

2017

Survey of 2016 Cases Under New York State Environmental Quality Review Act

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

Edward McTiernan
Arnold & Porter

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Environmental Law Commons](#)

Recommended Citation

Michael B. Gerrard & Edward McTiernan, *Survey of 2016 Cases Under New York State Environmental Quality Review Act*, 258(8) N.Y.L.J., JULY 13, 2017 (2017).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3063

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Environmental Law

Expert Analysis

Survey of 2016 Cases Under New York State Environmental Quality Review Act

The courts decided 46 cases in 2016 under the New York State Environmental Quality Review Act (SEQRA), which requires the preparation of an environmental impact statement (EIS) for state or local governmental actions that could have a significant impact.

For only the second time since this annual survey began in 1991, no court overturned any agency decision where an EIS had been prepared. Eight challenges involved an EIS—all failed. In circumstances where there was no EIS, challengers won four and lost 20. In sum, 2016 was a bad year for plaintiffs in SEQRA cases.

Proposed Changes

The most important SEQRA development of the year was probably the proposal by the

MICHAEL B. GERRARD is a professor at Columbia Law School and director of the Sabin Center for Climate Change Law, and special counsel to Arnold & Porter Kaye Scholer. EDWARD McTIERNAN, a former general counsel of the New York Department of Environmental Conservation, is a partner in Arnold & Porter Kaye Scholer.



By
**Michael B.
Gerrard**



And
**Edward
McTiernan**

state Department of Environmental Conservation (DEC) to significantly amend its SEQRA regulations (commonly known as the 617 regulations) for the first time since 1995.

In sum, 2016 was a bad year for plaintiffs in SEQRA cases.

DEC has been considering revisions for several years, and in January 2016 it finally issued proposed rules. All in all, the proposed revisions do not amount to the comprehensive streamlining that some had hoped for, but there are some important revisions.

First, scoping—a public process of announcing and soliciting comment on the overall contents of EISs before their preparation—would

become mandatory. It already is required for EISs prepared by the city of New York, but it is not consistently done outside of the city.

Second, there would be an expansion of the Type II list—the list of kinds of actions that never require an EIS. Among the new items on the list:

- Green infrastructure upgrades and retrofits;
- Installing 5 MW or less of solar arrays on landfills, cleaned-up brownfield sites, sites zoned for industrial use, and residential and commercial parking facilities;
- Sustainable development of disturbed sites;
- Brownfield cleanup agreements that do not commit to specific future uses of the property;
- Land transfers for affordable housing.

Expanding the Type II list should reduce the number of EISs that are needed. However, the number of EISs would be increased by a

proposed lowering of the numerical thresholds for some Type I actions—the actions that are more likely than others to require an EIS. For example the Type I parking space threshold would be lowered from 1,000 vehicles to 500 vehicles in municipalities with 150,000 residents or less.

The revisions would also require that when an EIS is prepared, there must be a discussion of “measures to avoid or reduce both an action’s environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding.” This will enhance the importance of DEC’s new sea level rise projections (discussed in this column on March 9, 2017).

The public comment period on these proposed regulations expired on May 19. DEC is now considering the comments, but has not announced a schedule for when the regulations will be finalized.

Timing of Litigation

The New York Court of Appeals issued one decision under SEQRA in 2016. (SEQRA was also relevant to a decision about the relicensing of the Indian Point nuclear power plant, *Entergy Nuclear Operations v. N.Y. State Dept. of State*, 28 N.Y.3d 279 (2016), but the decision did not apply or construe SEQRA.) In *Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92 (2016), the Court of Appeals affirmed the dismissal of a challenge to a positive declaration

(a decision that an EIS is needed), holding that the positive declaration was not ripe for judicial review. The Town Board of Smithtown had issued the positive declaration in connection with an application to rezone a parcel from residential to heavy industrial. Though the parcel had been leased for several years to a school bus company and used as a bus yard and trucking station—a nonconforming use—the town had never enforced the residential zoning. The possibility of challenging a positive declaration had been

All in all, the proposed revisions do not amount to the comprehensive streamlining that some had hoped for, but there are some important revisions.

largely opened up by a 2003 decision of the Court of Appeals, *Gordon v. Rush*, 100 N.Y.2d 236 (2003), and much confusion had ensued about the size of this opening. In this new case the court clarified that the expense of having to go through the EIS process was not enough of a hardship to warrant piecemeal judicial review of the SEQRA process.

Several other cases were also dismissed because they were brought too early. A developer’s allegations that town officials were conspiring to impede its land development plans were found not ripe. *Roe v. Town of Mamakating*, 2016 U.S.

Dist. LEXIS 75665 (S.D.N.Y. June 9, 2016). Likewise, the designation by the DEC commissioner of the lead agency for a project was declared not reviewable. *Vill. of Islandia v. Martens*, Index No. 5874/15 (Sup. Ct. Suffolk County Oct. 31, 2016). When a lead agency had rescinded its negative declaration (its decision that no EIS was needed), one court found this was not final agency action and plaintiffs’ due process claims were not ripe. *Leonard v. Planning Bd. of Town of Union Vale*, 65 F. App’x 35 (2d Cir. 2016). Another lead agency waited too long to rescind a negative declaration; since the agency had already taken its final action on the project, it could not go back and require an EIS. *Pittsford Canalside Properties v. Vill. of Pittsford*, 137 A.D.3d 1566 (4th Dept. 2016).

One village did not bother to rescind its negative declaration; it rejected the project anyway. The court found this determination was improperly based on generalized community objections rather than specific legitimate bases, and it overturned the village’s rejection of the project. *Ramapo Pinnacle Properties v. Vill. of Airmont Planning Bd.*, 145 A.D.3d 729 (2d Dept. 2016)

Overtaking Declarations

Four decisions found that agencies had improperly decided not to prepare EISs.

The approval of a Wal-Mart Supercenter was annulled after citizens reported sightings of threatened

bird species at the site, but the town board never undertook or required on-site surveys. The town also failed to consider the impact of the big-box development on the community character of the neighboring village, which might suffer business displacement. Furthermore, the town did not look at the surface water impact of the reconstruction of four golf course holes on an adjacent golf course, a central part of the project. *Wellsville Citizens for Responsible Devt. v. Wal-Mart Stores*, 140 A.D.3d 1767 (4th Dept. 2016).

A city's attempt to annex property in an adjoining town failed because no EIS had been prepared. *City of Johnstown v. Town of Johnstown*, 135 A.D.3d 1081 (3d Dept. 2016). A residential subdivision was blocked when there had been no environmental assessment form, a necessary prerequisite for negative declarations for certain kinds of actions. 24 Franklin Ave. *R.E. Corp. v. Heaship*, 139 A.D.3d 742 (2d Dept. 2016). Approval of a cell tower was struck down when it was found that there was no record to support the negative declaration. *Falco v. Zoning Bd. of Appeals of Town of Pomfret*, 52 Misc.3d 1223(A) (Sup. Ct. Chautauqua County Aug. 2016).

Standing

Ten cases were dismissed because the plaintiffs were found to lack standing—more than for any other procedural flaw. A real estate group lost its challenge to a

moratorium on conversion of hotel space to non-hotel space because economic injury is not a basis for standing under SEQRA. *Real Estate Bd. of N.Y. v. City of N.Y.*, Index Nos. 160081/2015, 101798/2015 (Sup. Ct. New York County June 20, 2016). Two cases were dismissed because the plaintiffs did not live close enough to the challenged project or its impacts. *Turner v. County of Erie*, 136 A.D.3d 1297 (4th Dept. 2016); *Azulay v. City of New York*, 36 N.Y.S.3d 406 (Sup. Ct. Richmond County 2016). In two cases the plaintiffs' alleged injuries did not differ from those of the public at large. *CPD NY Energy v. Town of Poughkeepsie Planning Bd.*, 139 A.D.3d 942 (2d Dept. 2016); *Ten Towns to Preserve Main Street v. Planning Bd. of Town of North East*, 139 A.D.3d 740 (2d Dept. 2016). One plaintiff's injuries were "conclusory and speculative." *Stewart Park & Reserve Coal v. Town of New Windsor Zoning Bd. of Appeals*, 137 A.D.3d 924 (2d Dept. 2016).

Several residents complained about installation of an "air stripper" in a park to remove a chemical from groundwater, but they did not establish that they used the portion of the park near the proposed location of the air stripper more than most other members of the public, and also their alleged injuries were "too speculative and conjectural to determine an actual and specific injury-in-fact." *Brummel v. Town of N. Hempstead*

Town Bd., 145 A.D.3d 880 (2d Dept. 2016).

An environmental group was unable to challenge DEC's designation of a lead agency because only other agencies have standing to mount such a challenge. *Preserve Hudson Valley v. DEC*, Index No. 1707/2015 (Sup. Ct. Orange County Oct. 11, 2016). Finally, a person—named Person—challenged the New York City's initiatives to reduce traffic congestion, claiming they "will result in greater risk of adverse health consequences (through additional air pollution), delayed ambulance times, and delayed access to toilet facilities (while sitting in traffic)." The court found these allegations to be "purely speculative," and no different from that suffered by the public at large. *Person v. NYC Dept. of Transp.*, 143 A.D.3d 424 (1st Dept. 2016).