

March 24, 1995

Environmental Commercial Law--Update on SEQRA Lawsuits for 1994

New York Law Journal

By Michael B. Gerrard

Related Articles

[EPA Drilling Waste Regs Under Fire: 5 Things To Know](#)

[US Supreme Court Decides Important Clean Water Act Case and Unanimously Rejects Government Position](#)

The Courts decided 57 cases¹ in 1994 under the New York State Environmental Quality Review Act (SEQRA).² As in prior years,³ this column presents a statistical summary of these cases and analyzes emerging trends. The 57 cases last year are about the same number as in 1993, but are down from the 70-75 seen annually in the early 1990s.

When the 1994 cases are viewed as a whole, two things are particularly striking. First, developers and property owners are increasingly using SEQRA; nine of last year's cases were from this category of parties, rather than the more usual environmentalist plaintiffs. Second, the courts are, more and more, dismissing SEQRA cases because they find the plaintiffs lack standing to sue. Ten cases were decided on this ground in 1994.

SEQRA requires the preparation of an environmental impact statement (EIS) when a state or local agency considers a discretionary action that may have a significant effect on the environment. Despite the volume of litigation, only a small fraction of actions subject to SEQRA lead to judicial decisions. The details of the SEQRA process are spelled out in regulations of DEC.⁴ In 1994, there were 232 positive declarations (formal notices that an EIS would be prepared), and the New York State Department of Environmental Conservation (DEC) received notices of 1,107 negative declarations (although this is only a small subset of the negative declarations that were issued).

In 1993 and 1994, DEC went through a lengthy series of public hearings and consultations aimed at a comprehensive revision to these regulations. The agency was on the verge of promulgating the new rules when Governor Cuomo was defeated in the November 1994 election. The rules were put on hold, and the Pataki administration has not announced what it plans to do with them.

Statistical Results

As has consistently been the case since these annual reviews began, challenges to EISs were much less successful in 1994 than were challenges to negative declarations (i.e., formal

determinations that no EIS is necessary).

There were decisions in 12 challenges to completed EISs (or substantive actions based on completed EISs) in 1994. All the challenges were dismissed but one. The one exception was a cluster of related cases concerning an effort to build a large Home Depot store in the Village of Port Chester in Westchester County. Justice James R. Cowhey, who decided all these cases, took the unusual step of finding that the Village's Board of Trustees had not been actively involved in reviewing Home Depot's permit applications, but rather had simply adopted the documents submitted by Home Depot's consultants without independent review. Thus, he concluded, "the Board abdicated its responsibility" under SEQRA.⁵

Challenges to negative declarations, or the failure to prepare an EIS without such a declaration, did much better in 1994.

The defendants' victories often stemmed from procedural defects in their opponents' claims. In all, 10 lawsuits were dismissed because the plaintiffs were found to lack standing to sue; six were dismissed because the suits were brought after expiration of the statute of limitations; three were dismissed as not yet ripe; in two, the plaintiffs had failed to exhaust their administrative remedies; and one claim was moot.

One of the challenges dismissed for lack of standing arose in the only Court of Appeals decision of 1994 that dealt with SEQRA. In *East Thirteenth Street Community Assn. v. New York State Urban Development Corp.*,⁶ neighbors sued UDC for condemning property for the construction of a 14-story building to house homeless and low-income families. They brought an original proceeding under the Eminent Domain Procedure Law (EDPL), claiming that UDC had violated the EDPL in the way it carried out the condemnation and that UDC had violated SEQRA by issuing a negative declaration.

The Court of Appeals found that the petitioners were not condemnees, were not otherwise entitled to standing under the EDPL and could not "bootstrap" themselves into standing in their EDPL claim based on the fact that they would have had standing under SEQRA. Thus the Court of Appeals affirmed the dismissal of the case.

East Thirteenth Street was an entirely procedural case (although it did typify the courts' general sympathy to the construction of facilities for homeless people). Other standing cases from lower courts were not uniformly procedural; several of them embodied the view of the judges that the challenged actions would not really harm the environment and that the plaintiffs were therefore not actually aggrieved.⁷

Another procedural trend is the tendency of some courts,

especially the Appellate Division, Third Department, to depart from the traditional "strict procedural compliance" standard under SEQRA⁸ and to excuse minor procedural errors.⁹

Suits by Owners

As noted above, a significant portion of the 1994 suits were brought, not by environmentalists, but by businesses or property owners seeking judicial help in moving their projects forward.

Two of these lawsuits were successful. In *Leisure Time Billiards v. Rose*,¹⁰ a town denied various approvals for a billiard parlor on the grounds that the facility would have an undesirable effect on the surrounding community and that it would create excessive traffic. The court noted that the project's SEQRA statements had found the billiard parlor would not have an adverse effect on the environment, and therefore the town was effectively precluded from disapproving the project on environmental grounds. This decision is reminiscent of a 1992 Court of Appeals decision that found that a town cannot deny approval for a project (in that case, a radio transmission tower) for impacts that the SEQRA documents said the project would not have.¹¹

The other successful lawsuit of this sort was *Gordon v. Matthew*,¹² which arises from a controversy in Suffolk County over the construction of steel bulkheads on beachfront property. DEC had become the lead agency under SEQRA for a series of applications for such bulkheads and issued negative declarations. Another governmental body, the Coastal Erosion Hazard Board of Review, was unhappy with these decisions and issued positive declarations.

However, the court ruled, this was contrary to the design of SEQRA, under which an agency, once designated as lead agency, had final say (subject to judicial review) over whether an EIS would be required. The court overturned the Hazard Board's positive declarations and ordered the board "to act with due expediency" on the applications.

Several other lawsuits by businesses were unsuccessful. These included cases challenging governmental agencies' requests for environmental information,¹³ a utility's plea that a county should have to prepare an EIS before requiring that new utility poles be set back from the road¹⁴ and a federal suit against town officials who had refused to grant a developer approval for as large a project as he requested after preparing an EIS.¹⁵ One developer unsuccessfully sought money damages for delays in the processing of its applications under SEQRA,¹⁶ and another was sanctioned for bringing what the court found to be a frivolous lawsuit against an environmental group that was challenging its project.¹⁷

Scope of Analysis

Three appellate cases from 1994 shed important light on the scope of judicial review and environmental analysis.

In *Coalition Against Lincoln West v. City of New York*,¹⁸ the City Council took zoning actions to approve Donald Trump's Riverside South development project. Opponents have argued that the project would create so much sewage that the capacity of the North River Water Pollution Control Plant would be exceeded.

The court dismissed the petition, but stated:

we note with concern the City's projections, supported by data concerning the purported net increase in wastewater flow from the catchment area into the designated North River facility, and the claim in the FEIS that the project would not cause the capacity limits set forth in the [water pollution] permit to be exceeded, notwithstanding a history of chronic permit violations and a present failure to comply with an outstanding consent order with [DEC].

The court went on to say that, upon reviewing the record, "we find no indication that the data is spurious or that the projects are facially invalid, and accordingly defer to the expertise of the administrative agencies."

This outcome follows the dictate of the Court of Appeals¹⁹ that courts afford considerable deference to expert agencies and not second-guess their technical judgments. Thus the First Department, at least, has declared that, notwithstanding judges' skepticism about the contents of an EIS, courts should not step in unless the data are "spurious" or "facially invalid."

The scope of lead agency review, rather than of judicial review, was the subject of *Schulz v. DEC*,²⁰ a suit brought by New York's best-known and most successful pro se environmental litigant, Robert Schulz. DEC had promulgated wastewater regulations for Lake George. Schulz argued, and the Appellate Division agreed, that an inevitable consequence of these regulations will be the construction of a sewer system for portions of the Lake George area and that this construction may have significant environmental impacts. Thus DEC's negative declaration for the regulations was annulled, because DEC's environmental review of the regulations had been too narrow.

Another lead agency was found to have been too narrow in its environmental analysis in *Farrington Close Condominium v. Incorporated Village of Southampton*.²¹ The Village sought to develop a park on a 17-acre parcel adjacent to various condominiums. The Village looked at the immediate plans for the park, which included a parking lot, access roads and a baseball field and issued a negative declaration. In doing so, the Village acted in a very cursory fashion without any close analysis, the

court found. Just as important, in the court's view, the Village did not examine the long-term development plans for the park, which included a football/soccer field, softball field, fitness trail, playground, tennis courts and an administration building. Thus the negative declaration was annulled because the Village had improperly segmented its review.

A final decision worthy of note was *Miller v. City of Lockport*.²² The City issued a negative declaration for a solid waste transfer station and material recovery facility. The Environmental Assessment Form had found numerous adverse impacts, but the City found that these impacts would be mitigated. SEQRA provides for a special procedure in such cases where impacts are found but will be mitigated as a condition of approval.

This procedure, the "conditional negative declaration," involves more public notice and deliberation than a standard negative declaration. The City had not gone through these procedures, which in any event are not available for Type 1 actions, and the negative declaration was annulled. Moreover, the Appellate Division noted that there is a low threshold of environmental impact for preparing EISs, and the proposed facility had seemed to cross that threshold.

NOTES

(1) All of these cases will be discussed in the forthcoming fifth annual update to *Environmental Impact Review in New York* by Michael B. Gerrard, Daniel A. Ruzow and Philip Weinberg (Matthew Bender).

(2) N.Y. Env'tl. Conserv. Law Art. 8.

(3) Prior reviews appeared in *The New York Law Journal* on March 29, 1991; March 27, 1992; March 26, 1993 and April 22, 1994.

(4) 6 NYCRR Part 617.

(5) *City of Rye v. Branco*, Index No. 93-13257, slip op. at 35 (Sup. Ct. Westchester Co. April 19, 1994). Related cases decided the same day in the same court were *Preston v. Board of Trustees for the Village of Port Chester*, Index No. 93-19947; *Preston v. Planning Commission for the Village of Port Chester*, Index No. 16328-93; *Preston v. Planning Commission for the Village of Port Chester*, Index No. 93-13040.

(6) 84 NY2d 287, 641 NE2d 1368, 617 NYS2d 706 (1994).

(7) E.g., *Stephens v. Gordon*, 202 AD2d 437, 610 NYS2d 531 (2d Dept. 1994).

(8) E.g., *Rye Town/King Civic Assn. v. Town of Rye*, 82 AD2d 474, 442 NYS2d 67 (2d Dept. 1981), app. dismissed, 56 NY2d 985, 439 NE2d 401, 453 NYS2d 682 (1982).

(9) *Hingston v. New York State Dept. of Environmental Conservation*, 202 AD2d 877, 609 NYS2d 446 (3d Dept.) app. denied, 84 NY2d 809, 645 NE2d 1218, 621 NYS2d 518 (1994); *Steele v. Town of Salem Planning Board*, 200 AD2d 870, 606 NYS2d 810 (3d Dept.), app.

denied, 83 NY2d 757, 639 NE2d 415, 615 NYS2d 874 (1994).
(10) 201 AD2d 340, 607 NYS2d 312 (1st Dept. 1994).
(11) *WEOK Broadcasting Corp. v. Planning Bd. of Lloyd*, 79 NY2d 373, 592 NE2d 778, 583 NYS2d 170 (1992).
(12) *NYLJ*, Sept. 12, 1994, 33:4 (Sup.Ct. Suffolk Co.).
(13) *Carlson Associates v. Town Board of Smithtown*, 206 AD2d 530, 615 NYS2d 407 (2d Dept. 1994); *Bay View Pines Estates Inc. v. Wines*, 204 AD2d 316, 611 NYS2d 576 (2d Dept. 1994).
(14) *New York State Elec. & Gas Corp. v. Commissioner of Dutchess County Dept. of Public Works*, 205 AD2d 1033, 613 NYS2d 784 (3d Dept.), app. denied, 84 NY2d 809, 645 NE2d 1218, 621 NYS2d 518 (1994).
(15) *Orange Lake Associates Inc. v. Kirkpatrick*, 21 F3d 1214 (2d. Cir. 1994).
(16) *Omabuild USA No. 1 Inc. v. State of New York* AD2d , 615 NYS2d 424 (2d Dept. 1994).
(17) *Gordon v. Marrone*, 202 AD2d 104, 616 NYS2d 98 (2d Dept. 1994).
(18) AD2d , 617 NYS2d 744 (1st Dept. 1994).
(19) See *Akpan v. Koch*, 75 NY2d 561, 554 NE2d 53, 555 NYS2d (1990).
(20) 200 AD2d 793, 606 NYS2d 459 (3d Dept.), app. dismissed, 83 NY2d 848, 634 NE2d 607, 612 NYS2d 111, app. denied, 83 NY2d 758, 639 NE2d 416, 615 NYS2d 875 (1994).
(21) 205 AD2d 623, 613 NYS2d 257 (2d Dept. 1994).
(22) AD2d , 620 NYS2d 680 (4th Dept. 1994).

People



[Michael B. Gerrard](#)
Senior Counsel
New York
+1 212.715.1190
michael.gerrard@aporter.com
VCard