2013

# Survey of 2012 Cases Under State Environmental Quality Review Act

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New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 8
THURSDAY, JULY 11, 2013

ENVIRONMENTAL LAW

Expert Analysis

# Survey of 2012 Cases Under State Environmental Quality Review Act

By
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The courts issued 55 decisions in 2012 under the State Environmental Quality Review Act (SEQRA).[1] As this annual survey shows, especially important decisions concerned the necessity of supplemental environmental impact statements (EISs), and the relationship of SEQRA to various federal laws.

The State Department of Environmental Conservation (DEC) was also busy. On Jan. 15, 2012, DEC adopted revised short and full environmental assessment forms, which are used in determining whether full EISs are needed. The new forms become effective on Oct. 7, 2013. They will be accompanied by workbooks and by an updated web-based geographic information system search engine to help find spatial information.

DEC is also in the process of updating the regulations implementing SEQRA for the first time since 1995. It now appears that the proposed changes will expand the list of Type II (exempt) actions, modify certain thresholds for Type I actions (those most likely to require EISs), make scoping of EISs mandatory rather than optional, and better define the procedures for accepting draft EISs.[2]

The 2012 cases continued the longstanding pattern in which actions for which EISs had been prepared were far more certain of surviving judicial review than those without EISs. In every one of the 12 cases in 2012 where an EIS was challenged, it survived review. Of the 34 cases in which actions were challenged for lack of an original or supplemental EIS, the government decisions prevailed in 27 and lost in 7. (The remaining cases of the 55 cannot be classified in this fashion.)

### Contaminated School Site

The most important SEQRA decision of the year was probably *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*.[3] The site of a former rail yard in the Bronx was being cleaned up under DEC's brownfields program so that a public school could be built there. After the school construction was finished, a long-term monitoring plan would be devised to make sure no hazardous vapors were escaping into the school. The Court of Appeals affirmed the lower courts in finding that the monitoring plan should have been discussed in the EIS for the school. Thus a supplemental EIS was required, as a description of the monitoring program was essential to an understanding of the project's environmental impact.

Judge Susan Phillips Read filed a concurring opinion saying that clarification is needed of the relationship between DEC's brownfield regulations and the SEQRA regulations, because there seems to be an undesirable duplication of effort.

One important implication of the case is that the Court of Appeals is continuing to require strict compliance with SEQRA. It rejected what might seem like a softer approach of forgiving procedural irregularities if the key issues have been disclosed and discussed in the public realm though outside of the SEQRA process.

Contaminated land was also involved in *Camardo v. City of Auburn*.[4] It concerned the demolition of a building and construction there of a performing arts center. As the Appellate Division, Fourth Department, declared, "Respondent recognized that additional environmental monitoring of the property after demolition was recommended because of the possibility of contaminants on the property. Respondents, however, did not require that additional measures take place in the event that such contamination was discovered after demolition. We conclude that the statement in the negative declaration [the conclusion that no EIS was needed] that further action may be needed based on future monitoring was an improper delegation of authority…Rather, when faced with a potential future impact, respondent should have issued a conditioned negative declaration."

### Rezoning

The other Court of Appeals decision under SEQRA in 2012 was *Chinese Staff and Workers' Association v. Burden*.[5] The City Planning Commission had issued a negative declaration for a rezoning in Brooklyn's Sunset Park neighborhood. The petitioners contended that the rezoning would lead to more market rate development, thereby increasing rental prices and accelerating displacement of low-income tenants. The

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suit alleged that City Planning failed to take a hard look at the number of developable lots, thus undercounting the projected net increase in residential units and failing to take a hard look at the likely impact of commercial zoning changes. The trial court disagreed, finding that the record supported City Planning's decision to issue a negative declaration.

On appeal, the Appellate Division affirmed. However, the panel split 3-2, affording an automatic appeal to the Court of Appeals. That court held that City Planning did not abuse its discretion. The decision was so brief and formulaic that it appeared the court was not really very interested in the case, but had no choice but to take it in view of the two dissents below.

**Federal Role**

Four decisions concerned the relevance of federal statutes to SEQRA. In three, the courts found that various statutes dampened or superseded SEQRA. In the fourth, the court found it had no jurisdiction over the SEQRA claim

The most notable of these cases was *Fortress Bible Church v. Feiner*.[6] In 1998 a Pentecostal church applied to the Town of Greenburgh in Westchester County for approvals to build a new church. The town gave them a very difficult time in the SEQRA process, delaying decisions, requiring frequent rewrites, and finally denying the application in 2004. The church sued the town under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) and several constitutional theories. The U.S. District Court held a long bench trial and found that the town had acted in bad faith, and had used the SEQRA process illegitimately as a way to block the church.[7]

The Second Circuit affirmed. It held that although SEQRA itself is not a land use regulation, its application by officials in this case was, in effect, a land use regulation, and thus RLUIPA applied. The court also held that it would be bad policy to exempt SEQRA review from RLUIPA protections, as localities could insulate their decisions from RLUIPA by cloaking their acts under the SEQRA banner.

In *Bell Atlantic Mobile of Rochester v. Town of Irondequoit*,[8] the town required an EIS for the construction of a cellular telephone tower. The federal district court agreed with the applicant "that the Town's Positive Declaration, triggering SEQRA, 'was plainly pretextual and wholly unjustified under SEQRA.'" It found that the federal Telecommunications Act of 1996 preempted local consideration of harm from radio frequency transmissions, and "speculative environmental loss, such as concern for property values, is also not an environmental factor under SEQRA." The court concluded that "Defendants' invocation of SEQRA's procedures was merely a delaying tactic as a result of a vocal opposition to the placement of a monopole in the one location that would address the lack of coverage."

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The third decision, *Sane Energy Project v. Hudson River Park Trust*,[9] concerned a natural gas pipeline that crossed land under the Hudson River Park. The Federal Energy Regulatory Commission had prepared an EIS under the National Environmental Policy Act.

The state agency that ran the park negotiated a right-of-way agreement to allow the pipeline. It was sued for not preparing its own EIS under SEQRA. New York Supreme Court found that federal law preempts state and local agency environmental review requirements for proposed interstate pipelines.

Finally, *State of New York v. Shinnecock Indian Nation*[10] involved a proposed casino. Various federal laws were cited, but the U.S. Court of Appeals for the Second Circuit held the case presented no real federal question and therefore the SEQRA issues did not belong in federal court.

A different kind of preemption —state over local—arose in *Troy Sand & Gravel v. Town of Nassau*.[11] It concerned special permits for a rock quarry. An EIS was prepared, and the DEC issued mining permits. The town decided to hire a planning consultant to analyze the environmental issues; the plaintiff would have to reimburse the town for the costs. The plaintiff sued and persuaded the trial court to enjoin the town from incurring these expenses.[12] The Third Department reversed. It found that DEC's SEQRA determination is binding on the town to the extent it cannot conduct a de novo SEQRA review. "However, local land use matters and zoning decisions—such as the consideration of special use permits—are within the exclusive responsibility of the Town."

The court found that DEC's "SEQRA findings did not bind the Town to issue the required special permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations," and that "while the SEQRA process is concluded and the Town is bound by DEC's SEQRA determination, the Town remains entitled to independently review plaintiff's application for the special use permit in accord with the standards contained in its zoning regulations, including consideration of the 'health, safety, welfare, comfort and convenience of the public,' both in general and in the immediate neighborhood, as well as 'the environmental impact.'"

**Supplemental EIS**

*Develop Don't Destroy (Brooklyn) v. Empire State Development Corp.*,[13] involved the long-running controversy over the Atlantic Yards project, which extends over 22 acres and is to be built in two phases. The first includes the Barclays Center arena, four or five nearby buildings, and transit improvements. The second phase will include 11 residential high-rise buildings. The EIS assumed a 10-year build-out period. In 2009, various development agreements were renegotiated, significantly extending the build-out period. The Supreme Court held and the First Department affirmed that this rendered the 10-year period in the EIS no longer relevant, and that a supplemental EIS would be needed.

**Property Owners' Challenges**

Property owners suing under SEQRA won some and lost some.

*Air Energy TCI v. County of Cortland*[14] concerned a wind energy project. The county Legislature declared the applicant's draft EIS incomplete. The applicant sued, but the court found the challenge was not ripe. "Although it is recommended that a lead agency attempt to provide sufficient guidance to enable an applicant to develop an acceptable DEIS with one revision effort, there is no limit on either the number of times that a lead agency may reject a submitted DEIS or that an applicant may submit revisions," the Supreme Court, Cortland County, found. It noted that "petitioner largely created its own dilemma by failing to timely initiate the SEQRA review process," and that "when the SEQRA process began

in earnest, respondent acted promptly to retain the services of special legal counsel and an environmental consultant and since that time has substantially complied with all SEQRA deadlines."

Property owners did better in *MCBBLA Family Trust v. Village of Poquott Planning Board*.[15] They sought to construct a dock that would accommodate two boats. The Planning Board issued a negative declaration, but it then denied the permit. It claimed it did so mainly based on non-environmental factors. The Supreme Court, Suffolk County, concluded that the record does not support denial of the permit. Specifically, the court found that "[t]he record does not support the community's or Planning Board members' concerns over hazards to small vessels, hindering public access, creation of a public nuisance, and cumulative adverse effects which were cited by the Planning Board as grounds for denying petitioner's application."

In *Riverso v. Rockland County Solid Waste Management Authority*,[16] the Rockland County Solid Waste Management Authority wanted to condemn plaintiff's property for expansion of its solid waste management facility. The Second Department struck down the negative declaration. The authority failed to address some key environmental issues, such as potential groundwater impacts. Moreover, the authority's failure to consider potential future plans for the property was improper segmentation.

The Second Circuit also ruled for property owners in *Zutt v. State of New York*.[17] Stormwater discharged from a culvert under Route 9D in Garrison had been running over plaintiffs' property and damaging it. In prior litigation, plaintiffs obtained damages for trespass and injunctive relief. Nevertheless, the State Department of Transportation invoked its powers of eminent domain and sought to condemn a portion of the property for a drainage easement. The Transportation Department claimed the action was exempt from SEQRA.

The Appellate Division concluded that the state had acted in bad faith, and it issued a permanent injunction to enjoin the state from pursuing the proposed condemnation. The action was not exempt as a maintenance project, and the state did not take a hard look at the relevant criteria. The court found, "the State failed to conduct any SEQRA review despite the recognition by the DOT's engineers of potential environmental impacts, hastily prepared a superficial environmental checklist only after faced with new litigation challenging its failure to comply with SEQRA, and proffered a baseless interpretation of its regulations with respect to Type II actions in order to avoid any environmental review."

### Other Decisions

Other 2012 decisions had the following holdings:

- An SEQRA challenge to designation of bicycle lanes at Prospect Park in Brooklyn was time-barred because it was brought too long after the city committed itself to a definite course of action, even though that was part of a pilot project.[18]
- An EIS for a construction and demolition debris landfill and recycling center was adequate but the accompanying findings statement was defective for lack of any explanation of its conclusions.[19]

The court in 'Feiner' held that it would be bad policy to exempt SEQRA review from the federal Religious Land Use and Institutionalized Persons Act protections, as localities could insulate their decisions from RLUIPA by cloaking their acts under the SEQRA banner.

- Nonbinding guidance on snowmobile use in the Adirondacks was not an "action" under SEQRA.[20]
- A town should pay monetary sanctions for issuing temporary certificates of occupancy for a project in the face of an injunction barring permits for the project, even though an appeal was pending,[21] and even though that injunction was then dissolved.[22]
- A negative declaration was properly issued for new zoning ordinances that address development and construction standards in floodplains, as the environmental impacts would be neutral or beneficial.[23]
- Reconstructing the boardwalks on Coney Island with plastic lumber instead of wood did not require an EIS.[24]
- Before committing by contract to build a new wastewater treatment plant, a county should have at least made a determination of significance under SEQRA.[25]

Finally, in three separate cases the Second Department reversed Supreme Court findings that plaintiffs lacked standing to sue under SEQRA. In two of these cases, the petitioners lived in close proximity to the project, and therefore did not need to show actual injury or special damage.[26] In the third, petitioner was a nearby village.[27]

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1. All these decisions are analyzed in the 2013 supplement to Michael B. Gerrard, Daniel A. Ruzow and Philip Weinberg, Environmental Impact Review in New York (LexisNexis 1990).
2. Jack A. Nasca and Lawrence H. Weintraub, "DEC Proposes changes to the SEQR Regulations," 24 Environmental Law in New York 87 (July 2013).
3. 20 N.Y.3d 148, 981 N.E.2d 766, 958 N.Y.S.2d 65 (2012).
4. 96 A.D.3d 1437, 949 N.Y.S.2d 302 (4th Dept. 2012).
5. 19 N.Y.3d 922, 973 N.E.2d 1277, 950 N.Y.S.2d 503 (2012).
6. 694 F.3d 208 (2d Cir. 2012).
7. *Fortress Bible Church v. Feiner*, 734 F.Supp.2d 409 (S.D.N.Y. 2010).
8. 848 F.Supp.2d 391 (W.D.N.Y. 2012).
9. 2013 N.Y. Misc. LEXIS 328 (Sup. Ct. N.Y. Co. Jan. 16, 2013).
10. 686 F.3d 133 (2d Cir.), reh'g en banc denied, 701 F.3d 101 (2d Cir. 2012).
11. 101 A.D.3d 1505, 957 N.Y.S.2d 444 (3d Dept. 2012).
12. *Troy Sand & Gravel v. Town of Nassau*, 34 Misc.2d 1219(A), 950 N.Y.S.2d 494 (Sup. Ct. Rensselaer Co. 2012).
13. 94 A.D.3d 508, 942 N.Y.S.2d 477 (1st Dept.), leave to appeal denied, 19 N.Y.3d 806, 973 N.E.2d 202, 950 N.Y.S.2d 104 (2012).
14. 39 Misc.3d 234, 955 N.Y.S.2d 769 (Sup. Ct. Cortland Co. 2012).
15. 2012 N.Y. Misc. LEXIS 1619 (Sup. Ct. Suffolk Co. March 27, 2012).
16. 96 A.D.3d 764, 946 N.Y.S.2d 175 (2d Dept. 2012).
17. 99 A.D.3d 85, 949 N.Y.S.2d 402 (2d Dept. 2012).
18. *Seniors for Safety v. NYC Dept. of Transp.*, 101 A.D.3d 1029, 1032-33, 957 N.Y.S.2d 710, 713 (2d Dept. 2012).
19. *Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1544-45, 945 N.Y.S.2d 434, 440 (3d Dept. 2012).
20. *Adirondack Council v. Adirondack Park Agency*, 92 A.D.3d 188, 192, 936 N.Y.S.2d 766, 769 (3d Dept. 2012).
21. *Vill. of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 928, 930-31, 955 N.Y.S.2d 60, 61-62 (2d Dept. 2012).
22. See *Vill. of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 919, 953 N.Y.S.2d 75, 78 (2d Dept. 2012), leave to appeal dismissed in part and denied in part, 20 N.Y.3d 1034, 984 N.E.2d 323, 960 N.Y.S.2d 348 (2013).
23. *Gabrielli v. Town of New Paltz*, 93 A.D.3d 923, 924, 939 N.Y.S.2d 641, 643 (3d Dept.), leave to appeal denied, 19 N.Y.3d 805, 972 N.E.2d 508, 949 N.Y.S.2d 343 (2012).
24. *Coney-Brighton Boardwalk Alliance v. NYC Dept. of Parks & Recreation*, 2012 N.Y. Misc. LEXIS 5571, at *9 (Sup. Ct. Kings Co. Dec. 10, 2012).
25. *Town of Woodbury v. County of Orange*, 2012 N.Y. Misc. LEXIS 2253, at *33-39 (Sup. Ct. Orange Co. May 2, 2012).
26. *Shapiro v. Town of Ramapo*, 98 A.D.3d 675, 677, 950 N.Y.S.2d 154, 156 (2d Dept. 2012), leave to appeal dismissed, 20 N.Y.3d 994, 982 N.E.2d 1256, 959 N.Y.S.2d 123 (2013); *Youngewirth v. Town of Ramapo*, 98 A.D.3d 678, 680, 950 N.Y.S.2d 157, 160 (2d Dept. 2012).
27. *Vill. of Pomona v. Town of Ramapo*, 94 A.D.3d 1103, 1105-07, 943 N.Y.S.2d 146, 150-51 (2d Dept. 2012).