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## The Dynamics of Secrecy in the Environmental Impact Statement Process

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# THE DYNAMICS OF SECRECY IN THE ENVIRONMENTAL IMPACT STATEMENT PROCESS

MICHAEL B. GERRARD\*

## INTRODUCTION

The environmental impact review laws—the National Environmental Policy Act (NEPA)<sup>1</sup> and its state counterparts<sup>2</sup>—are premised on the idea of full and open disclosure. The notion underlying these laws is that if the government and the public are fully informed of the impacts of and alternatives to proposed actions, they will make wise decisions about whether and how to proceed.<sup>3</sup> The Freedom of Information Act<sup>4</sup> and its state counterparts<sup>5</sup> even more explicitly seek to open up governmental deliberations to the public. Considered together, these two types of laws would lead one to believe that secrecy has little place in the assessment of environmental impacts.<sup>6</sup>

Although this supposition is logical, it is not the practical reality. The practice, in contrast with the theory of impact review, is suffused with secrecy. Although this Article focuses on the dynam-

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<sup>1</sup> 42 U.S.C. §§ 4321-4370c (1988 & Supp. III 1991).

<sup>2</sup> These "little NEPAs" are enumerated in 2 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.08[2] (1993).

<sup>3</sup> See *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

<sup>4</sup> 5 U.S.C. § 552 (1988).

<sup>5</sup> All the state freedom of information laws are reprinted in JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS (1986 & Supp. 1993).

<sup>6</sup> A third type of law with a related purpose is the "open meetings" or "sunshine" law, which requires that meetings of government bodies be open to the public. New York has such a law, the Open Meetings Law, N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 1988). A discussion of it is beyond the scope of this Article.

ics of secrecy in the impact statement process in the state of New York, its conclusions and recommendations for reform are applicable to other states throughout the country, as well as to the federal system.

Secrecy in the impact statement process results from the interaction of several factors: the common practice of environmental impact statements (EISs) being prepared by project applicants; the long delays at most agencies in responding to document requests; the growing reluctance of the New York State Department of Environmental Conservation (DEC) to hold adjudicatory hearings on permit applications; and the great judicial deference afforded agencies that have approved EISs. In reviewing EISs, the courts defer very heavily to the lead agencies, which in turn rely very heavily on the project applicants. Since the applicants can significantly influence the presentations of their technical consultants,<sup>7</sup> project critics are relegated to the periphery on the key substantive issues. Thus the full disclosure purposes of New York State's "little NEPA," the State Environmental Quality Review Act (SEQRA),<sup>8</sup> are often frustrated.<sup>9</sup>

These tendencies are not as evident at the federal level under NEPA, primarily because agencies, not private applicants, prepare EISs under NEPA.<sup>10</sup> However, a federal agency seeking to build a

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<sup>7</sup> The precise influence that an EIS author exerts on the contents of the EIS does not appear to have been the subject of much study. However, there has been considerable commentary on the analogous issue of the difference between risk assessments on hazardous waste sites performed by consultants hired by EPA versus those performed by consultants retained by potentially responsible parties (PRPs). Much of this commentary posits that consultants working for PRPs downplay risks. *E.g.*, E. Donald Elliott, *Superfund: EPA Success, National Debacle?*, NAT. RESOURCES & ENV'T, Winter 1992, at 11. This hypothesis is supported by empirical findings that show that cleanups in which PRPs take the lead are less stringent than those in which EPA takes the lead. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COMING CLEAN: SUPERFUND PROBLEMS CAN BE SOLVED 5-6 (1989); GAO Says Private Parties Select Containment Remedies More Often Than EPA, 23 Env't Rep. (BNA) 724 (1992). Due to concern over bias, EPA has attempted to take over the supervision of risk assessments from PRPs. *Shift of Risk Assessment Authority to EPA Has Negligible Effect on Duration, Agency Says*, 23 Env't Rep. (BNA) 3170 (Apr. 16, 1993); *Superfund: Potentially Responsible Parties May Conduct Risk Assessments at Some Sites, EPA Announces*, 24 Env't Rep. (BNA) 843 (Sept. 10, 1993); *D.C. Circuit Asked to Remand EPA 'Rule' Eliminating PRP Role in Risk Assessments*, 21 Env't Rep. (BNA) 1530 (Dec. 7, 1990).

<sup>8</sup> N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984).

<sup>9</sup> Under the California Environmental Quality Act, that state's equivalent of SEQRA, the applicant typically prepares the EIS. *See Friends of La Vina v. County of L.A.*, 284 Cal. Rptr. 171 (Ct. App. 1991).

<sup>10</sup> 40 C.F.R. § 1506.5(b) (1992). *See Greene County Planning Bd. v. Federal*

dam or an office building will have motivations similar to those of private project applicants. Thus, even at the federal level, agencies themselves often have the same self-interests as applicants.

## I

### THE NATURE OF THE SECRETS

This Article focuses primarily on the secrecy of raw data—the calculations and the assumptions underlying the technical conclusions presented in EISs. For example, suppose that a developer wants to put up a new building in Syracuse, New York where high levels of carbon monoxide have been measured in the ambient air. If the traffic generated by the new building is found to cause or worsen violations of federal air quality standards for carbon monoxide, construction of the building might violate the Clean Air Act. Typically, the developer will hire a consulting firm to prepare the EIS for the project. A local agency—perhaps the Syracuse city planning department—will become the lead agency in supervising the SEQRA process. However, the lead agency generally will not become very deeply involved in EIS preparation. Instead, it will rely on the developer and the developer's consultants to accumulate the raw data and draft the EIS.

In predicting the impact of the project on carbon monoxide levels, the developer's consultants will use a series of mathematical models that rely on a number of inputs such as:<sup>11</sup>

- How much traffic will be generated by the project?
- How much of that traffic will use single-occupancy vehicles, carpools, buses, bicycles?
- What time of day will the traffic occur?
- What routes will the traffic use?
- What other buildings will have been erected in the area by the time the proposed project is finished?
- What will their traffic impacts be?
- What will be the average age of the automobiles that will travel to and from the building? Will the automobiles have modern

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Power Comm'n, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

<sup>11</sup> See generally LARRY W. CANTER, ENVIRONMENTAL IMPACT ASSESSMENT 49 (1977); ENVIRONMENTAL IMPACT ANALYSIS HANDBOOK ch. 3 (John G. Rau & David C. Wooten eds., 1980). See also Charles D. Case, *Problems in Judicial Review Arising From the Use of Computer Models and Other Quantitative Methodologies in Environmental Decision-Making*, 10 B.C. ENVTL. AFF. L. REV. 251 (1982).

emissions control equipment? How well will the automobiles be maintained, especially their emissions control systems?

- When the project is built, will the conditions of the roads be better, worse, or the same as they are now?

- What weather conditions will prevail? Will the emissions be well dispersed by the winds, or will they remain in the same area, and for how long? During the winter will the temperature be so low that the cars will have to warm up for an extended period?

- What are the existing levels of air quality at the key locations?

Several dozen more items could be added to this list. At every one of these points, and at many others not enumerated here, the analyst has discretionary choices to make. Some of these choices are constrained by guidance documents from government agencies;<sup>12</sup> some are not constrained; and others are ambiguously constrained. But throughout the process, the analyst applies "best professional judgment." If that judgment is consistently applied in one direction, it may well show that the building will cause a violation of Clean Air Act standards. If the professional judgment is consistently applied in the other direction, the calculations may show just the opposite.

Thus, where the developer hires the consultant—as is almost invariably the case under SEQRA—the discretionary choices will tend to be made in one particular direction. In environmental impact statements for projects in New York City, for example, almost no EISs have predicted that the projects will cause violations of air quality standards, except in a very few instances where, despite the most favorable assumptions, the absence of violations could not plausibly be projected.

Similarly long strings of assumptions arise in assessing many other types of impacts—for example, the impact of a landfill in a river on a fish population; the health risk from construction of an incinerator; and the noise impact of a highway. All of these assessments involve the repeated application of best professional judgment by experts.

Few lead agencies have resources to examine those judgments. For large projects, the City of New York is sometimes able to

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<sup>12</sup> In December 1993, the Mayor's Office of Environmental Coordination in New York City released CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL, designed to dictate the methodologies for answering many of the above questions for EISs where a New York City agency is the lead agency.

devote significant professional expertise to the review of an EIS.<sup>13</sup> That, however, is the exception. More typically, the lead agency, like a town planning board, may have a junior planner who is rather intimidated by the luminaries who have written the EIS, who may make three or four times his or her salary, and whose ranks the junior planner hopes to join some day. Once a judgment on a substantive impact is enshrined in an EIS, the nominal decision-making body may find its hands tied, and it may be unable to act contrary to that judgment.<sup>14</sup>

As a result, very often the only people who are inclined to examine, test, and take apart these judgments are project opponents. But to do that, even if the opponents have (as few do) the necessary resources and sufficient funds to hire outside experts, the opponents still need the data, the assumptions, and the calculations that went into the applicant's predictions. The principal mechanisms they have for getting that information are EISs and the New York State Freedom of Information Law (FOIL).<sup>15</sup> As will now be shown, however, these mechanisms have significant shortcomings.

## II

### FREEDOM OF INFORMATION LAW

In theory, a wide range of information is quickly available under FOIL. FOIL requires agencies to furnish requested information within five business days,<sup>16</sup> but in reality this process often takes months. It is not uncommon for a requester to wait a year or two to receive documents. After some time passes, one can file an administrative appeal asserting that nonresponse is effectively a denial,<sup>17</sup> and occasionally this may speed matters up. Some time later,

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<sup>13</sup> See Ellen M. Spindler, *Reforming New York City's Environmental Quality Review (CEQR): Site-Specific Adjudicative Zoning Approvals*, 1 N.Y.U. ENVTL. L. J. 62, 73-74 (1992).

<sup>14</sup> The leading example arose in a controversy over the construction of several radio transmission towers near the Hudson River. The EIS, prepared by the applicant's consultants and approved by the town planning board, concluded that the towers would have no adverse aesthetic impact. The planning board later attempted to deny approval for the towers on the grounds they would have a negative aesthetic impact. The New York Court of Appeals affirmed the annulment of the planning board's decision on the grounds that it was not supported by substantial evidence. *WEOK Broadcasting Corp. v. Planning Bd. of the Town of Lloyd*, 592 N.E.2d 778 (N.Y. 1992).

<sup>15</sup> N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 1988).

<sup>16</sup> *Id.* § 89.3.

<sup>17</sup> *Id.* § 89.4(a).

one can sue to force a response,<sup>18</sup> and the agency bears the burden of proving why a record should not be disclosed.<sup>19</sup> But this litigious path faces several practical constraints:

- The comment period on EISs can be as short as thirty days,<sup>20</sup> and it is essentially impossible for an applicant to go through the entire FOIL request and appeal process in such a short period of time;

- State and local agencies are able, simply by filing a notice of appeal, to obtain an automatic stay from the enforcement of a judgment against them.<sup>21</sup> Thus, even if a lawsuit is brought and the plaintiff wins, the plaintiff may not be able to enforce the judgment and obtain the information until all appeals have been exhausted—a process that can easily take two years or more;

- Few citizen organizations have the resources to bring lawsuits under FOIL, because the value of the information sought is uncertain, and because their resources are already stretched by securing representation on the more substantive and passionate environmental issues of concern.

Agencies employ several excuses for not producing requested documents. Among the most common is the exemption for inter-agency or intra-agency documents,<sup>22</sup> under which agencies often withhold drafts and sometimes fail to designate internal reports as “final,” keeping them in perpetual draft form. The attorney work product privilege is another common excuse for not producing requested documents.<sup>23</sup> Moreover, although information must be produced in computer-readable form if possible,<sup>24</sup> agencies have been known to provide computer data but not the codes necessary to decipher them. Some agencies also claim that information is the property of their consultants and cannot be obtained. These excuses are often invalid,<sup>25</sup> but by the time they are finally declared as

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<sup>18</sup> *Id.* § 89.4(b).

<sup>19</sup> *Capital Newspapers v. Burns*, 67 N.E.2d 665, 667 (N.Y. 1986).

<sup>20</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8(c) (1993).

<sup>21</sup> N.Y. CIV. PRAC. L. & R. 5519(a)(1) (McKinney 1991).

<sup>22</sup> N.Y. PUB. OFF. LAW § 87.2(g) (McKinney 1988).

<sup>23</sup> N.Y. CIV. PRAC. L. & R. 3101(c) (McKinney 1991).

<sup>24</sup> *Brownstone Publishers, Inc. v. New York City Dep't of Buildings*, 560 N.Y.S.2d 642 (App. Div. 1990).

<sup>25</sup> *See Westchester Resco Co., L. P. v. Jorling*, RJI No. 01-92-ST3502 (N.Y. Sup. Ct. Oct. 5, 1992) (involving resource recovery plant operator who sued DEC to block release of plant operating reports, claiming they contained trade secrets exempt from the FOIL; court dismissed petition, finding that most of the information was publicly available elsewhere).

such, the opportunity for citizen participation in governmental action has often passed.

### III SEQRA

The State Environmental Quality Review Act (SEQRA)<sup>26</sup> requires that all state or local agencies (with very few exceptions) "shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."<sup>27</sup> This appears to be, and in fact is, a very broad mandate. The threshold for preparing an EIS under SEQRA is considerably lower than that under NEPA,<sup>28</sup> and the courts have broadly construed the EIS mandate, frequently striking down agency decisions not to prepare an EIS.<sup>29</sup> However, there are several exemptions, and two in particular have shielded many important actions from environmental review.

The first exemption is for "civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order."<sup>30</sup> The New York State DEC frequently allows existing landfills and other controversial facilities to operate and even to expand under the rubric of a consent decree. In a leading case, a vertical expansion of a major landfill on Long Island was ordered by DEC, and the New York Court of Appeals confirmed that no EIS was necessary.<sup>31</sup> Using the same technique, New York City's mammoth Fresh Kills landfill on Staten Island has continued to operate without ever having received a construction or operation permit from DEC, or ever having been the subject of a final EIS.

The other major exemption from preparing an EIS under SEQRA is for "emergency actions which are immediately necessary on a limited and temporary basis for the protection or preservation

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<sup>26</sup> N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984).

<sup>27</sup> *Id.* § 8-0109(2).

<sup>28</sup> *Chinese Staff & Workers Ass'n v. City of N.Y.*, 502 N.E.2d 176, 180 (N.Y. 1986) (comparing EIS requirements under NEPA and SEQRA).

<sup>29</sup> *E.g.*, *West Branch Ass'n, Inc. v. Planning Bd. of Ramapo*, 576 N.Y.S.2d 675 (App. Div. 1991); *New York Archaeological Council v. Town Bd. of Cocksackie*, 576 N.Y.S.2d 680 (App. Div. 1991).

<sup>30</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(1) (1993).

<sup>31</sup> *N.Y. Pub. Interest Research Group v. Town of Islip*, 520 N.E.2d 517 (N.Y. 1988).



of life, health, property or natural resources."<sup>32</sup> This exemption may initially have been conceived for such conventional emergencies as shoring up a dam that is about to collapse in a storm, but the courts have extended it to gradually-developing, long-anticipated crises such as homelessness<sup>33</sup> and prison overcrowding.<sup>34</sup>

Even where an EIS is prepared, the New York Court of Appeals has declared that public release of the underlying data is not required. The first such decision arose out of the Times Square Redevelopment Project in Manhattan. The court stated that "[n]othing in the [SEQRA] statute or regulations requires that an agency make raw data available to the public."<sup>35</sup> Ironically, the issue of availability of data did not genuinely arise in that case, because the underlying data (though not the field notes) had indeed been provided.<sup>36</sup> Subsequently, the Court of Appeals repeated the same rule in a challenge to DEC's adoption of water quality standards for toxic chemicals,<sup>37</sup> and in a challenge to a large development project in Brooklyn.<sup>38</sup>

The lead agency has considerable ability to require information from the applicant,<sup>39</sup> and only in rare cases—such as where the lead agency has subjected an applicant to a long series of apparently dila-

<sup>32</sup> N.Y. COMP. CODE R. & REGS. tit. 6, § 617.2(q)(4) (1993).

<sup>33</sup> *Spring-Gar Community Civic Ass'n v. Home for the Homeless, Inc.*, 540 N.Y.S.2d 453, 454 (App. Div. 1989); *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981 (Sup. Ct. 1989). See generally Ronald C. Slye, *Environmental Review of Facilities for the Homeless in New York*, 3 ENVTL. L. IN N.Y. 177 (1992); Katherine Baird Russo, *Neighborhood Character and SEQRA: Courts Struggle With Homeless Shelters, Prisons, and the Environment*, 14 COLUM. J. ENVTL. L. 231 (1989).

<sup>34</sup> *Board of Visitors-Marcy Psychiatric Ctr. v. Coughlin*, 453 N.E.2d 1085, 1085-89 (N.Y. 1983); *Silver v. Koch*, 525 N.Y.S.2d 186, 188-89 (App. Div.), *appeal dismissed*, 522 N.E.2d 1069, and *appeal denied*, 533 N.E.2d 673 (N.Y. 1988).

<sup>35</sup> *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 439 (N.Y. 1986).

<sup>36</sup> Interview with Stephen L. Kass, counsel to defendant in *Jackson* (June 8, 1993).

<sup>37</sup> *Industrial Liaison Comm. v. Williams*, 527 N.E.2d 274, 278 (N.Y. 1988) (holding that "[n]othing in the statute or regulations governing environmental impact statements requires an agency to make the raw data upon which its environmental impact statement is based available to the public").

<sup>38</sup> *Akpan v. Koch*, 554 N.E.2d 53, 59 (N.Y. 1990) (holding that "[t]here is no requirement that the EIS contain all the raw data supporting its analysis so long as that analysis is sufficient to allow informed consideration and comment on the issues raised"). See also *Residents for a More Beautiful Port Washington v. Town of North Hempstead*, N.Y.L.J., Sept. 1, 1988, at 21 (Sup. Ct.), *aff'd* 545 N.Y.S.2d 297 (App. Div. 1989).

<sup>39</sup> See *Meadow Brook Equities, Ltd. v. DEC*, 520 N.Y.S.2d 232, 234 (App. Div. 1987).

tory requests—will the courts intercede.<sup>40</sup> Other involved agencies (those which must decide whether to approve, undertake, or fund a project)<sup>41</sup> cannot require further information under SEQRA, though they can use their other statutory authority to require further information.<sup>42</sup> Outside of the limited SEQRA and FOIL processes, however, the public has few other options to secure information.

#### IV

#### DEC HEARINGS

One device that is available for acquiring raw data and other information underlying project applications is a DEC adjudicatory hearing. When a project requires a permit from the DEC, the agency may hold an adjudicatory hearing, a trial-like proceeding in front of a DEC-employed administrative law judge (ALJ).<sup>43</sup> Discovery is available in these proceedings at the ALJ's discretion.<sup>44</sup> At the hearing itself, the applicant's witnesses are subject to searching cross-examination.<sup>45</sup> Thus, DEC adjudicatory hearings are a very powerful tool for uncovering the data supporting the figures and assertions contained in EIS and permit applications.

The applicant's experts are on the stand under oath, and will

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<sup>40</sup> *E.g.*, 383 *Madison Assocs. v. New York City Planning Comm'n*, N.Y.L.J., June 20, 1988, at 25; *Gordon v. Town of Bedford Planning Bd.*, Index No. 14653/89 (N.Y. Sup. Ct. Mar. 27, 1990).

<sup>41</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(t) (1993). An "involved agency" is an agency that has jurisdiction by law to fund, approve, or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve, or undertake an action, then it is an "involved agency," notwithstanding that it has not received an application for funding or approval at the time the SEQRA process is commenced. The lead agency is also an "involved agency." *Id.*

<sup>42</sup> See Robert Feller, *The New SEQR Regulations and Nonlead Agency Decision-Making*, 8 N.Y. ST. BAR ASS'N ENVTL. L. SEC. J. 9 (1988). See also *State v. LGM Assoc.*, Index No. 7117/87 (N.Y. Sup. Ct. Nov. 27, 1987) (holding that DEC's challenge was time barred where DEC, an involved agency, challenged SEQRA determinations of a local planning board that was acting as lead agency).

<sup>43</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 624 (1993); Daniel A. Ruzow & J. Langdon Marsh, *Hearing Reports Under the Environmental Conservation Law: Their Function, Preparation, and Importance*, 2 PACE ENVTL. L. REV. 191 (1985). See generally Gerald M. Levine, *The New York State Environmental Quality Review Act of 1975: An Analysis of the Parties' Responsibilities in the Review/Permit Request Process*, 12 FORDHAM URB. L.J. 1 (1983-84).

<sup>44</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(b)(6) (1993).

<sup>45</sup> *Id.* § 624.7(6) (discussing the process of the hearing and the admissibility of evidence).

usually have been required to turn over all their notes and computations. Attorneys who have participated in such hearings, including this author, have frequently observed expert witnesses revealing their serious, sometimes outcome-determinative errors under cross examination.

DEC adjudicatory hearings, however, are being granted less and less frequently, in the author's observation. The DEC Commissioner has expressed reluctance to grant these hearings, largely because they lead to considerable delays in permit decisions. The standard for granting such hearings is "whether the issues raised are substantive and significant, and resolution of such issues may result in permit denial, require major modification to the project or the imposition of significant permit conditions."<sup>46</sup> This is very similar to New York's standard for defeating summary judgment.<sup>47</sup> Over the years, the DEC has moved away from this codified standard. Today, the actual standard applied by DEC more closely resembles the process whereby an intervenor must establish enough objections, at the outset, to prevail on a motion for summary judgment.<sup>48</sup> This current standard is a far more exacting standard than the hearing regulations envisioned. As a result, hearings have been denied on major projects, such as landfills and incinerators, that a few years ago would clearly have been subjected to hearings.

DEC still routinely holds less formal hearings at which members of the public can make comments about applications. DEC calls these "legislative hearings," even though they are before ALJs.<sup>49</sup> Such hearings, however, provide very little opportunity for discovering new information because:

- Hearing participants are not afforded an opportunity for discovery;
- These hearings are typically held with only a month or two's notice,<sup>50</sup> and this is seldom enough time to find and hire an attorney

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<sup>46</sup> *Id.* § 624.6(c).

<sup>47</sup> See N.Y. CIV. PRAC. L. & R. 3212(b) (McKinney 1991).

<sup>48</sup> See, e.g., Owl Energy Resources, 1993 N.Y. Envtl. LEXIS 8 (D.E.C. Feb. 26, 1993); Washington County Board of Supervisors, 1992 N.Y. Envtl. LEXIS 61 (D.E.C. Dec. 7, 1992); Sithe/Independence Power Partners, 1992 N.Y. Envtl. LEXIS 66 (D.E.C. Nov. 9, 1992); Monroe County 1991 N.Y. Envtl. LEXIS 52 (D.E.C. July 2, 1991). See also Residents of Bergen Believe in the Env't and Democracy, Inc. v. Jorling, Index No. 7879/91 (N.Y. Sup. Ct. Feb. 10, 1992) (upholding DEC refusal to hold adjudicatory hearing on proposed landfill), *aff'd*, 600 N.Y.S.2d 653 (App. Div. 1993).

<sup>49</sup> N.Y. COMP. CODES R. & REGS. tit. 6, §§ 621.1(i), 621.7 (1993).

<sup>50</sup> See *id.* § 617.8(d).

and experts, get answers to FOIL requests, and prepare the presentation; and

- These hearings do not provide opportunity for members of the public to question those who prepared the EIS.

For both adjudicatory and legislative hearings, no technical assistance is available to the public. If a good-sized municipality is opposed to the project, it usually has resources to retain the necessary help. However, few community groups can afford to hire their own experts and counsel. This situation greatly favors affluent communities, and makes it difficult or impossible for middle and lower-income communities to participate effectively in the permitting process. Without technical assistance, the data in the EIS and the application package are likely to be incomprehensible. Expert assistance is required to work through these materials just as much as a translator is required to break through a language barrier.<sup>51</sup>

After the hearing process, whatever it maybe, the proceeding enters the judicial review phase. The question at this phase is, typically, whether the agency decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."<sup>52</sup> Discovery is available only by leave of the court,<sup>53</sup> and is seldom requested or granted.<sup>54</sup> The challenger is only provided with the official record, and since review is on the record, the lead agency will typically say that anything outside the record is unreviewable and irrelevant.

This limitation on extrinsic evidence makes perfect sense in many contexts. However, where the issue is whether an EIS adequately looked at the range of impacts a project could have, extrinsic evidence is essential for an informed ruling, just as it is essential if there is an allegation of bribery or other improper influences outside of the process. Although some federal courts have allowed the admission of extra-record evidence in NEPA litigation,<sup>55</sup> this

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<sup>51</sup> Cf. *El Pueblo Para el Aire Limpio v. County of Kings*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 20357 (Cal. Super. Ct. Dec. 30, 1991) (holding that EIS and other documents for proposed hazardous waste incinerator in Spanish-speaking area should have been translated into Spanish).

<sup>52</sup> N.Y. CIV. PRAC. L. & R. 7803(3) (McKinney 1991).

<sup>53</sup> *Id.* at 408.

<sup>54</sup> See generally *Coalition Against Lincoln West, Inc. v. City of N.Y.*, 465 N.Y.S.2d 170, 177 (App. Div.) (refusing to remand a case for further discovery even where there was an indication that the EIS was defective), *aff'd*, 457 N.E.2d 795 (N.Y. 1983).

<sup>55</sup> See, e.g., *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978). See generally DANIEL R.

issue has seldom been litigated under SEQRA.<sup>56</sup>

When it comes time for them to render a decision, the courts have given great deference to the technical judgments of administrative agencies that have approved and acted upon EISs. This holds true both for federal courts acting under NEPA<sup>57</sup> and state courts applying SEQRA.<sup>58</sup> Thus, it is quite rare for a court to hold that an EIS prepared under SEQRA is so deficient that a decision based on that EIS should be overturned.<sup>59</sup>

### CONCLUSION

As shown above, the following chain of deference operates as part of the impact statement process: the courts will defer to the lead agency; the lead agency, under SEQRA, will allow the applicant, using its own consultants, to prepare the EIS; the consultants know who signs their checks, and though most will not engage in outright falsehoods, where there is to be the discretionary application of professional judgment—which is always—that judgment will tend to be exercised in the direction most favorable to the client, i.e., the applicant.

Most lead agencies are not properly staffed to police this process. Few citizen groups are either, but even those that are become hobbled by the secrecy of the raw data, calculations, and modelling assumptions. The end result is that applicants are often able to manipulate the process with little effective oversight from the administrative agencies, the courts, or the public.

This author would like to offer these suggestions to address the cloud of secrecy that currently hangs over the SEQRA process:

(1) The SEQRA regulations should be amended to say that all data, work sheets, field notes, models, and modelling assumptions underlying information presented in EISs should be made available for public review in a document repository.

(2) Applicants who have prepared EISs should be required to make the EIS authors available for one or more technical meetings with interested parties who can informally ask them about the methodologies and data used.

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MANDELKER, NEPA LAW AND LITIGATION § 4.09[1][b] (2d ed. 1992).

<sup>56</sup> See MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.05 (1990 & Supp. 1993).

<sup>57</sup> See, e.g., *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 377 (1989).

<sup>58</sup> See, e.g., *Akpan v. Koch*, 554 N.E.2d 53, 57 (N.Y. 1990).

<sup>59</sup> See Stephen L. Kass & Michael B. Gerrard, *SEQRA Update for 1991*, N.Y.L.J., Mar. 27, 1992, at 3.

(3) The authors of EISs should be required to attach a professional engineer's certification that the document is a fair depiction of the nature and likely impact of the project.

(4) Reasonable access should be allowed for inspection and sampling of project sites.

(5) Where a showing is made for its necessity, additional time should be afforded for public comment on complex applications.

(6) DEC should return to its prior policy of liberally granting adjudicatory hearings on major permit applications.

(7) Technical assistance grants should be given to communities to review certain kinds of permit applications. At the federal level, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has a provision for such grants for neighbors of hazardous waste sites.<sup>60</sup> Such grants should be made more widely available, at the expense of the applicants, so that the public can be assured that decisions with important impacts on the environment and public health have been made based on accurate data and sound analysis.

With adoption of the above recommendations, we would come much closer to fulfilling the underlying objectives of both SEQRA and FOIL—open, broadly participatory, fully-informed governmental decision making.

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<sup>60</sup> 42 U.S.C. § 9617(e) (1988). *See* U.S. GEN. ACCOUNTING OFFICE, EPA'S SUPERFUND TAG PROGRAM: GRANTS BENEFIT CITIZENS BUT ADMINISTRATIVE BARRIERS REMAIN (1992).