

INTRODUCTION

SEQRA: EFFECTIVE WEAPON—IF USED AS DIRECTED

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INTRODUCTION

After a quarter of a century, the State Environmental Quality Review Act¹ (SEQRA) is firmly in place as an integral part of New York's governmental landscape. It has furnished an absolutely vital fulcrum from which the public can participate in—and if necessary challenge—decisions inflicting environmental impacts on local communities. This statute has bolted the door forever on the notorious era when state and local governments could make land-use decisions in the proverbial smoke-filled room, injuring communities with impunity, exemplified by the oft-quoted line of that consummate builder, Robert Moses, that “[o]nce you sink that first stake, . . . they’ll never make you pull it up.”²

SEQRA has halted—or significantly reduced the impact of—numerous actions of New York State and local government agencies, including shopping mall rezonings, highways, sports stadiums, and large-scale residential subdivisions.³ The litigated decisions are but

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¹ State Environmental Quality Review Act (SEQRA), ch. 612, 1975 N.Y. Laws 895 (1975) (codified as amended at N.Y. ENVTL. CONSERV. L. §§ 8-0101 to 8-0117 (McKinney 1997)).

² ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 218 (1974).

³ See, e.g., *Tri-County Taxpayers Ass'n v. Town Bd.*, 432 N.E.2d 592, 592 (N.Y. 1982) (involving the development of a sewer district); *Town of Henrietta v. Dep't of Env'tl. Conserv.*, 430 N.Y.S.2d 440, 443 (App. Div. 1980) (regarding the development of a regional shopping mall).

the tip of the iceberg; many more agency determinations have been modified to mitigate their environmental impacts without—or in order to avert—SEQRA litigation.

Yet, like most statutes aimed at complex problems, SEQRA is not a panacea. There are several respects in which it could be more effective.⁴ This brief article is intended to focus on the most salient.

SCOPE OF JUDICIAL REVIEW

First, the courts accord great deference to agency decisions involving the exercise of discretion.⁵ After a series of early decisions overturning land-use determinations where agencies ignored SEQRA procedure entirely,⁶ or blatantly violated the Act's procedures,⁷ local governments learned—some more quickly than others—that courts would not hesitate to step in where SEQRA was sidestepped.⁸ But, as long as agencies follow SEQRA's procedures, i.e., preparing environmental impact statements (EISs) and weighing alternatives and measures to mitigate harms,⁹ courts are reluctant to interfere with the actual determinations governments make.

For example, in *Jackson v. New York State Urban Development Corp.*,¹⁰ the Court of Appeals rejected claims that an EIS for a major office building redevelopment around Manhattan's Times Square failed to consider the gentrification and displacement of existing

⁴ See *infra* notes 5-47 and accompanying text (concluding that SEQRA could be more effective in the scope of judicial review, cumulative impact review, standing to sue, and the selection of lead agency).

⁵ See, e.g., *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 436 (N.Y. 1986) (stating that courts should generally defer to an agency's decision except in cases where the decision appears to be "arbitrary, capricious or unsupported by substantial evidence"); see also *Jennings v. N.Y. State Office of Mental Health*, 682 N.E.2d 953, 958 (N.Y. 1997) (according factual determinations made by agencies a great deal of deference even when the same facts could have led to quite different—but equally valid—conclusions).

⁶ See, e.g., *Tri-County Taxpayers Ass'n*, 432 N.E.2d at 594-95 (annulling resolutions authorizing the establishment and financing of a sewer district because the town failed to comply with SEQRA because no environmental impact statement (EIS) was prepared); see also *Giuliani v. Hevesi*, 644 N.Y.S.2d 265, 267 (App. Div. 1996) (concluding the city's resolutions were null and void because it did not file a timely negative declaration and failed to take a "hard look" at environmental concerns, both of which are requirements of SEQRA).

⁷ See, e.g., *Coca-Cola Bottling Co. of N.Y. v. Bd. of Estimate*, 532 N.E.2d 1261, 1265 (N.Y. 1988) (annulling the resolution of the Board due to its failure to make a determination of whether the project would have a significant environmental effect); *Village of Westbury v. Dep't of Transp.*, 549 N.E.2d 1175, 1175-76 (N.Y. 1989) (annulling the negative declaration and remitting the matter for the preparation of an EIS).

⁸ See, e.g., *Village of Westbury*, 549 N.E.2d at 1176.

⁹ See N.Y. ENVTL. CONSERV. L. § 8-0109(1), (2) (McKinney 1997).

¹⁰ 494 N.E.2d 429 (N.Y. 1986).

residents that would likely occur¹¹ (and in fact has).¹² This judicial attitude stems from a long history of judicial deference to administrative bodies' expertise, based on the constitutional separation of powers and the hesitancy of judges to substitute their judgment for that of the executive branch.¹³ This has led, in some SEQRA cases, to the courts upholding local government permits for large-scale development, despite the likelihood of severe impacts on traffic, water supply, sprawl and related concerns.¹⁴

It is proper for the judiciary to defer to presumably expert—and responsible—government agencies when reviewing those bodies' decisions.¹⁵ But this deference places a heavy burden on those administrative agencies—planning boards, town boards, highway departments, and the like—to genuinely take environmental issues into account, and not simply rubber-stamp projects with serious impacts. It also means citizens must be prepared to furnish persuasive factual proof of potential environmental harms when opposing a development.¹⁶ In the end, greater sophistication and organization among citizen groups are the best means of making SEQRA work, and, in the long run, of convincing elected officials

¹¹ *Id.* at 433, 438.

¹² See NYU Press Releases, *New Book from NYU Press Mourns Loss of the Notorious Side of Times Square*, at www.nyu.edu/publicaffairs/newsreleases/b_New_B4.shtml (last visited November 5, 2001) (arguing that “the Times Square of the 1970s, ‘80s, and early ‘90s is—in the late ‘90s—becoming ‘Disneyfied’”).

¹³ See *Jackson*, 494 N.E.2d at 435-36. “[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively.” *Id.*

¹⁴ See, e.g., *Akpan v. Koch*, 554 N.E.2d 53, 55, 58-59 (N.Y. 1990) (discussing the asserted inaccuracies and incompleteness of the EIS and deciding that the court's responsibility is not to review the data itself, but to ensure that the lead agency has reviewed the data); *Coalition Against Lincoln W. v. City of N.Y.*, 617 N.Y.S.2d 744, 745 (App. Div. 1994) (mem.) (deferring to the City Planning Commission's expertise in granting the developer's application, despite the court's concerns about the accuracy of the Commission's waste-water reduction predictions); *Hingston v. N.Y. State Dep't of Env'tl. Conserv.*, 609 N.Y.S.2d 446, 449 (App. Div. 1994) (refusing to decide whether the Department of Environmental Conservation (DEC) adequately considered data that a proposed gravel mine would adversely impact traffic in an adjoining town).

¹⁵ See, e.g., *Aldrich v. Pattison*, 486 N.Y.S.2d 23, 30 (App. Div. 1985) (“A flexible standard of review, allowing considerable latitude for the exercise of discretion by the responsible administrative agency or governmental body, is particularly appropriate for the assessment of the environmental consequences of a project, which frequently involves technical and scientific issues more properly entrusted to the expertise of an agency, rather than to a court of general jurisdiction.”).

¹⁶ In *Duke & Benedict, Inc. v. Town of Southeast*, 678 N.Y.S.2d 343, 345 (App. Div. 1998) a plaintiff was deemed to have standing after showing the potential for actual environmental harm. *Id.* The plaintiff was able to establish that the proposed project would have an adverse impact on his horse farm because of increased traffic and noise. The case, however, was dismissed because it lacked merit. *Id.*

that responsiveness to environmental concerns is good politics.¹⁷ But in addition, the courts ought not hesitate to annul agencies' actions that neglect SEQRA's mandates nor should they or defer unduly to agencies' expertise where environmental concerns have been given short shrift.¹⁸ As the Second Circuit memorably held in *Scenic Hudson Preservation Conference v. Federal Power Commission*,¹⁹ a landmark early environmental decision, agencies ought not "to act as an umpire blandly calling balls and strikes for adversaries appearing before [them]; the right of the public must receive active and affirmative protection at the hands of the [agency]."²⁰

CUMULATIVE IMPACT REVIEW

SEQRA enables greater public participation in government decision-making,²¹ and as Justice Brandeis long ago noted, "[s]unlight is said to be the best of disinfectants."²² Although SEQRA cannot by itself force enlightened planning, it has been used, and, should be used more often, to require agencies to consider the cumulative impact of related actions.²³ One wise Court of Appeals decision, *Save the Pine Bush, Inc. v. City of Albany*,²⁴ required the City of Albany to weigh the overall effect of permitting numerous individual buildings in the Pine Bush area of the City of

¹⁷ When a citizen organization can pass the standing hurdle, it will have the opportunity to challenge developments that do not adequately consider environmental factors. *See, e.g.*, *Citizens Against Retail Sprawl ex rel Ciancio v. Giza*, 722 N.Y.S.2d 645, 648-49 (App. Div. 2001) (forcing a town board to reconsider the conversion of a parcel of land containing a residential zone into a general business district); *Long Island Pine Barrens Soc'y v. Town of Islip*, 690 N.Y.S.2d 95, 97 (App. Div. 1999) (mem.) (reinstating the citizen group's petition opposing the sale of a parcel of land until an analysis consistent with SEQRA was performed).

¹⁸ The courts have, in fact, annulled determinations when the agencies involved in determining the environmental impact of proposed projects have not considered all of the factors required to satisfy SEQRA. *See, e.g.*, *Chinese Staff & Workers Ass'n v. City of N. Y.*, 502 N.E.2d 176, 181 (N.Y. 1986) (annulling the City's decision because it failed to consider the long-term displacement involved with the proposed project and, thus, did not comply with SEQRA); *Schenectady Chem., Inc. v. Flacke*, 446 N.Y.S.2d 418, 419-20 (App. Div. 1982) (deciding that a DEC declaration should be sent back to the agency for further consideration because the appropriate environmental data was not examined).

¹⁹ 354 F.2d 608 (2d Cir. 1965).

²⁰ *Id.* at 620.

²¹ *See* N.Y. ENVTL. CONSERV. L. § 8-0109(4) (McKinney 1997).

²² LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (2d ed. Augustus M. Kelley Publishers 1971) (1914).

²³ *See, e.g.*, *City of Buffalo v. N.Y. State Dep't of Env'tl. Conserv.*, 707 N.Y.S.2d 606, 615-16 (Sup. Ct. 2000) (holding DEC's failure to consider a cumulative impact of a new bridge and toll plaza to be a violation of SEQRA and further rescinding DEC's decision to issue a permit for the construction).

²⁴ 512 N.E.2d 526 (N.Y. 1987).

Albany.²⁵ Another ruling, *Village of Westbury v. New York State Department of Transportation*,²⁶ insisted that the State agency examine the impact of redesigning a major Long Island highway interchange on the roads of a nearby village where a highway leading to that interchange would not be widened until later.²⁷

But some later court decisions have not required agencies to look at such cumulative impacts. *Long Island Pine Barrens Society, Inc. v. Planning Board*²⁸ held that the three towns within whose borders the Long Island pine barrens lie need not prepare an EIS examining the cumulative impact of over two hundred projects under consideration in that region.²⁹ The pine barrens are, as the court itself noted, “indispensable” for protection of the aquifer on which Long Island depends for its water supply.³⁰ Indeed, the Legislature had designated the pine barrens a special groundwater protection area and directed the Long Island Regional Planning Board to prepare a comprehensive management plan for the area, to be approved by the State Department of Environmental Conservation (DEC), precisely to preserve it from over development.³¹ But, ironically, because the Regional Planning Board had neglected to prepare that management plan, the court concluded there was no comprehensive plan for the area requiring a cumulative EIS.³² It was exactly the failure to prepare that plan, of course, that underscored the need for an EIS to examine the cumulative impact of development in the pine barrens. But the applicable DEC regulation mandates that cumulative impacts be weighed only where “other simultaneous or subsequent actions . . . are included in any long-range plan of which the action under consideration is a part” or are “likely to be undertaken as a result” of the action, or are “dependent thereon.”³³

²⁵ See *id.* at 531.

²⁶ 549 N.E.2d 1175 (N.Y. 1989).

²⁷ See *id.* at 1176-78.

²⁸ 606 N.E.2d 1373 (N.Y. 1992).

²⁹ See *id.* at 1380 (noting that the projects “involve a diverse range of activities requiring approvals by a wide number of agencies at different levels of government”).

³⁰ *Id.* at 1375.

³¹ See *id.* at 1376, 1379 (tracing the historical development of the area’s protective legislation); see also N.Y. ENVTL. CONSERV. LAW §§ 55-0113-55-0115 (McKinney 1997) (setting forth the duties of the council designated to oversee the protection of the Pine Barrens).

³² *Long Island Pine Barrens*, 606 N.E.2d at 1380-81 (noting that “to the extent that [cumulative impact statement requirements] have proven deficient, the solution must be devised by the Legislature”).

³³ N.Y. COMP. CODES R. REGS. tit. 6, § 617.7(c)(2) (1995).

Although the Legislature retrieved the ball by creating the Central Pine Barrens Joint Planning and Policy Commission³⁴—with authority to control development in the pine barrens that would threaten the aquifer—the *Pine Barrens* decision stands, unduly restricting the cumulative impact review requirement.³⁵ A recent lower court decision, *City of Buffalo v. New York State Department of Environmental Conservation*,³⁶ has commendably followed *Village of Westbury* and directed a cumulative EIS to examine both the construction of the new bridge between Buffalo and Canada adjacent to the existing Peace Bridge and the redesign of the toll plaza at the bridges' entrance.³⁷ But it is past time for the DEC's rules implementing SEQRA to be amended to make explicit the salutary requirement that cumulative impacts be considered whenever two or more actions are significantly linked, and not only where a "long-range plan" exists.

STANDING TO SUE

SEQRA is, in the end, only as effective as New York's courts will allow it to be. A string of early court rulings soon after SEQRA's enactment ensured its vitality by enjoining projects and vacating permits where agencies had ignored SEQRA by failing to write EISs or to consider alternatives or mitigation measures.³⁸ However, a 1991 decision of the Court of Appeals, *The Society of the Plastics Industry, Inc. v. County of Suffolk*,³⁹ unduly limited the ability of citizens to obtain legal standing in court to question agencies' compliance with SEQRA.⁴⁰ The court held by a four to three vote that to assert a violation of the Act, one must show environmental injury—economic harm, a traditional basis for standing, will not

³⁴ N.Y. ENVTL. CONSERV. LAW § 57-0119(2) (McKinney 1997).

³⁵ Following the lead of the Court of Appeals, some lower courts have refused to require a cumulative EIS for multiple projects. For example, in *North Fork Environmental Council, Inc. v. Janoski*, 601 N.Y.S.2d 178, 179-80 (App. Div. 1993) (mem.), the trial court adopted the *Pine Barrens* decision and held the decisive factor to be whether "a 'larger plan' for development" existed and not whether there was a "common geographical base" for the project. *Id.*

³⁶ 707 N.Y.S.2d 606 (Sup. Ct. 2000).

³⁷ *See id.* at 615-16 (concluding that the three proposed construction projects are part of a single development plan and, thus require an EIS).

³⁸ *See, e.g., H.O.M.E.S v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832-33 (App. Div. 1979) (holding the agency's decision that building a domed stadium would not significantly affect the environment to be "arbitrary and capricious"); *see also supra* notes 6-8 and accompanying text (discussing early decisions disallowing projects when SEQRA was ignored or blatantly violated).

³⁹ 573 N.E.2d 1034 (N.Y. 1991).

⁴⁰ *Id.* at 1037-38.

do—and that the injury be qualitatively different from that suffered by the public in general.⁴¹ This means downtown merchants may not challenge a town's permit to build a shopping center in a wetland. Even more problematic are some later lower court decisions that extended this notion of standing. One court ruled that lakefront homeowners lacked standing to question a large residential development along the same lake without a claim that they owned adjacent or affected property—even though the group asserted their concern over the environmental quality of the lake and the land abutting it.⁴² Although two recent appellate decisions repaired some of this damage and upheld standing for citizen groups,⁴³ it is crucial for our courts to keep their doors open. The United States Supreme Court has recognized this need in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*,⁴⁴ holding a citizen group alleging environmental injury to its members had standing to assert water quality violations.⁴⁵ The need to afford citizens access to the courts to challenge violations of SEQRA is equally vital, especially given the aims of the Act to enhance public participation. If agencies are immune from court review, the likelihood of their complying with SEQRA will surely start to erode.

LEAD AGENCY

One critical issue under SEQRA concerns which government body becomes the lead agency—thus assuming primary responsibility to comply with SEQRA—in cases involving more than one agency. For example, a developer often needs permits from both a town and the DEC. The locality, though, may favor the project for tax-base and employment reasons, and may be quite willing to shrug off environmental concerns. Thus, the designation of the lead agency is vital to whether genuine SEQRA compliance will occur. The DEC

⁴¹ *Id.* at 1043-44.

⁴² *Otsego 2000, Inc. v. Planning Bd.*, 575 N.Y.S.2d 584 (App. Div. 1991) (finding that a not-for-profit group organized to protect the environmental interest of the land surrounding the lake did not have standing to sue under SEQRA unless its members could demonstrate specific, non-economic injury).

⁴³ *See Comm. to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Comm'n*, 695 N.Y.S.2d 7, 12 (App. Div. 1999) (finding that the citizen group did have standing because some of its members were threatened with injury and their interests were “germane to the petitioners’ purposes”); *Long Island Pine Barrens Soc’y, Inc. v. Town of Islip*, 690 N.Y.S.2d 95, 97 (App. Div. 1999) (mem.) (noting that the citizens alleged a “deleterious impact” upon their water supply).

⁴⁴ 528 U.S. 167 (2000).

⁴⁵ *Id.* at 180-85 (finding that an association representing individuals with standing may sue on their behalf).

has authority to resolve questions as to the lead agency but has not always exercised the power so as to insure effective review under SEQRA.⁴⁶ When it is appropriate the DEC should be willing to wield that authority, and to accept responsibility as the lead agency. Commendably, it has done so in some recent cases.⁴⁷

CONCLUSION

SEQRA's opponents feared it would hamstring a great deal of needed development. Twenty-five years under SEQRA have shown that those fears were misplaced. The instances when valuable projects have been delayed or stymied—such as plans to dredge New York harbor to accommodate large container ships, and to build a fast rail link to New York City's airports—have stemmed from inadequate funding and lack of firm governmental commitment, not from the need for environmental quality review. With the fine tuning here suggested, SEQRA should serve New York even better in this new millennium. All we need is the courage to use it effectively.

⁴⁶ See 1 MICHAEL B. GERRARD, DANIEL A. RUZOW, PHILIP WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, § 3.03[1][b][ii] (2001) (discussing the state legislation and regulations enabling the DEC); see also §3.03[b][ii][C] (2001) (noting that when projects are industrial in nature, the DEC regional office has been consistently designated as the lead agency, on the other hand, when land development activities are involved local bodies generally are appointed as the lead agency).

⁴⁷ See, e.g., *Town of Coeymans v. City of Albany*, 655 N.Y.S.2d 172, 173-74 (App. Div. 1997) (deciding that the DEC's decision to assume the role of lead agency was appropriate and not immediately reviewable unless the plaintiff could show a direct injury resulting from the DEC's designation of itself as the lead agency); see also *City of Buffalo v. N.Y. State Dep't of Env'tl. Conserv.*, 707 N.Y.S.2d 606, 609 (Sup. Ct. 2000).