agreement to sell up to 1.5 million gallons of water a day to a subsidiary of Shell Oil that operates gas wells in Pennsylvania. The water would be loaded onto trains at a transloading facility to be built in Painted Post for the short trip to Pennsylvania.

The village determined that its agreement to sell the water was a Type II action exempt from SEQRA review and issued a negative declaration for the lease agreement for the transloading facility, meaning that no EIS would be required. Residents of the village who lived very close to the tracks sued, saying there should have been an EIS. They said they would be adversely affected by the noise and air pollution from the added rail traffic. They won at the trial court level,[6] but the Appellate Division, Fourth Department, reversed. It said that the trains would move throughout the entire village, and because many people would be affected by the noise, none of them had standing to sue.[7]

The court in 'Painted Post' found that "the number of people who are affected by the challenged action is not dispositive of standing." The Court of Appeals has now repudiated the broad readings of 'Plastics Industries,' and appears to be much more willing to hear suits by citizen plaintiffs.

Reversing, the Court of Appeals found that its 26-year-old decision in *Society of the Plastics Industries* did not require denial of standing. The court found that "the number of people who are affected by the challenged action is not dispositive of standing."[8] The Court of Appeals has now repudiated the broad readings of *Plastics Industries*, and appears to be much more willing to hear suits by citizen plaintiffs.

On remand, the Fourth Department ruled that the Village of Painted Post had failed to comply with SEQRA.[9] It rejected the contention that the SEQRA cause of action should be dismissed on laches or mootness grounds, even though the transloading facility was substantially complete, because the principal challenge was to its operation, not its construction. On the merits, the court said the village had acted arbitrarily and capriciously when it determined that the withdrawal and sale of surplus water required no SEQRA review. The court said the village's lease agreement for the transloading facility should also be annulled because a consolidated SEQRA review for both agreements was required to avoid segmentation.

Less than a month after the Court of Appeals decision in *Village of Painted Post*, the Supreme Court in Putnam County relied on it to grant standing to the challengers to a large-scale retail and hotel development, and stayed the

development until the litigation was resolved.[10] Earlier in the year, prior to the Painted Post decision, two courts had dismissed cases where the plaintiffs were alleging injuries no different than those suffered by the public at large,[11] though in one of them standing would probably have been denied anyway because the alleged injury was solely economic, which is an independent basis to deny SEQRA standing.[12]

Ripeness

Another Court of Appeals decision under SEQRA that had sown confusion was *Gordon v. Rush*,[13] which involved a challenge to a positive declaration (a decision that an EIS is needed). Previously, such challenges were deemed impermissible because there was no final agency action; suit must await the ultimate agency decision on the proposed project. But in 2003 in *Gordon* the Court of Appeals allowed a suit where an agency that lacked authority to approve a project nonetheless required an EIS. This led to further suits challenging positive declarations.

The Court of Appeals cleared up the confusion in *Ranco Sand and Stone Corp. v. Vecchio*.[14] (This was issued in March 2016; ordinarily it would go in next year's update, but we did not want to delay reporting on it.) Ranco had asked the town of Smithtown to rezone a parcel it owned from residential to heavy industrial. When the town issued a positive declaration, Ranco sued, hoping to apply *Gordon* as a "bright line" allowing challenges to any positive declaration and claiming that it would cost $75,000 to $150,000 to prepare an EIS.

Rejecting Ranco's suit as unripe, the Court of Appeals stated that "the ruling in *Gordon* was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an initial step in the SEQRA process."[15] The court declared that

> *Gordon* stands for the proposition that where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency, when the proposed action is not subject to SEQRA, or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper.[16]

The courts in 2015 dismissed several other SEQRA suits as being unripe.[17] However, where a planning board required a supplemental EIS several years after development of a subdivision had begun, the developer was allowed to sue.[18]

Reliance on EISs

EISs are not merely piles of paper. They must be used to guide agency decisions, as two cases demonstrated.

The Falcon Group Limited Liability Company wanted to develop a 13-unit residential development in the Town/Village of Harrison in Westchester County. Harrison required an EIS, and when it was finished, Harrison's planning board adopted a findings statement rejecting the project. The findings statement found that the proposed action did not minimize or avoid adverse environmental effects to the maximum extent practicable, and would result in significant adverse effects that could not be avoided. Falcon sued the planning board.

The Supreme Court annulled the findings statement and sent the matter back to the board. The Appellate Division, Second Department, affirmed. It found that the board's conclusions in the findings statement were based in part "on factual findings which were contradicted by the scientific and technical analyses included in the [final EIS] and not otherwise supported by empirical evidence in the record." In other words, once the planning board had issued the final EIS, it was stuck with its conclusions.[19]

In *Troy Sand & Gravel Co. v. Town of Nassau*,[20] the plaintiff had been trying for more than a decade to build a quarry in a town that clearly did not want it. In 2007 the DEC had issued a final EIS and granted a mining permit. The town started to conduct its own environmental review. The Third Department found that while the town was allowed "to conduct an independent review whereby it applies the standards and criteria found in its zoning regulations, its review of the environmental impact of the project is necessarily based on the EIS record because its zoning determinations must find a rationale in its SEQRA findings."

EIS Overturned

The Supreme Court, New York County, struck down the final EIS for a nursing home building that would be near a school. The court found that the EIS had not taken a close enough look at the alleged effects on the schoolchildren from construction noise and from lead-contaminated dust, and had devoted too little attention to possible ways to mitigate both impacts.[21] (The Appellate Division, First Department, has heard oral argument on the appeal from this decision.)

Segmentation

The SEQRA reviews of two actions were overturned because of impermissible segmentation—i.e., considering separately activities that should have been reviewed together. In one, a drainage plan should have been considered together with the project it would serve.[22] In the other (the remand of the Painted Post case discussed above), an agreement to sell water should have been reviewed together with the construction of a facility to transfer the water.[23]

However, there was no segmentation when separate reviews were conducted of a hospital building and a parking garage 50 blocks away.[24]

Applicability of SEQRA

SEQRA review was found to be unnecessary for the release of a restrictive covenant,[25] installation of a traffic barrier,[26] execution of a power purchase agreement for the output of a solar energy facility,[27] and a drainage project.[28]

However, SEQRA review and a full environmental assessment form were required for the adoption of a local law that would regulate the placement, construction and use of moorings along and in Lake Champlain.[29]

1. N.Y. Envtl. Conserv. Law §3-0319.
2. Science-Based State Sea-Level Rise Projects, N.Y.S. Register, at 29 (Nov. 10, 2015).
3. 26 N.Y.3d 301 (2015).
4. 77 N.Y.2d 761 (1991).
5. 13 N.Y.3d 297 (2009).
6. 50 Misc.3d 1205(A) (Sup. Ct. Steuben Co. 2013).
7. 115 A.D.3d 1310 (4th Dept. 2014).
8. 26 N.Y.3d at 311. The Court of Appeals approvingly cited *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973), a U.S. Supreme Court decision generally regarded as the high point of citizen standing.
9. 134 A.D.3d 1475 (4th Dept. 2014).
10. *Napolitano v. Town Bd. of Southeast*, 51 Misc.3d 206 (Sup. Ct. Putnam Co. 2015).
11. *Glass v. County of Suffolk*, 130 A.D.3d 726 (2d Dept. 2015); *Glyca Trans LLC v. City of New York*, 2015 N.Y. Misc. LEXIS 3262 (Sup. Ct. Queens Co., Sept. 8, 2015).
12. See 2015 N.Y. Misc. LEXIS 3262, at *25.
13. 100 N.Y.2d 236 (2003).
14. *Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92 (2016).
15. 27 N.Y.3d at 100.
16. 27 N.Y.3d at 100 (citations omitted).
17. See *Cmty. Watersheds Clean Water Coal. v. DEC*, 134 A.D.3d 1201 (3d Dept. 2015); *Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1188 (3d Dept. 2015); see also *Lucente v. Terwilliger*, 46 Misc.3d 1217(A), (Sup. Ct. Tompkins County 2015).
18. *Toll Land V Ltd. P'ship v. Planning Bd. of the Vill. of Tarrytown*, 49 Misc.3d 662 (Sup. Ct. Westchester Co. 2015).
19. *Falcon Group Limited Liability Co., v. Town/Vill. of Harrison Planning Board*, 131 A.D.3d 1237 (2d Dept. 2015).
20. *Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1170 (3d Dept. 2015).
21. *Friends of P.S. 163 v. Jewish Home Lifecare*, 51 Misc.3d 1225(A) (Sup. Ct. New York Co. 2015).
22. *J. Owens Building Co. v. Town of Clarkstown*, 128 A.D.3d 1067 (2d Dept. 2015).
23. *Sierra Club v. Vill. of Painted Post*, 134 A.D.3d 1475 (4th Dept. 2015).
24. *Residents for Reasonable Dev. v. City of N.Y.*, 128 A.D.3d 609 (1st Dept. 2015).
25. *Rappaport v. Vill. of Saltaire*, 130 A.D.3d 930 (2d Dept. 2015).
26. *County of Rockland v. Town of Clarkstown*, 128 A.D.3d 957 (2d Dept. 2015).
27. *Shoreham Wading River Advocates for Justice v. Town of Brookhaven Planning Bd.*, 2015 N.Y. Misc. LEXIS 2847, at *43 (Sup. Ct. Suffolk Co. Aug. 3, 2015).
28. *Smithline v. Town & Vill. of Harrison*, 131 A.D.3d 1173 (2d Dept. 2015).
29. *Plattsburgh Boat Basin v. City of Plattsburgh*, 50 Misc.3d 271 (Sup. Ct. Clinton Co. 2015).