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## Litigation Under SEQRA Declining, Exemption Use Is Rising

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## ENVIRONMENTAL LAW

## Expert Analysis

## Litigation Under SEQRA Declining, Exemption Use Is Rising

The State Environmental Quality Review Act (SEQRA),<sup>1</sup> the statute that requires the preparation of environmental impact statements (EISs) for discretionary actions by state and local governments that may have a significant effect on the environment, has long been by far the most fertile source of environmental litigation in New York. That is still so, but the volume has declined, probably because much of such litigation grows out of disputes over proposed construction projects, and there are fewer of those in the recent recession.

During 2009 there were a total of 45 decisions under SEQRA in the state courts.<sup>2</sup> (There were none in the federal courts.) That is the lowest number since I began this annual survey in 1990; the next lowest were 51 (in 1997) and 53 (in both 1993 and 2004). The average annual number has been 61.9.

One pattern from the prior years has been that an action is much less vulnerable to judicial challenge if an EIS has been prepared than if it has not. That is still the case, but less so. Of the 11 actions challenged after the preparation of an EIS in 2009 decisions, every one of them survived. For the period 1990 through 2008, 16 percent of such challenges were successful annually. Of the 32 actions challenged where there was no EIS, plaintiffs won in four (12.5 percent); historically plaintiffs won an average of 26.9 percent.

### Exemptions

The most striking aspect of the 2009 cases was the successful assertion that challenged actions were exempt from SEQRA. This claim was litigated in eleven cases, and successful in ten. However, this does not necessarily mean that the courts are quicker to find an exemption; it may mean instead that plaintiffs are raising SEQRA claims in all kinds of disputes where it might not seem applicable.

For example, SEQRA was found inapplicable to the amendment of a ground lease that would remove the requirement that a residential complex be dedicated to low and moderate income housing,<sup>3</sup> and to the decision of the state

By  
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Department of Housing and Community Renewal whether to offer renewal leases before demolishing a building.<sup>4</sup> SEQRA's exemption for renovation or replacement in kind was found to cover the renovation of a pavilion and construction of an adjacent comfort station at Union Square Park;<sup>5</sup> a storm sewer replacement;<sup>6</sup> upgrading of an athletic field with artificial turf, lighting and bleachers;<sup>7</sup> and conversion of a disused building, formerly used by the police, into a police command center.<sup>8</sup> Since environmental considerations were not within the purview of the decision-makers, no SEQRA

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compliance was required of the Public Authorities Control Board in approving a major development project (for which other agencies had prepared and reviewed an EIS),<sup>9</sup> or of the state transportation commissioner in approving the discontinuance of a rail line on safety grounds.<sup>10</sup>

A split decision was issued with respect to the reopening and expansion of the Brooklyn House of Detention—the reopening was not subject to SEQRA, but the later expansion would be.<sup>11</sup>

The one case where a claim of exemption failed involved the issuance of concessions for use of playing fields at Randall's Island in the East River. The court found that the concessions were part of a larger effort that would change the intensity of the use of the park, and that it would be impermissible segmentation to consider different parts separately.<sup>12</sup>

Segmentation arose in three other cases as well, and in all of them the claim was rejected. These involved a sewage treatment plant upgrade that

was found not to practically determine site plan approval for a proposed development;<sup>13</sup> enactment of a local zoning law for wind farms, while leaving to a later day the analysis of specific projects;<sup>14</sup> and a storm sewer outlet replacement that was apparently not an integral part of a development project.<sup>15</sup>

### Standing

The most important SEQRA decision of 2009 was *Save the Pine Bush Inc. v. Common Council of the City of Albany*, decided by the Court of Appeals on Oct. 27.<sup>16</sup> I devoted this column on Nov. 27, 2009 to that case, and I won't repeat that discussion here, except to reiterate that this decision solved one of the two major problems created by the Court of Appeals in its 1991 decision in *Society of the Plastics Industry v. County of Suffolk*.<sup>17</sup> The new decision granted standing to plaintiffs who wish to preserve a precious place located far from home. As I pointed out in that prior column, it did not address the other major problem—threats at home to resources that many people use equally. The requirement in *Plastics* that SEQRA plaintiffs must "suffer direct harm, injury that is in some way different from that of the public at large" survived the *Save the Pine Bush* ruling.

Five 2009 SEQRA decisions in addition to *Save the Pine Bush* addressed standing. In four of them, the lawsuits were dismissed, citing *Plastics*, because the plaintiffs could not show that they would be affected differently than the public at large—in other words, the issue that was not addressed in *Save the Pine Bush*.<sup>18</sup> In the fifth, some plaintiffs were dismissed on those grounds, but others were found to have standing.<sup>19</sup>

Because the *Plastics* issue persists, efforts continue in the state legislature to amend SEQRA to adopt a more liberal standing rule. A bill doing that again passed the Assembly,<sup>20</sup> and for the first time it reached the Senate floor, but it was defeated on April 20, 2010 by a vote of 29 to 32.

### Suits by Applicants

Most SEQRA litigation is brought by people challenging project approvals, but some is from applicants who are frustrated by delays or disapprovals. Four such cases came out in 2009. The applicant won only one.

In that case, the applicant applied for site plan approval for a big box store in 2000, in conformance with the town's zoning code. Shortly thereafter, the town moved to change the zoning in a way

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that would inhibit the project. The town took a very long time with the SEQRA process for the project. A decade after the initial application, the Supreme Court, Suffolk County, declared that “[a] court will apply the zoning ordinance currently in existence at the time a decision is rendered unless ‘special facts’ are present to demonstrate that the municipality acted in bad faith and unduly delayed acting upon an application while the zoning law was being changed.” It found that this applicant was treated differently from other applicants and therefore the special facts exception is applicable.<sup>21</sup>

In the other cases brought by applicants, the government agencies were found to be justified in requiring a supplemental EIS,<sup>22</sup> in rescinding a negative declaration and requiring an EIS because of new information about potential adverse impacts,<sup>23</sup> and in denying the application.<sup>24</sup>

### Safety Issues

Two cases considered claims that safety hazards had been inadequately considered under SEQRA.

In one of the many cases concerning the controversial Atlantic Yards project in Brooklyn, plaintiffs claimed the EIS should have addressed the risk of a terrorist incident at the project site. The Appellate Division found:

SEQRA contains no provision expressly requiring an EIS to address the risk of terrorism and, indeed, it would not appear that terrorism may ordinarily be viewed as an “environmental impact of [a] proposed action”...within the statute’s purview. We do not, however, find it necessary to determine whether consideration of the prospect of terrorism may ever lie within the scope of the environmental review mandated by the statute, and leave open the possibility that there may be a case in which a proposed action will by its very nature present a significantly elevated risk of terrorism... For now, it suffices to observe that the project at issue does not pose extraordinarily inherent risks.<sup>25</sup>

The other case involved a proposed metal shredder at a scrap metal processing facility located near the Rochester Airport. Operators of a flight school and others expressed concern that gasoline tanks incompletely drained of fuel may explode during shredding, posing a hazard to aircraft overhead. The Appellate Division, by a 3-2 vote, deferred to the decision of the planning board, as lead agency, not to address this issue; the dissenters felt the concerns were sufficiently serious that they should have been studied.<sup>26</sup> The Court of Appeals reversed, citing the reasons stated in the dissenting opinions.<sup>27</sup>

### Irregularities Forgiven

Two strikingly similar decisions exhibit uncommon forgiveness of procedural error. Ordinarily, if an action is classified Type I, a full environmental assessment form must be filled out, including Part 2 and, if any potential adverse effects are identified, Part 3. Both cases concerned proposed Wal-Marts—one in the Town of Amherst, in Erie County, and one in the Town of Greece, in Monroe County. Both were Type I actions, but in

both the lead agency failed to complete Part 2 and Part 3 of the form. In both decisions, the Appellate Division, Fourth Department, found that the towns had actually considered the factors set forth in those sections, so the decisions could stand.<sup>28</sup>

### State, City Handbooks

After years of preparation, the New York State Department of Environmental Conservation (DEC) has issued a new edition of its “SEQR Handbook,”<sup>29</sup> and the Mayor’s Office of Environmental Coordination issued a new edition of the “CEQR Technical Manual.”<sup>30</sup> These books are designed to provide detailed instructions to those who prepare environmental assessments and EISs; to lead agencies and applicants; and to their counsel.

The SEQR handbook had not been updated since 1992; the new edition reflects changes in regulations and practices over the last two decades. The CEQR technical manual, last updated in 2000, to a certain extent codifies how CEQR practice for large projects has been developing in recent years, but it also:

- Requires analysis of the greenhouse gas impacts of projects;<sup>31</sup>
- Requires analysis of the water and sewer infrastructure from the project site to the discharge point, to ensure that wastewater can reach its intended destination without overflows;
- For large publicly-sponsored projects, requires an analysis of consistency with PlaNYC;
- For some projects, especially near the waterfront, calls for a pedestrian wind assessment;
- Modernizes shadow assessments through use of computer models.



1. N.Y. Environ. Cons. L. art. 8.
2. All these decisions will be covered in the forthcoming annual update to Michael B. Gerrard, Daniel A. Ruzov & Philip Weinberg, *Environmental Impact Review in New York* (LexisNexis).
3. *Branch v. Riverside Park Community LLC*, 24 Misc 3d 1226(A), 899 NYS2d 57 (Sup. Ct. N.Y. Co. July 2009), aff’d, 74 AD3d 634, 903 NYS2d 390 (1st Dept. 2010).
4. *220 CPS “Save our Homes” Assn. v. New York State Department of Housing and Community Renewal*, 60 AD3d 593, 877 NYS2d 21 (1st Dept. 2009).
5. *Union Square Community Coalition v. New York City Department of Parks and Recreation*, 21 Misc 3d 1109(A), 886 NYS2d 69 (Sup. Ct. N.Y. Co. 2009).
6. *Rodgers v. City of North Tonawanda*, 60 AD3d 1379, 875 NYS2d 409 (4th Dept. 2009).
7. *Groarke v. Board of Education of Rockville Centre Union Free School District*, 63 AD3d 935, 880 NYS2d 535 (2d Dept. 2009).
8. *Chatham Towers Inc. v. New York City Police Department*, 24 Misc3d 1238(A), 901 NYS2d 898 (Sup. Ct. N.Y. Co. 2009), aff’d, 2010 WL 2606317 (1st Dept. July 1, 2010).
9. *Develop Don’t Destroy Brooklyn v. Urban Development Corp.*, 59 AD3d 312, 874 NYS2d 414 (1st Dept.), leave to appeal denied, 13 NY3d 713, 893 NYS2d 841 (2009).
10. *Island Park v. New York State Department of Environmental Conservation*, 61 AD3d 1023, 876 NYS2d 203 (3d Dept. 2009).
11. *Stop BHOD v. City of New York*, 22 Misc 3d 1136(A), 881 NYS2d 367 (Sup. Ct. Kings Co. 2009).
12. *Citywide Council on High Schools v. Franchise and Concession Review Committee of the City of New York*, Index No. 107463/09 (Sup. Ct. N.Y. Co. Dec. 29, 2009).
13. *Cairo Plaza, LLC v. Town of Cairo*, Index No. 0021/05 (Sup. Ct. Greene Co. March 26, 2009).
14. *Finger Lakes Preservation Assn. v. Town Board of Town of Italy*, 25 Misc 3d 1115, 887 NYS2d 499 (Sup. Ct. Yates Co. 2009).
15. *Rodgers v. City of North Tonawanda*, 60 AD3d 1379, 875 NYS2d 409 (4th Dept. 2009).
16. 13 NY3d 297, 890 NYS2d 405 (2009).
17. 77 NY2d 761, 570 NYS2d 778 (1991).
18. *Cairo Plaza, LLC v. Town of Cairo*, Index No. 0021/05 (Sup. Ct. Greene Co. March 26, 2009); *Village of Canajoharie v. Planning Board of the Town of Florida*, 63 AD3d 1498, 882 NYS2d 526 (3d Dept. 2009); *Farella v. Town of Durham*, Index No. 1142/09 (Sup. Ct. Greene Co. Dec. 7, 2009); *Sutherland v. New York City Housing Development Corp.*, 61 AD3d 479, 877 NYS2d 43 (1st Dept. 2009), leave to appeal denied, 13 NY3d 703, 886 NYS2d 94 (2009).
19. *Bloodgood v. Town of Huntington*, 58 AD3d 619, 871 NYS2d 644 (2d Dept. 2009).
20. A.3423/S.1635.
21. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, Index No. 30047/02 (Sup. Ct. Suffolk Co. June 5, 2009). In a subsequent opinion, the court found that plaintiff need not obtain a variance. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, Index No. 30047/02 (Sup. Ct. Suffolk Co. Nov. 9, 2009).
22. *Oyster Bay Associates Limited Partnership v. Town Board of Town of Oyster Bay*, 58 AD3d 855, 874 NYS2d 492 (2d Dept. 2009), leave to appeal denied, 12 NY3d 716, 884 NYS2d 69 (2009).
23. *It’s Greener Now Inc. v. New York State*, Index No. 8269/08 (Sup. Ct. Albany Co. April 23, 2009).
24. *Laidlaw Energy and Environmental Inc. v. Town of Ellicottville*, 59 AD3d 1084, 873 NYS2d 814 (4th Dept. 2009).
25. *Develop Don’t Destroy (Brooklyn) v. Urban Development Corp.*, 59 AD3d 312, 874 NYS2d 414 (1st Dept. 2009), leave to appeal denied, 13 NY3d 713, 893 NYS2d 841 (2009).
26. *Anderson v. Town of Chili Planning Board*, 59 AD3d 1017, 873 NYS2d 796 (4th Dept. 2009).
27. *Anderson v. Town of Chili Planning Board*, 12 NY3d 901, 885 NYS2d (2009).
28. *Hartford/North Bailey Homeowners Assn. v. Zoning Board of Appeals of Town of Amherst*, 63AD3d 1721, 881 NYS2d 265 (4th Dept. 2009), leave to appeal denied, 66 AD3d 1504, 886 NYS2d 63 (2009); *Residents Against Wal-Mart v. Planning Board of Town of Greece*, 60 AD3d 1343, 875 NYS2d 691 (4th Dept. 2009), leave to appeal denied, 12 NY3d 715, 884 NYS2d 69 (2009).
29. <http://www.dec.ny.gov/permits/6188.html>.
30. [http://www.nyc.gov/html/oec/html/ceqr/technical\\_manual.shtml](http://www.nyc.gov/html/oec/html/ceqr/technical_manual.shtml).
31. DEC adopted a policy on this issue in 2009. [http://www.dec.ny.gov/docs/administration\\_pdf/eisghpolicy.pdf](http://www.dec.ny.gov/docs/administration_pdf/eisghpolicy.pdf). See also Michael B. Gerrard, “Greenhouse Gases: Emerging Standards for Impact Review,” NYLJ, March 27, 2009.